Cases that Shaped the Federal Courts

Bivens v. Six Unknown Agents of Federal Bureau of Narcotics

1971

Justice William Brennan

Federal Judicial Center
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Central Question

Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?

Historical Context

The Fourth Amendment prohibits government officers from conducting "unreasonable searches and seizures." Although the Amendment was ratified in 1791, the scope and nature of the legal remedies for violations of the Amendment have undergone a lengthy evolution. Since 1914, the federal courts had applied an "exclusionary rule" to cases in which police officers violated the Fourth Amendment. Under this rule, the government could not use evidence obtained by violating the Fourth Amendment. This rule only applied where there was a criminal prosecution, however. In cases where the police violated suspects' rights and then determined there was insufficient proof of wrongdoing to bring a charge, the federal legal remedy was less clear. In theory, suspects whose rights had been violated could sue officers for trespass, but such a suit was fundamentally a state-law claim. In *Bivens v. Six Unknown Federal Narcotics Agents*, however, the Supreme Court of the United States determined that the Constitution implicitly authorized federal suits for money damages against officers violating the Fourth Amendment.

Legal Debates Before *Bivens*

In *Bell v. Hood* (1946), the Supreme Court dealt with a case that presented some of the issues raised in *Bivens*. In that case, the plaintiffs brought a suit against FBI officers who they claimed had violated their Fourth and Fifth Amendment rights by illegally arresting them and searching and seizing their property. The trial court had dismissed the suit, reasoning that the Constitution did not explicitly authorize such a lawsuit. The Supreme Court reversed that decision, but did not explicitly hold that the Constitution authorized suits of this kind. Instead, the Court held that whether the Constitution permitted the suit was a legal question that the trial court had to determine before it could dismiss the case. Chief Justice Harlan Fiske Stone and Justice Harold Burton dissented from this decision, arguing that the Constitution did not create a right to sue for violations of the Fourth and Fifth Amendments and that such suits should have been brought in state court as trespass actions.

In *Monroe v. Pape* (1961), the Court held that a Reconstruction-era civil rights statute permitted individuals to bring a lawsuit against state officers who had violated their constitutional rights by engaging in an improper search or seizure. Since that statute required the officers to be operating "under color of state law," the decision did not apply

to federal agents, though some lawyers and scholars believed that the Court would bridge this gap by answering the question *Bell* left open and finding that the Constitution itself authorized suits against federal officers in the same way the statute in *Monroe* authorized suits against state officers.

The Case

Webster Bivens claimed that, in 1965, federal narcotics agents entered his home and arrested him for drug offenses. He further claimed that the officers "manacled [him] in front of his wife and children, and threatened to arrest the entire family[,] searched the apartment from stem to stern[, and took him] to the federal courthouse in Brooklyn [and the to the Federal Narcotic Bureau], where he was interrogated, booked, and subjected to a visual strip search."

In 1967, Bivens filed suit in the U.S. District Court for the Eastern District of New York against the officers, claiming that the arrest and search violated his Fourth Amendment rights. Bivens initially brought his suit without the assistance of an attorney. The arrest, he claimed, was not based on probable cause and had been made using unreasonable force. The district court, however, dismissed the lawsuit on the theory that if the federal agents were violating the Fourth Amendment, they were no longer acting as government officers (the Constitution generally applies only to government actions). The district court then refused Bivens's attempt to appeal the case *in forma pauperis* (a process that allows poor litigants to avoid many of the costs associated with the legal process), because the judge deemed the appeal frivolous.

The Court of Appeals for the Second Circuit disagreed on this last point, determining that Bivens's appeal raised important legal issues, and appointed an attorney to represent him. The Court nevertheless upheld the district court's rejection of the case. The Court of Appeals stressed that, even where a party claimed federal officers had violated his or her rights, some federal statute (such as the one involved in *Monroe*) was needed to authorize a suit. Bivens, the court noted, could still seek redress against the officers but, in the absence of a federal statute empowering him to sue in the federal courts, his recourse was limited to suing for trespass in state court. Bivens then appealed to the Supreme Court of the United States.

