

Civil Rights Section

A Publication of the American Association for Justice

Vol. 16, No. 2, Winter 2009

INSIDE

- 2 2008-2009
Section Officers
- 4 New Section
Members, Welcome!
- 6 Cruel and Unusual:
How the Ninth Circuit
Changed the
Landscape of *Bivens*
Litigation under the
Eighth Amendment

Letter from the Chair

The Leonard Weinglass Award

By Adele P. Kimmel, Washington, DC

Every year, the Civil Rights Section presents the Leonard Weinglass in Defense of Civil Liberties Award to honor an individual who has made a significant contribution to the defense of our civil rights and civil liberties. I am pleased to announce that the 2009 Weinglass Award will be presented during the AAJ Annual Convention in San Francisco.

The Weinglass Award is given to an individual who has made a notable contribution to the defense



Adele P. Kimmel

of civil liberties by bringing, trying, or resolving a suit, or by otherwise protecting or advancing civil liberties in a way that has had a significant impact in the past year. Although we prefer to give the award to an attorney, this is not a requirement.

The Weinglass Award is named after civil rights lawyer Leonard Weinglass, who has long demonstrated a strong commitment to

continued on page 3

Mark Your Calendars...



**AAJ 2009
Annual Convention**
July 25-29
San Francisco, CA

When Does a Public Employee Speak “As a Citizen”?

By Frank Corrado, Wildwood, NJ

Cases that ask whether the First Amendment protects public employees’ speech have always vexed the courts. They require a judge to navigate between opposite positions. First, the court must recognize that public employees have the same rights as any citizen to speak about issues of public importance. Second, the court must account for the government’s right, like that of a private employer, to control its employees’ speech.¹

Until 2006, the Supreme Court took a middle course between these extremes.

Beginning with *Pickering v. Board of Education*, the Court held that a public employee who speaks “as a citizen on a matter of public concern” will receive First Amendment protection unless his speech so disrupts the workplace as to outweigh its value to the public.² The “*Pickering* balance,” as it has come to be known, represents the Court’s effort to permit the government to function as an employer without allowing it to extinguish its employees’ speech rights.

continued on page 2

Public Employee cont. from page 1

In applying this balance over the years, lower courts developed a two-step analysis, asking first whether an employee's speech involved a matter of public concern and then whether the employer's need for an efficient, effective workplace trumped that public interest. That the employee may have spoken pursuant to his job responsibilities did not determine whether the employee spoke "as a citizen."³

In 2006, however, the Supreme Court decided *Garcetti v. Ceballos*.⁴ *Garcetti* involved a deputy Los Angeles district attorney who wrote an internal memo questioning the veracity of a police affidavit. He claimed his superiors retaliated against him for writing it.

The Ninth Circuit said the First Amendment protected the memo. It held that the memo concerned a public issue whose importance outweighed the employer's interest in efficiency. The memo did not forfeit First Amendment

protection merely because Ceballos wrote it pursuant to his prosecutorial responsibilities.

In a 5-4 decision written by Justice Kennedy, the Supreme Court reversed. The Court held that the "controlling factor" on the issue was that Ceballos's "expressions were made pursuant to his duties as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case." Accordingly, the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."⁵

Garcetti thus indicates that the first element of the *Pickering* standard—the "public interest" prong—requires a determination of whether a public employee is speaking "as a citizen" rather than merely

continued on page 3

Back issues of Civil Rights Section Newsletters can be found on our Web site at www.justice.org/sections/civilrights.

This Section Newsletter is intended to be a forum of opinion and information pertaining to the interest of Section members. Unless specifically stated otherwise, its contents reflect the views of authors only, and should not be interpreted as a statement of the position or policies of AAJ or the Section itself.

Published material remains the property of AAJ. No material may be reproduced or used out of context without prior approval of, and proper credit to, this Section Newsletter.

Contacting AAJ

AAJ General Numbers

800-424-2725 or 202-965-3500

Sections, ext. 700

www.justice.org/sections
sections@justice.org

Membership, ext. 611

www.justice.org/resources
membership@justice.org

Litigation Groups, ext. 700

www.justice.org/litgroups
litgroups@justice.org

Meetings & Conventions, ext. 613

www.justice.org/convention
conventions@justice.org

AAJ Education, ext. 612

www.justice.org/education
education@justice.org

AAJ Exchange, ext. 615

www.justice.org/exchange
exchange@justice.org

2008–2009 Section Officers

Chair

Adele P. Kimmel
Public Justice, PC
1825 K St. NW, Suite 200
Washington, DC 20006
Phone: 202-797-8600 • Fax: 202-232-7203
akimmel@publicjustice.net

Chair-Elect

Barry H. Dyller
Dyller Law Firm
88 N. Franklin St.
Wilkes-Barre, PA 18701
Phone: 570-829-4860 • Fax: 570-825-6675
barry.dyller@dyllerlawfirm.com

