10-1979

Carlson v. Green

Lewis F. Powell Jr.

Ellen - I don't think this requires any change. Do you agree? ✓

Agree -
Ellen

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

Ellen — Please do

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.
1.

Mr. Justice Powell

Copies to the Conference

p.1

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

4-18-80

From: Mr. Justice Powell

2nd DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES

APR 18 1980

Recirculated: _____

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

able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." The *Davis* rule now sets the boundaries of the "principled discretion" that must be brought to bear when a court is asked to infer a private cause of action not specified by the enacting authority. *Id.*, at 252 (POWELL, J., dissenting). But the Court's opinion, read literally, would restrict that discretion dramatically. Today we are told that a court must entertain a *Bivens* suit unless the action is "defeated" in one of two specified ways.

Bivens recognized that implied remedies may be unnecessary when Congress has provided "equally effective" alternative remedies. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 397 (1971); see *Davis* v. *Passman*, *supra*, 442 U. S., at 248. The Court now volunteers the view that a defendant cannot defeat a *Bivens* action simply by showing that there are adequate alternative avenues of relief. The defendant also must show that Congress "explicitly declared [its remedy] to be a *substitute* for recovery directly under the Constitution and viewed [it] as equally effective." *Ante*, at 4 (emphasis in original). These are unnecessarily rigid conditions. The Court cites no authority and advances no policy reason—indeed no reason at all—for imposing this threshold burden upon the defendant in an implied remedy case.

The Court does implicitly acknowledge that Congress possesses the power to enact adequate alternative remedies that would be exclusive. Yet, today's opinion apparently will permit *Bivens* plaintiffs to ignore entirely adequate remedies if Congress has not clothed them in the prescribed linguistic garb. No purpose is served by affording plaintiffs a choice of remedies in these circumstances. Nor is there any precedent for requiring federal courts to blind themselves to congressional intent expressed in language other than that which we prescribe.

A defendant also may defeat the *Bivens* remedy under today's decision if "special factors" counsel "hesitation." But

the Court provides no further guidance on this point. The opinion states simply that no such factors are present in this case. The Court says that petitioners enjoy no "independent status in our constitutional scheme" that would make judicially created remedies inappropriate. *Ante*, at 4. But the implication that official status may be a "special factor" is withdrawn in the sentence that follows, which concludes that qualified immunity affords all the protection necessary to ensure the effective performance of official duties. No other factors relevant to the purported exception are mentioned.

One is left to wonder whether judicial discretion in this area will hereafter be confined to the question of alternative remedies, which is in turn reduced to the single determination that congressional action does or does not comport with the specifications prescribed by this Court. Such a drastic curtailment of discretion would be inconsistent with the Court's long-standing recognition that Congress is ultimately the appropriate body to create federal remedies. See *ante*, at 4–5; *Bivens* v. *Six Unknown Fed. Narcotics Agents*, *supra*, 403 U. S., at 397. A plaintiff who seeks his remedy directly under the Constitution asks the federal courts to perform an essentially legislative task. In this situation, as Mr. Justice Harlan once said, a court should "take into account [a range of policy considerations] at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy." *Bivens*, *supra*, at 407. The Court does not explain why this discretion should be limited in the manner announced today.

The Court's absolute language is all the more puzzling because it comes in a case where the implied remedy is plainly appropriate under any measure of discretion. The Federal Tort Claims Act, on which petitioners rely, simply is not an adequate remedy.[1] And there are reasonably clear indications

[1] The Federal Tort Claims Act is not a federal remedial scheme at all, but a waiver of sovereign immunity that permits an injured claimant to

that Congress did not intend that statute to displace *Bivens* claims. See *ante*, at 4–5. No substantial contrary policy has been identified, and I am aware of none. I therefore agree that a private damages remedy properly is inferred from the Constitution in this case. But I do not agree that *Bivens* plaintiffs have a "right" to such a remedy whenever the defendant fails to show that Congress has "provided an [equally effective] alternative remedy which it explicitly declared to be a *substitute*. . . ." In my view, the Court's willingness to infer federal causes of action that cannot be found in the Constitution or in a statute denigrates the doctrine of separation of powers and hardly comports with a rational system of justice. Cf. *Cannon* v. *University of Chicago*, 441 U. S. 677, 730–749 (1979) (POWELL, J., dissenting).[2]

II

In Part III of its opinion, the Court holds that " 'whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action.' " *Ante*, at 9, quoting 581 F. 2d 699, 674–675 (CA7 1978). I

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recover damages against the United States where a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346 (b); see also 28 U. S. C. § 2674. Here, as in *Bivens* itself, a plaintiff denied his constitutional remedy would be remitted to the vagaries of state law. See 403 U. S., at 394–395. The FTCA gives the plaintiff even less than he would receive under state law in many cases, because the statute is hedged with protections for the United States. As the Court points out, the FTCA allows neither jury trial nor punitive damages. *Ante*, at 7. And recovery may be barred altogether if the claim arises from a "discretionary function" or "the execution of a statute or regulation, whether or not such statute or regulation is valid." 28 U. S. C. § 2680 (a).

[2] I do not suggest that courts enjoy the same degree of freedom to infer causes of action from statutes as from the Constitution. See *Davis* v. *Passman*, 442 U. S. 228, 241–242 (1979). I do believe, however, that the Court today has overstepped the bounds of rational judicial decision-making in both contexts.

agree that the relevant policies require the application of federal common law to allow survival in this case.

It is not "obvious" to me, however, that "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules" in every case. *Ante*, at 8; see *id.*, at 9. On the contrary, federal courts routinely refer to state law to fill the procedural gaps in national remedial schemes. The policy against invoking the federal common law except where necessary to the vitality of a federal claim is codified in 42 U. S. C. § 1988, which directs that state law ordinarily will govern those aspects of § 1983 actions not covered by the "laws of the United States."

The Court's opinion in this case does stop short of mandating uniform rules to govern all aspects of *Bivens* actions. *Ante*, at 9–10, n. 10. But the Court also says that the preference for state law embodied in § 1988 is irrelevant to the selection of rules that will govern actions against federal officers under *Bivens*. *Ibid.* I see no basis for this view. In *Butz* v. *Economou*, 438 U. S. 478, 498–504, and n. 25 (1978), the Court thought it unseemly that different rules should govern the liability of federal and state officers for similar constitutional wrongs. I would not disturb that understanding today.

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
	1/21/80							
~~cert~~ ~~pet~~ ~~dropt~~ 1/8/80	1st dropt 2/19/80 ~~2nd dropt~~	await dissent 3/3/80	join WJB 3/3/80	join WJB 3/4/80	join WJB 3/3/80	await dissent 2/13/80	will dissent 2/13/80	join JPS 3/13/80
dropt 1/17/80	4/10/80	join LFP 4/18/80				1st dropt conc in judgment 3/25/80	signed dropt 4/7/80	
						2nd dropt 4/18/80	1st dropt 4/16/80	
				78-1261 Carlson v. Green				

P.S & LRP are awaiting dissent by WHR

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

From: Mr. Justice Brennan

Circulated: FEB 2 9 1980

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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.

questions are presented for decision: (1) Is a remedy available directly under the Constitution given that respondent's allegations could also support a suit against the United States under the Federal Tort Claims Act?[2] and (2) If so, is survival of the cause of action governed by federal common law or by state statutes?

I

The District Court held that under *Estelle* v. *Gamble*, 429 U. S. 97 (1976), the allegations set out in note 1, *supra*, pleaded a violation of the Eighth Amendment's proscription against infliction of cruel and unusual punishment[3] giving rise to a cause of action for damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U. S. 388 (1971). The court recognized that the decedent could have maintained this action if he had survived, but dismissed the complaint because in its view the damages remedy as a matter of federal law was limited to that provided by Indiana's survivorship and wrongful death laws and, as the court construed those laws, the damages available to Jones' estate failed to meet § 1331 (a)'s $10,000 jurisdictional amount requirement. The Court of Appeals for the Seventh Circuit agreed that an Eighth Amendment violation was pleaded under *Estelle* and that a cause of action was stated

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[2] This question was presented in the petition for certiorari, but not in either the District Court or the Court of Appeals. However, respondent does not object to its decision by this Court. Though we do not normally decide issues not presented below, we are not precluded from doing so. *E. g.*, *Youakim* v. *Miller*, 425 U. S. 231, 234 (1976). Here, the issue is squarely presented and fully briefed. It is an important, recurring issue and is properly raised in another petition for certiorari being held pending disposition of this case. See *Loe* v. *Armistead*, 582 F. 2d 1291 (CA4 1978), cert. pending sub nom. *Moffit* v. *Loe*, No. 78-1260. We conclude that the interests of judicial administration will be served by addressing the issue on its merits.

[3] Petitioners do not contest the determination that the allegations satisfy the standards set out in *Estelle*.

under *Bivens*, but reversed the holding that § 1331 (a)'s jurisdictional amount requirement was not met.[4] Rather, the Court of Appeals held that § 1331 (a) was satisfied because "whenever the relevant State survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action." 581 F. 2d 669, 675 (1978). The court reasoned that the Indiana law, if applied, would "subvert" "the policy of allowing complete vindication of constitutional rights" by making it "more advantageous for a tortfeasor to kill rather than to injure." *Id.*, at 674. We granted certiorari. 442 U. S. — (1979). We affirm.

II

Bivens established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special fac-

[4] The relevant Indiana law provides that a personal injury claim does not survive where the acts complained of caused the victim's death. Ind. Code § 34-1-1-1. Indiana does provide a wrongful death cause of action for the personal representative of one whose death is caused by an alleged wrongful act or omission. Damages may "includ[e], but [are] not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings." But if the decedent is not survived by a spouse, dependent child, or dependent next of kin, then the recovery is limited to expenses incurred in connection with the death. Ind. Code § 34-1-1-2.