The Supreme Court's Ruling

At the Supreme Court, Bivens's appointed counsel successfully argued that the Constitution created an implied right to sue for Fourth Amendment violations. The government argued that Bivens still had a way to seek recourse against the agents if they had violated his rights. That means, however, was a case in state court for trespass, not a federal suit

under the Constitution. Although the government's counsel acknowledged that the United States always removed such cases to the federal courts, he argued that the recognition of a new form of suit would open the door to the courts creating the functional equivalent of statutes like the one in *Monroe*.

Writing for the Court, Justice William Brennan held that the Fourth Amendment impliedly authorized lawsuits like Bivens's. The purpose of the Fourth Amendment, Brennan emphasized, was to protect private citizens from unauthorized intrusions by federal officers. To give that protection full meaning, it was necessary that citizens had a mechanism for enforcing their rights, and the most logical and appropriate means was a lawsuit for damages. The availability of that right, he reasoned, should not turn on state law.

In his dissenting opinion, Justice Harry Blackmun worried that the Court's decision would provoke an "avalanche" of new cases. "Whenever a suspect imagines, or chooses to assert, that a Fourth Amendment right has been violated," Blackmun reasoned, "he will now immediately sue the federal officer in federal court."

Aftermath and Legacy

Many legal scholars speculated about the degree to which *Bivens* would establish a pattern for lawsuits based on other provisions in the Constitution. In 1979, the Court recognized a constitutional right to sue for violations of the Fifth Amendment's Due Process Clause. In 1980, the Court recognized such a right in Eighth Amendment cases. However, the Supreme Court subsequently refused to recognize claims for violations of several other provisions in the Constitution, including the First Amendment, in the absence of a statute providing a right to sue.

Discussion Questions

- Both Justice Blackmun's dissent and some external criticisms of the *Bivens* decision suggested that the ruling would lead to a flurry of new federal lawsuits against law enforcement officers. Does this necessarily follow from *Bivens*? What factors might keep some suspects from filing suit against federal officers?
- At the oral arguments in *Bivens*, the government's attorney noted that a federal statute allows the federal government to "remove" cases to federal court when it is sued in state court. As result, he argued, virtually every state-law case brought against federal agents would eventually end up in federal court. If this is so, does it change your view of whether *Bivens* was necessary?
- Several critics of the *Bivens* decision have argued that the Court assumed a legislative role by crafting a new right to sue for constitutional violations in the absence of a federal law authorizing such suits. Were these critics right? Are there circumstances where it is appropriate for courts to "fill gaps" left by Congress, or would such a practice violate the separation of powers?

Documents

Supreme Court of the United States, Opinion *Bell v. Hood*, April 1, 1946

In Bell v. Hood*, the Supreme Court reversed a district court's determination that it did not have jurisdiction over a challenge similar to Bivens's, but did not decide whether the Constitution supplied a right to sue for violations of the Fourth Amendment. After the case was remanded (sent back) to the district court, that court again rejected the complaint, reasoning that if the officers had acted within their governmental authority, they were protected by the doctrine of sovereign immunity, which prohibits individuals from suing the government in certain circumstances. If the officers had exceeded their official authority, moreover, the district court held that the Fourth Amendment would no longer apply, as it only pertained to government action.*

Mr. Justice Black delivered the opinion of the Court.

Petitioners brought this suit in a federal district court to recover damages in excess of $3,000 from the respondents who are agents of the Federal Bureau of Investigation. The complaint alleges that the court's jurisdiction is founded upon federal questions arising under the Fourth and Fifth Amendments. It is alleged that the damages were suffered as a result of the respondents imprisoning the petitioners in violation of their constitutional right to be free from deprivation of their liberty without due process of law, and subjecting their premises to search and their possessions to seizure, in violation of their constitutional right to be free from unreasonable searches and seizures.…

Respondents make the following argument in support of the District Court's dismissal of the complaint for want of federal jurisdiction. First, they urge that the complaint states a cause of action for the common law tort of trespass made actionable by state law and that it therefore does not raise questions arising "under the Constitution or laws of the United States." Second, to support this contention, respondents maintain that petitioners could not recover under the Constitution or laws of the United States, since the Constitution does not expressly provide for recovery in money damages for violations of the Fourth and Fifth Amendments and Congress has not enacted a statute that does so provide. A mere reading of the complaint refutes the first contention and, as will be seen, the second one is not decisive on the question of jurisdiction of the federal court.…

