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Constitutional Law - Damages for Fourth Amendment Violations by Federal Agents

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CONSTITUTIONAL LAW—DAMAGES FOR FOURTH AMENDMENT VIOLATIONS BY FEDERAL AGENTS

Webster Bivens alleged that on December 26, 1965, six federal narcotics agents broke into his apartment without a search or arrest warrant and thoroughly searched his apartment. The agents manacled Bivens in the presence of his wife and children, and threatened to arrest the entire family. He was arrested for violation of the narcotics laws and taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip-search. Later, the complaint against him was dismissed.

On July 7, 1967, Bivens brought suit in the federal district court,[1] seeking $15,000 damages from each of the six defendants. In addition to the allegations above, Bivens claimed to have suffered great humiliation, embarrassment, and mental suffering as a result of the agents' unlawful conduct. Fairly read, the complaint alleged that the arrest was made without probable cause. Bivens argued that the fourth amendment condemnation of unreasonable searches and seizures entitled him to monetary damages, despite the absence of a federal statute creating such a remedy.

The district court, on defendants' motion, dismissed the complaint for lack of federal question jurisdiction,[2] and alternatively, for failure to state a claim upon which relief could be granted.[3] On appeal to the Second Circuit[4] the dismissal was affirmed on the ground of failure to state a claim upon which relief could be granted. The Court of Appeals found that, according to *Bell v. Hood*,[5] the federal district court has jurisdiction to determine whether a complaint founded on the fourth amendment states a claim upon which relief can be granted. The United States Supreme Court granted certiorari.[6] On June 21, 1971, the Court held

1. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 276 F. Supp. 12 (E.D. N.Y. 1967).

2. 28 U.S.C. § 41(1) (1940), *as amended*, § 1331(a) (1964).

3. FED. R. CIV. P. 8(a).

4. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 409 F.2d 718 (2d Cir. 1969).

5. Bell v. Hood, 327 U.S. 678 (1946).

6. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 399 U.S. 905 (1970).

that violation of the fourth amendment by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Although the fourth amendment[7] was ratified by the United States Congress in 1791, no one was allowed to sue a federal agent for damages in violation of his fourth amendment rights until the *Bivens* decision. The purpose of this case note is to explain the necessity for creating a remedy for a violation of an individual's fourth amendment rights by federal agents, and to illustrate the significance of the *Bivens* decision in the development of constitutional law.

The general grant of federal question jurisdiction requires a plaintiff to allege a "matter in controversy" which "arises under the Constitution, laws, or treaties of the United States."[8] Historically, the courts have interpreted this to mean that federal question jurisdiction requires the plaintiff to allege a question as to the scope and effect of the Constitution. Until 1946, damage actions against federal agents for violation of an individual's fourth amendment rights had been dismissed on the ground that federal courts had no jurisdiction, because the issues did not present a question as to the scope and effect of the fourth amendment.

In *Taylor v. DeHart*,[9] for example, the plaintiff instituted a suit for damages. He alleged that the defendants under color of their offices as prohibition agents, conspired to search and actually did search his residence without a lawful search warrant, and were therefore in violation of the fourth amendment to the Constitution of the United States. The plaintiff insisted that the federal court had original jurisdiction since the matter arose under the Constitution of the United States. The court, in dismissing the case, held: "The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution. . . . There is no such controversy here."[10]

In 1946, the Supreme Court in *Bell* removed the jurisdictional blockade to relief. Bell's complaint stated in part that on December 18, 1942, the

7. U.S. CONST. amend. IV.

8. 28 U.S.C. § 41(1) (1940), *as amended*, § 1331(a) (1964) states: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

9. 22 F.2d 206 (W.D. Mo. 1926), *appeal dismissed*, 274 U.S. 726 (1927); *see* Dowling Bros. v. Andrews, 19 F.2d 961 (7th Cir. 1927); Ranklin Gilmore & Co. v. Newton, 270 F. 332 (S.D. N.Y. 1920); *cf.* Johnson v. Thomas, 16 F. Supp. 1013 (N.D. Tex. 1936).