Vice Chair

David M. Cedar
Merovitz, Cedar & Gruber, LLC
100 Century Pkwy., Suite 305
Mount Laurel, NJ 08054
Phone: 856-702-6630 • Fax: 856-702-6640
dcedar@mcglegal.com

Secretary

Herman Gerhard Guetersloh
Law Offices of Herman Guetersloh, LLC
1401 Forum Dr., Suite B
Rolla, MO 65402
Phone: 573-364-1600 • Fax: 573-364-1607
hgadvocate@hotmail.com

Treasurer

Susan Ann Silverstein
AARP Foundation Litigation
601 E St. NW, Room A4-150
Washington, DC 20049
Phone: 202-434-2159 • Fax: 202-434-6424
ssilverstein@aarp.org

Newsletter Editor

Jonathan Koles
Koles, Burke & Bustillo, LLP
2600 Kennedy Blvd.
Jersey City, NJ 07306
Phone: 201-200-0300 • Fax: 201-200-0410
jkoleslaw@aol.com

Immediate Past Chair

Joseph C. Grassi
Barry, Corrado, Grassi & Gibson, PC
2700 Pacific Ave.
Wildwood, NJ 08260
Phone: 609-729-1333 • Fax: 609-522-4927
jgrassi@capelegal.com

AAJ Sections Staff

Anne Doohan
Director

Scott Gehring
Content and Communication
Coordinator

Stuart Banashek
Associate Director

Lauren Khair
Office and Program
Assistant

David Ciesla
Editor of Legal Content

sections@justice.org
www.justice.org/sections

© 2009, American Association for Justice
Formerly Association of Trial Lawyers of America (ATLA®)
All rights reserved

Public Employee cont. from page 2

as an employee, measured principally by whether the speech is part of the employee's job. That approach appears to reflect the Court's concern that, absent some bright line to distinguish "citizen" from "employee" speech, courts will inevitably constitutionalize public employee grievances and whistle-blowing.⁶

That is an indisputably worthy concern. But as the *Garcetti* dissenters pointed out, focusing narrowly or exclusively on an employee's job responsibilities tips the Pickering balance strongly toward the government, and consequently imperils free speech values. If First Amendment protection depends entirely on whether an employee spoke as part of his job, significant amounts of speech about matters of public concern will lose constitutional protection. Moreover, the degree of protection will turn not on the speech's value to the public, but on who says it and to whom it is said.⁷ The same speech might receive different levels of constitutional protection on different occasions.

For example, in *Morales v. Jones*, the Seventh Circuit held that a police officer's report of police corruption to a district

attorney, rendered as part of his job duties, was not protected by the First Amendment, but that his deposition testimony on the same subject, given as part of a civil suit, was protected. The officer's job responsibilities included investigating and reporting police corruption, but did not include testifying in a civil suit.⁸ The court "recognize[d] the oddity of a constitutional ruling in which speech said to one individual may be protected by the First Amendment, while precisely the same speech said to another individual is not protected." But it believed *Garcetti* compelled that "odd" result.

Unfortunately, many of the lower courts that have decided public employee speech cases after *Garcetti* have taken a similar, almost mechanical, approach to whether an employee is speaking "as a citizen." Those courts have looked exclusively at whether the employee's job responsibilities include speaking on the relevant



Frank Corrado

subject. If so, that factor alone is dispositive, and the First Amendment does not protect that speech.⁹

A good example of this approach is *Tamayo v. Blagojevich*.¹⁰ There the interim director of the Illinois Gaming Board testified at a legislative hearing that the governor and two of his advisors improperly interfered with the board's performance by

misusing public funds and attempting to influence licensing decisions. The governor subsequently had her removed, and she sued, alleging a retaliatory violation of her First Amendment rights.

The court dismissed Ms. Tamayo's claim. It found she had a duty as IGB director to bring wrongdoing to the attention of the relevant supervisory bodies, including the committee charged with legislative oversight of gambling in Illinois. Because it believed her sworn

continued on page 4

Letter from the Chair cont. from page 1

defending our civil liberties. From his days representing the Chicago Seven (originally, the Chicago Eight) with partner William Kunstler to his more recent representation of the Cuban Five, Weinglass's clients are a "Who's Who" of politically targeted criminal defendants. For example, in addition to the Chicago Seven and the Cuban Five, Weinglass has represented Angela Davis; Ron Kaufman; Jane Fonda; Bill and Emily Harris (the kidnapers of Patty Hearst); Native American activists Jimi Simmons, Skyhorse, and Mohawk; and death row journalist Mumia Abu-Jamal.

Our Section sponsored a speech by Leonard Weinglass and awarded the first ever Weinglass Award to him at the 2004 AAJ Annual Convention in Boston. Since then, the Civil Rights Section has

presented the Weinglass Award to Public Justice Executive Director Arthur Bryant, for his precedent-setting work advancing the rights of women under Title IX of the Civil Rights Act, the federal law prohibiting sex discrimination in federally funded education programs; attorney Alan Graf, who used attorneys' fees that he was awarded in First Amendment protestor cases to set up a foundation to defend civil rights; and attorney Edward G. Kramer, for his incredible work combating discrimination in housing and predatory lending practices.

