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'Scannlain, 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.

Tuesday, November 15, 2011

Law Practice
D.C. firm in merger talks with Luce Forward
Washington D.C.-based McKenna Long & Aldridge LLP is now in ongoing merger negotiations with San Diego-based Luce Forward Hamilton & Scripps LLP.

Criminal
Judge rejects lawyer's plea agreement
Federal prosecutors became ensnared in a rare standoff Monday with a district judge who rejected a plea agreement in the prosecution of a heavyweight litigator embroiled in a campaign finance scandal.

Mergers & Acquisitions
Dealmakers
A roundup of recent M&A and financing activity and the lawyers involved.

U.S. Supreme Court
US Supreme Court grants
A roundup of cases agreed to be reviewed by the high court.

High Court's decision to consider Medicaid expansion raises eyebrows
The U.S. Supreme Court's announcement that it will take up the constitutionality of President Barack Obama's health care law did not surprise legal observers, but its choice to consider striking the Medicaid expansion did.

California Supreme Court
Liu looks back on the legacy of his seat on the state Supreme Court
State Supreme Court Justice Goodwin Liu spoke to the Consumer Attorneys of California on Saturday, focusing as much on the legacy of Justice Roger Traynor as he did on his own progress settling into the court after two months.

Law Practice
Locke Lord adds to SF office
Locke Lord LLP continued its expansion into California with the hiring of insurance regulatory attorney Elizabeth A. Tosaris as partner in San Francisco.

Intellectual Property
Patent reform provision already impacting litigation trends

For the last quarter of a century, the Supreme Court has consistently narrowed the ability to sue federal officers under Bivens.

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 the right of every individual to claim the protection of the laws, whenever he receives an injury." 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.

Previous Next

A provision of the patent reform act that limits the number of defendants that can be tried in a single case already is having an impact on how and where patent infringement complaints are filed.

Litigation
Attorney of the Year honors for lawyers who took on nursing home industry
A team of attorneys who took on the nursing home industry in a landmark case over staffing has won Consumer Attorneys of California's biggest honor.

Criminal
Giants payroll manager pleads guilty to embezzlement
A former San Francisco Giants payroll manager pleaded guilty Monday in San Francisco federal court to embezzling $2.2 million from the team.

Litigation
Medi-Cal cuts put on hold
California has put on hold its 10 percent reduction in Medi-Cal reimbursements pending court review.

Mergers & Acquisitions
VeriFone buys Point International
Sullivan & Cromwell LLP led an international deal team for San Jose-based VeriFone Systems Inc. on its $818 million acquisition of Sweden-based Point International from Nordic Capital.

Law Practice
Silver & Freedman to dissolve in spring
Century City-based Silver & Freedman APLC, a well-established and highly-respected business law firm, announced Monday that it will split amicably on March 31.

Criminal
Counties eye Riverside's pay-for-incarceration proposal
California counties struggling to find creative ways to come up with revenue in the battered economy are keeping a close eye on a highly unusual move by Riverside County to make inmates foot the bill for their jail stays.

Constitutional Law
Enforcing the Constitution
It is the judicial role to provide a remedy for constitutional violations. By **Erwin Chemerinsky** of UC Irvine, School of Law

Law Practice
Joe Paterno: legal requirements versus moral imperatives
In court, much like life, you may be judged on your moral rather than legal obligations. By **Mary Dollarhide** of Paul Hastings LLP