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Constitutional Law - Search and Seizure - Federal Cause of Action for an Illegal Search and Seizure

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CONSTITUTIONAL LAW—SEARCH AND SEIZURE—FEDERAL CAUSE OF ACTION FOR AN ILLEGAL SEARCH AND SEIZURE—The Supreme Court of the United States has held that there is a federal cause of action founded directly on the fourth amendment against federal agents who have conducted an illegal search and seizure.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

Petitioner sought recovery for humiliation and mental suffering resulting from a search and seizure of his apartment conducted by federal agents without probable cause. The District Court for the Eastern District of New York dismissed the case for lack of federal jurisdiction and failure to state a cause of action.[1] The Second Circuit Court of Appeals held that jurisdiction existed, but affirmed the lower court's dismissal for failure to state a cause of action.[2] The United States Supreme Court granted certiorari[3] to consider whether an illegal search and seizure conducted by federal officials gives rise to a federal cause of action for damages.

In rejecting the argument that fourth amendment rights are properly protected by state remedies,[4] the Court reasoned that state remedies in the form of civil trespass laws protect interests which are not necessarily identical with those protected by the constitutional amendment. The fourth amendment is not limited or defined by local trespass law; indeed, the interests protected may be inconsistent. The Court further found that damages have historically been awarded whenever personal rights have been violated. Where a statute provides jurisdiction, the damage remedy is normally available to the federal courts whether the injury arises under a statute or under the constitution.[5] The Court concluded that petitioner was entitled to recover money damages for

1. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 276 F. Supp. 12 (E.D. N.Y. 1967).
2. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 409 F.2d 718 (2d Cir. 1969).
3. 399 U.S. 905 (1970).
4. The Constitution does not specifically provide a means of enforcing the amendments and the burden has often fallen to the states. *See generally* Comment, *State Remedies for Federally Created Rights*, 47 MINN. L. REV. 815, 816 (1963).
5. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971), *citing* Bell v. Hood, 327 U.S. 678, 684 (1946), where the Court stated that "it is well settled that where legal rights have been involved, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

injuries resulting from a federal agent's violation of the fourth amendment.[6]

As early as 1900 the Court allowed an action for damages against state election officials who had refused the plaintiff a vote in a congressional election.[7] While this action was based on the Constitution,[8] never before the instant case had the Court found a federal cause of action for damages directly on the language of an amendment.[9]

In some earlier cases, the Court indicated that the remedy granted was constitutionally founded, but these cases were based either indirectly or directly on federal or state statutes. In one decision the Court went so far as to conclude that the statute under which the action was brought was not necessary for enforcement of the right—the right rested directly on the fifth amendment.[10]

While not explicitly creating a cause of action based directly on the Constitution, the Court has exhibited a broad range of discretion in the use of its equitable power. In some instances, the Court has applied remedies to implement statutory schemes where Congress specified a wrong but neglected to prescribe a remedy.[11] For example, 42 U.S.C. § 1983,[12] previously section 1 of the Civil Rights Act of 1871,[13] provides liability for persons acting under color of state law who deprive others of constitutional rights but does not specify the procedure for redress or the kind of damages. Under this statute, the courts have upheld illegal search and seizure claims against state officials by construing the claims

6. The Court did not entertain the question of whether the agents were immune from liability due to their official position as it had not been reached by the court below.

7. Wiley v. Sinkler, 179 U.S. 58 (1900).

8. The Court stated that the right had "foundation in the Constitution and the laws of the United States." *Id.* at 62. *Accord,* Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927); Giles v. Harris, 189 U.S. 475 (1903); Swafford v. Templeton, 185 U.S. 487 (1902).

9. The Court possibly came closest in *West v. Cabell,* 153 U.S. 78 (1894), but this case can be distinguished on the basis that the federal official involved posted a bond for his performance.

10. Jacobs v. United States, 290 U.S. 13 (1933).

11. *See, e.g.,* J. I. Case Co. v. Borak, 377 U.S. 426 (1964). A stockholder was allowed a civil cause of action based upon an alleged violation of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1964), although the language of the statute made no mention of a private cause of action. The opinion stated that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." 377 U.S. at 433.

12. 42 U.S.C. § 1983 (1964) provides:

Every person who, under color of any statute, ordinance, regulation, customs 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.

