Supreme Court of the United States

OCTOBER TERM 1970

In the Matter of:

WEBSTER BIVENS, Petitioner, vs. SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS Respondent.	**Docket No.** 301

Place Washington, D. C.

Date January 12, 1971

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

WEBSTER BIVENS, Petitioner	)	
vs	)	No. 301
SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS	)	

The above-entitled matter came on for argument at 1:00 o'clock p.m. on Tuesday, January 12, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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On behalf of Petitioner

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On behalf of Respondents

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Grant, you may proceed.

ORAL ARGUMENT BY STEPHEN A. GRANT, ESQ.

ON BEHALF OF PETITIONER

MR. GRANT: Mr. Chief Justice and may it please the Court:

Twenty-five years have elapsed since this Court, in an opinion by Mr. Justice Black in Bell against Hood, left for another day the question of whether a violation of the Fourth Amendment gives rise to a Federal claim for damages. At long last the question is once again presented to the Court in this case.

Briefly the facts: the name of the case, Bivens against Six Unknown Federal Agents, really tells the story. It began in the early morning darkness in November five years ago. The six narcotics agents with guns drawn, forced their way into Bivens' home in the Bronx andproceeded to conduct a thorough and apparently fruitful search. They put handcuffs on him in front of his wife and children; took him away to be further questioned and booked, as well as subjected to an extremely thorough, humiliating search of his person.

At all times the agents acted without any legal authority without a search and arrest warrant. After the complaint against Bivens was dismissed, but too poor to hire a

lawyer, he decided to sue the agents for the outrage he suffered. He knew the U. S. Constitution guaranteed each citizen the right to be secure against unreasonable search and seizure. He knew that the Federal Courts had general jurisdiction over cases arising under the constitution. He thought he had a pretty good case.

With the able assistance of the U. S. Attorney's office, the District Court made short shrift of -- the complaint. No statute afforded a remedy against Federal officers. In any case, the defendants had acted in the performance of duty. Complaint dismissed.

The appeal of informa pauperis denied; the district judge's certification that an appeal would be frivolous. Fortunately for Bivens, a distinguished judge in the Second Circuit Court of Appeals considered thecomplaint not so frivolous. A hearing was granted and I was assigned counsel.

At this time the Department of Justice represented the defendants, arguing with admirable dexterity that the Fourth Amendment was intended simply to bar the defensive privilege for an unreasonable search and seizure.

Q Could you keep your voice up a little, Mr. Grant.

A Yes, Your Honor.

But that the privilege is nevertheless available here because the defendants had acted within the outer

perimeter of their line of duty. The Circuit Court panel was impressed by the lack of precedent for the damage remedy. It concluded that enforcing the Fourth Amendment was a matter for the Congress. It recognized that the privilege question was properly raised. The ruling that Bivens had no cause of action found it unnecessary to decide the issues. The judgment dismissing the complaint was affirmed.

The first issue was whether violation of the constitutional right to be secure against unreasonable search and seizure gives rise to a Federal claim for damages. The answer turns first on the intent of the framers. Second: on the adequacy of existing remedies to fulfill that intent and finally, on the role of the court in enforcing rights secured by the constitution.

First, the intent of the framers:the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated. These words: we, of course, have a promise to the people and imperative to the executive, but perhaps most important of all the command of keeping aware of the problems, the practical problems of controlling governmental power, they were a special mandate to the Judiciary that stood between the people and their government.

This is clear from Madison's famous statement that if the Bill of Rights were incorporated into the Constitution

independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they would resist every encroachment by the Legislative or the Executive.

The framers didn't say how the courts were to act as guardians; how they were to resist the encroachments that sooner or later must come; they didn't have to. But, as the members of this Court well know, the amendment itself is based on one of the great landmarks of English Constitutional law: Entick against Carrington, a civil action in trespass against the King's Messengers; a search and seizure conducted under the invalid authority of a general warrant.

Lord Camden's ringing denunciation of unjustifiable government intrusions in 1765 was well-known to the colonists in their struggles against the King's customs officers prior to the revolution. It was, as this Court has noted several times, in the minds of the framers when they drafted the Fourth Amendment.

And with the Entick case in mind they were no doubt confident that the courts would enforce the constitutional guarantee by the traditional remedy of civil damages.

Q Mr. Grant, do you know whatever ever happened to the Bell and Boyd on remand?

A Yes, Your Honor. On bringing it to the District Court they claimed, the plaintiffs' claim for a Federal claim was rejected on the merits on the theory that if the

agents -- it was either claimed against the agents personally in which case they were immune from suit; or if it was a claim against the government they were also immune on their sovereign immunity.

Q And no further appeal was taken?

A It was affirmed, I believe, by the Ninth Circuit and that was where the matter rested.

Q It ended their appeal? Do you have any comment as to why this issue really comes up only in 1971 --

A I think that is an extraordinary question and if I could I would like to reserve that for later. I think that is one of the extraordinary questions in this case.

Having said this much as to which I believe there is no disagreement, the precise question becomes a presumed intent of the framers as to the applicationof the constitutional guarantee such as civil damage actions.

