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Continuing to Close the Courthouse Doors?

BY ERWIN CHEMERINSKY

The Supreme Court's October Term 2016 was unusual because from the first Monday in October until the April argument calendar, there were only eight justices on the bench. This affected every aspect of the Court's work, causing the justices to take and decide fewer cases and to look for ways to find consensus in order to avoid 4–4 splits. In fact, the Court was unanimous in over 50 percent of the decisions. This is not because the justices have suddenly found great consensus, but because of the types of matters on the docket and because of their approach to cases, often ruling narrowly and leaving the larger issues unresolved.

In other ways, though, this term was similar to prior terms under the Roberts Court. Once more, it was the Kennedy Court, as Anthony Kennedy was in the majority in 97 percent of the decisions — more than any other justice. Even focusing just on the non-unanimous cases, Kennedy was in the majority in 93 percent of the cases, far more than any other justice.

In another way, too, October Term 2016 continued an important trend of the Roberts Court: The Supreme Court used jurisdictional doctrines to close the courthouse door to keep injured individuals from having their day in court. Many legal doctrines fashioned by the Supreme Court over the last several decades — restricting who has standing to sue, expanding sovereign immunity, enforcing arbitration clauses that prevent suits in court, limiting the availability of habeas corpus — mean that the courts often cannot provide any remedy to those whose rights have been violated.

Two decisions from October Term 2016 were particularly important in continuing this trend. One dealt with personal jurisdiction and the other concerned suits against federal officers. Both are likely to have long-term consequences on access to the courts.

PERSONAL JURISDICTION

Everyone who attends law school learns the law of personal jurisdiction, the doctrine that determines when a court can hear a civil case involving an out-of-state defendant. For decades, the law has been largely settled and ultimately focused on whether it was fair to force someone to come from out of the state to defend a lawsuit. But in recent years, the Supreme Court has dramatically changed this law, most recently in June 2017 in *Bristol-Myers Squibb Co. v. Superior Court of California*. This case, and a few recent earlier rulings, have made it much more difficult for a plaintiff to sue an out-of-state defendant, even when the defendant is a corporation that has extensive business contacts in a state.

This is going to create a significant impediment to holding corporations accountable, particularly in mass-tort situations and cases involving many people who each lose a relatively small amount from a corporation's wrongdoing. There is no way to understand this change in the law except as a major victory for corporations at the expense of injured consumers, patients, and employees. It is all about closing the courthouse doors.

The law of personal jurisdiction

For decades, the Supreme Court has held that due process limits the ability of courts in a state to exercise jurisdiction over out of state defendants. In *International Shoe Co. v. Washington* (1945), the Court held that unless a defendant consents to litigation in ▸

a state, a court can exercise personal jurisdiction only if the defendant has "minimum contacts" with that state.

In subsequent cases, the Court identified two different ways of finding minimum contacts: general jurisdiction and specific jurisdiction. General jurisdiction was thought to exist when the defendant had systematic and continuous contacts with the state. Specific jurisdiction was based on the defendant's contacts with the state giving rise to the cause of action.

But over the last several years, the Court has significantly narrowed the availability of both general and specific jurisdiction. As to general jurisdiction, in *Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011), the Court said that a court may assert jurisdiction over a foreign corporation only when the corporation's affiliations with the state in which suit is brought are so constant and pervasive "as to render [it] essentially at home in the forum State."

In *Daimler AG v. Bauman* (2014), the Court reaffirmed that general jurisdiction exists only over a defendant who is "home" within a state. There the Court found no personal jurisdiction over a large international corporation that extensively marketed and sold cars in California for the actions of its subsidiary in another country. The Court, in an opinion by Justice Ruth Bader Ginsburg, unanimously declared that "Daimler's slim contacts with the State hardly render it at home there."

