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COULD A NEW SECTION 1983 COVERING FEDERAL OFFICIALS CURB EXECUTIVE BRANCH ABUSE OF CONSTITUTIONAL RIGHTS?

By J. Kennerly Davis, Jr.

Note from the Editor:

This article notes public distrust of the federal government in light of recent scandals, and proposes that a new federal statute authorizing civil rights lawsuits against federal officials could help to mitigate that distrust.

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• H. Allen Black, *Balance, Band-Aid, or Tourniquet: The Illusion of Qualified Immunity for Federal Officials*, 32 WILLIAM & MARY L. REV. 733 (1991), <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1937&context=wmlr>.

• David Zaring, *Personal Liability as Administrative Law*, 66 WASH. & LEE L. REV. 313 (2009), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1046&context=wlulr>.

• John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLORIDA L. REV. 851 (2010), http://www.law.virginia.edu/pdf/faculty/hein/jeffries/jeffries_2010_62flalrev851.pdf.

Professional commentators have expressed their surprise at the extent to which the national political establishment was upended in the 2016 election cycle by the populist campaigns of unconventional outsiders. But the experts should have seen it coming. The trust and respect that Americans feel for the federal government, and the officials who staff it, have been on the decline for years.

In September 2015, Gallup reported that trust in government is the lowest it has been in a decade. Seventy-five percent of Americans believe corruption is widespread in the government. Fewer than one in five Americans trust Washington to do what is right on a regular basis, and almost half believe that government poses an immediate threat to the rights and freedoms of ordinary citizens.¹ At about the same time in 2015, the Pew Research Center reported that four in five Americans feel frustrated or angry with the government, fewer than half view the Department of Justice favorably, and one in four registered voters think of government as an enemy.²

Such widespread alienation and antipathy is not just disturbing; it's dangerous. Abraham Lincoln understood this better than most when he warned in his famous Lyceum Address that without the widespread, deeply felt support of the people, our system of government cannot endure. If the feelings of the citizens become alienated from the government, "it will be left without friends, or with too few, and those few too weak to make their friendship effectual" during a crisis.³

I. EXECUTIVE BRANCH ABUSE BY UNACCOUNTABLE OFFICIALS

How have we come to such a perilous point? Among the significant causes of our plight, we must surely include those frequently recurring cases of federal officials who overreach the bounds of their legitimate authority and abuse their office, violating due process and the constitutional rights of their fellow citizens in the process. The stories of abuse have become all too familiar: the systematic targeting by IRS officials of conservative

1 75% in U.S. See *Widespread Government Corruption*, GALLUP (Sept. 19, 2015), <http://www.gallup.com/poll/185759/widespread-government-corruption.aspx?>; *Trust in Government*, GALLUP (Sept. 13, 2015), <http://www.gallup.com/poll/5392/trust-government.aspx?>; *Half in U.S. Continue to Say Gov't Is an Immediate Threat*, GALLUP (Sept. 21, 2015), <http://www.gallup.com/poll/185720/half-continue-say-gov-immediate-threat.aspx?>.

2 *Beyond Distrust: How Americans View Their Government: General Opinions About The Federal Government*, PEW RESEARCH CENTER (Nov. 23, 2015), <http://www.people-press.org/2015/11/23/2-general-opinions-about-the-federal-government>; *Ratings of Federal Agencies, Congress and the Supreme Court*, PEW RESEARCH CENTER (Nov. 23, 2015), <http://www.people-press.org/2015/11/23/4-ratings-of-federal-agencies-congress-and-the-supreme-court>.

3 Abraham Lincoln, *Address to the Young Men's Lyceum of Springfield, Illinois* (Jan. 27, 1838), <http://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm>.

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organizations and individuals;⁴ the raids by heavily armed inspectors of peaceful farms and factories;⁵ the intimidating threats of prosecution or agency enforcement action that punish dissent and extract shakedown settlements;⁶ and the retaliation against legitimate whistleblowers within the executive branch.⁷ Is it any wonder that a large number of Americans view the federal government as an enemy?