Our position is that Federal Common Law is the source of the plaintiff's rights; that the constitutional guarantee provides the basis in Federal law for all substantive incidents of the suit, including the claim itself, whether there has been an unreasonable search and seizure, the measure of damages, and the scope of the officers' defense.

In saying this, I rely first and foremost on the language of the amendment, which says: "the constitutional freedom shall not be violated," speaking in categorical terms

of securing the fundamental rights and in no way suggesting a more limited application such as merely foreclosing a defense in the suit.

And I rely secondly, on the historical background; on the very fact of the amendment's adoption at a time when everyone knew that the common law under Entick against Carrington already protected against unreasonable search and seizure.

The amendment nothing unless it elevated the common law right to the level of a guarantee that could not be negated by state or even Federal law. And it meant little as a guarantee if it was merely a lofty statement of principle; a right without a remedy, dependent upon legislative action for its enforcement, or was otherwise subject to the vicissitudes of state law.

How little, indeed, when we consider that the Congress hasn't acted in 180 years and uncertainties of varying local rules the remedy for the state law has become all but completely impotent.

The Government, however, argues --

Q Mr. Grant, when you speak of the vicissitudes of state laws, I'm not quite sure what that embraces. Maybe some states would not --

A Vicissitudes in the sense that state laws develop in response to different considerations in the area of

trespass and those considerations are more or less developed in all of the 50 States.

Q Well, I would have thought that most of the law of trespass developed in the state courts and very little of it ever in Federal courts.

A It certain did, Your Honor, but it developed with respect, and I think Mr. Justice Harlan pointed this out in Monroe against Pape: developed in a context where the only question was the private right of action against another private citizen. And the facts, the measure of recovery, particularly the question of whether you could only recover for the damages, physical damage to property.

Q Well, isn't it correct that many states provide that statutes for cause of action against official conduct that is conduct of officials, that is not authorized official conduct?

A If they do, which I cannot answer, when you say is any of this -- I do not know. But, if they do again I would rely on theargument it happens to be a coincidence in which state does and which state doesn't, and what principles govern that cause of action as well.

And it is precisely that element of chance in what state they are in and what state happens to provide for it and I don't think the Federal rights would prevail.

The Government, however, argues that the framers

must have been thinking, in procedural terms, merely of foreclosing the defense of justification. If the amendment was intended simply to bar a claim and unreasonable search and seizure was justified in the name of the law, the argument is weak at both ends.

First, it says too little; and failure to explain how, in the long line of decisions upholding constitutional claims in equity, the amendment that provided this for one type of relief, but not another.

Yet, as these decisions clearly suggest, an injunction would be available to bar a Fourth Amendment violation. Surely this must be because the framers' intent, in the Federal interest, goes beyond procedural niceties by foreclosing defenses, to the very securing of the constitutional right. Yet how can this interest be sufficient for an injunction and not for damages, particularly under a system of law where equitable relief is the exception rather than the rule.

On the other hand, the government's position says too much. For the mere fact of foreclosing the justification defense implies an intent on the part of the framers to vindicate the constitutional right by and award of civil damages. Yet, if absent congressional action state law were intended to govern plaintiff's claim then were and are free not only to leave the right uncertain as it now is, but even to oppose

-- of obstacles or bar civil liberty altogether.

Q I take it you think that what is involved here is both whether the Federal Court has jurisdiction and what the applicable law is.

A I want to make my position very clear: that there are two questions that are very definitely raised in this case, but I want to focus on the substantive law in particular and not --

Q Well, certainly --

A -- and not when the case is decided. To my mind if the plaintiff had sued in the state court the law that should govern this claim is Federal Law, because it's a Federal right that he will be seeking to vindicate.

Q Well, it wouldn't necessarily mean that state law would govern if the Federal Courts didn't have jurisdiction. In other words, that still could be held that there was no jurisdiction in the Federal Court but that in the state court Federal law could govern.

A It certainly could.

The Government's final argument is that the framers could not have intended to create a Federal cause of action because if they had the Federal Court would have, at the outset, been given jurisdiction over the cases arising under the constitution.

The logic of this position compels the conclusion

that the Congress -- had not intended to create any enforceable Federal rights on statutes until 1875 when the original jurisdiction was finally granted. Obviously this wasn't true. The framers and Congress assumed that the Federal rights would be enforced in the state courts. And the effectivsness of this enforcement of the Fourth Amendment was assured by the then accepted, omnipresence of the common law.

For, when the amendment was adopted Entick against Carrington was assumed to be the common law throughout the land. There could hardly have been any compelling need for original Federal jurisdiction and the state courts could be expected to enforce the principles of Entick with the uniformity derived from common custom and tradition.

Indeed, there was little need to distinguish between state and Federal common law rights, for well over a century afterward, when unver the philosophy of Swift against Tyson, the common law was regarded as a single and cohesive body of principles.

This is why Slocum against Mayberry, on which the government heavily relies for its view. In fact, it's precisely the other way. If you look at the opinion of the court, what Chief Justice Marshall did say was that damages were to be sought in a "suit at common law," but that the "common law tribunals of the United States were not available to hear the claim because Congress had not given them juris-

diction."

