



Texas man held at gunpoint by federal agent seeks Supreme Court intervention

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February 2, 2019, is the day Kevin Byrd says he narrowly avoided being shot and killed.

Byrd, now 41, was in his car in a parking lot in Conroe, Texas, trying to learn more information about a car crash involving an ex-girlfriend. A man whose son was involved in the accident approached the front of his vehicle with a gun drawn.

Video surveillance from the parking lot captured the incident and shows the man, Ray Lamb, walking to Byrd's driver's side door with the firearm raised as Byrd attempts to drive away. Lamb forced him to stop, threatening to "put a bullet through his f**king skull" and "blow his head off," according to Byrd's recollection of the incident and later court filings.

Then, Byrd recalled, Lamb pulled the trigger.

"I've been around firearms a lot and you don't put your finger on the trigger unless you're going to shoot someone," he told CBS News. "There isn't a way to know the gun was jammed unless he pulled the trigger."

Lamb's gun had malfunctioned, and the two remained in a standoff — Byrd in his car and Lamb standing in front of it — until local police arrived, surveillance footage shows. It was then that Lamb identified himself to officers as an agent with the Department of Homeland Security and showed his credentials, according to court filings.

The officers detained Byrd for several hours, but released him after reviewing footage of the incident, he said. Lamb was then arrested for aggravated assault with a deadly weapon and misdemeanor criminal mischief, charges that were later dropped.

Byrd filed a civil lawsuit against Lamb in federal court, suing him for excessive use of force and unlawfully detaining him in violation of the Fourth Amendment. Lamb asked the court to dismiss the claims, but the court denied his request. The 5th U.S. Circuit Court of

Appeals reversed, finding that as a federal officer, Lamb couldn't be sued under a 1971 Supreme Court decision known as *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.

Now, Byrd wants the Supreme Court to step in and ensure federal officers like Lamb can be held accountable for constitutional violations.

"How can he be immune?" Byrd said of Lamb. "He wasn't on duty, he wasn't actively trying to arrest me. How can he be immune?"

Under the *Bivens* decision, the Supreme Court recognized individuals can seek damages from federal officers alleged to have violated their constitutional rights. But the high court has narrowed its scope over the years, and lower courts have limited the circumstances under which federal officers can be sued for unconstitutional acts, leaving people who assert they have been wronged with little recourse.

"Are federal officials somehow different than state and local officials?" said Anya Bidwell, a lawyer with the public-interest law firm Institute for Justice who is representing Byrd. "If you look at this, it makes no sense to have this two-track system of accountability, and it makes no sense to have special protections for someone who happens to work for the federal government."

All police officers are entitled to qualified immunity, a legal doctrine that shields law enforcement from lawsuits unless they violate "clearly established" constitutional rights. But Bidwell said "it's only federal officials that have this special protection" — namely, broad immunity from lawsuits alleging violations of constitutional rights. The Institute for Justice estimates there are more than 100,000 federal law enforcement officers in the U.S.

Byrd asked the Supreme Court in August to review the 5th Circuit's decision and decide whether front-line federal officers can be sued for Fourth Amendment violations, arguing intervention by the high court would resolve a split among the federal circuit courts.

Had the incident occurred in New York or California, for instance, Byrd would've been able to sue Lamb under the Fourth Amendment because of rulings in those states' relevant circuit courts involving the *Bivens* decision, Bidwell told the justices. But because it happened in Texas, Byrd's lawsuit was tossed by the 5th Circuit, where a *Bivens* cause of action wasn't available.

Byrd's case is backed by a cross-ideological coalition that includes the American Civil Liberties Union (ACLU) and Cato Institute, a libertarian think tank.

"These are doctrines created out of whole cloth by the justices themselves," Somil Trivedi, a senior staff attorney with the ACLU's Criminal Law Reform Project, said. "The court now, if it has hesitations, it's their obligation to fix it."

Trivedi said that in the five decades since the Supreme Court issued its decision in *Bivens*, the court has slowly changed the claims that are amenable to lawsuits against federal officers, closing the courthouse doors to many who seek to hold accountable federal officials for alleged unconstitutional conduct.

"It provides this additional layer of protection just for federal agents where if they don't admit the kind of constitutional violation that happens to have been built into *Bivens*, you can't even sue them at all," he said.

Lawyers for Lamb are asking the Supreme Court to deny Byrd's request, arguing the "unusual allegations in this case make it an especially poor vehicle," in part because it arises out of a personal dispute between Lamb's family and Byrd, not from typical law-enforcement activity. Lamb's lawyer did not return a request for comment.

If the Supreme Court does decide to intervene, Lamb's urged the court to overrule *Bivens* altogether, arguing it violated the separation of powers and has no historical support.

"There is an obvious factor counseling hesitation: separation-of-powers considerations militate against expanding a judicially created cause of action for damages in circumstances where Congress itself has declined to do so," Lamb's lawyers told the high court in a filing last month.

A reversal of *Bivens*, they continued, could prompt Congress to pass a statute that allows individuals to sue federal officers over violations of constitutional rights.

The Supreme Court has not yet said when it will consider Byrd's case at a private conference. But the justices have in recent months spurned similar cases, even as national momentum has built for police reform and calls for law enforcement accountability has mounted.

Byrd said he's optimistic — but realistic — about the chances his case will be the one that breaks through.

"He's an officer of the law and should be held to a higher standard than a normal citizen," he said of Lamb. "He should know the law."