10. 22 F.2d 206, 208 (W.D. Mo. 1926).

defendants did arrest and imprison the individual plaintiffs and did search the homes of said plaintiffs, and seize and carry away books, papers and effects of said plaintiffs; and that by reason of the deprivation of their constitutional rights the plaintiffs had suffered damages. The district court dismissed the suit for want of federal jurisdiction. The Circuit Court of Appeals affirmed.[11] The United States Supreme Court granted certiorari,[12] and reversed.[13] The Supreme Court held that the jurisdictional requirement of a federal question is met by an allegation that a substantial federal right has been violated, as long as such a claim is not immaterial and made solely for the purpose of obtaining jurisdiction, or where the claim is wholly insubstantial or frivolous.[14]

Although this decision seemed to be a victory for Bell, whose allegations were very similar to those of Bivens, the ground that he had gained was costly. The United States Supreme Court found that the federal district court did have jurisdiction, so it remanded the case back to the district court for consideration of whether the complaint stated a claim upon which relief can be granted. On remand, the district court dismissed for failure to state a claim, finding that "neither the Constitution nor the statutes of the United States give rise to any cause of action in favor of the plaintiffs. . . ."[15] Subsequently, the courts merely switched from holding that no statute grants jurisdiction to holding that no statute grants a cause of action,[16] implying that statutory authority is a prerequisite for a federal cause of action for damages.

Bivens is the first case since *Bell* to examine the question whether a federal damage action is implicit in the fourth amendment. The first issue presented to the *Bivens* Court is whether the power to authorize damages as a judicial remedy for vindication of a federal constitutional right is placed by the Constitution exclusively in the hands of Congress. According to the three dissenters, whether to afford a redress in money damages for a violation of one's fourth amendment rights rests exclusively within the powers of the legislature. Mr. Justice Black, in his dissent, states:

11. Bell v. Hood, 150 F.2d (9th Cir. 1945).

12. Bell v. Hood, 326 U.S. 706 (1945).

13. Bell v. Hood, 327 U.S. 678 (1946).

14. *Id.* at 682-83.

15. Bell v. Hood, 71 F. Supp. 813, 821 (S.D. Cal. 1947).

16. McShane v. Moldovan, 172 F.2d 1016 (6th Cir. 1949); *cf.* United States v. Faneca, 332 F.2d 872 (5th Cir. 1964), *cert. denied*, 380 U.S. 917 (1965); Koch v. Zuieback, 194 F. Supp. 651 (S.D. Cal. 1961), *aff'd*, 316 F.2d 1 (9th Cir. 1963); Garfield v. Palmieri, 193 F. Supp. 582 (E.D. N.Y. 1960), *aff'd*, 290 F.2d 821 (9th Cir. 1961).

There can be no doubt that Congress could create a federal cause of action for damages for an unreasonable search in violation of the fourth amendment. Although Congress had created such a federal cause of action against state officials acting under color of state law, it has never created such a cause of action against federal officials. . . . For us to do so is, in my judgment, an exercise of power that the Constitution does not give us.[17]

The majority of the *Bivens* Court, however, held that the federal courts do have the power to award damages for a violation of an individual's fourth amendment rights regardless of the absence of a statute authorizing such damages.

Although federal courts have frequently created damage remedies to enforce statutes which did not expressly authorize damage remedies,[18] and nondamage remedies to enforce constitutional rights,[19] they have only rarely inferred a damage remedy from a constitutional right.[20]

The Constitution, in creating the fourth amendment rights, omits specific protection of them;[21] therefore, the institutions created by the Constitution must formulate the remedial system. Since state and federal legislatures have the ability to weigh competing policies and choose

17. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 427 (1971). 42 U.S.C. § 1983 (1964) states: "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

18. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1916).

19. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914) (exclusionary rule); *Ex parte* Young, 209 U.S. 123 (1908) (injunction).

20. In Jacobs v. United States, 290 U.S. 13 (1933), the Supreme Court, without explicit statutory authorization, granted monetary compensation for land flooded by a bridge constructed by the government. Money damages were the only feasible remedy, since the flooded land could not be unflooded and the usual remedy of declaring the taking invalid and returning the land was not available. In Nixon v. Condon, 286 U.S. 73 (1932), the Supreme Court held that a resolution under purported state statutory authority of a state party executive committee, denying Negroes their right to vote at a primary election, was violative of the fourteenth amendment, and a Negro denied his right to vote could sue election judges for damages without explicit statutory authority. In Nash v. Air Terminal Services, 85 F. Supp. 545 (E.D. Va. 1949), a federal district court found implicit in the fifth amendment a federal cause of action for damages suffered as a result of racial discrimination by a federal government concessionaire.

