
FEDERALISM & SEPARATION OF POWERS

A RETURN TO “THE HEADY DAYS”?

THE SUPREME COURT ADDRESSES WHETHER THE *BIVENS* DOCTRINE SHOULD
EXTEND TO EMPLOYEES OF GOVERNMENT CONTRACTORS IN *MINNECI V. POLLARD*

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I. Introduction

On November 1, 2011, the Supreme Court heard oral arguments in *Minnecci v. Pollard*, a case that will determine whether employees of government contractors can be held liable for damages for alleged constitutional violations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* and its progeny.¹ *Minnecci* should resolve a circuit split between the Ninth Circuit, which held that employees of government contractors can be held liable under *Bivens*, and the Fourth, Tenth, and Eleventh Circuits, which held that they could not. In resolving this circuit split, the Supreme Court will need to address a number of questions that have divided lower courts for many years, such as whether employees of governmental contractors are considered federal actors; whether recognition of a *Bivens* claim is precluded if a plaintiff has alternative remedies, even if those remedies are not congressionally crafted; and how the imposition of asymmetrical liability costs on government contractors impacts availability of a *Bivens* remedy.

II. Overview of Existing Case Law

The Supreme Court’s opinion in *Minnecci*, regardless of which way it is decided, should resolve a question left undecided in *Correctional Services Corp v. Malesko*.² In *Malesko*, a divided Supreme Court³ held that inmates in privately-operated correctional facilities could not bring a *Bivens* claim against the corporation that operated the facility.⁴

The Supreme Court found that extending *Bivens* liability to private corporations would not advance *Bivens*’ goal “to deter individual federal officers from committing constitutional violations.”⁵ Allowing liability against an employer would undermine *Bivens*’ deterrent effect because “if a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury.”⁶

Additionally, the Court reasoned that extending *Bivens* to private corporations was in all meaningful aspects the same as allowing liability against the federal agency that employed an offending federal officer, a proposition the Supreme Court

rejected in *FDIC v. Meyer*.⁷ An alternative outcome would provide inmates in privately-operated facilities with a superior remedy to those enjoyed by inmates in government-operated facilities.⁸ The Supreme Court explained that “[w]hether it makes sense to impose asymmetrical liability costs on private prison facilities alone is a question for Congress, not us, to decide.”⁹

This concern over asymmetrical liability costs was a central factor in the Supreme Court’s other main reason for refusing to extend *Bivens* to private corporations. Because inmates in privately-operated facilities could bring claims under state tort law, they “enjoy a parallel tort remedy that is unavailable to prisoners housed in Government facilities.”¹⁰ The existence of “alternative remedies [that] are at least as great, and in many respects greater, than anything that could be had under *Bivens*”¹¹ counseled against the “marked extension of *Bivens*”¹² sought by the plaintiff. The Supreme Court also noted that like inmates in facilities operated by the Bureau of Prisons, inmates in private facilities could bring concerns over their conditions of confinement to the attention of the BOP either through suits against the BOP for injunctive relief in federal courts or the BOP’s Administrative Remedy Program.¹³

Although *Malesko* resolved the issue of whether a *Bivens* remedy was available against a private company that operates a correctional facility, both sides of the opinion recognized that they were not addressing whether the individual employees of the private contractor could be held liable under *Bivens*. The majority recognized that *Malesko* was not “seek[ing] a cause of action against an individual officer” as in prior cases extending *Bivens*.¹⁴ Similarly, the dissent noted that “the question [of] whether a *Bivens* action would lie against the individual employee of a private corporation . . . is not raised in the present case.”¹⁵

This open question regarding the liability of the employees of private contractors has vexed the lower courts for years: divided panels of the Fourth and Tenth Circuits and a unanimous panel of the Eleventh Circuit determined a *Bivens* remedy was not available, while a divided panel of the Ninth Circuit recently recognized a *Bivens* remedy against the employees of government contractors.

A. An Equally Divided Tenth Circuit Holds that Employees of Private Contractors Are Not Subject to Liability Under *Bivens* in Peoples v. CCA Detention Centers

Cornelius E. Peoples filed two *Bivens* complaints regarding his pretrial detention in a federal prison operated by CCA, a private, for-profit corporation.¹⁶ In the first complaint (*Peoples I*), Peoples described how he feared attack by members of the “Mexican Mafia.”¹⁷ Despite filing formal and informal grievances, he was placed in the same prison unit as the

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Mexican Mafia members and was not transferred to a new unit until after he was physically assaulted twice.¹⁸ In the second complaint (*Peoples II*), he described how CCA had kept him in administrative segregation, where he did not have access to a law library, for thirteen months. He did not receive written notice of the reasons for administrative segregation immediately, and he did not receive a hearing for five months. He also believed that his phone calls with his attorney were unconstitutionally monitored.¹⁹

Citing *Malesko*, the district court dismissed *Peoples I* for lack of subject matter jurisdiction, as the availability of other remedies precluded a *Bivens* claim.²⁰ A different judge on the district court dismissed *Peoples II* on different grounds after assuming that a *Bivens* claim against the individual defendants was available, as the Tenth Circuit had not addressed the issue.²¹ *Peoples* timely appealed both dismissals, and the Tenth Circuit considered them together.

