

USALSA Report

United States Army Legal Services Agency

Litigation Division Notes

Trial Counsel's Pre-Referral Subpoena Puts Bank at Risk

The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) recently considered whether a bank's compliance with a trial counsel's Article 32 subpoena violated the Right to Financial Privacy Act (RFPA).¹ In *Flowers v. First Hawaiian Bank*,² the Ninth Circuit ruled that the trial counsel could not lawfully issue a subpoena for the Article 32 proceedings. Thus, when the bank complied with the subpoena without complying with the RFPA notice provisions, it violated the RFPA and may have subjected itself to liability.

The Right to Financial Privacy Act

The RFPA³ was enacted in 1978 in response to *United States v. Miller*.⁴ In *Miller*, the Supreme Court held that a customer did not have a protected Fourth Amendment privacy interest in his bank records, and therefore could not challenge the validity of a government subpoena of those records.⁵ The RFPA prescribes five means by which the federal government may seek customer records from financial institutions: (1) customer consent; (2) administrative subpoenas; (3) judicial subpoenas; (4) search warrants; and (5) "formal written request[s]" by government agencies.⁶ The RFPA prescribes standards and procedures that the government must follow with respect to each of these mechanisms, including advance notice and an opportunity to seek judicial relief from administrative and judicial sub-

poenas and written requests.⁷ As a general matter, no "government authority"⁸ may obtain a customer's financial records without following the standards and procedures prescribed by the RFPA.⁹

Financial institutions are prohibited from disclosing customer financial records "except in accordance with the provisions" of the RFPA, and a financial institution may not release such records until the government "certifies in writing to the financial institution that it has complied with the applicable provisions" of the RFPA.¹⁰ Once the government has provided the written certification, good-faith reliance on it immunizes the financial institution from liability under the RFPA and state law.¹¹

These general requirements are subject to a number of statutory exceptions, most of which are contained in 12 U.S.C. § 3413. The exception that applies to *Flowers* is section 3413(e), the "comparable rules" exception, which provides, "Nothing in this chapter shall apply when financial records are sought by a Government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the Government authority and the customer are parties."¹²

*Facts*¹³

This case arose while one of the plaintiffs, Sergeant Major Marshall Flowers, was stationed at the Schofield Barracks in

1. 12 U.S.C. §§ 3401-3422 (2000).

2. 293 F.3d 966 (9th Cir. 2002).

3. See generally Captain Donald W. Hitzeman, *Due Diligence in Obtaining Financial Records*, ARMY LAW., July 1990, at 39; Major James Key, *Litigation Division Note: Right to Financial Privacy Act*, ARMY LAW., Sept. 1998, at 52.

4. 425 U.S. 435 (1976).

5. *Id.* at 445.

6. 12 U.S.C. §§ 3402, 3404-3408 (2000).

7. See, e.g., *id.* § 3405(1)-(3) (governing the procedural requirements for administrative subpoena); *id.* § 3410 (authorizing judicial challenges to government requests for access to financial records).

8. 12 U.S.C. § 3401(3). The RFPA defines "government authority" to mean "any agency or department of the United States, or any officer, employee, or agent thereof." *Id.*

9. *Id.* §§ 3402, 3403(a).

10. *Id.* § 3403(a)-(b).

11. *Id.* § 3417(c).

12. *Id.* § 3413(e).

Hawaii.¹⁴ Sergeant Major Flowers was charged with larceny¹⁵ under the Uniform Code of Military Justice (UCMJ) in April 1998.¹⁶ In preparation for the Article 32 investigation, the trial counsel requested the Flowers' bank records from the First Hawaiian Bank's Schofield Branch. The trial counsel issued the request on a form entitled "SUBPOENA,"¹⁷ requesting all bank records for an account held jointly by Sergeant Major and Mrs. Flowers. The request explained that the records were needed for presentation at an Article 32 proceeding. The bank subsequently informed Sergeant Major Flowers, by letter, that the Army had requested his bank records and enclosed a copy of the request. After notifying Sergeant Major Flowers of the request, the bank provided the Flowers' financial records in accordance with the Army's request. The Army later dismissed the charges against Sergeant Major Flowers.¹⁸

