

No.
In The
Supreme Court of the United States

ROBERT EVERY

Petitioner

v.

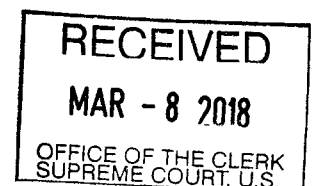
U.S. DEPARTMENT OF VETERANS AFFAIRS; U.S.
GENERAL SERVICES ADMINISTRATION; MICHAEL
MAYO-SMITH, DIRECTOR V.A.VISN 1; RYAN LILLY,
DIRECTOR OF TOGUS VA MEDICAL CENTER; KEITH
WAYE, SBA, SALVATORE VOTER, TOGUS VA
MEDICAL CENTER; EDWIN LEE, TOGUS VA MEDICAL
CENTER, JANE OR JOHN DOE

Respondents

On petition for a writ of Certiorari
To the First Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

The case went to the District Court for the State of New Hampshire where Judge Landya McCafferty did not dismiss it for cause as the government requested. Her Honor did say that the case should be brought in the Court of Claims. The petitioner then brought only the issue of venue to the Appellate Court for the First Circuit and First Circuit affirmed the decision of the District Court as to venue.

QUESTION PRESENTED FOR REVIEW

The question before the Court is one of jurisdictional venue – whether the case belongs in Federal District Court for the State of New Hampshire or the Court of Appeals in Washington D.C.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page

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IN THE
SUPREME COURT OF THE UNITED STATES

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States First Circuit Court of Appeals appears at Appendix A to the petition and is unpublished.

No petition for rehearing was timely filed in this case.

The opinion of the United States District Court for the District of New Hampshire appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States First Circuit Court of Appeals entered judgment was December 14th, 2017

No petition for rehearing was filed in this case.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment: "Congress shall make no law ...
abridging the freedom of speech..."

Fifth Amendment: "No person shall... be deprived of life,
liberty, or property, without due process of the law..."

18 U.S.C. § 1621: Whoever

In any declaration, certificate, verification, or statement
under the penalty of perjury as permitted under section
1746 of title 28 United States Code, willfully subscribes as
true any material matter which he does not believe to be
true;

Is guilty of perjury..."

STATEMENT OF THE CASE

The question of venue revolves around several important issues, and after a brief overview of the background, each will be explored.

The background: The petitioner is a certified service disabled veteran by virtue of a zero percent disability rating for having his eardrums blown out in Vietnam while ordnance officer of Navy Attack Squadron 147. The petitioner would also like to emphasize that's a far cry from being a ground pounder when mortars are raining down or pushing a stick forward to begin a bomb run with multiple Surface to Air Missiles and heavy triple A coming your way.

The petitioner is also president of Esterhill Boat Service Corporation. (Esterhill) Esterhill owns an architect designed, elevator serviced, medical building across from Rumford Hospital in Rumford, Maine. The Rumford VA clinic was across the street in an old former nurse's dormitory that Rumford Hospital owned. When the lease was coming up Esterhill tried to get Togus VA Medical Center to look at its building and was stonewalled. The VA extended the lease with the hospital for a year rather than put it out to bid, and still wouldn't look at the medical building owned by Esterhill. It was only when the petitioner said he was a service connected veteran, and asked where they were in relation to fulfilling their 3%

mandate in relation to the Veterans Act of 2006, that the VA changed course.

Everyone liked the clinic, the providers and veterans alike – in fact, a contracting officer said the medical building had the best record and lowest cost of all Togus VA outpatient clinics.

Bearing in mind that Togus VA Medical Center is the lowest ranked VA Medical Center in New England, when the lease was expiring Togus called for the clinic to be on one floor and disqualified us. In the Esterhill medical building, (designed by Togus) primary care was on the first floor and mental health on a different floor – the same as at Togus VA Medical Center. The mental health provider said both he and his patients preferred that, and he told that to the inspection team rating properties for the new contract.

So what happened? Unknown to the petitioner, there was political pressure put on Togus VA Medical Center to locate the clinic in an old, dilapidated mill building with punched out windows, no parking, a chemical storage facility in one end, and a roof which later blew off in a windstorm. The same building the Town of Rumford had been given for a dollar to get rid of. The closest parking was a dirt lot 500 feet away that didn't belong to the building – and miraculously, the bid specifications said parking could be 500 feet away.

Have you ever seen an old vet with a cane in each hand struggling to walk 25 feet in six inch steps? How about 500 feet over ice and snow covered streets?

