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REPORT

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Supreme Court to Decide for First Time Whether Federal Contractors' Employees May be Subjected to *Bivens* Actions

BY CRAIG SMITH AND DANIEL P. GRAHAM

Four decades ago, in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the Supreme Court held that individuals may sue federal officials whose on-the-job actions violated the individuals' federal constitutional rights, even if Congress had not created a cause of action for the suit. During its term starting this fall, the Court will decide in *Minneci v. Pollard*, 10-1104, whether some individuals can assert such an implied cause of action against federal contractors' employees for similarly violating the individuals' rights while working on behalf of the federal government.

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In the decision under appeal, the Ninth Circuit held that federal inmates could sue privately employed prison guards for violating their Eighth Amendment right against cruel and unusual punishment. The Ninth Circuit held that under *Bivens* and its progeny, the prisoners have an implied cause of action for their constitutional claims.

This article aims to explain the *Pollard* appeal to federal contractors so that they can evaluate the effects that the Supreme Court's ultimate decision could have on their own businesses. The consequences for prison contractors alone could be significant, because the United States government has steadily increased the number of prisoners under private management. For instance, the guards sued in *Pollard* worked for a contractor that currently has agreements to accommodate over 30,000 individuals detained by the Federal Bureau of Prisons, U.S. Marshals Service, and U.S. Immigration and Customs Enforcement. Depending on the rationales supporting the Court's ultimate decision in *Pollard*, contractors and their employees in other fields—particularly intelligence and law-enforcement—could see their interests affected as well.

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Facts of Pollard. Richard Pollard is a federal inmate who served two years at a prison operated by the GEO Group, Inc. While at the prison, Pollard injured his arms. He later accused the prison's guards—all employed by the GEO Group—of so mistreating him after the injury that the guards violated his Eighth Amendment right against cruel and unusual punishment. Pollard filed a *Bivens* suit for money damages against the guards, GEO Group, and a prison doctor. A magistrate judge dismissed the claims against the guards, ruling that *Bivens* claims could not be asserted against those defendants. Pollard subsequently appealed to the Ninth Circuit and won a reversal over a vigorous dissent, with the decision captioned as *Pollard v. GEO Group, Inc.*, 629 F.3d 843 (2010).[1]

Background on *Bivens* Actions. The *Bivens* action is a judicial creation, one that the mid-20th Century Supreme Court saw as filling a gap in the U.S. Constitution's protections. When *Bivens* was decided, Congress had not created a cause of action for individuals whose constitutional rights were violated by federal officials and who sought damages. (One still has not been created.) Thus, no federal analog existed to 42 U.S.C. § 1983, which allows private suits for damages against *state* officials who violate federal constitutional rights. *Bivens* actions were intended to allow the same suits for violations by federal officials.

To date, only three types of federal constitutional violations have given rise to a *Bivens* suit. In the *Bivens* decision itself, the Supreme Court allowed a suit seeking compensation for allegedly unreasonable searches and seizures that violated the Fourth Amendment. Eight years later, the Court implied a cause of action where an individual had alleged that a congressman's sex discrimination violated the Fifth Amendment's Due Process Clause. *Davis v. Passman*, 442 U.S. 228 (1979). Finally, in a decision related to the arguments in *Pollard*, the Court recognized a federal inmate's right in *Carlson v. Green*, 446 U.S. 14 (1980), to sue federally employed prison guards and officials for alleged violations of the Eighth Amendment's freedom from cruel and unusual punishment.

The Court has rebuffed all other attempts to extend *Bivens*. Examples of rejected suits include those against federal employees who allegedly violated a government employee's First Amendment rights, *see Bush v. Lucas*, 462 U.S. 367 (1983), and a Social Security applicant's rights under the Due Process Clause, *see Schweiker v. Chilicky*, 487 U.S. 412 (1988).

Also rejected by the Court was a *Bivens* claim similar to those asserted in *Pollard* and *Carlson*: in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), the justices rejected an inmate's suit against a federal prison contractor (the corporate entity) for alleged Eighth Amendment violations committed by its employees while working as federal prison guards.[2]

When taken together, these decisions have tightly constrained the types of *Bivens* actions available, and are thought to be part of an overall trend by the Court away from recognizing implied causes of action. As Justice Scalia put it, the Court has ''sworn off the habit'' that held sway when *Bivens*, *Davis*, and *Carlson* were decided ''of venturing beyond Congress's intent'' to create causes of action where Congress did not. *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001).