After noting that the availability of a *Bivens* claim was not a jurisdictional question but a remedies question,²² the Tenth Circuit panel held that a *Bivens* claim does not exist against individual employees of a private corporation operating a federal prison. As no courts of appeals had considered whether the existence of a state-law remedy precluded the extension of *Bivens* to employees of privately-operated prisons in the four years since *Malesko*, the court looked at two district court opinions.²³ In *Sarro v. Cornell Corrections, Inc.*, the Rhode Island district court held that while under *Malesko* a prisoner could not sue the corporation that operated the prison, the prisoner could sue the corporation's employees.²⁴ The *Sarro* court reasoned that this served the core purpose of *Bivens*, which was to deter individuals; that this would create parity among guards in federally-operated prisons and guards in privately-operated prisons; that no federal remedies were available to prisoners in pretrial detention like *Sarro*; and that allowing the availability of a *Bivens* remedy to rest on the availability of a state tort remedy would make federal prisoners' remedies vary by state, which *Bivens* sought to avoid.²⁵ In *Peoples I*, the court held that under *Malesko*, a *Bivens* claim was only available when the prisoner had no alternative remedy. Therefore, the availability of a state tort remedy precluded allowing a *Bivens* claim against individual employees of a private prison operator.²⁶

The Tenth Circuit adopted the analysis of *Peoples I*, basing its opinion on the limited circumstances in which a *Bivens* action is available, as described in *Malesko*. The availability of an alternative state tort remedy removed *Peoples* from the category of plaintiffs who may pursue a *Bivens* claim.²⁷ The court also noted that whatever asymmetries in liability between federally- and privately-operated prisons existed, they were not created by the court; instead, the court maintained the status quo.²⁸ While there were policy reasons to extend *Bivens* liability to individual employees of private corporations operating federal prisons, the decision to do so is best left to Congress.²⁹

Judge Ebel's dissent argued that the only "alternate 'cause of action' sufficient to preclude a *Bivens* action must be a constitutional cause of action."³⁰ Thus, state law tort remedy is insufficient. *Malesko* is best read as preserving *Bivens* claims against private individuals.³¹ The best way to promote federal-state and public-private parallelism is through allowing suits

against private individuals, as allowed under § 1983.³² Allowing suits against individuals would provide uniformity of liability instead of making the protection of prisoners' constitutional rights "depend on the varying contours of state law" and on the facts.³³ And finally, the goal of individual deterrence embodied in the *Bivens* remedy is undermined by not allowing federal prisoners to sue individual private prison operators.³⁴

The issue was eventually addressed by the Tenth Circuit en banc. However, the en banc court was evenly divided on the issue, which meant that while the district court's dismissal of the claim was affirmed, the case carried no precedential value.³⁵

*B. The Fourth Circuit Agrees that a Bivens Remedy Is Unavailable but Is Divided over Whether GEO's Employees Are Federal Actors in Holly v. Scott*³⁶

Ricky Holly, an inmate incarcerated at Rivers Correctional Institution in Winton, North Carolina, claimed that GEO's employees violated his Eighth Amendment rights by failing to properly treat his diabetes.³⁷ Holly brought suit under *Bivens* against the facility's warden and his treating physician.³⁸ The defendants were "both employed directly by GEO, and thus the only link between their employment and the federal government is GEO's contract with the BOP."³⁹ At the district court level, the defendants unsuccessfully sought to have Holly's claim dismissed on the basis that as employees of a private corporation they were not subject to liability under *Bivens*.⁴⁰

On appeal, a divided panel of the Fourth Circuit Court of Appeals reversed the district court's ruling and held that GEO's employees were not subject to suit under *Bivens*. The majority opinion, authored by Judge J. Harvie Wilkinson and joined by Judge R. Bryan Harwell of the United States District Court of South Carolina (sitting by designation), began by reviewing the Supreme Court's reluctance to expand the *Bivens* doctrine almost since its inception.⁴¹ This reluctance is based in part on the fact that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases."⁴² Moreover, as Congress established the statutory provisions that allowed inmates to be housed in private facilities based on "the belief that private management would in some circumstances have comparative advantages in terms of cost, efficiency, and quality of service . . . add[ing] a federal damages remedy to existing avenues of inmate relief might well frustrate a clearly expressed congressional policy."⁴³

In the majority's view, extending *Bivens* to GEO's employees was precluded by two factors. "First, defendants are private individuals, not government actors. Second, Holly has an adequate remedy against defendants for his alleged injuries under state law."⁴⁴