The issue of law is whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments. That question has never been specifically decided by this Court. That the issue thus raised has sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it can be seen from the cases where this Court has sustained the jurisdiction of the district courts in suits brought to recover damages for depriving a citizen of the right

to vote in violation of the Constitution. And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do. Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. Whether the petitioners are entitled to recover depends upon an interpretation of 28 U.S.C. § 41 (1) and on a determination of the scope of the Fourth and Fifth Amendments' protection from unreasonable searches and deprivations of liberty without due process of law. Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction.

Reversed.

Document Source: *Bell v. Hood*, 327 U.S. 678, 679, 680, 684–85 (1946) (citations omitted).

Chief Justice Harlan Fiske Stone and Justice Harold Burton, Dissenting Opinion in *Bell v. Hood*, April 1, 1946

The district court is without jurisdiction as a federal court unless the complaint states a cause of action arising under the Constitution or laws of the United States. Whether the complaint states such a cause of action is for the court, not the pleader, to say. When the provision of the Constitution or federal statute affords a remedy which may in some circumstances be availed of by a plaintiff, the fact that his pleading does not bring him within that class as one entitled to the remedy, goes to the sufficiency of the pleading and not to the jurisdiction. But where, as here, neither the constitutional provision nor any act of Congress affords a remedy to any person, the mere assertion by a plaintiff that he is entitled to such a remedy cannot be said to satisfy jurisdictional requirements. Hence we think that the courts below rightly decided that the district court was without jurisdiction because no cause of action under the Constitution or laws of the United States was stated.

The only effect of holding, as the Court does, that jurisdiction is conferred by the pleader's unfounded assertion that he is one who can have a remedy for damages arising under the Fourth and Fifth Amendments is to transfer to the federal court the trial of the allegations of trespass to person and property, which is a cause of action arising wholly under state law. For even though it be decided that petitioners have no right to damages under

the Constitution, the district court will be required to pass upon the question whether the facts stated by petitioners give rise to a cause of action for trespass under state law.

Document Source: *Bell v. Hood*, 327 U.S. 678, 685–86 (1946) (citations omitted).

Supreme Court of the United States, Opinion in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, June 21, 1971

The excerpts from Bivens *included below focus on the question of the Court's ability to fashion a remedy for constitutional violations. Chief Justice Burger's dissenting opinion, which primarily focused on the use of the exclusionary rule to prohibit the use of evidence seized in violation of the Fourteenth Amendment, and Justice Harry Blackmun's brief dissent accusing the Court of improperly legislating for the bench, are omitted.*

In *Bell v. Hood* we reserved the question whether violation of [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does.…

Respondents do not argue that petitioner should be entirely without remedy for an unconstitutional invasion of his rights by federal agents. In respondents' view, however, the rights that petitioner asserts—primarily rights of privacy—are creations of state and not of federal law. Accordingly, they argue, petitioner may obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts. In this scheme the Fourth Amendment would serve merely to limit the extent to which the agents could defend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals. Candidly admitting that it is the policy of the Department of Justice to remove all such suits from the state to the federal courts for decision, respondents nevertheless urge that we uphold dismissal of petitioner's complaint in federal court, and remit him to filing an action in the state courts in order that the case may properly be removed to the federal court for decision on the basis of state law.

We think that respondents' thesis rests upon an unduly restrictive view of the Fourth Amendment's protection against unreasonable searches and seizures by federal agents, a view that has consistently been rejected by this Court. Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully

used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." …The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile. Thus, we may bar the door against an unwelcome private intruder, or call the police if he persists in seeking entrance. The availability of such alternative means for the protection of privacy may lead the State to restrict imposition of liability for any consequent trespass. A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well. "In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime." Nor is it adequate to answer that state law may take into account the different status of one clothed with the authority of the Federal Government. For just as state law may not authorize federal agents to violate the Fourth Amendment, neither may state law undertake to limit the extent to which federal authority can be exercised. The inevitable consequence of this dual limitation on state power is that the federal question becomes not merely a possible defense to the state law action, but an independent claim both necessary and sufficient to make out the plaintiff's cause of action.…

That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is … well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U. S., at 684 (footnote omitted). The

present case involves no special factors counselling hesitation in the absence of affirmative action by Congress.... [W]e cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts....