The petitioner raised the issue of parking along with the general overall condition of the building. At that point, the VA and its agents went after the petitioner – the only thing Togus VA Medical Center agents didn't do, was give the petitioner a tee shirt with a bull's eye on the front and back. As a result of the issues raised, the old mill building didn't submit a bid and there was only one other bidder beside Esterhill.

The other bidder had a long deserted building that had flooded below the 100 year flood, but Togus VA Medical Center administrators took that bid – despite the fact it was double Esterhill's bid. Then 10 weeks after the bid was initially awarded, Togus VA Medical Center administrators, without coming out with a new bid, illegally doubled both the amount of money and length of the bid in a sweetheart deal for that bidder. Even after all this, the bidder defaulted on the contract. All of this was done to hurt the petitioner for pointing out that what they were doing, was not only wrong, but illegal.

Beyond this, members of the inspection team skipped over a large portion of the rating sheets and deliberately lowered the score of Esterhill. Esterhill would have prevailed in the inspection if this hadn't happened. The VA agents weren't mad at the business, just the petitioner. In addition, the inspection team said they discussed the mental health provider's preference for the third floor and decided the petitioner (as an individual) had rehearsed the mental health provider to make the mental health provider say that he was better able to calm his patients in the quietness of his own area and that his patients preferred it. (The contracting officer actually stated (under oath) in his official report to the GAO, that

the inspection team had discussed the mental health provider's statements, and the contracting officer put in his report to the GAO that the "... personnel on the inspection team later said that they thought the doctor had been rehearsed by Mr. Every."

The petitioner doesn't even know the mental health provider. The VA scheduled the inspection visit as well as the mental health provider's appointments. When the inspection team walked by his office, his door was open and he didn't have a patient – something over which the petitioner had no control.

When the contract was again put out to bid the petitioner was told he was disqualified and couldn't bid – even as a service disabled veteran. This occurred despite the clear intent of 38 U.S.C. Sec. 8128. (For some reason, that bid was never awarded, and Esterhill has kept the contract through a series of extensions.)

Since that time, the petitioner has been subjected to even more egregious actions, designed to single out and punish the petitioner, but these are beyond this brief background.

The VA has been out to get the petitioner since then – the same as the shameful treatment of Doctor William Weeks. (Attachment C) As you read about Doctor Weeks, please bear in mind that Doctor Weeks was on the school board, and was church treasurer, both usually unpaid and time consuming – not something a crook would ordinarily do. The prosecution also took place in VISN 1 – the same VISN headquarters for the actions in the present petition before the Court. Lastly, when you set out to discredit and

destroy an individual – a family and marriage can, and do, become casualties. At that point, it's no longer a contract dispute.

REASONS FOR GRANTING THE PETITION

The first issue is that of standing. Does the petitioner have standing to go before the Court of Claims? The petitioner maintains he does not. He does not hold a contract with the VA.

The contract is held by Esterhill Boat Service Corporation – not the petitioner. Esterhill and the petitioner are separate legal entities and there is a legal wall of separation between the petitioner as an individual, and Esterhill Boat Service Corporation. As such, the petitioner believes the Court of Claims would rule that the petitioner has no standing to bring this case before them as a contract dispute because the petitioner doesn't hold the contract. Furthermore the petitioner maintains, and the VA's own records show it to be true, that the VA's actions were directed against him as an individual. There is no other venue for the plaintiff, as an individual, than District Court.

The VA has used its leverage in the contract process to punish the petitioner for speaking up and trying to correct a process gone astray. The target is the petitioner – just as it was Doctor Weeks.

It is true Congress has given special emphasis to the relationship between service disabled veterans, as well as any business controlled by them, and the Department of

Veterans Affairs. This is clearly shown in the Veterans Act of 2006. It is also true that the clear intent of Congressional legislation is to give preference to service disabled veterans, as seen in the Court's recent decision of *Kingdomware Technologies, Inc v. United States*, 579 U.S. (2016). However, that does not change the fact that the target is the petitioner – not Esterhill. Nor does it change the fact the petitioner is a separate legal entity from Esterhill.

When VA agents are unchecked in their behavior, are willing to sell veterans down the road, lie under GAO oath, and conduct illegal bids, the petitioner maintains that crosses the line and becomes a tort. This case is not a case about the per unit price of widgets, Rather, it's about an attempt by agents of the VA to silence a critic of decisions that are not only nonsensical – but illegal. To punish the petitioner they cheated in their evaluation of the bid, took a bid double that of the petitioner's business, colluded together about the mental health provider's statements to the petitioner, lied under oath to the GAO about the petitioner, and then doubled the length and time of a bid without advertising – only to have the bidder default – just to hurt the petitioner. This conduct crosses the line and represents a carefully orchestrated attempt to inflict harm – a tort – on the petitioner. 28 U.S.C §1491 (a) (1) specifically prevents the Court of Claims from hearing cases “sounding in tort”.