The defendants' status as private individuals was a key aspect of the Court's analysis because of "the importance of a party's private status in our constitutional scheme. The Bill of Rights is a negative proscription on *public* action—to simply apply it to *private* action is to obliterate 'a fundamental fact of our political order.'"⁴⁵ Restricting the applicability of the Bill of Rights to public action "preserve[s] an area of individual freedom by limiting the reach of federal law and federal judicial power."⁴⁶ By maintaining this distinction between public and private action, courts "maintain the Bill of Rights as a shield

that protects private citizens from the excesses of government, rather than a sword that they may use to impose liability upon one another.⁴⁷

Although the Court “harbor[ed] some doubt as to whether such liability would ever be appropriate,” it went on to analyze whether the GEO defendants could be considered federal actors under the “state action” doctrine applied to constitutional claims under Section 1983.⁴⁸ The Court undertook this analysis despite the fact that “the Supreme Court ‘ha[s] never held that the contours of *Bivens* and § 1983 are identical.’”⁴⁹

Ultimately, the Court found that GEO’s employees are not federal actors under the public function test because they did not exercise powers traditionally reserved to the state.⁵⁰ In reaching this conclusion, the majority focused on the Supreme Court’s determination in *Richardson v. McKnight*⁵¹ that the operation of correctional facilities was not a traditional public function because “the private operation of jails and prisons existed in the United States in the eighteenth and nineteenth centuries and in England, the practice dated back to the Middle Ages.”⁵² As Holly’s alleged injury arose “out of defendants’ operation of the prison [and] not the fact of Holly’s incarceration,” the defendants did not engage in a traditionally public function and therefore were not federal actors subject to *Bivens* liability.⁵³

The Fourth Circuit also rejected Holly’s contention that the Supreme Court’s holding in *West v. Atkins*⁵⁴ required the court to find that “the provision of medical care to an inmate is always a public function, regardless of what entity operates the correctional facility where he is housed.”⁵⁵ In *West*, the Supreme Court held that “a physician employed by North Carolina to provide medical services to state prison inmates [] acted under color of state law for purposes of § 1983.”⁵⁶ The crucial distinction, according to the Fourth Circuit, was that in this case the defendants had no direct relationship with the governmental entity.⁵⁷ The Court could not conclude “that provision of medical care in a private prison is somehow a ‘public function’ while maintaining fidelity to *Richardson* that the prison’s general operation is not.”⁵⁸

The Court also held that the existence of adequate, and perhaps superior, state tort remedies precluded an extension of *Bivens*. According to the majority, the Supreme Court has only extended *Bivens* in situations where the plaintiff lacked any alternative remedy against the allegedly offending individual.⁵⁹ Here “North Carolina law . . . supplies Holly with multiple claims against the individual defendants.”⁶⁰ Thus, there was no need to recognize a *Bivens* claim against the GEO defendants.

Judge Dianna Gribbon Motz filed an opinion that, while concurring in judgment, vehemently disagreed with the majority’s analysis of the federal actor issue. Under Judge Motz’s analysis, the question was foreclosed by the Supreme Court’s holding in *West*. She believed that the defendants qualified as federal actors because they “perform a public function delegated to them by the federal government, and they assume the necessary obligations inherent in that function.”⁶¹ However, Judge Motz concurred in the judgment because the availability of adequate state remedies precluded recognition of a new *Bivens* cause of action.⁶²

C. *The Eleventh Circuit Determines that the Presence of Adequate State Remedies Precludes a Bivens Claim in Alba v. Montford*

Luis Francisco Alba filed a *Bivens* suit against individual employees of Corrections Corporation of America (“CCA”), a private corporation that operated the federal prison in Georgia in which he was incarcerated.⁶³ He alleged that, pursuant to a CCA policy, the employees failed to provide him with proper post-operative treatment after surgery for a benign goiter in his throat.⁶⁴ The district court dismissed Alba’s claim at the initial screening stage because, as Alba had “adequate remedies in state court,” it failed to state a *Bivens* claim.⁶⁵

The Eleventh Circuit assumed without deciding that CCA was a government actor, but it unanimously agreed with the district court that the availability of remedies under state tort law rendered a *Bivens* claim unavailable.⁶⁶ An alternative remedy sufficient to defeat a *Bivens* claim does not have to be a federal remedy because *Malesko* rejected that argument and because the *Bivens* court expressed concern that *Bivens* would not be able to recover under state tort law.⁶⁷ Georgia tort law in this instance was not inconsistent with the rights protected by the Eighth Amendment and even provided Alba with superior means of recovery.⁶⁸ The court also noted that, while Alba did not sue CCA, he was challenging CCA’s policy instead of the conduct of the individual employees, and the Supreme Court “made it abundantly clear” in *Malesko* that “*Bivens* will not support an action challenging the conduct or policy of a non-individual defendant.”⁶⁹

D. *The Ninth Circuit Holds that GEO’s Employees are Subject to Liability Under Bivens in Pollard v. Minneci*

In 2001, Richard Pollard,⁷⁰ a federal inmate, was incarcerated at Federal Correctional Institution at Taft in California, a facility operated by the GEO Group, Inc.⁷¹ pursuant to a contract with the Federal Bureau of Prisons.⁷² On April 7, 2001, Pollard slipped and fell on a cart left in a doorway while working in the facility’s butcher shop.⁷³ The facility medical staff took x-rays and determined that Pollard may have fractured both of his elbows.⁷⁴ He was placed in a bilateral sling and referred to an orthopedic clinic outside of the facility.⁷⁵