At the same time, the Court has limited specific jurisdiction. In *Walden v. Fiore* (2014), the Court held that specific jurisdiction exists based only on contacts the defendant creates with the forum state. Gina Fiore and Keith Gipson, Nevada residents, were stopped by a DEA agent in Atlanta and found to have $97,000 in cash. Fiore and Gipson explained that they were professional gamblers and the money was their stake and winnings. Anthony Walden, the DEA agent, seized the cash and advised Fiore and Gipson that their funds would be returned if they proved a legitimate source for the cash. Fiore and Gipson returned home to Nevada without their money. After eight months, their money was returned to them.

Fiore and Gipson sued Walden in federal court in Nevada. Walden moved to dismiss for lack of personal jurisdiction, but the Ninth Circuit found that there was specific jurisdiction over him because it was foreseeable that the effects of his actions would be felt in Nevada, the place where Fiore and Gipson lived.

OVER THE LAST SEVERAL YEARS, THE COURT HAS SIGNIFICANTLY NARROWED THE AVAILABILITY OF BOTH GENERAL AND SPECIFIC JURISDICTION.

The Supreme Court, in an opinion by Justice Clarence Thomas, unanimously reversed the Court of Appeals decision. As the Court explained, "our 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." The Court said: "But the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him."

Bristol-Myers Squibb Co. v. Superior Court

Bristol-Myers Squibb Co. was sued in California Superior Court by several hundred individuals from 33 states (including 86 from California) for injuries from the Bristol-Myers drug Plavix, a drug used to prevent heart attacks and strokes in people who are at high risk of these events. There is no dispute that Bristol-Myers has extensive contacts with California: It regularly markets and promotes its drugs in California and distributes them to pharmacies in California to fill prescriptions.

But Bristol-Myers is incorporated in Delaware and has its principal place of business in New York and New Jersey. The parties and the lower courts agreed that there is not general jurisdiction in California, because it is not "home" in that state. This shows how much the law of personal jurisdiction has changed: Until recently this would have been enough to show systematic and continuous contacts with California and would have established general jurisdiction.

There is no dispute that Bristol-Myers can be sued in California by those who reside there and took Plavix there. Bristol-Myers, though, objected to non-California residents being able to sue in that state for the injuries they incurred elsewhere. The California Supreme Court found specific jurisdiction, emphasizing that there would be little inconvenience to Bristol-Myers Squibb because it already was defending a lawsuit for the same claims in California.

The Supreme Court held, 8–1, that jurisdiction did not exist for the out-of-state plaintiffs to sue in California.

Justice Samuel Alito wrote for the Court and said that the out-of-state plaintiffs could not sue in California because there was not an "adequate link between the State and the nonresidents' claims." Justice Alito wrote: "The relevant plaintiffs are not California residents and do not claim to have suffered harm in that State. In addition, . . . all the conduct giving rise to the nonresidents' claims occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction." Justice Alito stressed that personal jurisdiction is not, as it always had been thought, primarily about fairness to a defendant; it is about constitutional limits on the territorial reach of a state court.

Justice Sonia Sotomayor wrote a forceful dissent and declared: "The majority's rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone. It will make it impossible to bring a nationwide mass action in state court against defendants who are 'at home' in different States. And it will result in piecemeal litigation and the bifurcation of claims. None of this is necessary. A core concern in this Court's personal jurisdiction cases is fairness. And there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike."

What now?

Justice Alito offered three alternatives to the plaintiffs: They could sue together in the state where the defendant is "home"; they could file separate suits in each of their state courts; or perhaps they can sue in federal court. But all of these are problematic. Suing in the defendant's home state may not be convenient to the plaintiffs or a desirable forum. It also is of no use when the defendant is a foreign corporation. Having plaintiffs sue in their own home state assumes there are enough plaintiffs there to make litigation viable.

It is notable that Justice Alito said that personal jurisdiction might be different in a federal court because until now personal jurisdiction in a state always has been deemed to be the same in the federal and state courts. This may suggest an even larger change to come in the law of personal jurisdiction, with it being different in a federal court compared to the state where it sits. This could be crucial for the future viability of multidistrict litigation or of nationwide class-action suits. Also, if personal jurisdiction is primarily about the constitutional reach of a state court, that will raise questions about whether it can continue to be gained by consent. Allowing consent makes sense when personal jurisdiction is primarily about fairness to a defendant, but not if it, like subject matter jurisdiction, is a structural limit on a court's authority.

