

(Intro music)

Amanda Pampuro: Welcome to Sidebar, a podcast by Courthouse News. I'm Amanda Pampuro, coming to you from Aurora, Colorado. This sanctuary city suburb gained national attention over immigrant gang violence when President Donald Trump was on the campaign trail, and for a while, Operation Aurora became synonymous with his promise to escalate immigration enforcement. As with elsewhere, immigrant detentions and warrantless arrests are on the rise here. One question that's been weighing on my mind as I look around my neighborhood is what limits do ICE agents have? And what happens when a federal agent violates someone's constitutional rights?

Vice President JD Vance: The precedent here is very simple. You have a federal law enforcement official engaging in federal law enforcement action. That's a federal issue. That guy is protected by absolute immunity. He was doing his job.

AP: That can't be right. Kelsey Reichmann, you are Courthouse News' Supreme Court reporter. What do you know about federal immunity?

Kelsey Reichmann: One could say too much. As our listeners are probably well aware, the Supreme Court gave Donald Trump broad immunity a few years back. Since then, they've continued to let him make expansive executive authority claims, giving the president almost carte blanche over the federal government.

AP: How does that fit into what Vice President JD Vance was talking about here?

KR: I'm always happy to deep dive into a complex legal web, and this one has the Supreme Court's fingerprints all over it. But even I was perplexed by the vice president's immunity claims, so I turned to some experts in the field.

Mike Fox: I would start by saying that JD Vance has absolutely no idea what he's talking about.

KR: Mike Fox, at the Cato Institute's Project on Criminal Justice, recently wrote an article titled License to Kill the Legal Black Hole of Federal Misconduct, and he explains the complexities of holding officers, particularly ICE and Border Patrol agents, accountable when they violate someone's rights. Fox said Vance's absolute immunity comments were emphatically false, but a mixture of legal barriers creates an uphill battle for anyone looking to sue a federal agent. Vance's comments came after the fatal shootings of Renée Good and Alex Pretti by federal immigration agents went viral on social media. Increasingly violent standoffs between protesters and law enforcement officers during President Donald Trump's immigration crackdown in Minnesota, coined Operation Metro Surge, were

particularly poignant for the city of Minneapolis, which was roiled by the murder of George Floyd.

AP: The Minnesota Attorney General's Office successfully brought charges against Minneapolis policeman Derek Chauvin after Floyd's killing in May 2020. Will they do that again against Jonathan Ross, the immigration agent who shot Good in an SUV in January?

KR: Because Ross is a federal agent, the state doesn't have the same authority to charge him. Ironically, the reason has to do with one of the most important civil rights laws in US history. It's known today as Section 1983, but in 1871, the statute was known as the Ku Klux Klan Act because it was aimed at protecting Black Americans from white supremacist violence and murder in the postbellum South. Section 1983 empowers individuals to sue state and local government officials who violate their federal constitutional rights.

MF: Right after the Civil War, we had a lot of newly freed slaves who had all these important rights on paper, but when they went to exercise them, they found racist officials in the South, primarily, barring them from exercising these rights. Congress understood the threat, and Congress answered that calling by ensuring that these individuals could go into federal court and seek both injunctive and monetary relief. At the time, the federal government, one, was not the one violating people's rights, and two, the federal government is one of enumerated powers and it's historically been really, really small.

KR: Section 1983 was invoked by the plaintiffs in *Brown v. Board of Education* and many other civil rights cases in the past and present, but the statute only worked because racist state officials couldn't interfere with federal officials' attempts to enforce Black Americans rights.

AP: This can't be the first time in 150 years that federal agents have stepped out of line. Fox mentioned that the federal government has historically been small, but it's rapidly expanded in the last few decades, you know, with the war on drugs and all.

KR: Exactly. One hundred years after Section 1983 was enacted, the Supreme Court ruled on a case known as *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*. Federal agents humiliated Webster Bivens in front of his family after barging into his Brooklyn home without a search warrant. The agents later strip searched him at a federal courthouse and arrested him on narcotics charges. Bivens sued the officers, claiming that the arrest and search violated his Fourth Amendment rights. His case made it all the way to the Supreme Court, where the justices ruled that Webster's rights against unreasonable search and seizure created a federal claim for damages.