He went on to say that the suit had to, therefore, be brought in the state courts. But, contrary to the government's suggestion, what he did not say was that the claim therefore arose under and was governed by state law. For him, and indeed, for the court for many years afterwards, such a parochial dissection of the common law was unthinkable, and thus it is that the question of governing law becomes vital only when a common law becomes what the courts say it is in fact. When, under Erie against Tompkins the pronouncements of state judges are recognized as binding in the Federal Courts and when asserting that the claim arises under and is governed by state law may defeat the Federal right.

And in this context -- I repeat, in this context, looking at the language and the background of the Fourth Amendment, it is inconceivable that the framers should have intended its enforcement to be subject to compromise in the state law and the rights recognized in Entick against Carrington forfeited because of Congressional inaction.

Turning to the second issue: the adequacy of existing remedies. From the framers' intent to its fulfillment, it is arguable, at least in principle that as a matter of Federal law the court should look to state law in civil damage actions for unreasonable searches until the Congress says otherwise. But, surely this turns most of all on whether

the framers' intent would thereby be fulfilled. The court below concluded that it would; that plaintiff should be left to sue under state law because existing remedies substantially vindicated Fourth Amendment rights.

With due respect, this conclusion cannot be sustained. It flies in the face of this Courts decision in Mapp against Ohio and Monroe against Pape, both of which required overriding substantial state interest. Because, as they said in Mapp, existing state laws were worthless and futile.

Moreover, given Federal rules under the Civil Rights Act against state officers, in the variety of local rules, and this is the point in response to your question, Mr. Chief Justice: the variety of local rules from state to state. It means that identical conduct in an unreasonable search and seizure will give rise to liability if committed by a state but not a Federal officer and if committed in one jurisdiction but not in another.

It leaves enforcement of Fourth Amendment rights subject to the accidents of which badge the defendant is wearing and on which side of a particular state boundary he happens to act.

And in terms of the larger question of determining police misconduct, the lower court's conclusion cannot be reconciled with the results of more detailed studies by scholars in the field. The most extensive work today, which

no doubt the members of the court have seen is that of Professor Oaks of the University of Chicago Law School. It is a recently published article which is cited on page 31 of the Government's brief. He concludes that the exclusionary rule has a relatively little impact as a deterrent to policemen's conduct because most police activity is directed not at securing evidence ofor prosecution but in apprehending criminals and maintaining order.

More important, he cites evidence in Canada that suggests the a civil remedy is reasonably effective in curbing the police and strongly urges that such a remedy be given a chance to do the job here.

Turning finally to the role of the courts: what is the responsibility of the courts when an aggrieved citizen enlists their aid to vindicate a claim based on a naked violation of the Fourth Amendment? Of course the Government, the Executive, insists the courts shouldn't act. They argue, and I quote: "that there must be a showing of the utmost necessity; must be vital, indispensable, essential and absolutely necessary."

In having themselves so restrictively set the stage on the question to be decided, they proceed to argue that ineffectual state remedies are nonetheless, not totally worthless; that the matter should be left to a Congress that hasn't acted in 180 years.

To all this I would say only three things: first, indeed, necessity must be shown for the courts to act. It is here as plain as anything can be. If the need to protect Fourth Amendment rights requires the court to suppress reliable evidence in criminal prosecutions at the expense of society, surely it provides the basis for a simple court remedy that would be available to the innocent and the guilty alike, and place the burden on the irresponsible police officer where it more properly belongs.

Q What standard of liability do you suggest the courts fashion, if they take on the job of enforcing the Fourth Amendment directly?

A Mr. Justice White, I think there are two different questions: one is whether the plaintiff has a cause of action and developing the Federal rule.

And one, which I think your question is directed to, which is the defendant's defense of privilege, which should be sufficiently broad to protect the policeman acting reasonably in discharging his duties.

Q -- the policeman believing that he had probable cause or --

A Yes, Your Honor, I would --

Q Even though he was quite wrong?

A Even though he was quite wrong, if he reasonably believed that he had probable cause that should be

a sufficient defense in my view, and I think that's consistent with this Court's opinion in Pierson against Ray. But, I think it's a separate question from whether the plaintiff has a right to sue, he has a Federal right that should be governed by Federal rules. That's already --

Q His subjective good faith would be sufficient defense, do you submit?

A I don't think I said that.

Q Well, that's the reason I asked the question.

A I think that this is beyond the scope of what the Court -- well, I'm not so sure; if the Court goes on to decide, which I urge it to do, that Barr against Matteo should be explained as applying to defamation with respect to its discretion within the outer perimeter of the line of duty, then it should indicate what the defense if government privilege is in trespass.

And the basis for that defense is established by the traditional cases of trespass in Pierson against Ray, and that would be a privilege for the officer's reasonable conduct in discharging his duty. Now, that is not subjective good faith, and I don't think society has an interest in subjective law enforcement. If the other people in society are held up to a standard of reasonable conduct, I think the police should be as well.

Q Is it the same test as would make a search

constitutional?

A No, it would not be the same test because --

Q Not the same test?

