May 19, 1983

81-469 Bush v. Lucas

Do not join. Carlson made a mess out of this area of the law, and this case reflects it. I have some problems with this draft, but changes could make it possible to join:

1. This is a minor point, but I find n. 7 on p. 5 as suggesting that the merits of petitioner's 1st A claim is a close issue. I would prefer not to say anything about the merits and would suggest removing the note.

2. 1st full paragraph, p. 6, second sentence: the Court is stuck with Carlson in the constitutional tort area, but there is no reason to suggest that this is the Court's standard with respect to other implied causes of action. Your opinions have made the relevant inquiry clear, and I think this sentence needs to be qualified appropriately. The third sentence makes this clear, but someone will use the second sentence out of context if it is not changed some.

3. Page 11 is the most troubling page. The third sentence holds that this Court is the judge of the remedy to determine its adequacy. I find this troubling
because I do not think that Congress must provide remedies for certain violations. Assuming, however, that there must be an adequate remedy, I find the next sentence to say that, in some areas, this Court can still supplement the "adequate" legislative scheme with a damages remedy.

The first sentence of the second paragraph suggests that Congress has not given the Court its answer in this area. I find this odd, since our answer in the end turns on the existence of a cumbersome review procedure for civil servants. I think Justice Stevens avoids stating what should be the true issue here, as in all implied-cause-of-action cases: what did Congress intend as to the 1st A violations alleged here. I think that question is simply answered by pointing to the civil service review system as preempting judicial action in this area. In some ways, I think Justice Stevens decides the questions he purports to leave open in n. 14 (p. 11). And I do not think he is right on the merits of that question.

4. On p. 13, first full paragraph, Justice Stevens posits the issue as "who decides?" I would have thought "Congress" would be the easy answer to that, and the Court's task is to determine congressional intent. I
find his stated inquiry in the last sentence of part II to be somewhat inappropriate for the Court. See also, pp. 21 and 23.

5. Note footnote 28 on p. 18. I am sure you will want to remove the suggestion that there might be a damage action for removing certain employees for national security reasons.

Jim
May 19, 1983

Re: 81-469 - Bush v. Lucas

Dear John,

I agree.

Sincerely,

Justice Stevens

Copies to the Conference

cpm
May 19, 1983

No. 81-469  Bush v. Lucas

Dear John,

Your proposed language is fine. Please join me.

Sincerely,

Justice Stevens

Copies to the Conference
May 20, 1983

Re: 81-469 - Bush v. Lucas

Dear Bill:

Would it satisfy your concerns if I revised the paragraph at the top of page 11 to read as follows:

"This much is established by our prior cases. The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation. When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the Court's power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation."

With respect to your concern about footnote 38 and the runover sentence on pages 22 and 23, I would much rather have your vote than either the footnote or the sentence. You're dead right, of course, about Davis, but I was struggling for ways to separate this case from Carlson and thought the point had enough merit to buttress the different result in the two cases. I wonder if it would be acceptable to you to incorporate the sentence in the text as well as footnote 38 into the end of footnote 37. If you feel strongly about it
and others agree with you, I will of course eliminate it entirely subject, of course, to any comment that may be forthcoming from those who have already joined.

Respectfully,

Justice Rehnquist

Copies to the Conference
Dear John:

I think you have done a fine job on a difficult opinion. I do, however, have some concern with the first paragraph on p. 11 and with the carry-over sentence on pp. 22-23.

The second sentence of the paragraph on p. 11 states "As long as it provides a constitutionally adequate if not identical alternative remedy, Congress may express its intent, by statutory language or clear legislative history, that such power should not be exercised." I have several difficulties with this proposition. It may fairly be read as expressing the view that if Congress does not provide a "constitutionally adequate if not identical alternative remedy," then it may not deny federal courts the power to invoke a particular remedy. To my mind, this is inconsistent with the statement in note 14, that "we need not reach the question whether the Constitution itself requires a judicially-fashioned damages remedy in the absence of any other remedy to vindicate the underlying right, unless there is an express textual command to the contrary." I agree with note 14, which I take to mean that we need not decide in this case whether the Constitution places any requirements on the type of remedies Congress makes available in federal court under §1331. The sentence, quoted above, in text on p. 11 suggests that there is some standard of "constitutional adequacy" applicable to remedies for constitutional violations. I do not think this case requires us to decide whether or not Congress could entirely abrogate a personal damages action for, by way of example, Fourth Amendment violations, and I would prefer not to prejudge the issue, as I think the sentence as currently phrased does. (Indeed, although I am sure the opposite was intended, the sentence might even be read as suggesting that
alternative remedies created by Congress must be "identical" to a *Bivens* damage action.)