The person selected to receive the 2009 Weinglass Award will likely participate in, and be presented with the award at, our Section's CLE program at the Annual Convention in San Francisco. The Section's Executive Board has spent a lot of time planning our upcoming education

program and we are confident that it will be excellent.

The program is still pending final approval, but currently includes the following topics: valuing excessive force cases; the annual Supreme Court review of civil rights decisions; recent developments in fair housing cases on behalf of people with disabilities; the impact of the 2008 amendments to the Americans with Disabilities Act; and litigating cases on behalf of immigration detainees who have suffered medical neglect or abuse. Given the wide range of our Section members' practices, we are doing our best to ensure that our upcoming CLE program offers something of value and interest to everyone.

I look forward to seeing as many of you as possible at AAJ's upcoming Annual Convention in San Francisco. ■

Public Employee cont. from page 3

testimony to that committee fell within its expansive description of her “official duties,” the court said *Garcetti* compelled a holding that Ms. Tamayo’s speech was not protected by the First Amendment.¹¹

The court reached this result despite—and without considering—the obvious “public value” of Ms. Tamayo’s speech and despite her testimony having been given publicly and under oath to an arm of the legislative branch. In fact, the court went on to say that an employee, like Ms. Tamayo, “with significant and comprehensive responsibility for policy formation and implementation certainly has greater responsibility to speak to a wider audience on behalf of the governmental unit.”¹² In effect, the court proclaimed that the greater the public responsibility of the speaker, the less likely the First Amendment will protect the speech.

Such an approach may track the letter of *Garcetti*, but it ignores several salient aspects of the opinion. First, *Garcetti* makes clear that whether an employee speaks “as a citizen” or “pursuant to his official duties” requires a “practical” rather than a formal or mechanical inquiry.¹³

Second, *Garcetti* limits its holding to Ceballos’s disposition memo—a purely internal document. It did not consider other, more public speech by Ceballos, including remarks at a bar association

meeting and testimony for the defense at a suppression hearing. It left consideration of that speech to the lower court on remand.¹⁴

Third, *Garcetti* expressly recognizes categories of “employee speech” beyond the reach of its holding. It reserves the question whether academic speech—which implicates “additional constitutional interests” deriving from the notion of academic freedom—deserves First Amendment protection even when uttered pursuant to an employee’s “official duties.”¹⁵

In other words, the “bright line” test in *Garcetti* for what constitutes speech “as an employee” rather than “as a citizen” reflects an underlying concern with purely internal speech—speech for which “there is no relevant analogue to speech by citizens who are not government employees.”¹⁶ A mechanical approach to *Garcetti* that focuses on an employee’s job duties misses its rationale and, consequently, the actual teaching of the case.

Recently the Third Circuit handed down a decision that takes a more nuanced, and, therefore, more appropriate approach to *Garcetti*. *Reilly v. City of Atlantic City* involved an Atlantic City police officer who participated in an investigation of other Atlantic City police officers and subsequently testified at one officer’s criminal trial.¹⁷ When Reilly was subsequently disciplined for sexual harassment of a female officer, he claimed his superiors improperly enhanced the disci-

pline in retaliation for earlier investigation and trial testimony. He sued for violation of his First Amendment rights.

Defendants claimed Reilly’s speech, including his trial testimony, was uttered “pursuant to his official duties” and thus, under *Garcetti*, was not protected by the First Amendment. The court agreed that Reilly’s trial testimony “appears to have stemmed from his official duties in the investigation.” Nevertheless, to the extent he testified truthfully at the criminal trial, the court held that the First Amendment protected Reilly’s testimony.¹⁸

In reaching that conclusion, the court rejected an exclusive focus on whether Reilly spoke “pursuant to his official duties.” Instead, it framed the issue as whether Reilly spoke “as a citizen” or “as an employee.” Relying on a long line of Supreme Court cases, it noted that “every citizen” has a duty to testify truthfully “to aid in the enforcement of the law.” That duty is strong enough to override substantial claims of privilege and reflects the importance of truthful testimony in ensuring “the very integrity of the judicial system and public confidence in the system.” These interests, the court said, are of such constitutional magnitude that they deserve the protection of the First Amendment.¹⁹

The court found that *Garcetti* “offers

continued on page 5

New Section Members, Welcome!

★ Eleanor Capogrosso

Law Office of
Eleanor Capogrosso, Esq.
New York, NY

★ Sean Coutain

Skadden, Arps, Slate,
Meagher & Flom LLP
Palo Alto, CA

★ H. Duncan Garnett Jr.

