The Burger Court Opinion Writing Database

Carlson v. Green

446 U.S. 14 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

FIRST DRAFT

Circulated: APR 8 1980

Recirculated: _____

CARLSON v. GREEN, No. 78-1261

MR. CHIEF JUSTICE BURGER, dissenting,

Although I would be prepared to join an opinion giving effect to Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) -- which I thought wrongly decided -- I cannot join today's unwarranted expansion of that decision. The Federal Tort Claims Act provides an adequate remedy for prisoners' claims of medical mistreatment. For me, that is the end of the matter.

Under the test enunciated by the Court the adequacy of the Tort Claims Act remedy is an irrelevancy. The sole inquiry called for by the Court's new test is "whether Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery under the Constitution." Ante at 4 (emphasis added).[1] That test would seem to permit a person

[1] The Court pays lip service to the notion that there must be no "special factors counselling hesitation in the absence of affirmative action by Congress." Ante at 4. Its one sentence discussion of the point, however, plainly shows that it is unlikely to hesitate unless Congress says that it must. See opinion of Mr. Justice Powell ante at 2-3."

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

CHAMBERS OF
THE CHIEF JUSTICE

April 10, 1980

MEMORANDUM TO THE CONFERENCE:

CARLSON v. GREEN, No. 78-1261

I will add the following as a final footnote to my dissent in this case.

[3] In response to this dissent, the Court's opinion tells us that it is merely "giv[ing] effect" to what Congress intended. See ante n. 5. Presumably, this is a reference to the legislative history of the 1974 Amendments in which Congress, according to the Court, "made it crystal clear that ... FTCA and Bivens [were] parallel, complementary causes of action." Ante at 4. But as Mr. Justice Rehnquist observes, the legislative history is far from clear. See post at n. 1. In any event, if the Court is correct in its reading of that history, then it is not really implying a cause of action under the Constitution; rather, this becomes simply a case of statutory construction. If so, almost all of the Court's opinion is dicta.

Regards,

WEB

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

APR 17 1980

1st PRINTED DRAFT Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-1261

Norman A. Carlson, Director, Federal Bureau of Prisons, et al., Petitioners, *v.* Marie Green, Administratrix of the Estate of Joseph Jones, Jr.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April —, 1980]

MR. CHIEF JUSTICE BURGER, dissenting.

Although I would be prepared to join an opinion giving effect to *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 338 (1971),—which I thought wrongly decided—I cannot join today's unwarranted expansion of that decision. The Federal Tort Claims Act provides an adequate remedy for prisoners' claims of medical mistreatment. For me, that is the end of the matter.

Under the test enunciated by the Court the adequacy of the Tort Claims Act remedy is an irrelevancy. The sole inquiry called for by the Court's new test is whether "Congress has provided an alternative remedy which *it explicitly declared* to be a substitute for recovery under the Constitution." *Ante*, at 4 (emphasis added).[1] That test would seem to permit a person whose constitutional rights have been violated by a state officer to bring suit under *Bivens* even though

[1] The Court pays lip service to the notion that there must be no "special factors counselling hesitation in the absence of affirmative action by Congress." *Ante*, at 4. Its one sentence discussion of the point, however, plainly shows that it is unlikely to hesitate unless Congress says that it must. See opinion of MR. JUSTICE POWELL, *ante*, at 2-3.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 10, 1980

RE: No. 78-1261 Carlson v. Green

Dear Chief:

I'll undertake the opinion for the Court in the above.

Sincerely,

Bill

The Chief Justice

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–1261

Norman A. Carlson, Director, Federal Bureau of Prisons, et al., Petitioners, *v.* Marie Green, Administratrix of the Estate of Joseph Jones, Jr.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March —, 1980]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondent brought this suit in the District Court for the Southern District of Indiana on behalf of the estate of her deceased son, Joseph Jones, Jr., alleging that he suffered personal injuries from which he died because the petitioners, federal prison officials, violated his due process, equal protection, and Eighth Amendment rights.[1] Asserting jurisdiction under 28 U. S. C. § 1331 (a), she claimed compensatory and punitive damages for the constitutional violations. Two

[1] More specifically, respondent alleged that petitioners, being fully apprised of the gross inadequacy of medical facilities and staff at the Federal Correction Center in Terre Haute, Indiana, and of the seriousness of Jones' chronic asthmatic condition, nonetheless kept him in that facility against the advice of doctors, failed to give him competent medical attention for some eight hours after he had an asthmatic attack, administered contra-indicated drugs which made his attack more severe, attempted to use a respirator known to be inoperative which further impeded his breathing, and delayed for too long a time his transfer to an outside hospital. The complaint further alleges that Jones' death resulted from these acts and omissions, that petitioners were deliberately indifferent to Jones' serious medical needs, and that their indifference was in part attributable to racial prejudice.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 9, 1980

MEMORANDUM TO THE CONFERENCE

No. 78-1261 - Carlson v. Green

In response to the Chief's dissent in the above, I propose to add the following footnote at the end of the second sentence of the second full paragraph on page 4 of the Court's opinion.

