

ROADMAP FOR RENEWAL

Protect the Courts As a Check on the Other Branches In Order to Uphold the Constitution

XII. Ensure courts may remedy violations of constitutional rights while addressing the possibility for overreach through single-judge injunctions

The Constitution provides important rights to individuals, among them the right to be free from unlawful searches and seizures, the right to due process, and the right to equal protection of the laws. When those rights are violated, individuals should be able to seek redress from the government for their injuries.

Congress should:

- Enact a statutory *Bivens* remedy to clarify that individuals whose constitutional rights are violated by federal officials are entitled to recover for their injuries;
- Enact a law to eliminate qualified immunity for both the statutory *Bivens* remedy and *state* government officials; and
- Enact a law clarifying that plaintiffs should have standing to challenge government actions when they have a reasonable basis to believe a government official has violated their constitutional rights.

The Problem

Today, a constellation of judge-made doctrines prevents many individuals from vindicating their most important constitutional rights. As a result, the courts are not fulfilling their constitutional role as an effective check on executive wrongdoing.

First, Congress has not enacted a statute providing for damages suits against federal officials who act unlawfully to violate individuals' constitutional rights. The courts have partially filled that void by recognizing an implied cause of action in the Constitution—referred to as a *Bivens* remedy. But the Supreme Court has made clear, as recently as last year, that *Bivens* remedies generally apply to violations of only a narrow set of constitutional rights: unlawful searches and seizures, cruel and unusual punishment, and gender discrimination. The narrowness of *Bivens* doctrine means that [many constitutional rights lack an accompanying remedy](#), and that officials violate those rights with impunity.¹

Second, and relatedly, the judge-made doctrine of qualified immunity further restricts the ability of individuals to recover damages for infringements of their civil rights. Beginning in the 1960s, the Supreme Court issued a series of decisions holding that officials would not be

¹ Stephen I. Vladeck, *Our Increasingly Unenforceable Constitution* (March 27, 2018), The New York Times. Available at <https://www.nytimes.com/2018/03/27/opinion/increasingly-unenforceable-constitution.html>.

liable for Constitutional violations so long as their actions did not violate “clearly established law.” In practice, this prevents plaintiffs from recovering damages even when they are the victims of egregious government misconduct at the federal, state, or local level. In 2017, for example, the Eleventh Circuit extended qualified immunity to a police officer who “had no warrant, knocked on the wrong door, and gunned down an innocent man in his own home.”² This overbroad immunity doctrine means that the threat of civil lawsuits is not an effective deterrent to official misconduct, and leaves many victims of official wrongdoing without recompense for their injuries.

Finally, the interplay of pleading requirements and recent developments in standing doctrine—which specifies what makes an injury the proper basis for a lawsuit—creates an additional barrier to holding the government accountable in the courts. The Supreme Court has held that, to establish standing, plaintiffs must demonstrate a causal relationship between their injuries and the defendant’s actions. On its own, this rule is sensible enough. But when coupled with heightened requirements for specificity in pleading, it can be very difficult for plaintiffs to establish standing in cases against the government. In such cases, the government controls most of the information needed to prosecute a case. As a result, it may be difficult for plaintiffs with meritorious claims to plead a claim with sufficient specificity to overcome standing requirements.

Proposed Solutions

Congress has a role to play in ensuring that the courts play their proper constitutional role vis-a-vis the executive branch. Congress can authorize suits against federal officials for violations of constitutional rights, and can also clarify if and when immunity is appropriate. Congress can also adjust the procedural rules that currently bar some meritorious constitutional claims. Doing so will revitalize the judiciary’s important role in ensuring accountability for government misconduct.

Congress should take the following actions to strengthen the executive branch’s accountability for Constitutional violations:

Enact a statutory *Bivens* remedy to clarify that individuals whose constitutional rights are violated by federal officials are entitled to recover for their injuries

- This remedy would apply to constitutional violations by federal officers.
- Congress could consider making the federal government itself the proper defendant in such actions, indemnifying individual officers, or limiting damages awards to moot concerns about liability for individual officers.

Enact a law to eliminate qualified immunity for both federal constitutional claims and 42 U.S.C. § 1983, which allows individuals to hold *state* government officials accountable for violations of constitutional rights

² David French, *End Qualified Immunity* (September 13, 2018), National Review. Available at <https://www.nationalreview.com/2018/09/end-qualified-immunity-supreme-court/>.

- A diverse coalition of advocacy groups from across the political spectrum — including both the Alliance Defending Freedom and the American Civil Liberties Union — have [spoken out](#) in favor of reforms to the qualified immunity doctrine.³
- Congress need not wait for the courts to revise doctrine; it can enact such a provision now.

Enact a law clarifying that plaintiffs should have standing to challenge government actions when they have a reasonable basis to believe a government official has violated their constitutional rights

- At a minimum, such a measure should address situations in which plaintiffs are unable to obtain the information they would need from the government in order to establish standing.

³ Brief of Amici Curiae in Support of Petitioner, *Almighty Supreme Born Allah v. Milling*, No. 17-8654, 2018 WL 3388317 (U.S. July 11, 2018). Available at https://www.supremecourt.gov/DocketPDF/17/17-8654/52935/20180711143053649_7.11.2018_Panideological%20Amicus%20Brief%20FINAL.pdf.