A I don't think it would be as strict a test and also I think that when you take the practical question of suing an officer who is trying to do his duty, for personal liability in front of a civil jury that in effect, the test would not be as rigid as the court trying to apply these --

Q Well, this would be, in logic and in theory. You use the word "reasonableness," and that's the same word, -- the same word that the United States Constitution uses that makes a search constitutional.

A I think the question now is the privilege of the officer, which is a defense in a suit for personal liability, whereas the question, for instance, of the probable cause, at least where it has arisen for the most part, has been in whether you can use the evidence against a criminal in a prosecution and I'm not sure they are the same.

I wish I could give you satisfactory answer to that.

But, I will move on right to the second question, since I only have a minute.

On the basis of the complaint in preliminary papers the government invoked the defense of governmental privilege in the District Court, as well as in the Circuit

Court of Appeals. They even urged the Circuit Court to go so far as sustaining the defense in the face of a clear and conscious violation of the constitution, and they cited three Circuit Court decisions to that effect, which I noted on pages 20 and 21 of my brief.

Now, that the issue is finally in front of this Court, they say that the same complaint, the preliminary papers, afford insufficient facts to -- for an informed judgment, obviously suggesting on the remand there will be additional facts to excuse the defendants.

I think clearly the problem is not with the facts; it's with the judgment. It has to be reversed and reversed by this Court because it has arisen, because this Court's pronouncements in Spalding against Vilas and Barr v. Matteo, were misapplied by the Fifth Circuit in Norton against McShane to shield an unconstitutional arrest and detention. The First Circuit has already rejected the Norton decision. Remanding the issue here to the Second Circuit will simply perpetuate a conflict that can only be resolved by this Court.

And so the position of the Petitioner, we very strongly urge that this issue is in the case that it should be reversed.

I would like to reserve the remaining portion of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Grant.

Mr. Feit, you may proceed whenever you are ready.

ORAL ARGUMENT BY JEROME FEIT, ESQ.

ON BEHALF OF RESPONDENTS

MR. FEIT: Mr Chief Justice andmay it please the Court:

At the outset I would like to make clear what, in the government's view is, and what is not involved in this case.

First of all, we do not contend that the District Court lacks jurisdiction under Section 1331(a) in the sense of Bell v. Hood for a cause of action stated on one construction of the constitution and defeated on another.

The critical question here and the one left undecided in Bell v. Hood by this Court, is recognizing the complaint on its face for pleading purposes, states an actionable tort under state law, should also be read as giving rise to a constitutional tort so that the elements of the cause of action, that is thetype of injuries compensible and the kinds of damages recoverable which is governed by Federally created law.

Our answer is: no; basically because of lack of necessity. Indeed, the tort remedy,as I would suggest a little later in the argument, is basically ineffectual as most other commentators have suggested.

Q Well, what would you say if the Court

entertained a suit by this very plaintiff, based on the constitution and said: certainly we will give a remedy; we have no jurisdictional problems in our court about --

A What would happen as a practical matter, Mr. Justice, is that if this suit had been brought in state court you would have been removed by the Federal Government to the Federal Court under 1442(a) of the Removal Statute because the Federal defenses --

Q That isn't the point. The point is: I'm trying to ask if you brought a suit in the state court, this same plaintiff, suing under the Fourth Amendment and the state court said: certainly we'll entertain an action to enforce the Fourth Amendment against the officer. And the governing law would be Federal Law then; wouldn't it?

A The governing law in regard to the issues of justification for the officer's action in arresting the Petitioner or the plaintiff in that case the law with regard to perhaps defenses of immunity would be governed by Federal law.

But the nature of the cause of action itself, as I have indicated, the type of injuries compensible or the kind of damages recoverable would not be governed by Federal law.

Q Why not?

A Unless this Court creates a constitutional tort, because historically --

Q Well, why couldn't it -- a state court -- it would be beyond the power of the state court to say to this plaintiff: you seek to sue under the Fourth Amendment; we accept the suit, in that very sense. It is a suit under the Fourth Amendment and we're going to enforce the Fourth Amendment in this suit. A state court couldn't say that?

A State court could say, assuming, as I have said, that it has not been moved to the Federal Court as it always will be, against a Federal officer under the 1442(a). The state court could set a precedent and say: looking to the officer's action we will determine this as it has to, under Federal law.

But, I have great difficulty, unless this Court decides that the arising under jurisdiction of 1331(a) creates a Federal cause of action that the state court could look to Federal law with regard to the injury and the damages compensible.

Q Can I get one point straight? You keep saying "if it was removed back to the Federal Court."

A No; I meant to say -- if I did say that, excuse me, Mr. Justice. As I said: the case will always be removed to the Federal Court as it has been in the past under the 1442(a)

Q And will be tried under the exact same -- take this particular case, filed in the state court. It will

removed to the Federal Court.

A Correct.

Q And proceed with the exact same pleadings you have right now.

A What would happen -- that is correct.

Q Well, what, other than motion is accomplished by sending it back to the state court?

A Well, this was never commenced in the state court. The issue is not what would be gained. I think, to our point of view, what would happen would be the court would be creating a constitutional tort and Petitioner has talked about the history of the Fourth Amendment and I would like to indicate that the Government's view is entirely contrary --

Q As it is staged now wouldn't the statute of limitations take care of the state authority?