Feelings of anger and frustration about such conduct are further increased by the fact that individual federal officials are seldom, if ever, effectively held to account for their abusive overreach. Stonewalled congressional hearings come to nothing. Impeachment is too cumbersome, and too extraordinary, to be considered a practical mechanism for enforcing accountability.⁸ Slow-rolled internal agency reviews finally conclude with some shuffling of personnel and bland assurances of continued commitment to mission and service. The individual officials involved in these scandalous activities may, at worst, be reassigned with generous relocation payments, or they may retire with full pensions, benefits, and final bonuses.⁹ They typically suffer no significant personal consequences for the rights they have violated, and the lives and livelihoods they have damaged.

With the legislative and executive branches of the federal government largely unable, or unwilling, to hold abusive officials accountable, the individuals whose rights have been violated have been left to seek redress on their own through the courts.

II. THE IMPLIED RIGHT UNDER *BIVENS* TO SUE ABUSIVE FEDERAL OFFICIALS

Under current law, it is at least theoretically possible for an aggrieved citizen to sue federal officials as individuals and thereby seek to recover money damages from those officials to compensate the citizen for the harm caused by the rights violation. But lawsuits like this face legal obstacles that are

virtually impossible to overcome. No federal statute explicitly authorizes this kind of suit.

In 1971, the U.S. Supreme Court found that Webster Bivens could sue to recover damages from agents of the Federal Bureau of Narcotics for their violation of his Fourth Amendment rights.¹⁰ Although no federal statute authorized his suit, the Court found that Bivens had an implicit right to sue the officials, and that that right to sue was directly grounded in the Constitution itself:

[A]s our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power.... It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And “where federally protected rights have been invaded...courts will be alert to...grant the necessary relief.”¹¹

Having concluded that Bivens had a right to sue under the Fourth Amendment, the Court held that he was entitled to recover money damages:

Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But “it is... well settled that where legal rights have been invaded, and federal statute provides for a general right to sue for such an invasion, federal courts may use any available remedy to make good the wrong done...”¹²

Having concluded that petitioner’s complaint states a cause of action under the Fourth Amendment...we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents’ violation of the Amendment.¹³

Since 1971, however, the courts have steadily chipped away at the *Bivens* decision, defining exceptions and exclusions and limitations such that little remains in case law to support a citizen’s suit for damages against federal officials for their violation of his or her constitutional rights. When Congress has included any sort of meaningful remedial mechanism in a statute without also expressly preserving a *Bivens* remedy, the Supreme Court has become increasingly reluctant to imply a *Bivens* cause of action.¹⁴ In a 2009 case involving a constitutional claim for damages, the Court confirmed that “implied causes of action are disfavored.”¹⁵ Some of the citizen lawsuits filed against IRS

4 Zachary Goldfarb & Karen Tumulty, *IRS Admits Targeting Conservatives for Tax Scrutiny in 2012 Election*, THE WASHINGTON POST (May 10, 2013), https://www.washingtonpost.com/business/economy/irs-admits-targeting-conservatives-for-tax-scrutiny-in-2012-election/2013/05/10/3b6a0ada-b987-11e2-92f3-f291801936b8_story.html.

5 Bill Frezza, *Lumber Union Protectionists Incited SWAT Raid On My Factory, Says Gibson Guitar CEO*, FORBES ONLINE (May 26, 2014), <http://www.forbes.com/sites/billfrezza/2014/05/26/lumber-union-protectionists-incited-swat-raid-on-my-factory-says-Gibson-CEO>.

6 Larry Kudlow, *The Obama Bank Shakedown*, NATIONAL REVIEW ONLINE (Aug. 22, 2014), <http://www.nationalreview.com/node/401696>.