In May 1999, the Flowers filed a pro se complaint against the bank in the U.S. District Court for the District of Hawaii (District Court).¹⁹ The Flowers alleged that the bank violated the RFPA's requirement that a financial institution only produce the financial records after receiving a certificate of RFPA compliance from the governmental authority requesting the records.²⁰ The bank moved for judgment on the pleadings. The bank argued that its release of the Flowers' financial records without a certificate of compliance did not violate the RFPA because the trial counsel's subpoena was for an Article 32 hearing, which the bank argued was under a rule comparable to that of the Federal Rules of Civil Procedure or Criminal Procedure. The District court agreed with the bank and held that section 3413(e) applied because the UCMJ applies principles of law and rules of evidence comparable to the federal rules, and

because the Article 32 proceeding was a form of litigation between the government and the bank's customer, Mr. Flowers. The court thus granted the bank's motion for judgment on the pleadings.²¹

The Flowers Appeal to the Ninth Circuit

The Flowers appealed to the Court of Appeals for the Ninth Circuit,²² arguing that the bank violated the RFPA by providing copies of their financial records to the Army without a certificate of compliance.²³ They also challenged the bank's assertion that the production of their financial records pursuant to the trial counsel's subpoena was exempt from the RFPA.²⁴

In its amicus brief to the Ninth Circuit, the Army conceded that neither the UCMJ, the Rules for Courts-Martial (RCM), nor any other provision of law authorized the Army to compel the bank to produce account records for an Article 32 investigation.²⁵ The Army did, however, argue that the subpoena was exempt from the RFPA under the "comparable rules" exception of the RFPA, arguing that the UCMJ and the RCM are comparable to the Federal Rules of Criminal Procedure.²⁶

The Ninth Circuit found that the comparable rules exception did not apply because the Army only met three of the four requirements of the comparable rules exception when it sought the Flowers' financial records for the Article 32 hearing.²⁷ The court found that the trial counsel was acting for a government authority within the meaning of the RFPA.²⁸ The court also relied on several military cases²⁹ to find that Article 32 proceed-

13. The facts of the case are from *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002) [hereinafter *Flowers I*] and *Flowers v. First Hawaiian Bank*, 85 F. Supp. 2d 993 (D. Haw. 2000) [hereinafter *Flowers II*].

14. *Flowers I*, 85 F. Supp. 2d at 994.

15. UCMJ art. 121 (2000).

16. *Flowers II*, 295 F.3d at 969.

17. *Id.* at 970; see U.S. Dep't of Defense, DD Form 453, Subpoena (August 1984).

18. *Flowers II*, 295 F.3d at 970. The administrative record revealed that Sergeant Major Flowers chose to accept adjudication under Article 15 and agreed to retire in lieu of trial by court-martial. *Id.* (citing the administrative record at 157-58, 162-63).

19. *Id.*

20. *Flowers I*, 85 F. Supp. 2d at 994.

21. *Id.* at 995.

22. *Flowers II*, 295 F.3d at 966.

23. See 12 U.S.C. § 3403(b) (2000) ("A financial institution shall not release the financial records of a customer until the Government authority seeking such records certifies in writing to the financial institution that it has complied with the applicable provisions of [the RFPA].").

24. *Flowers II*, 295 F.3d at 969.

25. *Id.* at 974.

26. *Id.* (citing 12 U.S.C. § 3413(e)).

ings meet the litigation requirement.³⁰ Citing *United States v. Samuels*,³¹ the court found that the Army had met the requirement that the government authority and the bank customer be parties to the litigation.³²

The court next turned to the question of whether an Article 32 subpoena of the bank records was under the Federal Rules of Civil or Criminal Procedure or under comparable rules of other courts. The court held that it was not,³³ noting that the UCMJ specifically authorizes the issuance of a subpoena in court-martial proceedings.³⁴ There is no such authority, however, for issuing subpoenas for Article 32 proceedings.³⁵ The court thus concluded that the trial counsel lacked subpoena power.³⁶