A In terms of, you mean in terms of the government's state, Your Honor?

Well, in terms of the statute of limitations the -- this alleged invasion of privacy occurred in November 26, 1965. The lawsuit was not commenced until June of 1967, a year and a half after the event. If it had been brought to the state court against a state officer, there is a one-year statute of limitations.

Q But as of right now if it goes back to the state court it's out of court. Is that right?

A Well, and even if this Court decides to create a cause of action and we, of course have suggested that it does not reach Barr and Matteo at all; if it goes back to the Federal Court, for example, and you say there is such a cause of action, presumably this would be dismissed under the statute of limitations. The Government could allege the defense as the statute of limitations.

Q Is there a cause of action for injunctive relief, as Mr. Grant suggested?

A There, and I think this gets into our general proposition: historically there has been a recognition of a cause of action and injunctive relief primarily in situations against the enforcement of state statutes --

Q But, is that for violation of the Fourth Amendment?

A I would assume that there could be a situation where there would be.

Q Well, then would this Court be creating a cause of action?

A It would be arising under the constitution in terms of --

Q That's not my question, Mr. Feit. If there is already a cause of action for injunctive relief for a violation of the Fourth Amendment, why does the Government suggest that we would be creating a cause of action?

A I believe the Government --

Q It's a remedy that damages won out on.

A Beaause that we think that the two are somewhat different. For example:--

Q What two are different?

A Because the action for injunctive relief, which is essentially an action which rests on necessity. For example, as to a Federal officer the law is not clear. I think it looks the other way. The state could not enjoin the Federal laws. At least Professor Warren thinks that and you suggest in Wheeldin v. Wheeler.

So, there is no remedy with regard to any state court with regard to a Federal officer in terms of injunctive relief. In that sense it fits our general proposition. In other words, this Court recognizes that a remedy should exist in the Federal Courts but there is no remedy existing in the state courts, and the injunction proceeding fits the need of necessity. It would be monstrous, I submit, that there should be a right without a remedy.

Clearly here there is a remedy for damages in the state court and it seems to me it's Petitioner's burden to show that there is a necessity to create a damage action. It is our position and the position of those who would -- the commentators who dealt with this matter in complete detail, that the difficulties with regard to the damage action could not

lie in the vagaries of state law, as is alleged here by the Petitioner.

Essentially, the fact of the matter is that the hesitancy of those who have been arrested to sue the police, and if they do sue, the undeniable fact that juries are reluctant to hold Federal or state officers personally responsible for damages at the request of one who may have a criminal record or comes from the lowest economic levels of society.

It seems to us, as the writers have pointed out, that other remedies should be sought; perhaps against the police entity in terms of governmental liability, amending the Tort Claims Act, perhaps.

Should administrative boards independent of the police, be established in the matter of police behavior; and if such bodies are created, what are their duties to be? And these are the kinds of questions, it seems to me, that are best suited for legislative determination and study --

Q Well, didn't the Congress, in passing 1983 and keeping it on the books all these years, turn over, in effect, to the courts the task of fashioning a good many, a good part of a Federal law of constitutional rights against state officers?

A Yes; and of course, I think that tends to support our position that is that Congress, in 1983, as this

Court read it in Monroe and Pape, created by statute, a civil remedy against state officers --

Q But left it very open-ended in the sense that all of the internal rules and standards had to be fashioned by the court.

A Well, under 1988 you look to where the Federal common law applies and you look to the state courts --

Q You don't think it's odd at all to have the cases against state officers rest on Federal law and the liability of Federal officers rest exclusively on state laws?

A I think this is not a real meaningful distinction because in all of these cases against Federal officers brought in the state courts will be removed to the Federal Courts.

Q I know, but on your position the law applied to the Federal Court will be state law.

A The law with regard to the nature of the damages and with regard to the type of injury compensible. It's quite clear that the question is to whether or not the officer acted on probable cause or whether he had immunity from suit. These questions, quite clearly, will be governed by Federal law.

What I am suggesting to the Court is that the notion, that the vagaries of state law, the differences in state law are the reasons why the court remedy has been

ineffectual; are not really accurate. The reason is, as I have said, is that wherever the case is tried, juries generally do not like to impose the liability on police officers. And no one, none of the commentators, even Professor _____ cited so extensively by the Petitioners, suggests governmental responsibility, the doctrine of governmental responsibility, perhaps liquidated damages.

Other writers have talked, as I have said, about the setting up of --

Q What's left for state law under your submission? The case is now removed to the Federal Court and you say that on most of the important elements, both the cause of action and the defense the Federal law governs.

A I say that as to the essentially as to the defense is Federal law.

Q That's what I said. Now, then what's left for state law?

A As I understand it what would be left to state law would be the measure of damages; the type of damages that could be recoverable --

Q What do you mean by type? Do you mean as between --

A Punitive, compensatory damages. I might point out, for example, that New York State in its action, where this occurred, was a leader in allowing responsibility

for damages for mental suffering; that kind of thing, which we submit should be governed by state law. But question of justification, which is the kind of conduct that was engaged in, that would be governed by Federal law; where there was an immunity suit that would be governed by the Federal law.

