JUDICIAL CREATION OF A FEDERAL CAUSE OF ACTION FOR DAMAGES FOR FOURTH AMENDMENT VIOLATIONS BY FEDERAL OFFICERS.

Bivens v. Six Unknown Named Agents Of The Federal Bureau Of Narcotics, 403 U.S. 338 (1971)

Plaintiff was arrested by Federal Narcotics Agents for alleged violations of federal narcotics laws. He contended that agents entered his apartment without a warrant, manacled him in the presence of his family, and searched the premises thoroughly. He was searched, interrogated, and booked at the federal courthouse in Brooklyn; however, the charges against him were later dismissed. Plaintiff brought action against the agents in federal district court seeking money damages based on alleged violations of his fourth amendment rights. He claimed the search caused him great humiliation, embarrassment, and mental suffering. The district court dismissed the complaint for lack of jurisdiction and failure to state a cause of action.[1] The Second Circuit Court of Appeals affirmed on the latter ground,[2] and the Supreme Court granted certiorari.[3] *Held:* An alleged violation of fourth amendment rights by federal officers states a valid cause of action for damages.[4]

Before *Bivens* there were three means of implementing the constitutional guaranties of the fourth amendment:[5] (1) common law tort reme-

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

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

3. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 399 U.S. 905 (1970).

4. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 338 (1971). In Bell v. Hood, 327 U.S. 678 (1946), the Supreme Court held that federal courts have jurisdiction to decide whether the fourth amendment can support a cause of action for damages. However, it failed to reach the issue decided in the principal case. On remand, 71 F. Supp. 813 (S.D. Calif. 1947), the district court held that plaintiff's complaint did not state a federal cause of action. Subsequent lower court decisions have followed this case as dispositive on the issue of inferred constitutionally based remedies. *E.g.*, United States v. Faneca, 332 F.2d 872 (5th Cir. 1964), *cert. denied*, 380 U.S. 917 (1965); Johnston v. Earle, 245 F.2d 793 (9th Cir. 1964); Martin v. Wyzanski, 262 F. Supp. 925 (D. Mass. 1967); Koch v. Zuieback, 194 F. Supp. 651 (S.D. Calif. 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 (2d Cir.), *cert. denied*, 368 U.S. 827 (1961).

5. Theoretically there are two other means of enforcing the fourth amendment: (1) criminal prosecutions of police for violations and (2) administrative sanctions. Both have insignificant practical value. District attorneys are not likely to prosecute police officers for violation, and administrators are equally unlikely to impose effective sanctions on their own officers. *See* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493-95 (1955); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 673-74 (1970).

In his dissent in *Bivens*, Chief Justice Burger offers another means of enforcing the fourth

dies—available against both federal and state officers; (2) the exclusionary rule—applicable in state and federal prosecutions; (3) statutory action—applicable against state officials only.

Traditionally, a victim of an unreasonable search has had recourse in state court. There, he could maintain an action in tort to vindicate his constitutional rights.[6] This remedy is available against federal as well as state officials.[7]

However, since 1914 the exclusionary rule has been regarded as the primary and most effective means of enforcing the fourth amendment.[8] In *Weeks v. United States*,[9] the Court ruled that evidence obtained by an illegal search and seizure is inadmissable in federal criminal prosecutions.[10] The fourth amendment guarantee against unreasonable searches and seizures was made binding on the states in 1949.[11] Finally, the exclusionary rule was extended to state prosecutions in 1961.[12]

Since 1961 there has been an additional civil remedy for fourth amendment violations. In *Monroe v. Pape*, the Court ruled that a victim of an unreasonable search by state officials is afforded a federal cause of action for damages under 42 U.S.C. § 1983.[13]

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amendment. He proposes that Congress enact legislation waiving sovereign immunity with regard to violations of the fourth amendment by government officials committed in the course of law enforcement. The plan would authorize a cause of action for damages based on fourth amendment violations and would create a quasi-judicial tribunal to hear all cases arising under the statute.