The Army argued that “[t]he fact that the subpoena was not specifically authorized by the UCMJ or the RCM does not mean that the subpoenaed records were not sought ‘under’ those rules within the meaning of 12 U.S.C. § 3413(e).”³⁷ The Army also argued that the word “under” in section 3413(e) should be construed to “embrace an Article 32 proceeding.”³⁸ The Army analogized the situation to that of federal question jurisdiction under 28 U.S.C. § 1331, and pointed out that the “arising under” requirement of the statute “can be met even if the case ultimately lacks merit.”³⁹

The Ninth Circuit disagreed. The court first noted that the subpoena stated on its face that it was issued for an Article 32 hearing, thus invoking nonexistent legal authority as the basis for its issuance. Second, the court found that in the context of 12 U.S.C. § 3413(e), the meaning of the word “under” is plain.⁴⁰ The court noted that “[s]ection 3413(e) only exempts from the RFPA financial records sought by a government authority ‘under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts,’”⁴¹ and concluded that “[t]he exemption’s reference to ‘rules’ presumes the existence of some rule that governs procedures for obtaining the sought-after information.”⁴² Because neither “[t]he Federal Rules of Civil or Criminal Procedure, the UCMJ, the RCM, nor any other rule authorizes the use of a subpoena in such a proceeding . . . the Army’s issuance of the Article 32 subpoena to obtain the Flowers’ financial records was not ‘under’ a rule as that term is used in 12 U.S.C. § 3413(e).”⁴³ Thus, the court held, “where no rule governs the issuance of the subpoena by which financial records are sought, that subpoena cannot be considered as having been issued ‘under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts’ for the purpose of 12 U.S.C. § 3413(e).”⁴⁴

27. *Id.* at 971 (citing the “comparable rules” exception at 12 U.S.C. § 3413(e)). The comparable rules exception consists of four requirements: “the applicable financial records must be sought by (1) a governmental authority, (2) under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts, (3) in connection with the litigation, (4) to which the governmental authority and the customer are parties.” 12 U.S.C. § 3413(e).

28. *Flowers II*, 295 F.3d at 971.

29. *United States v. Payne*, 3 M.J. 354, 355 n.5 (C.M.A. 1977); *United States v. Burrow*, 16 C.M.R. 94, 96-97 (C.M.A. 1966); *United States v. Samuels*, 10 C.M.R. 206, 213 (C.M.A. 1959); *United States v. McCarty*, 25 M.J. 667, 670 (A.F.C.M.R. 1987).

30. *Flowers II*, 295 F.3d at 971.

31. 10 C.M.R. 206, 212 (C.M.A. 1959).

32. *Id.*

33. *Flowers II*, 295 F.3d at 972.

34. 10 U.S.C. § 846 (2000).

35. *Flowers II*, 295 F.3d at 972.

36. *Id.* at 975-76. The court also held that the subpoena did not fit within the exemption of the RFPA for grand jury proceedings, 12 U.S.C. 3413(i) (2000). The court explained that although there is similarity between a grand jury and an Article 32 proceeding, an Article 32 proceeding is not conducted by a grand jury with subpoena power. An investigating officer without subpoena powers conducts an Article 32 investigation. *Flowers II*, 295 F.3d at 975-76; see MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405 (2002) [hereinafter MCM].

37. *Flowers II*, 295 F.3d at 974.

38. *Id.*

39. *Id.*

40. *Id.* (citing 12 U.S.C. § 3413(e) (2000)).

41. *Id.*

42. *Id.* See, e.g., FED. R. CIV. P. 45; FED. R. CRIM. P. 17; 10 U.S.C. § 846; MCM, *supra* note 36, R.C.M. 703(e)(2)(C).

43. *Flowers II*, 295 F.3d at 974.