Patten, Wornom, Hatten
& Diamonstein, LPC
Newport News, VA

★ Stephen Johnson

Ritchie, Dillard & Davies,
PC
Knoxville, TN

★ David Paul

Paul & Sugerman, PC
Portland, OR

★ Shelley Stangler

The Law Offices of
Shelley L. Stangler, PC
Springfield, NJ

★ Michael Studebaker

Law Office of
Michael Studebaker, LLC
Ogden, UT

★ Kevin Terry

Law Offices
of Kevin H. Terry
Houston, TX

Public Employee cont. from page 4

no express instruction on the application of the First Amendment to the trial testimony of a public employee.” It turned therefore to the principles it had previously discussed:

Much as the duty to testify is not vitiated by one’s role as a newsman, or as the President of the United States, the citizen’s obligation to testify truthfully is no weaker when one is employed by the government in any other capacity. Thus, the act of offering truthful testimony is the responsibility of every citizen, and the First Amendment protection associated with fulfilling that duty of citizenship is not vitiated by one’s status as a public employee. That an employee’s official responsibilities provided the initial impetus to appear in court is immaterial to his/her independent obligation as a citizen to testify truthfully.

When a government employee testifies truthfully, s/he is not “simply performing his or her job duties”; rather, the employee is acting as a citizen and is bound by the dictates of the court and the rules of evidence. Ensuring that truthful testimony is protected by the First Amendment promotes “the individual and societal interests” served when citizens play their vital role in the judicial process. Thus, the principles discussed in *Garcetti* support the need to protect truthful testimony in court.²⁰

This approach is truer to *Garcetti* than a purely formulaic inquiry into the scope of a public employee’s job duties. A moment’s reflection—to say nothing of a reading of the *Garcetti* dissents—will suggest numerous circumstances in which a public employee, in the course of discharging his job responsibilities, nevertheless speaks “as a citizen.” A professor at a state college, a prison doctor, a secretary faced with racist or sexist conditions at her workplace, or an auditor reporting embezzlement of public funds do not “simply perform their job duties” when they speak.

At a minimum, as the *Reilly* decision makes clear, any public testimony by a public official, even when he is “just doing his job,” implicates constitutional interests that require First Amendment protection. An inflexible focus on “job responsibilities” in that circumstance does not honor *Garcetti*; to the contrary, it subverts it.

It may be true, as the Third Circuit pointed out, that *Garcetti* has “narrowed the [Supreme] Court’s jurisprudence in the

7. *Id.* at 427 (Stevens, J., dissenting); 432-34 (Souter, J., dissenting); 447 (Breyer, J., dissenting).

8. 494 F.3d 590, 598 (7th Cir. 2007).

9. *See, e.g., Boyce v. Andrew*, 510 F.3d 1333, 1346-47 (11th Cir. 2007) (holding that social workers who complained to their supervisors and their union that child welfare managers were overworked and endangering children spoke as employees, not as citizens); *Phillips v. City of Dawsonville*, 499 F.3d 1239, 1241-43 (11th Cir. 2007) (concluding that the city clerk, whose position gave her control and accountability for city funds, acted within the scope of her job duties when she reported to the city council that the mayor was improperly charging the city for his

Any public testimony by a public official, even when he is “just doing his job,” implicates constitutional interests that require First Amendment protection.

area of employee speech.”²¹ Nevertheless, courts applying *Garcetti* to public employee speech claims must take care not to let its “pursuant-to-official-duties” rubric obliterate the delicate constitutional balance between a public employer’s responsibilities and a public employee’s rights as a citizen. The Third Circuit’s decision in *Reilly* illustrates how a court might keep that balance intact. ■

Frank Corrado, Barry Corrado, Grassi & Gibson, PC; 2700 Pacific Ave., Wildwood, NJ 08260; T: 609-729-1333; FCorrado@capelegal.com.

Notes

1. Justice Holmes famously took the latter position while serving on the Massachusetts Supreme Judicial Court: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).
2. 391 U.S. 563 (1968); *see also Connick v. Myers*, 461 U.S. 138 (1983); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Waters v. Churchill*, 511 U.S. 661 (1994); *City of San Diego v. Roe*, 543 U.S. 77 (2004).
3. *See, e.g., Gustafson v. Jones*, 290 F.3d 895 (7th Cir. 2002); *Baldassarre v. N.J.*, 250 F.3d 188 (3d Cir. 2001); *Fox v. D.C.*, 83 F.3d 1491 (D.C. Cir. 1996).
4. 547 U.S. 410 (2006).
5. *Id.* at 421.
6. *Id.* at 423.

personal expenses); *Vila v. Padron*, 484 F.3d 1334, 1339 (11th Cir. 2007) (holding that a community college vice president, whose employment contract was not renewed following her reports of illegal and unethical conduct by the college president, was not entitled to reinstatement because her allegations fell “squarely within her official job duties”).

10. 526 F.3d 1074 (7th Cir. 2008).

11. 526 F.3d at 1092.

12. *Id.*

13. *Garcetti*, 547 U.S. at 424.

14. *Id.*

15. *Id.* at 425. Moreover, in his dissent, Justice Souter makes that point that “the claim relating to [Ceballos’s] truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process.” *Id.* at 444 (Souter, J., dissenting).

16. *Id.* at 424.

