

The Burger Court Opinion Writing Database

Bivens v. Six Unknown Federal Narcotics Agents

403 U.S. 388 (1971)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



B

Supreme Court of the United States
Washington, D. C. 20543

May 13, 1971

CHAMBERS OF
THE CHIEF JUSTICE

No. 301 -- Bivens v. Six Unknown Named Agents of Federal
Bureau of Narcotics

MEMORANDUM TO THE CONFERENCE:

Enclosed my dissent in the above. In some form
it will be incorporated by reference in my dissent on the
merits in Coolidge although I do not intend to write there.

Regards,

W. J. Brennan

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: Mr. Justice Black
Mr. Justice Douglas ✓
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: The Chief Justice

Circulated: MAY 13 1971

Recirculated: _____

No. 301 -- Bivens v. Six Unknown Named Agents of Federal Bureau
of Narcotics

MR. CHIEF JUSTICE BURGER, dissenting.

I dissent from today's holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separation of powers -- and perhaps get a better result -- by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task -- as we do not.

This case has significance far beyond its facts and its holding. For more than fifty-five years this Court has enforced a rule under which evidence of undoubted reliability and probative value has been suppressed and excluded from criminal cases whenever it was obtained in violation of the Constitution. Weeks v. United States, 232 U.S. 383 (1914); Boyd v. United States, 116 U.S. 616, 633 (1886) (dictum.) This rule was extended to the states in Mapp v. Ohio

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 25, 1971

No. 301 - Bivens v. Six Unknown Named Agents of Federal
Bureau of Narcotics

MEMORANDUM TO THE CONFERENCE:

I contemplate adding the attached as an Appendix to my
dissenting opinion in the above.

Regards,

WRB

To: Mr. Justice Black
Mr. Justice Douglas ✓
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 301.—OCTOBER TERM, 1970

From: The Chief Justice

Circulated: _____

Webster Bivens, Petitioner,

v.

Six Unknown Named Agents
of Federal Bureau of
Narcotics.

On Writ of Certiorari
the United States Court
of Appeals for the Sec-
ond Circuit.

Re-circulated: JUN 11 1971

[June —, 1971]

MR. CHIEF JUSTICE BURGER, dissenting.

I dissent from today's holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not. Professor Thayer, speaking of the limits on judicial power, albeit in another context, had this to say: ¹

“And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where the responsibility lies, and to bring down on the precise locality

¹J. Thayer, O. Holmes, & F. Frankfurter, John Marshall 87-88. (Phoenix ed. 1967).

10. Mr. Justice Black
 Mr. Justice Douglas
 Mr. Justice Harlan
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall ✓
 Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

No. 301.—OCTOBER TERM, 1970

Circulated: _____
 Recirculated: JUN 18 1971

Webster Bivens, Petitioner,
 v.
 Six Unknown Named Agents
 of Federal Bureau of
 Narcotics.

On Writ of Certiorari to
 the United States Court
 of Appeals for the Sec-
 ond Circuit.

[June 21, 1971]

MR. CHIEF JUSTICE BURGER, dissenting.

I dissent from today's holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not. Professor Thayer, speaking of the limits on judicial power, albeit in another context, had this to say: ¹

“And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where the responsibility lies, and to bring down on the precise locality the thunderbolt of popular condemnation. . . . For

¹ J. Thayer, O. Holmes, & F. Frankfurter, John Marshall 87–88. (Phoenix ed. 1967).

To: The Chief Justice
✓ Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Black

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Com: Black, J. MAR 10

No. 301.—OCTOBER TERM, 1970

Circulated: _____

Recirculated: _____

Webster Bivens, Petitioner.
v.
Six Unknown Named Agents
of Federal Bureau of
Narcotics.

On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[March —, 1971]

MR. JUSTICE BLACK, dissenting.

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 ~~victim~~ a federal cause of action for damages against the officers making the search. There can be no doubt that such a search could legislatively be made the premise for an action for damages. Congress has of course created a federal cause of action for persons deprived of their federal constitutional rights by *state* officials acting under the color of state law or custom.* Congress could likewise create a remedy against federal officials who exceed the bounds of constitutional restraints 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,

*"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U. S. C. § 1983 (1964).

subject of the
search

Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: Black, J.

SUPREME COURT OF THE UNITED STATES

Regulated: _____

MAY 10 1971

Recirculated: _____

No. 301.—OCTOBER TERM, 1970

Webster Bivens, Petitioner,
v.
Six Unknown Named Agents
of Federal Bureau of
Narcotics.

On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[May —, 1971]

MR. JUSTICE BLACK, dissenting.

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,¹ 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,

¹ "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U. S. C. § 1983 (1964).

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

U. S. DEPARTMENT OF JUSTICE

March 11, 1971

Dear Bill:

In No. 301 - Bivens v.

Six Agents, please join me.

W. O. D.

Mr. Justice Brennan

WM
AJ
1487

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[Handwritten initials]

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun

2nd DRAFT

SUPREME COURT OF THE UNITED STATES ^{Justice Harlan, J.}

No. 301.—OCTOBER TERM, 1970

Circulated: JUN 2 1971

Recirculated: _____

Webster Bivens, Petitioner,	} On Writ of Certiorari to	
<i>v.</i>		the United States Court
Six Unknown Named Agents		of Appeals for the Sec-
of Federal Bureau of		ond Circuit.
Narcotics.		