Document Source: *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389, 390–92, 394–97 (1971) (citations omitted).

Justice John Marshall Harlan, Concurring Opinion in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, June 21, 1971

My initial view of this case was that the Court of Appeals was correct in dismissing the complaint, but for reasons stated in this opinion I am now persuaded to the contrary. Accordingly, I join in the judgment of reversal....

[T]he interest which Bivens claims—to be free from official conduct in contravention of the Fourth Amendment—is a federally protected interest. Therefore, the question of judicial power to grant Bivens damages is not a problem of the "source" of the "right"; instead, the question is whether the power to authorize damages as a judicial remedy for the vindication of a federal constitutional right is placed by the Constitution itself exclusively in Congress' hands....The contention that the federal courts are powerless to accord a litigant damages for a claimed invasion of his federal constitutional rights until Congress explicitly authorizes the remedy cannot rest on the notion that the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment. Thus, in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute.

If it is not the nature of the remedy which is thought to render a judgment as to the appropriateness of damages inherently "legislative," then it must be the nature of the legal interest offered as an occasion for invoking otherwise appropriate judicial relief. But I do not think that the fact that the interest is protected by the Constitution rather than statute

or common law justifies the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy. Initially, I note that it would be at least anomalous to conclude that the federal judiciary—while competent to choose among the range of traditional judicial remedies to implement statutory and common-law policies, and even to generate substantive rules governing primary behavior in furtherance of broadly formulated policies articulated by statute or Constitution—is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will.…

[T]he judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment. To be sure, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." But it must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes.…

Putting aside the desirability of leaving the problem of federal official liability to the vagaries of common-law actions, it is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court. However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit. Finally, assuming Bivens' innocence of the crime charged, the "exclusionary rule" is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.…

Document Source: *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 398, 400–04, 407, 409–10 (1971) (citations omitted).

Justice Hugo L. Black, Dissenting Opinion in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, June 21, 1971

In my opinion for the Court in *Bell v. Hood*, 327 U. S. 678 (1946), we did as the Court states, reserve the question whether an unreasonable search made by a federal officer in violation of the Fourth Amendment gives the subject of the search a federal cause of action for damages against the officers making the search. There can be no doubt that Congress could create a federal cause of action for damages for an unreasonable search in

violation of the Fourth Amendment. Although Congress has created such a federal cause of action against state officials acting under color of state law, it has never created such a cause of action against federal officials. If it wanted to do so, Congress could, of course, create a remedy against federal officials who violate the Fourth Amendment in the performance of their duties. But the point of this case and the fatal weakness in the Court's judgment is that neither Congress nor the State of New York has enacted legislation creating such a right of action. For us to do so is, in my judgment, an exercise of power that the Constitution does not give us.

Even if we had the legislative power to create a remedy, there are many reasons why we should decline to create a cause of action where none has existed since the formation of our Government. The courts of the United States as well as those of the States are choked with lawsuits. The number of cases on the docket of this Court have reached an unprecedented volume in recent years. A majority of these cases are brought by citizens with substantial complaints—persons who are physically or economically injured by torts or frauds or governmental infringement of their rights; persons who have been unjustly deprived of their liberty or their property; and persons who have not yet received the equal opportunity in education, employment, and pursuit of happiness that was the dream of our forefathers. Unfortunately, there have also been a growing number of frivolous lawsuits, particularly actions for damages against law enforcement officers whose conduct has been judicially sanctioned by state trial and appellate courts and in many instances even by this Court. My fellow Justices on this Court and our brethren throughout the federal judiciary know only too well the time-consuming task of conscientiously poring over hundreds of thousands of pages of factual allegations of misconduct by police, judicial, and corrections officials. Of course, there are instances of legitimate grievances, but legislators might well desire to devote judicial resources to other problems of a more serious nature.

