Journal of Legislation

Volume 48 | Issue 2 Article 7

6-20-2022

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Cole Craghan

Journal of Legislation [Vol. 48:2]

IT SHOULD NOT MATTER WHAT TYPE OF OFFICER WRONGLY ARRESTS YOU: USING CIVIL RIGHTS ACTIONS TO PROTECT PEACEFUL PROTESTORS

*Cole Craghan**

INTRODUCTION

On June 1, 2020, an operation headed by the United States Park Police ("USPP") and the U.S. Secret Service cleared protestors from Lafayette Square outside the White House.[1] At the same time, then-President Trump spoke nearby in the Rose Garden; he recommended that governors across the country "dominate the streets" and declared that he would deploy the United States military if governors did not take necessary action.[2] Then, from June 4, 2020 to August 31, 2020, federal officers were sent to a number of cities across the country to respond to ongoing protests; 755 federal agents were sent to Portland, Oregon alone.[3] This response by the Department of Homeland Security ("DHS") involving agents from U.S. Customs and Border Protection ("CBP"), U.S. Immigration and Customs Enforcement, and the United States Secret Service (jointly "DHS officers") was meant to protect federal property from ongoing protests.[4] The response, however, left much to be desired in terms of execution and exposed issues that arise when the government uses federal agents to respond to protests. A report conducted by the DHS Office of the Inspector General in April 2021 found that the DHS officers deployed to Portland were "unprepared to effectively execute" the coordinated response and that without the necessary training, they could commit actions that result in "injur[ies], death[s], and liability."[5]

DHS's use of federal agents in response to protests was a common occurrence during the summer of 2020, and the possibility of using federal agents in the future seems legally justified even when acting outside the scope of protecting federal

*J.D. Candidate, University of Notre Dame Law School, Class of 2023; B.A. in Political Science, DePaul University, 2020. Special thanks to Professor Jennifer McAward for her help and guidance on this Note.

1. OFF. OF INSPECTOR GEN.: U.S. DEP'T OF THE INTERIOR, REVIEW OF U.S. PARK POLICE ACTIONS AT LAFAYETTE PARK, at 3 (2021), [hereinafter REVIEW OF U.S. PARK POLICE ACTIONS AT LAFAYETTE].

2. Donald Trump, President, White House Rose Garden, Speech on Protests Against Police Brutality (June 1, 2020) (transcript available at www.trumpwhitehouse.archives.gov/briefings-statements/statement-by-the-president-39/) [hereinafter President Trump: Speech on Protests Against Police Brutality].

3. Maxine Bernstein, *Federal Agents Sent to Portland to Defend Courthouse Lacked Consistent Training, Equipment or Use of Force Policies, Report Says*, OREGONIAN/OREGON LIVE (Apr. 21, 2021, 10:10 AM), www.oregonlive.com/crime/2021/04/federal-agents-sent-to-portland-to-defend-courthouse-lacked-consistent-training-equipment-or-use-of-force-policies-report-says.html.

4. *See* REVIEW OF U.S. PARK POLICE ACTIONS AT LAFAYETTE, *supra* note 1.

5. OFF. OF INSPECTOR GEN., DHS HAD AUTHORITY TO DEPLOY FEDERAL LAW ENFORCEMENT OFFICERS TO PROTECT FEDERAL FACILITIES IN PORTLAND, OREGON, BUT SHOULD ENSURE BETTER PLANNING AND EXECUTION IN FUTURE CROSS- COMPONENT ACTIVITIES (2021), https://www.oig.dhs.gov/sites/default/files/assets/2021-04/OIG-21-31-Mar21.pdf [hereinafter DHS REPORT].

property.[6] One power of CBP is based on their actions done within 100 miles of a U.S. border; this is referred to as the "Border Zone."[7] Within these areas, CBP agents are given broad authority to conduct stops and searches, even when done outside of checkpoints, as part of a "roving patrol."[8] When cities like Portland, Washington, D.C., and Chicago fall within these zones, that means there are ever-increasing possibilities of constitutional violations based on expansive powers of federal agents.[9]

In response to the presence of these powers being used nationwide in 2020, this Note will not focus on whether the DHS or any federal agent were or should be liable for the actions that took place during the protests in the summer of 2020, as those cases will continue to be litigated .[10] Rather, this Note will focus on the ability for civil rights actions to be brought against federal agents when they are used in response to protests.

Civil rights actions against state actors are traditionally brought through 42 U.S.C. § 1983, which grants liability against those acting under state law who have committed constitutional violations.[11] It only grants liability to those working under the law of states, territories, or districts of the United States.[12] Section I of this Note examines § 1983 more in- depth, and specifically looks at the restrained outcome of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, which attempts to extend § 1983 to federal agents.[13] The Section will follow the history of *Bivens* in cases such as *Davis v. Passman*[14] and *Carlson v. Green*,[15] which show both very limited expansions of what is now known as a "*Bivens* action." [16] Next, Section II follows the recent upswing in the usage of federal agents in responding to protests and possible limits of their powers that may or may not exist.

After going through the protests occurring today, Section III examines the especially vulnerable nature of protests and protestors in relation to the response from federal agents, and how varying motives behind responding to protests can

6. *See* discussion *infra* Section II.

7. *The Constitution in the 100-Mile Border Zone*, ACLU, https://www.aclu.org/other/constitution-100-mile-border-zone (last visited May 22, 2022) [hereinafter ACLU Border Zone].

8. Deborah Anthony, *The U.S. Border Patrol's Constitutional Erosion in the "100-Mile Zone"*, 124 PA. ST. L. REV. 391, 407 (2020) (discussing the powers given to CBP Agents during stops within the 100-mile zone). While roving patrols are a separate issue, they are often done with limited justification, representing the widespread powers that federal agents carry. ACLU Border Zone, *supra* note 7.

9. ACLU Border Zone, *supra* note 7. Nearly two-thirds of the U.S. population, including nine out of ten of the largest U.S. cities, fall within the 100-mile border zone. *Id.*

10. *See* Lauren Berg, *Trump, Feds Escape Most Claims Over Lafayette Square Clash*, LAW360 (June 21, 2021, 9:38 PM), www.law360.com/articles/1396154/trump-feds-escape-most-claims-over-lafayette-square-clash; *see, e.g.*, Noelle Crombie, *Donavan LaBella, Portland Protester Fired on by feds, plans to sue government for millions*, OREGONIAN/OREGON LIVE (June 04, 2021, 8:42 PM), https://www.oregonlive.com/portland/2021/06/donavan-labella-portland-protester-fired-on-by-feds-plans-to-sue-government-for-millions.html.

11. 42 U.S.C. § 1983 (2018) (emphasis added).

12. *Id.*

13. *See* 403 U.S. 388 (1971).

14. 442 U.S. 228 (1979).

15. 446 U.S. 14 (1980).