Conflicts Among the Courts of Appeals. The Supreme Court has described its analysis of potential new *Bivens* claims as a two-part test. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). First, the Court evaluates whether existing processes and remedies can fully protect plaintiffs' interests from the type of constitutional harm alleged. Second, the Court determines whether special factors counsel against recognizing the implied constitutional cause of action being sought. A third, related question can surface as well: whether the defendant can be deemed to have acted under the color of federal authority in the first place.

For the Eighth Amendment violation alleged in *Pollard*, the Fourth, Ninth, and Eleventh Circuit have in essence disagreed on all three *Bivens* questions.[3] The Ninth Circuit answered them all in the plaintiff's favor in *Pollard* and therefore recognized the *Bivens* claim. Both the Fourth and Eleventh Circuits in previous years, as well as the *Pollard* dissent, reached the opposite conclusions in denying (or voting to deny) *Bivens* claims. *See Alba v. Montford*, 517 F.3d 1249 (11th Cir. 2008); *Holly v. Scott*, 434 F.3d 287 (4th Cir. 2006). These conflicts set the stage for the Supreme Court to grant the cert. petition filed by the *Pollard* defendants, and resolution of each of the three disagreements should be of interest to federal prison contractors and, less directly, other federal contractors.

Defendants as Federal Actors

Whether a privately employed guard working at a federal prison can act with the federal authority that gives rise to *Bivens* claims has not been decided by the Supreme Court. The Ninth Circuit gave an affirmative answer in *Pollard*. To determine whether the prison-guard defendants had engaged in federal action, the appeals court borrowed, as it had in other *Bivens* cases, the state-action analysis applied to suits filed under 42 U.S.C. § 1983. 629 F.3d at 854-55. Finding that under Supreme Court precedent, private prison guards working at state prisons exercise state authority and can therefore be sued under Section 1983, the Ninth Circuit found that privately employed guards at federal prisons similarly exercise the federal authority necessary to be subjected to a *Bivens* suit. *Id.* at 856 (citing *West v. Atkins*, 487 U.S. 42, 49-51 (1988)).

A few years earlier, the Fourth Circuit reached a different conclusion in *Holly* because the court focused on the guards' relationships with the federal government.[4] Privately employed guards who worked under contract at government-operated prisons ''are not federal officials, federal employees, or even independent contrac-

[1] For narrative simplicity, both the Ninth Circuit decision *Pollard v. GEO Group, Inc.*, and the Supreme Court appeal to be argued in the coming term, *Minneci v. Pollard*, will be referred to as *Pollard*.

[2] The GEO Group was dismissed from Pollard's suit on this ground.

[3] Although other federal courts have also rejected Bivens claims against privately employed federal prison guards, *see Peoples v. CCA Det. Ctrs.*, 422 F.3d 1090 (10th Cir. 2005) (vacated on other grounds by evenly divided *en banc* panel); *Holz v. Terre Haute Reg. Hosp.*, 123 Fed. App'x 712 (7th Cir. 2005) (affirming dismissal of prisoner's claim), these are the three principal decisions.

[4] In *Montford*, the Eleventh Circuit assumed without analysis that privately employed guards could exercise federal authority while working at federal prisons.

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tors in the service of the federal government.'' 434 F.3d at 292. The guards instead worked for a private company, and the company's federal contract was not by itself enough to subject the guards to liability in a *Bivens* suit. *Id.* at 293.

Alternatives for Protecting Constitutional Interests

Even if private individuals can engage in federal action that violates constitutional rights, their acts should not give rise to *Bivens* actions when alternative remedial schemes can protect plaintiffs' interests. The Fourth and Eleventh Circuits concluded that injured federal prisoners could file state-law damages suits for maltreatment under the watch of privately employed federal prison guards. *Holly*, 434 F.3d at 295–297; *Montford*, 517 F.3d 1254-55. The Fourth Circuit explained that, by contrast, the Supreme Court had recognized *Bivens* actions only when plaintiffs otherwise would have had no alternative remedy or at least none against individual federal employees.[5] *Holly*, 434 F.3d at 295. The Ninth Circuit was less persuaded by these remedies, though, concluding in *Pollard* that the existence of state-law remedial schemes, without more, was not enough to counsel against recognizing a *Bivens* claim. 629 F.3d at 860.