We sit at the top of a judicial system accused by some of nearing the point of collapse. Many criminal defendants do not receive speedy trials and neither society nor the accused are assured of justice when inordinate delays occur. Citizens must wait years to litigate their private civil suits. Substantial changes in correctional and parole systems demand the attention of the lawmakers and the judiciary. If I were a legislator I might well find these and other needs so pressing as to make me believe that the resources of lawyers and judges should be devoted to them rather than to civil damage actions against officers who generally strive to perform within constitutional bounds. There is also a real danger that such suits might deter officials from the proper and honest performance of their duties.

All of these considerations make imperative careful study and weighing of the arguments both for and against the creation of such a remedy under the Fourth Amendment. I would have great difficulty for myself in resolving the competing policies, goals, and

priorities in the use of resources, if I thought it were my job to resolve those questions. But that is not my task. The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States. Congress has not provided that any federal court can entertain a suit against a federal officer for violations of Fourth Amendment rights occurring in the performance of his duties. A strong inference can be drawn from creation of such actions against state officials that Congress does not desire to permit such suits against federal officials. Should the time come when Congress desires such lawsuits, it has before it a model of valid legislation, 42 U. S. C. § 1983, to create a damage remedy against federal officers. Cases could be cited to support the legal proposition which I assert, but it seems to me to be a matter of common understanding that the business of the judiciary is to interpret the laws and not to make them.

I dissent.

Document Source: *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 427–30 (1971) (citations omitted).

Supreme Court of the United States, Dissent in *Carlson v. Green*, April 22, 1980

The Court's decision in Carlson *extended* Bivens *to a case in which the mother of a prisoner who died from an asthma attack while in federal custody alleged her son had been denied medical treatment in a manner that violated the Eighth Amendment's ban on cruel and unusual punishment. Justice William Rehnquist, who later became Chief Justice, dissented, arguing that* Bivens *itself had been wrongly decided. Although the Court did not heed Rehnquist's call to overturn* Bivens*, it declined to extend its holding in several cases following* Carlson.

Although ordinarily this Court should exercise judicial restraint in attempting to attain a wise accommodation between liberty and order under the Constitution, to dispose of this case as if *Bivens* were rightly decided would in the words of Mr. Justice Frankfurter be to start with an "unreality." *Bivens* is a decision "by a closely divided court, unsupported by the confirmation of time," and, as a result of its weak precedential and doctrinal foundation, it cannot be viewed as a check on "the living process of striking a wise balance between liberty and order as new cases come here for adjudication." …

Despite the lack of a textual constitutional foundation or any precedential or other historical support, *Bivens* inferred a constitutional damages remedy from the Fourth Amendment, authorizing a party whose constitutional rights had been infringed by a federal officer to recover damages from that officer. *Davis v. Passman*, 442 U. S. 228 (1979),

subsequently held that such a remedy could also be inferred from the Due Process Clause of the Fifth Amendment. And the Court today further adds to the growing list of Amendments from which a civil damages remedy may be inferred. In so doing, the Court appears to be fashioning for itself a legislative role resembling that once thought to be the domain of Congress, when the latter created a damages remedy for individuals whose constitutional rights had been violated by state officials, 42 U. S. C. § 1983, and separately conferred jurisdiction on federal courts to hear such actions, 28 U. S. C. § 1343.…

In adding to the number of Amendments from which causes of actions may be inferred, the Court does not provide any guidance for deciding when a constitutional provision permits an inference that an individual may recover damages and when it does not. For example, the Eighth Amendment, from which the Court infers a cause of action today, also provides that "[e]xcessive bail shall not be required, nor excessive fines imposed.…" If a cause of action be inferred for violations of these and other constitutional rights—such as the Seventh Amendment right to a jury trial, the Sixth Amendment right to a speedy trial, and the Fifth Amendment privilege against compulsory self-incrimination—I think there is an ever-increasing likelihood that the attention of federal courts will be diverted from needs that in this policy-making context might well be considered to be more pressing.…

Because the judgments that must be made here involve many "competing policies, goals, and priorities" that are not well suited for evaluation by the Judicial Branch, in my view "[t]he task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States." …

