

No. 25-417

In the Supreme Court of the United States

FRANCIS NIELSEN, *Petitioner*,

v.

KEKAI WATANABE

On Writ of Certiorari to
the United States Courts of Appeals
for the Ninth Circuit

**BRIEF FOR NEUTRAL PRINCIPLES AND
PROJECT FOR PRIVACY & SURVEILLANCE
ACCOUNTABILITY, INC. AS *AMICI CURIAE*
SUPPORTING RESPONDENT**

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QUESTION PRESENTED

Whether the original public meaning of the Article III “judicial Power” includes the authority to adjudicate claims and provide remedies for persons injured by federal officers acting contrary to constitutional restrictions on their powers and authority.

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INTRODUCTION, SUMMARY, AND INTEREST OF *AMICI CURIAE*¹

Petitioner asks this Court to overrule *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), because he argues that holding federal officers personally liable for damages is inherently a legislative creation, unavailable unless Congress first authorizes it. But the text and history of the Constitution show otherwise. The judicial Power had long been understood to include the authority to adjudicate claims and provide remedies when a government officer invaded a private right, such as by entering a home, seizing goods, or detaining a vessel. The injured party sued in an ordinary common-law action, usually trespass. The officer pleaded his governmental authority as a justification. The court then exercised judicial power by deciding whether the law authorized the officer's conduct. If not, the officer answered in damages. Personal officer liability was not something Congress first had to create by statute. It was ordinary judicial business: recognizing an existing right, deciding whether an officer violated it and whether any defenses applied, and providing an appropriate remedy.

In Article III's vesting the "judicial Power of the United States" in the Supreme Court and any lower courts subsequently established by Congress, U.S. Const. art. III, § 1, nothing suggests that the Founding generation understood that power differently from the

¹ This brief was not authored in whole or in part by counsel for any party and no person or entity other than *Amici Curiae* or its members or counsel has made a monetary contribution toward the brief's preparation or submission.

judicial power courts possessed at the time. Indeed, the ratification debates confirm that understanding. When George Mason warned that a federal officer might invade a citizen's home and escape accountability, John Marshall answered that a law purporting to authorize the trespass "would be void" and that the injured citizen could obtain redress in the ordinary courts. Congress surely had some role in establishing other federal courts and making substantive law within its constitutional authority. But nothing suggests that suits against federal agents depended on affirmative legislation. Nor that Congress could authorize the violation of rights and eliminate all remedies for resulting injuries.

Courts decided whether the officer was liable under the ordinary law governing his conduct and whether properly exercised superior law supplied a valid defense. And Congress could exercise its legislative powers—to the extent conferred by the Constitution and subject to Article III and other constitutional constraints—to prescribe potential defenses, channel suits into federal court, and otherwise balance private rights with valid public authority. Congress could also decide after judgment whether the Treasury would indemnify the officer for acts potentially in excess of authority. But such indemnification was between the government and its agents, not an evisceration of private rights and remedies.

A proper understanding of the judicial power is of great interest to *Amici* Neutral Principles and Project for Privacy & Surveillance Accountability, Inc. (PPSA). Neutral Principles is a nonprofit, nonpartisan

organization created to promote the consistent and rigorous application of neutral legal principles emphasizing fidelity to the text and structure of the Constitution and laws regardless of outcome. Its mission is to apply traditionally conservative legal methods in a rigorously nonpartisan way—ensuring that both substantive and procedural constitutional safeguards against government overreach are upheld, regardless of shifting political winds. As jurists and scholars such as Judge Bork, Professor Wechsler, and many others before and since have recognized, the unprincipled exercise of judicial power in pursuit of particular results is unsustainable and illegitimate. Since the 1980s, conservative scholarship and jurisprudence have demonstrated that such neutral principles are best found in a faithful, unbiased adherence to the original public meaning of the text of the Constitution and, when necessary, the relevant history and tradition that may help resolve any ambiguities in that text. But it is always the ratified text—in this case the “judicial Power of the United States”—that comes first and takes precedence.

