CONSTITUTIONAL BUSINESS

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Suing Your Federal Government for Civil Rights Violations

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On the occasion of the 200th anniversary of the *Bill Of Rights*, many attorneys may not realize that these rights each contain within them an intrinsic enabling authority for the purpose of redressing violations of these rights by those federal employees entrusted to uphold and protect them.

It is worth remembering that the authors of the Bill Of Rights were heavily influenced by Anglo-Saxon legal theorists such as Sir William Blackstone, who declared that there were "three absolute rights ... the right of personal security, the right of personal liberty and the right of personal property. [1] Blackstone believed the principal aim of society is to protect individuals in the enjoyment of these absolute rights which were vested in them by the immutable laws of nature. [2]

Blackstone's ideas became embodied in the Federalist papers, and in the writings of James Madison on property interests, which he defined in quite broad terms:

"In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right, and which leaves to every one else the like advantage ... [A] man has a property in his opinions, and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties, and free choice of the objects on which to employ them."

"The protection of these faculties" Madison wrote in *The Federalist* No. 10, "is the first object of government."

As Madison might have anticipated, and as modern students of law and history may realize, in the pursuit of its various other objectives, the federal government from time to time treads on

these rights and "faculties" and on the natural rights of mankind whose protection is found in the Ninth Amendment of the U.S. Constitution.

When Congress enacted Title 42 U.S. Code §1983 and other federal civil rights laws for the redress of violations of these rights, it did not extend liability to federal officials and employees. Instead, these laws were held to apply to "state action", and the actions of county and municipal government (except when federal officials conspired with others. See *Fonda v. Gray*, 1983(CA 9) CAL 707 F.2d. 435.)

The dilemma on how to obtain compensation for victims of "constitu tional torts" by federal actors remained essentially unresolved until the case of *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971).

Bivens has had more impact on the accountability of federal government officials than perhaps any other decision in the history of American law. The central issue in Bivens was whether the Fourth Amendment of the Federal constitution created an implied right of action. This was decided affirmatively in a claim for damages by individuals whose home was searched unreasonably (and hence unconstitutionally) by federal narcotic agents. Jurisdiction was not claimed under title 42 U.S. Code § 1983, which as of this writing, has not yet been held to extend liability to federal officials in most circumstances. Instead the enabling legislation was found under Title 28 U.S. Code § 1331 which grants general jurisdiction on the basis of a federal question.

Subsequent cases have held the Bivens theory of recovery applies to other claims under the various rights enumerated in the Constitution. (For decisions concerning redress of Fifth Amendment claims with Bivens actions, See *Young v. Pierce*, (DC Tex. 544 F.Supp. 1010) and Eight Amendment claims *Mackey v. Indiana Hospital*, (DC PA 562 F.Supp. 1251. [3]

Litigants who seek to bring claims against federal officials for abuses of their authority have been confused concerning the proper way to characterize their actions in the pleadings. Generally speaking, how one drafts a complaint and not what evidence is to be introduced determines whether a claim can survive as a federal cause of action. *Tully v. Mott Supermarkets, Inc.*, 337 F.Supp. 834, 844 D.N.J. (1972).

For example, cases have held that if other theories of recovery are pleaded, a Bivens action must fail. This has forced attorneys to select whether they wish to use the Federal Tort Claims Act (Title 28 U.S. Code § 2679) and its strict presentment requirements and other federal law or to rely on a *Bivens* theory. A complaint alleging both theories are at risk of a dispositive motion. *Serra v. Pichardo*, 786 F.2d. 237 (6th Cir.)

Another easy mistake to make is in deciding who to name as a defendant. A lawsuit naming the FBI or United States Department of Justice per se as defendants may fail because the agencies are likely to raise certain immunity defenses which have yet to be abolished.

Federal employees may become personally liable for constitutional deprivation by direct participation, failure to remedy wrongs after learning about it, creation of a policy or custom

under which constitutional practices occur or gross negligence in managing subordinates who cause violations. (*Gallegos v. Haggerty*, Northern District of New York, 689 F.Supp. 93)

Although certain federal officials have absolute immunity from private suit, most executive officials enjoy only qualified immunity. The rationale for the distinction is that higher officials require greater liability than officials with less complex and discretionary responsibilities. *Hatori v. Haya*, 751 F.Supp. 1401.

