

However, upon rereading *Guirlando*, Corcoran wavered just a bit. "So, no legally significant act in the U.S.? I don't know. Comparing these two cases leaves me wondering."

But the decision in *Guirlando* did at least make "common sense," Corcoran said. "Almost everything of legal significance happened in Turkey, and the Turkish bank agreed to suit there."

By TOM P. TAYLOR

Full text at <http://pub.bna.com/lw/090478.pdf>.

United States—Constitutional Torts

Public Health Service Employees Are Immune From *Bivens* Suits Related to Medical Duties

Public Health Service employees enjoy absolute immunity from constitutional tort claims arising from their performance of medical and related functions in the scope of their employment, the U.S. Supreme Court ruled unanimously May 3, resolving a circuit split (*Hui v. Castaneda*, U.S., No. 08-1529, 5/3/10).

The plaintiffs, whose decedent died after admitted medical malpractice by PHS physicians, argued that PHS employees, like federal employees generally under the Westfall Act, 28 U.S.C. § 2679(b)(2)(A), are immune from ordinary tort claims but are subject to the money damages remedy for constitutional torts recognized in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

But Justice Sonia Sotomayor said that 42 U.S.C. § 233(a), which predates *Bivens* and makes the FTCA remedy against the United States "exclusive of any other civil action or proceeding" for any personal injury caused by a PHS officer or employee performing a medical or related function "while acting within the scope of his office or employment," by its terms "limits recovery for such conduct to suits against the United States." She found it significant that Section 233(a) lacks any exception for *Bivens* suits of the kind written into the Westfall Act. Arguments of the plaintiffs and amici that failure to recognize a remedy is against the public interest must yield to the statutory text, she said.

Multiple Claims Asserted. The decedent, while a detainee of U.S. Immigration and Customs Enforcement, repeatedly complained of a penile lesion. He alleged that the defendants, a PHS physician and administrator at the ICE detention facility, put off his requests for a biopsy for almost a year until four different specialists had recommended one. The biopsy proved positive. Although the decedent's penis was amputated the next day, the cancer had spread, and he died a year later.

The decedent filed this suit three months before his death. His estate and heirs were substituted as plaintiffs. They alleged medical negligence claims and violations of the decedent's Fifth, Eighth, and 14th Amendment rights. The government admitted liability for medical negligence under the FTCA. But the individual PHS defendants asserted immunity under Section 233(a).

The district court denied immunity, stating that under *Carlson v. Green*, 446 U.S. 14 (1980), a *Bivens* remedy is unavailable only when an alternative remedy is both expressly declared to be a substitute and can be

viewed as equally effective, or when special factors counsel hesitation against recognizing the remedy. Section 233(a) was enacted before *Bivens* and makes no mention of the Constitution or recovery under it, the district court noted.

The U.S. Court of Appeals for the Ninth Circuit affirmed, 546 F.3d 682, 77 U.S.L.W. 1219 (9th Cir. 2008), reasoning that under *Carlson*, the FTCA remedy available under Section 233(a) is not equally effective as a *Bivens* remedy, the latter of which affords punitive damages, a jury trial, and uniform federal rules not available in malpractice actions under the FTCA. Acknowledging that *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000), had held to the contrary, the Ninth Circuit said that *Cuoco* had erroneously relied on "dictum" in *Carlson* referring to Section 233(a) as an example of Congress's "practice of explicitly stating when it means to make FTCA an exclusive remedy."

It Meant What It Said. Reversing, the Supreme Court said, "Our inquiry in this case begins and ends with the text of the statute." The statutory phrase stating that the FTCA remedy "shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee" underscores that recovery for PHS employees' medical-related actions is limited to suits against the United States, the court said. It added that the passage from *Carlson* referred to by the Ninth Circuit as "dictum" did indeed recognize Section 233(a) as an exclusive remedy, and its meaning "has become no less explicit since we last made that observation."

Section 233(a)'s preceding *Bivens* does not undermine its exclusivity, the court said: "Language that broad easily accommodates both known and unknown causes of action." The later-enacted Westfall Act's inclusion of an exception to immunity for *Bivens* claims is "powerful evidence" that exclusivity itself—whether in the Westfall Act or Section 233(a)—does not imply a *Bivens* exception, the court said.

Two Separate Inquiries. The Ninth Circuit's reliance on *Carlson* was misplaced, the court said. "There are two separate inquiries involved in determining whether a *Bivens* action may proceed against a federal agent: whether the agent is amenable to suit, and whether a damages remedy is available for a particular constitutional violation absent authorization by Congress." *Carlson* involved only the latter inquiry, addressing whether damages were an available remedy for an Eighth Amendment violation, the court said; it did not broach whether the defendants were amenable to suit. In contrast, the issue here is whether the defendants enjoy immunity shielding them from suit, the court said. The sole issue is thus whether Section 233(a) confers that immunity, it said.

The plaintiffs argued that Section 233(a)'s reference to 28 U.S.C. § 1346(b) incorporates the entirety of the FTCA, including the Westfall Act and its exception for *Bivens* claims. But the court said that Section 233(a) refers only to the "remedy against the United States provided by section 1346(b) and 2672"; it does not refer to Section 2679(b)(2)(A), the Westfall Act exception. Moreover, the latter provision only refers to the immunity set forth in "Paragraph (1)" of the same provision, and thus does not refer back to Section 233(a), the court added.