PPSA is a nonprofit, nonpartisan organization dedicated to protecting privacy rights against unwarranted government surveillance. PPSA has a particular interest in how courts remedy violations of the Fourth Amendment. For much of American history, damages against individual officers were a principal way to enforce constitutional limits on searches and seizures, long before the judicial creation of the exclusionary rule. Whether providing such redress falls within the judicial Power therefore directly implicates PPSA’s mission.

Practice inconsistent with the constitutional text cannot supplant, expand, or limit its original public meaning. That principle applies equally to the scope and limits of the judicial Power itself. Here, the text and supporting history and tradition show that although the source and form of a *Bivens* action may be modern, judicial adjudication of personal officer liability is not. Whether the Constitution defeats an officer's defense to a state-law tort or directly supplies the duty the officer violated, courts do what they have always done: adjudicate an existing duty, its breach, and the appropriate remedy. Those functions fall within the judicial Power vested in the federal courts by the Constitution. They neither depend on nor can be eliminated by the other branches consistent with the separation of powers.

ARGUMENT

The Founding generation understood the Constitution's "judicial Power" to include the traditional judicial function of testing an officer's claimed authority to invade a person's rights against governing substantive law and imposing liability when that authority failed. Early American practice confirms a division of responsibility between the judicial and legislative branches. Courts adjudicated officer liability under existing law. Congress regulated matters within its legislative authority and controlled the public fisc. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), later looked to a different source of substantive rights and duties: the Constitution itself. But courts continued to adjudicate violations and provide remedies. That change does not support Petitioner's

historical premise that officer liability was inherently a legislative creation or that providing remedies for violating existing constitutional duties falls beyond the judicial Power.

I. The Founding Generation and English Tradition Understood the Judicial Power to Include the Authority of Courts to Provide Redress When Government Officers Exceeded Their Lawful Authority.

The Constitution “vested” the “judicial Power of the United States *** in one supreme Court, and in such inferior Courts” as Congress may “ordain and establish.” U.S. Const. art. III, § 1. Historically, courts exercising judicial power decided whether an officer’s claimed authority justified an invasion of a person’s rights. If the officer lacked authority for the invasion, he was held liable under the ordinary law governing invasive conduct, generally the common law applicable between private parties. Existing law established the rights at issue; superior law could provide a defense; and courts decided whether the officer violated a right, whether a defense applied, and what remedy followed. That understanding was well established in English law and carried over into the ratification debates over the new Constitution.

When the Founders vested “[t]he judicial Power of the United States” in the courts, U.S. Const. art. III, § 1, they drew on a long historical practice of what courts did. Blackstone noted that “courts of justice” exist to protect private rights by “expounding and enforcing those laws, by which rights are defined, and wrongs prohibited.” 3 William Blackstone,

Commentaries 2 (Oxford, Clarendon Press 1768), <https://tinyurl.com/puwf3jcw>. Blackstone organized private law around rights, wrongs that violate them, and remedies that redress them. *Id.* at 2-3. And he noted that “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.” *Id.* at 23. The injured party’s suit “set[s] the law in motion.” *Id.* at 22. The court then provides the process and the remedy. Thus, remedying established legal wrongs was ordinary judicial power.

That remedial tradition also fits the Founding-era distinction between judicial judgment and legislative will. Hamilton famously described the judiciary as “hav[ing] neither FORCE nor WILL, but merely judgment.” The Federalist No. 78, in 2 *Federalist: A Collection of Essays* 291 (New York, J. & A. McLean 1788) (Hamilton), <https://tinyurl.com/yb5x6yv3>. Adjudicating an existing private-law action, testing an officer’s asserted authority against superior law, and applying the remedy supplied by that action fit comfortably within that understanding of the judicial Power. Creating new rights or liabilities would present a different question. Such rights could arise from the common law, legislation, or—as in *Bivens*—the Constitution itself. Courts may need an external source for those rights. But not to enforce or remedy existing rights.