AP: Let's see if I'm understanding this correctly. If a state trooper unlawfully searches your home, you can file a Section 1983 claim under the Fourth Amendment. And since 1971, you've been able to file a *Bivens* claim if a federal agent violated your rights.

KR: Yes, in theory. After the Supreme Court ruled on *Bivens*, that was the case for a while.

AP: We wouldn't be here if there wasn't a but!

KR: But *Bivens* fell out of favor on the court. The justices started paring it back, limiting the circumstances when agents can be sued. In 2022, the Supreme Court gutted *Bivens* in *Egbert v. Boule*. Robert Boule, the owner of an inn along the U.S.-Canada border, which is aptly named Smugglers Inn, sued a CBP agent under *Bivens* after an altercation. Boule asked the agent, Eric Egbert, to leave. Egbert refused and pushed Boule to the ground. Boule complained to the agent's supervisors, leading Egbert to suggest that the IRS should investigate Boule. The Supreme Court ruled that Boule didn't have a First Amendment claim for retaliation, or a Fourth Amendment claim for excessive force. In an opinion from Justice Clarence Thomas, the court said that *Bivens* claims couldn't be brought against Border Patrol officers because of national security concerns.

MF: The Supreme Court said, 'No, we're not extending to new contexts, we're not touching immigration enforcement.' And they mentioned national security implications, which I think is absolute nonsense. But that's where we are. So, now we're in this maze or labyrinth of lack of accountability, where if your rights are violated by federal officials, unless your name is Webster Bivens and you're suing six unknown named agents, you are out of luck. And frankly, if Mr. Bivens were to bring a suit again, I don't think he's alive anymore, but if he were to come back to life and bring a suit again, that would be the vehicle by which the Supreme Court, the conservative justices on the Supreme Court, would get rid of the doctrine entirely.

KR: Most attorneys won't take on clients who want to sue agents despite having the odds stacked against them. That's when they turn to people like Marie Miller at the Institute for Justice.

Marie Miller: The reality is, when people come to us with complaints against federal officers, it's really often the case that they've already spoken with a lot of other lawyers who have said, 'There's nothing we can do. It's too much of an uphill battle. It's not worth it. You know, I'm not going to take your case.' So, those people are often coming to us saying, 'Look, no attorney will take my case. What, you know, what can we do?' Whereas that's usually not the case if it's a local or state officer who's violated someone's rights.

KR: Several states have passed what are known as converse 1983 laws, creating an equivalent to Section 1983 under state law. Miller's colleague Anya Bidwell explained how these laws would work.

Anya Bidwell: State remedies are traditional remedies, right? From the beginning of this country what the founders really contemplated in terms of the judiciary was very much you come to state court, you say that your rights were violated and then the court tests that. And if they were, then the court would order a remedy. And then if it's a remedy against a federal official or a state official and they actually were acting within the scope of their duty and were doing everything correctly, then they would be indemnified, right? But the first step was a person who was injured gets to come to court, and if they can prove that they were injured, they would get a remedy. So, what we're trying to do is get at least those traditional remedies back. And the states have been reluctant for a long time to kind of take control of the situation.

KR: Miller and Bidwell are representing George Retes in a test case for this solution. In July, Retes arrived at a farm in Ventura County, California, where he worked as a security contractor, to find that an ICE raid was underway.

George Retes: I see the blockade of agents lined up across the road and I pull up slowly. Majority of them are all masked up, gas masks because of the tear gas and everything.

KR: Retes put his car in park, telling the agents that he's a U.S. citizen and that he's just trying to get to work. The agents then give Retes a series of conflicting directions.

GR: Agents pulling on my door handles, banging on my windows. Trying to, like, break the window. Trying to get me out. All while other agents are telling me to reverse and to pull over to the side. Get the fuck out of here. Like, pull over to the side. Get back to your car. You're not going to work today. They're just all yelling different things. And then they drag me out. They pepper spray me immediately. They drag me out and they just throw me on the ground. An agent comes, he kneels on my neck, and another agent kneels on my back. All while I'm just letting them do, like, anything they want with me because I'm not trying to fight them. I'm not trying to resist. Like, just take it.