> 5. To satisfy this test, petitioners need not show that Congress recited any specific "magic words". See the dissenting opinion of the CHIEF JUSTICE, post, at 2 and note 2. Instead, our inquiry at this step in the analysis is whether Congress has indicated that it intends the statutory remedy to replace, rather than to complement, the Bivens remedy. Where Congress decides to enact a statutory remedy which it views as fully adequate only in combination with the Bivens remedy, e.g. 28 U.S.C. § 2680(h), that congressional decision should be given effect by the courts.

Subsequent footnotes will be renumbered accordingly.

Sincerely,

Bill

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–1261

Norman A. Carlson, Director, Federal Bureau of Prisons, et al., Petitioners, v. Marie Green, Administratrix of the Estate of Joseph Jones, Jr.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April —, 1980]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondent brought this suit in the District Court for the Southern District of Indiana on behalf of the estate of her deceased son, Joseph Jones, Jr., alleging that he suffered personal injuries from which he died because the petitioners, federal prison officials, violated his due process, equal protection, and Eighth Amendment rights.[1] Asserting jurisdiction under 28 U. S. C. § 1331 (a), she claimed compensatory and punitive damages for the constitutional violations. Two

[1] More specifically, respondent alleged that petitioners, being fully apprised of the gross inadequacy of medical facilities and staff at the Federal Correction Center in Terre Haute, Indiana, and of the seriousness of Jones' chronic asthmatic condition, nonetheless kept him in that facility against the advice of doctors, failed to give him competent medical attention for some eight hours after he had an asthmatic attack, administered contra-indicated drugs which made his attack more severe, attempted to use a respirator known to be inoperative which further impeded his breathing, and delayed for too long a time his transfer to an outside hospital. The complaint further alleges that Jones' death resulted from these acts and omissions, that petitioners were deliberately indifferent to Jones' serious medical needs, and that their indifference was in part attributable to racial prejudice.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 23, 1980

MEMORANDUM TO THE CONFERENCE

RE: Cases held for No. 78-1261, Carlson v. Green

Two cases have been held pending decision in Carlson.

1. Moffitt v. Loe, No. 78-1260

The court below held that Loe's allegation that his arm was injured as a result of federal marshalls' unconstitutional actions stated a cause of action remediable under Bivens. The only issue presented to us by the United States, as petitioner, tracked word for word the the first issue presented in Carlson:

"Whether, in circumstances in which the Federal Tort Claims Act provides an adequate federal remedy, an alternative remedy should be found to be implied under the Fifth Amendment."

The only distinction is that the Loe claim arose under the Fifth Amendment because Loe was a federal detainee when he was allegedly injured by federal marshalls, whereas the Carlson claim arose under the Eighth Amendment because Jones was already convicted. Under the rationale of Carlson, this distinction is of no importance.

I shall vote to deny the petition for certiorari.

2. Bush v. Lucas, No. 79-1044

Petitioner, an engineer at a federal space flight center, made some public statements critical of the center. Respondent, director of the center, publicly and firmly denied those statements, and demoted petitioner from GS-14 to GS-12. Petitioner brought suit in state court alleging that respondent had defamed him and had conspired with others to demote him in violation of his First Amendment rights. The District Court, to which the respondent had removed the case, granted respondent's motion for summary judgment, and the Court of Appeals affirmed. The courts held that Barr v. Matteo gave respondent absolute immunity from state tort claims and that there was no Bivens remedy for the allegedly retaliatory demotion because there were adequate administrative remedies under the Civil Service regulations. Meanwhile, an appellate panel of the Civil Service Commission had ordered that petitioner be restored to his former position and awarded $30,724.40 in back pay.

Carlson strongly suggests that the administrative scheme is not an adequate alternative remedy since it lacks three of the four features which we found lacking in the FTCA: damages against the individual (or, for that matter, the Government), availability of punitive damages, and right to jury trial. The court did not refer to any legislative history which might suggest that Congress contemplated that the regulations would pre-empt the Bivens remedy. The administrative action probably has not mooted the case since petitioner may be able to prove damages or punitive damages against respondent beyond the loss of back pay. It follows that, whatever we might do were the Barr v. Matteo issue presented independently, the Court of Appeals should reexamine the Bivens issue in light of Carlson.

I shall vote to grant, vacate, and remand for reconsideration in light of Carlson.