17. 532 F.3d 216 (3d Cir. 2008).

18. 532 F.3d at 231. Because the case was before the court on an appeal of a summary judgment decision, and because there were unresolved factual questions involving Reilly’s participation in the investigation, the court did not read the question whether Reilly’s “investigatory” speech, as opposed to his trial testimony, was protected. *Id.* at 227-28.

19. *Id.* at 228-31. The court pointed out that neither claims of journalist privilege, *see Branzburg v. Hayes*, 408 U.S. 665, 686 (1972), nor claims of executive privilege, *see U.S. v. Nixon*, 418 U.S. 683, 708 (1974), are strong enough to override this duty. Moreover, it noted that, pre *Garcetti*, “the overwhelming weight of authority” in the circuits was that “an employee’s truthful testimony in court is protected by the First Amendment.”

20. *Reilly*, 532 F.3d at 231 (internal citations omitted).

21. *Foraker v. Chaffinch*, 501 F.3d 231, 241 (3d Cir. 2007).

Cruel and Unusual

How the Ninth Circuit Changed the Landscape of *Bivens* Litigation under the Eighth Amendment

By Conal Doyle, Oakland, CA

The recent presidential election was perhaps the penultimate victory in a civil rights movement that began many years ago. It also brings an end to an administration stained by some of the worst civil rights violations of our generation. Out of that administration comes one of the most egregious Eighth Amendment cases in the history of American jurisprudence.

Beyond Cruel and Unusual

On March 11, 2008, a district court in Los Angeles characterized the conduct of government doctors as “beyond cruel and unusual.” In *Castaneda v. U.S.*, doctors in the United States Public Health Service (PHS) refused to provide immigration detainee Francisco Castaneda a biopsy to rule out penile cancer, despite clear orders to do so by the detainee’s treating provider and several private doctors chosen by the government to evaluate him.¹

When Mr. Castaneda was ultimately released, 11 months after a PHS physician assistant recommended a biopsy “ASAP,” it was too late. His cancer had spread. Mr. Castaneda’s penis was amputated on Valentine’s Day 2007, and he died a slow and painful death over the next year, dying on February 16, 2008.

Like many precedent-setting cases, *Castaneda*’s impact likely derives, at least in part, from a set of facts that may be unrivaled in the history of Eighth Amendment jurisprudence.² In a chilling footnote at the end of its opinion, the district court characterized the defendants’ conduct as follows:

After all, Plaintiff has submitted powerful evidence that Defendants knew Castaneda needed a biopsy to rule out cancer, falsely stated that his doctors called the biopsy “elective,” and let

him suffer in extreme pain for almost one year while telling him to be “patient” and treating him with Ibuprofen, antihistamines, and extra pairs of boxer shorts. Everyone knows cancer is often deadly. Everyone knows that early diagnosis and treatment often saves lives. Everyone knows that if you deny someone the opportunity for an early diagnosis and treatment, you may be—literally—killing the person. Defendants’ own records bespeak of conduct that transcends negligence by miles. It bespeaks of conduct that, if true, should be taught to every law student as conduct for which the moniker “cruel” is inadequate.³

The court also rejected the “Defendants’ attempt to sidestep responsibility for what appears to be, if the evidence holds up, one of the most, if not the most, egregious Eighth Amendment violations the Court has ever encountered.”⁴ In denouncing the defendants’ argument that the case amounted to nothing more than alleged malpractice, the court observed:

[F]rom the first time Castaneda presented with a suspicious lesion in March 2006 through his release in February 2007, the care afforded him by Defendants can be characterized by one word: nothing. The evidence that Plaintiff has already produced at this early stage in the litigation is more thorough and compelling than the complete evidence compiled in



Conal Doyle

some meritorious Eighth Amendment actions.”⁵

The court also recognized the likelihood of a punitive damages award:

[T]he evidence that Plaintiff has presented thus far—through Defendants’ own records—suggests a strong case for punitive damages because it shows that Defen-

dants’ behavior was both callous and misleading. The evidence suggests that they refused Castaneda’s request for a biopsy despite their knowledge that several medical specialists suspected cancer and “strongly recommended” a biopsy to rule out that possibility. Worse, the evidence suggests that not only did the individual Public Health Service Defendants ignore doctor recommendations to provide Castaneda with a simple procedure, they may also have lied about those recommendations.⁶

A Landmark Civil Rights Ruling

Mr. Castaneda’s “Kafkaesque nightmare” prompted widespread international media attention, including coverage in every major U.S. newspaper and television stories on Univision, Telemundo, and the CBS news magazine *60 Minutes*. Perhaps overshadowed by the sensational factual setting of the case is an unprecedented legal decision that has changed the landscape of civil rights litigation against physicians

continued on page 7

Cruel and Unusual cont. from page 6

employed by the federal government.