KR: Retes, who's a U.S. citizen and Army veteran, would end up being held for over 72 hours, first on a Navy base and then in a detention center in Los Angeles.

GR: They placed me on suicide watch, like I'm naked in, like, a hospital gown. And it's this yellow room. This concrete yellow room. They just leave the lights on 24/7 from Friday morning to Sunday afternoon to literally the point when I was released and they never let me shower. They never let me contact my family or talk to an attorney. Sunday afternoon comes and just says, like, 'You're off suicide watch,' and like, 'I'm getting released.' And that

was it. And he just walked away. I'm still locked in that cell for a couple more hours until eventually another officer comes up and they walk me downstairs. And that was it. Just you're free to go. All the charges on you are dropped and you're free to go. So, I was locked up and missed my daughter's birthday for no, for no reason, basically. And they just stayed silent. They couldn't give me an answer. And the paper had just said I was arrested for detention pursuant to arrest. Just basically arrested for being arrested.

KR: Retes filed a civil rights lawsuit against ICE in February. Miller explained how cases against federal officers typically play out in state courts.

MM: Historically, if a federal officer violated your rights, you go to state court, you say, 'This person violated my rights, but it amounted to various torts. Assault. Battery. Negligence.' And then the federal officers would say, 'Okay, but my defense is that I was doing my job for the federal government. I was acting under federal authority. So, what I did wasn't illegal.' And then the plaintiff's response to that would be, well, what you were doing was actually not authorized because you were violating the federal Constitution. And so, that's the back and forth that historically would happen in these state cases.

AP: Miller is talking in the past tense, so, I'm sensing this isn't how state torts against agents play out in the present.

KR: Correct. There are two prongs that make these suits nearly impossible as well. The Westfall Act and the Federal Tort Claims Act, or the FTCA. The Westfall Act provides federal employees with immunity from negligence claims within the scope of their employment. Because there's always a Supreme Court connection, Congress passed the statute after the justices unanimously ruled in *Westfall v. Irwin* in 1988, which rejected a couple's state law tort suit against the husband's supervisors for exposing him to toxic ash while he was working as a civilian employee with the Army.

MF: And when the Westfall Act was passed, it kind of made sense because, look, I'm in D.C. now. There's a lot of ice on the ground. If the postal delivery person happens to skid on ice and rear end my car, I don't think, and I think most people would agree, that we don't want the postal delivery person to be held personally liable for that. And that was what the Westfall Act was intended to protect against. However, it's been construed so broadly that it now protects against intentional torts and malfeasance, and it's basically an absolute bar to bringing torts lawsuits against government officials.

KR: The FTCA allows individuals to sue the government for personal injuries, but the statute's complex and tedious requirements make it difficult to navigate. Even then, the FTCA has a liability shield to protect the government's discretionary policy judgments. Working in tandem, agents are dismissed from state cases under the Westfall Act. Then the

case is moved to federal court with the U.S. government as a defendant where it can rely on the FTCA.

MF: So, now instead of suing, you know, agent Smith, you're suing ICE under this unbelievably, mind numbingly complex Federal Tort Claims Act, which is ripe with exceptions that are rigged in favor of the government.

AP: What do the exceptions look like?

KR: One example comes from a Supreme Court ruling last June in a case known as *Martin v. United States*. Trina Martin, her son and her then-boyfriend were present in their Georgia residence in 2017 when a SWAT team battered down her door as part of an operation targeting violent gang activity. FBI agents carrying assault rifles swarmed the house, setting off flash bang grenades. It was only after agents handcuffed Trina and her family that the FBI realized they had raided the wrong house. The agents blamed the mix-up on a faulty GPS. The Martins were left traumatized by the raid, with Trina's seven-year-old son needing years of therapy. The family sued the FBI, but lower courts dismissed the case, stating that the raid occurred while the agents were executing federal policy. Fox laid out the government's argument for me.

MF: They're saying that, you know, whether an agent needs to check to make sure they're at the right address before tearing a door down in the middle of the night, that's a policy choice. That's a policy discretion that the agent has. And therefore, they are not liable or the agency is not liable. That is just ridiculous. We've argued that you can't exercise discretion to violate the Constitution. I think that's emphatically correct, but that's a real barrier.