Q My difficulty is that the Government apparently concedes so much, so many of the issues would be ruled by Federal law, but something, you tell us, is left for state law, and I must confess: I don't follow why the distinction.

Q Certainly it can't be to protect the Federal Courts because you just said all the cases are going to end up in the Federal Court anyway.

A No, it's not to protect the Federal Courts in that sense. I think that essentially what I am suggesting is --

Q What difference is it going to make in the plaintiff's cause of action. You now concede that he has one; all the issues are governed by Federal law, those that you have specified, assuming that they all result favorably to the plaintiff. Now, where is the, as between state law and Federal law on the issue of damages?

A Well, it seems to me that it is a jurisprudential kind of thing as to whether or not this Court, as it was not done for over two hundred years of litigation in

these areas, to determine that a course of action exists under the constitution without the showing of necessity. It seems to us, for example, that if this Court said that a cause of action is governed by Federal law, maybe creating a constitutional tort. Could Congress then decide: well, we do not think that the tort remedy is effective; would Congress be barred from saying: we do not think the tort method is an effective method. We want to try something else, assuming the Federal law enforcement officer is of the type which requires some other kind of treatment. Would you need a constitutional amendment for that?

It seems to me that you raise quite a difficult problem. Even if it doesn't raise constitutional questions, would Congress be chilled in further examination and decide, well, we'll leave this matter to the courts for determination?

Q Do you think you could go into a state court or a Federal court and sue a Federal officer for having broken into the house at night and seized a bunch of goods and asked for an injunction and a turn-over order to have him return the property.

A I wouldhave great doubt about that. This Court has not decided that --

Q That's just an injunction; isn't it?

A Well, I think what I'm suggesting is --

Q You couldn't sue the Federal officer to get

the property back?

Q You could take a replevin action.

A A replevin action, you mean sue to get the property back inthe state court --

Q Well, I know, but a replevin action rests on a violation of the Fourth Amendment.

A But, of course, again the -- that question, the question would be removed to the Federal Courts.

Q Well, would the Federal law govern it? Or --

A I would have to say that the state laws would govern the course of action.

Q Why would it?

A I thought I had been able to establish it, because --

Q It's not Erie Railroad, because this is not a diversity case.

A No. It seems to me that what it might lead tois really what we're concerned about is if you start creating Federal causes of action, as I say, they may be constitutional kinds of remedies that are being created.

Q Well, what happened in this case if it's filed in the state court and removed to the Federal Court? Who controls the damages; the state or the Federal Government?

A Well, it's our submission that the measure of damages would be governed by state law and I might point out

that New York State ois a leader in compensatory damage recovery for alleged invasion, mental invasions of the Petitioner or claimants.

Q So, why can't you hear this now on the same basis?

A Yes; it would be --

Q Well, like I say, let's make believe it was ??????? filed in the state court first; it wouldn't be here; would you?

A No; if this case were filed in the state court, removed to the Federal Court to be tried in the Federal Court --

Q Right.

Q But, what I have missed somewhere along the line is why do you say the state law won't be applicable?

A Because -- why state law would not be applicable?

Q Would be; would be.

Q To the extent you say it is, which I gather is very small.

A I thought -- my position is: the state law would be applicable because the cause of action on the common law basis did not arise from the constitution in the Fourth Amendment. The constitution essentially is that the historical bases, I think, clearly show, was aimed at securing that right

and creating the rule that you could not rely on writs of assistance and general warrants for justification --

Q You are assuming what kind of a cause of action? For trespass?

A Assuming a cause of action for trespass, false imprisonment --

Q Or possibly replevin, as Justice White says. What you want is the property back. Your two million dollars worth of whatever -- contraband. You want that back, and --

A WEll, as I say, if --

Q What if you sued in the state court simply for a violation of your Fourth Amendment rights and the state, that particular state said: that's fine; we have a court remedy for that. We're under the constitution of the United States around here in this state and we give a tort remedy for a violation of constitutional rights.

And then that's removed to the Federal Court?

A That's removed to the Federal Court.

Q And then you have an action then in the Federal Courts, removable only because the defendants are Federal officers.

A Federal officers.

Q And what's the difference, then, between what you would have then and what your -- Petitioner alleges you would have here?

A Well, I think you would have there, in a sense, in which -- and I'd like to get to the second point -- the thing you have then, it seems to us, is the creation of a constitutional cause of action.

Q It's a cause of action for damages based upon rights that are accorded to you under the constitution. Now, you might have a cause of action for damages based upon the rights that are accorded upon you by the common law of negligence, if you were hit by an automobile. It doesn't mean it's a constitutional cause of action.

A Well, it seems to us that there are defects in creating that kind of remedy, even if it isn't a constitutional tort in that sense could Congress then change it, as against Federal Courts?

Q Well, that's another case, isn't it? That's a --

A And secondly -- for instance, if you recognize the existence of this Federal cause of action, might it not be -- have an overdeterring effect on Federal officers?