In 1971, the Supreme Court issued one of the most significant civil rights decisions of the twentieth century, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.⁸ *Bivens* created a civil rights cause of action for constitutional violations by federal officials, similar to the remedies already available against state and local officials under 42 U.S.C. § 1983. Under *Bivens*, federal employees may be held liable for money damages in their individual capacity. Unlike a claim against the United States under the Federal Tort Claims Act (FTCA), *Bivens* claims permit a jury trial and punitive damages and are not subject to the vagaries of the state law where the claim arose.

Six months before *Bivens* was decided, Congress passed the Public Health Service Act, 42 U.S.C. § 233(a), which purported to provide absolute immunity from suit for PHS employees. The statute states in pertinent part:

DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE ACTS⁹

Sec. 233. (a) The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of Title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.¹⁰

According to the Defendants in *Castaneda*, PHS employees enjoy absolute

immunity from suit under this statutory provision and all claims arising from their conduct must be brought against the United States under the FTCA. However, the FTCA does not permit constitutional claims against the United States and would effectively extinguish those claims. There is ample case law to support the Defendants' argument. Since the enactment of § 233(a) in 1970, every published

noneconomic damages and would not be entitled to a jury trial, punitive damages, or pre-death pain and suffering under California's survival statute.¹²

In contrast, the *Bivens* claims have no cap on noneconomic damages, and a jury trial and punitive damages are available. Under the federal survival rule, Mr. Castaneda's estate is also entitled to pre-death pain and suffering.¹³

Bivens claims permit a jury trial and punitive damages and are not subject to the vagaries of the state law where the claim arose.

decision, including a Second Circuit opinion, had erroneously held that PHS employees are immune from *Bivens* claims under § 233(a).¹¹

Based on distinct, but consistent, analyses of § 233(a) that are far more thorough than those done in any previous case, both the U.S. District Court for the Central District of California and the Ninth Circuit held in *Castaneda* that § 233(a) permits *Bivens* claims against PHS employees. There is currently a split between the Second and Ninth Circuits on this issue, and the defendants have filed a petition for rehearing en banc in the Ninth Circuit. It is also likely that they will eventually seek review by the U.S. Supreme Court. As explained below, the Ninth Circuit's more thorough and compelling analysis of § 233(a) will likely survive Supreme Court scrutiny and become the law of the land.

Practical Ramifications

The practical significance of the *Castaneda* decision is staggering. If Mr. Castaneda was limited to an action against the United States under the FTCA, his claim would arguably be governed by MICRA, California's medical malpractice "tort reform" act. Under MICRA, his heirs would be limited to a total of \$250,000 in

In *Castaneda*, the Ninth Circuit recognized that the effects of *Bivens* "preemption" would be felt hardest in those states that have enacted "medical malpractice tort reform," and that this would not serve the goal of promoting uniform application of federal rights. In the court's words:

Reacting to a "crisis" in medical malpractice insurance costs and availability, many states in the mid-1980s began to enact legislative changes designed both to deter frivolous lawsuits and to limit the size of damage awards even in meritorious ones.... [T]wenty-three states have placed statutory limits on non-economic damages, many limiting medical malpractice awards in particular. Statutory damage caps for malpractice can range from \$250,000 to \$1.25 million.¹⁴

Castaneda will likely have the biggest impact on plaintiffs who happen to suffer constitutional violations in "tort reform" states because they will no longer be subject to damages caps. However, this assumes that the medical neglect rises to the level of a constitutional violation, which typically means proving "deliberate indifference" on the part of the

continued on page 8

Cruel and Unusual cont. from page 7

medical providers.¹⁵

In non-tort reform states, it may be sensible to forego the availability of a jury trial and punitive damages that *Bivens* claims provide and simply litigate against the United States under the FTCA. There are several advantages to this approach: (1) the plaintiff only has to prove medical negligence, not deliberate indifference; (2) there is a guaranteed collectible defendant, the United States; (3) the plaintiff does not have to spend the resources or time litigating and briefing interlocutory immunity appeals (involving both absolute and qualified immunity) that come with constitutional claims; and (4) the plaintiff will obtain a much faster and more economical (bench) trial.

Historical Context of the Public Health Service Act

The Public Health Service Act was one act in a series intended to provide immunity to government employees. Most, like § 233(a), concern federal medical personnel.¹⁶ All of these statutes contain language almost identical to § 233(a), purporting to make the FTCA the “exclusive remedy” for claims against the specified employees. Although the Ninth Circuit’s decision in *Castaneda* was limited to the Public Health Service Act, it follows logically that the same analysis would apply to all of these immunity statutes, permitting *Bivens* claims against those classes of federal employees.