The District Court read the complaint in this case as stating claims under both §§ 34-1-1-1 and 34-1-1-2. Accordingly, the court assumed that recovery on the claim was limited to expenses (all of which would be paid by the Federal Government) only because Jones died without a spouse or any dependents. The Court of Appeals read the complaint as stating only a survivorship claim on behalf of Jones under § 34-1-1-1. Thus it assumed that the claim would have abated even if Jones had left dependents or a spouse. 581 F. 2d 669, 672, n. 4. Resolution of this conflict is irrelevant in light of our holding today.

tors counselling hesitation in the absence of affirmative action by Congress." *Id.*, 403 U. S., at 396; *Davis* v. *Passman*, 442 U. S. 228, 245 (1979). 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. *Bivens*, 403 U. S., at 397; *Davis* v. *Passman*, 442 U. S., at 245–247.

Neither situation obtains in this case. First, the case involves no special factors counselling hesitation in the absence of affirmative action by Congress. Petitioners do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate. *Davis* v. *Passman*, 442 U. S., at 246. Moreover, even if requiring them to defend respondent's suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them under *Butz* v. *Economou*, 438 U. S. 478 (1978), provides adequate protection. See *Davis* v. *Passman*, 442 U. S., at 246.

Second, we have here no explicit congressional declaration that persons injured by federal officers' violations of the Eighth Amendment may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress. Petitioners point to nothing in the Federal Tort Claims Act (FTCA) or its legislative history to show that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations. FTCA was enacted long before *Bivens* was decided, but when Congress amended FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers, 28 U. S. C. § 2680 (h), the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action:

"[A]fter the date of enactment of this measure, innocent

> individuals who are subjected to raids [like that in *Bivens*] will have a cause of action against the individual Federal agents *and* the Federal Government. Furthermore, this provision should be viewed as a *counterpart* to the *Bivens* case and its progenty [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved." S. Rep. No. 93–588, 93d Cong., 1st Sess., 3 (1973) (emphasis supplied).

In the absence of a contrary expression from Congress, § 2680 (h) thus contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights.

This conclusion is buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. See 38 U. S. C. § 4116 (a), 42 U. S. C. § 233 (a), 42 U. S. C. § 2458a, 10 U. S. C. § 1089 (a), and 22 U. S. C. § 817 (a) (malpractice by certain Government health personnel); 28 U. S. C. § 2679 (b) (operation of motor vehicles by federal employees); and 42 U. S. C. § 247b (k) (manufacturers of swine flu vaccine). Furthermore, Congress has not taken action on other bills that would expand the exclusivity of FTCA. See, *e. g.*, S. 695, 96th Cong., 1st Sess. (1979); H. R. 2659, 96th Cong., 1st Sess. (1979); S. 3314, 95th Cong., 2d Sess. (1978).

Four additional factors, each suggesting that the *Bivens* remedy is more effective than the FTCA remedy, also support our conclusion that Congress did not intend to limit respondent to an FTCA action. First, the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. See

Butz v. *Economou*, 438 U. S. 478, 505 (1978).[5] Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect,[6] *Imbler* v. *Pachtman*, 424 U. S. 409, 442 (1976) (WHITE, J., concurring in the judgment), surely particularly so when the individual official faces personal financial liability.

Petitioners argue that FTCA liability is a more effective deterrent because the individual employees responsible for the Government's liability would risk loss of employment[7] and becauses the Government would be forced to promulgate corrective policies. That argument suggests, however, that the superiors would not take the same actions when an employee is found personally liable for violation of a citizen's constitutional rights. The more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity.

Second, our decisions, although not expressly addressing and deciding the question, indicate that punitive damages may be awarded in a *Bivens* suit. Punitive damages are "a partic-

[5] 42 U. S. C. § 1983 serves similar purposes. See, *e. g.*, *Robertson* v. *Wegmann*, 436 U. S. 584, 590–591 (1978); *Carey* v. *Piphus*, 435 U. S. 247, 256 (1978); *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972); *Monroe* v. *Pape*, 365 U. S. 167, 172–187 (1961).

[6] Indeed, underlying the qualified immunity which public officials enjoy for actions taken in good faith is the fear that exposure to personal liability would otherwise deter them from acting at all. See *Butz* v. *Economou*, 438 U. S. 478, 497 (1978); *Scheuer* v. *Rhodes*, 416 U. S. 232, 240 (1974).

[7] Some doubt has been cast on the validity of the assumption that there exist adequate mechanisms for disciplining federal employees in such cases. See Testimony of Griffin B. Bell, Attorney General of the United States, Joint Hearing before the Subcommittee on Citizens and Shareholders Rights and Remedies and the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Part 1, 95th Cong., 2d Sess., at 6 (1978).

ular remedial mechanism normally available in the federal courts," *Bivens*, 403 U. S., at 397, and are especially appropriate to redress the violation by a government official of a citizen's constitutional rights. Moreover, punitive damages are available in "a proper" § 1983 action, *Carey* v. *Piphus*, 435 U. S. 247, 257, n. 11 (1978) (punitive damages not awarded because District Court found defendants "did not act with a malicious intention to deprive respondents of their rights or to do them some other injury"),[8] and *Butz* v. *Economou*, *supra*, suggests that the "constitutional design" would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression. 438 U. S., at 504. But punitive damages in an FTCA suit are statutorily prohibited. 28 U. S. C. § 2674. Thus FTCA is that much less effective than a *Bivens* action as a deterrent to unconstitutional acts.

Third, a plaintiff cannot opt for a jury in an FTCA action, 28 U. S. C. § 2402, as he may in a *Bivens* suit.[9] Petitioners argue that this is an irrelevant difference because juries have been biased against *Bivens* claimants. Reply Brief at 7, Brief at 30–31, n. 30. Significantly, however, they do not assert that judges trying the claims as FTCA actions would have been more receptive, and they cannot explain why the plaintiff should not retain the choice.

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[8] Moreover, after *Carey* punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury.

[9] Petitioners argue that the availability of punitive damages or a jury trial under *Bivens* is irrelevant because neither is a *necessary* element of a remedial scheme. But that argument completely misses the mark. The issue is not whether a *Bivens* cause of action or any one of its particular features is essential. Rather the inquiry is whether Congress has created what it views as an *equally* effective remedial scheme. Otherwise the two can exist side by side. Moreover, no one difference need independently render FTCA inadequate. It can fail to be equally effective on the cumulative basis of more than one difference.

Fourth, an action under FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward. 28 U. S. C. § 1346 (b) (United States liable "in accordance with the law of the place where the act or omission occurred."). Yet it is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules. See Part III, *infra*. The question whether respondent's action for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution.

Plainly FTCA is not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated respondent exclusively to the FTCA remedy.

I agree

III

Bivens actions are a creation of federal law and, therefore, the question whether respondent's action survived Jones' death is a question of federal law. See *Burks* v. *Lasker*, 441 U. S. 471, 476 (1979). Petitioners, however, would have us fashion a federal rule of survivorship that incorporates the survivorship laws of the forum State, at least where the state law is not inconsistent with federal law. Respondent argues, on the other hand, that only a uniform federal rule of survivorship is compatible with the goal of deterring federal officials from infringing federal constitutional rights in the manner alleged in respondent's complaint. We agree with respondent. Whatever difficulty we might have resolving the question were the federal involvement less clear, we hold that only a uniform federal rule of survivorship will suffice to redress the constitutional deprivation here alleged and to protect against repetition of such conduct.

WJB says "uniform rule of survivorship" is necessary

In short, we agree with and adopt the reasoning of the Court of Appeals, 581 F. 21, at 674–675 (footnote omitted):

> "The essentiality of the survival of civil rights claims for complete vindication of constitutional rights is buttressed by the need for uniform treatment of those claims, at least where they are against federal officials. As this very case illustrates, uniformity cannot be achieved if courts are limited to applicable state law. Here the relevant Indiana statute would not permit survival of the claim, while in *Beard* [v. *Robinson*, 563 F. 2d 331 (CA7 1977),] the Illinois statute permitted survival of the *Bivens* action. The liability of federal agents for violation of constitutional rights should not depend upon where the violation occurred. . . . In sum, we hold that whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action."

Robertson v. *Wegmann*, *supra*, holding that a § 1983 action would abate in accordance with Louisiana survivorship law is not to the contrary. There the plaintiff's death was not caused by the acts of the defendants upon which the suit was based.[19] Moreover, *Robertson* expresslsy recognized that to

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[19] *Robertson* fashioned its holding by reference to 42 U. S. C. § 1988 which requires that § 1983 actions be governed by

"the comon law, as modified and changed by the constitution and laws of the State wherein the court having jurisdiction of [the] civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States."

Section 1988 does not in terms apply to *Bivens* actions, and there are cogent reasons not to apply it to such actions even by analogy. *Bivens* defendants are federal officials brought into federal court for violating the Federal Constitution. No state interests are implicated by applying purely federal law to them. While it makes some sense to allow aspects of § 1983 litigation to vary according to the laws of the States under whose authority § 1983 defendants work, federal officials have no similar

prevent frustration of the deterrence goals of § 1983 (which in part also underlie *Bivens* actions, see Part II, *supra*) "[a] state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him." 436 U. S., at 592. A federal official contemplating unconstitutional conduct similarly must be prepared to face the prospect of a *Bivens* action. A uniform rule that claims such as respondent's survive the decedent's death is essential if we are not to "frustrate in [an] important way the achievement" of the goals of *Bivens* actions. *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 702–703 (1966).[11]

Affirmed.