Subsequent practice under the Fourth Amendment and its precursor rules provide concrete examples of that judicial function. It “presupposes and conjures up tort law.” Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30

Suffolk U. L. Rev. 53, 64 (1996) (emphasis omitted). A lawful warrant historically protected the searching officer from the trespass action the citizen could otherwise bring, but an unlawful warrant left the officer exposed to damages. *Id.* at 60. Damages against officers were thus a central component of the judicial power to enforce legal limits on searches and seizures when the Fourth Amendment was adopted. That remedial tradition predates the exclusionary rule by more than a century.

The earlier general-warrant cases illustrate the practice. In *Entick v. Carrington* (1765) 95 Eng. Rep. 807 (KB), Entick sued the King's messengers in trespass for breaking into his house and seizing his papers under a Secretary of State's warrant. See 19 T.B. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors* 1030 (London, T.C. Hansard 1816) ("Howell's State Trials"), <https://tinyurl.com/2s37jdax>. The judge, Lord Camden, *id.* at 1044, noted that the warrant was "a justification at common law," so "the officer is answerable if the magistrate has no jurisdiction." *Id.* at 1045. But the officer bore the burden "to shew the law, by which this seizure is warranted. If that cannot be done, it is a trespass." *Id.* at 1066. Because the officer could not make that showing, the ordinary trespass damages followed. The existing legal duty supplied the basis for liability. The court adjudicated the claimed defense and supplied the remedy when that defense failed.

Other early English cases confirm the pattern was not isolated. In *Wilkes v. Wood* (1763) 98 Eng. Rep. 489 (CPD), Wilkes recovered an exemplary

verdict of £1,000 for the ransacking of his house under a general warrant the court held “in itself illegal, and contrary to the fundamental principles of the constitution.” 19 Howell’s State Trials at 1167-1168. The warrant at issue in *Money v. Leach* (1765) 97 Eng. Rep. 1075 (KB), similarly authorized the King’s messengers to search for and arrest the unnamed “authors, printers, and publishers” of *The North Briton* No. 45. When the messengers arrested Leach, who proved to be none of those things, the court held the warrant illegal and denied them statutory protection. 19 Howell’s State Trials at 1024-1027. These were ordinary common-law actions, not proto-constitutional torts. Testing official authority against governing law and applying the established remedy was ordinary judicial work. The governing duty came from existing law. But interpreting that law and remedying its violations were judicial tasks.

The ratification debates show the same understanding extended into the new republic. At the Virginia Convention on June 20, 1788, George Mason warned that the new federal judiciary would shield federal officers. A “federal sheriff,” he worried, could “go into a poor man’s house and beat him, or abuse his family, and the federal court will protect him.” 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 554 (2d ed., New York, Burt Franklin 1888). John Marshall answered that a law purporting to authorize the trespass “would be void,” and that “[t]he injured man would trust to a tribunal in his neighborhood. To such a tribunal he would apply for redress, and get it.” *Ibid.* No clause of the Constitution,

he added, “bars the individual member injured from applying to the state courts to give him redress.” *Ibid.* State courts then were expected to adjudicate both state and federal law, subject to this Court’s review of federal questions. But it was state courts that provided the initial remedy.

That pattern is the Founding-era baseline. State courts applied the common law and adjudicated any claimed defenses of officer authority. Marshall understood those courts’ judicial power to include the authority to provide a remedy. That redress did not depend on Congress first creating a cause of action against the federal officer. The Constitution was adopted against that background of judicial redress under existing law, informing the original meaning of “the judicial Power.” Congress could create lower federal courts and channel federal cases into them. But that authority did not call into question the judicial power to provide remedies. To the contrary, federal attempts to authorize trespass or similar invasions of rights by federal officers, or to strip away the judicial power to provide remedies, would have been beyond the legislative power.