At the time most of these statutes were enacted, *Bivens* had not been decided. Therefore, there was no private right of action to sue federal employees for consti-

titutional violations. Moreover, it was not until 1976 that the Supreme Court decided *Estelle v. Gamble*, the seminal case establishing the right of prisoners to bring medical neglect claims under the Eighth Amendment’s cruel and unusual punishment clause.¹⁷

In 1980, the Supreme Court decided *Carlson v. Green*, the lynchpin of the Ninth Circuit’s analysis in *Castaneda*.¹⁸ *Carlson* established a federal prisoner’s right to bring a *Bivens* claim for medical neglect under the Eighth Amendment, but also recognized an exception to this general rule. Under *Carlson*, a *Bivens* remedy will not lie when an alternative remedy is both “explicitly declared to be a substitute” and is “viewed as equally

continued on page 9



Formerly the Association of Trial Lawyers of America (ATLA®)

AAJ Education Endowed
by Power Rogers & Smith

AAJ Education

2009 CLE Programs

Trial Advocacy Colleges

Case Plus: The Next Step in Developing and Testing Your Trial Story*

April 1–4, 2009
Crowne Plaza Jacksonville
Riverfront Hotel
Jacksonville, FL

Essentials of Civil Litigation

June 6–9, 2009
Location coming soon!

Litigating Nursing

Home Cases*

June 11–14, 2009
Westin Memphis Beale Street
Memphis, TN

Seminars

Managing Your Practice and the Media*

April 27–28, 2009
AAJ Headquarters and
Grand Hyatt Washington
Washington, DC

Jazz Fest: Litigating Auto Collision Cases

Cosponsored by the Louisiana Association for Justice and AAJ’s Motor Vehicle Collision, Highway and Premises Liability Section
May 1–3, 2009
Royal Sonesta Hotel
New Orleans, LA

Wyeth v. Levine: Supreme Court Decision

Program date will immediately follow publishing of court opinion
Washington, DC

CLE Abroad

Greek Isles Cruise

October 23–30
Greek Isles and Turkey

AAJ Conventions

2009 Annual Convention*

July 25–29, 2009
Hotel TBD
San Francisco, CA

* Reserved for AAJ Regular, Sustaining, Life and President’s Club members

FOR MORE INFORMATION

Visit www.justice.org/education, call 800-622-1791 or 202-965-3500, ext. 612, or e-mail education@justice.org.

Cruel and Unusual cont. from page 8

effective,” or in the presence of “special factors” which militate against a direct recovery remedy.¹⁹

In 1988, Congress passed the Federal Employees Liability Reform and Tort Compensation Act of 1988 (LRTCA) to add an express exclusivity provision to the FTCA and to make clear that *Bivens* actions for constitutional torts are preserved.²⁰ The LRTCA expanded § 2679(b) of the FTCA, which previously made the FTCA the exclusive remedy for injury resulting from a federal employee’s operation of a motor vehicle, to encompass any “injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.”²¹ Because the FTCA substitutes the United States as the defendant in place of employees acting within the scope of their official duties, the LRTCA acts as a general grant of immunity to government employees for all official acts.

However, the LRTCA clarified that the FTCA’s general immunity “does not extend or apply to a civil action against an employee of the Government...which is brought for a violation of the Constitution of the United States.”²² Thus, Congress made explicit what had previously been implicit when the Supreme Court decided *Carlson*: “[C]onstitutional claims are outside the purview of the Federal Tort Claims Act.”²³

The District Court’s “Statutory Trail” Analysis in *Castaneda*

The district court in *Castaneda* held that the Public Health Service Act does not provide immunity to PHS employees based on an analysis of the plain language of § 233(a). The court recognized that statutory construction principles require an analysis of the provisions of the entire law when determining a statute’s plain meaning. The court therefore followed § 233(a)’s statutory trail and examined the cited FTCA provisions, as well as the statutory provisions cited by the FTCA

provisions referenced in § 233(a).

Following that statutory trail, the district court concluded that § 233(a) incorporated by reference § 2679, which specifically states that FTCA’s exclusive remedy does not apply to *Bivens* actions. Thus, far from evincing an intent to make the FTCA the exclusive remedy for *Bivens* actions, Congress, through the LRTCA,

Ninth Circuit and are contemplating whether to seek Supreme Court review. It is uncertain whether the Court will grant the likely petition for certiorari. However, if the Court decides to review *Castaneda*, it is clear that it will have two separate and compelling avenues for affirming and recognizing Congress’s intent to preserve *Bivens* claims against PHS employees.

The Second Circuit did not perform a proper analysis of Carlson’s two-part test; did not recognize the distinction between a run-of-the mill medical negligence claim and a constitutional violation; and did not address the effect of the LRTCA.

intended the exact opposite—to specifically preserve the right to bring *Bivens* actions against all federal employees.

The Ninth Circuit’s Analysis in *Castaneda: Carlson Controls*

The Ninth Circuit affirmed the district court’s ruling in *Castaneda*, but on different grounds. Rather than addressing the district court’s analysis of § 233(a)’s “statutory trail,” the Ninth Circuit applied the *Carlson* test to § 233(a) and considered whether: (1) Congress provided an alternative remedy that is “explicitly declared to be a substitute for” *Bivens* (rather than a complement to it); and (2) Congress viewed that remedy as “equally effective” to preempt *Bivens*.