13. Act of April 20, 1871 ch. 22, § 1, Rev. Stat. § 1979, 17 Stat. 13.

to be a deprivation of right under the fourth amendment, applicable to the states through the fourteenth amendment.[14] The anomalous result of these decisions, prior to the instant case, had been a remedy for federal constitutional violations against state officials, but not against federal officials.

In areas where there are no guiding statutes, the Court has exercised its equitable power to provide non-damage remedies for official misconduct. Ejectment has been used as a remedy for violation of the constitutional ban against a taking of property without compensation.[15] Injunctive relief has been granted in instances as diverse as cases involving police violations of the Constitution[16] to cases in the recently developing area of school desegregation.[17] In an exercise of its supervisory power, the Court has excluded from the courtroom evidence obtained in violation of the Constitution.[18]

In view of the wide scope of discretion exhibited by the Court's use of its equitable power,[19] the creation of a remedy where a federal constitutional right is involved should not seem surprising.[20] The Court has previously been inclined to mold law where there is a grant of jurisdiction and an absence of statutory guidance.[21] Furthermore, a violation of the right to be free from unreasonable search and seizure by federal officials is an injury deserving of remedy. Indeed, the original

14. Monroe v. Pape, 365 U.S. 167 (1961); Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962). *See generally* Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 Nw. U.L. REV. 277 (1965). For an interesting application of the statute, see *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966), where a federal court issued an injunction under authority of 42 U.S.C. § 1983 (1964) to halt repeated searches of Negro homes by the Baltimore police.

15. United States v. Lee, 106 U.S. 196 (1882).

16. Ricket Rice Mills v. Fontenot, 297 U.S. 110 (1956) (federal injunction used to prevent federal officers from collecting an unconstitutional tax); Hague v. CIO, 307 U.S. 496 (1939) (federal injunction issued as a remedy to enjoin police from illegal arrest and detention of individuals); *Ex parte* Young, 209 U.S. 123 (1908) (an attorney general prevented from proceeding under an unconstitutional statute).

17. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964). For a discussion of the federal injunction as a remedy, see Comment, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 (1968).

18. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

19. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The Court stated that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.* at 163.

20. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). The Court stated that "it is not uncommon for federal courts to fashion federal law where federal rights are concerned." *Id.* at 457.

21. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). "In the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." *Id.* at 367. This principal, applied in *Clearfield* in a contract action, was later applied in a tort action in *United States v. Standard Oil Co. of California*, 332 U.S. 301 (1947).

conception of the fourth amendment was at least partly inspired by English cases granting civil damages for illegal searches by government officials.[22]

Although the Court did not view it as a necessary criterion for creation of the remedy,[23] whether the new cause of action will be more effective in preventing official misconduct than previously existing remedies is a question that arises. The remedies that existed prior to the new cause of action were judicial exclusion,[24] state criminal actions,[25] federal criminal actions[26] and state civil trespass actions. There is much agreement that the exclusionary rule has proved ineffective in discouraging police violations of the fourth amendment;[27] moreover, it does not compensate the innocent victim of an unreasonable search.[28] The lack of prosecutions under federal and state criminal statutes attest to their ineffectiveness,[29] which has been attributed to the reluctance of prosecutors to indict their subordinates.[30]

22. *See, e.g.*, Entick v. Carrington, 95 Eng. Rep. 807 (1765). For a brief history behind the creation of the fourth amendment, see Boyd v. United States, 116 U.S. 616 (1886).

23. 403 U.S. at 388.

24. See cases cited in note 18, *supra*.

25. State statutory provisions are listed in Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 VA. L. REV. 621 (1955). *See also* Mapp v. Ohio, 367 U.S. 643, 652 (1960); Wolf v. Colorado, 338 U.S. 25, 30-31 (1949).

26. Federal statutes have provided criminal liability for federal officers or employees who conduct a search without a search warrant and without probable cause since 1921. 18 U.S.C. § 2236 (1964).

27. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 426-27 (1971) (Appendix to Chief Justice Burger's dissenting opinion). Justice Burger in his dissenting opinion viewed the Court's decision to create a new cause of action as a violation of the separation of powers doctrine and beyond the judicial power of the Court. 403 U.S. at 412-13. He described the exclusionary rule as being an "anomalous and ineffective mechanism." *Id.* at 420. Finally, he suggested that Congress should develop an administrative remedy whereby the exclusionary rule would be abrogated in its entirety, a cause of action for violation of the fourth amendment would be created, sovereign immunity of federal officials would be waived and a quasi-judicial tribunal would adjudicate all claims. *Id.* at 422-23. *See* Comment, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 (1968).