As Pollard prepared to leave the facility for his orthopedic appointment, facility staff ordered him to put on a prison jumpsuit.⁷⁶ Although Pollard claimed that, as a result of the injuries to his elbows, putting his arms through the sleeves of the jumpsuit “would cause him excruciating pain,” he was required to do so before leaving the facility.⁷⁷ Additionally, Pollard was required to wear a “black box” restraining device on his wrists despite complaints about the pain caused by the device.⁷⁸

The orthopedist who saw Pollard diagnosed him with “serious injuries to his elbows and recommended that his left elbow be put into a posterior splint for approximately two weeks.”⁷⁹ However, when Pollard returned to the facility he was told that “due to limitations in staffing and facilities” he would not receive the treatment recommended by the orthopedist.⁸⁰ Pollard also claimed that over the next several weeks facility staff failed to make accommodations that would allow him to feed or bathe himself, that he was required to work in spite of

his injuries, and that he was required to wear the “black box” device before he was allowed to go to a follow-up appointment with his orthopedist.”⁸¹

Pollard, proceeding *pro se*, filed suit in the Eastern District of California against GEO and a number of GEO’s employees. The complaint sought monetary damages from the defendants under *Bivens* for a violation of his Eighth Amendment rights. The district court dismissed the GEO suit based on the Supreme Court’s holding in *Malesko*,⁸² and subsequently dismissed the suit against the GEO employees based on the Tenth Circuit’s holding in *Peoples* and the Fourth Circuit’s holding in *Holly*.⁸³

Pollard, now represented by counsel, appealed the dismissal to the Ninth Circuit Court of Appeals. A divided three-judge panel of the Ninth Circuit⁸⁴ reversed the district court’s holding with respect to GEO’s employees. The majority opinion, authored by Judge Paez and joined by Judge Hug, took direct aim at the reasoning of the various decisions that rejected an extension of *Bivens*, focusing most of its energy on the Fourth Circuit’s decision in *Holly*.⁸⁵ Ultimately, the majority opinion held that Pollard should be able to bring a *Bivens* claim against GEO’s employees because “(1) the GEO employees act under color of federal law for purpose of *Bivens* liability and (2) the availability of a state tort remedy does not foreclose Pollard’s ability to seek redress under *Bivens*.”⁸⁶

The majority determined that GEO’s employees are federal actors based on a review of the “state action” principles developed by the Supreme Court in suits brought under 42 U.S.C. § 1983.⁸⁷ The majority did not explain why it is applying the state action principles developed under Section 1983 other than to say that both the Ninth Circuit and “[o]ther circuits have . . . recognized the similarity of the § 1983 and *Bivens* doctrines.”⁸⁸

In order to determine whether GEO’s employees were engaged in “state action,” the majority applied the “variation” of the public function test applied by the Supreme Court in *West*.⁸⁹ Under this test, a private employee is a state actor and subject to liability under Section 1983 if the employee is “fully vested with state authority to fulfill essential aspects’ of the state’s” constitutionally-imposed responsibilities.⁹⁰ According to the majority, GEO’s employees must be federal actors, and therefore amenable to suit under *Bivens*, because “there is no principled difference to distinguish the activities of the GEO employees in this case from the governmental action identified in *West*.”⁹¹ Ultimately, GEO’s employees must be amenable to suit under *Bivens* because Pollard’s alleged constitutional “deprivation was caused . . . by the federal government’s exercise of its power to punish Pollard by incarceration and to deny him a venue independent of the federal government to obtain needed medical care.”⁹²

The majority went on to explicitly reject what it considered the “illogical reading of *West*” employed by the Fourth Circuit in *Holly*.⁹³ Under the majority’s reading of *West*, there is no distinction between the actions of a private individual working directly for the governmental entity and an individual who is working for a private corporation that has a contract with a governmental entity.⁹⁴ *West* provides that “‘contracting out’ care ‘does not relieve’ the government of its ‘constitutional duty’

to provide adequate care or ‘deprive inmates of the means to vindicate their Eighth Amendment rights.’”⁹⁵

The majority also found unconvincing the Fourth Circuit’s refusal to define GEO’s employees as federal actors due to their inability to raise the defense of qualified immunity based on the Supreme Court’s holding in *Richardson*.⁹⁶ Initially, the *Pollard* majority rejected the Fourth Circuit’s reliance on this factor in its analysis because “the Court in *Richardson* expressly noted that it ‘did not address [] whether the defendants are liable under § 1983 even though they are employed by a private firm.’”⁹⁷ But it goes on to assert that its determination that GEO’s employees are federal actors is correct because “in *Malesko*, the Supreme Court explicitly left open the possibility that private prison employees could act under the color of federal law and therefore face *Bivens* liability.”⁹⁸