The Ninth Circuit held that Congress did not explicitly declare § 233(a) as a substitute and that the FTCA remedy is not “equally as effective” as a *Bivens* claim.²⁴ The Ninth Circuit also considered the historical context of the statute and legislative history to support its conclusion.²⁵

The Supreme Court

The defendants in *Castaneda* have filed a petition for rehearing en banc in the

Even the Court’s “originalists” should appreciate the district court’s plain language analysis, should they decline to consider § 233(a)’s legislative history and historical context.

Moreover, the Ninth Circuit’s analysis of § 233(a) is far more compelling than the Second Circuit’s contrary analysis. The Second Circuit did not perform a proper analysis of *Carlson*’s two-part test; did not recognize the distinction between a run-of-the mill medical negligence claim and a constitutional violation; and did not address the effect of the LRTCA, which specifically exempts *Bivens* claims from the FTCA’s exclusivity provision.

As a result, if the Supreme Court ultimately addresses the issue of whether PHS employees enjoy absolute immunity from *Bivens* claims, there are strong reasons for believing that it will permit plaintiffs to proceed with their claims for Eighth Amendment violations. ■

Conal Doyle, Willoughby Doyle LLP, 1814 Franklin St., Suite 800, Oakland, CA 94612; T: 510-451-2777; conal@willoughbydoyle.com.

continued on page 10

Cruel and Unusual cont. from page 9

Notes

1. *Castaneda v. U.S.*, 538 F. Supp. 2d 1279 (C.D. Cal. 2008), *aff'd*, *Castaneda v. Henneford*, 546 F.3d 682 (9th Cir. Oct. 2, 2008). The plaintiffs are represented by Conal Doyle, Willoughby Doyle LLP, and Adele Kimmel, Public Justice, PC.

2. Mr. Castaneda was a civil detainee, thus his claim was rooted in the Fifth Amendment's due process clause, not the Eighth Amendment's prohibition on cruel and unusual punishment. See *Bell v. Wolfish*, 441 U.S. 520, 536-37 & n. 16 (1979). In this case, however, that formal distinction is irrelevant: "With regard to medical needs, the due process clause imposes, at a minimum, the same duty the Eighth Amendment imposes." *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1187 (9th Cir. 2002). For ease of reference, this article will describe the claims at issue in terms of the Eighth Amendment.

3. *Castaneda*, 538 F. Supp. 2d at 1298 n.16. Procedurally, the court was ruling on the defendants' Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, which permits the court to go outside the four corners of the complaint and

consider evidence. In response to the motion, the plaintiff attached 33 exhibits of the defendants' official medical records, which documented verbatim the allegations of the complaint.

4. *Id.* at 1295.

5. *Id.*

6. *Id.* at 1297.

7. *Castaneda*, 546 F.3d at 694 n.12.

8. 403 U.S. 388 (1971).

9. It is interesting to note that § 233(a)'s heading in Title 42 of the U.S. Code is "Exclusiveness of remedy," but the heading in the Statutes at Large is "Defense of Certain Malpractice and Negligence Acts." Compare Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, § 223(a), with 42 U.S.C. § 233(a)(1970), and 42 U.S.C. § 233(a)(2003). Where the language of a statute does not appear in the U.S. Code precisely as it was printed in the Statutes at Large, courts must defer to the Statutes at Large. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993). *Castaneda* is the first case to consider the actual title of the Public Health Service Act.

10. 42 U.S.C. § 233(a) (emphasis added).

11. *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000). Several district courts came to the same conclusion,

following *Cuoco* without substantive independent analysis.

12. CAL. CIV. CODE § 3333.2.

13. See *Garcia v. Whitehead*, 961 F. Supp. 230 (C.D. Cal. 1997) (holding that the federal survival rule applies to civil rights claims under § 1983, and the cause of action survives plaintiff's death, including claims for pain and suffering).

14. *Castaneda*, 546 F.3d at 691 (internal citations omitted).

15. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

16. See, e.g., 10 U.S.C. § 1089(a) (immunity for military medical personnel); 22 U.S.C. § 2702 (immunity for State Department medical personnel); 38 U.S.C. § 4116 (immunity for Veterans' Administration medical personnel).

17. 429 U.S. 97 (1976).

18. 446 U.S. 14 (1980).

19. *Castaneda*, 546 F.3d at 687-88.

20. Pub. L. No. 100-694 (1988).

21. 28 U.S.C. § 2679(b)(1).

22. § 2679(b)(2)(A).

23. *Castaneda*, 546 F.3d at 695.

24. *Id.* at 689-92.

25. *Id.* at 692-95.



AAJ 2009 ANNUAL CONVENTION

SAN FRANCISCO, CA
JULY 25-29, 2009

Thousands of trial attorneys will gather to discuss tools for their practice, strategies for the courtroom, and the issues facing our nation.

To register visit:
www.justiceannualconvention.org
or call: 800-424-2725, ext. 613

Register by May 1 and Save \$100

 AMERICAN ASSOCIATION for JUSTICE
Formerly the Association of Trial Lawyers of America (ATLA®)

WWW.JUSTICEANNUALCONVENTION.ORG