It is clear under Art. III of the Constitution that Congress has broad authority to establish priorities for the allocation of judicial resources in defining the jurisdiction of federal courts. Congress thus may prevent the federal courts from deciding cases that it believes would be an unwarranted expenditure of judicial time or would impair the ability of federal courts to dispose of matters that Congress considers to be more important.…

In my view the authority of federal courts to fashion remedies based on the "common law" of damages for constitutional violations likewise falls within the legislative domain, and does not exist where not conferred by Congress.…

The Court not only fails to explain why the *Bivens* remedy is effective in the promotion of deterrence, but also does not provide any reason for believing that other sanctions on federal employees—such as a threat of deductions in pay, reprimand, suspension, or firing—will be ineffective in promoting the desired level of deterrence, or that Congress did not consider the marginal increase in deterrence here to be outweighed by other considerations. And while it may be generally true that the extent to which a sanction is imposed directly on a wrong-doer will have an impact on the effectiveness of a deterrent remedy, there are also a number of other factors that must be taken into account—such

as the amount of damages necessary to offset the benefits of the objectionable conduct, the risk that the wrongdoer might escape liability, the clarity with which the objectionable conduct is defined, and the perceptions of the individual who is a potential wrongdoer.…

I think the Court's formalistic procedural approach to this problem is flawed for one additional reason. As noted above, the approach adopted by the Court in *Bivens* and reaffirmed today is one that permits Congress to displace this Court in fashioning a constitutional common law of its choosing merely by indicating that it intends to do so. Otherwise, unless special factors counsel "hesitation," it will be presumed under the Court's analysis that Congress intended any remedy it creates to be enforced simultaneously by federal courts with a *Bivens* action. The Court provides no justification for this canon of divining legislative intention. Presumably when Congress creates and defines the limits of a cause of action, it has taken into account competing considerations and struck what it considers to be an appropriate balance among them. In my view it is wholly at odds with traditional principles for interpretation of legislative intention and with the constitutional notion of separation of powers to conclude that because Congress failed to indicate that it did not intend the cause of action and its limitations to be defined otherwise, it intended for this Court to exercise free rein in fashioning additional rules for recovery of damages under the guise of an inferred constitutional damages action.…

Document Source: *Carlson v. Green*, 446 U.S. 14, 32, 35–36, 38, 44–45, 53–54 (1980) (citations omitted).

Supreme Court of the United States, Opinion in *Bush v. Lucas*, June 13, 1983

This excerpt from a decision delivered several years after Bivens *describes some of the leading cases applying its central idea in other legal contexts.* Bivens *did not, however, give plaintiffs the right to sue for any and all alleged constitutional violations;* Bush *itself denied a claim under the First Amendment, and several later cases have declined to extend* Bivens *in other areas.*

In *Davis v. Passman*, the petitioner, former deputy administrative assistant to a Member of Congress, alleged that she had been discharged because of her sex, in violation of her constitutional right to the equal protection of the laws. We held that the Due Process Clause of the Fifth Amendment gave her a federal constitutional right to be free from official discrimination and that she had alleged a federal cause of action. In reaching the conclusion that an award of damages would be an appropriate remedy, we emphasized the fact that no other alternative form of judicial relief was available. The Court also was persuaded that the special concerns which would ordinarily militate against allowing

recovery from a legislator were fully reflected in respondent's affirmative defense based on the Speech or Debate Clause of the Constitution. We noted the absence of any explicit congressional declaration that persons in petitioner's position may not recover damages from those responsible for their injury.

Carlson v. Green, 446 U.S. 14 (1980), involved a claim that a federal prisoner's Eighth Amendment rights had been violated. The prisoner's mother brought suit on behalf of her son's estate, alleging that federal prison officials were responsible for his death because they had violated their constitutional duty to provide him with proper medical care after he suffered a severe asthmatic attack. Unlike *Bivens* and *Davis*, the *Green* case was one in which Congress had provided a remedy, under the Federal Tort Claims Act, against the United States for the alleged wrong. As is true in this case, that remedy was not as completely effective as a *Bivens*-type action based directly on the Constitution.