16. *See* Hernandez v. Mesa, 140 S. Ct. 735, 741 (2020) (explaining the history of *Bivens* and its purpose in expanding § 1983).

criminalize what was previously legal First Amendment activity. Finally, Section IV recommends legislation to cover the gap left by *Bivens*. This legislation will aim to re-expand the holding in *Bivens* by providing a cause of action against federal agents when constitutional violations occur during a response to protests. Advocating for this expansion via legislation will allow for the protection of a First Amendment right without over-expanding liability to federal law enforcement agencies.

I. EXPANDING AND COLLAPSING CIVIL RIGHTS ACTIONS SINCE BIVENS

The basis of civil rights claims against federal agents is grounded in *Bivens*. In 1971, the Supreme Court ruled that a cause of action for damages could be brought against federal agents acting under the color of law when they act in violation of the Fourth Amendment.[17] The suit in *Bivens* was brought after an unconstitutional arrest and search took place in the home of the plaintiff, in front of his wife and children.[18] Justice Brennan and the Supreme Court took a major step and implied a cause of action directly under the Fourth Amendment for violations that occurred at the hands of federal officers acting under the color of law.[19]

This case would seemingly open the door in federal court for lawsuits against federal agents. However, the dissenting opinions in *Bivens* seem to hint at a future court taking a different path. Chief Justice Burger wrote that the holding in *Bivens* created "a damage remedy not provided for by the Constitution and not enacted by Congress."[20] Justice Black further dissented, arguing that although "Congress could create a federal cause of action . . . for [the Court] to do so is . . . an exercise of power that the Constitution does not give us."[21] The problems of separation of powers and deference to congressional action had been noted by the dissent, and the majority did not seem to have an argument in response to this dissent.[22]

Before the views of these dissenters would find a foothold in majority opinions later in the Court's history, there were a few incredibly limited expansions of the holding in *Bivens*. The first of these came in *Davis v. Passman*, in which the plaintiff sought damages for a Fifth Amendment violation.[23] Davis sought damages from her employer, a United States Congressman, for firing her on the basis of sex and violating her Fifth Amendment rights.[24] The holding in *Passman* found that relief in the form of damages constituted an appropriate remedy in response to the Fifth

17. *Bivens*, 403 U.S. at 391.

18. *Id.* The arrest took place inside the plaintiff's home without a warrant in which they subjected him and his home to a full search in front of his wife and children. *Id.* The agents then took the plaintiff to a federal courthouse where he was interrogated, and strip searched. *Id.*

19. *Id*. at 397.

20. *Id.* at 411 (Burger, C.J., dissenting).

21. *Id.* at 427–28 (Black, J., dissenting).

22. Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 296 (1995) (explaining that only Justice Harlan's concurrence responded to arguments posed by the dissent).

23. Davis v. Passman, 442 U.S. 228, 229 (1979).

24. *Id.* at 230–31.

Amendment violations.[25] Only a year later, the court ruled on *Carlson v. Green*,[26] another case that sought to expand the holding in *Bivens.* In *Carlson*, the plaintiff brought forward an Eighth Amendment claim on behalf of her son, who died due to a failure by police officers to provide medical attention while in federal custody.[27] Once again, the court expanded *Bivens* to include relief in the form of damages for a violation of the Eighth Amendment.[28] During these two expansions of federal agent liability, there were further hints of a looming restriction on *Bivens*. In *Passman*, the majority themselves acknowledged that damages can be awarded so long as there are not "special factors counseling hesitation in the absence of affirmative action by Congress."[29] Another limit presented was based on the availability of an alternative remedy. Should a defendant show that an alternative remedy was declared a substitute under the Constitution, and is viewed as equally effective, then a *Bivens* claim would be denied.[30] In 1983, two years after *Carlson*, the court found an alternative remedy in the case of *Bush v. Lucas* and subsequently rejected the claim that was made.[31] Bush, a NASA engineer, sought damages based on claims of defamation and First Amendment violations.[32] However, because "[f]ederal civil servants [was] now protected by an elaborate, comprehensive scheme . . . by which improper action may be redressed," Bush's claim was able to be resolved through a sufficient alternative remedy, and his *Bivens* claim was denied.[33] This holding also expanded the implied deference to Congress that was mentioned in past cases, holding that "Congress is in a far better position than a court to evaluate the impact of a new species of litigation."[34] The impact of the *Bivens* holding expanded quickly, but its fall has been a slow degradation of the scope of monetary relief against federal agents.

In 2007, *Wilkie v. Robbins* came before the court after a "seven-year campaign of relentless harassment and intimidation to force Robbins to [grant an easement to the Bureau of Land Management Officials]."[35] The Court denied relief to Robbins, and the past limiting factors that had been previously discussed were brought to the forefront of the majority's opinion. Choosing to expand the previous view of alternative remedies, Justice Souter wrote that remedies should be based on a "judgment about the best way to implement a constitutional guarantee."[36] Afraid of prompting an "onslaught of *Bivens* actions,"[37] the Court refused to further expand the cause of action to the Fourth and Fifth Amendment claims presented by Robbins.

25. *Id.* at 234.
26. Carlson v. Green, 446 U.S. 14, 15 (1980).
27. *Id.* at 16.
28. *Id.* at 18–19.
29. David v. Passman, 442 U.S. 228, 245 (1979) (quoting Butz v. Economou, 438 U.S. 478, 504 (1978)).
30. *Carlson*, 446 U.S. 14, 18–19 (1980).
31. 462 U.S. 367, 389–90 (1983).
32. *Id.* at 368–69.
33. *Id*. at 385.
34. *Id*. at 390.
35. 551 U.S. 537, 568 (2007) (Ginsburg, J., dissenting).
36. *Id.* at 550.
37. *Id.* at 562.

The trend of denying *Bivens* plaintiffs continued with more recent cases, such as *Ziglar v. Abbasi*, which responded to litigation arising from government policies after September 11, 2001.[38] In the majority opinion, Justice Kennedy expanded upon a new preliminary factor for courts to consider when handling a *Bivens* suit— Justice Kennedy would add this step by defining what was previously called " "special factors counselling hesitation."[39] Addressing this decision on hesitation, the Court gave guidance on deciding what is a "new context" in a *Bivens* claim and explained that:

> The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is *different in a meaningful way* from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; . . . or the presence of potential special factors that previous *Bivens* cases did not consider.[40]

Deciding that a "new context" should be anything that sets the present case apart from *Bivens* as "different in a meaningful way" seems to be a broad and undefined term.[41] This is likely a result of the new posture of the court, which "has made clear that expanding the Bivens remedy is now a 'disfavored' judicial activity." [42] The view that *Bivens* has gone too far is not shied away from by Justice Kennedy, who would even say that "it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today."[43]

Finally, and most recently, *Hernandez v. Mesa* refused to expand *Bivens* again. This time, *Hernandez* applied the previously discussed explanation of what a new context is.[44] Because *Hernandez* had both "foreign relations and national security" implications, the Court found that this was a new context.[45] Despite the claims being based on reasonable Fourth and Fifth Amendment grounds for a shooting by a Customs and Border Patrol Agent, to the Court the identification of a new context is "broad," and a new context was indeed present there.[46] Therefore, a cause of action

38. 137 S. Ct. 1843, 1847 (2017).

