

19-6635

ORIGINAL

In the

United States Supreme Court

MATTHEW PAUL BOROWSKI,

Plaintiff-Appellant,

v.

KIMBERLY BECHELLI, THOMAS

CRAWFORD, MARK SVENINGSON,



Defendants-Appellees.

On Appeal from the United States Court of Appeals, for the Seventh Circuit.

No. 19-1113 – Decided June 20th, 2019.

United States District Court, for the Southern District of Illinois.

No. 16-cv-848-JPG-GCS – J. Phil Gilbert, *Judge*.

PLAINTIFF'S PETITION FOR A WRIT OF CERTIORARI

MATTHEW PAUL BOROWSKI

pro se

Reg. No. 58580-060

USP Marion

P.O. Box 1000

Marion, Illinois 62959

Questions for Review

- I. Is the judicial remedial structure created in *Ziglar v. Abbasi* constitutional under Article III, Section 2?
- II. Is the judicial remedial structure created in *Ziglar v. Abbasi* constitutional under the Due Process Clause of the Fifth Amendment?
- III. Is Title 42, United States Code, Section 1983 constitutional under the Due Process Clauses of the Fifth and Fourteenth Amendments?

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Case History

On 27 July 2016, Plaintiff filed a complaint in the United States District Court for the Southern District of Illinois (Doc. 1) alleging that his First and Fifth Amendment rights were violated by BOP officials in the rejection of a publication. The “mailroom” officials were named in his First Amendment violations, while the Warden and the Director of the BOP’s North Central Region were named in his Fifth Amendment violations. Defendants Baird and Revell were successful in their motion for dismissal of the alleged Fifth Amendment violations (Doc. 45) – of which is not in question on this appeal.

Defendant’s Bechelli, Crawford, and Sveningson filed a motion to dismiss for summary judgement (Doc. 53), arguing that this Court’s decision in *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017) barred Plaintiff’s First Amendment claims filed pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971).

The Report and Recommendation by the Magistrate Judge (Doc. 62) concluded that special factors dictated hesitation in applying *Bivens* to Plaintiff’s First Amendment claims and recommended that Defendants’ motion to dismiss be granted. (Appx. Doc. 4)

Plaintiff objected to the Report and Recommendation (Doc. 63), maintaining that the Magistrate Judge erroneously characterized his case as arising under *Bivens* because Plaintiff filed suit pursuant to the intentions of 42 U.S.C. §1983, and that the Court has no right to hold State agents to a different standard of liability than Federal agents acting in the same role.

The District Court Judge adopted the Magistrate Judge's Report and Recommendation (Doc. 65) in the matter of the *Ziglar* issue, in that Plaintiff is barred from bringing a *Bivens* claim for First Amendment violations. (Appx. Doc. 2 & 3)

Plaintiff immediately filed a Notice to Appeal this judgement to the Seventh Circuit Court of Appeals (Doc. 67). In his appeal (USCA7, Doc. 1), Plaintiff asked three questions in relation to the District Court's judgement:

1. Should all *Bivens* actions, heretofore, be now classified as *Abbasi* actions, since *Bivens* has ultimately, and unquestionably, been overturned?
2. Did the Court in *Abbasi* create a judicial deprivation by allowing for arbitrary enforcement of only judicially recognized constitutional rights, in direct contravention of the Fifth Amendment Due Process Clause?
3. Does 42 U.S.C. §1983 selectively target certain government worker, unequally and arbitrarily, violating the Fifth and Fourteenth Amendments' Due Process Clauses?

The Defendants argued in their response (USCA7 Doc.) that since Plaintiff didn't meaningfully argue the points of *Abbasi* he failed to preserve any appealable issue. Plaintiff responded (USCA7 Doc.) that the reasoning that he didn't argue any of the factors within the framework of *Abbasi* was that *Abbasi* itself was unconstitutional.