28. Besides its general inhibiting effect on unreasonable police searches, the magnitude of which has been questioned (*supra* note 27), the rule benefits only those who are found to possess illegal drugs or evidence of crime that could possibly be suppressed prior to trial as fruits of an illegal search. *See* Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523, 530 (1967). This is not true in the confession or identification areas where the rule tends to protect indiscriminately both the guilty and non-guilty. A major difference between the areas is that coerced confessions or tainted identifications are inherently unreliable as evidence while fruits of a search are reliable whether or not the search was legal.

29. Mapp v. Ohio, 367 U.S. 643, 651-53 (1960). In Nusslein v. District of Columbia, 115 F.2d 690, 695 (1940), the court commented on the existence of the federal criminal statutes but noted there had never been, to that date, a prosecution under it. In Baxter v. United States, 188 F.2d 119 (6th Cir. 1951), the court recognized that the officers had violated the act but no prosecution was undertaken. *See generally* Edwards, *supra* note 25. Only a few state cases have involved criminal prosecutions for illegal searches. *Id.* at 622.

30. Irvine v. California, 347 U.S. 128, 152 (1954) (Douglas, J., dissenting); Wolf v. Colorado, 338 U.S. 25, 42 (1949) (Murphy, J., dissenting).

Finally, state civil trespass actions have proved useless. This failure has been attributed to two reasons. First, the doctrine of sovereign immunity protects the governmental body for which the offending officer was acting. Second, damage awards are primarily limited to property damage that is often minimal in an illegal search.

The rule has long existed that a government agent is personally liable only where his actions transgress the limits of authority afforded him by his position.[31] Otherwise, he is included within the sovereign immunity of the state.[32] This concept has been applied to make agents liable who acted pursuant to an unauthorized order of a superior[33] or pursuant to the command of an unconstitutional statute.[34] Any illegal search might be viewed as being beyond the authority of an agent, thereby placing him outside the protection of sovereign immunity. The difficulty with this formulation is that where the act of an agent requires the exercise of his judgment, courts usually construe his authority as broadly as possible.[35] An agent of the government has been held personally immune even where his conduct could subject the government to liability.[36]

In considering the deterrence value of civil suits, the rule that sovereign immunity protects the agency for which the offending official acts has far reaching significance. Only actions occurring within the nebulous area referred to as probable cause are deemed to be within the authority of a law enforcement official conducting a search.[37] A jury, in determining whether probable cause exists, might be unduly influenced by sympathy for the plight of an official facing liability; whereas in determining the liability of a government agency, the jury may arrive at a more objective decision. Furthermore, a judgment against a government agent may be uncollectable as an individual agent is apt to be judgment proof.[38] A judgment against the government agency, on the

31. Little v. Barreme, 6 U.S. (2 Cranch) 169 (1804). *See, e.g.*, Goldman v. American Dealers Service, 135 F.2d 398 (2d Cir. 1943). Officials who seized a citizen's property without lawful authority were stripped of their official character and treated as private wrongdoers.

32. In Pennsylvania, for example, the rule is that lawful authority acts as a complete defense. McAleer v. Good, 216 Pa. 473 (1907).

33. Bates v. Clark, 95 U.S. 204 (1877); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1851).

34. Chaffin v. Taylor, 114 U.S. 309 (1884).

35. *See, e.g.*, Spalding v. Vilas, 161 U.S. 483 (1896). An agent was held immune from personal liability even though his actions were maliciously performed. The Court held that his conduct involved matters within the authorized scope of his discretion.

36. Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 703 n.27 (1949).

37. *See, e.g.*, Kozlowski v. Ferrara, 117 F. Supp. 650, 652 (S.D.N.Y. 1954). F.B.I. agents are permitted to exercise judgment in the analogous area of arrest only within the scope of probable cause.

38. *See, e.g.*, Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966). The court reasoned

other hand, would serve as incentive for correcting abuses, and could filter down to him in the form of discipline or in the form of general policies adopted by his superiors.[39]

Even if a judgment is allowed against a government entity for an unlawful search conducted by one of its agents, an additional problem is encountered in that the amount of damages recoverable is not usually significant. As damage awards are usually limited to property damage,[40] a serious invasion of the fourth amendment could result in minimal recovery.