39. *Id.* at 1857 (citing Carlson v. Green, 446 U.S. 14, 18 (1980)).

40. *Id.* at 1859–60 (emphasis added).

41. *Id.* at 1859.

42. *Id.* at 1857 (quoting Ashcroft v. Iqbal, 566 U.S. 662, 675 (2009)).

43. *Id.* at 1856.

44. 140 S. Ct. 735 (2020).

45. *Id.* at 739.

46. *Id.* at 743. In holding that this is a new context, the merits of whether or not a Fourth Amendment violation occurred is not weighed. *See id.*

based on a new context cannot even be brought under *Bivens*, and the merits of the case cannot be tried under this type of suit. In his concurrence, Justice Thomas did not mince words and wrote that "[t]he foundation for *Bivens*—the practice of creating implied causes of action in the statutory context—has already been abandoned."[47]

What results is a cause of action against federal agents that have been all but overruled. Meanwhile, the counterpart (and origin) of a *Bivens* action against state actors is 42 U.S.C. § 1983. Section 1983 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.[48]

Monroe v. Pape and *Monell v. Department of Social Services* characterize § 1983 as providing a federal remedy against independent state actors and municipalities that committed a constitutional violation while acting within their authority.[49] The first of these cases, *Monroe*, was brought about in the early 1960s. Recognizing that state law may be inadequate in bringing a resolution after a constitutional violation, the Court in *Monroe* sought to make up for the shortcomings of state laws that protected plaintiffs in theory but not in practice.[50] Following the spirit of accountability for state actors who commit constitutional violations, *Monell* further expanded the *Monroe* holding by including the local municipalities in the definition of a "person" who is acting under state law.[51] This expansion was crucial as it allows policies, ordinances, or even customs of municipalities that conflict with citizens' constitutional rights to be challenged in a private lawsuit.[52] Following *Monroe* and *Monell*, actions against state actors have been numerous[53] and "in virtually every single Term of the [Supreme] Court, [the Court] has decided a substantial number of cases dealing with different facets of [section] 1983 litigation."[54] But this type of action is restricted to officials who acted under the color of state or local law, not federal law.

47. *Id.* at 750 (Thomas, J., concurring).

48. 42 U.S.C. § 1983.

49. *See* Monroe v. Pape, 365 U.S. 167 (1961), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); *Monell*, 436 U.S. at 658.

50. *Monroe*, 365 U.S. at 174–75 (discussing the reasons for § 1983 and how although state remedies may be available in theory, a federal action may be necessary to resolve constitutional violations that state courts are inadequate to resolve).

51. *Monell*, 436 U.S. at 669.

52. *Id.* at 690–91 (discussing how a custom can be the basis of a constitutional deprivation even without explicit approval by local legislature). Customs and usages were included because they can result in widespread discriminatory practices with the same impact as laws. *Id.*

53. Stephen H. Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. MIA. L. REV. 381, 435 (1984).

54. Martin A. Schwartz, *Constitutional Litigation Under Section 1983 and the* Bivens *Doctrine in the October 2008 Term*, 26 TOURO L. REV. 531, 532 (2010).

II. THE FEDERAL RESPONSE TO PROTESTORS

While there has been a major decline in the usage of a *Bivens* suit in response to constitutional violations committed by federal agents, there was recently an upswing in using federal agents to respond to protests that occurred around the country. The summer of 2020 saw protests across the country in support of George Floyd and the Black Lives Matter Movement,[55] and the response varied across the country. On June 1, 2020, a protest in Lafayette Square, Washington D.C., saw the USPP and Secret Service use tear gas and riot control to clear protestors from the park.[56]

The exact timeline and motive for the events are disputed, with officers claiming there were objects thrown by protesters, and press coverage claiming there were no acts of violence but rather a peaceful demonstration.[57] However, what resulted was the use of force by federal agents, and the use of force was not free from error or even demonstrative of a clear policy on protest response. A review of the incident by the U.S. Department of the Interior's Inspector General Office found that there was a "lack of specific policy" when it came to USPP agents' response to events of this nature.[58] A plethora of planning errors by the USPP, including the fact that "many officers were not reporting for duty until that afternoon because of the long hours they had worked over the past 2 days[,]" would contribute to confusion in the procedure for clearing protestors from the park based on uncertain timing of actions by the federal agents present.[59] Further, there were prominent issues with setting up communication both between agencies and with the protestors in Lafayette Square.[60] These shortcomings led to "confusion during the operation" and ultimately resulted in the questionable use of force against protestors.[61] Despite these issues, the Inspector General Report also concluded that "the USPP had the authority and discretion to clear Lafayette Park" on June 1st.[62] Subsequent lawsuits claimed that the use of tear gas, pepper spray, and rubber bullets resulted in unlawful use of force and injury to the plaintiffs who were exercising their First Amendment rights.[63] However, as of May 2021, a judge had already "suggested . . . that there seemed to have been a 'legitimate' national security concern" which would justify the use of

55. *See* Adina Campbell, *What is Black Lives Matter and what are the aims?*, BBC (June 13, 2021), https://www.bbc.com/news/explainers-53337780 (explains the timeline and origin of the BLM movement and details influences during the summer of 2020). *See generally* BLACK LIVES MATTER, blacklivesmatter.com (last visited May 22, 2022).

56. REVIEW OF U.S. PARK POLICE ACTIONS AT LAFAYETTE, *supra* note 1.

57. Ted Johnson, *Park Police Claim That Protesters Threw Projectiles at Lafayette Square Park, But Reporters Say They Saw Peaceful Demonstration*, DEADLINE (June 2, 2020, 5:23 PM), https://deadline.com/2020/06/donald-trump-george-floyd-demonstrators-lafayette-square-park-1202949717/.

58. REVIEW OF U.S. PARK POLICE ACTIONS AT LAFAYETTE, *supra* note 1.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Khorri Atkinson, *Judge Mulls Presidential Safety Claim in Lafayette Sq. Clash*, LAW360 (May 28, 2021, 9:00 PM), https://www.law360.com/articles/1389469.

force on June 1, 2020.[64] Whether or not the use of force was morally right or wrong, the legal conclusions have thus far weighed in favor of federal agencies.