The Appeals Court passed on weighing in on any of these questions in their affirmation of the District Court's judgement – completely sidestepping the overall constitutionality of both *Abbasi* and 42 U.S.C §1983 – concluding merely that they could not disregard Supreme Court precedent. However, they made a point in acknowledging that Plaintiff has preserved his arguments. (USCA7 No. 19-1113)(Appx. Doc. 1)

Upon receiving the Seventh Circuit's June 20th decision, Plaintiff timely filed his petition for a Writ of Certiorari.

Jurisdictional Statement

This is a Writ for Certiorari to appeal the original decision of a District Court judgement, entered on 14 December 2018, in the Southern District of Illinois. The District Court had original subject matter jurisdiction, per 28 U.S.C. §1331, because plaintiff invoked his liberty interest in his First Amendment constitutional rights.

The judgement of the Court of Appeals for the Seventh Circuit, affirming the District Court's decision was entered on 20 June 2019, under the jurisdiction of 28 U.S.C. §1291.

This Court has jurisdiction per 28 U.S.C. §1254 and Rule 10 of the Rules of the United States Supreme Court. The United States Court of Appeals has chosen to defer their opinion in these issues to this Court, as the governing precedent was set by this Court through their decision of *Abbasi*. Plaintiff challenges that precedent vis a vis this writ of certiorari along with the constitutionality of 42 U.S.C. §1983.

Constitutional Provisions and Statutes

- United States Constitution, Article III, Section 2

The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make.

The trial of all crime, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

- Fifth Amendment

No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- 18 U.S.C. §242

Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are proscribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or and attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

- 28 U.S.C. §1254

Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree;
- (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

- 28 U.S.C. §1291

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c) and (d) and 1295].

- 28 U.S.C. §1331

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

- 42 U.S.C. §1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

- Rule 10, Rules of the United States Supreme Court

Considerations Governing Review of Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

- (a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b) A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of the United States court of appeals;
- (c) A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decision of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Statement of Case

Plaintiff brings this Appeal of the Seventh Circuit affirmation of the Southern District of Illinois' judgement before this Court to ascertain whether or not the framework of *Abbasi* is constitutional under Article III and the Fifth Amendment, as well as whether 42 U.S.C. §1983 is constitutional under the Fifth and Fourteenth Amendments. The Seventh Circuit Court of Appeals had jurisdiction for plaintiff's appeal under 28 U.S.C. §1291, and simply chose not to address the lawfulness of this Court's *Abbasi* ruling. They also wholly ignored plaintiff's challenge to 42 U.S.C. §1983.

Argument

Arizona Supreme Court Justice Clint Bolick put it on record best, in his concurring opinion in the decision of *Arizona v. Maestas*, (Ariz. 2018), stating that “when the judiciary fails to interpret and enforce constitutional rights and limits, it shrinks from its central duty and drains the Constitution of its intended meaning.” Indeed, with the advent of *Abbasi*, the federal judiciary has illustrated this sentiment, and we are witnessing its implications in this instant course of events. The era of *Bivens* is officially over, and the birth of total civil immunity for federal agents to conduct themselves however they desire has arrived under the banner of *Abbasi*.

Abbasi cannot be used to determine whether or not to proceed in this matter, for it is in violation of Article III of the Constitution and Due Process clauses of the Fifth and Fourteenth Amendments. To understand this a little more, plaintiff would introduce James Madison’s Federalist No. 47 allowing that “[t]he oracle who is always consulted and cited on [separation of powers], is the celebrated Montesquieu.” He then quotes Montesquieu, “Were the power of judging joined with the legislature, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*.”

As it stands, this is exactly what has happened with *Bivens* type remedies over the past several decades. Plaintiff has continually expressed this arbitrariness of the courts to take it upon themselves to decide, in the most *Animal Farm* of ways, if and when any constitutional right is of such import to be afforded protection

against violations by federal officials. Each time, this arbitrariness is further emphasized by whether or not a certain stance is ‘favored’ or ‘disfavored’ at any given moment, subjecting the game to being changed instantly, contrary to Congressional and Constitutional intent. Here *Abbasi* has created a rule of law outside the realm of Congress.