The court acknowledged noting in *United States v. Smith*, 499 U.S. 160 (1991), that Section 2678(b) "applies to all federal employees." But it said that in that case, "we had no occasion to consider whether the *Bivens* exception in § 2679(b)(2)(A) impliedly repealed pre-existing immunity provisions to the extent of any inconsistency." Repeals by implication are not favored, and the plaintiffs did not point to anything in Section 2679's text or history to overcome that rule, the court said.

The plaintiffs argued that Section 233(a)'s lack of a provision, analogous to that in the Westfall Act, for the attorney general's certification that a PHS employee was acting within the scope of his or her employment at the time of the challenged action indicates that PHS employees must rely on the Westfall Act certification procedure. But the court said that the Section 233(a) scope of employment proof may be effected under the "ordinary rules of evidence and procedure."

Attorneys See More Clarity. Adele P. Kimmel, managing attorney for Public Justice, Washington, D.C., who represented the plaintiff's family, told BNA April 3 that, while the family retains a viable claim under the FTCA, the uniformity of federal law available in *Bivens* suits affords more "clarity" than the state law governing malpractice claims under the FTCA. Conflicts as to the applicable state law and varying damages caps may complicate litigation in FTCA suits, she said.

An attorney for the PHS defendants was not immediately available for comment May 3.

Jonathan S. Franklin, Fulbright & Jaworski, Washington, D.C., who filed an amicus brief on behalf of national experts on health services for detained persons in support of the plaintiffs, told BNA May 3 that the practical impact of the ruling on the parties here may be limited, given that the plaintiffs may still pursue an FTCA malpractice claim. "More broadly," the decision may lead to the "bizarre result" that PHS doctors will have greater immunity than other federal doctors as well as state and local government physicians with whom they work side by side, Franklin said. (Making the same point, Kimmel noted that federal prisons, for example, are staffed by both Bureau of Prisons and PHS physicians.) That incongruity is now for Congress to address, Franklin said.

Asked whether the ruling is part of the Supreme Court's trend of cutting back on *Bivens* claims generally or more a function of the particular statute at issue, Franklin said that it appears to be the latter. There was a broader degree of consensus in this case that is not necessarily seen in other *Bivens* cases, he observed.

Timothy B. Hyland, Stein, Sperling, Bennett, DeJong, Driscoll & Greenfeig, Rockville, Md., who filed an amicus brief on behalf of commissioned PHS officers, the American Medical Association, and others in support of the defendants, told BNA April 3 that the ruling will make it easier for PHS to deploy its physicians to trouble spots throughout the nation and the world where they are needed. The Ninth Circuit ruling had made that difficult because of differences among the states that give rise to a "malpractice trap," he said. The physicians are "obviously pleased" with the ruling because they can now be deployed without the "gun held to their head" in the form of potential *Bivens* liability, he said.

Hyland saw the ruling as being limited to the interpretation of Section 233(a) rather than representing any larger trend in *Bivens* case law. He noted that, while patients of PHS physicians may still assert FTCA claims in connection with their treatment, the physicians would participate as witnesses in such litigation, which compared to being parties in *Bivens* suits is a more "comfortable place to be."

Elaine J. Goldenberg, Jenner & Block, Washington, D.C., argued for the PHS defendants. Assistant to the Solicitor General Pratik A. Shah argued for the United States as amicus curiae supporting the defendants. Conal Doyle, Willoughby Doyle, Oakland, Calif., argued for the plaintiffs.

By THOMAS D. EDMONDSON

Full text at <http://pub.bna.com/lw/081529.pdf> and 78 U.S.L.W. 4367.

Cases In Brief

Rehearing Ahead in Felon Disenfranchisement Case

The U.S. Court of Appeals for the Ninth Circuit April 28 granted rehearing en banc in a case in which a panel held that Washington state's felon disenfranchisement law violated Section 2 of the Voting Rights Act. The panel ruling, 78 U.S.L.W. 1395, agreed with the district court's finding that there was "compelling" evidence of racial bias in the state's criminal justice system, and it decided that the interaction of that bias with the felon disenfranchisement law resulted in a denial of the right to vote "on account of race or color" within the meaning of Section 2 of the VRA. *Farrakhan v. Gregoire*, 9th Cir., No. 06-35669, order granting en banc rehearing 4/28/10.

Incontinent Court Reporter Loses ADA Suit

An Illinois court reporter with incontinence fired after refusing proposed accommodations has no Americans with Disabilities Act or Rehabilitation Act claim because in-court reporting was an "essential function" of her job and she refused a reasonable accommodation that would permit her to perform that function, the U.S. Court of Appeals for the Seventh Circuit ruled April 7. Assuming that the employee had a disability within the meaning of the statutes, she was not a "qualified individual with a disability" because she could not perform the "essential" job function of rotating among different courtrooms to do in-court reporting, the court said. Even if she were a "qualified individual," the court said she cannot prove an ADA failure to accommodate claim because she rejected the employer's proposed reasonable accommodation of placing her in courtrooms close to bathrooms, not assigning her to courtrooms with scheduled trials, and arranging for her to give a "high sign" to judges if she needed to take an immediate bathroom break. The employee's suggested accommodation that she be allowed to work exclusively in a court reporter control room in the DuPage County courthouse and excused from live courtroom duty was unreasonable under the ADA, the court ruled. The act does not require an employer to create a new position or excuse an individual from performing essential job functions in