These actions occurred in Washington D.C., just steps from the White House. Thus, federal action may seem to be the obvious response. Portland, Oregon, however, is not just a few feet from the White House. A city across the country became a major focus of the clash between protestors and federal agents, and it garnered national news coverage. On the same day as the incident at Lafayette Square, then President Trump gave a speech calling for aggressive responses to protests occurring around the country.[65] Not only did he call on governors and mayors to act, then- President Trump also threatened to take matters into his own hands and said he would "deploy the United States military and quickly solve the problem for [the governors and mayors]."[66]

During the following months, 755 DHS Officers were sent to Portland as a response to protests that had been ongoing in the city.[67] Known as "Operation Diligent Valor," the response from DHS Officers was intended to address increasing violence and "positively identify and arrest serious offenders" in the city.[68] Throughout the response, there were constant reports of protestors being taken off the streets by unmarked officers who drove unmarked vehicles.[69]

One specific incident caught on video resulted in a response from the U.S. Customs and Border Patrol, who confirmed that the arrest was made by their agents.[70] While the statement claims that agents were "wearing CBP insignia during the encounter" a video of the event only shows patches with the words "Police" on camouflage uniforms.[71] A similar confrontation led to the death of a protestor who was wanted for involvement in a previous shooting. Despite conflicting reports of the confrontation, then President Trump would go on to brag that the U.S. Marshalls in Portland did what local authorities did not want to do.[72] Referring to a confrontation that led to a *suspect* being shot thirty-seven times, then President Trump commended U.S. Marshalls explaining that "[i]t took 15 minutes, it was over . . . . We got him."[73] The same day that a warrant was issued for the protestor, federal

64. *Id.*

65. President Trump: Speech on Protests Against Police Brutality, *supra* note 2.

66. *Id.*

67. Bernstein, *supra* note 3.

68. Kaitlin Flanigan, *Docs: Homeland Security's Portland Protests Mission Called "Operation Diligent Valor",* KOIN (July 23, 2020, 5:42 PM), https://www.koin.com/news/protests/docs-homeland-securitys-portland-protests-mission-called-operation-diligent-valor/.

69. Ken Klippenstein, *The Border Patrol Was Responsible for an Arrest in Portland*, NATION (July 17, 2020), https://www.thenation.com/article/society/border-patrol-portland-arrest/.

70. Statement on CBP Response in Portland, U.S CUSTOMS & BORDER PROT. (July 23, 2020), www.cbp.gov/newsroom/speeches-and-statements/statement-cbp-response-portland-oregon.

71. *See* notes 68–69 and accompanying text. A video circulated, and subsequent reports claimed the officers were only wearing "Police" patches which never clearly identified them as CBP Agents. The CBP statement conversely said that the officers were marked as CBP agents and identified themselves to the individual who was arrested.

72. Mike Baker & Evan Hill, *'We Got Him': Trump Cheers the Killing of an Antifa Activist*, N.Y. TIMES (Oct. 15, 2020), www.nytimes.com/2020/10/15/us/elections/we-got-him-trump-cheers-the-killing-of-an-antifa-activist.html.

73. *Id.*

agents effectively acted as judge, jury, and executioner; they then received praise for their actions.[74] These aforementioned incidents in Portland were also investigated, and the resulting report from the DHS Inspector General almost mirrors the previous report from Lafayette Park. The report found multiple issues in the Portland response, specifically citing problems with DHS Officers failing to complete required training, lacking necessary equipment, and a failure to use consistent uniforms, devices, and tactics while responding to the protests.[75] These findings constituted two *recommendations* (rather than reprimands or even findings of wrongdoing) to the DHS for instituting policy changes in the future, to which the "DHS concurred."[76]

In regard to the legal justification of the operation, there is little doubt that the DHS Officials were acting within their authority, despite claims from locals in Portland that this type of action was unconstitutional.[77] Under 40 U.S.C. § 1315, the DHS had the federal authority to designate and deploy officers from multiple agencies to assist in Portland.[78] Section 1315 refers to the Secretary of the DHS and his ability to respond with DHS Officers to protect federal property, and those on the property.[79] Despite its designated purpose of protecting federal property, § 1315 does not hold officers on the property itself. As § (b)(2)(E) points out, DHS Officers may "conduct investigations, on and off the property in question[,]" and the officers may also make unwarranted arrests.[80] Even then, this is not the limit of the officers' powers under § 1315. Officers may also "carry out such other activities for the promotion of homeland security as the Secretary may prescribe."[81] The powers granted to officers responding to national security issues need not go through Congress or even their state officials. Section 1315(f) grants the power to set guidelines for officers to the Secretary of Homeland Security and Attorney General, both of whom are appointed, rather than elected, officials.[82] Despite the fact that the failures to train could have resulted in (and could continue to result in) "injury, death, and liability", the actions were still seemingly justified.[83]

Even outside of legal justifications for bringing the suit, there are problems with bringing the suits based on the secrecy surrounding the circumstances under which federal agents were used in Portland. The Oregon Attorney General did try to bring a suit against federal agents in Portland during the protests, but one issue present in the complaint was that federal agents "have made it impossible for them to be individually identified by carrying out law enforcement actions without wearing any

74. *Id.*

75. DHS REPORT, *supra* note 5.

76. *Id.*

77. Hallie Golden, *'That's an Illegal Order': Veterans Challenge Trump's Officers in Portland*, GUARDIAN (July 25, 2020), www.theguardian.com/us-news/2020/jul/24/portland-trump-order-federal-officers-veterans-protests.

78. DHS REPORT, *supra* note 5, at 8.

79. 40 U.S.C. § 1315.

80. *Id.*

81. *Id.*

82. *Id.*

83. DHS REPORT, *supra* note 5.

identifying information, even so much as the agency that employs them."[84] Even after facing hurdles of legality, those seeking recourse have had to face logistical issues of naming defendants.

A broader justification for using federal agents was based on then President Trump's Executive Order 13933 entitled "Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence."[85] This executive order was aimed at protecting monuments across the country, and again responding to protests that had been occurring.[86] The executive order allowed the Attorney General to work with local law enforcement to protect monuments and arrest offenders, and also permitted the withholding of federal funding from cities and states that failed to follow the purpose of the executive order.[87] Going a step further however, the executive order would send federal agents from the DHS or Department of Defense at the request of the Secretary of the Interior, the Secretary of Homeland Security, or the Administrator of General Services.[88] None of these are state officials. What this executive order did was allow the federal government to request—and then send in—agents in response to monuments or federal property throughout the country allegedly being vandalized. It did not matter if the state or local officials wanted the federal agents there, a unilateral decision was made by the federal government. In fact, Portland Mayor Ted Wheeler was pepper- sprayed during a protest where he was "demanding [the federal officers] leave."[89] In concert with this executive order, the DHS announced a new task force, the DHS Protecting American Communities Task Force ("PACT"), that would coordinate DHS law enforcement agencies to protect "monuments, memorials, statues, and federal facilities."[90] At the time the task force was implemented, Acting Secretary Wolf had already directed the deployment of DHS Officials across the country.[91]

Referring to protestors as "violent anarchists and rioters," Wolf and federal agents followed the Trump Administration's policy in cracking down at both the state and federal levels against protestors.[92] In September of 2020, despite the federal government claiming a crackdown against these violent anarchists and rioters as the goal of their agents overbearing the will of state officials, only a fraction of the arrests

84. Compl. at 2, Rosenblum v. U.S. Dep't of Homeland Sec., No. 3:20-cv-01161-HZ, (D. Or. July 17, 2020). This complaint filed by the Oregon Attorney General examines not just the hurdles of identifying the DHS Officers, but further exemplifies the tension between state and federal actors in challenging the presence of federal actors in Portland. *Id.*

85. Exec. Order No. 13933, 85 Fed. Reg. 40081 (July 2, 2020).

86. *Id.*

87. *Id*.