The Court acknowledged that a *Bivens* action could be defeated in two situations, but found that neither was present. First, the Court could discern "'no special factors counselling hesitation in the absence of affirmative action by Congress.'" Second, there was no congressional determination foreclosing the damages claim and making the Federal Tort Claims Act exclusive. No statute expressly declared the FTCA remedy to be a substitute for a *Bivens* action; indeed, the legislative history of the 1974 amendments to the FTCA "made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action."

This much is established by our prior cases. The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation. When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the courts' power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation. . . .

Document Source: *Bush v. Lucas*, 462 U.S. 367, 376–78 (1983) (citations omitted).

James E. Pfander and David Baltmanis, *Georgetown Law Journal*, 2009–2010

Many scholars, and some justices, have critiqued the Supreme Court's approach to Bivens *actions in the decades since the original decision. This excerpt from an article arguing for an alternative approach to* Bivens *suits recounts several of these criticisms.*

The Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* plays a central role in our system of constitutional remedies. Yet critics have long questioned the Court's decision to fashion a federal common law right of action to enforce the Fourth Amendment. While the criticism ranges broadly, a consistent theme has been to question the democratic and institutional legitimacy of the judicial role in fashioning remedies for constitutional violations. Thus, in *Bivens* itself, Chief Justice Burger and Justice Black both dissented on the ground that the creation of rights of action was a matter for Congress. More recently, Justices Scalia and Thomas have characterized the Bivens decision as ripe for reconsideration, arguing that the decision was the product of an earlier time, when the Court wrongly took on the legislative task of recognizing new rights of action. Perhaps in response, the Court has grown a good deal more circumspect. In a recent decision, *Wilkie v. Robbins*, the Court echoed earlier cases in concluding that "special factors" argued against the recognition of a right of action for a novel Fifth Amendment retaliation claim.

The Court's willingness to analyze the existence of a *Bivens* action on a case-by-case basis introduces a layer of uncertainty into constitutional litigation. Rather than assuming the existence of a *Bivens* action for claims against federal officers and agents, the federal courts must conduct a threshold inquiry to determine if the specific constitutional claim at issue will support an implied right of action. Often, the federal courts undertake this analysis at a high level of particularity. Thus, a discharged employee of a member of Congress may bring a Fifth Amendment equal protection claim, but a dissatisfied applicant for government benefits may not press a Fifth Amendment due process claim. Fifth Amendment takings claims have fared slightly better, but retaliation aimed at the exercise of the Fifth Amendment right to resist a government taking of property does not give rise to a *Bivens* action. Inmates of federal institutions may bring Eighth Amendment claims for cruel and unusual punishment, but individuals confined in facilities run by federal government contractors have been less successful. With their hit-or-miss quality, these decisions display the sort of incoherence that often betrays the absence of a clear rationale.

Cases arising out of the Bush administration's terrorism-related detention and extraordinary rendition programs highlight these concerns with the case-by-case evaluation of the viability of novel *Bivens* claims. In a series of cases involving individuals who were

allegedly subjected to extraordinary rendition and to harsh and degrading conditions of confinement at Guantdnamo Bay and elsewhere, the lower federal courts have thus far consistently refused to recognize a *Bivens* remedy. These decisions reflect some reluctance on the part of lower courts to second-guess military judgments during a time of war, some uncertainty about how to apply the Court's malleable standards, and a presumption against the viability of novel claims. Apart from the uncertainty it engenders, the practice of judicial selectivity raises legitimacy issues of its own along with the very real possibility that judicial evaluation of the merits of the specific claim may influence the *Bivens* calculus.

Scholars have offered a range of theories to shore up the legitimacy of the *Bivens* action. An early article by Walter Dellinger viewed the grant of "judicial power" in Article I of the Constitution as providing the ultimate source of remedial authority. Henry Monaghan sought to include the *Bivens* remedy within the framework of what he called "constitutional common law," law that grows out of permissible choices among remedial alternatives and (like other federal common law) remains subject to some degree of congressional control. Gene Nichol defended the Court's exercise of remedial creativity, pointing out that courts in the common law tradition have long played a role in defining the remedies needed to vindicate important rights. Richard Fallon and Daniel Meltzer would incorporate the *Bivens* remedy into a remedial framework that seeks to ensure that government actors generally operate within the bounds of the law. Notably, the Fallon and Meltzer approach places greater emphasis on systemic issues than on the right of any particular individual to secure a remedy. Thus, a *Bivens* remedy operates as a fallback device and its availability necessarily depends, in part, as it did in *Wilkie*, on a case-by-case evaluation of the array of available alternative remedies. Despite these efforts at justifying, narrowing, and defending the *Bivens* remedy, critics remain dubious.…