21. U.S. CONST. amend. IV states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

among a great variety of possible remedies,[22] the federal courts traditionally have deferred to such legislatures for their creation. However, the federal judiciary has a duty to initiate new remedies whenever, in the words of the *Bivens* Court, "a clearly declared right is left so wanting of remedies as to render it a 'mere form of words.' "[23] A constitutional right cannot be sacrificed simply because of legislative inaction.

Although the Supreme Court in *Bivens* recognizes that it has the power to create a damage remedy, it also recognizes that there are conflicting policies affected by their decision to create a damage remedy. Because its policy of maintaining the separation of powers conflicts with its duty to defend constitutional rights, the Supreme Court has allowed relief not expressly authorized by Congress only when "necessary" or "appropriate" to the vindication of the interests asserted.[24]

At this point, the Court had to determine whether a creation of a damage remedy was "necessary" or "appropriate" to vindicate Bivens' fourth amendment interests. The respondents contended that Bivens' rights could be vindicated, without the creation of a federal damage remedy, by the traditional methods of relief used in situations such as the one Bivens alleged. The Court agreed that it would not create a damage remedy if Bivens' rights could be adequately vindicated by another remedy. Traditional remedies available to protect against an illegal search by federal officers are criminal prosecution of the officers,[25] injunctions,[26] exclusion of evidence,[27] and state civil remedies.

Criminal prosecution of the officers only protects society from the officers' criminal acts. It does not directly compensate the injured victim. Since Bivens alleged direct injuries from the respondents' unconstitutional conduct, and since punishment of the government agents would not compensate Bivens' injuries, criminal prosecution of the federal officers would not be an adequate vindication of Bivens' rights.

22. *See generally* HART & WECHSLER, THE FEDERAL COURT AND THE FEDERAL SYSTEM 313-14 (1953).

23. *Supra* note 4, at 722-23. *See generally* Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969).

24. J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964); United States v. Standard Oil Co., 332 U.S. 301, 307 (1947).

25. 18 U.S.C. § 2236 (1964).

26. Although there is no case holding injunctive relief, there are dicta that federal courts have the power to enjoin federal officers from exceeding the limits of their authority by conducting illegal searches. *See, e.g.*, Bell v. Hood, 71 F. Supp. 813, 819 (S.D. Cal. 1947). *See generally* Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 (1968).

27. Weeks v. United States, 232 U.S. 383 (1914).

Injunctive relief is available only to a person who has adequate warning that the police are going to search him. This relief is clearly ineffective for Bivens.

The exclusionary rule operates only when a search has been successful and the prosecution seeks to introduce evidence in court against the victim of the illegal search. Since no evidence was found by the illegal search, the exclusionary rule is useless to Bivens.

The government's main contention in the *Bivens* case is that Bivens had the opportunity to sue the respondents in the state court for trespass and false imprisonment. Since he can obtain money damages for the respondents' illegal conduct, it is not "necessary" that the Court create a damage remedy based on a violation of the fourth amendment. The Court discusses this comment at great length and arrives at the conclusion that:

> The interests protected by state laws regulating trespass, and the invasion of privacy, and those protected by the fourth amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile.[28]

If Bivens were to sue the respondents in the state court for trespass and false imprisonment, that court would have the alternative of either treating the federal officers as private citizens[29] or treating them as federal agents acting under color of federal law.[30]

If the state court decides to treat the federal agents as private citizens, asserting no power other than their own, it would be placing the injured victim at a great disadvantage. A private citizen will not be liable in trespass if he demands, and is granted, admission to another's house.[31] But one who demands admission to another's house under a claim of federal authority stands in a far different position.[32] A mere annunciation of federal power by a federal agent is likely to unlock the door.[33] As Mr. Justice Brennan states in his opinion in *Bivens*:

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28. 403 U.S. 388, 394.

29. *See* Goldman v. American Dealers Service, 135 F.2d 398, 400 (2d Cir. 1943), where the court held that officials who without lawful authority seize a citizen's property, are stripped of their private official character and become private wrongdoers.

