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Supreme Court Has Made It Difficult to Sue Immigration Agents

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Two fatal shootings by immigration agents during an enforcement blitz targeting Minneapolis spotlight a Supreme Court doctrine that has steadily narrowed, but not eliminated, families' ability to seek damages for harms caused by federal officers.

The court has sharply limited the ability to make what's known as a *Bivens* claim—a court-created cause of action to seek damages when federal officers violate constitutional rights.

With that channel essentially blocked, legal experts say, the best alternative for individuals or families of victims is seeking damages under the Federal Tort Claims Act. Local and state prosecutors can also bring charges under their state's criminal laws, though both options face hurdles in surpassing certain exemptions and immunities for federal officers.

The scenarios highlight how judicial doctrines have made it "monumentally more difficult to use the federal courts to gain accountability for federal law enforcement and state law enforcement than it was 30 years ago," said David Shapiro, executive director of the MacArthur Justice Center, which litigates law enforcement misconduct and other civil rights cases.

Still, the door isn't completely shut, Shapiro said. "There is very much still a path in really egregious cases."

'Operation Metro Surge'

The Trump administration's deployment of Immigration and Customs Enforcement and Border Patrol officers in Minneapolis engendered near-constant protests and efforts by locals to observe what the administration called "Operation Metro Surge."

Federal agents fatally shot US citizens Renee Good on Jan. 7 and Alex Pretti on Jan. 24, in incidents that were documented on camera. The Department of Homeland Security also faces a lawsuit alleging agents retaliated against and detained people engaged in peaceful protests.

The Reconstruction-era Congress passed a law allowing members of the public to sue state officials for monetary damages for the violations of their constitutional rights, but no parallel statute exists pertaining to federal officials.

The Supreme Court in a 1971 case called *Bivens v. Six Unknown Named Agents* created an implied right of action by holding that a person could seek money damages from federal officials who violated their Fourth Amendment right against unreasonable searches and seizures.

But the justices have applied that precedent to an extremely limited set of facts in the intervening decades.

"The Supreme Court has substantially limited *Bivens*, such that it has become very difficult to seek accountability for violations of constitutional rights through money damages suits," said Samuel Siegel, senior counsel at Georgetown Law's Institute for Constitutional Advocacy and Protection.

The court has also explicitly declined twice in recent years to expand *Bivens* into immigration contexts.

In *Egbert v. Boule*, the conservative majority said permitting such a suit against Customs and Border Protection agents "presents national security concerns" that foreclosed relief. The court reached a similar conclusion in 2020, when it declined to allow a *Bivens* suit against CBP officers for a cross-border shooting.

Two justices, Clarence Thomas and Neil Gorsuch, have called for the court to overturn *Bivens* entirely. Thomas wrote in 2020 the foundation for the decision had "already been abandoned."

High Bar

The Federal Tort Claims Act provides an alternative method of suing the government when federal officers' negligence causes injury, but it, too, has limitations and exceptions.

At the top of the list for the Minnesota cases is the discretionary function exemption, said Mike Nakamura of Shulman Rogers. The exemption shields officers from FTCA lawsuits when they are exercising discretion in the course of their duties regardless of whether that discretion was abused.

"If I'm the government, I'm going to say, 'Discretionary function exemption. ICE is following the policies we laid out, therefore the FTCA is out. We have immunity,'" Nakamura said

The government has a good track record of doing so, according to a 2024 Harvard Law Review analysis which found courts have agreed to dismiss FTCA suits nearly 75% of the time the discretionary function exemption has been invoked.

The Supreme Court unanimously held last year in *Martin v. United States* that a section of the FTCA allowing suits against federal law enforcement for certain actions doesn't override the discretionary function exemption.

Nakamura said Good's and Pretti's families could have a number of causes of action, including wrongful death and negligent supervision.

But, he said, because the FTCA depends upon laws in the state a suit is filed, they will also have to contend with Minnesota's modified comparative fault system. Under that system, if a judge found either Good or Pretti were at least 51% at fault, the entire suit would be thrown out.

Other Pathways

Judge Justin Walker, a Donald Trump appointee on the DC Circuit, presented another potential option in a case stemming from federal officers' tactics in clearing a protest outside the White House in wake of the police killing of George Floyd in 2020.

The appeals court in 2023 said *Bivens* didn't extend to the protesters' claims, but Walker wrote a concurring opinion saying that state tort suits may be a way for the case to proceed.

While a 1988 law called the Westfall Act barred many civil actions for money damages targeting federal officials' conduct, Walker said, there's an "overlooked exception" that may permit state tort suits based on actions violating the Constitution.

Some states have enacted laws that permit tort claims in state courts alleging constitutional violations by federal officers, said Siegel, who previously served in the Justice Department's Office of Legal Counsel.

"But none has been fully tested in litigation yet," he said. The Trump administration last month sued Illinois over one such law, claiming it violated the Constitution's Supremacy Clause.

Sens. Alex Padilla (D-Calif.) and Richard Blumenthal (D-Conn.) in mid-December introduced a law enforcement accountability bill that they say would create a statutory right of action allowing individuals to sue federal agencies when their employees violate their constitutional rights. The bill's chances of advancing are slim in a Republican-controlled Congress.

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