[June —, 1971]

MR. JUSTICE HARLAN, concurring in the result.

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.

Petitioner alleged, in his suit in the District Court for the Eastern District of New York, that the defendants, federal agents acting under color of federal law, subjected him to a search and seizure contravening the requirements of the Fourth Amendment. He sought damages in the amount of \$15,000 from each of the agents. Federal jurisdiction was claimed, *inter alia*,¹ under 28 U. S. C. § 1331 (a) which provides:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States."

¹ Petitioner also asserted federal jurisdiction under 42 U. S. C. § 1983 and 28 U. S. C. § 1343 (3), and 28 U. S. C. § 1343 (4). Neither will support federal jurisdiction over the claim. See *Bivens v. Six Unknown Named Agents*, 409 F. 2d 718, 720 n. 1 (CA2 1969).

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U. S. DEPARTMENT OF JUSTICE

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Brennan, J.

No. 301.—OCTOBER TERM, 1970

Circulated: 3-11-71

Webster Bivens, Petitioner,
v.
Six Unknown Named Agents
of Federal Bureau of
Narcotics.

On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

Recirculated: _____

[March —, 1971]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Fourth Amendment provides that

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”

In *Bell v. Hood*, 327 U. S. 678 (1946), we reserved the question whether violation of that command 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.

This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner's complaint alleged that on the day respondents, agents of the Federal Bureau of Narcotics acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun

1, 3, 9
Blair
joined on 3/15
OK

2nd DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: 3-26-71

No. 301.—OCTOBER TERM, 1970

Webster Bivens, Petitioner, v. Six Unknown Named Agents of Federal Bureau of Narcotics.	} On Writ of Certiorari to the United States Court of Appeals for the Sec- ond Circuit.
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[March —, 1971]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Fourth Amendment provides that

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"

In *Bell v. Hood*, 327 U. S. 678 (1946), we reserved the question whether violation of that command 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.

This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner's complaint alleged that on that day respondents, agents of the Federal Bureau of Narcotics acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.

Handwritten initials and a checkmark.

CHAMBERS OF
JUSTICE POTTER STEWART

Supreme Court of the United States
Washington, D. C. 20543

March 11, 1971

No. 301, Bivens v. Six Unknown Agents

Dear Bill,

I am glad to join your opinion for the
Court in this case.

Sincerely yours,

Handwritten signature: P.S.

Mr. Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

SECTION OF ADVISORY

March 16, 1971

Re: No. 301 - Bivens v. Six Unknown
Named Agents

Dear Bill:

Please join me in your opinion
in this case.

Sincerely,

B.R.W.

Mr. Justice Brennan

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 15, 1971 .

Re: No. 301 - Bivens v. Six Unknown Named Agents

Dear Bill:

Please join me.

Sincerely,


T.M.

Mr. Justice Brennan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

U.S. DEPARTMENT OF JUSTICE

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas ✓
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

1st DRAFT

SUPREME COURT OF THE UNITED STATES Blackmun, J.

No. 301.—OCTOBER TERM, 1970

Circulated: 3/23/71

Uncirculated: _____

Webster Bivens, Petitioner,	} On Writ of Certiorari to	
v.		the United States Court
Six Unknown Named Agents		of Appeals for the Sec-
of Federal Bureau of		ond Circuit.
Narcotics.		

[March —, 1971]

MR. JUSTICE BLACKMUN, dissenting.

I, too, dissent. I do so largely for the reasons expressed in Chief Judge Lumbard's thoughtful and scholarly opinion for the Court of Appeals. But I also feel that the judicial legislation, which the Court by its opinion today concededly is effectuating, opens the door for another avalanche of new federal cases. Whenever a suspect imagines, or chooses to assert, that a Fourth Amendment right has been violated, he will now immediately sue the federal officer in federal court. This will tend to stultify proper law enforcement and to make the day's labor for the honest and conscientious officer even more onerous and more critical. Why the Court moves in this direction at this time of our history, I do not know. The Fourth Amendment was adopted in 1791, and in all the intervening years the Court has not seen fit to take this step. Other remedies for the truly aggrieved person are available and always have been.

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(WY)

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Blackmun, J.

No. 301.—OCTOBER TERM, 1970

Circulated: _____

Recirculated: _____

6/14/71

Webster Bivens, Petitioner,
v.
Six Unknown Named Agents
of Federal Bureau of
Narcotics.

On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[June —, 1971]

MR. JUSTICE BLACKMUN, dissenting.

I, too, dissent. I do so largely for the reasons expressed in Chief Judge Lumbard's thoughtful and scholarly opinion for the Court of Appeals. But I also feel that the judicial legislation, which the Court by its opinion today concededly is effectuating, opens the door for another avalanche of new federal cases. Whenever a suspect imagines, or chooses to assert, that a Fourth Amendment right has been violated, he will now immediately sue the federal officer in federal court. This will tend to stultify proper law enforcement and to make the day's labor for the honest and conscientious officer even more onerous and more critical. Why the Court moves in this direction at this time of our history, I do not know. The Fourth Amendment was adopted in 1791, and in all the intervening years neither the Congress nor the Court has seen fit to take this step. I had thought that for the truly aggrieved person other quite adequate remedies have always been available. If not, it is the Congress and not this Court that should act.

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U.S. DEPARTMENT OF JUSTICE