For an analogous situation, if a party tries to do away with a person by running a loaded, forty ton dump truck into their car and severely injures the individual, it doesn't make it a motor vehicle violation. It is assault because the person behind the wheel possessed both motive

and intent (Mens rea) to hurt someone. The actions of the VA agents were directed with full knowledge of their illegality. Their actions were designed to hurt and punish the petitioner, as an individual, for exercising the right of free speech to correct a course of action gone astray. There are many other instances beyond the scope of this Petition, and luckily, the VA does not have a forty ton dump truck.

The VA has a long history of punishing those who draw attention to the repeated failures of some of its administrators. These particular actions were directed against the petitioner as an individual and for this reason the petitioner maintains that District Court is the proper venue. As any citizen, the petitioner possesses the Constitutional safeguards affording the right of free speech, due process, and equal protection, without the specter of retaliatory action – particularly that of a governmental agency whose sole purpose is reflected in Abraham Lincoln's mission, "To care for him who shall have borne the battle and his widow and his orphan".

When VA agents ignore their sworn duty to the government, their oath, their duty to taxpayers, and finally, to veterans who were willing to sling a rifle over their shoulder and do what any sane person would rather avoid, they are, and should be, accountable.

Congressional and Executive intent in promoting Lincoln's mission is reflected in such legislation, as the Veterans Act of 2006, and the recent 2017 Department of Veterans Affairs Accountability and Whistleblower Protection Act. These measures were necessary, because a long list of VA administrators think they are above the law.

Let's now look at another reason why proper venue is District Court. To do this, let's turn to the case of Doctor William Weeks – a case brought by the Government in the United States District Court for the District of Vermont. (Case No. 1:09-CV-122)

Briefly, Dr Weeks, after writing a series of acclaimed articles critical of the Department of Veterans Affairs over mental health care, was charged by the United States Department of Veterans Affairs and the Government, with five misdemeanor criminal counts of violating Federal law prohibiting conflict of interest in relation to a contract.

It is disingenuous for the Government to argue the present case belongs in the Court of Claims when they charged Doctor Weeks in United States District Court for the District of Vermont. (Case No. 1:09-CV-122) (Both the Tucker Act and the Alternative Dispute Resolution Act (“ADRA”) were codified when it occurred. If it was a contract dispute, as the Government argues in the present case, it should have been brought in the Court of Claims. If it was as a result of a tort, so too, is the present case. 28 U.S.C. § 1491 (a) (1) specifically excludes the Court of Claims from hearing cases “sounding in tort”.

Beyond the criminal case the Government filed in the District Court, the Government also filed a civil case against Doctor Weeks in the same Court on May 5, 2009. (1:09-CV-122) (Document # 1) Again, after the codification of the Tucker Act and the Alternative Dispute Resolution Act which the Government maintains precludes the petitioner from bringing this action in the district court.) Doctor Weeks then brought a civil counter claim against the VA and its administrators in the same Court.

.After Doctor Weeks was fully acquitted of all five counts by a jury, the Government settled his civil claims – but not before ruining his life. These actions arose out of Doctor Week’s participation in contracts and were all brought in the United States District Court for the State of Vermont.

Both this case and that of Doctor Weeks are the same because both are the result of retaliatory action – the fact that the Government was the petitioner in one, and the defendant in the other, does not allow the Government to cherry pick the venue and say we can bring an action in District Court, but the petitioner cannot. The Government deliberately chose to bring both criminal and civil charges in a contract dispute involving Dr Weeks in Federal District Court. Why? The Government was doing its best to silence an individual trying to focus attention on poor mental health practices by VA administrators. In the petition before you, the petitioner is trying to focus attention on not only poor practices, but illegal behavior that crosses the line to become tortuous behavior

The Government wants the case in the Court of Claims because that venue is more favorable to the Government, both as a venue and logistically. However, what is fair for the Government is fair for the petitioner. This Court is the only protection standing between the petitioner and the treatment the VA gave Doctor Weeks.

The petitioner also realizes that while there may be victors, there are no winners in a courtroom. Before resorting to the Court, the petitioner initially, and as new circumstances arose, respectfully contacted the contracting officer, the head of Togus VA Medical Center, the Director of VISN 1 (in charge of the VA New England region) the

Secretary of the VA, and the VA Inspector General. Nothing was ever done. Everything was referred back to Togus VA Medical Center administrators – the offenders – for review.