Conclusion

Flowers provides two salient lessons that trial counsel must understand: first, trial counsel do not have the power to “subpoena” civilians (or evidence under civilian control) for use at Article 32 investigations; second, the means they use to obtain financial records under the RFPA must depend on the status of their case in the litigation process. Ignorance of the law and legal procedures for obtaining financial records is no excuse for violating federal law and exposing the Army to liability. The RFPA provides account holders a private right of action against the government when it violates their rights under the statute; this makes understanding the provisions of the RFPA important. In *Flowers*, for example, the Ninth Circuit remanded to the District Court to allow the Flowers to amend their complaint to add the Army as a defendant.⁴⁵ The Ninth Circuit’s ruling opens the door for courts to hold the Army liable when it obtains financial records in violation of the RFPA. That potential liability includes: (1) damages of \$100 per violation; (2) any “actual damages” sustained as a result of the disclosure; and (3) in the case of willful or intentional violations, punitive damages.⁴⁶

Finally, in *Flowers*, the Ninth Circuit noted the limitations of Article 32 investigations when compared to grand jury proceedings in federal courts. These limitations suggest a need to update the UCMJ and the Rules for Courts-Martial to grant trial counsel or investigating officers subpoena authority at Article 32 proceedings.⁴⁷ CPT Witherspoon and Ms. Solomon.⁴⁸

Court Strikes Down Post-Award Attempt to Make a Good Procurement Better

Introduction

On 13 March 2002, the U.S. Court of Federal Claims (COFC) enjoined the Army from taking post-award corrective action in *MCII Generator & Electronic v. United States*.⁴⁹ This

case illustrates that the COFC appears unwilling to allow the Army to take corrective action unless the administrative record establishes that the proposed corrective action remedies either a defect or deficiency in the original procurement. The case also raises the issue of whether an agency may take corrective action after award to improve an already proper procurement.

Background

On 23 May 2001, the Army issued a Request for Proposal (RFP) for the procurement of Tactical Quiet Generators.⁵⁰ On 26 September 2001, the Army awarded the contract to MCII Generators and Electric, Inc. (MCII). On 12 October 2001, an unsuccessful offeror, Engineered Electric Company, doing business as Fermont, filed a post-award bid protest with the General Accounting Office (GAO) that alleged a series of errors by the Army, including: (1) improper evaluation of price by not evaluating packaging and marking; and (2) improper evaluation of MCII’s past performance.⁵¹

The Army defended the procurement and argued that the GAO should deny Fermont’s protest. On 28 November 2001, the GAO posed certain questions to the Army about Fermont’s allegations. On 6 December 2001, the Army advised the GAO that it would take corrective action by re-opening the solicitation and that, at a minimum, the Army would amend the price evaluation criteria. Based on the proposed corrective action, the GAO dismissed Fermont’s protest.⁵²

On 29 January 2001, the Army amended the RFP in accordance with its representation to the GAO. The amendments included a revision of its price evaluation criteria to incorporate a formula for evaluating packaging and marking costs (P/M costs).⁵³ On 30 January 2001, MCII sued in the COFC, asking the court to enjoin the Army’s proposed corrective action and to confirm its suspended award. The gravamen of MCII’s complaint was that the Army’s decision to take corrective action to

44. *Id.* at 975.

45. *Id.* at 977.

46. 12 U.S.C. § 3417 (2000).

47. In response to the Ninth Circuit’s ruling, the Army Litigation Division is considering recommending changes to the Rules for Courts Martial that would give trial counsel limited subpoena power to obtain evidence for presentation at Article 32 investigations.

48. Ms. Jennifer Solomon worked as a summer intern in the General Litigation Branch, U.S. Army Litigation Division, during the summer of 2002.

49. No. 02-85C, 2002 U.S. Claims Lexis 86 (March 13, 2002).

50. *Id.* at *2-3.

51. *Id.* at *3.