6. McClung v. Benton, 123 Iowa 368, 98 N.W. 881 (1954); Krehbiel v. Henkle, 142 Iowa 677, 121 N.W. 378 (1909); Goad v. State, 239 Md. 345, 349, 211 A.2d 337 (1964) (Dictum).

7. Day v. Gallup, 69 U.S. 97 (1864); Slocum v. Maryberry, 15 U.S. 1, 10 (1817).

8. Oaks, *supra* note 5, at 666; Paulsen, *Safeguards in the Law of Search and Seizure*, 52 Nw. U.L. REV. 65, 74 (1957); 41 ILL. L. REV. 558, 560 (1946).

9. 232 U.S. 383 (1914).

10. The exclusionary rule rests mainly on a theory of deterrence. Linkletter v. Walker, 381 U.S. 618 (1965) (indicating that the basis of the exclusionary rule is solely deterrence by not applying it retroactively); Elkins v. United States, 364 U.S. 206, 217 (1960), "The rule is calculated to prevent, not to repair. It's purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Oaks, *supra* note 5, at 668-72.

11. Wolf v. Colorado, 338 U.S. 25 (1949).

12. Mapp v. Ohio, 367 U.S. 643 (1961). For a more detailed history of the exclusionary rule *see* Broeder, *The Decline and Fall of Wolf v. Colorado*, 41 NEB. L. REV. 185 (1961); Hartman, *Admissability of Evidence Obtained by Illegal Search and Seizure Under the United States Constitution*, 28 MOD. L. REV. 298 (1965).

13. 365 U.S. 167 (1961). The fourth amendment was made applicable to the states through the due process clause of the fourteenth amendment. The Supreme Court reasoned that 42 U.S.C. § 1983 was meant to enforce provisions of the fourteenth amendment; thus, the Court held that a claim based on a violation of the fourth amendment by state officers states a valid cause of action.

rights by federal officers is not provided by the constitution or by statute. The Supreme Court, however, has been willing to derive remedies from statutory or constitutional provisions. Judicial creation of damage remedies based on statutory provisions is well supported by precedent.[14] There is also ample authority for judicial formulation of injunctive and equitable relief as a means of vindicating constitutional guaranties.[15] However, in only a few instances has the Court fashioned a damage remedy resting directly on the Constitution.[16] When the Court has acted in this area, it has indicated that a remedy will not be implied from a statutory or constitutional provision absent a showing of its necessity to vindicate the provision.[17]

In *Bivens* the Supreme Court held that the fourth amendment is an independent limitation on the power of federal officials regardless of local law. Respondent argued that the fourth amendment merely limits a federal officer's defense in a state tort action. If he had violated the fourth amendment, he would be denied the defense of valid federal authority.[18] The Supreme Court rejected this contention.[19] Consequently an infringement of the federally guaranteed right was deemed sufficient

14. *E.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Steele v. Louisville & N.R.R. Co., 323 U.S. 192 (1944); Reitmaster v. Reitmaster, 162 F.2d 691 (2d Cir. 1947); Wills v. TWA, Inc., 200 F. Supp. 360 (S.D. Cal. 1961); *See* 48 COLUM. L. REV. 1090 (1948).

15. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914); *Ex parte* Young, 209 U.S. 123 (1908); United States v. Lee, 106 U.S. 196 (1882); Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1112, 1138 (1969). The Court has acted in this area despite the fact it has been historically regarded as a more proper function of Congress. *See* Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 213 (1969).

16. In Swafford v. Templeton, 185 U.S. 487 (1902), and Wiley v. Sinkler, 179 U.S. 58 (1900), the Supreme Court upheld an action for damages based on the constitutional right to vote. The Court chose not to rely on the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1964). *See also* Nixon v. Herndon, 273 U.S. 536 (1927). This is another civil damages action based on a denial of the right to vote in federal elections; and again, despite specific statutory authorization the court suggests that the basis for the suit may be in common law.

See Jacobs v. United States, 290 U.S. 13 (1933), in which the Supreme Court allowed damages for land inundated as result of a federal project. The self-executing quality of the fifth amendment may prevent this from being precedent for actions based on other constitutional provisions. The fifth amendment states, ". . . nor shall private property be taken for public use, without just compensation." A right to go to court and obtain payment for land taken by the government would seem inherent in the right to just compensation.