7 Joe Davidson, *VA Culture of Reprisals Against Whistleblowers Remains Strong After Scandal*, THE WASHINGTON POST (Sept. 22, 2015), <https://www.washingtonpost.com/news/federal-eye/wp/2015/09/22/va-culture-of-reprisals-against-whistleblowers-remains-strong-after-scandal/>.

8 Only one appointed executive branch official has ever been impeached: Secretary of War William W. Belknap in 1876. See *William W. Belknap (1869–1876)*, Miller Center of Public Affairs, University of Virginia, <http://millercenter.org/president/essays/belknap-1869-secretary-of-war>.

9 Robert W. Wood, *IRS’ Lois Lerner Got Pension, \$129K Bonus, New Call For Criminal Charges*, FORBES ONLINE (June 1, 2015), [http://www.forbes.com/sites/Robertwood/2015/06/01/irs-lois-lerner-got-pension-\\$129K-bonus-new-call-for-criminal-charges](http://www.forbes.com/sites/Robertwood/2015/06/01/irs-lois-lerner-got-pension-$129K-bonus-new-call-for-criminal-charges).

10 *Webster Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Bivens alleged that federal narcotics agents had handcuffed him, searched his house, arrested him, interrogated him, and strip searched him, all without a warrant or probable cause, causing him emotional distress for which he claimed damages. *Id.* at 389-90.

11 *Id.* at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

12 *Id.* at 396 (quoting *Bell*, 327 U.S. at 684).

13 *Id.* at 397.

14 *Bush v. Lucas*, 462 U.S. 367 (1983); see also *Schweiker v. Chilicky*, 487 U.S. 412 (1988).

15 *Ashcroft v. Iqbal*, 556 U.S. 662, 669 (2009).

officials for their political targeting of conservatives have been based on the *Bivens* decision, and they have been severely set back by how narrowly courts now read the *Bivens* decision in cases like this.¹⁶

It might be possible to revitalize the essential principle of the *Bivens* decision, and clearly establish the right of a citizen to sue for damages the individual federal officials who have violated his rights. Such a revitalization could be especially important in light of the lack of meaningful relief available to an aggrieved citizen through any other means. As Chief Justice John Marshall observed many years ago, “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.”¹⁷

III. THE STATUTORY RIGHT TO SUE ABUSIVE STATE OFFICIALS

A turbulent period in our nation’s past provides a dramatic example of the kind of action that has been taken, and could be taken again, to protect the rights of citizens from abusive public officials. During Reconstruction, in 1870 and 1871, Congress passed a series of civil rights acts to facilitate enforcement of the rights set forth in the recently enacted Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. One section of the Civil Rights Act of 1871 was later officially designated to be Section 1983 of the U.S. Code.¹⁸

Section 1983 provides an explicit basis for any citizen whose constitutional or legal rights have been violated by a person acting under state government authority to sue that person personally for money damages and equitable redress to account for the harm resulting from the rights violation. It provides that:

Every person who, under color of any statute, ordinance, regulation custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress¹⁹

Over the years, Section 1983 has become a powerful tool for individuals to enforce their rights and to hold abusive state actors accountable. The statute has been broadly construed to apply to virtually any sort of state action, authorized or not,²⁰ whether carried out by a government employee or associated private party.²¹ Under Section 1983, citizens can sue for punitive

damages,²² and they can collect reimbursement for their legal bills if they prevail in their litigation.²³

Section 1983 does not, by its terms, provide any immunity from liability for defendants. Nevertheless, over the years the Supreme Court has drawn on principles of common law to create absolute immunity from liability under the statute for government officials performing judicial, legislative, or prosecutorial functions.²⁴ Similarly, the Supreme Court has created qualified immunity from liability under the statute for government officials performing executive or administrative functions. Qualified immunity protects officials from liability unless their conduct violates a clearly established constitutional or statutory right.²⁵

IV. THE CIVIL RIGHTS ACT OF 1871—FOR 2017

Congress enacted Section 1983 during Reconstruction to help protect the constitutional rights of citizens against abuses perpetrated by individuals acting under the authority of their state governments (mostly newly freed slaves whose rights were threatened by the KKK and other white supremacist groups that held sway over many public officials in the South at the time). Today, Americans have a growing concern about the threat posed to constitutional rights by individuals acting under the authority of the federal government.