The conclusion in inescapable that the Court has provided substantial protection for corporations — even a corporation like Bristol-Myers Squibb that engaged in a nationwide marketing campaign for its product — at the expense of injured plaintiffs.

SUING FEDERAL OFFICERS

The *Bivens* Cause of Action

No federal statute authorizes federal courts to hear suits or give relief against federal officers who violate the Constitution of the United States. Although 42 U.S.C. §1983 authorizes suits against state and local officers, it has no application to the federal government or its officers. Nor are suits against federal officers allowed under any analogous statute.

Yet the Supreme Court long has held that federal officers may be sued for injunctive relief to prevent future infringements of federal laws. The federal courts' ability to entertain suits seeking money damages against federal officers stems from the landmark 1971 decision of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.* In *Bivens*, the Supreme Court ruled that federal officers who violate constitutional rights can be sued for money damages directly under the Constitution. Such lawsuits are named for that decision: "*Bivens* suits." They are a necessary tool for enforcing the Constitution and holding federal officers liable — especially since the United States government has sovereign immunity and generally cannot be sued for money damages. But for more than 35 years, the Supreme Court has backed away from the *Bivens* decision and has made it increasingly difficult to sue federal officers, even when they commit egregious constitutional violations. The Court did so again, in a significant way, in October Term 2016 in *Ziglar v. Abassi*.

In *Bivens*, the plaintiff, Wesley Bivens, alleged that he had been subjected to an illegal and humiliating search by agents of the Federal Bureau of Narcotics, and sought money damages as compensation. The district court dismissed the case saying that the law provided no basis for relief, and the Court of Appeals for the Second Circuit affirmed, holding "that the Fourth Amendment does not provide a basis for a federal cause of action for damages arising out of an unreasonable search and seizure." Bivens's only remedy against the federal officers, according to the Second Circuit, was under state tort law in state court.

The United States Supreme Court reversed this ruling. It held that Bivens did not need to rely on a federal statute to sue, but could sue for damages based on the Fourth Amendment alone. The majority opinion, by Justice William ▸

Brennan, emphasized that individuals whose rights have been violated should not have to resort to state remedies, which might be inadequate or hostile to the federal constitutional interest. Furthermore, the judiciary has the authority and the duty to provide remedies to ensure the necessary relief for violations of federal rights. In an important and often-cited concurring opinion, Justice John Harlan explained that the federal courts long have devised remedies for violations of federal law. Moreover, he explained, it is essential that federal courts be able to provide such relief: "[I]t is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position. . . . For people in Bivens' shoes it is damages or nothing."

Initially, the Court applied *Bivens* and permitted suits under the Constitution. In *Davis v. Passman*, the Court held that a female aide could sue a congressman for gender discrimination based on a cause of action inferred directly from the Fifth Amendment's guarantee of equal protection.

In *Carlson v. Green*, the Supreme Court held that a mother whose son had died while serving a sentence in the Federal Corrections Center in Terre Haute, Ind., could sue prison officials on her son's behalf, claiming that his death was caused by gross inadequacies of medical facilities and staff and that this constituted cruel and unusual punishment. The Court held that a *Bivens* suit was available to remedy this Eighth Amendment violation.

Limiting *Bivens* Suits

But since *Carlson v. Green* in 1980, every Supreme Court decision has rejected the availability of a *Bivens* suit. In *Correctional Services Corporation v. Malesko* (2001), both Chief Justice William Rehnquist in his majority opinion and Justice Antonin Scalia in a concurring opinion noted this trend. The issue in *Malesko* was whether a privately operated prison could be sued in a *Bivens* action. In holding that such suits are not permitted, Rehnquist noted that "[s]ince *Carlson* [*v. Green* in 1980], we have consistently refused to extend *Bivens* liability to any new context or new category of defendants. . . . In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by individual officer's unconstitutional conduct. Where such circumstances are not present, we have consistently rejected invitations to extend *Bivens*, often for reasons that foreclose its extension here." Justice Scalia, joined by Justice Clarence Thomas, went further and urged the overruling of *Bivens*.