As the new cause of action is similar to state civil actions, it is likely that it will suffer from the same defects.[41] Without punitive or exemplary damages, judgments will have negligible deterrent effect on official misconduct. Even substantial recoveries will be meaningless where an official is judgment proof. In addition, as the judgment will be against the officer alone, and not against the governmental agency for which he acts, it will have no effect on the general policy of the agency.

It is submitted that a solution to the persistent problem of official misconduct might be in a congressional scheme waiving sovereign immunity and providing punitive damages. This scheme would not only remove the barriers of immunity, as was done in the Tort Claims Act,[42] but should, as a matter of course, implicate the agency directly superior to the offending official.[43] Such a provision would result in direct pressure

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that the assets of police afford little chance of compensation for illegal searches. *Id.* at 202. *See generally* Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 346 (1936).

39. *See generally* Comment, *Suits Against Governments and Officers: Damage Actions*, 72 HARV. L. REV. 209, 229 (1963); Hall, *supra* note 38, at 347-48.

40. *See* Wolf v. Colorado, 338 U.S. 25, 41-44 (1948) (Murphy, J., dissenting), where the illusory nature of the trespass action due to the lack of meaningful damages is discussed. Many states are inclined to limit punitive damages; a few permit none at all. In Pennsylvania, for example, plaintiff must show malice in fact before he can recover punitive or exemplary damages. McCarthy v. De Armit, 99 Pa. 63 (1881). A case which is unique because it granted damages for pain and suffering resulting from an unlawful search is *Deaderick v. Smith*, 33 Tenn. App. 151, 230 S.W.2d 406 (1950).

41. There are indications that actions against state officials under 42 U.S.C. § 1983 (*supra* notes 12-14 and accompanying text) have also been plagued by these same defects. *Monroe* was decided within a year after *Mapp* and yet it is not clear that 42 U.S.C. § 1983 has been any more effective than the exclusionary rule in discouraging unlawful police conduct. Only a few cases brought under 42 U.S.C. § 1983 have allowed exemplary damages. *See, e.g.*, Basista v. Weir, 340 F.2d 74, 86 (3d Cir. 1965) (punitive damages awarded); Rhoads v. Horvat, 270 F. Supp. 307, 310 (D. Colo. 1967) (damages for pain, suffering and humiliation allowed). The question of whether government entities can be sued under the Act has been a confused issue with varying results in different jurisdictions. *See* Comment, *Suing Public Entities Under the Federal Civil Rights Act: Monroe v. Pape Reconsidered*, 43 U. COLO. L. REV. 105, 106-10 (1971).

42. Federal Tort Claims Act, Act of Aug. 2, 1946, Ch. 753, 60 Stat. 842 (codified in scattered sections of 28 U.S.C.).

43. The Federal Tort Claims Act removed the immunity of the government to suits

on the agency to correct the abuses of its subordinates. The scheme could allow a suit to be brought nominally against the official, while providing a remedy against the government entity. In analogous situations statutes have provided for suits against specific government officials while allowing relief against the United States. For example, a suit may be brought against the Alien Property Custodian for return of the proceeds from property erroneously seized and sold,[44] and against the Federal Housing Commissioner for claims arising under his agency's activities.[45]

Punitive damages would be an essential element of the scheme.[46] The use of punitive damages may be seen in the provisions of other statutes. The treble damage provision of the anti-trust laws provides incentive for its enforcement and deterrence for its violation.[47] In order to create incentive for private actions against individuals defrauding the government, the "qui tam" statutory provision allows a minimum recovery of $2000 for each violation successfully prosecuted.[48] Similarly, punitive damages would provide incentive to enforce the mandate of the fourth amendment.

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for injuries caused by its agents, but this waiver of immunity did not extend to harms caused through discretionary action of government officials. 28 U.S.C. § 2680(a) (1964).

44. 50 U.S.C. App. § 9(a) (1964). *See, e.g.*, Guessefeldt v. McGrath, 342 U.S. 308 (1952).

45. 12 U.S.C. § 1702 (1964).

46. It is submitted that Justice Burger's proposed administrative scheme (*supra*, note 27), designed primarily as a replacement for the exclusionary rule, would also prove ineffective unless it provided punitive damages.

47. 15 U.S.C. § 15 (1964).

48. 31 U.S.C. § 231 (1964). Where there is an attempt to defraud the government, as outlined in 31 U.S.C. § 231, any person can bring a "qui tam" action to recover damages on behalf of the government and receive half of the damages. A minimum recovery of $2000 for each violation serves as an incentive for bringing the suit. *See, e.g.*, United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943).