88. *Id*.

89. Steve Benham, *Wheeler Meets With Protesters for 'Listening Session'; Demands Feds Leave, Gets Gassed*, KATU PORTLAND (July 23, 2020), https://nbc16.com/news/local/wheeler-meets-with-protesters-for-listening-session-demands-feds-leave.

90. *DHS Announces New Task Force to Protect American Monuments, Memorials, and Statues*, DEP'T. OF HOMELAND SEC. (July 1, 2020), https://www.dhs.gov/news/2020/07/01/dhs-announces-new-task-force-protect-american-monuments-memorials-and-statues.

91. *Id*.

92. Chantal Da Silva, *DHS Launches Task Force to Protect U.S. Monuments, Memorials and Statues*, NEWSWEEK (July 1, 2020), https://www.newsweek.com/dhs-launches-task-force-protect-u-s-monuments-memorials-statues-1514668.

made by federal officials were for serious crimes, and over seventy percent of the arrests made by federal agents were for misdemeanors or simple citations.[93] Arresting protestors based on the previously mentioned executive order resulted in protestors being "arrested for being in front of the federal courthouse or on the sidewalk and failing to disperse or not dispersing quickly enough when ordered to do so."[94] Despite violence and rioting being a source of the show of force by the Trump Administration, the arrests themselves show a different story. Statements by then-President Trump seemed to raise tensions at the protests, increasing rather than decreasing civil unrest by calling protestors "thugs" and threatening that "when the looting starts, the shooting starts."[95] What was created during the summer of 2020 was tension between protestors and newly-introduced federal agents who wielded more power than average state police officers, and were untrained to respond to the protests.

Aside from these specific instances of federal officers responding to protesters around the country, another worry is that of the already expansive powers of federal agents. One agency used in Portland was the U.S. Customs and Border Patrol which was specifically responsible for the arrests of protesters throughout the city. While their authority for the arrests was granted through an executive order, the scope of their authority is broader than what was present in Portland.

Despite the federal agents' authority being based on their border protection responsibilities, agents would routinely stop, search, and seize people who could be hundreds of miles from the border.[96] Power for CBP agents comes from being within a "reasonable distance from any external boundary of the United States;" in practice, a reasonable distance has been treated as any point within 100 miles of a border.[97] The U.S. border is not read to be restricted to the southern border. This means that cities like Chicago, Philadelphia, and Portland all fall within a "reasonable distance" to an external boundary, and CBP agents are afforded broad powers.[98] Even then, the CBP is not seemingly limited by this, as they will often perform "roving patrols" well past 100 miles into the U.S. and have conducted searches and seizures as a result.[99] While Fourth Amendment limitations exist along with a requirement of "reasonable suspicion" for roving patrols, the actual meaning of "reasonable suspicion" for federal CBP agents appears to be a little harder to pin down, even in comparison to the already low standard in state policing.[100]

93. Ryan Lucas, *Review of Federal Charges In Portland Unrest Shows Most Are Misdemeanors*, NPR (Sept. 5, 2020), https://www.npr.org/2020/09/05/909245646/review-of-federal-charges-in-portland-unrest-show-most-are-misdemeanors.

94. Aglae Eufracio, *A Human Rights Crisis Under Our Roof*, 23 SCHOLAR 201 (2021).

95. *Id.* at 228 (explaining how these statements in connection with claims that state officials had failed to act further raised racial and political tensions across the country).

96. Anthony, *supra* note 8, at 398.

97. *Id.*

98. ACLU Border Zone, *supra* note 7.

99. Anthony, *supra* note 8, at 407.

100. *Id*. at 409–10 (analyzing cases involving roving patrols and the standard of reasonable suspicion for CBP agents being vague and loosely followed by agent).

The ever-increasing influence and power of the CBP is viewed as synonymous with increasing the surveillance state and expanding federal powers in relation to the people they search for.[101] While these powers may seem unrelated to protests, these powers exemplify the ever-expanding authority granted to officers in agencies such as the CBP; and these officers would not be restricted from using previously granted authority and training simply because they are being used to respond to a protest.

III. MOVING TO AVAILABILITY OF ACTIONS FOR PROTESTORS

The manner in which federal agents' power is being used to respond to protests and push political agendas presents issues regarding the remedies that protestors who suffer civil rights violations might receive. Coinciding with what is essentially the downfall of *Bivens*, a clear path to a civil rights action against federal agents who violate the Constitution can be hard to see. While *Bivens* is still good law and has not been overruled, *Bivens* would likely not apply to a lawsuit brought forward by someone injured at a protest due to the rigorous standard it presents. As a result of the fluid and ever-changing nature of protests, viewing each case within a "new context" is highly likely as each protest presents unique issues. Under the current rigorous standard required to bring a suit under *Bivens*, protestors are likely left without the option of a private lawsuit in response to a Constitutional violation; rather, any possible lawsuit is relegated to a standard tort claim brought through the Federal Tort Claims Act.[102] However, using § 1983 as a guide, Congress can pass legislation to provide that pathway for a resolution of civil rights violations that acknowledges the importance of protestors' constitutional rights.

A. Lawsuits Against a Federal Agent vs a State Agent

The powers of federal agents are broad. Although President Biden has already revoked Executive Order 13933, which was responsible for a large number of federal agents being deployed throughout the country,[103] the ability to deploy those agents despite the wishes of state and local officials was based in a seemingly clear legal authority.[104] Of course, when presidents act to expand powers, that power is almost certain to reappear. The deployment of federal agents across the country in response to protests should be an alarming development. The inability to bring a civil rights cause of action leaves some of the most crucial rights held by Americans unprotected based not on the action that occurred, but rather, as a result of who the perpetrator is. When the government is the "bad actor[,]" the ability of the injured party to seek recourse is especially necessary. As Justice Brandeis wrote in *Olmstead*:

101. *Id.* at 432.

102. *See generally* Federal Tort Claims Act, 28 U.S.C. § 1346; *see also id.* § 1346(b) (noting that courts have jurisdiction for torts committed by government employees acting in the scope of their employment).

103. Executive Order on the Revocation of Certain Presidential Actions and Technical Amendment, Exec. Order No. 14029, 86 Fed. Reg. 7025 (May 14, 2021).

104. *See* discussion at *supra* Section II (discussing the federal deployment of agents).