17. *See* J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Mapp v. Ohio, 367 U.S. 643, 657 (1961); Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts*, 117 U. PA. L. REV. 1 (1968).

18. Brief for Respondent at 10-11, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 338 (1971).

19. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 394 (1971).

basis for a federal cause of action.[20] The Court rejected the notion that to create this cause of action, there first must be a showing that money damages is a necessary and integral part of the fourth amendment.[21] In light of its general power to award money damages, the Court indicated a mere showing of an injury resulting from an unconstitutional search by federal officials was sufficient.[22] Though the Court chose to create this remedy without requiring a showing of its necessity to vindicate the provisions of the fourth amendment, it is questionable whether such a showing could have been made.

Several arguments in support of a federal damages remedy have been advanced. These include: (1) the ineffectiveness of the exclusionary rule as an adequate deterrent;[23] (2) the absence of uniformity in the procedural and substantive law of the various states that produces inconsistent results for victims of fourth amendment violations;[24] (3) the inadequate amount of damages available under the common law of many states.[25]

Despite these arguments, the question still remains whether this new cause of action will significantly enhance protection of fourth amendment rights. It does not seem likely that it will deter unlawful conduct by federal officers or increase compensation for violations. This remedy will suffer from the same problems as the state civil remedies. Juries will be hesitant to impose a judgment against a law enforcement official who steps beyond his authority in an attempt to enforce the law.[26] Also, those bringing suit are often individuals with whom juries are not likely to sympathize.[27] In the event a substantial money judgment is obtained, there is a strong possibility that the defendant will be unable to satisfy it.[28] With a small chance of recovering a substantial judgment, a victim

20. *Id.* at 395.

21. *Id.* at 397.

22. *Id.*

23. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 S. CT. L. REV. 1, 37-40 (1961); Oaks, *supra* note 5; Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337 (1939); Comment, *Evidence-Police Regulation by Rules of Evidence*, 42 MICH. L. REV. 679, 685-88 (1944); Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 NW. U.L. REV. 493 (1952).

24. Wolf v. United States 338 U.S. 25, 43-44 (1949) (Murphy, J., dissenting); *See* Foote, *supra* note 5, at 498-506; Katz, *supra* note 16, at 52.

25. Wolf v. United States, 338 U.S. 25, 43 (1949) (Murphy, J., dissenting); Foote, *supra* note 5, at 498-500; Paulsen, *supra* note 6, at 72-73.

26. Oaks, *supra* note 5, at 673.

27. Foote, *supra* note 5, at 500; Paulsen, *supra* note 6, at 72-73.

28. Foote, *supra* note 5, at 499; Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 348 (1936); Oaks, *supra* note 5, at 673.

of an unreasonable search is often unwilling to expend the time and expense necessary for litigation.[29]

This new cause of action is analagous to the 42 U.S.C. § 1983 remedy regarding state officials. Suffering from the same defects as state remedies, this federal statutory remedy has not added to the deterrence of or compensation for unlawful conduct.[31] Indeed, there has not been a great influx of suits against state police since *Monroe v. Pape*,[32] and there is little reason to expect a different result under this new cause of action.

The decision in *Bivens* may be interesting from a jurisprudential standpoint. It shows the court's willingness to make use of the traditional damage remedy in its search for an effective means of securing constitutional interests. This could have implications regarding the general role of the judiciary versus the legislature in the implementation of constitutional guaranties. However, in light of its defects, its impact in the area of fourth amendment rights seems minimal.

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29. Foote, *supra* note 5, at 500; Note, *Philadelphia Police Practices and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1209 (1952).

30. *See* Oaks, *supra* note 5, at 674; Comment, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEX. L. REV. 1015, 1034 n. 124 (1967).

31. *See* Oaks, *supra* note 5, at 674; Comment, *supra* note 23, at 504-05.

32. Brief for Respondent at 27 n. 30, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 338 (1971).