Special Factors

When contemplating whether any special factors counsel against recognizing a *Bivens* action, courts seem to ask an open-ended, context-dependent question. *See Pollard*, 629 F.3d at 863 (compiling questions previously asked and noting that no ''exhaustive list'' had been compiled). The factors considered can change from case to case, and in truth some better resemble weighing the pros and cons of a *Bivens* action. One such debated special factor from *Pollard* illustrates the point: the risk that recognizing the action will impose asymmetrical liability on various potential defendants. The majority said that recognizing a *Bivens* action against privately employed federal prison guards would *reduce* asymmetry because only then would federal inmates' damages claims not depend on whether they were housed in federally or privately run facilities. *Id.* at 868. To the contrary, concluded the dissenting judge in *Pollard*,[6] liability will be asymmetrical with or without this particular implied cause of action. If the sought *Bivens* actions were recognized, then privately employed federal prison guards would be subject to both *Bivens* and state-law actions, whereas federally employed guards would be immune under the Federal Torts Claims Act from the state-law suits. *Id.* at 875. For the appellate judges deciding *Pollard* then, the analysis thus seemed to turn on which asymmetry in liability better fulfills the purpose of recognizing, or not recognizing, *Bivens* claims.

Courts can ask, and have asked, similar questions about other special factors, such as whether recognizing the claim will undermine *Bivens*'s purpose of deterring unconstitutional acts by individual federal actors.[7] Their answers may be of particular interest to federal contractors who provide services other than correctional services.

***Pollard's* Implications for Federal Prison Contractors.** If the Court upholds *Pollard*, privately employed guards at federal prisons would face substantial exposure to suits by inmates they interact with.

Prison contractors' employees nationwide would for the first time be subject to *Bivens* suits. Their chances of being sued would be good, too, because inmates tend to be litigious. An amicus petition urging certiorari for *Pollard* noted that prisoners had filed 19,000 *Bivens* actions in the preceding decade, better than one suit per federally employed prison guard over that period. Privately employed guards could reasonably expect the same treatment from the federal prison population.

Worse still for private guards, they may be subjected to these *Bivens* suits without the protection of qualified immunity. This doctrine shields defendants from constitutional-tort suits unless they ''violate clearly established statutory or constitutional rights of which a reasonable person would have known.'' *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009). Federal and state employees can invoke this protection from *Bivens* and Section 1983 suits. But state contractors' employees cannot, meaning they are at risk of Section 1983 suits in many more situations than are their state-employed counterparts. *See Richardson v. McKnight*, 521 U.S. 399 (1997). Employees of federal prison contractors might similarly be barred from invoking qualified immunity, leaving them with less protection than if they were federal employees.

Federal prison contractors could end up shouldering their employees' *Pollard*-recognized *Bivens* burdens. For one, employees might demand higher wages and benefits to compensate for the greater prospect of legal fees and personal liability. Indeed, labor-market forces could drive the contractors to indemnify their employees and also provide them with legal counsel when permissible. Such financial burdens on contractors might be no different than if the Supreme Court had, in *Malesko*, allowed *Bivens* actions directly against the contractors.

Presumably these costs could be further passed on to the federal government through higher contract prices. And if notable splits in Eighth Amendment jurisprudence develop, contractors might feel compelled to charge higher prices in jurisdictions with more ''pro-inmate'' decisions.

On the other hand, the employees' chances of being subject to any suit at all might increase only marginally. With or without a *Bivens* action available, employees will be subject to state-law suits and possibly other administrative or federal remedial processes. (Though to be sure, the state causes of action may be subject to liability limits that do not apply to *Bivens* claims.)

Further, many federal prison contractors' employ guards who are at risk of federal constitutional-tort suits under 42 U.S.C. § 1983. To use GEO Group as an

[5] The Court allowed *Bivens* actions against federally employed prison guards in part because the Federal Tort Claims Act barred common-law suits against them unless ''the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward.'' *Carlson*, 418 U.S. at 22.