Again, it's against Wheeler and Wheeldin, which is was cited by this Court several years ago, where this Court refused to apply that course of action dealing with the granting of process and the Court pointed out in an opinion by Mr.Justice Douglas that we're not in the free-wheeling days of Erie against Tompkins.

Essentially, our position on the cause of action issue is that we're concerned as to what may be the consequences of the creation of that kind of action on behalf of the suing individual. And it seems to us that there are possibilities that Congress may not act. This is the kind of an area of what are the natures of the remedies that should be afforded are quite difficult to determine. And it seems to us that counsel's judicial restraint and requires legislative or perhaps Congressional action in the area.

Q Well, what is the amount he asked for here?

A The amount he asked for here was $15,000 against each Federal officer.

Q That's certainly not a very unusual remedy; is it? It's nothing that takes a great deal of craftsmanship or creativity to understand a cause of action for money damages.

A No, it does not. I have tried to indicate the reasons why we feel, however, the Court should not create the cause of action for the reasons as I have tried to say, for fear that it might create a constitutional tort limited to Congress.

But, ifthe Court should reject our view -- if I may use my remaining time on the remaining issue -- and should reject our view and determine that a cause of action for damages should be created on the -- under the Fourth Amendment,

so that this was properly brought in the Federal Court. We strongly urge that it should not now decide the question of official immunity pressed upon it by Petitioner.

While Petitioner says so, and the record can read both ways, it is not clear that the District Court reached that issue,but even if it did, the Court of Appeals certainly did not. It clearly refrained from reaching the question of immunity.

The only facts inthe record consists of Petitioner's brief complaint as a motion for summary judgment, the government's motion to dismiss and the accompanying affidavit. Without appealing the District Court dismissed in a short memorandum on the grounds that it had no jurisdiction. In a subsequent memorandum denying the motion to appeal at the -- found additionally that no cause of action had been stated.

The record, I think is in our judgment, wholly adequate to permit an informed judgment as to whether these agents were acting within the scope of their duties. It may well be, under the development of the facts, that the agents were indeed acting with probable cause. This is not the kind of complaint where the record, at page 1 and 2 for example, that's set forth in Monroe v. Pape, where 13 Chicago police officers entered at the early hours of the morning; caused Mr. Monroe and his family to stand naked, then took Mr. Monroe down to headquarters for intensive investigation.

As I say, the circumstances surrounding the officers' actions may be expendable so as to be completely justified under the Fourth Amendment. On the other hand, the government may be able to assert that if there was a violation of the Fourth Amendment it is wholly technical --

Q But, the government prevented all of that by its motion for summary judgment; right?

A Well, it seems to me that the government should --

Q Is that right?

A The government moved to switch the complaint and --

Q Well, I'm sorry for my language, but --

A And filed an affidavit relying on the claim that the action was brought under the --

Q Well, how can you argue about what you would prove when you weren't interested in proving anything?

A Well, it seems to us that the facts that the government may have made a mistake or that the court did not require -- the District Court did not require further governmental affidavits of further showing -- it seems to us that this Court should not be required to decide a question of such significance as the Barr and Matteo proposition on this kind of barren record.

Thus, it seems to us under the procedures for

relief based upon the new Federal Rules of Procedure -- of the Federal Rules of Civil Procedure; the further affidavits should be submitted to permit the record to be fleshed out. And this Court should not reach in this very barren context, this very significant question as to the scope of the immunity doctrine as applied to Federal agents.

Q Mr. Feit, was that suggestion made to the Court of Appeals, do you know?

A I think the suggestion was not made to the Court of Appeals. The Court of Appeals specifically, however, refrained. The Government argued the Barr and Matteo issue in the Court of Appeals. The Court of Appeals, however, specifically refrained from deciding that question, finding that there was no cause of action available, believing that it should not create one because of the rule of exclusion and that there was no need for the creation of such a remedy.

For these reasons it is our basic position that the Court should not create a constitutional tort and dismiss the complaint. If it disagrees with us on this issue, however, we strongly urge that it not reach the immunity issue, since no record exists upon which that issue could be fairly decided. It should, instead, remand the case to the District Court for a further development of the record on that issue and on other possible issues of justification for the official action.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Feit.

Mr. Grant, you have about seven minutes left.

REBUTTAL ARGUMENT BY STEPHEN A. GRANT, ESQ.

ON BEHALF OF PETITIONER

MR. GRANT: I'll make only a few remarks unless there are questions from the bench.

First: when you asked if state law governs this crime. If state law governs this crime we will go back to the District Court. We're out of court, if Mr. Feit was correct in saying that the state statute of limitations bars the --

Q I gather the statute of limitations was --

A I think we brought it two years after the trespass.

Q Another year.

A And that's precisely the kind of question, and there are obviously other issues besides the damages that would bear on the Federal right.

What is required here is not, as the government so strongly suggests, creating a new cause of action in the sense of defining a new and certainly not a constitutional tort.

Here, unlike Wheeler against Wheeldin, we already have in the constitution a prescription against an unreasonable search and seizure and the tort of trespass is as old as any a common law. This Court is asked to hold nothing more than at

such a time honored claim than trespass is governed by Federal law and based on a Fourth Amendment violation. And what is required would not, again, as the government suggests, freeze Fourth Amendment remedies in a mode that could only be broken by a constitutional amendment.

