

## Article addresses constitutional issues with private government contractors

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A University of Kansas law professor has co-authored an article about remedying constitutional violations perpetrated by privately employed government contractors on the heels of briefing the same issue in the U.S. Supreme Court.

In addition to this real-world engagement as a lawyer and as a scholar, Lumen N. Mulligan, professor of [law](#) and director of the Shook, Hardy and Bacon Center for Excellence in Advocacy, brings this high-level, hands-on experience to the KU Law School classroom.

Mulligan co-authored both an amicus curiae brief in the high court case of *Minnecci v. Pollard* and an article, discussing the case, with Alexander A. Reinert, associate professor of law at the Benjamin N. Cardozo School of Law. The article will appear in the *Washington University Law Review* in May 2013.

In the case, an inmate at a privately run federal prison claimed that during work detail he fractured both of his elbows. He wasn't given immediate medical care, was later shackled, exacerbating the injury before treatment, and was ultimately left unable to work upon his release. He sued for violations of his Eighth Amendment constitutional rights. The Supreme Court ruled that, even though publicly employed [prison guards](#) would be susceptible to suit, the privately employed guards could not be found liable for constitutional violations because of their employment status.

Taking a stance contrary to the Court's ultimate holding during the high court briefing, Mulligan explained that "our position was that there should be no distinction, in terms of liability for constitutional violations, between government-run and privately run prisons. The decision as it stands allows federal agencies to avoid their constitutionally imposed liability simply by hiring private contractors."

In the article, the professors argue that the decision was in error and discuss how its impact can be limited.

"The opinion, in our view, fatally ignores—indeed fails to even consider—the text of the Westfall Act of 1988, which specifically endorsed constitutional actions such as what was at issue in *Minneeci*," Mulligan said. "Also, it destroys the parallel set of doctrine for remedying violations of [constitutional rights](#) by state and federal officers and creates asymmetrical liability for private versus public employs, which in turn creates non-market-based incentives to privatize government functions."

The decision was also troublesome because the use of state tort law, which the Supreme Court relied upon as an alternative to a constitutional action, cannot always be applied in the same manner as federal constitutional law, Mulligan and Reinert argue.

"Indeed, many of these assumed state law remedies are not available for plaintiffs," Mulligan said. "The very same defendants from *Minneeci* often argue that state law does not apply to them because they are immune under the so-called government contractor doctrine. These defendants should not be allowed to have their cake and eat it, too."

In addition to this pro bono service to the bar, Mulligan said taking part in ongoing, high-level court action benefits KU Law students. By supplying arguments in the [Supreme Court](#), working with practicing

attorneys, judges and clients, Mulligan is better able to engage students with skills-based learning—not simply dated textbook material.

"I believe that keeping up with practice helps me connect with my students and deliver up-to-date approaches to the art of advocacy. Students want to know that their coursework will translate to practice directly," Mulligan said. "As such, my continued work in that regard adds some authenticity to the classroom."

Provided by University of Kansas

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