30. *See* McMahan's Adm'x. v. Draffen, 242 Ky. 785, 790, 47 S.W.2d 716, 718 (1932), where the court held that whenever an officer exceeds or abuses his authority, and thereby infringes on the constitutional rights of the owner or occupant of the premises, he is liable for the damages therefore to such occupant.

31. *See* PROSSER, THE LAW OF TORTS 109-110 (3rd ed. 1964); 1 HARPER & JAMES, THE LAW OF TORTS § 1.11 (1956).

32. *Cf.* Amos v. United States, 255 U.S. 313, 317 (1921).

33. *See* Weeks v. United States, 232 U.S. 383, 386 (1914).

In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to a crime.[34]

If a federal officer is treated as a private individual in a state trespass suit, the mere fact that he, as a federal agent, demanded and was granted entrance will defeat the victim's allegation of trespass, since the victim had allowed the officer to enter. It is likely that the victim often will not be exerting his free will in allowing the federal agent to enter, since the victim is coerced by the federal agent's claim of authority. Nevertheless, this is immaterial since the agent is looked upon as a private citizen.

In order to avoid the inadequacy of treating a federal agent as a private citizen in a state civil suit, the state court may elect to treat him as a federal agent acting under the color of his authority. This approach is also inadequate, for just as state law may not authorize federal agents to violate the fourth amendment,[35] neither may state law undertake to limit the extent to which federal authority can be exercised.[36]

The United States Supreme Court in *Bivens* found that it has the power to create a damage remedy when necessary to protect a constitutional right, regardless of the absence of a statute creating such a damage remedy. Further, the Court found that since Bivens had no adequate alternative in which to be compensated for the injuries he had suffered as a result of the federal agents' violation of his fourth amendment rights, a creation of a damage remedy was necessary to protect his rights stated in the fourth amendment.

The costly victory of Bell has already been pointed out. Bivens feared a similar fate. In *Bell*, the United States Supreme Court never reached the issue of whether the allegations stated a claim upon which relief could be granted. The district court, on remand, dismissed the ac-

34. 403 U.S. 394, 395; United States v. Lee, 106 U.S. 196, 219 (1882). At least one state has outlawed resistance to an unlawful arrest sought to be made by a person known to be an officer of the law. *See* State v. Koonce, 89 N.J. Super. 169, 180-84, 214 A.2d 428, 433-36 (1965).

35. Byars v. United States, 273 U.S. 28 (1927); Weeks v. United States, 232 U.S. 383 (1914); *In re* Ayers, 123 U.S. 443, 507 (1887).

36. *In re* Neagle, 135 U.S. 1 (1890). Here, David Neagle, a deputy marshal of the United States, was held in prison by the sheriff of San Joaquin County, California, on a charge of the murder of David S. Terry. The United States Supreme Court, by writ of habeas corpus, found that the killing of Terry by Neagle was done in pursuance of Neagle's duty as a deputy marshal in defending the life of Justice Field, and that therefore, Neagle's imprisonment was in violation of the Constitution of the United States.

tion for failure to state a claim. In *Bivens*, the Supreme Court refused to consider whether the defendants were immune from liability because of their official positions as agents of the United States government.

It seemed as though Bivens would end up like *Bell* when the district court, on remand, determined that federal agents are immune from suit. However, a reversal by the United States Court of Appeals for the Second Circuit[37] and their order sending the case back to the district gave a new life to Bivens' suit. The reversal represents a realization of the significance of the Bivens Court's decision to expand its protection of the rights of individuals as provided in the Constitution of the United States and its amendments.

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37. Bivens v. Six Unknown Agents, 456 F.2d 1339, 1341 (2d Cir. 1972). "We have concluded and now decide and hold that it is a principle of federal law that Agents of the Federal Bureau of Narcotics, and other federal police officers such as Agents of the FBI performing similar functions, while in the act of pursuing alleged violators of the narcotics laws or other criminal statutes, have no immunity to protect them from damage suits charging violations of constitutional rights. We further hold, however, that it is a valid defense to such charges to allege and prove that the federal agent or other federal police officer acted in the matter complained of in good faith and with a reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted."