



Options for Suing the Federal Government Under *Bivens* Unlikely to Expand

November 7, 2011

In 2001, federal inmate Richard Lee Pollard sustained two broken elbows after tripping over a cart in a privately operated prison housing federal inmates. He sued five prison employees for their actions after his injuries. On Nov. 1, 2011, the Supreme Court held oral argument in *Minneci v. Pollard* and considered the possibility of creating a new federal remedy against private employees who work for a federal government agency.

Pollard claimed that after his injuries, prison employees put him back to work before his arms were healed, causing him extreme pain in violation of his Eighth Amendment right against cruel and unusual punishment. Pollard pursued his claims under the authority of the 1971 Supreme Court case *Bivens v. Six Unknown Federal Narcotics Agents*, which held that, under limited circumstances, a plaintiff could bring a private cause of action for damages against federal employees who violated a constitutional right when there was no other adequate remedy under federal law.

While there was concern at the time that *Bivens* would open the door to a slew of federal cases, the Court has been reluctant to extend its holding beyond the facts of the *Bivens* case, and has done so only three times since 1971. The Supreme Court has not recognized a new *Bivens* right in the past 31 years.

In this oral argument, the Supreme Court was reviewing a Ninth Circuit ruling granting Pollard a *Bivens* right to sue the private employees in a prison for federal inmates. The issue that the justices focused on was whether the availability of a state law cause of action would be an “adequate remedy” for a plaintiff when there was no adequate remedy under federal law.

The attorney for the prison workers, Jonathan S. Franklin, argued against the creation of liability for employees of a private firm working for the government under contract, at least when the suing individual has an alternative remedy in state court. The court seemed inclined to agree with Franklin’s argument that since every state provides a state law remedy for such a claim, there is an adequate remedy available under law and therefore there is no need to create a federal cause of action for damages.

The federal government also sided with the prison workers. The Solicitor General submitted a merits brief that argued that Pollard could sue for damages under California law and probably



receive a better result than he would in a *Bivens* lawsuit because California tort law imposes a lower standard of liability than the Eighth Amendment. At oral argument, Pratik A. Shah, assistant to the Solicitor General, focused on the language of prior Court opinions suggesting that the availability of an alternative remedy was likely fatal to any attempt to establish a new *Bivens* right.

The Justices' line of questioning indicated that they found the state law claim to be an adequate remedy. Justice Elena Kagan questioned why Pollard brought the claim under *Bivens*. She said, "It seems mysterious to me. If you bring it as a negligence claim, you get a lower standard of liability, negligence versus deliberate indifference. You get vicarious liability. So I have been trying to puzzle out, why aren't these brought as negligence claims rather than as *Bivens* claims?"

Pollard's attorney, John F. Preis, struggled to give satisfactory answers as to why *Bivens* should apply. He tried to reframe the question in his opening argument, stating that this issue is "whether a Federal prisoner's access to constitutional remedies should turn on the mere happenstance of where the prisoner is detained."

Preis argued that federal remedies should be available to Pollard because it is not certain that state law remedies would be available for Pollard's claims. The Justices seemed unconvinced by this argument. Justice Stephen Breyer pressed, "Tell me your specific claim that does not arise under state tort law, that's all I want to know, which is the same question I heard – I just didn't hear the answer to." Preis could not satisfactorily answer this question, as every answer he gave — inadequate health care, deprivation of nutritious food, and others — the Justices believed could be addressed by state law tort claims. In the end, Preis had to weakly answer that this was brought as a federal claim because Pollard only had access to books on federal law in the prison library.

The Justices' questioning indicates that they are unlikely to extend *Bivens* to cover cases against private employees where there is an adequate remedy under state law. Defendants will likely have to wait for another case before the holding in *Bivens* is extended again.

Crime in the Suites is authored by the [Ifrah Law Firm](#), a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

The commentary and cases included in this blog are contributed by Jeff Ifrah and firm associates Rachel Hirsch, Jeff Hamlin, Steven Eichorn and Sarah Coffey. These posts are edited by Jeff Ifrah and Jonathan Groner, the former managing editor of the *Legal Times*. We look forward to hearing your thoughts and comments!