Enforcing the Constitution

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In 1971, in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the U.S. Supreme Court held that federal government officials may be sued for money damages for violating the U.S. Constitution. Although there is not a specific statute authorizing such suits, the Court inferred a cause of action directly from the rights guaranteed by the Constitution. Agents of the Federal Bureau of Narcotics had subjected Webster Bivens to an abusive and humiliating search and the Court said that he was entitled to sue for damages under the Fourth Amendment. In the famous words of Justice John Marshall Harlan's concurring opinion, "[f]or people in Bivens's shoes, it is damages or nothing."

For the last quarter of a century, the Supreme Court has consistently narrowed the ability to sue federal officers under Bivens. Two recent events in the same week, a 9th U.S. Circuit Court of Appeals decision and a Supreme Court argument, raise the question of how much is left of Bivens and whether it will even survive.

In Mirmehdi v. United States, 2011 DJDAR 16167 (9th Cir. Nov. 3, 2011), the 9th Circuit held that non-citizens who are not lawfully in the United States may not sue for money damages under Bivens for their unconstitutional detention. The case involved four individuals who were held in custody from 2001 until 2005. They sued for money damages claiming that their detention was unconstitutional.

Previously, the 9th Circuit had ruled that immigration officials can be sued for money damages under Bivens. Papa v. INS, 281 F.3d 1004 (9th Cir. 2002). But the 9th Circuit in Mirmehdi said that since then, the Supreme Court has frowned upon Bivens suits. Judge Diarmuid O'Scanlain, writing for the panel, explained that "in the 38 years since Bivens, the Supreme Court has repeatedly rejected Bivens claims outside the context discussed in that specific case." He continued: "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases" because "[s]uch a decision implicates grave separation of powers concerns."

It is striking that this was exactly the argument made by the dissenting justices in Bivens - that it should be for Congress, and not the judiciary, to provide remedies for constitutional violations. Under this reasoning, no suits should be allowed against federal officers for violating the Constitution, no matter how egregious their conduct or how serious the injuries they inflict. The majority in Bivens expressly rejected this argument.

But in the same week that the 9th Circuit decided Mirmehdi, several of the Supreme Court justices at oral argument expressed doubts about Bivens. In Minneci v. Pollard, 629 F.3d 843 (9th Cir. 2010), cert. granted, 131 S.Ct. 1131 (2011), the Court considered whether a Bivens suit can be brought against prison guards at a private prison operating under a contract with the federal government. There are currently over 25,000 federal prisoners housed in 13 privately run detention facilities.
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At the oral argument on Nov. 1, several of the justices expressed the view that Richard Pollard should use state tort law for a remedy for his injuries, even though he claimed that his Eighth Amendment right to be free from cruel and unusual punishment was violated, and that a Bivens suit should not be available. A decade ago, in Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001), the Court, in a 5-4 decision, held that a corporation operating a private prison could not be sued for its constitutional violations in a Bivens suit. The Court said that Bivens suits can be used only against individuals and not against entities. The oral argument in Minneci suggested that the Court may extend this to bar suits against individual prison guards employed by private prisons.

In Malesko, Justice Antonin Scalia, joined by Justice Clarence Thomas, essentially called for the overruling of Bivens and declared that "Bivens is a relic of the heady days in which the Court assumed common-law powers to create a cause of action.... I would limit Bivens to the precise circumstances that it involved."

But this view, and that expressed by Judge O'Scannlain in Mirmehdi, fails to acknowledge that it is fundamental to the judicial role to provide remedies for constitutional violations. Long ago, in Marbury v. Madison, 5 U.S. 103 (1803), the Supreme Court explained that "[t]he very essence of civil liberty certainly consists in this, that no man should be officer of the laws and yet subject to the same laws." Courts have allowed suits for injunctions against federal officers, even without any statutory authorization, since early in American history.

If a Bivens cause of action is unavailable, then in these situations the only remedy is likely to be under state tort law. In some instances, there might be a claim under the Federal Tort Claims Act against the United States, but its scope is limited. For example, in Mirmehdi, the 9th Circuit also held that a suit could not be brought under the FTCA. In Minneci, the Supreme Court found that no claim would exist under the FTCA against the private prison or against the United States.

But surely the vindication of constitutional rights should not depend on the vagaries of state tort law, including state law defenses that might preclude recovery altogether. The underlying rationale of Bivens is that it is for the federal courts, as a matter of federal law, to provide a remedy for violations of the Constitution.

It is still possible that both Mirmehdi and Minneci might uphold the availability of relief under Bivens. In Mirmehdi, for instance, the 9th Circuit en banc might conclude that it conflicts with its earlier decision in Papa v. INS, which allowed a Bivens suit against INS officials. In Minneci, the Supreme Court might hold that prison guards at private prisons can be sued for constitutional violations.

It is important for the Supreme Court and the 9th Circuit to remember that the underlying rationale of Bivens is as important as when that case was decided 40 years ago: It is the judicial role to provide a remedy for constitutional violations. For the Mirmehdis and Pollard, like for Bivens, it is truly damages or nothing.