52. *Id.*

53. *Id.* (citing the administrative record at page 1504).

re-solicit as to price, which entailed amending the RFP to evaluate P/M costs, was arbitrary and capricious.⁵⁴

Decision

The COFC sustained the bid protest; it enjoined the Army from taking corrective action to re-open competition and from re-soliciting through a revised RFP. Based on the administrative record, the COFC found that the Army's decision to re-solicit was "arbitrary, capricious and not in accordance with law."⁵⁵ The court stated "that the decision to take 'corrective action' must be rationally related to the defect that is identified."⁵⁶ It went on to state that "[t]he problem in this case is identifying the defect that supports the decision to re-open competition; or if not a defect or deficiency, at least the reason for the decision."⁵⁷ The COFC found that the administrative record did not identify any defect supporting the re-solicitation of price.⁵⁸ In fact, the court determined that the administrative record demonstrated that the Army firmly believed that its original evaluation of price was proper and comported with "sound business judgment."⁵⁹

Having found that neither a defect nor a deficiency played a role in the Army's decision to re-solicit the procurement as to price, the COFC then raised the issue of whether the Army could change an RFP after award to achieve an improved result or to make a "good result even better."⁶⁰ The COFC stated that "even if we frame the legal question this way, support in the Administrative Record and legal authority are both lacking."⁶¹ The COFC then stated that even "if an 'improved' award decision is to be the justification [for corrective action], the record

would have to demonstrate that likely improvement."⁶² The COFC held that the administrative record did not support a claim that the inclusion of P/M costs into the price evaluation formula provided a better result for the Army. As such, the COFC found "no asserted or substantiated reason" in the administrative record for the decision to re-solicit as to price, and enjoined the Army from taking corrective action.⁶³

Conclusion

This case illustrates that the COFC seems unwilling to allow an agency to take post-award corrective action in the form of re-soliciting, absent a reasonable determination that some defect or deficiency would otherwise warrant a correction. The COFC also raised—but left open—the issue of whether any situation could justify an agency to take post-award corrective action to make a non-defective procurement better. Lastly, this decision puts agencies on notice that the amount of deference the GAO gives to the scope of an agency's proposed corrective action may differ from the amount of deference agencies can expect from the COFC. In this case, the GAO dismissed the protest, finding that the agency provided appropriate relief through its proposed corrective action, thereby making the protest moot.⁶⁴ This was in stark contrast to the COFC, which held that the agency's rationale for the corrective action was arbitrary, capricious, and not in accordance with the law.⁶⁵ Agencies that formulate corrective actions must be mindful that their decisions might eventually end up being reviewed before the COFC. Major Salussolia.

54. *Id.* MCH's complaint also alleged that the Army's corrective action to re-evaluate past performance was arbitrary and capricious. After MCH filed the complaint, however, all parties agreed that the corrective action as to the past performance was warranted and not at issue before the court. *Id.* at *4.

55. *Id.* at *1.

56. *Id.* at *3.

57. *Id.* at *4-5.

58. *Id.* at *5.

59. *Id.* at *6.

60. *Id.*

61. *Id.*

62. *Id.* at *8.

63. *Id.* at *10-12.

64. Fermont, Comp. Gen. B-289162, B-289162.2, B-289162.3, Dec. 11, 2001 (unpublished) (on file with author).

65. *MCH*, 2002 U.S. Claims Lexis 86, at *1.

Case Note

Federal Court Keeps Army Out of Custody Fight

Introduction

Recently, the U.S. District Court for the District of New Jersey, citing the historical precedent set by the federal courts, held that federal courts lack the power to involve themselves in domestic child custody matters. In *Powell v. Fort Dix Department of Defense Police Department*,⁶⁶ a non-custodial parent sued the Fort Dix Police Department (Department) for damages when the Department refused to enforce a state court child custody order. In granting the Department's motion to dismiss, the court determined that it did not have jurisdiction to hear the matter.

Background

Mr. Carroll Powell and his ex-wife were litigating custody and visitation rights over their daughter in the New Jersey Superior Court. The dispute between the parents was bitter; the court had already issued mutual restraining orders.⁶⁷ Although neither parent resided on Fort Dix, their daughter attended and participated in activities at a swimming pool on post.⁶⁸ The Burlington County Superior Court had thus designated the Fort Dix swimming pool as the location where Mr. and Mrs. Powell were to transfer custody of their daughter.⁶⁹ The custody exchanges had resulted in numerous confrontations between the two parents, often requiring the Department's officers to

intervene. Each parent had requested the Department's intervention on different occasions. Mr. Powell became frustrated with the visitation arrangement and sued the Department after both he and Mrs. Powell accused each other of violating the terms of the state court's visitation order.⁷⁰