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 3, 1980

Re: 78-1261 - Carlson v. Green

Dear Bill:

I shall await Bill Rehnquist's dissenting opinion.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 18, 1980

Re: No. 78-1261, Carlson v. Green

Dear Lewis,

Please add my name to your opinion concurring in the judgment in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

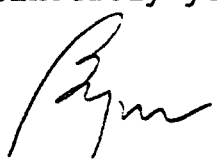
March 3, 1980

Re: 78-1261 - Carlson v. Green

Dear Bill,

Please join me.

Sincerely yours,



Mr. Justice Brennan

Copies to the Conference

cmc

March 4, 1980

Re: No. 78-1261 - Carlson v. Green

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 3, 1980

Re: No. 78-1261 - Carlson v. Green

Dear Bill:

Please join me.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

From: Mr. Justice Powell

3-25-80

Circulated MAR 25 1980

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-1261

Norman A. Carlson, Director, Federal Bureau of Prisons, et al., Petitioners, *v.* Marie Green, Administratrix of the Estate of Joseph Jones, Jr.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March —, 1980]

MR. JUSTICE POWELL, concurring in the judgment.

Although I join the judgment, I do not agree with much of the language in the Court's opinion. The Court states the principles governing *Bivens* actions as follows:

> "*Bivens* established that the victims of a constitutional violation . . . have a right to recover damages. . . . Such a cause of action may be defeated . . . in two situations. The first is when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress.' . . . The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective. . . ." *Ante*, at 3-4 (emphasis in original).

The foregoing statement contains dicta that go well beyond the prior holdings of this Court.

I

We are concerned here with inferring a right of action for damages directly from the Constitution. In *Davis* v. *Passman*, 442 U. S. 228, 242 (1979), the Court said that persons who have "no [other] effective means of redress" "must be

— p.1

The Chief Justice
Justice Brennan
Justice Stewart
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens

Justice Powell

4-18-80

APR 18 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1261

Norman A. Carlson, Director, Federal Bureau of Prisons, et al., Petitioners, *v.* Marie Green, Administratrix of the Estate of Joseph Jones, Jr.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, concurring in the judgment.

Although I join the judgment, I do not agree with much of the language in the Court's opinion. The Court states the principles governing *Bivens* actions as follows:

> "*Bivens* established that the victims of a constitutional violation . . . have a right to recover damages. . . . Such a cause of action may be defeated . . . in two situations. The first is when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress.' . . . The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective. . . ." *Ante*, at 3-4 (emphasis in original).

The foregoing statement contains dicta that go well beyond the prior holdings of this Court.

I

We are concerned here with inferring a right of action for damages directly from the Constitution. In *Davis* v. *Passman*, 442 U. S. 228, 242 (1979), the Court said that persons who have "no [other] effective means of redress" "must be

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 3, 1980

Re: No. 78-1261 - Carlson v. Green

Dear Bill:

In due course I will circulate a dissent in this case.

Sincerely,

Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 7 APR 1980

Recirculated: _____

FIRST DRAFT

No. 78-1261 Carlson v. Green

MR. JUSTICE REHNQUIST, dissenting.

The Court today adopts a formalistic procedural approach for inferring private damage remedies from constitutional provisions that in my view still further highlights the wrong turn this Court took in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). 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." Kovacs v. Cooper, 336 U.S. 77, 89 (Frankfurter, J., concurring). 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,

Sylistic Corrections Throughout
Pp 1, 2, 5, 9, 14, 16
Changes
Pp 1, 9 11, 14, 16, 19, 21, 22, 23

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 16 APR 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1261

Norman A. Carlson, Director, Federal Bureau of Prisons, et al., Petitioners, *v.* Marie Green, Administratrix of the Estate of Joseph Jones, Jr.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April —, 1980]

MR. JUSTICE REHNQUIST, dissenting.

The Court today adopts a formalistic procedural approach for inferring private damage remedies from constitutional provisions that in my view still further highlights the wrong turn this Court took *in Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U. S. 388 (1971). 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." *Kovacs* v. *Cooper,* 336 U. S. 77, 89 (1949) (Frankfurter, J., concurring). *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." Cf. *id./B. & W. Taxi Co.* v. *B. & Y. Taxi Co.,* 276 U. S. 518, 532–533 (1978) (Holmes, J., dissenting); *Hudgens* v. *National Labor Relations Board,* 424 U. S. 507 (1975), overruling *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U. S. 308 (1968).[1]

[1] As observed by Mr. Justice Brandeis, "This Court, while recognizing

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 13, 1980

Re: 78-1261 - Carlson v. Green

Dear Bill:

Please join me.

Respectfully,

Mr. Justice Brennan

Copies to the Conference