Article III, Section 2, of the Constitution explicitly grants courts the power to rule in only four matters: law, equity, maritime, and admiralty. This Court in *Bivens* derived their power to grant relief through their right to matters of equity under Article III, which would apply to any other constitutional right.

This Court in *Abbasi* eschews this power of equity and goes on to craft some *Frankenstein* treatise that has no constitutional backing in either equity or law – they assume the notion that neither 42 U.S.C. §1983 nor any other law empowers a federal court to grant relief in matters such as these, and do not allow for the base argument of equity as this Court did in *Bivens*. This creates an issue since the judicially created remedial structure that *Abbasi* poses could now only be rooted in admiralty or maritime; neither of which is applicable to that case.

This Court’s opinion in *Bivens* told of a judiciary that held the power, as a matter of constitutional mandate, to vindicate constitutional violations performed under the color of official government business. This was embodied by the majority of that decision, quoting that “[t]he 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. One of the first duties of government is to afford that protection.”

Marbury v. Madison, 1 Cranch 137, 163, 2 L.Ed. 60, 69 (1803) Their overall consensus was that, under the rules of equity, if the federal judiciary has jurisdiction to hear the case, then so to is the federal judiciary empowered to grant any traditional relief to redress any violation.

“[C]onversely, if a general grant of jurisdiction to the federal courts by Congress is thought adequate to empower a federal court to grant equitable relief for all areas of subject-matter jurisdiction enumerated therein, see 28 U.S.C. §1331(a), then it seems to me that the same statute is sufficient to empower a federal court to grant a traditional remedy at law.” (*Bivens* @ 405, Justice Harlan concurring in result)

The question of whether this Court’s ruling in *Abbasi* is constitutional under the Due Process Clause of the Fifth Amendment, is encapsulated in the question of whether a citizen’s rights are bestowed upon them by their creator, and are thereby inalienable; or are a citizen’s rights postulated and micromanaged by a judiciary that weighs that right against the Leviathan that is the government?

This Court’s opinion in *Abbasi* has all but officially overturned the *Bivens* decision. In *Abbasi*, this Court had concluded that the majority in *Bivens* erred in their interpretation of the importance of a citizen’s constitutional rights, and should have deferred to the minority opinion that Congress never explicitly created a way to safeguard citizens’ rights against an overreaching federal executive branch. The *Abbasi* decision chastises the *Bivens* judgement’s rationale and creates a litmus test that is insurmountable, so much so, that had *Bivens* been argued today, the outcome would surely be reversed.

This standing is definitely counter to the intentions of Congress and the Constitution as observed by the legal philosopher Blackstone:

“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested right.” (*Marbury* @ 163)

By the judiciary entertaining the rationale of the *Abbasi* decision, they have created an imbalance of liability between the levels of government, abandoning the principles of the Due Process Clause encapsulated by both the Fifth and Fourteenth Amendments, for when the Courts act according to no limit but their own discretion – when the citizen can only know what the rules are after the Courts announce them, and only for that moment, until the Courts change them again – then the citizens’ rights are insecure; they are vulnerable to the self-interested or abusive acts of the government and its agents.

On account of *Abbasi*, state and territory agents are held to a higher level of personal liability than their federal counterparts, such that, if a State employed Illinois Department of Corrections Officer were to commit the same depriving action that the federally employed Bureau of Prisons Corrections Officer also committed, the District Court would not have dismissed this matter as it had done. For it is a material fact the that sole reason for the District Court’s dismissal in this matter is on account that the defendants are federal employees – even though Congress never explicitly bestowed any civil immunity upon that caste of society. (See *Bivens* @ 397, “...for we have here no explicit congressional declaration that persons injured by a federal officer’s violation of the Fourth Amendment may *not* recover money damages from the agent...” (emphasis added))

In addition, they craft this creature in such a way that gives the judiciary sole discretion as to when and how it is applied, bringing to mind Alexander Hamilton's Federalist No. 78 stating:

"[i]t can be of no weight to say, that the courts on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature...The Courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGEMENT, the consequences would equally be the substitution of their pleasure to that of the legislative body."