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claim to be bound only by the law of the State in which they happen to work. *Bivens*, 403 U. S., at 409 (Harlan, J., concurring). Moreover, these petitioners have the power to transfer prisoners to facilities in any one of several States which may have different rules governing survivorship or other aspects of the case, thereby controlling to some extent the law that would apply to their own wrongdoing. See *Robertson*, 436 U. S., at 592–593, and n. 10. Another aspect of the power to transfer prisoners freely within the federal prison system is that there is no reason to expect that any given prisoner will have any ties to the State in which he is incarcerated, and, therefore, the State will have little interest in having its law applied to that prisoner. Nevertheless, as to other survivorship questions that may arise in *Bivens* actions, it may be that the federal law should choose to incorporate state rules as a matter of convenience. We leave such questions for another day.

[11] Otherwise, an official could know at the time he decided to act whether his intended victim's claim would survive. Cf. *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696 (1966) (whether statute of limitation will matter cannot be known at time of conduct).

er2/29/80

MEMORANDUM

TO: Mr. Justice Powell

FROM: Ellen

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

Mr. Justice Brennan's draft opinion for the Court bothers me for four reasons. (1) First, his discussion of the Bivens cause of action incorporates the same analysis you objected to in Passman. On p. 3-4, the governing principles are set out 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: (i) when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress, and (ii) 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." (first emphasis added, second in original).

Again, the Court ignores the rule that "federal courts must exercise a principled discretion when called upon to infer a private cause of action directly from the language fo the Constitution." (From your Passman dissent, p. 1). This case differs from Passman in that there is nothing that should lead the Court to reject the damages action. But I do not know that you want to join an opinion that so explicitly and affirmatively adopts the "right to damages" idea.

(2) Second, Mr. Justice Brennan writes that alternative remedies will not be deemed to replace Bivens actions unless Congress "explicitly declare[s it] to be a substitute. . . . " (p. 4) (emphasis in original). I doubt that this is true. Moreover, it is wholly irrelevant in this case, where Congress plainly didn't intend to replace Bivens actions. This congressional intent, like an explicit declaration, is relevant. But neither expressed intent nor the lack of it should be controlling.

(3) Third, and less significant, the opinion omits what I consider to be the most crucial reasons why the FTCA remedy is not adequate. Mr. Justice Brennan mentions that "an action under FTCA exists only if the State . . . would permit a cause of action for that misconduct to go foraward." But he then says only that "it is obvious that the liability of federal officials . . . should be governed by uniform rules." That proposition - at least as broadly stated as it is in this opinion - is not obvious to me. The important point about the FTCA's reliance on state law is that the FTCA is not a federal remedial scheme - it merely waives sovereign immunity for existing tort claims. Nothing guarantees that the state law tort will bear any resemblance to the constitutional one, or that it will effectuate the policies underlying Bivens. That - not lack of uniformity - is the deficiency of the FTCA remedy. Moreover, Mr. Justice Brennan makes no mention of the special exceptions to the FTCA (Bench Memo, at 3-4) which could reduce the availability of the remedy even below what exists under state law.

(4) Fourth, Mr. Justice Brennan's view of the paramount importance of uniformity carries over into Part III, which implies in text that all the details of a Bivens action must be governed by uniform federal law. In particular, the language of the CA adopted by the Court in p. 9 is instructive: "The liability of federal agents for violation of constitutional rights should not depend upon where the violation occurred. . . " This bears a strong resemblance to the "outcome determinative" test once used in the Erie context, and, as such, is bound to be unworkable. Indeed, this reasoning would call into question settled law in the Courts of Appeals that the statute of limitations in Bivens actions is borrowed from state law. The footnote takes some of this back, stating that "it makes some sense to allow aspects of § 1983 litigation to vary according to [State law]" and that "as to other survivorship questions . . ., it may be that the federal law should choose to incorporate state rules as a matter of convenience." (pp. 9-10 n. 10).

Despite the footnote, I am worried about the broad language in the text. The opinion suggests that in Bivens actions there is a presumption favoring a uniform rule, which is directly opposite to the statutory presumption favoring state law in § 1983 actions. 42 U.S.C. § 1988. This is contrary to the spirit of Butz v. Economou, in which the Court suggested it would be unseemly for federal officers to be governed by different rules than state officials. Apparently for this reason, the opinion fails

adequately to deal with the contrary precedent in Robertson or to analyze, as the Court did in Robertson, the effect of applying state law on the policies underlying the constitutional cause of action. Indeed, the Court provides no real guidance for determining when state law might be "convenient" enough to override the uniformity interest. Although I could see holding that the state law in this case is too restrictive to further the federal policies, I do not agree that there should be a presumption in favor of federal common law.

CONCLUSION: Points (2) and (3) are not serious. (2) could probably be worked out with language changes, and (3) might not be worth protesting about. (1) and (4) are more troubling. On the cause of action issue, I suppose you are now bound by Passman. But it might be worth writing separately to show that you need not use the "right to damages" analysis to reach this result. As to the survivorship question, the footnote and the outlandish result of reading the text literally may prevent any untoward results in future cases. I also believe that my reaction is colored by what seems to be back-of-the-hand treatment of a difficult issue. Accordingly, you may not feel that it is worth the trouble to say anything different on this point. On the other hand, I do believe that the language and analysis of the draft is way too broad, overstating the interest in uniformity and cutting a wide swath for federal common law where it is not necessary. The result is not as troubling in this case as it is where important State interests are

at stake. Here, the State has no interest in applying its own law in federal constitutional actions. Rather, the problem is the judicial legislation inherent in adopting uniform federal rules as often and as broadly as this opinion suggests.

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 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

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

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

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 4, 1980

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

Dear Bill:

Please join me.

Sincerely,

T.M.

T.M.

Mr. Justice Brennan

cc: The Conference

er 1/4/80

1. Bivens action not preempted by Fed Tort claim

Prisoner inmate died from deliberate medical malpractice in Fed prison. Her admin brought Bivens suit under 8th Amend. SG argues that FTCA provides exclusive remedy for this type tort.

In my Passman dissent I relied on J. Harlan for view that there is no damage suit remedy (i.e. Bivens suit) for all constitutional violations. We must consider some same policy considerations that motivate a legislature. Here, when FTCA was amended in 74, leg. hist. suggest intent not to supercede Bivens

BENCH MEMORANDUM

Also FTCA claims are limited to those available under state law. See pp 3-5

FTCA itself is limited - eg no jury trial - p 3

TO: Mr. Justice Powell

FROM: Ellen

DATE: January 4, 1980

RE: No. 78-1261 Carlson v. Green

2. Not clear whether Fed. law of survivorship (i.e. right to sue) applies. In Robertson, we applied La law - but found it ~~not~~ harmonious with policy of 1983

There are two issues:

1. Whether there should be a Bivens action for damages for deliberate medical mistreatment in violation of the Eighth Amendment, when the victim has an alternate remedy in the form of a malpractice action against the United States under the Federal Tort Claims Act?

2. If there is such an action, whether survival of the action is governed by Indiana statutes that would bar this claim?

I

On the Bivens issue, my initial impression was that it is improper to allow plaintiffs to circumvent the procedures of

the FTCA by alleging constitutional violations. The briefs have convinced me otherwise. As you pointed out in your concurrence in Davis v. Passman, a damages remedy is not constitutionally compelled for violations of all constitutional rights. Bivens itself looked to a variety of factors, and Justice Harlan's concurrence suggested that the Court look to the same sorts of discretionary policies that a legislature might in fashioning a remedy. Brown v. General Services Administration, 425 U.S. 820 (1976), looks in the same general direction, although Brown was a § 1981 action and accordingly looked primarily to congressional intent.

The basic inquiry seems to focus on the adequacy of alternative channels of enforcement to serve the policies of deterrence and compensation. The parties have somewhat muddled the role of congressional intent in this enterprise. I don't believe that Congress could properly provide for an exclusive remedy unless the remedy was also constitutionally adequate. Conversely, the absence of explicit congressional intent to fashion an exclusive remedy is not controlling. For the same reasons, I doubt that Congress' intent to provide a parallel remedy would be absolutely controlling if the redundancy of the statutory and constitutional actions was apparent. However, the evidence that Congress expressly preserved Bivens as an alternate remedy when it amended the FTCA to cover the sorts of harms alleged in that case is certainly relevant to the question whether the FTCA is in fact an effective alternative when

constitutional rights have been violated.

In this case, I think the SG misleads when he says that the FTCA is a "comprehensive remedial scheme for the kind of claim raised here." It is not. All the FTCA does is waive sovereign immunity and permit the recovery of damages against the United States "where . . . a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346 (b); see also 28 U.S.C. § 2674. This isn't a federal remedial scheme at all. It remits the plaintiff entirely to his state law rights. Moreover, the FTCA gives the plaintiff even less than he would have under state law in many cases, because it is hedged with protections for the United States:

FTCA not comprehensive remedy

1. The plaintiff cannot recover punitive damages.

2. He is not entitled to trial by jury.

3. The United States may well be entitled to use the good faith or qualified immunites provided by state law to protect individuals, not the state. Cf. Owen v. City of Independence.

4. There is an exception for acts performed by employees "exercising due care in the execution of a statute or regulation, whether or not such statute or regulation is valid." 28 U.S.C. § 2680(a) - a provision that would immunize many constitutional violations.

?

5. There is an exception for performance of "a

discretionary function or duty . . . whether or not the discretion be abused," which exempts from liability all planning decisions. Dalehite v. United States, 346 U.S.15, 42 (19530.

6. The plaintiff must exhaust administrative remedies before coming to court.

Not only is the plaintiff subject to "the vagaries of common law actions," Bivens, 403 U.S. at 409 (Harlan, J. concurring), but in some cases there will be no damages at all because of the additional defenses of the FTCA. Finally, the deterrent aspects of Bivens ~~aspects~~ are not served to the same extent by actions against the United States. The SG argues that purpose will be better served because officials will institute corrective action if liability is imposed upon the government itself. Whatever the validity of this argument, it rests on a theory quite different from that underlying Bivens.