KR: In 1974, Congress amended the Federal Tort Claims Act with a law enforcement proviso, an exception to the exception. The addition came after national outrage about a pair of wrong house raids, similar to the facts of the Martins' case. Under the proviso, sovereign immunity is waived on claims of assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution. The Supreme Court said that the law enforcement proviso should be considered equally with the other provisions in the act, but Justice Neil Gorsuch said that the Martins' suit wasn't barred under the Supremacy Clause. Martin's case is now back before the Eleventh Circuit to decide whether her claims can move forward.

AP: Kelsey, you just said the Westfall Act and the FTCA effectively nullify most of these lawsuits. How does Retes stand a chance?

KR: The Institute for Justice's strategy stems from a dusty, nearly four-decade old law journal article that proposed the idea of converse 1983 laws. These are traditional state

remedies that Bidwell mentioned earlier. Several states, like California, already had these laws on the books before the recent ICE raids, but over a dozen more are looking to implement similar statutes.

AB: The reason the states have been reluctant is because they are worried about this interaction between state law and federal law, and how it's going to work out. But we are confident that actually the United States Supreme Court is going to agree with us that states actually can do that, and that Congress allows them explicitly to do that. So, while implied rights of action directly under the Constitution are all but dead, the so-called *Bivens* claims, right, the Supreme Court basically said, 'We want nothing to do with those things.' We think that with state rights of action for violations of the United States Constitution, that that argument is actually alive and the Supreme Court is going to be very open to them.

KR: The Institute for Justice currently has an appeal before the Ninth Circuit testing California's statute. During the nationwide protests against police brutality in 2020, entrepreneur and activist René Quiñonez's small screen-printing business received orders for thousands of face masks emblazoned with protest speech, such as stop killing black people. Quiñonez shipped the packages from the same post office he typically used, where the nature of his screen-printing business was well known. But instead of receiving their protest apparel, Movement Ink's customers receive notifications that the packages containing nothing but the masks had been seized by law enforcement. Over two years of litigation, the federal government could not identify a reason to suspect Movement Ink, Mr. Quiñonez, their customers or the packages of anything unlawful either for the postal worker who diverted the packages, or the federal law enforcement officers who detained the packages. Before deciding to detain the packages indefinitely, the officers made no attempts to call any of the senders or recipients, all of whom were clearly identified on the boxes. Quiñonez sued government officials for violating his First and Fourth Amendment rights. A lower court rejected his suit, finding that the officers couldn't be sued under *Bivens* and that the government shouldn't be sued under the FTCA. But the Institute for Justice thinks that Quiñonez's appeal could be a test case for state converse 1983 remedies on appeal at the Supreme Court.

MM: Congress passed the Federal Tort Claims Act, which basically funneled all of those cases into federal district court and made the claims be against the United States only instead of against the individual officers, and created a host of immunities for why the United States wouldn't be liable. But Congress also left open a door for constitutional violations, saying, 'Okay, the Federal Tort Claims Act is going to cover a bunch of wrongs by federal officials. But if they violated the Constitution, then you can bring other kinds of

claims.' And that's where these converse 1983 statutes fit in, because they are claims for violations of the Constitution. So, they are removed from that kind of exclusive remedy that the Federal Tort Claims Act provides for other kinds of wrongs.

AP: Kelsey, when I heard you wanted to dive into the legal barriers to suing ICE agents, I thought we'd be talking about qualified immunity. And you haven't mentioned it once.

KR: That's because everything we've discussed so far is just getting to the courthouse doors. Section 1983, *Bivens*, converse 1983 and the rest all concern causes of actions to sue law enforcement officials. If you manage to make it over the first obstacle, there's another one twice as big waiting on the other side.

AP: The term qualified immunity gets thrown around a lot. Tell me how it works.

KR: The idea is that officers must know that their actions are wrong. That means there must be precedent for that wrongdoing.