> If the government becomes a lawbreaker[,] it breeds contempt for law for it invites every man to become a law unto himself. It invites anarchy to declare that, in the administration of the criminal law, the end justifies the means, would bring terrible retribution. Against that pernicious doctrine, this Court should resolutely set its face.[105]

Addressing violations by the government at any level is a complex issue that tends to be highly scrutinized for obvious reasons of sovereignty. *Chisholm v. Georgia* allowed Plaintiffs to successfully bring a suit against the state, despite claims of sovereign immunity.[106] Congress and the courts would then act in the form of the Eleventh Amendment and *Hans v. Louisiana* in order to address the issues of sovereign immunity, and shield states from broad liability.[107] The dual goals of sovereignty and liability protections have protected both state and federal agents to a high degree, but federal agents still stand apart in their broad powers and the inability to pursue a law suit with a civil rights cause of action. Without the ability to bring a civil rights action, the First Amendment, and the right to assembly, is relegated to an everyday tort claim, diminishing the impact that § 1983 and civil rights actions have.

The powers of federal agents in comparison to state actors such as your everyday police officer deserve special attention because of the aforementioned broad jurisdiction held by federal agents and the special circumstance that allows the executive administration in power to apparently deploy agents to respond to a political message. When similar actions are committed by state actors, a § 1983 response allows injured parties to bring a civil rights lawsuit for constitutional violations that occurred. For instance, in May 1970, protests at Kent State University in Ohio were met with a thirteen-second barrage of bullets that left four students dead.[108] *Scheuer v. Rhodes* addressed the injuries suffered by students who were protesting, alleging that officers acting under the color of law had violated their constitutional rights.[109] In this case, the cause of action itself was not the issue; rather, the case focused on the application of the Eleventh Amendment to state police forces, ultimately concluding that officers were not afforded the protection of the Eleventh Amendment.[110]

This 'hear no evil, see no evil' approach not only leaves plaintiffs without a path to rectify the violation of their civil rights, but disincentivizes any agency from instituting meaningful change.[111] The response to the killings of Kent State

105. Olmstead v. United States, 277 U.S. 438, 483 (1928).

106. 2 U.S. 419 (1793).

107. U.S. CONST. AMEND. XI. *See also* Hans v. Louisiana, 134 U.S. 1 (1890).

108. *Remembering the May 4, 1970, Shootings at Kent State University*, AKRON BEACON J. (Apr. 29, 2021), https://www.beaconjournal.com/story/news/2021/04/29/looking-back-may-4-1970-ohio-national-guard-shootings-kent-state-university-four-students-killed/7396482002/.

109. 416 U.S. 232 (1974).

110. *Id.*

111. DHS REPORT, *supra* note 5, at 8 (the response to a report stating failures in policy implementation and training was a "concurrence" by the agency, with no stated goals in enacting change or correcting wrongs).

protestors prompted a discussion about whether state actors are protected from liability based on absolute immunities afforded to states under the Eleventh Amendment; while *Scheuer* set a standard for answering that question, the importance of addressing constitutional violations at a federal level remains ever-important due to their increased jurisdiction and national presence in 2020.

B. Purposes of Punishing Protestors

At a basic level, policing during a protest becomes a balancing act of protecting the First Amendment rights of protestors with officers' ability to engage in effective policing of criminal activity.[112] However, when the interests of the government in responding to a protest are considered, this confrontation places "speech and safety in direct opposition to one another and relegates speech to a lesser role than the preservation of public order."[113]

This interaction has been seen in cases resulting from the 2020 protests where specific instances of interrupting protests were justified in order to police criminal activity.[114] Criminal activity at recent protests placed protestors at odds with police officers and resulted in confrontations between the two groups. The results of these confrontations created an issue where the First Amendment was placed in a tier secondary to public safety, time, place, and manner restrictions.[115] An aspect of this conflicting interest was present in the Lafayette Square, Washington, D.C. protests. There, during attempts to coordinate a push to remove protestors from the park, the "USPP acting chief of police stated it was the USPP's priority to install the antiscale fence as soon as possible to ensure the safety of Federal officers and property."[116] The goal of the officers present was not in any way related to the First Amendment rights of the protestors. The goals of protecting officers and property had outweighed the constitutional rights of the protestors in the mind of the USPP and the federal agents who were present. What resulted was the famous imagery of officers rushing a crowd with tear gas, and a now-infamous photo of then-President Trump holding a bible on the same spot where those protestors had just been tear- gassed and removed from the property with force.[117]

In addition to the problems created by police attempting to stop crime, protests face other unique issues, such as governments enacting "crime-creating" laws.[118]

112. Jennifer M. Kinsley, *Black Speech Matters*, 59 U. LOUISVILLE L. REV. 1, 4 (citing *State v. Oden* where police cite the ability to effectively police criminal conduct in protests as a justification for making arrests).

113. *Id.*

114. *Id.* (referencing *State v. Oden*, where an attempt to arrest an individual for stealing an officer's bike was hindered by the fact that a crowd did not disperse, consequently requiring officers to use force against peaceful protestors).

115. *Id.* at 4–5.

116. REVIEW OF U.S. PARK POLICE ACTIONS AT LAFAYETTE, *supra* note 1 at 8.

117. Ayesha Rascoe & Tamara Keith, *Trump Defends "Law And Order" Symbolism Of Photo-Op At St. John's Church*, NPR (June 3, 2020, 12:05 PM), https://www.npr.org/2020/06/03/868779265/trump-defends-symbolism-of-photo-op-at-st-johns-church; *see also*, Libby Cathey, *Trump Calls Tear Gas Reports "Fake News," but Protesters' Eyes Burned Just the Same*, ABC NEWS (June 4, 2020), abcnews.go.com/Politics/trump-calls-tear-gas-reports-fake-news-protesters/story?id=71052769.

118. Kinsley *supra* 112, at 9.

Crime-creating laws often come in the form of preventative measures that seek to limit possible crime that hasn't occurred yet, but incidentally create limits on protests that inevitably lead to peaceful protestors being arrested. One notable example of this is curfew laws. For example, looking to Cincinnati, Ohio during the 2020 protests, a curfew law was passed that exempted a number of individuals; it did exempt those protesting the murder of George Floyd.[119] Curfew laws like this aim not at addressing crime that has occurred, but crime that *could* occur; these laws will inevitably lead to the law being "utilized to arrest those merely engaged in peaceful, constitutionally-protected expression."[120] What laws like these do in practice is create a crime that peaceful protestors can be arrested for, placing the First Amendment activity in a uniquely precarious spot that once again permits the arrest of peaceful protestors.

Issues such as racism in policing can lead to attacks on protestors not for criminal action that may have occurred, but for the messaging itself. In response to the Black Lives Matter protests that occurred in virtually every city across the United States in 2020, "public officials at all levels of government began associating the Black Lives Matter protests with vandalism and crime in their rhetoric."[121] The creation of this rhetoric led to policies from governments that were not aimed at criminal activity taking place, but at the peaceful protestors, shutting down protected speech that would be occurring. Establishing a tone like this obviously has real impacts. as "government authorities were more likely to intervene in Black Lives Matter protests than in other demonstrations, and more likely to intervene with forces, like using teargas, rubber bullets and pepper spray or beating demonstrators with batons."[122]

For example, in Tennessee, state officials made it a felony (rather than a misdemeanor) to camp on state property and included a thirty-day minimum jail sentence.[123] In passing this bill, representatives claimed to be aiming to "prevent what has happened in other cities like Portland and Washington, DC."[124] Citing the rhetoric of violence in other cities outside of the State of Tennessee, the Tennessee legislature was looking to arrest protestors who, in their opinion, would "knowingly thumb their nose at authority" by arresting them for a felony, and as a result, disenfranchising them from voting in future elections.[125] This law, while at the state level, provides an example of how protests based on racism in the police force garnered special attention. Additionally, it shows how laws were passed not in direct response to criminal actions in Tennessee, but rather, were focused on silencing the speech itself and removing protestors who had been entirely peaceful. The creation of a law to further crack down on protests like this goes not at reducing crime, but at

119. *Id.* at 10.