Here as in Bivens, the interests protected by state laws regulating malpractice may be inconsistent with those served by the Eighth Amendment, for many of the same reasons stated in Bivens. 403 U.S., at 394. And the federal interest in uniformity is disserved by the FTCA remedy, which looks exclusively to the laws of the 50 states. In short, this is not a scheme specially adapted and designed - with some modifications - to remedy a particular sort of constitutional violation, as was Title VII. See Brown v. GSA. It merely

authorizes litigants to bring state law claims. Precisely the same situation prevailed in Bivens itself, except that the United States was not liable to suit. The addition of a solvent defendant to the picture should not change the result. Although the petitioner suggests that even Bivens should now come out the other way, Brief at 33, the alleviation of one of the concerns expressed in that decision does not seem to me to be controlling. Indeed, the fact that petitioner's logic inevitably leads to the abandonment of virtually all Bivens suits is a compelling argument against it.

This conclusion is buttressed by the Congress' clear intention to preserve Bivens claims when it amended the FTCA in 1974 to provide an additional remedy for the same conduct, see Respondent's brief at 35-36, by the repeated rejections in Congress of attempts to amend the FTCA to substitute direct government liability for all individual liability in cases arising out of the performance of official duties, see Brief Amicus Curiae for the ACLU Foundation at 25-29, and by the concerns expressed by various congressmen that the FTCA remedy would be insufficient without substantial changes, see id. at 26-27 and cf. Petitioner's Brief at 37 n. 38.

The public policy concerns raised by the petitioner in the other direction are not persuasive. Brief at 38-39. The fact that a suit against the government should be preferable to the claimant is hardly a reason to deny him an alternative remedy that he may irrationally prefer or that may in unusual

circumstances (as here) be preferable. Indeed, the usual superiority of an FTCA suit alleviates to some extent the "floodgates" concern so often expressed in these suits. The petitioner also says that substitution of government liability will benefit the public because the fear of personal liability and the burden of trial dampens the ardor of public officials. But the doctrines of qualified and absolute immunity were designed to meet precisely these concerns. We ought not to strike a different (and rather one-sided) balance here.

Finally, there has been a suggestion that this question is not properly before us. Although it is true the question was not raised below and is not really related to the argument, made below, that no cause of action should be implied under the eighth amendment, it was the principal question on which the Court granted cert. It is a question of considerable importance and one to which the parties have devoted the lion's share of their briefing. There is no jurisdictional bar. Although the Court could properly refuse to consider the question, it would probably be preferable to reach it.

Altho Q was not raised below, we granted cert on it

II

This issue raises no difficult theoretical questions. I am inclined to agree with the parties that Bivens actions should generally be treated similarly to § 1983 actions. See Butz v. Economou, 438 U.S. 478 (1978). Therefore Robertson v. Wegman, 436 U.S. 584 (1978) is the controlling law. Robertson

says that state survival laws generally will govern constitutional damages actions against federal officials. But the holding there was:

> a narrow one, limited to situations in which no claim is made that state law generally is inhospitable to survival of § 1983 actions and in which the particular application of state survivorship law, while it may cause abatement of the action, has no independent adverse effect on the policies underlying § 1983. . . . A different situation might well be presented . . . if state law 'did not provide for survival of any tort actions . . . . We intimate no view, moreover, about whether abatement . . . could be allowed in a situation in which deprivation of federal rights caused death.

Robertson v. Wegmann (La case)

The debate in this case is over the applicability of the possible exceptions noted in Robertson, all of which seem to turn principally on an analysis of whether application of the state law of survival would frustrate the purposes of constitutional damages actions. The issues here are muddied by a dispute over the Indiana law.

The petitioner says that all actions in Indiana "survive" to some extent. Although personal injury actions that cause a death do not "survive" in the sense that the victim's claim is completely abated, Indiana provides for a separate action for the victim's personal representative to sue in his own right or to recover damages for next of kin. This is in a legal sense a separate claim. But whether it should be treated differently for purposes of our analysis is not clear. The point should not be how the actions are labelled, for once the victim is dead the same people are likely to end up with the

recovery whether the action be labelled "survival" or "wrongful death." As long as the constitutional claim of a deceased victim can be asserted in a wrongful death action, I would be inclined to take the petitioner's view and lump both actions together to see, in sum, what may be recovered. We do not know whether Indiana law would permit a constitutional claim to be brought under the wrongful death statute, but I have no reason to believe this would not be permissible. Accordingly, I will assume that damages would be available under Indiana law for the items provided in that statute.

In the particular circumstances of this case, the recovery provided for the allegedly unconstitutional death is woefully inadequate. But that is because the victim died leaving no widow or dependent relative. I doubt that the limitation on damages in these circumstances would have any significant effect on the policies underlying Bivens. As the petitioner points out, the survival of personal injury claims may often create a windfall to nondependent relatives or even unrelated heirs. At least, the policy of compensation is less compelling when the victim has died leaving no nuclear family or dependent relatives.

The problem of deterrence is more troublesome. But the statutes, taken together, do not completely eliminate recoveries when the victim has died. Indeed, they significantly reduce recoveries only in the special circumstances presented here. I doubt that the prospect of "getting off" without

damages liability when a prospective victim has no family would significantly affect the conduct of federal officials who know that in cases where the victim survives or leaves a widow or dependents he may have to answer in damages.

I am somewhat troubled by this aspect of the case because it seems to place the Court at large to make predictive judgments as it sees fit on whether rules of law will "adequately" compensate or deter. Because I see no real benefit in the creation of a federal rule of survivorship more liberal than that provided by Indiana law, I would be inclined to avoid this exercise in creating common law rules in a largely legislative area. Even though the Court has done so in admiralty to a certain extent, Moragne v. States Marine Lines, Inc., 398 U.S. 375, 405-498 (1970), there are too many outright policy questions in fashioning survival and wrongful death actions: Who is entitled to sue? For what items of damages? The absence of a body of common law precedent would seem to me to make these questions excruciatingly difficult unless we look to state law. For these reasons, I lean to reverse the CA7 and hold that the action was properly dismissed on the basis of Indiana law. But I don't feel strongly one way or the other on this question and could easily be persuaded the other way if there is some compelling reason to believe the policies underlying Bivens would be compromised.

Ellen would create no federal rule of survivorship more liberal than that of Indiana that benefits only a spouse & dependent relatives

CONCLUSION

On the first issue, I believe the FTCA cannot be interpreted as the exclusive remedy for the injury caused by the alleged constitutional violation in this case. If that result obtains in this case, it would be difficult to distinguish the whole array of Bivens actions - indeed, the SG's brief strongly suggests that he would now apply the same rule to the facts of Bivens itself. This logic seems designed to eliminate Bivens actions entirely. While the Bivens action arguably has contributed little to enforcement of constitutional obligations while clogging the courts with amorphous suits governed by no easily discernible laws, it would seem disingenuous to overrule it indirectly in the way proposed by the SG.

On the second issue, the analysis is more straightforward but the result, in my view, less clear. I would lean to adopt the Indiana law of survivorship and reverse the CA7, with the result that the action will be barred.

Director of Fed Bureau of Prisons.

78-1261 CARLSON v. GREEN (Ct of A 7) Argued 1/7/80

Two Q:

1. Whether a Bivens action exists under 8th Amend for wilful malpractice on a prisoner inmate - even that a claim would exist under Fed Tort Claims Act?

2. If answer to above Q is "yes", does a fed. com. law of survivorship apply rather than state law?

Complaint alleged wilful & malicious malpractice. As Complaint was dismissed, must accept allegations as correct. (See last ¶ of Complaint)

Pellet (SG)

Two Q:

1. Whether Bivens action exists?

2. " scope/nature of action

is det. by fed common law rather than state law? (Reach this only if answer to 1st Q is affirmative)

× × ×

Concedes Govt didn't raise Q 1 in cts below (FN 9, p 16 of SG's Brief), but see FN 9 for reasons we nevertheless should consider issue.

Q is not whether FTCA is as broad as a Bivens action. Rather it is whether FTCA provides an adequate remedy.

(P.S. said that Brown intended to make Title VII exclusive. Leg. hist. here is not that clear. See N 31, p 32 of Resps Br)

Can only sue Govt - not individuals - under FTCA.

Deutsch (Resp)

Complaint alleges an 8th Amend claim under Estelle v Gamble. Also alleged Govt deprived Resp. of his life w/o due process - a 5th amend violation. There is no common law tort claim

BRW: not a Q whether Tort Claims act is exclusive. Rather, Q is whether is orderly adm. of justice, another remedy is more appropriate

P.S. noted there was no survival action until Lord Campbell's Act. Nothing in Const. requires a right of survival, it is a matter of state law.

Resp. nevertheless argues that if death results from Const. violation, there must be survival right.

Two statutes in Fed: Survivorship & wrongful death.

[redacted]

There is a survivorship action by the estate of decedent for the Const violation of decedent's rights.

Relies on fed. com. law of survivorship. Justice Stewart says there was no com. law of survival & therefore there can be no fed com law

Note →

Dentsch (cont.)

JPS noted Sup Ct. has never allowed punitive damages in a Bivens case.

Geller (Reply)

If there were no Fed Tort Claims remedy there would be a Bivens type remedy. Must be a fed remedy for Const. violation.