MM: Qualified immunity works like this. If you've got a claim against a state or local official says, 'This is what happened to me, it violated XYZ rights.' Then the defendant comes in and says, 'OK, I've got qualified immunity. You need to show that the rights that I violated were clearly established.' And what that means as a practical matter is the plaintiff needs to identify a prior case with nearly identical facts to what happened to them in the jurisdiction that you're in. Not just the same facts, but it's got to be in the same geographic region of the United States. And the courts make that analysis really a rigorous burden, because the facts have to be so closely aligned, it's very hard to overcome. There's another way you can overcome it by showing that the violation was just so obvious that you don't need analogous facts. But the courts have treated that exception pretty narrowly, especially certain circuits. They've reserved it for certain kinds of violations of the Constitution. So, unless the plaintiff can point to a prior case with really close facts, the defendant will get off scot-free. Even if the court says, 'Oh yes, this was a constitutional violation.' Um, it's, they say it's not clearly established.

AP: How often do qualified immunity precedents get established?

KR: Rarely, because courts aren't hearing these cases.

MF: We're now in a situation where the courts don't even have to decide if a constitutional violation occurred before granting qualified immunity. So, you're sort of in this catch 22, where if you're a plaintiff in one of these lawsuits, you have to identify a case on point. Meanwhile, the courts aren't getting these cases. They're not putting officers on notice because, of course, officers go home and read appellate case law every night. They're not putting officers on notice. So, therefore, there's never going to be a time where there's going

to be a violation where precisely the same thing happened and a judge or jury said it was unconstitutional.

AP: There is one more elephant in the room. Congress created Section 1983 to address claims against local officers. Why not do the same for federal agents?

KR: Article I is light on big legislation these days, but there have been efforts over the years to amend Section 1983. The most recent came from Representatives Hank Johnson and Jamie Raskin, who introduced the Bivens Act in November. The legislation would allow citizens to recover damages for constitutional violations committed against them by federal officials. But under this current Congress, there's very little incentive to expand *Bivens*. And even if there was, that would only be the first hurdle.

MF: The problem is, by and large, the movement is coming from Democrats, not Republicans, who control both branches of Congress or both houses of Congress and the White House. And most of the approaches the Democrats have are exceedingly narrow and aren't going to solve the problem entirely. If you just codify *Bivens*, you still run into qualified immunity problems. If you just get rid of qualified immunity, you still have no ability to sue federal agents.

KR: Fox warned that proposals to reform qualified immunity could hurt rather than help victims.

MF: That is immensely problematic because qualified immunity was illegitimately created by the Supreme Court almost 60 years ago. The last thing we want is to have legislative legitimacy, to have Congress give its blessing to qualified immunity, because while some of these proposals might allow narrow sets of agents, i.e. ICE and Border Patrol agents who use excessive force to be held accountable, in other words, you could sue them under statute and they will not get qualified immunity. Other federal agents and state and local law enforcement, who comprise the overwhelming majority of constitutional violations, will not only continue to benefit from qualified immunity, but it will have the legislative stamp of approval, which now curtails the ability to challenge these grants of qualified immunity in courts as being illegitimate because Congress said it's lawful and that is horrific. That is just the worst thing we could possibly do.

AP: I am picturing a precarious house of cards, and if you want to clear the *Bivens* hurdle, bring more cases against federal agents into your court. You might pull cards from the bottom and end up with stronger qualified immunity protections, making it harder to bring the suit to the ultimate determination of whether your rights were violated.

KR: Yep. And you never know what you're going to get when you shuffle the deck.

AP: I do wonder, with the increase in ICE activity and scrutiny on whether they're following the book, will we get more challenges and increase the chances of Bivens eventually being broken.

KR: Or holding up. We'll have to see.

AP: Thank you for breaking this down with me. If you learned something in today's episode, please subscribe to Sidebar by Courthouse News on your favorite streaming platform. Follow us on Bluesky and X. And if you want extra credit, leave us a review. Next time on Sidebar, we'll have New Yorkers Josh Russell and Erik Uebelacker unpack the cases against Luigi Mangione, who just dodged the death penalty while facing charges in two separate cases for the killing of UnitedHealthcare CEO Brian Thompson. Despite being charged with cold blooded murder, the 27-year-old has drawn the veneration of hundreds of supporters who often line up outside the court, recap proceedings on Reddit and allegedly plot to break him out with a pizza cutter.

(Outro music)