> THE COURT STRESSED THAT THE JUDICIARY SHOULD NOT EXPAND THE AVAILABILITY OF *BIVENS* SUITS BEYOND THE HOLDINGS OF *BIVENS*, *DAVIS V. PASSMAN*, AND *CARLSON V. GREEN*. THIS WILL MAKE IT EVEN HARDER TO BRING *BIVENS* SUITS IN THE FUTURE.

Ziglar v. Abassi

Ziglar v. Abassi, decided in 2017, very much continues the trend of the Court limiting *Bivens* suits and closing the courthouse doors. The case involved a suit brought by individuals who were detained after 9/11, allegedly based on their race and religion. Abassi was one of 84 aliens arrested in New York City following the terrorist attack there on Sept. 11, 2001. He was held in the Metropolitan Detention Center.

Abassi and the others alleged that the conditions of their detention were harsh. The detainees were held in tiny cells for up to 23 hours a day with little opportunity for exercise or recreation. The lights in the cells were kept on 24 hours a day, making it nearly impossible to sleep. And they were forbidden to keep anything in their cells, even basic hygiene products like soap and a toothbrush. They were strip-searched often, even randomly, and were denied access to most forms of communication with the outside world. They said that they were subjected to physical and emotional abuse from the guards.

Abassi and the others filed their complaint on their own behalf and on behalf of a putative class seeking compensatory and punitive damages, attorney's fees and costs. They claimed that the government had no reason to suspect them of any connection to terror-

ism and had no reason to hold them for so long in these harsh conditions.

They sued two groups of federal officials in their official capacity. The first group included former Attorney General John Ashcroft, former FBI Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar. They also sued the detention center's warden Dennis Hasty and the associate warden James Sherman. Their suit was brought under *Bivens v. Six Unknown Federal Narcotics Agents.*

The Court held, 4 to 2, that there was no *Bivens* cause of action directly under the Constitution. Justice Kennedy wrote for the Court, joined by Chief Justice John Roberts and Justices Thomas and Alito. Justice Stephen Breyer wrote a vehement dissent, joined by Justice Ginsburg. Justice Sotomayor recused herself, likely because she was a judge on Second Circuit when the case was considered there. And Justice Elena Kagan recused herself, probably because her office had dealt with the case when she was President Barack Obama's first solicitor general.

Justice Kennedy's opinion said that *Bivens* suits raise serious separation of powers issues. He said that it should be for Congress, not the courts, to create causes of action. In this way, he embraced the arguments of the dissenters in *Bivens*, which explicitly had been rejected by its majority. Writing for the Court, Justice Kennedy said that there were important reasons to not allow a *Bivens* suit. He stressed that a *Bivens* remedy should not be used to challenge policies, rather only individual actions by officials. He also said that national security policies especially counsel hesitation and should not be the basis for *Bivens* suits.

The Court stressed that the judiciary should not expand the availability of *Bivens* suits beyond the holdings of *Bivens*, *Davis v. Passman*, and *Carlson v. Green*. This will make it even harder to bring *Bivens* suits in the future. Once more the courthouse door is being closed to those whose constitutional rights have been violated.

Justice Breyer's strong dissent made this point and also disagreed with the majority's separation of powers concerns. If the judicial role is seen as enforcing the Constitution, *Bivens* is an integral part of the courts place in the system of separated powers and checks and balances.

CONCLUSION

These recent rulings restricting personal jurisdiction and limiting suits against federal officers are significant barriers for injured people who wish to sue. These decisions are just the latest in a trend of the Supreme Court closing the courthouse doors. It is a trend that is especially pernicious because it receives so little public attention. Newspapers don't focus attention on doctrines like personal jurisdiction or *Bivens*; they are seen as too complicated and technical. But rights are meaningless unless there is a court to enforce them.

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