More central to the disagreements between the Ninth and Fourth Circuits was the question of the relevant function to be analyzed in determining whether GEO’s employees performed a public function.⁹⁹ The Ninth Circuit rejected the Fourth Circuit’s determination that the incarceration of prisoners and the management of prisons were separate and distinct governmental functions based on *West*’s statement that a prisoners’ constitutional injury from inadequate medical care is “caused, in the sense relevant for state-action inquiry, by the State’s exercise of its right to punish [the prisoner] by incarceration.”¹⁰⁰ In the end, the Ninth Circuit

decline[d] to artificially parse [the power to incarcerate] into its constituent parts—confinement, provision of food and medical care, protection of inmate safety, etc.—as that would ignore that those functions all derive from a single public function that is the sole province of the government: “enforcement of state-imposed deprivation of liberty.”¹⁰¹

As the power to incarcerate has been “traditionally the exclusive prerogative of the [government],” the Ninth Circuit determined that it was appropriate to hold that GEO’s employees were undertaking a public function.¹⁰²

The Ninth Circuit then recognized that a judicially-created *Bivens* remedy is not necessarily required simply by the fact that it determined GEO’s employees to be federal actors.¹⁰³ Before recognizing a new *Bivens* remedy, a court must also analyze (1) “whether any alternative existing process for protecting the [constitutionally recognized] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages,” and (2) where there exist “any special factors counseling hesitation before authorizing a new kind of federal litigation.”¹⁰⁴

The *Pollard* majority determined that the availability of state tort remedies to redress inmate injuries was insufficient to prohibit the court from recognizing a new *Bivens* remedy. Despite the Supreme Court’s specific language that *Bivens* remedies are only available in the absence of any alternative remedy, the Ninth Circuit determined that “the mere existence of a potential state law claim did not suffice to preclude a *Bivens* action.”¹⁰⁵

The majority went on to hold that the existence of state tort remedies did not provide “convincing reasons” to refrain

from recognizing a new *Bivens* claim for two primary reasons. Initially, the majority found that Congress's failure to create a statutory remedy to address claims by federal inmates in privately-managed facilities counseled in favor of a judicially-created remedy.¹⁰⁶ While the Ninth Circuit cites a number of cases in support of this proposition, the only case that directly deals with the issue is *Carlson v. Green*.¹⁰⁷ *Carlson* is among those cases from the bygone era of "heady days in which the [Supreme] Court assumed common-law powers to create causes of action . . ."¹⁰⁸ Additionally, relying on *Carlson* and the Ninth Circuit's opinion in *Castaneda v. United States*,¹⁰⁹ an opinion rejected by the Supreme Court,¹¹⁰ the Ninth Circuit found that state tort remedies are insufficient to preclude a judicially-created *Bivens* remedy because the contours of the remedies available to each inmate will vary depending on which state the inmate's claim arises.¹¹¹

According to the Ninth Circuit, there were also no special factors counseling hesitation from recognizing a new *Bivens* remedy.¹¹² Adopting a *Bivens* remedy for inmates in private facilities would produce a workable cause of action because under Eighth Amendment jurisprudence "the applicable standards are clear. There is no need for the district court to craft new standards or remedies to address Pollard's claims."¹¹³ The Ninth Circuit also held that recognizing a *Bivens* cause of action would enhance the doctrine's core purpose of deterring individual officers from committing unconstitutional acts because (1) it would allow inmates to avoid liability caps, preflight certification requirements, and other limitations placed on state action; and (2) "*Bivens* may allow for recovery of greater damages in some cases than a state tort law remedy."¹¹⁴ However, existence of these asymmetrical liability costs did not rise to such a level as to "counsel hesitation in recognizing a *Bivens* remedy here."¹¹⁵

Based upon its finding that GEO's employees were federal actors, that inmates in privately-operated facilities lacked a sufficiently adequate remedy to preclude recognizing a *Bivens* remedy, and that there were no special factors counseling hesitation against recognizing such a claim, the majority reversed the district court's decision and allowed Pollard's *Bivens* claim against GEO's employees to proceed.¹¹⁶

Dissenting from the majority opinion, Judge Restani commented that "[t]he majority overlooks the reality that the Supreme Court has recognized *Bivens* causes of action only where federal officials, by virtue of their position, enjoy impunity, if not immunity, from damages liability because of gaps or exemptions in statutes or in the common law."¹¹⁷ Such gaps did not exist in Pollard's case because "his 'alternative remedies [under state tort law] are at least as great, and in many respects greater than anything that could be had under *Bivens*."¹¹⁸ Given the existence of an adequate remedy to address Pollard's alleged injury, "bedrock principles of separation of powers foreclose[] judicial imposition of a new substantive liability."¹¹⁹ Judge Restani also noted that, contrary to the majority's assertion, the Supreme Court has considered state tort remedies sufficient to preclude the recognition of a new *Bivens* remedy.¹²⁰ Moreover, she asserted that "[i]t is to much of a stretch to infer, as the majority does," that the Supreme Court would have reached the same result in *Wilkie* had the

case involved a handful of state law tort claims instead of an amalgamation of state, federal, administrative, and judicial remedies.¹²¹ Moreover, there was no compelling need to ensure uniformity in this area of the law because employees of private entities do not receive the same immunities as federal officials and the basic elements of state law tort claims "are fundamentally the same in every state."¹²²

