

# 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



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. B.*

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 the 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.

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,

C.R.B.

93

— TS 1, 2, 3, 4, 6, 7, 8, 9, 11, 12, 13

1st DRAFT

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

## 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 Recariculated: JUN 11 1971  
the United States Court of Appeals for the Second Circuit.

[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:<sup>1</sup>

"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

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

13

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** of the United States Chief Justice

No. 301.—OCTOBER TERM, 1978 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:<sup>1</sup>

"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

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

B  
/

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 18

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,

subject of the  
Search

\*"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).

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

"Rev."

2nd DRAFT

From: Black, J.

SUPREME COURT OF THE UNITED STATES

Regulated:

MAY 1 6 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,<sup>1</sup> 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

<sup>1</sup> "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).

March 11, 1971

Dear Bill:

In No. 301 - Bivens v.  
Six Agents, please join me.

W. O. D.

Mr. Justice Brennan

WV  
A  
1487

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 <sup>Harlan, J.</sup>

Circulated JUN 21 1971

No. 301.—OCTOBER TERM, 1970

Recirculated:

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

[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*,<sup>1</sup> 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.”

<sup>1</sup> 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).

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

From: Brennan, J.

Circulated: 3-11-71

## SUPREME COURT OF THE UNITED STATES

No. 301.—OCTOBER TERM, 1970

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

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

[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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THE TRADITION OF CONCEPTS

1, 3, 9

Re: *and fair*  
Given on 3/15  
OK  
2nd DRAFT

2nd DRAFT

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

From: Brennan, J.

Circulated:

Recirculated: 3-26-71

SUPREME COURT OF THE UNITED STATES

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.

[March —, 1971]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

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

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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.



Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

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,



P.S.

Mr. Justice Brennan

Copies to the Conference

March 16, 1971

Re: No. 301 - Stevens 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

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

No. 301.—OCTOBER TERM, 1970

Blackmun, J. Circulated: 3/23/71

Uncirculated: \_\_\_\_\_

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

[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.

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

No. 301.—OCTOBER TERM, 1970

Circulated:

6/14/71

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.

[June —, 1971]

MR. JUSTICE BLACKMUN, dissenting.

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