[6] The Hon. Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

[7] The Supreme Court rejected the *Bivens* claim asserted against the federal contractor in *Malesko* because in answering this question, it concluded that plaintiffs would pursue deeper-pocketed contractors rather than the entities' employees. *See* 531 U.S. at 69-71.

example again, more than half of the U.S.-based individuals that the company has contracted to guard are housed in state or local facilities. So GEO and its competitors would not be unfamiliar with preparing for constitutional tort suits against their employees. These contractors should be experienced at training employees, managing potential litigation, and planning for financial contingencies that must be considered when dealing with constitutional torts. The net financial effect, therefore, could prove manageable.

***Pollard's* Implications for Other Federal Contractors.** Employees of other federal contractors could see their interests affected by the Supreme Court's conclusions in *Pollard* as well. For one, the Court could rule that contractors' employees do not, categorically, act under color of federal authority, thereby relieving all contractors' employees from potential *Bivens* suits. Such a broad ruling might not happen, because even the two current justices most opposed to newly implied causes of action—Justices Thomas and Scalia—have previously analyzed exercises of government authority by job function (e.g. ''prison guard'') rather than employment status (e.g. ''federal employee'').[8]

But then again, Justice Scalia, joined by Justice Thomas, has also written that he would ''limit *Bivens* and its two follow-on cases to the precise circumstances that they involved.'' *Malesko*, 534 U.S. at 75 (Scalia, J., concurring) (internal citations omitted). The Court's thirty-year history of rejecting new *Bivens* actions should give contractors comfort that this sort of broad ruling is also a good possibility.

If the Court concludes in *Pollard* that, in general, contractors' employees can be subject to *Bivens* suits as though they worked for the federal government, then the analysis in that case would shift to the other two *Bivens* questions, whether alternative remedies exist and whether special factors counsel against recognizing the cause of action. These remaining questions might best be confined to the right allegedly violated, but the Court's treatment of the Eighth Amendment claim in *Pollard* nevertheless could indicate how the justices would treat *Bivens* suits alleging that contractors' employees violated individuals' Fourth or Fifth Amendment rights.

If the justices react favorably to the claim-specific *Bivens* questions in *Pollard*, then contractors' employees supporting intelligence-gathering and law-enforcement functions in particular could in the future be found amenable to *Bivens* suits. The reason is that these employees perform job functions that could violate individuals' Fourth Amendment rights much in the same way as federal officers violated the plaintiff's rights in the original *Bivens* case. As such, intelligence and law-enforcement contractors should pay attention to the *Pollard* Court's analysis of the remaining *Bivens* questions to see if they yield clues about their own chances of arguing that such claims shouldn't be recognized.

Conclusion. The tangled jurisprudence under *Bivens* and Section 1983 provides both sides with arguments to advance their case. Pollard, the plaintiff seeking a *Bivens* remedy, can remind the Court that it has already upheld constitutional-tort claims against state-level private prison contractors under Section 1983, and ask why federal-level contract prison guards should escape such liability. Pollard can also argue that since federally employed prison guards are subjected to *Bivens* claims, declining to recognize the claim against privately employed counterparts could allow the U.S. Government to ''contract away'' its prison guards' constitutional-tort liability, leaving inmates' remedies subject to the vagaries of states' tort laws.

The prison guards will no doubt argue that the Court has been steadfast in refusing to extend *Bivens* beyond the three specific scenarios in *Bivens*, *Davis*, and *Carlson*. Adding privately employed individuals would represent a dramatic departure outside those tightly constrained cases, one running almost completely counter to the Court's trend of refusing to recognize free-standing implied causes of action.

The latter position advocated by the guards will likely persuade more justices. Privately employed guards who work at federal prison would, in that case not be subject to *Bivens* actions. Indeed, if the views of Justices Scalia and Thomas hold sway, the Court may broadly rule that *Bivens* actions may not be asserted against any employees of federal contractors at all—which would provide significant relief to all federal contractors and their employees.

[8] In § 1983 cases, the justices have taken a functional approach in concluding that contract prison employees exercise state authority. *See Richardson v. McKnight*, 521 U.S. 399, 417 (1997) (Scalia, J., dissenting) (arguing that ''function rather than status'' governs qualified immunity); *West v. Atkins*, 487 U.S. at 58 (Scalia, J., concurring in part and concurring in the judgment) (agreeing that doctor working under contract can exercise state authority).

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