SUPREME COURT OF THE UNITED STATES

No. 00–860

CORRECTIONAL SERVICES CORPORATION, PETITIONER *v.* JOHN E. MALESKO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[November 27, 2001]

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

In *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), the Court affirmatively answered the question that it had reserved in *Bell* v. *Hood*, 327 U. S. 678 (1946): whether a violation of the Fourth Amendment "by *a federal agent* acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct." 403 U. S., at 389 (emphasis added). Nearly a decade later, in *Carlson* v. *Green*, 446 U. S. 14 (1980), we held that a violation of the Eighth Amendment by federal prison officials gave rise to a *Bivens* remedy despite the fact that the plaintiffs also had a remedy against the United States under the Federal Tort Claims Act (FTCA). We stated: "*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." 446 U. S., at 18 (emphasis added).

In subsequent cases, we have decided that a *Bivens* remedy is not available for every conceivable constitutional violation.[1] We have never, however, qualified our

[1] See, *e.g.*, *FDIC* v. *Meyer*, 510 U. S. 471 (1994); *Schweiker* v. *Chilicky*,

holding that Eighth Amendment violations are actionable under *Bivens*. See *Farmer* v. *Brennan*, 511 U. S. 825 (1994); *McCarthy* v. *Madigan*, 503 U. S. 140 (1992). Nor have we ever suggested that a category of federal agents can commit Eighth Amendment violations with impunity.

The parties before us have assumed that respondent's complaint has alleged a violation of the Eighth Amendment.[2] The violation was committed by a federal agent—a private corporation employed by the Bureau of Prisons to perform functions that would otherwise be performed by individual employees of the Federal Government. Thus, the question presented by this case is whether the Court should create an exception to the straightforward application of *Bivens* and *Carlson*, not whether it should extend our cases beyond their "core premise," *ante*, at 9. This point is evident from the fact that prior to our recent decision in *FDIC* v. *Meyer*, 510 U. S. 471 (1994), the Courts of Appeals had consistently and correctly held that corporate agents performing federal functions, like human agents doing so, were proper defendants in *Bivens* actions.[3]

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487 U. S. 412 (1988); *Bush* v. *Lucas*, 462 U. S. 367 (1983); *Chappell* v. *Wallace*, 462 U. S. 296 (1983).

[2] Although it might have challenged the sufficiency of respondent's constitutional claim, see *ante*, at 10–11, petitioner has not done so. See Tr. of Oral Arg. 55 (acknowledgment by petitioner that the complaint states an Eighth Amendment violation). Its petition for certiorari presented the single question whether a *Bivens* cause of action for damages "should be implied against a private corporation acting under color of federal law." Pet. for Cert. (i).

[3] See *Schowengerdt* v. *General Dynamics Corp.*, 823 F. 2d 1328 (CA9 1987); *Reuber* v. *United States*, 750 F. 2d 1039 (CADC 1984); *Gerena* v. *Puerto Rico Legal Servs., Inc.*, 697 F. 2d 447 (CA1 1983); *Dobyns* v. *E–Systems, Inc.*, 667 F. 2d 1219 (CA5 1982); *Yiamouyiannis* v. *Chemical Abstracts Serv.*, 521 F. 2d 1392 (CA6 1975).

It is true that one court has overruled its Circuit precedent in light of *Meyer* and held that *Meyer* dictates the exclusion of all corporate

Meyer, which concluded that federal agencies are not suable under *Bivens*, does not lead to the outcome reached by the Court today. In that case, we did not discuss private corporate agents, nor suggest that such agents should be viewed differently from human ones. Rather, in *Meyer*, we drew a distinction between "federal agents" and "an agency of the Federal Government," 510 U. S., at 473. Indeed, our repeated references to the Federal Deposit Insurance Corporation's (FDIC) status as a "federal agency" emphasized the FDIC's affinity to the federal sovereign. We expressed concern that damages sought directly from federal agencies, such as the FDIC, would "creat[e] a potentially enormous financial burden for the Federal Government." *Id.*, at 486. And it must be kept in mind that *Meyer* involved the FDIC's waiver of sovereign immunity, which, had the Court in *Meyer* recognized a cause of action, would have permitted the very sort of lawsuit that *Bivens* presumed impossible: "a direct action against the Government." 510 U. S., at 485.[4]

Moreover, in *Meyer*, as in *Bush* v. *Lucas*, 462 U. S. 367 (1983), and *Schweiker* v. *Chilicky*, 487 U. S. 412 (1988), we were not dealing with a well-recognized cause of action. The cause of action alleged in *Meyer* was a violation of procedural due process, and as the *Meyer* Court noted, "a *Bivens* action alleging a violation of the Due Process Clause of the Fifth Amendment may be appropriate in

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entities from *Bivens* liability. *Kauffman* v. *Anglo-American School of Sofia*, 28 F. 3d 1223 (CADC 1994). However, as another court has explained, that conclusion is in no way compelled by *Meyer*. See *Hammons* v. *Norfolk Southern Corp.*, 156 F. 3d 701 (CA6 1998).

[4] *Meyer* also did not address the present situation because the Court understood the plaintiff's "real complaint" in that case to be that the individual officers would be shielded by qualified immunity, 510 U. S., at 485, a concern not present in the case before us, see *Richardson* v. *McKnight*, 521 U. S. 399, 412 (1997) (denying qualified immunity to private prison guards in a suit under 42 U. S. C. §1983).

some contexts, but not in others." 510 U. S., at 484, n. 9. Not only is substantive liability assumed in the present case, but respondent's Eighth Amendment claim falls in the heartland of substantive *Bivens* claims.[5]

Because *Meyer* does not dispose of this case, the Court claims that the rationales underlying *Bivens*—namely, lack of alternative remedies and deterrence—are not present in cases in which suit is brought against a private corporation serving as a federal agent. However, common sense, buttressed by all of the reasons that supported the holding in *Bivens*, leads to the conclusion that corporate agents should not be treated more favorably than human agents.

First, the Court argues that respondent enjoys alternative remedies against the corporate agent that distinguish this case from *Bivens*. In doing so, the Court characterizes *Bivens* and its progeny as cases in which plaintiffs lacked "*any alternative remedy*," *ante*, at 8. In *Bivens*, however, even though the plaintiff's suit against the Federal Government under state tort law may have been barred by sovereign immunity, a suit against the officer himself under state tort law was theoretically possible. Moreover, as the Court recognized in *Carlson*, *Bivens* plaintiffs also have remedies available under the FTCA. Thus, the Court is incorrect to portray *Bivens* plaintiffs as lacking any other avenue of relief, and to imply as a result that respondent in this case had a substantially wider array of non-*Bivens* remedies at his disposal than do other *Bivens* plaintiffs.[6] If alternative remedies provide a sufficient

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[5] The Court incorrectly assumes that we are being asked "to imply a new constitutional tort," *ante*, at 4. The tort here is, however, well established; the only question is whether a remedy in damages is available against a limited class of tortfeasors.

[6] The Court recognizes that the question whether a *Bivens* action would lie against the individual employees of a private corporation like

justification for closing the federal forum here, where the defendant is a private corporation, the claims against the individual defendants in *Carlson*, in light of the FTCA alternative, should have been rejected as well.[7]

It is ironic that the Court relies so heavily for its holding on this assumption that alternative effective remedies—primarily negligence actions in state court—are available to respondent. See *ante*, at 10–12. Like Justice Harlan, I think it "entirely proper that these injuries be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability." *Bivens*, 403 U. S., at 409 (opinion concurring in judgment). And aside from undermining uniformity, the Court's reliance on state tort law will jeopardize the protection of the full scope of federal constitutional rights. State law might have comparable causes of action for tort claims like the Eighth Amendment violation alleged here, see *ante*, at 10–11, but other unconstitutional actions by prison employees, such as violations of the Equal Protection or Due Process Clauses, may find no parallel causes of

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Correctional Services Corporation (CSC) is not raised in the present case. *Ante*, at 3. Both petitioner and respondent have assumed *Bivens* would apply to these individuals, and the United States as *amicus* maintains that such liability would be appropriate under *Bivens*. It does seem puzzling that *Bivens* liability would attach to the private individual employees of such corporations—*subagents* of the Federal Government—but not to the corporate agents themselves. However, the United States explicitly maintains this to be the case, and the reasoning of the Court's opinion relies, at least in part, on the availability of a remedy against employees of private prisons. Cf. *ante*, at 10 (noting that *Meyer* "found sufficient" a remedy against the individual officer, "*which respondent did not timely pursue*" (emphasis added)).

[7] Although the Court lightly references administrative remedies that might be available to CSC-housed inmates, these are by no means the sort of comprehensive administrative remedies previously contemplated by the Court in *Bush* and *Schweiker*.

action in state tort law. Even though respondent here may have been able to sue for some degree of relief under state law because his Eighth Amendment claim could have been pleaded as negligence, future plaintiffs with constitutional claims less like traditional torts will not necessarily be so situated.[8]

Second, the Court claims that the deterrence goals of *Bivens* would not be served by permitting liability here. *Ante*, at 8–9 (citing *Meyer*). It cannot be seriously maintained, however, that tort remedies against corporate employers have less deterrent value than actions against their employees. As the Court has previously noted, the "organizational structure" of private prisons "is one subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide—pressures not necessarily present in government departments." *Richardson* v. *McKnight*, 521 U. S. 399, 412 (1997). Thus, the private corporate entity at issue here is readily distinguishable