The crux of Mr. Powell's complaint was that the Department was interfering with his visitation rights under the visitation order by not ordering his wife to comply with the visitation schedule in its terms.⁷¹ In his four-count complaint, Mr. Powell alleged that the Department violated three federal criminal statutes: Obstruction of Court Orders,⁷² Conspiracy Against Rights,⁷³ and Federally Protected Activities.⁷⁴ He also alleged that the Department failed to accord the Burlington County Superior Court's domestic violence restraining order full faith and credit by not enforcing its terms against Mrs. Powell.⁷⁵

Fort Dix's Defense

In his complaint, Mr. Powell asked for damages for alleged violations of his rights under the U.S. Constitution and federal statutes. The legal basis for his claim appeared to be a common law tort theory or one under *Bivens v. Six Unnamed Agents of the Federal Bureau of Narcotics*.⁷⁶ In response, the Department moved to dismiss the complaint under Federal Rule of Civil Procedure (Rule) 12 (b) (1) and (6),⁷⁷ and for summary judgment pursuant to Federal Rule of Civil Procedure 56.⁷⁸ The Department first argued that the complaint failed to state a cognizable *Bivens* claim because a *Bivens* claim cannot lie against a federal agency, and the federal criminal statutes cited in the

66. No. 01-5319, slip op. (D.N.J. June 5, 2002) (on file with author).

67. *Id.* at 1.

68. *Id.* at 1-2.

69. *Id.* at 2.

70. *Id.* The administrative record did not explain why the command did not bar the Powells from Fort Dix, an exclusive federal enclave. *Id.*

71. *Id.* Under the Supremacy Clause of the U.S. Constitution, a state court does not have the power to issue an order requiring an exclusive federal enclave such as Fort Dix to allow civilians to conduct their private affairs on its land. U.S. CONST. art. VI, cl. 2; *Mayo v. United States*, 319 U.S. 441, 445 (1943); *see also* *United States v. Alaska Pub. Util. Comm.*, 23 F.3d 257 (9th Cir. 1994).

72. 18 U.S.C. § 1509 (2000).

73. *Id.* § 241.

74. *Id.* § 245.

75. *Powell v. Powell*, No. FV 03-0743-022 (Burlington County Super. Ct. Oct. 26, 2001).

76. 403 U.S. 388 (1971). Victims of constitutional violations by federal employees or agents may maintain *Bivens* claims for damages despite the absence of any statute specifically conferring such rights. *Bivens*, 403 U.S. at 390-97. Aggrieved parties may sue federal employees directly and in their individual capacities for violations of constitutionally protected rights. *Id.* Federal officials performing discretionary functions may be liable in *Bivens* actions if they knew or should have known that they were violating clearly established constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Individuals may not sue federal agencies for constitutional violations under *Bivens*. *See* *FDIC v. Meyer*, 510 U.S. 471 (1994).

77. FED. R. CIV. P. 12 (b) (1) (governing "lack of jurisdiction over the subject matter"); FED. R. CIV. P. 12 (b) (6) (governing "failure to state a claim upon which relief can be granted").

complaint do not provide a private cause of action. The Department also argued that the court lacked subject matter jurisdiction over any common law tort claims because the plaintiff had failed to comply with the jurisdictional prerequisites under the Federal Tort Claims Act (FTCA).⁷⁹

Decision

The court found that although the case was styled as a tort action, it merely amounted to a “garden variety” custody dispute in which the Department involuntarily became involved.⁸⁰ Relying on Supreme Court precedent, the court concluded that federal courts do not have power to involve themselves in cases of divorce, alimony, or child custody.⁸¹ Although Mr. Powell styled his case as a tort action, the court could not hold in Mr. Powell’s favor without construing the meaning of state court orders involving custody and visitation.⁸²