What we're talking about is not redefining the Fourth Amendment, but about its enforcement in the matter of Federal common law free from local rules. Such common law could, consistent with the amendment, be changed by legislative action. And even if the right to damages were called a constitutional right, there is nothing to prevent the Congress from requiring the claim to be asserted against the government itself, or providing for indemnity for its officers.

Finally, what we are asking would not, as worried the court below, lead down a long and uncertain road in creating Federal rules, for you would open a Pandora's box of civil litigation to vindicate constitutional claims.

The courts, and particularly the Federal Courts responsibility to formulate their rules and to determine the difficult question of which constitutional violations give rise to damage claims, is already present under the Civil Rights Act.

Recognizing the Federal nature of the plaintiff's claim here would be if the Courts later so wished, an easily distinguished decision, resting as it must, not merely on the

Fourth Amendment, but on the specific intent of the framers, and on the background of common law that imposed personal liability.

In concluding, I would like to return to the question raised by Mr. Justice Blackmun, to a thought that I suggested at the beginning. For me it's extraordinary that the fundamental questions in this case arise to this Court's decision over 200 years after they were settled in England in Entick against Carrington, and 180 years after the framers attempted to incorporate the promise of Entick into the Fourth Amendment.

And, as I said, 25 years after this Court so clearly suggested the availability of a Federal claim in Bell against Hood. The explanation, as the courts know too well, does not lie in any dearth of unreasonable searches and seizures. Such abuses continue and apparently unabated by judicial suppression for legally seized evidence.

Obviously there is something fundamentally wrong in the understanding of the people and of the police as to the meaning of the Fourth Amendment. But it is, in the practical sense, the guarantee that can and will be enforced.

If there is to be a change it will not come from simply sustaining the right to sue in Federal Courts. And, as the Government points out in its brief, the Civil Rights Act was recognized over ten years ago, yet the use of

the Civil Rights Act remedies have been minimal. Stronger medicine is needed.

A reaffirmation of the citizen's right under Federal law and the Government's liability in clear and resounding terms that will be heard and understood by the people and by the police.

And from where would come, from a Congress that recently authorized no knock entry by the police; clearly not. It would be from this Court or not at all. And looking at the 25 years between Bell against Hood and today, it would be now or very possibly never in our time.

Thank you.

Q Suppose we were to hold that there is a cause of action and Congress has a bill saying there should not be a cause of action. What would be the situation?

A If this Court were to hold that the plaintiff had a right under the constitution for compensation for a violation of the Fourth Amendment, such a law, I believe, would be in derogation of the Fourth Amendment, but that doesn't mean that Congress doesn't have considerable flexibility. As I pointed out, they could easily adopt a bill that would require like the Federal Tort Claims Act. All they would have to do would be to modify it so the suit could be brought against the government.

Q Your idea is -- your belief is that if we were

to hold there is a cause of action and Congress has studied the matter and reached the conclusion there should not be a cause of action, that the Congressional act would be unconstitutional?

A I would certainly defer to the Court's judgment, but that would be my position; yes. I believe it would be a derogation of the Fourth Amendment, such a statute.

Q You wouldn't think Congress, instead of putting it that way, could say the Federal Court shall have no jurisdiction to hear suits against Federal officers?

A That is precisely why I insist that the question is not simply jurisdictional --

Q Well, I know but -- how about answering my question.

A I'm sorry, Mr. Justice White.

Q Well, what if Congress didn't put it the way Mrs. Justice Black put it to you, but just said: the Federal Court shall have no jurisdiction to hear any cases against Federal officers?

A That would be fine; the suit could be brought in the state court but the point is that the law in the state court would be Federal law and it would be subject to being brought up to this Court and the rules, hopefully, would be loud and clear on the right to damages for all kinds of suffering and the rules that defends liability would be equally

clear. The Fourth Amendment would be vindicated in the state courts. That, of course, wasthe system before 1875; exactly the --

Q Could Congress repeal the exclusionary rule? I guess not, after Mapp against Ohio, which held it was part of the Fourth and Fourteenth Amendments.

I guess your answer is no?

A Yes. But there is no question in Mapp against Ohio it rested very strongly on the inadequacy of other remedies.

Q Well, it rested as reported to rest on the finding that the exclusionary rule was part of the Fourth and Fourteenth Amendments, which was something new.

A I think that's right, but there may very well be room, once the underpinning of the inadequacy of civil remedies if there were effective civil remedies, for an argument that it is essential in the case where it is being used with an overreaching part of the government to prosecute the defendant. And in that type of case, and it certainly is an essential part, whereas in the technical case there is no overreaching, no authorization from higher governmental officers, then perhaps one sees the other bases removed the question should be re --

Q So, yes; if you prevail here the logic of the progress of events might lead the Court to be invited to

reconsider, at least the full force of the exclusionary rule.

A It certainly might.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Grant, Mr. Feit. The case is submitted.

(Whereupon, at 2:00 o'clock p.m. the argument in the above-entitled matter was concluded)