120. *Id.*

121. *Id.* at 4 (citing responses from President Trump calling violence at some protests "domestic terror" and other politicians echoing this sentiment).

122. Eufracio, *supra* note 94.

123. S.B. 8005, 111th Gen. Assemb., 2d Extraordinary Sess., 2020 Tenn. Pub. Acts 3.

124. Kelly Mena, *New Tennessee Law Penalizes Protesters Who Camp on State Property with Felony and Loss of Voting Rights*, CNN (Aug. 22, 2020), https://www.cnn.com/2020/08/22/politics/tennessee-felony-camping-law-right-to-vote/index.html.

125. *Id*.

silencing the voice of the protestors. Its purpose is not to clear protestors because they were committing acts of vandalism—that had not happened in Tennessee—its purpose was to directly stop their speech by physically removing them, and then indirectly remove speech through disenfranchising voters by making their peaceful protest into a felony.

Using federal agents similarly does not just address issues of vandalism or rioting but can also be viewed as a way to chill the message being conveyed in the protest and hinder the First Amendment right to protest as a whole.[126] Even beyond a standard chilling effect, crackdowns by federal agents can be enacted in order to score political points. Attributing the strong response from the Trump Administration as a political ploy, it is not out of the question that an administration would deploy federal agents to drive a narrative for an election and muddy the waters of ongoing domestic issues in order to fit that narrative with a political message.[127] Government officials have even claimed that the attacks against protesters from federal agents were not focused on safety, but on "attacking civil society, instilling fear and disrupting our great cities." [128] The chilling effect on First Amendment rights is not something that should be taken lightly, let alone something that should be left without a private right to recourse through the legislative process.

The violation of the right to protest is especially precarious because limits are already in place based on public safety. When citizens engage in their First Amendment rights, they further place themselves at odds with government interests, and this is especially true of the protests that took place in 2020. Protesting against the police forces that stood across from them in the streets meant that the protestors were put at odds with the police not just because they were allegedly hindering the police in stopping criminal activity, but because their voices were directly aimed at the people facing them. When federal agents lacking training and clear policy on protest response are introduced, the situation can become escalated. In tandem with statements from the White House that would enflame passions of both sides of the protests, it is no surprise that the responses from DHS agents across the country included "questionable" uses of force.

As a result, establishing a clear boundary of what is a permissible response is necessary to protect the civil right to protest. At their most basic level, the restrictions against protests are based on time, place, and manner of the speech.[129] But, as shown in this Section, while these may be the only restrictions done in theory, in practice, more nefarious limitations are presented in the responses to protestors. The ever-changing messaging and scope of protests can impact the response from local or

126. Lucas, *supra* note 93 (citing Steve Kanter in the article suggesting the chilling of free speech directly by responding to the content of the protests instead of time, place, or manner restrictions).

127. Richard Read & Justin Yau, *Federal Agents are Arresting Protesters in Portland. Officials Say It's Legal*, L.A. TIMES (July 21, 2020, 9:04 PM), https://www.latimes.com/world-nation/story/2020-07-21/portland-protest-federal-agents (discussing the Trump campaign in 2020 and how it made law and order a centerpiece of the campaign— pushing a response to protests to the front of campaign issues).

128. Derrick Bryson Tyler, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 25, 2021), https://www.nytimes.com/article/george-floyd-protests-timeline.html.

129. *See* Cox v. New Hampshire, 312 U.S. 569 (1941).

federal agents, and factors such as time, place, and manner can all be tools in disrupting or silencing protests.

IV. PROVIDING THE PROTECTION IN CONGRESS

Congress should act to provide a cause of action for protestors based on Constitutional violations committed by federal agents that may occur during the course of the protest. The ability to bring a civil rights lawsuit based on a First Amendment violation should be the obvious source of righting the wrong that has occurred. The problem lies in recent Supreme Court cases downgrading *Bivens* and deferring to the legislature, creating uncertainty in how § 1983 might apply to federal agents. The path to a civil rights cause of action was presented in *Bivens*, but rather than follow the path and expand these protections to include violations of First Amendment rights, courts recently have done everything but overturn *Bivens*. Currently, bringing a Fourth Amendment claim at a protest through this channel would prove to be just short of impossible. The solution should lie not in overturning *Bivens*, as courts have made themselves clear in their belief that the remedy should come from Congress, nor is the solution in directly converting *Bivens* into law. Instead of looking at *Bivens* itself, Congress should look to reestablish the law that would lead to the holding in the first place.

Section 1983 provides a starting point for civil rights actions, and new legislation should be based on the civil rights statute that is used against state officials. A solution should be based on passing legislative action tailored to protecting protestors from federal agents, in the same way they would be protected against state agents. Solving the problem of unaccountability for federal agents requires legislative action, and the executive actions of 2020 show that the necessity to protect protestors specifically has grown substantially. The ability to bring a tort case against a federal agent does not address the fundamental First Amendment violation that has occurred and does not provide a redress for that civil rights violation itself. A resolution of this issue should come in the form of an act by Congress mirroring § 1983 but aimed at the goal of protecting protestors against overstep by federal agents, and thus re-expanding the *Bivens* holding to protect First Amendment rights to assemble. The basis of the Protection of Protestors Act ("POP Act") would read:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of *any law of the United States*, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of the *right of the people peaceably to assemble*, shall be liable to the party injured.

This Act provides a basis of recourse in relation to the civil rights violation that occurs and is directly targeted at both federal agents—*any law of the United States*—and protection of protestors – *right of the people to peaceably to assemble* – addressing the recent problems that have been presented across the country.