In light of Americans’ declining faith in federal government institutions and the scandals that apparently justify that loss of faith, Congress could revisit Section 1983 and the *Bivens* decision and give serious consideration to drafting and possibly enacting a federal version of Section 1983. The new statute could provide that:

Any person or entity that, acting under color of law, or when clothed with the authority or delegated authority of any statute, regulation, directive, declaration, guidance, communication, custom or usage of any agency, department, office or other subdivision of the federal government, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any substantive or procedural rights, or privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. The party injured shall be entitled to recover payment for all losses suffered as a result of the

¹⁶ *Linchpins of Liberty v. United States*, Civil Action No. 2013-0777 (D.D.C. Oct. 23, 2014) (order granting defendants’ motion to dismiss).

¹⁷ *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803).

¹⁸ Civil Rights Act of 1871, a.k.a. the Ku Klux Klan Act, Pub. L. No. 42-22, 17 Stat. 13 (1871).

¹⁹ 42 U.S.C. § 1983 (2016).

²⁰ *Monroe v. Pape*, 365 U.S. 167 (1971).

²¹ *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982); *see also Edmondson v. Leesville Concrete Company*, 500 U.S. 614 (1991).

²² *Smith v. Wade*, 461 U.S. 30 (1983).

²³ The Civil Rights Attorney’s Fee Awards Act of 1976, 42 U.S.C. § 1988 (2016).

²⁴ *Stump v. Sparkman*, 435 U.S. 349 (1978) (judicial immunity); *Eastland v. U.S. Serviceman’s Fund*, 421 U.S. 491 (1975) (legislative immunity); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutorial immunity).

²⁵ *Harlow v. Fitzgerald*, 457 U.S. 800 (1986); *see also Anderson v. Creighton*, 483 U.S. 635 (1987).

deprivation, including punitive damages, all attorney's fees and other costs incurred to obtain redress.

Perhaps the new statute could be titled "The Civil Rights Enforcement Act of 2017" and, if passed into law, designated to be Section 1984 of the U.S. Code.

Of course, the likelihood of enactment is small. The legislative process involves many steps and considerable uncertainty. Each proposal has to compete with thousands of others for the limited time and resources available to the members of Congress and their staffs. Few bills become law; most do not. Concerns are often raised about the risk of unintended consequences that could flow from proposed legislation. In this case, such concerns might be especially acute given the fact that it has taken the Supreme Court years to work out the differing types of immunity available to state actors under Section 1983.

Some legislators may, in light of the recent election results, feel that the new administration and Congress should be given a chance to work together to address issues of executive branch abuse before spending any time and resources to pursue the new legislation discussed herein. But while the most recent cases of abuse are always associated with the most recent administration, the threat posed to constitutional rights by the modern administrative state and its consolidated powers is ongoing no matter which party is in power. Elections can bring change and political accountability, but as James Madison reminds us in the *Federalist Papers*:

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many... may justly be pronounced the very definition of tyranny.²⁶

[And while a] dependence on the people is, no doubt, the primary control on the government; ... experience has taught mankind the necessity of auxiliary precautions.²⁷

Perhaps, upon thoughtful consideration, legislation like The Civil Rights Enforcement Act of 2017 might be seen as a worthwhile auxiliary precaution.

²⁶ The Federalist No. 47, at 249 (James Madison) (George Carey and James McClellan ed., 2001).

²⁷ The Federalist No. 51, at 269 (James Madison) (George Carey and James McClellan ed., 2001).