78-1261 Carlson v Green, Adm of Estate of Inmate
(Director Bureau of Prisons)

Preference Rule

[in Bivens suit]

DC dismissed

1. Complaint alleged wilful & malicious malpractice — an 8th Amend claim under Estelle v Gamble. Also 5th Amend claim - deprivation of life. Thus, constitutional violation - not simply a com. law tort. Passman

Bivens suit proper

2. Fed Tort Claim Act not exclusive remedy.
(a) Congress, in 1974 amend to FTCA indicated intent not to supplant Bivens.
(b) FTCA not adequate as compared to Bivens: (i) limited to state law torts; (ii) no jury trial; (iii) certain exceptions - eg discretionary acts by employee executing a statute

3. Proper Bivens Claim - no contrary policy considerations as in Passman - where separation of powers should have caused restraint

x x x

Not at issue, await discussion

Issue of survivorship

Robinson v Wagman (1988 case on 1983 policy)
- state law applies unless adverse impact on policies that underlie 1983 - i.e. frustrate purpose of Const. damage action

must be some limits

Indiana recovery for wrongful death inadequate - absent wife or dependent relatives

A fed. rule would be attractive here, but it would set a wide-ranging precedent. Not sure I can go along with a uniform rule.

Affirm 6 Reverse 2
Remand 1

78-1261 Carlson v. Green, Admx of Estate of inmate . Conf. 1/9/80
Fed Bureau Prisons

The Chief Justice Remand

We have enlarged 8th amend to cover "reckless indifference".

Govt did not make Tort claims Act argument until this Court.

On merits, think FTCA provides adequate remedy.

Also

Mr. Justice Brennan Affirm

Allegations support Bivens claims.

If we reach FTCA argument (we need not), would hold it is inadequate. This is a Const. violation. A suit vs. Govt is not an adequate remedy. Should be able to sue individuals also.

(Brennan did not discuss nonmonetary)

Mr. Justice Stewart Reverse

In doubt.

Mr. Justice White Affirm

Agree with W & B as to Bivens
Would reach Tort claims Act - it is inadequate.
Apply fed law as to surrounds.

Mr. Justice Marshall Affirm

Agree with W & B & B R W

Mr. Justice Blackmun Affirm

Allegations allege Bivens const claims.
Sever fed. palmer.
Agree FTCA does not displace Bivens.
& Govt liability not same as personal liability.
Dissented in Robinson
And statute not consistent with Fed. Rules

Mr. Justice Powell *Affirm*

See my notes on yellow sheets

Mr. Justice Rehnquist *Reverse*

Would not infer *Bivens* claim
Agree FTCA is not adequate
if there were a *Bivens* claim
State survivorship laws apply
in 1983 & Bivens actions both

Mr. Justice Stevens *Affirm*

Prior cases support a Const. *Bivens*.
Our opinions should note that Congress
has power to provide by statute the standards
& rules for *Bivens* suits. *Bivens*, *Passman*
& now this case open door to all kinds of
suits ~~by~~ by-passing other remedies.

State statute says action survives,
~~but~~ and ~~fed~~ fed law can't supplant state
law of estates. ~~Fed law~~ State law should determine
who inherits & who adm. estates. Fed law can determine
whether.

Ask Jon →

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

lfp/ss 3/13/80

78-1621 CARLSON v. GREEN

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 principles said to govern a Bivens cause of action are stated 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 is explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." Ante, at 3-4 (first emphasis added, second in original).

(citations omitted)

Much of the foregoing language is unnecessary dicta. Moreover, it goes beyond any prior holding by this Court.

Cannon 414 U.S. 677

I

We are concerned here with implying a ~~cause~~ right of action (for damages) from the Constitution, ~~when none is specified.~~ I have thought that the burden was on the party asserting such a right at least to establish the inadequacy or absence of other remedies (Ellen - if I am correct, please cite

~~cases).~~

~~The Court now would shift the burden, and~~ require that a defendant show that Congress has provided "an alternative remedy which it explicitly declared to be a substitute" for a Bivens cause of action, and that Congress viewed its remedy "as equally effective". These are unnecessarily inflexible conditions. Nor does the Court suggest any policy considerations for imposing such a threshold burden on a defendant in an implied remedy case. If the Court's language is taken literally, the question is not merely whether Congress has prescribed an adequate remedy. Even if such a remedy is entirely adequate, the defendant also must show that Congress has "explicitly declared [its remedy] to be a substitute for recovery directly under the Constitution". Ante, at —.

Absent such an explicit showing, the Court apparently thinks a Bivens plaintiff may ignore an adequate congressional remedy. It ~~simply~~ makes no sense, in such a situation, to afford a plaintiff a choice of two federal remedies, especially where one is implied and the other

affirmatively provided by Congress. ~~Moreover~~, such a rule would make irrelevant other evidence of congressional intent. I also view it as ~~presumptuous~~ to instruct Congress on the form as well as the substance of its legislation.

The Court does state that a Bivens cause of action may be defeated if a defendant demonstrates "special factors" counseling hesitation in the absence of affirmative action by Congress. But no guidance ~~is afforded by the Court's opinion~~ as to this possible exception. It states simply that no ~~such factors~~ are present in this case, and that petitioners enjoy no "independent status" that would make "judicially created remedies against them inappropriate". This ~~reference to~~ the official status ~~of the defendant~~ is immediately diluted by the sentence that follows, ~~In it~~, the Court states that even if

factors relevant to its purported exception. The eagerness of this Court to ~~imply~~ authorize federal ~~causes of action~~ claims for relief that are authorized neither by the Constitution nor by Congress is, in my view, a disservice both to the doctrine of separation of powers and to a rational system of justice. FN (Ellen, add a cite to my dissent in Cannon, and possibly other cites). Cannon - Not a difference

II

This is not to ~~say~~ deny that in appropriate circumstances private causes of action may ~~not~~ be inferred from provisions of the Constitution. 442 @ 252. (Ellen: cite my Passman disssent). The Court has recognized, Bivens, supra, at 397, and this Court again today acknowledges, that Congress is the appropriate body to create federal remedies. Although the Court's opinion imposes new requirements as to when a congressionally prescribed remedy supplants the right to bring a Bivens suit, the Court has never gone so far as to say that Congress cannot provide an exclusive remedy. This being so, logic would require that - absent congressional action - a federal court in

deciding whether to imply a remedy should exercise the sort of discretion that one would expect from a legislative body. As Mr. Justice Harlan noted, a court should "take into account [a range of policy considerations] at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy". Bivens, supra, at 407. It is difficult to know from today's decision, written in absolutist terms, whether the "discretion" of a court is now reduced to determining simply whether there is a legislative remedy that both comports in substance and form with the Court's new requirements.

Despite my serious disagreement with language of the opinion, I do agree with the Court's conclusion that this is a proper case for a Bivens cause of action. The Federal Tort Claims Act, relied upon by petitioner, does not provide an adequte remedy*; indeed, as the

*Ellen, include a summary note as to why the statutory remedy is inadequate.

Court points out, the legislative history makes reasonably clear that Congress did not intend to foreclose a Bivens suit. Moreover, no policy considerations to the contrary have been identified by any of the parties.

III

In part III of its opinion, the Court - adopting the reasoning of the Court of Appeals - holds that "whenever the relevant state survival statute would abate a Bivens-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action." Ante, at 9.

I agree that relevant policy considerations require the application of a federal common law to allow survival in this case. There is language in the opinion, however, that seems to suggest that in Bivens actions generally, there should be a uniform federal rule. It is not clear to me that the Court would go this far. See n. 10, p. 9-10, infra, and it would be quite unnecessary in this case to adopt any such uniform rule.

Moreover, this would be incompatible with the statutory presumption favoring state law in §1983 actions. 42 U.S.C. §1988. It also would be contrary to the spirit of Butz v. Economou in which the Court indicated that it would be unseemly for federal officers to be governed by different rules than state officers. At least, where statutes of limitation are at issue, I have thought it settled that in both Bivens and 1983 actions the federal courts applied state statutes of limitations. (Ellen: cite a case or two).

lfp/ss 3/13/80

file
(Rough Draft

78-1621 CARLSON v. GREEN

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 principles said to govern a Bivens cause of action are stated 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 is explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." Ante, at 3-4 (first emphasis added, second in original).

Much of the foregoing language is unnecessary dicta. Moreover, it goes beyond any prior holding by this Court.

I

We are concerned here with implying a cause of action from the Constitution when none is specified. I have thought that the burden was on the party asserting such a right at least to establish the inadequacy or absence of other remedies (Allen - if I am correct, please cite

cases).

The Court now would shift the burden, and require that a defendant show that Congress has provided "an alternative remedy which it explicitly declared to be a substitute" for a Bivens cause of action, and that Congress viewed its remedy "as equally effective". These are unnecessarily inflexible conditions. Nor does the Court suggest any policy considerations for imposing such a threshold burden on a defendant in an implied remedy case. If the Court's language is taken literally, the question is not merely whether Congress has prescribed an adequate remedy. Even if such a remedy is entirely adequate, the defendant also must show that Congress has "explicitly declared [its remedy] to be a substitute for recovery directly under the Constitution".

Absent such an explicit showing, the Court apparently thinks a Bivens plaintiff may ignore an adquate congressional remedy. It simply makes no sense, in such a situation, to afford a plaintiff a choice of two federal remedies, especially where one is implied and the other

affirmatively provided by Congress. Moreover, such a rule would make irrelevant other evidence of congressional intent. I also view it as presumptuous to instruct Congress on the form as well as the substance of its legislation.

The Court does state that a Bivens cause of action may be defeated if a defendant demonstrates "special factors" counseling hesitation in the absence of affirmative action by Congress. ante, at 3. But no guidance is afforded ~~by the Court's opinion~~ as to this possible exception. It states simply that no such factors are present in this case, and that petitioners enjoy no "idependent status" that would make "judicially created remedies against them inappropriate". ante, at 4. This reference to the official status of the defendant is immediately diluted by the sentence that follows. In it, the Court states that even if defending a Bivens suit "might inhibit [performance of] official duties, the qualified immunity accorded . . . under Butz v. Economos . . . provides adequate protection".