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[8] The Court blames respondent, who filed his initial complaint *pro se*, for the lack of state remedies in this case; according to the Court, respondent's failure to bring a negligence suit in state court was "due solely to strategic choice," *ante*, at 11. Such strategic behavior, generally speaking, is imaginable, but there is no basis in the case before us to charge respondent with acting strategically. Cf. *ibid.* (discussing how proving a federal constitutional claim would be "considerably more difficult" than proving a state negligence claim). Respondent filed his complaint in federal court because he believed himself to have been severely maltreated while in federal custody, and he had no legal counsel to advise him to do otherwise. Without the aid of counsel, respondent not only failed to file for state relief, but he also failed to name the particular prison guard who was responsible for his injuries, resulting in the eventual dismissal of the claims against the individual officers as time barred. Respondent may have been an unsophisticated plaintiff, or, at worst, not entirely diligent about determining the identify of the guards, but it can hardly be said that "strategic choice" was the driving force behind respondent's litigation behavior.

from the federal agency in *Meyer*. Indeed, a tragic consequence of today's decision is the clear incentive it gives to corporate managers of privately operated custodial institutions to adopt cost-saving policies that jeopardize the constitutional rights of the tens of thousands of inmates in their custody.[9]

The Court raises a concern with imposing "asymmetrical liability costs on private prison facilities," *ante*, at 10, and further claims that because federal prisoners in Government-run institutions can only sue officers, it would be unfair to permit federal prisoners in private institutions to sue an "officer's employer," *ibid*. Permitting liability in the present case, however, would *produce* symmetry: both private and public prisoners would be unable to sue the principal (*i.e.,* the Government), but would be able to sue the primary federal agent (*i.e.,* the government official or the corporation). Indeed, it is the *Court's* decision that creates asymmetry—between federal and state prisoners housed in private correctional facilities. Under 42 U. S. C. §1983, a state prisoner may sue a private prison for deprivation of constitutional rights, see *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 936–937 (1982) (permitting suit under §1983 against private corporations exercising "state action"), yet the Court denies such a remedy to that prisoner's federal counterpart. It is true that we have never expressly held that the contours of *Bivens* and §1983 are identical. The Court, however, has recognized sound jurisprudential reasons for parallelism, as different stan-

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[9] As *amici* for respondent explain, private prisons are exempt from much of the oversight and public accountability faced by the Bureau of Prisons, a federal entity. See, *e.g.*, Brief for Legal Aid Society of New York as *Amicus Curiae* 8–25. Indeed, because a private prison corporation's first loyalty is to its stockholders, rather than the public interest, it is no surprise that cost-cutting measures jeopardizing prisoners' rights are more likely in private facilities than in public ones.

dards for claims against state and federal actors "would be incongruous and confusing." *Butz* v. *Economou*, 438 U. S. 478, 499 (1978) (internal quotation marks omitted); cf. *Bolling* v. *Sharpe*, 347 U. S. 497, 500 (1954) ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government"). The value of such parallelism was in fact furthered by *Meyer*, since §1983 would not have provided the plaintiff a remedy had he pressed a similar claim against a state agency.

It is apparent from the Court's critical discussion of the thoughtful opinions of Justice Harlan and his contemporaries, *ante*, at 5, and n. 3, and from its erroneous statement of the question presented by this case as whether *Bivens* "should be extended" to allow recovery against a private corporation employed as a federal agent, *ante*, at 1, that the driving force behind the Court's decision is a disagreement with the holding in *Bivens* itself.[10] There are at least two reasons why it is improper for the Court to allow its decision in this case to be influenced by that predisposition. First, as is clear from the legislative materials cited in *Carlson*, 446 U. S., at 19–20, see also *ante*, at 6, Congress has effectively ratified the *Bivens* remedy; surely Congress has never sought to abolish it. Second, a rule that has been such a well-recognized part of our law

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[10] See also *ante*, at 1 (SCALIA, J., concurring) (arguing that *Bivens* is a "relic of . . . heady days" and should be limited, along with *Carlson* v. *Green*, 446 U. S. 14 (1980), and *Davis* v. *Passman*, 442 U. S. 228 (1979), to its facts). Such hostility to the core of *Bivens* is not new. See, *e.g.*, *Carlson*, 446 U. S., at 32 (REHNQUIST, J., dissenting) ("[T]o dispose of this case as if *Bivens* were rightly decided would in the words of Mr. Justice Frankfurter be to start with an 'unreality' "). Nor is there anything new in the Court's disregard for precedent concerning well-established causes of action. See *Alexander* v. *Sandoval*, 532 U. S. 275, 294–297 (2001) (STEVENS, J., dissenting).

for over 30 years should be accorded full respect by the Members of this Court, whether or not they would have endorsed that rule when it was first announced. For our primary duty is to apply and enforce settled law, not to revise that law to accord with our own notions of sound policy.

I respectfully dissent.