Today, *Bivens* provides the only generally available basis on which individuals can seek an award of damages for federal violations of constitutional rights. In 1971, it was "damages or nothing" for Webster Bivens, as Justice Harlan vividly explained; today, it has become "Bivens or nothing" for those who seek to vindicate constitutional rights.…

Questions about the legitimacy of *Bivens* date from the decision's announcement in 1971 and have persisted over the years. In *Bivens*, the Court recognized a federal right of action to enforce the Fourth Amendment.… The absence of federal statutory support for the right to sue provided one important focus of the dissenters' criticisms of the *Bivens* decision. Chief Justice Burger, along with Justices Black and Blackmun, argued that Congress should take the lead in defining the way individuals enforce the Constitution. Perhaps the most interesting response to the dissent was that provided by the concurring opinion of Justice Harlan. Harlan argued that a federal right of action already existed; that individuals in Bivens's position could have sued in federal court for injunctive relief against

a pending or threatened Fourth Amendment violation. All the Court was really adding was a federal remedy in the nature of tort damages for folks like Bivens who lacked any effective alternative. Moreover, Harlan pointed out that the Court had previously allowed individuals to bring federal claims to enforce rights conferred by statute, even though the statute at issue had failed to provide that the rights in question were enforceable by individual suit. If the Court could legitimately expand the range of remedies for statutory violations, Harlan suggested, the Court might well recognize a judge-made remedy for constitutional violations.…

The critique of *Bivens* rests at bottom on claims about the proper roles of the federal courts and Congress in the recognition of rights to sue. As Justice Powell observed in his dissenting opinion in *Cannon v. University of Chicago*, Congress normally takes the lead in deciding who can sue to enforce rights in federal courts. As Justice Kennedy observed more recently, echoing Justice Powell, judicial willingness to recognize implied rights of action may interfere with the legislative process by adding new provisions to a statute that Congress had not seen fit to insert. More fundamentally, the Court understands that the recognition of a federal right to sue-given current jurisdictional arrangements inevitably results in the expansion of access to the federal courts for individual suitors. The Court's more recent decisions suggest that Congress should make the decision about expanded access, rather than the federal courts. One can, of course, question the validity of these criticisms on their own terms and their application to the different situation in *Bivens*, where constitutional (rather than statutory) rights were at stake. But questions of institutional competence lie at the heart of the call to overrule *Bivens*. The Court's approach to recent cases does little to answer critics of the judicial role.…

All of these cases present a variation on the same theme: an individual claims that government officials have taken superficially legitimate action for the improper purpose of punishing him for exercising his constitutional rights. These cases inevitably present line-drawing problems, as well.…

The selectivity entailed in this case-by-case approach invites attacks from critics on both sides. Those who question the judicial role in *Bivens* can point to recent cases in support of their claim that the Court has yet to articulate a justification for taking on the essentially legislative task of deciding when to fashion a damages action. For these critics,… recent experience demonstrates the wisdom of abandoning the enterprise altogether. Those who continue to view *Bivens* as rightly decided can mount a similar criticism of the Court's failure to make the action available to all claimants who allege serious violations of their constitutional rights. For these critics,… the Court's refusal to allow claims for retaliation under the Fifth Amendment cannot be squared with its willingness to permit First Amendment retaliation claims to proceed.…

Document Source: James E. Pfander and David Baltmanis, "Rethinking *Bivens*: Legitimacy and Constitutional Adjudication," *Georgetown Law Journal* 98 (2009–10): 117–21, 123, 125–27, 129, 130–31 (footnotes omitted).

Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of "the judicial power," remedies, judicial review, the relationship between federal judicial power and states' rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn's Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws made by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter's Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCardle* (1869). Could Congress remove a pending appeal from the Supreme Court's jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States v. Allocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?