In sum, the Court identifies no special

factors relevant to its purported exception. The eagerness of this Court to imply federal causes of action that are authorized neither by the Constitution nor by Congress is, in my view, a disservice both to the doctrine of separation of powers and to a rational system of justice. (Ellen, add a cite to my dissent in Cannon, and possibly other cites).

II

This is not to say that in appropriate circumstances private causes of action may not be inferred from provisions of the Constitution. (Ellen: cite my Passman disssent). The Court recognized in Bivens, supra, at 397, and this Court again today acknowledges, that Congress is the appropriate body to create federal remedies. Although the Court's opinion imposes new requirements as to when a congressionally

deciding whether to imply a remedy should exercise the sort of discretion that one would expect from a legislative body. As Mr. Justice Harlan noted, a court should "take into account [a range of policy considerations] at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy". Bivens, supra, at 407. It is difficult to know from today's decision, written in absolutist terms, whether the "discretion" of a court is now reduced to determining simply whether there is a legislative remedy that both comports in substance and form with the Court's new requirements.

Despite my serious disagreement with language of the opinion, I do agree with the Court's conclusion that this is a proper case for a Bivens cause of action. The Federal Tort Claims

Court points out, the legislative history makes reasonably clear that Congress did not intend to foreclose a Bivens suit. Moreover, no policy considerations to the contrary have been identified by any of the parties.

III

In part III of its opinion, the Court - adopting the reasoning of the Court of Appeals - holds that "whenever the relevant state survival statute would abate a Bivens-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action." Ante, at 9.

I agree that relevant policy considerations require the application of a federal common law to allow survival in this case. There is language in the opinion, however, that seems to suggest that in Bivens actions generally, there should be a uniform federal rule. It is not clear to me that the Court would go this far. See p. 10, n. 9-10, infra, and it would be quite unnecessary in this case to adopt any such uniform rule.

Moreover, this would be incompatible with the statutory presumption favoring state law in §1983 actions. 42 U.S.C. §1988. It also would be contrary to the spirit of Butz v. Economou in which the Court indicated that it would be unseemly for federal officers to be governed by different rules than state officers. At least, where statutes of limitation are at issue, I have thought it settled that in both Bivens and 1983 actions the federal courts applied state statutes of limitations. (Ellen: cite a case or two).

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,

John

Mr. Justice Brennan

Copies to the Conference

March 13, 1980

78-1261 Carlson v. Green

Dear Bill:

Although I voted to affirm, I am not able to join your opinion for the Court. I think we went too far in Passman, and your draft incorporates - perhaps understandably - the Passman analysis.

I will await Bill Rehnquist's dissent before deciding what to do.

In any event, you have a Court.

Sincerely,

Mr. Justice Brennan

lfp/ss

cc: The Conference

I decided to write a concurring op.

er 3/18/80

78-1261 CARLSON v. GREEN

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 is explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective. . . ." Ante, at 3-4 (emphasis in original).

Much of the foregoing statement contains language is dictum that unnecessarily extends far well beyond the prior holdings of this Court.

I

We are concerned here with implying a right of action for damages directly from the Constitution. In the past, the Court has said that persons who have "no [other] effective means of redress" "must be able to invoke the existing jurisdiction of the courts for the protection of

their justiciable constitutional rights." Davis v. Passman, 442 U.S. 228, 242 (1979). The Davis rule in itself confines the "principled discretion" that should be brought to bear when a court is asked to infer a private cause of action not specified by the enacting authority. Id., at 252 (POWELL, J., dissenting). But the Court seems bent on eliminating every vestige of discretion. Today we are told that a court must entertain a Bivens suit unless the action is "defeated" in one of two specified ways.

The Court recognized in Bivens that the need for implied remedies may be obviated when Congress has supplied "equally effective alternative remedies." Id., at 248; see Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397 (1971). But the Court holds today that a defendant cannot defeat a Bivens action simply by showing that there are adequate alternative avenues of relief. The defendant must also show that Congress "explicitly declared [its remedy] to be a substitute for recovery directly under the Constitution and viewed [it] as equally effective."

These are unnecessarily inflexible conditions. The Court cites no authority and advances no policy reason - indeed no reason at all - for imposing this threshold burden upon the defendant in an implied remedy case.

The Court does implicitly acknowledge that Congress possesses the power to enact adequate alternative remedies that would be exclusive. Yet, today's opinion apparently will permit Bivens plaintiffs to ignore entirely adequate remedies if Congress has not clothed them in the ~~proper~~ prescribed linguistic garb. No purpose is served by affording plaintiffs a choice of remedies in these circumstances. Nor ~~does it make sense for~~ do our prior cases require federal courts to close their eyes to congressional intent that ~~is~~ may not be expressed in ~~the way that this Court prefers~~ language we prescribe. Indeed, I would have thought it presumptuous for this Court to instruct Congress on the form its legislation must take.

The Court does state that the Bivens remedy may be defeated if "special factors" counsel hesitation in the absence of affirmative action by Congress. But no further guidance is provided. The Court states simply that no such factors are

present in this case, and that petitioners enjoy no "independent status" that would make judicially created remedies inappropriate. Ante, at 4. The implication that official status may be a "special factor" is withdrawn in the sentence that follows, which concludes that qualified immunity affords all the protection necessary to the effective performance of official duties. No other factors relevant to the purported exception are mentioned.

One is left to wonder whether judicial discretion in this area will hereafter be confined to the single determination that a legislative remedy does or does not comport with the specifications prescribed by this Court. Such a drastic curtailment of discretion would be inconsistent with the Court's longstanding recognition that Congress is ultimately the appropriate body to create federal remedies. See

a court should "take into account [a range of policy considerations] at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy". Bivens, supra, at 407. I do not understand why this discretion must be limited in the manner announced today.

The Court's absolutist language is the more puzzling for its adoption in a case where the implied remedy is so plainly appropriate under any measure of discretion. The Federal Tort Claims Act, relied on by petitioners, simply is not an adequate remedy.1/ And there are reasonably clear indications that Congress did not intend that statute to displace Bivens claims. See ante, at 4-5. No substantial contrary policy has been identified, and I am aware of none. I therefore agree that a private damages remedy properly is

cannot be found in Constitution or statute is an affront to the doctrine of separation of powers and a disservice to a rational system of justice. Cf. Cannon v. University of Chicago, 441 U.S. 677, 730-749 (POWELL, J., dissenting).2/

II

In part III of its opinion, the Court holds that "'whenever the relevant state survival statute would abate a Bivens-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action.'" Ante, at 9, quoting 581 F.2d, at 674-675. I agree that the relevant policies require the application of federal common law to allow survival in this case.

It is not [so] "obvious" to me that "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules" in every case. Ante at 8; see id., at 9. On the contrary, federal courts routinely refer to state law to fill the procedural gaps in national remedial schemes. The policy against invoking the federal common law except

Ellen - where does quote come from?

where necessary to the vitality of a federal claim is codified in 42 U.S.C. § 1988, which creates a presumption in favor of state law in § 1983 actions.

The Court's opinion in this case stops short of mandating uniform rules to govern all aspects of Bivens actions. Ante, at 9-10 n. 10. But it appears designed - at the least - to reverse in Bivens actions the presumption applicable under § 1983. The distinction is both unnecessary to the analysis of this case and contrary to the spirit of Butz v. Economou, 438 U.S. 478, 498-504 & n. 25 (1978). In Butz, the Court indicated that it would be unseemly for different rules to govern the liability of federal and state officers for the same constitutional harm. I would not disturb that understanding today.

FOOTNOTES

1/ The FTCA is not a federal remedial scheme at all, but a waiver of sovereign immunity that permits an injured claimant to recover damages against the United States "where . . . a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b); see also 28 U.S.C. § 2674. Here, as in Bivens itself, a plaintiff who is denied his constitutional remedy would be remitted to the vagaries of state law. See 403 U.S., at 394-395. The FTCA gives the plaintiff even less than he would receive under state law in many cases, because the statute is hedged with protections for the United States. As the Court points out, neither punitive damages nor jury trial are available under the FTCA. Ante, at 7-8. And

2/ I do not imply that courts enjoy the same degree of freedom to imply causes of action from statutes as they do from the Constitution. See Davis v. Passman, 442 U.S. 228, 241-242 (1979). I do believe, however, that the Court has seriously overstepped the bounds of rational judicial decisionmaking in both contexts.

er 3/18/80

78-1261 CARLSON v. GREEN

MR. JUSTICE POWELL, concurring in the judgment.

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

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The foregoing statement contains dictum that goes well beyond the prior holdings of this Court.

I

We are concerned here with ~~implying~~ inferring a right of action for damages directly from the Constitution. In the past, the Court has said that persons who have "no (other) effective means of redress" "must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." Davis v.

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As the Court recognized in Bivens, the need for implied remedies may be obviated when Congress has supplied "equally effective alternative remedies." Id., at 248; see Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397 (1971). The Court now volunteers the view that a defendant cannot defeat a Bivens action simply by showing that there are adequate alternative avenues

Court cites no authority and advances no policy reason - indeed no reason at all - for imposing this threshold burden upon the defendant in an implied remedy case.

The Court ~~does~~ implicitly acknowledges that Congress possesses the power to enact adequate alternative remedies that would be exclusive. Yet, today's opinion apparently will permit Bivens plaintiffs to ignore entirely adequate remedies if Congress has not clothed them in the prescribed linguistic garb. No purpose is served by affording plaintiffs a choice of remedies in these circumstances. Nor do our prior cases require federal courts to close their eyes to congressional intent that may not be expressed in the language we prescribe. Indeed, I would have thought it presumptuous for this Court to instruct Congress on the form its legislation must take.

no such factors are present in this case, and that petitioners enjoy no "independent status" that would make judicially created remedies inappropriate. Ante, at 4. The implication that official status may be a "special factor" is withdrawn in the sentence that follows, which concludes that qualified immunity affords all the protection necessary to the effective performance of official duties. No other factors relevant to the purported exception are mentioned.