II. Early American Practice Confirms that Courts Adjudicated Officer Liability While Congress Exercised Distinct Legislative Powers Over the Remedial System.

Historical practice confirms the same division of authority. Courts redressed officer liability under existing law. Congress separately exercised its enumerated and incidental powers, subject to other constitutional limits. It enacted statutory defenses,

regulated federal procedure, and decided whether the public fisc would bear a judgment. Whether every such regulation fell within Congress’s constitutional authority presents a separate question. The original understanding of the legislative and judicial powers—and of the Takings Clause—necessarily imposed limits. But critically here, Congress legislated against a preexisting system of judicial power to adjudicate officer liability. Personal officer liability did not await congressional creation.

A. Federal officers remained personally answerable when their claimed authority failed.

Early officer suits repeatedly followed the same structure as early common-law suits. An officer was sued through an existing form of action; he invoked federal authority; the court tested that authority against governing law; and, if the authority did not justify his conduct, the officer could remain personally liable.²

One early example, *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), illustrates this practice. There, Captain George Little seized a neutral vessel, the

² The same pattern appears throughout the early reports. See, e.g., *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 337 (1806) (trespass against collector acting without lawful authority); *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137, 159 (1836) (collector personally liable for illegally exacted duties); see also Andrew Kent, *Lessons for Bivens and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers*, 96 Notre Dame L. Rev. 1755, 1764 (2021) (collecting cases as early analogues to modern qualified immunity). Whether such defenses could survive subsequent constitutional limits such as the Takings Clause is a question for other cases.

Flying-Fish, on the high seas under presidential instructions issued pursuant to statute. But the statute only authorized seizing vessels bound *to* a French port; the *Flying-Fish* was sailing *from* one. In ruling against Captain Little, Chief Justice Marshall held that the officer “acts at his peril,” and “[i]f those instructions are not strictly warranted by law he is answerable in damages to any person injured by their execution.” *Id.* at 170, 177-178. It did not matter that he claimed to be acting under the President’s orders: “[T]he instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.” *Id.* at 179. Marshall admitted that his “first bias” had been to excuse an officer who obeyed orders in good faith, but that he had “receded from this first opinion” and joined the rest of the Court in imposing liability. *Ibid.*

The same rule applied when an officer exceeded statutory authority over property. In *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 2 (1817), a customs officer detained a vessel under the Embargo Act, which authorized detaining the vessel but not its cargo. The owner recovered the cargo by ordinary replevin, and the Court held that where a seizure “be finally adjudged wrongful, and without reasonable cause, [the party] may proceed, at his election, by a suit at common law *** for damages for the illegal act.” *Id.* at 10.

Later decisions carried the same rule beyond the early Republic. In *Mitchell v. Harmony*, Harmony sued an Army officer in trespass for seizing his property during the Mexican-American War. *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 128 (1851). There,

this Court held that an officer “can[not] justify himself for doing an unlawful act, by producing the order of his superior.” *Id.* at 137. And “an order *** to commit a trespass *** can afford no justification to the person by whom it was executed.” *Ibid.*

Nor could an officer’s purported good faith save him from liability. In *Bates v. Clark*, Army officers who seized liquor believing they were in Indian country were “utterly without any authority in the premises,” so “their honest belief that they had is no defence” to the trespass. *Bates v. Clark*, 95 U.S. 204, 209 (1877).