Judge Restani also disagreed with the majority's analysis regarding the presence of special factors counseling hesitation in recognizing a new type of *Bivens* claim. In her view, feasibility concerns did not counsel in favor of a *Bivens* remedy for all inmates in private facilities because "allowing a *Bivens* action to go forward only where a plaintiff would otherwise have no alternative remedy [under state law] is not unduly complicated," and she could not conceive of any circumstances in which state tort law would not provide a remedy for an inmate's claim.¹²³ Additionally, Judge Restani did not believe that recognizing a *Bivens* cause of action would further the deterrence goals of *Bivens* because state law provided an adequate deterrent effect through awards of "compensatory and punitive damages for the same conduct . . ."¹²⁴ Finally, recognizing a *Bivens* cause of action would only exacerbate the existing asymmetrical liability costs between inmates in private and public facilities because of the increased types of claims that may be brought against the employees of private facilities and their lack of qualified immunity from *Bivens* claims.¹²⁵

Joining Judge Restani in her rejection of the majority's opinion were the eight judges of the Ninth Circuit who dissented from the denial of the GEO defendants' petition to have the matter heard en banc.¹²⁶ Judge Bea and those who joined him believed that it was contrary to Supreme Court precedent to recognize a *Bivens* cause of action because "Pollard has a viable suit in state court against each of the jailor defendants under theories of intentional or negligent tort or medical malpractice."¹²⁷ Moreover, the dissenting judges found the majority's concerns regarding lack of uniformity were misplaced because of the existence of "an adequate, and arguably superior, tort claim under state law."¹²⁸ Ultimately, the dissenting judges found that

[t]he panel's explanation for this disagreement [with other circuits] reduces to a policy judgment that plaintiffs in this situation should have another forum in which to pursue these claims even though an adequate state remedy exists. Whatever may be the merits of that policy judgment, it is for Congress, not us, to make.¹²⁹

III. Analysis

A review of the various circuit court opinions, and particularly *Holly* and *Minnecci*, demonstrates where the fault lines are on this issue. First, there is a dispute over whether the employees of private corporations that operate correctional facilities constitute federal actors. Second, the courts disagree whether the availability of state tort remedies precludes the recognition of a *Bivens* remedy. Finally, there is controversy over whether and to what extent the difference between the private and public entities that operate correctional facilities impacts a court's ability to recognize a *Bivens* remedy.

With regard to the federal actor question, there is a clear dispute over whether this question is governed by *West's* holding that governmental entities cannot contract away their constitutional responsibilities or *Richardson's* statement that the operation of correctional facilities is not a traditional public function.¹³⁰ Interestingly, at the Supreme Court neither *Minneci*, nor the United States in its amicus brief in support of *Minneci*, spend any meaningful time discussing the federal actor issue. *Minneci* asserts that the resolution of this matter does not "require a determination of whether employees of private prison operators exercise governmental powers as a general matter."¹³¹ Similarly, the United States indicates that "the Court need not reach this issue to decide this case," but goes on to indicate that if the Court does take up the issue, "the government submits that private prison contractors do act 'under color of law' for certain purposes, including for purposes of federal criminal law."¹³² Pollard does not make any arguments in support of the position that GEO's employees are federal actors, but instead asserts that *Minneci's* failure to address the issue constitutes a concession of that point.¹³³ While *Minneci* and the United States are correct in their assertion that resolution of the federal actor issue is not necessary to resolve the case, addressing the issue of when private action reaches the level of government action could provide much-needed guidance on this unsettled question. This is particularly true in light of the reality that while *Minneci* only deals with prison operators, its reasoning will be employed in litigation involving government contractors beyond the corrections industry.

The courts of appeals disagree over whether the availability of state tort remedies preclude recognition of a *Bivens* claim. Primarily the dispute centers over whether congressionally-crafted remedies are the exclusive means of prohibiting a *Bivens* claim or whether any adequate remedy will do. According to the Ninth Circuit, only remedies crafted by Congress should be considered remedies adequate to defeat a *Bivens* cause of action: "The mere availability of a state law remedy does not counsel against allowing a *Bivens* cause of action. . . . [O]nly remedies crafted by Congress can have such a preclusive effect."¹³⁴ The majorities in *Holly*, *Peoples*, and *Alba* held that the availability of any alternative remedy precludes a *Bivens* remedy: "[A] *Bivens* claim should not be implied unless the plaintiff has no other means of redress or unless he is seeking an otherwise nonexistent cause of action against the individual defendant."¹³⁵ The court's judgment of what constitutes an adequate alternative remedy will be central to its decision.