In fact, in response to the petitioner's letter to the Inspector General concerning negative statements made about him by contracting personnel at Togus VA Medical Center, the petitioner received a form letter from the VA Inspector General's Office, telling the petitioner if he wasn't satisfied with his health care, he should take it up with VISN 1, the VA Regional District in charge of VA New England healthcare. Nothing was done, and VA agents only intensified their efforts against the petitioner. This is particularly egregious when the VA Inspector General's Office was in the forefront of leading the charge against Doctor Weeks.

Let's now look at the First Circuit Court of Appeals arguments for venue and the principal laws and cases cited by that Court for venue. We will only look at cases cited by the First Circuit because it is that Court for which the Writ of Certiorari is sought.

The First Circuit Court in its decision cited only one law. "See 28 USC § 1491 (b) (1), (vesting exclusive jurisdiction over disputes regarding bid solicitations by federal agencies in the Court of Federal Claims)"

28 U.S.C. §1491 (a) (1) specifically excludes the Court of Claims from cases "sounding in tort". The petitioner maintains that the present case represents tortuous behavior on the part of the defendants – just as the government maintained with Doctor Weeks.

28 U.S.C. §1491 (b) (1) says: "Both the United States Court of Federal Claims, and the district courts of the United States have jurisdiction to render judgment..." The case of Doctor William Weeks in the United States District Court for the State of Vermont is illustrative. The petitioner maintains he has no standing before the Court of Claims because he is a separate legal entity from Esterhill, does not hold the contract, is not bound by the Tucker Act or ADRA, and that the actions of the defendants were directed against the petitioner as an individual.

The petitioner's claims against the agents are not for monetary gain (The action – at this point – seeks damages of \$1 against each of five agents for a total of \$5.) The petitioner brought the action because it's an affront to every veteran to seek to locate a clinic in a dilapidated, long abandoned building with no parking and a bulk chemical storage facility in the other end, and then going after the petitioner for trying to correct a course of action gone astray. The petitioner maintains the VA agent's behavior breached the threshold of tortuous conduct.

In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) government agents may well have been acting in the belief what they were doing was right, given the influence drugs have had on our society. In the present case (one in which there were no exigent circumstances) VA agents crossed over the center line of the law, deliberately turning their dump truck into the petitioner's lane. The agents, under the guise of contract actions, sought retribution against the petitioner for speaking out. The agents deliberately ignored the right of free speech, due process, and equal protection in their attempt to inflict tortuous harm on the petitioner.

Some VA agents have a long history of unchecked abuse of power. The Veterans Act of 2006, as well as the 2017 Department of Veterans Affairs Accountability and Whistleblower Protection Act are indicative of the need to check the behavior of VA agents, something the Veterans Affairs Agency has been unwilling or unable to do. In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) the Court said “... that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting – albeit unconstitutionally – in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority but his own”

Unlike the *Bivens* case, there were no exigent circumstances. In the present case, the agents of the VA were afforded many chances to alter course. Instead, they became more dedicated to the task of punishing the petitioner – actions the petitioner maintains were done by VA agents, in tort, to hurt the petitioner. Like the *Bivens* case, both the District Court and Court of Appeals initially denied the petitioner’s claim.

Looking at *Gonzalez v. Velez*, 16-1572 (July 24, 2017, First Circuit), an extremely convoluted case, there is a significant difference. *Gonzalez* was a government employee and had standing under the Civil Service Reform Act by virtue of being a government employee. The petitioner in the present case is an individual who does not hold a contract with the Department of Veterans Affairs and is not subject to the Court of Claims.

While both Congressional and Executive laws clearly recognize a favored relationship between a business owned

by a veteran and the veteran owning it – there is a legal wall of separation between the petitioner and Esterhill. The actions of VA agents were directed against the petitioner, and the petitioner maintains he does not have standing before the Court of Claims.

Further, the First Circuit, in its Gonzalez decision, cited as its basis, *Ziglar v. Abbasi*, 137 S. Ct 1843 (2017). The petitioner would now like to now look at that case.

Ziglar v. Abbasi, 137 S. Ct 1843 (2017) is different from that of the petitioner. First, the petitioners in that case were not only illegally present aliens, but they were suspected of possible terrorist affiliations – detained in response to the September 11th attacks on our nation. In contrast, the petitioner is a veteran, who while not a hero, was in Vietnam and worked and lived with many who risked their lives on a daily basis.

The Court, in their decision, rightfully found that *Ziglar v. Abassi*, 137 S. Ct 1843 (2017) bore little resemblance to a Bivens claim. Even more telling is the language of 28 U.S.C. § 1491 (b) (3), which says: “In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.”