The historical rule was not absolute. Officers enjoyed defenses and protections, including some prescribed by Congress. But those protections regulated existing liability rather than creating the underlying action. Where Congress made an officer’s honest opinion the governing standard, good faith was a complete statutory defense; the prize cases recognized probable-cause protections; and these operated as early analogues to modern qualified immunity. Those defenses thus confirm Congress’s regulatory role in defining rights and duties. But they do not make enforcing those rights and duties—or remedying their violation—a legislative rather than judicial function.³

The same distinction between officer liability and government responsibility also explains sovereign

³ And whether those protections and defenses were properly within Congress’s power—or instead might constitute a Taking or denial of Due Process—is a thornier question still. The legislative power surely does not encompass the authority to nullify constitutional duties and prohibitions.

immunity. Under current jurisprudence the United States cannot be sued without its consent. Yet the immunity of the sovereign and the liability of the officer are distinct questions. Conduct beyond lawful authority remained the officer's own. And a void law affords no protection to the officer who executed it. *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 839, 870-871 (1824). And the sovereign's immunity did not shield an officer who held property without valid authority. *United States v. Lee*, 106 U.S. 196, 220 (1882). A suit against an officer lacking valid authority was not considered a suit against the United States. *Id.* at 208-209, 215-216. *Ex parte Young* later restated the same principle, holding that an officer enforcing an unconstitutional enactment "is stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. 123, 159-160 (1908). *Young* carried the preexisting officer-suit principle forward; it did not originate it. Sovereign immunity "generally barred private individuals from suing the United States directly, but it did not bar suits against government officials." James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1868 (2010).

B. Congress regulated the officer-suit system and decided whether the public fisc would bear judgments.

Officer liability and public responsibility were distinct questions. Congress exercised legislative power over public responsibility and the administration of the officer-suit system. And it

channeled litigation into federal courts, enacted measures affecting officer liability, and controlled the public fisc.⁴ Those measures regulated a preexisting system of judicial remedies. They did not create officer liability in the first instance and likely could not have eliminated it without providing a just compensatory alternative.

Congress's first regulations of the officer-suit regime involved forum channeling, not substantive law governing officer liability. The Judiciary Act of 1789, 1 Stat. 73, gave this Court review, by writ of error, of a final state-court judgment denying a right, title, privilege, or exemption claimed under federal authority—the route by which a state-court officer suit, in which a federal-authority defense had been raised and rejected, reached this Court. *Gelston v. Hoyt* involved exactly that posture, on a writ of error from the New York courts. *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 303, 333 (1818). Later Congresses let federal-officer suits be removed from state to federal court, protecting officers from local hostility while leaving the underlying liability intact. Congress also enacted statutes purporting to supply officers with defenses against existing claims. Whether those statutes represented a permissible exercise of legislative power presents a separate question. In any event, they concerned the substance of rights and duties, not the judicial power to adjudicate claims and remedy their violation.

⁴ Whether Congress had authority to create new defenses, rather than merely channel suits into the federal courts, is also a separate question of the scope of legislative authority, not the limits on the judicial Power *vel non*.

Removal presupposed a suit to remove; appellate review, a judgment to review; and a statutory defense, a preexisting claim against which to operate. Congress provided routes for review and removal and at times purported to supply defenses. None created the underlying common-law actions in the first instance. When Congress later displaced portions of that regime, moreover, it paired limits on personal liability with mechanisms for public payment of claims. Kent, *supra* note 2, at 1767-1769. Congress thus shifted responsibility for compensable injuries rather than simply extinguishing the injured party's remedy. Had it instead sought to nullify claims for injury by federal officers without providing a substitute claim, the Founding generation likely would have viewed that deprivation as void.

Officer indemnification makes the division especially clear: "Courts were to decide whether the conduct in litigation was lawful and award damages against the officer if it was not; Congress was to decide whether the officer had acted for the government within the scope of his agency, in good faith," and on that basis whether the public fisc should bear the loss. Pfander & Hunt, *supra*, at 1868. Madison described the same sequence. The injured owner would "first secure a judicial resolution of their legal claims" against the officer, after which Congress would decide, "through the appropriations process," whether to pay the judgment. *Id.* at 1866.