One is left to wonder whether judicial discretion in this area will hereafter be confined to the single determination that a legislative remedy does or does not comport with the specifications prescribed by this Court. Such a drastic curtailment of discretion would be inconsistent with the Court's longstanding recognition that Congress is ultimately the

legislative task. As Mr. Justice Harlan once said, a court should "take into account [a range of policy considerations] at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy." Bivens, supra, at 407. I do not understand why this discretion must be limited in the manner announced today.

The Court's absolute language is the more puzzling for its adoption in a case where the implied remedy is so plainly appropriate under any measure of discretion. The Federal Tort Claims Act, relied on by petitioners, simply is not an adequate remedy.[1] And there are reasonably clear indications that Congress did not intend that statute to displace Bivens claims. See ante, at 4-5. No substantial contrary policy has been identified, and I am aware of none. I therefore

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against invoking the federal common law except where necessary to the vitality of a federal claim is codified in 42 U.S.C. § 1988, which creates a presumption in favor of state law in § 1983 actions.

The Court's opinion in this case stops short of mandating uniform rules to govern all aspects of Bivens actions. Ante, at 9-10 n. 10. But it appears designed - at the least - to reverse in Bivens actions (against federal officers) the presumption ~~applicable under~~ (suits against state officials that State law should apply where relevant) § 1983. ~~The distinction~~ This suggestion is both unnecessary to the analysis of this case and contrary to the spirit of Butz v. Economou, 438 U.S. 478, 498-504 & n. 25 (1978). In Butz, the Court indicated that it would be unseemly for different rules to govern the liability of federal and state officers for the ~~same~~ similar constitutional harm. I would not disturb that understanding today.

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Typo on p. 3

278

3-24-80

2nd CHAMBERS 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, 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

able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." The *Davis* rule now sets the boundaries of the "principled discretion" that must be brought to bear when a court is asked to infer a private cause of action not specified by authority. *Id.*, at 252 (POWELL, J., dissenting). But the Court's opinion, read literally, would restrict that discretion dramatically. Today we are told that a court must entertain a *Bivens* suit unless the action is "defeated" in one of two specified ways.

Bivens recognized that implied remedies may be unnecessary when Congress has supplied "equally effective" alternative remedies. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 397 (1971); see *Davis* v. *Passman*, *supra*, 442 U. S., at 248. The Court now volunteers the view that a defendant cannot defeat a *Bivens* action simply by showing that there are adequate alternative avenues of relief. The defendant also must show that Congress "explicitly declared [its remedy] to be a *substitute* for recovery directly under the Constitution and viewed [it] as equally effective." *Ante*, at 4 (emphasis in original). These are unnecessarily rigid conditions. The Court cites no authority and advances no policy reason—indeed no reason at all—for imposing this threshold burden upon the defendant in an implied remedy case.

The Court does implicitly acknowledge that Congress possesses the power to enact adequate alternative remedies that would be exclusive. Yet, today's opinion apparently will permit *Bivens* plaintiffs to ignore entirely adequate remedies if Congress has not clothed them in the prescribed linguistic garb. No purpose is served by affording plaintiffs a choice of remedies in these circumstances. Nor ~~do our prior cases require~~ federal courts to blind themselves to congressional intent expressed in language other than that which we prescribe.

A defendant also may defeat the *Bivens* remedy under today's decision if "special factors" counsel "hesitation." But the Court provides no further guidance on this point. The

opinion states simply that no such factors are present in this case. The Court says that petitioners enjoy no "independent status in our constitutional scheme" that would make judicially created remedies inappropriate. *Ante*, at 4. But the implication that official status may be a "special factor" is withdrawn in the sentence that follows, which concludes that qualified immunity affords all the protection necessary to ensure the effective performance of official duties. No other factors relevant to the purported exception are mentioned.

One is left to wonder whether judicial discretion in this area will hereafter be confined to the question of alternative remedies, which is in turn reduced to the single determination that congressional action does or does not comport with the specifications prescribed by this Court. Such a drastic curtailment of discretion would be inconsistent with the Court's longstanding recognition that Congress is ultimately the appropriate body to create federal remedies. See *ante*, at 4–5; *Bivens* v. *Six Unknown Fed. Narcotics Agents*, *supra*, 403 U. S., at 397. A plaintiff who seeks his remedy directly under the Constitution asks the federal courts to perform an essentially legislative task. In this situation, as Mr. Justice Harlan once said, a court should "take into account [a range of policy considerations] at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy." *Bivens*, *supra*, at 407. The Court does not explain why this discretion should be limited in the manner announced today.

The Court's absolute language is all the more puzzling because it comes in a case where the implied remedy is plainly appropriate under any measure of discretion. The Federal Tort Claims Act, on which petitioners rely, simply is not an adequate remedy.[1] And there are reasonably clear indications

[1] The Federal Tort Claims Act is not a federal remedial scheme at all, but a waiver of sovereign immunity that permits an injured claimant to recover damages against the United States where a private person "would

that Congress did not intend that statute to displace *Bivens* claims. See *ante*, at 4–5. No substantial contrary policy has been identified, and I am aware of none. I therefore agree that a private damages remedy properly is inferred from the Constitution in this case. But I do not agree that *Bivens* plaintiffs have a "right" to such a remedy whenever the defendant fails to show that Congress has "provided an [equally effective] alternative remedy which it explicitly declared to be a *substitute*. . . ." In my view, the Court's eagerness to infer federal causes of action that cannot be found in the Constitution or in a statute denigrates the doctrine of separation of powers and hardly comports with a rational system of justice. Cf. *Cannon* v. *University of Chicago*, 441 U. S. 677, 730–749 (1979) (POWELL, J., dissenting).[2]

II

In Part III of its opinion, the Court holds that " 'whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action.' " *Ante*, at 9, quoting 581 F. 2d 699, 674–675 (CA7 1978). I

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be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346 (b); see also 28 U. S. C. § 2674. Here, as in *Bivens* itself, a plaintiff denied his constitutional remedy would be remitted to the vagaries of state law. See 403 U. S., at 394–395. The FTCA gives the plaintiff even less than he would receive under state law in many cases, because the statute is hedged with protections for the United States. As the Court points out, the FTCA allows neither jury trial nor punitive damages. *Ante*, at 7. And recovery may be barred altogether if the claim arises from a "discretionary function" or "the execution of a statute or regulation, whether or not such statute or regulation is valid." 28 U. S. C. § 2680 (a).

[2] I do not suggest that courts enjoy the same degree of freedom to infer causes of action from statutes as from the Constitution. See *Davis* v. *Passman*, 442 U. S. 228, 241–242 (1979). I do believe, however, that the Court today has overstepped the bounds of rational judicial decisionmaking in both contexts.

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It is not "obvious" to me, however, that "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules" in every case. *Ante*, at 8; see *id.*, at 9. On the contrary, federal courts routinely refer to state law to fill the procedural gaps in national remedial schemes. The policy against invoking the federal common law except where necessary to the vitality of a federal claim is codified in 42 U. S. C. § 1988, which directs that state law ordinarily will govern those aspects of § 1983 actions not covered by the "laws of the United States."

The Court's opinion in this case does stop short of mandating uniform rules to govern all aspects of *Bivens* actions. *Ante*, at 9–10, n. 10. But the Court also says that the preference for state law embodied in § 1988 is irrelevant to the selection of rules that will govern actions against federal officers under *Bivens*. *Ibid.* I ~~do not agree~~. In *Butz* v. *Economou*, 438 U. S. 478, 498–504, and n. 25 (1978), the Court thought it unseemly that different rules should govern the liability of federal and state officers for similar constitutional ~~harms~~ wrongs. I would not disturb that understanding today.

see no basis for this view.

23073

3-24-80

~~3-20-80~~ 2d

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

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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.

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A defendant may also defeat the *Bivens* remedy under today's decision if "special factors" counsel hesitate in the absence of affirmative action by Congress. But the Court

supplies no further guidance on this point. The opinion states simply that no such factors are present in this case, and that petitioners enjoy no "independent status in our constitutional scheme" that would make judicially created remedies inappropriate. *Ante*, at 4. The implication that official status may be a "special factor" is withdrawn in the sentence that follows, which concludes that qualified immunity affords all the protection necessary to ensure the effective performance of official duties. No other factors relevant to the purported exception are mentioned.

One is left to wonder whether judicial discretion in this area will hereafter be confined to the single determination that ~~a legislative remedy~~ does or does not comport with the specifications prescribed by this Court. Such a drastic curtailment of discretion would be inconsistent with the Court's long-standing recognition that Congress is ultimately the appropriate body to create federal remedies. See *ante*, at 4–5; *Bivens* v. *Six Unknown Fed. Narcotics Agents*, *supra*, 403 U. S., at 397. A plaintiff who seeks his remedy directly under the Constitution asks the federal courts to perform an essentially legislative task. In this situation, as Mr. Justice Harlan once said, a court should "take into account [a range of policy considerations] at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy." *Bivens*, *supra*, at 407. ~~I do not understand~~ why this discretion should be limited in the manner announced today.