Based upon the Supreme Court's holdings in *Malesko*, where state tort law remedies seem to have been sufficient to bar a *Bivens* cause of action, it appears that *Minneci* has the better argument. However, the Ninth Circuit is correct in its statement that the Supreme Court has been less than clear on this point.¹³⁶

Regardless of how the Supreme Court resolves this matter, asymmetrical liability costs will exist between private and public providers of correctional services. If there is a *Bivens* remedy against the employees of privately-operated correctional facilities, inmates in these facilities will have both *Bivens* and state law claims at their disposal. In addition to having an

additional set of claims, inmates in privately-operated facilities will have an easier path to recovery on their *Bivens* claims because the defendants will not be entitled to the defense of qualified immunity. A prisoner in a privately-operated prison would be able to recover damages from individual prison officials for violations that were not clearly established, while a prisoner in a federally-operated prison would not be able to recover for the same violation. Similarly, a prison official in a privately-operated prison would be subjected to personal liability in more situations than a prison official in a federally-operated prison due to the multiple causes of action available to plaintiffs. Of course, if the Supreme Court rejects the Ninth Circuit's reasoning, inmates in privately-operated facilities will only be able to recover through state law claims. Either way inmates in privately-operated facilities are in a vastly different position than inmates in federally-operated facilities.

However, a case pending in the Eastern District of North Carolina has presented a potential route for inmates in privately-operated facilities to seek redress for constitutional violations. In *Mathis v. The GEO Group, Inc.*,¹³⁷ the court has indicated that the Bureau of Prisons may be held liable for an Eighth Amendment violation if the BOP's on-site contract monitor is aware of unconstitutional conduct by the contractor or its employees and is deliberately indifferent to the unconstitutional acts.¹³⁸ Although *Mathis* does not involve a *Bivens* claim against the BOP's on-site contract monitor, the potential exists that such a claim could be viable. If such a claim were recognized, it would address at least some of the concerns raised over the government contracting away its constitutional responsibilities.¹³⁹

Ultimately, the only way the asymmetrical liability issue can be addressed, barring some wholesale change in the law, is if Congress addresses the issue. Congress has the ability and the authority to produce a remedial scheme to address tortious conduct, both of a constitutional nature and otherwise, by both government contractors and their employees. A congressionally-crafted cause of action would, most likely, have the additional benefit of preempting state law tort claims, which would provide the uniformity of liability sought by those who support Pollard's position.

Despite the existence of the controversy over the potential liability of the employees of government contractors for several years, Congress has shown neither the interest, nor the will, to act on this issue. It is unlikely that it will do so at any point in the near future and nearly certain that the issue will not be addressed prior to the Supreme Court resolving *Minneci*.

IV. Conclusion

A decision to uphold the Ninth Circuit could signal a shift in the Supreme Court's approach to recognizing judicial causes of action. The Court may be less willing to wait for Congress to act to protect constitutional rights and more willing to fill in the gaps where Congress has been silent: a return to the "heady days in which [courts] assumed common-law powers to create causes of action."¹⁴⁰ As in *Davis* and *Carlson*, it could also be a narrow expansion limited to the facts in *Minneci* and only apply to suits by prisoners against prison officials employed by a private corporation that operates a federal prison.

Practically, a decision upholding the Ninth Circuit could lead to increased costs in government contracting and increased litigation. If employees of government contractors may be subject to individual liability for possible constitutional violations, they will demand higher pay or indemnification, which will in turn drive up the cost of the contracts to the government. The courts will also face more suits filed by prisoners. Given the increasing number of prisons operated by private corporations, the number of *Bivens* suits could dramatically increase.¹⁴¹

However, given the Supreme Court's reluctance to expand *Bivens*,¹⁴² it is likely that the Court granted certiorari to undo the expansion of *Bivens* approved by the Ninth Circuit. The unavailability of the *Bivens* remedy where another adequate remedy is available is relatively uncontroversial, and this will likely provide a firm basis for the Supreme Court to agree with the Fourth, Tenth, and Eleventh Circuits and refuse to extend *Bivens* to individual employees of private prison operators.