Two cases discussed above show how that division worked in practice. When Captain Little was held personally liable in *Little v. Barreme*, Congress indemnified him by private bill. See Pfander & Hunt,

supra, at 1902-1903. And in another case, after the seizure of the *American Eagle* was held unlawful, David Gelston, the New York collector, faced a state-court judgment exceeding \$100,000. *Albert Gallatin to James Madison 12 December 1815*, at n.1, Founders Online, <https://tinyurl.com/4n9e9mud> (last visited Sep. 30, 2026). Gelston could not post the bond to appeal—though he was, as Albert Gallatin wrote to President Madison, “only an Agent in this transaction.” *Id.* This Court affirmed in *Gelston v. Hoyt*, 16 U.S. at 333. Congress then appropriated up to roughly \$130,000 to cover Gelston and Schenck. *Albert Gallatin to James Madison, supra*, at n.1. The Court later explained that because “the government *** is bound to indemnify the officer,” a personal judgment worked “no eventual hardship.” *Tracy v. Swartwout*, 35 U.S. (10 Pet.) 80, 98-99 (1836).

Indemnity was discretionary, however; “relatively routine, but not automatic.” Pfander & Hunt, *supra*, at 1868. Officers succeeded on roughly sixty percent of their petitions; relief could be slow, and Congress refused to indemnify where the officer had exceeded his agency. *Id.* at 1867-1868. That discretion reflected a legislative judgment distinct from the court’s adjudication of liability. Courts adjudicated personal liability under the ordinary law governing the officer’s conduct, while Congress decided whether the Treasury would ultimately satisfy the resulting judgment. Congress exercised its authority over the public fisc while leaving judicial power to adjudicate officer liability where Article III vested it—in the courts.

III. Looking to the Constitution as the Source of Existing Rights and Duties Does Not Transform Officer Liability from a Traditional Judicial Function into an Inherently Legislative One.

Bivens changed the traditional officer suit in one respect. It looked directly to the Constitution as the source of the duty the officer violated and hence the basis for an otherwise ordinary action against an officer. Previously, the Constitution ordinarily entered the case as superior law defeating an officer's claimed authority to invade common-law rights. *Bivens* recognized that the Constitution itself also contained rights and duties whose violation could cause cognizable injuries. Recognizing that additional source of substantive rights and duties does not change the historical allocation of judicial and legislative functions. If anything, it reflects a limit on legislative power. And that legislative power could not validly negate the supreme law of the land.

Founding-era plaintiffs ordinarily sued through established common-law causes of action—trespass, trover, or replevin—rather than directly under the Constitution. But the relevant difference is only the source of the substantive duty, not the judicial function of adjudication and remedy. Woolhandler and Collins call earlier suits “garden-variety common-law actions,” in which the Constitution “negates a defense of justification rather than provid[es] the source of the action.” Ann Woolhandler & Michael G. Collins, *Was Bivens Necessary?*, 96 Notre Dame L. Rev. 1893, 1901, 1914 (2021). The constitutional question usually

entered through the officer's asserted justification, not as the source of the plaintiff's claim.

That traditional structure persisted, though its source of law evolved. By its final pre-*Erie* form, the officer-suit remedy was understood as part of the general common law—neither distinctly state nor distinctly federal—with federal law supplying the defense and this Court supplying review. Carlos M. Vázquez, *Bivens and the Ancien Régime*, 96 Notre Dame L. Rev. 1923, 1924 (2021). This Court has similarly explained that “the traditional way in which civil litigation addressed abusive conduct by federal officers was by subjecting them to liability for common-law torts,” claims that “could be raised in state or federal court.” *Hernandez v. Mesa*, 589 U.S. 93, 110 (2020).