Any action is considered to be against the "sovereign" and hence fails to state a claim if judgment would "interfere with public administration, or compel the United States to act in foreign policy, or enjoin foreign policy. (*Sanchez Espinola v. Reagan*, 770 F.2d. 202, *Rochfort v. Gibbs*, 696 F.Supp. 1151, WD Michigan, 1988.)

Many litigants facing civil lawsuits in which the United States is the plaintiff have erroneously sought to counterclaim against the U.S. The United States, however, to this date has not waived sovereign immunity for claims for damages, (See *United States v. Northside Realty Associates*, 324 F.Supp. 287, 291 (N.D. GA 1971) (dismissing a counterclaim asserted against the Attorney General where plaintiff in the suit was the United States on the ground that although the suit was initiated by the Attorney General, the real party in interest was the United States).

When lawsuits are brought against federal officials, they must be brought against them in their "individual" capacity not their official capacity. The theory appears to be that when federal officials perpetrate constitutional torts, they do so *ultra vires* and lose the shield of sovereign immunity. *Williamson v. U.S. Department of Agriculture*, 815 F.2d. 369, *ACLU Foundation v. Barr*, 952 F.2d. 457, 293 U.S. App. DC 101, (CA DC 1991).

Bivens actions, again, are by no means an exclusive remedy for redressing abuses of authority by federal government employees, even in a political context. In the celebrated case of *Socialist Workers Party v. Attorney General*, 596 F.2d. 58 (1979), 444 U.S. 903 (1979) (cert. denied) one of the many claims of the plaintiff, a Trotskyite communist organization, was for 193 surreptitious entries or burglaries committed by the F.B.I. Another set of claims was for the use of disruptive informants in the organization, which successfully proved itself to be a non-violent, educational group more involved in promoting and discussing ideas rather than in any violent act.

Judge Thomas Griesa's final decision in the case allowed recovery under the Federal Tort Claims Act for the intentional torts of invasion of privacy for the use of informants as well as for the F.B.I.'s burglaries, under a theory of trespass. Many other counts were dismissed in the case for failure to adhere to the procedural requirements of the Federal Tort Claims Act (FTCA).

Why plaintiff's counsel selected the FTCA rather than the *Bivens* theory of recovery is not known.

The social consequences of having available remedies such as Bivens and the FTCA are significant. Together with the Freedom of Information Act, The Privacy Act, and the willingness

of disillusioned persons within government to act as "whistleblowers," a limited deterrent effect exists to serious violations of civil rights by government.

The sensation caused by the illegal federally sponsored research experiments on mentally disabled children sequestered for nearly 40 years and revealed only recently indicates the changes in public sentiments.

Nevertheless, many courts have considered civil rights claims to be "disfavored actions." Consider the court in *Littleton v. Berbling*, 468 F.2d. 390 (7th Cir. 1971):

"The civil damages suit is worthless, especially if the victim of oppression is a social misfit or an unsavory character."

The words of Justice Louis Brandeis however, offer another view:

"Decency, security and liberty alike demand that government officials shall be subjected to the rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law, it invites every man to come a law unto himself. It invites anarchy. (*United States v. Olmstead*, 277 U.S. 438 (1928).

Notes

1. *Unfinished Business: A Civil rights Strategy For America's Third Century*. Clint Bolick Pacific Research Institute For Public Policy, San Francisco, CA 1990.

2. *Ibid*.

3. First Amendment litigation concerning IRS tax exempt status for minority political and religious movements is also common. For an historical perspective see *Income Disadvantages of Political Activities*, (Colum. L. Rev. 273 (1957). Also, Clark, *The Limitation On Political Activities: A Discordant Note In the Law Of Charities*, 46 VA L.Rev. 439 (1960). See also, *Communist Party v. Commissioner of Internal Revenue*, 332 F.2d. 325, 329(D.C. Cir. 1964; *Wolfe v. U.S. Tax Court*, (1981) (D.C. Colo. 513 F.Supp. 912.

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