Endnotes

- 1 403 U.S. 388 (1971).
- 2 534 U.S. 62 (2001).
- 3 Chief Justice Rehnquist authored the majority opinion and was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Scalia wrote a concurring opinion, joined by Justice Thomas, that explained his broad rejection of the reasoning underlying *Bivens* and his desire to "limit *Bivens* and its two follow on cases to the precise circumstances they involved." *Id.* at 524 (Scalia, J., concurring) (citations omitted). Justice Stevens filed a dissenting opinion, which was joined by Justices Souter, Ginsburg, and Breyer.
- 4 *Id.* at 63.
- 5 *Id.* at 70.
- 6 *Id.* at 71.
- 7 *Id.* at 70-71 (citing *FDIC v. Meyer*, 510 U.S. 471 (1994)).
- 8 *Id.* at 71-72.
- 9 *Id.* at 72.
- 10 *Id.* at 72-73.
- 11 *Id.* at 72.
- 12 *Id.* at 74.
- 13 *Id.*
- 14 *Id.* At one point, Malesko attempted to add the individuals allegedly responsible for his injuries to the suit as defendants, but they were dismissed on statute of limitations grounds. *Id.* at 65.
- 15 *Id.* at 79 n.6 (Stevens, J., dissenting).
- 16 *Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090, 1093 (10th Cir. 2005), *vacated in relevant part by equally divided court*, 449 F.3d 1097 (10th Cir. 2006) (en banc).
- 17 *Id.* at 1093.
- 18 *Id.* at 1093-94.
- 19 *Id.* at 1094.
- 20 *Id.*
- 21 *Id.* at 1094-95.
- 22 *Id.* at 1096.
- 23 *Id.* at 1100.
- 24 *Sarro v. Cornell Corrections, Inc.*, 248 F. Supp. 2d 52 (D.R.I. 2003).

The District Courts for the Districts of New Jersey and Kansas subsequently adopted the *Sarro* opinion. *Jama v. INS*, 343 F. Supp. 2d 338, 362-63 (D.N.J. 2004); *Purkey v. Corrections Corp. of Am.*, 339 F. Supp. 2d 1145, 1148-51 (D. Kan. 2004).

- 25 *Peoples*, 422 F.3d at 1100-01.
- 26 *Id.* at 1101.
- 27 *Id.*
- 28 *Id.* at 1102-03.
- 29 *Id.* at 1103.
- 30 *Id.* at 1109 (Ebel, J., dissenting).
- 31 *Id.* at 1110.
- 32 *Id.* at 1110-12.
- 33 *Id.* at 1112-13.
- 34 *Id.* at 1113.
- 35 *Peoples v. CCA Detention Ctrs.*, 449 F.3d 1097 (10th Cir. 2006) (en banc).
- 36 Womble Carlyle represented the GEO Defendants in *Holly v. Scott*, but Mr. Numbers did not participate in the case.
- 37 *Holly v. Scott*, 434 F.3d 287, 288 (2006).
- 38 *Id.*
- 39 *Id.*
- 40 *Id.*
- 41 *Id.* at 290.
- 42 *Id.* at 289 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)).
- 43 *Id.* at 290.
- 44 *Id.*
- 45 *Id.* at 291 (emphasis in original) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).
- 46 *Id.* (emphasis in original) (quoting *Lugar*, 457 U.S. at 936).
- 47 *Id.* at 292 (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972)).
- 48 *Id.* at 291-92.
- 49 *Id.* at 292 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 62, 82 (2001)).
- 50 *Id.* at 293.
- 51 521 U.S. 399 (1997).
- 52 *Holly*, 434 F.3d at 293 (quoting *Richardson*, 521 U.S. at 405-07).
- 53 *Id.* at 293.
- 54 487 U.S. 42 (1988).
- 55 *Holly*, 434 F.3d at 293-94.
- 56 *Id.* at 294 (quoting *West*, 487 U.S. at 54).
- 57 *Id.*
- 58 *Id.*
- 59 *Id.* at 295.
- 60 *Id.* at 296.
- 61 *Id.* at 299 (Mortz, J., concurring in judgment only).
- 62 *Id.* at 302-03.
- 63 *Alba v. Montford*, 517 F.3d 1249, 1251 (11th Cir. 2008).
- 64 *Id.* at 1251.
- 65 *Id.* at 1251-52.
- 66 *Id.* at 1254.
- 67 *Id.* (citing *Correctional Servs. Corp. v. Malesko*, 534 U.S. 62, 69

even where the prisoner would face considerable procedural difficulties in filing a state action); *Holly*, 434 F.3d at 296-97 (holding by both the majority and Judge Motz's concurrence that available state remedies defeat a *Bivens* action).

136 See *Pollard*, slip op. at 8164-66.

137 *Mathis v. The GEO Group, Inc.*, No. 08-ct-00021 (E.D.N.C. filed May 28, 2008). Mr. Numbers represents The GEO Group Inc. in this litigation.

138 *Mathis v. The GEO Group, Inc.*, No. 08-ct-00021, slip op at 7-13 (E.D.N.C. Sept. 29, 2010)

139 See *Pollard*, slip op. at 8157; *Holly*, 434 F.3d at 299 n.1 (Motz, J., concurring in judgment).

140 *Correctional Servs. Corp. v. Malesko*, 534 U.S. 62, 75 (2001) (Scalia, J., concurring).

141 In mid-2007, 30,379 out of 199,118 total federal prisoners (15.2%) were held in privately-operated prisons, and the percentage has been steadily increasing annually. WILLIAM J. SABOL & HEATHER COUTURE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISON INMATES AT MIDYEAR 2007, at 1, 5 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim07.pdf>.

142 The Supreme Court has refused to extend *Bivens* to new circumstances in the seven opportunities it has had since 1980. Brief for Petitioners at 13, *Minneci v. Pollard*, No. 10-1104 (U.S. 2011).