Erie Railroad Co. v. Tompkins then dissolved that general common law and required a federal court to identify a positive sovereign source—state or federal—for its rule of decision. 304 U.S. 64, 78-79 (1938). But this Court still “recognized the continuing viability of state-law tort suits against federal officials” before the Westfall Act displaced it. *Hernandez*, 589 U.S. at 110-111. That response from Congress completed much of the modern transformation. Congress made the Federal Tort Claims Act the exclusive remedy for most tort claims arising from federal employees' official conduct, but expressly excepted actions “brought for a violation of the Constitution.” 28 U.S.C. § 2679(b)(2)(A).

That exception does not ratify *Bivens*; Congress simply “left *Bivens* where it found it.” *Hernandez*, 589

U.S. at 111 n.9. Nor does *Erie*'s insistence on a positive source of law undermine *Bivens*. The Constitution itself supplies the *substantive* rights and duties to be adjudicated. Federal courts provide process and remedies, consistent with the original public meaning of the judicial Power. Where the same conduct also gives rise to an ordinary state-law tort for which the FTCA supplies a remedy, Congress has channeled redress for that injury to an action against the United States rather than eliminated judicial redress altogether. See 28 U.S.C. §§ 1346(b)(1), 2679(b)(1).

Those changes illustrate the modern remedial landscape's distance from the Founding-era system but do not—and cannot—reflect a narrowing of the judicial Power. Changes to the source and form of the remedy do not establish that officer liability was historically a legislative creation or that judicial remedies for constitutional violations can be eliminated by Congress.

That history brings the modern source-of-law problem into focus. Once the general common law was limited to the states, what lawful source of federal law authorizes a direct constitutional action in federal court? The answer is the Constitution itself. When seeking a remedy for an injury caused by violating the Constitution, substantive liability is measured against the rights and duties imposed by that independent and existing source of controlling law, not by the mere will of the courts. Courts then perform the traditional adjudicative and remedial functions Article III vests in them. Congress may have authority to alter or channel some substantive rights or shift particular remedies, as it has done through the FTCA and

Westfall Act. But nothing in that authority establishes that providing a traditional judicial remedy for an established legal right is itself an exercise of legislative will rather than judicial power.

Whatever the constitutional limits on Congress's authority to alter or channel particular remedies, the different source of substantive rights and duties in a *Bivens* claim does not establish Petitioner's historical premise. This Court's modern *Bivens* cases frame the inquiry differently. When the Court has called expanding *Bivens* a "disfavored' judicial activity" and stressed that "the question is not what Congress has done but instead what courts may do," it has asked whether courts may recognize a cause of action absent congressional authorization. *Hernandez*, 589 U.S. at 101, 110 (citation omitted from second quotation). But history shows why that framing obscures the distinction between the source of substantive rights and judicial remedies for their violation. Providing a remedy for the violation of an established legal right does not necessarily entail legislative creation of a cause of action. Such actions were judicial in nature. The legislature may surely add causes of action and perhaps channel claims from old actions to new ones consistent with constitutional protections. But it cannot simply remove components of the judicial power or require express congressional permission before federal courts exercise their vested constitutional authority.

For centuries, providing redress against an officer who exceeded his lawful authority was understood as an exercise of judicial power, not legislative will. *Bivens* may have looked to an additional source of

underlying law and adapted the form of the traditional action. But it did not encroach upon legislative authority. The judicial power to remedy violations of substantive law supplied by the Constitution did not disappear with the rejection of general federal common law. The relevant historical question is whether the authority to provide redress for the violation of an established right was understood to be part of “the judicial Power.” The historical evidence shows that it was.

CONCLUSION

Bivens changed the substantive source and adapted the procedural form of the traditional action, not the historical role of courts in adjudicating personal officer liability. At the Founding, adjudicating claims and providing redress for established legal rights were exercises of the judicial Power. Petitioner is therefore mistaken in his premise that damages liability against a federal officer is inherently a legislative creation requiring Congress first to create such an action. Because that premise underlies Petitioner’s separation-of-powers position, *Bivens* should be recognized as a proper exercise of the judicial Power and viewed with far less skepticism. The judgment should be affirmed.

Respectfully submitted,

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