An advantage to using the language from § 1983 to form the basis of this new action would be rooted in an already existing body of case law defining the terms and purposes of the law for a clear implementation. *Monell* is already one of the more formative cases of civil rights actions in relation to state actors and could be equally transformative in bringing actions against federal actors as well. The purpose of *Monell* was to acknowledge that the word "person" is limited not just to individuals acting out of step with the law, but rather addresses government units as a whole being susceptible to liability.[130] Specifically, *Monell* held that Congress intended for municipalities and local governments to be included in the definition of a 'person' under § 1983, and these government offices could be held liable where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[131] In relation to this new law, *Monell* could be seen as holding federal agencies—viewed as equivalent to municipalities in this scenario—responsible when they implement policies, ordinances, et cetera. that violate the First Amendment right to assemble. Applying *Monell* to federal actors would allow civil rights actions for policies that directly violate the right to protest, and would be a major step in addressing policies implemented in Portland, where unmarked officers essentially kidnapped protestors without warning.[132]

Another expansion from a previously decided case would come from *City of Canton v. Harris*.[133] Addressing issues of training and specifically failures to train, this case would be crucial in bringing actions where protests were improperly responded to due to carelessness in training. Building on *Monell*, *Harris* held that municipalities could be held liable not just for specific unconstitutional policy, but also for constitutional violations resulting from a failure to train their employees.[134] While the holding in *Harris* does base the failure to train on "deliberate indifference"[135] by the government, there is still a basis to bring cases when constitutional violations do occur. Specifically, the court ruled that:

> [A] municipality can be liable under § 1983 only where its policies are the "moving force [behind] the constitutional violation." Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983. As Justice Brennan's opinion in *Pembaur v. Cincinnati*, . . . put it: "[M]unicipal liability under § 1983 attaches where—and only

130. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).

131. *Id*.

132. Klippenstein, *supra* note 69.

133. 489 U.S. 378 (1989).

134. *Id*. at 380.

135. *Id*. at 388.

> where—a deliberate choice to follow a course of action is made from among various alternatives" by city policymakers.[136]

This interpretation of *Harris* would directly face issues present in responses to protests that embodied a "lack of specific policy" or were mishandled due to confusion in that policy.[137] Crucial oversights in training that currently are brushed aside by an Inspector General Report could actually be litigated and used to bring a civil rights action for governmental agencies' failures in responding to protests. What became clear during the federal government's response was that the refusal to implement specific policy and uphold standards of training necessary to respond to the protests. While this may be a close case of whether or not the federal agencies acted with 'deliberate indifference' the fact that the federal government deliberately went out of their way to ignore and overcome the wishes of local officials, a case could certainly be made.

Resolving broad issues such as training that had a major impact on the constitutional violations that could have occurred would also be perhaps the most impactful way to address violations directly. Rather than deal with the issues of finding out what specific federal agent committed a violation, a standard of widespread incompetence could be met by showing the patterns of failures to train and the absence of policy that caused the injury suffered during a First Amendment protest. This would allow plaintiffs to bring actions against the agency responsible as a whole and would allow lawsuits like the one filed by the Oregon Attorney General to make it past the hurdle of identifying specific agents when they act to conceal their identities during their response to protests.

What this proposed legislation does not do is overly limit federal agents in their ability to do their jobs. Federal agents are afforded broad powers because they often perform broad and important duties. Focusing this act directly at the protection of protestors is important not just for protecting First Amendment rights, but also acknowledges the unique nature of federal actors and the functions they perform. Further, while this act should provide a good first step to protecting protestors, immunities that exist for federal officials would serve as a layer of protection for federal officers. Officers at the local, state, and federal levels are afforded broad protections based on immunities alone. This can serve as a protection for actions even when a constitutional violation occurred. Immunities themselves are worthy of endless notes and articles, and this paper does not look to address issues presented (or resolved) by immunities that can protect officers. However, it is important to acknowledge that even with the resolution in the form of legislative action, officers and agencies can still be protected if they are not acting clearly outside of their authority.

This still should not serve as a reason to not pass this type of legislation, as immunities themselves do not entirely undermine the ability to bring civil rights

136. *Id*. at 389.

137. REVIEW OF U.S. PARK POLICE ACTIONS AT LAFAYETTE, *supra* note 1; *see also* DHS REPORT, *supra* note 5.

lawsuits. Cases such as *Anderson v. Creighton*[138] and *Kisela v. Hughes*[139] show that despite being afforded immunities, officers can still be held liable, or not liable, depending on whether their case meets a certain set of criteria of what the "clearly established law "in their jurisdiction is. Most actions of officers will be protected unless "existing precedent 'squarely governs' the specific facts at issue" ensuring officers are further protected in the course of their employment.[140] At this point, cases against federal agents are not even getting to the substance of the action because of the protections around failures to bring actions themselves. This bill would be the crucial first step in holding wrongdoers in federal agencies liable. After taking the first step, Congress would likely to need pass subsequent legislation addressing these immunities. If not, almost any protest could be seen as lacking "clearly established law" due to the fluid nature of protests. Providing clarity on the issue of immunities is an issue that would help provide federal agents not just in enforcing and upholding the law when handling protestors, but generally in police work.

CONCLUSION

Protests can be a divisive occurrence across the United States. But that doesn't mean protestors should be left without recourse when they suffer constitutional violations at the hands of federal agents, simply because they were in fact *federal* agents. While the Supreme Court has previously tried to bring this cause of action to Americans who suffer constitutional violations from federal agents, the case of *Bivens* is now almost as ineffective as the Eighteenth Amendment. Had it been decided under the current reading of § 1983, the case would likely have received a completely different outcome denying relief to the Plaintiff. The shell of what remains of the *Bivens* holding provides no constitutional recourse for those who were exercising their First Amendment right to peaceably assemble.

With the degredation of *Bivens*, there has also been an expansion of the federal response to protests. With a legal basis in executive orders that overcame the will of local and state officials, protests in 2020 were met with a response from federal agents that *at the very least* deserve a lawsuit that weighs the merits of the constitutional violations that occur. Rather, any civil rights action based on constitutional violations at the hands of federal agents is dead on arrival. For those fighting against injustice and racism in systems across the United States, their voices do not care which type of officer is arresting them, and any resulting lawsuits similarly should not be based on what type of agent was acting.

What resulted in 2020 was an inability to bring civil rights actions against federal agents. But the inability there, should be met with opportunity here. Despite the country seeing decreased protests since the change in administration, a more thorough examination of the wrongs that took place needs to be undertaken, and a

138. 483 U.S. 635 (1987) (establishing that constitutional violations must be violations of clearly established law for the officer to lose his immunity defense).

139. 138 S. Ct. 1148 (2018) (holding a very narrow definition of "clearly established law" that provides fairly broad protection for officers who would commit borderline unconstitutional acts).

140. *Id*. at 1153.

recourse should be available for when this inevitably happens again. If not, agencies have little to no incentive to address and correct the failures and shortcomings of past federal responses to protests. The inflammatory rhetoric that can escalate the clash between local protestors and federal agents can once again be used as justification to arrest protestors and silence their First Amendment speech.

By downgrading *Bivens*, courts have put the pressure on Congress to enact changes in the area of civil rights actions. With increased use of federal agents in the course of countering actions of protestors, the vulnerabilities they face are left utterly unprotected when it comes to providing recourse for violations of their First Amendment rights. Providing a recourse by expanding § 1983 liability does not solve all of the issues we face when it comes to protecting the right to protests. It does provide recourse for those who were wrongly injured, silenced, or imprisoned for trying to engage in a peaceful protest that was met with unconstitutional actions. At the very least, a clarity issue can be resolved through passing a law that puts in place some form of protection for protests.