Ziglar v. Abassi, 137 S. Ct 1843 (2017) was about national security. This case is not. In its essence it is about Department of Veterans Affairs agents making their own law while knowing what they were doing was wrong. All of it was done to hurt the petitioner without any regard to taxpayers or veterans. Even more galling, it was a

premeditated course of action, initiated and sustained over a long period of time, and without any exigent circumstances. Our sovereignty wasn't under attack, nor had people senselessly died.

The Veterans Act of 2006 defines a special relationship between veterans and the Department of Veterans Affairs. It applies only to the Department of Veterans Affairs. The reason for this is that many VA agents and administrators have ignored not only Abraham Lincoln's mission, but veterans and taxpayers, at the expense of advancing their own agenda. VA agents are subject to the same Constitutional privileges and restraints as the petitioner when they go home at night. However, when they report to work, some VA agents think they shed the responsibility our Constitutional protections afford to others, just as they shed their coats when they arrive in the office.

Nevertheless, they are agents of the government, and there are not two sets of Constitutional laws – one for agents of the VA and one for everyone else, particularly in light of the Court's quote in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) "... that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting – albeit unconstitutionally – in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority but his own"

We'll now look at the final case cited by the First Circuit in its decision, *Speilman v. Genzyme Corp.*, 251 F.3d 1,4, (First Cir. 2001).

The Court said the case should not go forward because the petitioner asked for only \$1 against each of five defendants, and that is below the Federal requirement to bring the case before the Federal Court.

In the original complaint filed in the District Court of New Hampshire, the petitioner asked for other relief that wasn't of a monetary nature. In the petitioner's amended complaint and its filings, the petitioner restated the jurisdictional provisions of the initial complaint, and focused on the behavior of the named agents, because, by their actions, the agents have shown the desire to punish the petitioner, or as in the case of Michael Mayo Smith (The Director of VISN 1) have done nothing when such conduct was brought to their attention. Without the case going forward, the petitioner has no means of identifying further misconduct or those involved in such conduct.

To illustrate this, during a later inspection of other properties, (The one for which VA agents told the petitioner he was pre disqualified.) the petitioner heard about negative comments the VA inspection team made to unrelated parties. When he requested the identity of the inspection team, Togus VA Medical Center charged the petitioner \$181.67 for one page – a fee the petitioner paid. (They could have simply forwarded the email naming the inspection team members.) To complete the request, the Togus VA Medical Center wanted \$7905, 79. (#5 amended complaint.)

The law allows Federal Courts to hear any case alleging a violation of Constitutional laws – laws such as due process and equal protection.

In addition, #7 of the amended complaint asks the court for the ability to name additional defendants. Much of what happened remains cloaked without the case going forward.

Justice Owen Roberts, in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938) said, "It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." The validity of the amount of damages claimed is a threshold issue of law for the judge to decide at the commencement of the case. The petitioner maintains the VA obstructed his requests under FOIA, and the facts of the case are not, and cannot be fully known without the case going forward.

Having said that, this case is not about money but changing behavior. We seem to have forgotten we are all Americans. We seem fixated upon money being the cure for all ills. It is not, and hopefully, we are better than that.

The petitioner realizes that while there are victors in court there are no winners. The case was only brought forward because the VA referred everything back to the Togus VA Medical Center administrators. Unfortunately some VA administrators have repeatedly put their own agenda ahead of veterans. How can an agency that refers complaints back to the perpetrators stop abuse?

The petitioner has the highest respect for the law and this Court. If this Petition for Certiorari is granted, the petitioner will engage an attorney for representation before the Court.

The petitioner would like to close with a story that bears on the final case cited by the First Circuit in their decision, *Spellman v. Enzyme Corp.*, 251 F.3d 1,4, (First Cir. 2001). The story is quoted from the petitioner's background statement in the original complaint.

"It was the early 70's and our squadron had just returned from another combat deployment to Vietnam. We were having a party as several of us were either leaving the Navy or transferring to other squadrons. I was talking to the Skipper. He had a highball in his hand and then something happened I've never forgotten. He studied me a second, shifted the glass to his left hand, made the sign of the cross, and said, "Bob, I'm not a brave man - inbound to target I do everything I can to dodge the triple A (anti-aircraft fire) and SAMS (surface to air missiles) - I jink and dodge with the best of them."

"Then he hesitated and said, "I've taken a check from Uncle for almost 20 years and during the final seconds of bomb run I bore straight in," then added in a lower voice, "I guess I owe the government that."

"He was lost the next deployment - the last A-7 attack plane of the War."

If we think he did it for the money, we might as well hang a "For Sale" sign on the Statue of Liberty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Very respectfully submitted,

Robert Every, pro se

Dated: March 2018