It has also been noted by plaintiff – through the wording of 18 U.S.C. §242 – that Congress intended that every right be protected against violations by *any* government official.

Again, there is no guiding principle, and therefore no safety found in the Courts in matter such as these. Everyday in the judiciary brings new rules and new exceptions to those rules – each arbitrarily reached – all in dependence on the political leaning of this Court's majority; it is essentially *ipse dixit* – the Court says "because I say so". This Court has cleverly hidden this writ of civil immunity within the *Abbasi* labyrinth of requirements that must be met in order to proceed with a civil complaint against federal agents.

This brings attention back to 42 U.S.C. §1983. Since this Court seems to now believe that the judiciary has no inherent equitable power to grant civil relief to citizens deprived of their civil rights by federal officials, then 42 U.S.C. §1983 must be held as void for being unconstitutional, as it illustrates the words of James Madison in his Federalist No. 57, speaking about the limits of powers of the House of Representatives in "that they can make no law which will not have its full

operation on themselves and their friends, as well as on the great mass of society.”

This Court’s role to enforce Madison’s words was then presented by Hamilton in his Federalist No. 78:

“Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all reservations of particular rights or privileges would amount to nothing.”

It is clear that absent the judiciary’s ability, as *Bivens* declared, to impose traditional remedies in equity, then 42 U.S.C. §1983 stands in direct contravention of Due Process; thus putting a target on state and territory officials while leaving federal officials free and clear of all personal civil liability, contrary to the underlying intent of Congress – as shown through their passage and wording of 18 U.S.C. §242, which allows for a citizen to hold federal agents criminally liable of up to a year imprisonment and/or *monetary fines* for violations of *any* constitutional right or privilege.

Moreover, 18 U.S.C. §242 is *not* limited to only State or Territory agents, and clearly leaves its breadth open to “[w]hoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person...to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States...” It is hard to envision that Congress would allow for criminal charges to be filed against federal agents, without the rational belief that those same agents could also be held accountable in the civil realm. In fact, with the passing of the *Bivens* verdict, Congress may have well have felt no need for any further discourse on the matter, for it was decided then that the federal judiciary

had the implicit power to impose traditional remedies to redress constitutional violations performed by federal agents.

Additionally, if a government agent was convicted of 18 U.S.C. §242, for depriving a person of their constitutional rights, they would also be accountable for restitution toward that victim. Restitution, while normally a part of criminal sentencing, is governed by the rules of civil law and is naturally a civil action. Which begs the further question of whether a federal agent convicted of this criminal statute is liable to pay restitution towards their victim? *Abbasi* would have this Court grant personal immunity against any restitution request, no matter how severe the civil rights deprivation, or injuries that were sustained, unless the victim could pass its muster.

An excerpt from James Madison's Federalist Number 57 should conclude this argument:

"I will add as a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments of which few governments have furnished examples; but without which every government degenerates into tyranny. If it be asked what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer, the genius of the whole system, the nature of just and constitutional laws, and above all the vigilant and manly spirit which actuates the people of America, a spirit which nourishes freedom, and in return is nourished by it.

If this spirit shall ever be so far debased as to tolerate a law not obligatory on the Legislature as well as on the people, the people will be prepared to tolerate anything but liberty."

Per 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on 6 November, 2019.



Matthew Paul Borowski
Reg. No. 58580-060
USP Marion
P.O. Box 1000
Marion, Illinois 62959