~~Yet more puzzling~~, the Court's absolute language comes in a case where the implied remedy is plainly appropriate under any measure of discretion. The Federal Tort Claims Act, ~~relied~~ on ~~by~~ petitioners, simply is not an adequate remedy.[1]

[1] The ~~FTCA~~ is not a federal remedial scheme at all, but a waiver of sovereign immunity that permits an injured claimant to recover damages against the United States where a private person "would be liable to the claimant in accordance with the law of the place where the act or omis-

And there are reasonably clear indications that Congress did not intend that statute to displace *Bivens* claims. See *ante*, at 4–5. No substantial contrary policy has been identified, and I am aware of none. I therefore agree that a private damages remedy properly is inferred from the Constitution in this case. But I do not agree that *Bivens* plaintiffs have a "right" to this remedy whenever the defendant fails to make the showing required today. In my view, the Court's eagerness to infer federal causes of action that cannot be found in Constitution or statute is an affront to the doctrine of separation of powers and a disservice to a rational system of justice. Cf. *Cannon* v. *University of Chicago*, 441 U. S. 677, 730–749 (1979) (POWELL, J., dissenting).[2]

INSERT A

II

In Part III of its opinion, the Court holds that " 'whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action.' " *Ante*, at 9, quoting 581 F. 2d 699, 674–675 (CA7 1978). I agree that the relevant policies require the application of federal common law to allow survival in this case.

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sion occurred." 28 U. S. C. § 1346 (b); see also 28 U. S. C. § 2674. Here, as in *Bivens* itself, a plaintiff ~~who is~~ denied his constitutional remedy would be remitted to the vagaries of state law. See 403 U. S., at 394–395. The FTCA gives the plaintiff even less than he would receive under state law in many cases, because the statute is hedged with protections for the United States. As the Court points out, neither jury trial nor punitive damages ~~are available under the FTCA~~. *Ante*, at 7. And recovery may be barred altogether if the claim ~~involves~~ arises from a "discretionary function" or "the execution of a statute or regulation, whether or not such statute or regulation is valid." 28 U. S. C. § 2680 (a).

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[2] I do not suggest that courts enjoy the same degree of freedom to infer causes of action from statutes as ~~they do~~ from the Constitution. See *Davis* v. *Passman*, 442 U. S. 228, 241–242 (1979). I do believe, however, that the Court today has overstepped the bounds of rational judicial decisionmaking in both contexts.

It is not "obvious" to me, however, that "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules" in every case. *Ante*, at 8; see *id.*, at 9. On the contrary, federal courts routinely refer to state law to fill the procedural gaps in national remedial schemes. The policy against invoking the federal common law except where necessary to the vitality of a federal claim is codified in 42 U. S. C. § 1988, which directs that state law ordinarily will govern those aspects of § 1983 actions not covered by the "laws of the United States."

The Court's opinion in this case stops short of mandating uniform rules to govern all aspects of *Bivens* actions. *Ante*, at 9–10, n. 10. ~~But it appears designed at the least to create a presumption in favor of federal common law. No such presumption is necessary to the decision of this case. Moreover, the Court apparently would reverse, in *Bivens* actions against federal officers, the presumption favoring state law in § 1983 lawsuits against state officers.~~ In *Butz* v. *Economou*, 438 U. S. 478, 498–504, and n. 25 (1978), the Court ~~indicated that~~ it ~~would be~~ unseemly ~~for~~ different rules ~~to~~ govern the liability of federal and state officers for similar constitutional harms. I would not disturb that understanding today.

INSERT A, on p. 4:

But I do not agree that Bivens plaintiffs have a "right" to such a remedy whenever the defendant fails to show that Congress has "provided an [equally effective] alternative remedy which it explicitly declared to be a substitute . . . ." In my view, the Court's eagerness to infer federal causes of action that cannot be found in the Constitution or in a statute denigrates the doctrine of separation of powers and ~~is a disservice to~~ [hardly comports with] a rational system of justice.

INSERT B, on p. 5

But the Court also says that the preference for state law embodied in § 1988 is irrelevant to the selection of rules that will govern actions against federal officers under Bivens. Ibid. I do not agree.

23073

3-24-80

~~2nd CHAMBERS~~ 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 ~~4~~, 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

able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." The *Davis* rule now sets the boundaries of the "principled discretion" that must be brought to bear when a court is asked to infer a private cause of action not specified by authority. *Id.*, at 252 (POWELL, J., dissenting). But the Court's opinion, read literally, would restrict that discretion dramatically. Today we are told that a court must entertain a *Bivens* suit unless the action is "defeated" in one of two specified ways.

Bivens recognized that implied remedies may be unnecessary when Congress has ~~supplied~~ "equally effective" alternative remedies. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 397 (1971); see *Davis* v. *Passman*, *supra*, 442 U. S., at 248. The Court now volunteers the view that a defendant cannot defeat a *Bivens* action simply by showing that there are adequate alternative avenues of relief. The defendant also must show that Congress "explicitly declared [its remedy] to be a *substitute* for recovery directly under the Constitution and viewed [it] as equally effective." *Ante*, at 4 (emphasis in original). These are unnecessarily rigid conditions. The Court cites no authority and advances no policy reason—indeed no reason at all—for imposing this threshold burden upon the defendant in an implied remedy case.

The Court does implicitly acknowledge that Congress possesses the power to enact adequate alternative remedies that would be exclusive. Yet, today's opinion apparently will permit *Bivens* plaintiffs to ignore entirely adequate remedies if Congress has not clothed them in the prescribed linguistic garb. No purpose is served by affording plaintiffs a choice of remedies in these circumstances. Nor ~~do our prior cases require~~ federal courts to blind themselves to congressional intent expressed in language other than that which we prescribe.

A defendant also may defeat the *Bivens* remedy under today's decision if "special factors" counsel "hesitation." But the Court provides no further guidance on this point. The

opinion states simply that no such factors are present in this case. The Court says that petitioners enjoy no "independent status in our constitutional scheme" that would make judicially created remedies inappropriate. *Ante*, at 4. But implication that official status may be a "special factor" is withdrawn in the sentence that follows, which concludes that qualified immunity affords all the protection necessary to ensure the effective performance of official duties. No other factors relevant to the purported exception are mentioned.

One is left to wonder whether judicial discretion in this area will hereafter be confined to the question of alternative remedies, which is in turn reduced to the single determination that congressional action does or does not comport with the specifications prescribed by this Court. Such a drastic curtailment of discretion would be inconsistent with the Court's longstanding recognition that Congress is ultimately the appropriate body to create federal remedies. See *ante*, at 4–5; *Bivens* v. *Six Unknown Fed. Narcotics Agents*, *supra*, 403 U. S., at 397. A plaintiff who seeks his remedy directly under the Constitution asks the federal courts to perform an essentially legislative task. In this situation, as Mr. Justice Harlan once said, a court should "take into account [a range of policy considerations] at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy."[1] *Bivens*, *supra*, at 407. The Court does not explain why this discretion should be limited in the manner announced today.

The Court's absolute language is all the more puzzling because it comes in a case where the implied remedy is plainly appropriate under any measure of discretion. The Federal Tort Claims Act, on which petitioners rely, simply is not an adequate remedy.[1] And there are reasonably clear indications

[1] The Federal Tort Claims Act is not a federal remedial scheme at all, but a waiver of sovereign immunity that permits an injured claimant to recover damages against the United States where a private person "would

that Congress did not intend that statute to displace *Bivens* claims. See *ante*, at 4–5. No substantial contrary policy has been identified, and I am aware of none. I therefore agree that a private damages remedy properly is inferred from the Constitution in this case. But I do not agree that *Bivens* plaintiffs have a "right" to such a remedy whenever the defendant fails to show that Congress has "provided an [equally effective] alternative remedy which it explicitly declared to be a *substitute*. . . ." In my view, the Court's eagerness to infer federal causes of action that cannot be found in the Constitution or in a statute denigrates the doctrine of separation of powers and hardly comports with a rational system of justice. Cf. *Cannon* v. *University of Chicago*, 441 U. S. 677, 730–749 (1979) (POWELL, J., dissenting).[2]

II

In Part III of its opinion, the Court holds that " 'whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action.' " *Ante*, at 9, quoting 581 F. 2d 699, 674–675 (CA7 1978). I

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be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346 (b); see also 28 U. S. C. § 2674. Here, as in *Bivens* itself, a plaintiff denied his constitutional remedy would be remitted to the vagaries of state law. See 403 U. S., at 394–395. The FTCA gives the plaintiff even less than he would receive under state law in many cases, because the statute is hedged with protections for the United States. As the Court points out, the FTCA allows neither jury trial nor punitive damages. *Ante*, at 7. And recovery may be barred altogether if the claim arises from a "discretionary function" or "the execution of a statute or regulation, whether or not such statute or regulation is valid." 28 U. S. C. § 2680 (a).

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agree that the relevant policies require the application of federal common law to allow survival in this case.

It is not "obvious" to me, however, that "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules" in every case. *Ante*, at 8; see *id.*, at 9. On the contrary, federal courts routinely refer to state law to fill the procedural gaps in national remedial schemes. The policy against invoking the federal common law except where necessary to the vitality of a federal claim is codified in 42 U. S. C. § 1988, which directs that state law ordinarily will govern those aspects of § 1983 actions not covered by the "laws of the United States."

The Court's opinion in this case does stop short of mandating uniform rules to govern all aspects of *Bivens* actions. *Ante*, at 9–10, n. 10. But the Court also says that the preference for state law embodied in § 1988 is irrelevant to the selection of rules that will govern actions against federal officers under *Bivens*. *Ibid.* I ~~do not agree.~~ In *Butz* v. *Economou*, 438 U. S. 478, 498–504, and n. 25 (1978), the Court thought it unseemly that different rules should govern the liability of federal and state officers for similar constitutional ~~harms~~ wrongs. I would not disturb that understanding today.

see no basis for this view.

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

From: Mr. Justice Powell

3-25-80

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SUPREME COURT OF THE UNITED STATES

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