The court went on to find that to the extent that the case alleged the commission of a constitutional tort under *Bivens*, Mr. Powell failed to identify the particular constitutional provision that the Department violated.⁸³ The court continued by stating that “a *Bivens* action, while appropriate against identified individuals who have violated a plaintiff’s constitutional rights, may not be brought against a government agency.”⁸⁴ The court found that to the extent that Mr. Powell was attempting to bring a non-constitutionally based tort action against the Department, an agency of the federal government, such an action would have to comply with the Federal Tort Claims Act (FTCA).⁸⁵ Under the FTCA, submission of an administrative

tort claim to the federal agency, the Department in this case, is a jurisdictional prerequisite to filing suit. The court, however, found that Mr. Powell’s complaint failed to allege that he had filed a claim with the appropriate federal agency. The court therefore held that it lacked jurisdiction to hear a complaint based on a non-constitutionally based tort theory.⁸⁶

Finally, the court addressed Mr. Powell’s allegation that the Department’s actions violated the federal criminal statutes cited in the complaint by noting that federal criminal statutes do not generally support an implied civil cause of action.⁸⁷ The court stated that “a private tort suit for relief based on a criminal statute does not state a valid claim.”⁸⁸

In his remaining count, Mr. Powell alleged that the Department violated the federal statute requiring the government to give the full faith and credit to protective orders by failing to enforce the Burlington County Superior Court’s restraining order.⁸⁹ Although the court recognized Congress’s effort to combat domestic violence when it enacted 28 U.S.C. § 2265(a), it held that the Department did not violate this statute, which applies to courts—not law enforcement agencies. The court reasoned that because the Department is not a court, it was not in a position to “enforce” state court orders within the meaning of the federal statute.⁹⁰

Conclusion

Powell is consistent with precedent that federal courts do have jurisdiction over child custody cases, which are exclu-

78. Defendant’s Memorandum of Law Supporting Motion to Dismiss at 3-6, *Powell v. Fort Dix Dep’t of Defense Police Dep’t*, No. 01-5319 (D.N.J. June 5, 2002) (on file with author).

79. Under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, aggrieved parties must submit administrative claims to federal agencies before filing suit. *Id.*

80. *Powell*, No. 01-5319, slip op. at 3.

81. *Id.* (citing *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859) (“[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”)); *see also* *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) (“[I]t makes far more sense to retain the rule that federal courts lack power to [rule in domestic matters] because of the special proficiency developed by state tribunals over the past century and a half in handling issues that arise in [these matters.]”).

82. *Powell*, No. 01-5319, slip op. at 3.

83. *Id.* at 4.

84. *Id.* (citing *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 483-86 (1994)).

85. 28 U.S.C. §§ 2671-2680 (2000).

86. *Powell*, No. 01-5319, slip op. at 5.

87. *Id.* at 4. (citing *Thompson v. Thompson*, 484 U.S. 174, 179-80 (1988); *Cort v. Ash*, 422 U.S. 66 (1975)).

88. *Powell*, No. 01-5319, slip op. at 4.

89. 18 U.S.C. § 2265 (2000).

90. *Powell*, No. 01-5319, slip op. at 5.

sively a state court function. Plaintiffs cannot overcome this jurisdictional hurdle by styling their actions as *Bivens* claims or violations of federal criminal statutes. When a domestic situation threatens to become disruptive or burdensome to the command, the staff judge advocate should advise the commander to bar the disruptive individuals from the installation. If a command learns that a state court has ordered federal law enforce-

ment officers to enforce a state child custody order, the staff judge advocate should contact his nearest United States Attorney. Such an order presumptively violates the Supremacy Clause, and may warrant action in a federal court to enjoin enforcement of the state court order.⁹¹
CPT Witherspoon/ Mr. McFeatters.⁹²

91. *See generally* U.S. CONST. art. VI. A state court may not properly order federal officers to perform acts that would violate their federal duties. Sovereign immunity and the Supremacy Clause also bar state courts from entering such orders. *See id.*; *Bosaw v. National Treasury Employees Union*, 887 F. Supp. 1199 (S.D. Ind. 1995).

92. Mr. Dale McFeatters worked as a summer intern in the General Litigation Branch, U.S. Army Litigation Division, during the summer of 2002.