I also am concerned that the paragraph may create a mistaken impression regarding the continued vitality of the second reason, articulated in *Carlson v. Green*, 446 U.S. 14 (1980), for not implying a *Bivens* remedy. *Carlson*, of course, said that when "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." *Id.*, at 18-19. It seems to me that the first paragraph on p. 11 shifts the focus of this prong from what Congress thinks is "equally effective" to what the courts think is equally effective. The draft states "Moreover, by creating an equally effective remedy, Congress may eliminate the need for judicial recognition of a *Bivens*-type action for damages." I would prefer to stay with the notion that the primary decision as to the efficacy of an alternative remedy should rest on Congress. (Indeed, this view seems far more consistent with the notion that Congress possesses greater competence than the Court in certain areas, which you have adopted as the theme of your opinion.)

My second concern is with aspects of the carry-over sentence on pp. 22-23, and the accompanying footnote. First, as to the final sentence of note 38, I wonder whether congressional inactivity in regulating an area necessarily cuts against a *Bivens* remedy. In the area of national security, for example, I would think congressional inactivity represents its considered judgment that the executive can do a better job than the legislative branch. Such a position would suggest to me that the courts would do well to follow Congress's example. (I suppose, given the second example in note 28, that future cases in this area are not entirely hypothetical.)

More generally, I doubt that courts can make principled decisions based on the degree of access of certain groups to Congress. First, it is difficult to see any way to decide what groups have influence and what groups do not. Moreover, different groups have varying amounts of access to Congress, depending largely upon the issue involved. (The plaintiff in *Davis*, for example, was a federal employee, and perhaps a member of NOW, but the influence of these groups was unable to provide her with any remedy.) I fear that if we attempt to ascertain the political power of various groups we will lead ourselves and the lower courts into a confusing areas lacking any real guidelines. I think this
would be unfortunate because the other factors you articulate in determining whether Congress is better able to make judgments in a particular area do, to my way of thinking, provide useful guidance.

Sincerely,

Justice Stevens

cc: The Conference
Consider asking John to change the first sentence in the second paragraph on page 11 to read substantially as follows:

"Congress has not resolved the question presented by this case by expressly denying petitioner the judicial remedy. Indeed, Congress rarely is explicit with respect to whether statutory remedies are preemptive. 14 We therefore must endeavor to ascertain the intention of Congress, looking to the legislative history as we customarily do, and also considering whether a damages remedy would involve any 'special factors counseling hesitation'.

As indicated above, John, I find that both of these considerations strongly support denial of a Bivens action in this case.

I cannot recall a single example of Congress having declared that remedies it prescribed were exclusive. Nor can I recall a legislative history, comparable to that before us in this case, that demonstrates so clearly that over several decades Congress has considered with care the rights and remedies of the government's own employees. It is simply unreasonable to suggest either that Congress simply overlooked the possibility of a damages remedy (Bivens has been on the books for more than a decade) or that it intended - as the Court found in Carlson - that the legislative remedies were merely "parallel or complementary" to those elaborately provided. Indeed, as I recall Harry saying at
Conference, in some respects the statutory remedies are consider­ably more protective than any damages remedy. After all, they have demonstrated their effectiveness in assuring continuity of federal employment that ends with retirement benefits that are the envy of many in the private sector.

Given the foregoing views, I would have difficulty in joining the final paragraph in your opinion unless you are willing affirmatively to decide the merits of this case. Nor do I think it is at all necessary for us to volunteer any observation as to whether a Bivens remedy would or would not be "good policy". Surely, few subjects have been considered with greater care over a longer period of years than the civil service.

I would like very much to join your opinion. I recognize the problems inherent in some of our past deci­sions that you endeavored in a scholarly to obviate. If you could make it clear that these problems, though requiring discussion, are really not at all serious in light of the long history of congressional concern for the civil service and also in view of the "range of policy considerations" that surely Congress already has considered.
May 23, 1983

Re: No. 81-469 Bush v. Lucas

Dear John:

The proposal in your letter of May 20th is quite satisfactory so far as my concerns about the paragraph at the top of p. 11 of your present draft are concerned. Insofar as fn. 38 and the run-over sentence on pp. 22 and 23 are concerned, your proposal is certainly acceptable; I would prefer the course suggested in my letter to you, but will leave it entirely to your discretion.

If you will make the proposed modification in the paragraph at the top of p. 11, I will be happy to join.

Sincerely,

Justice Stevens

cc: The Conference
Consider asking John to change the first sentence in the second paragraph on page 11 to read substantially as follows:

"Congress has not resolved the question presented by this case by expressly denying petitioner the judicial remedy. Indeed, Congress rarely is explicit with respect to whether statutory remedies are preemptive. We therefore must endeavor to ascertain the intention of Congress, looking to the legislative history as we customarily do, and also considering whether a damages remedy would involve any 'special factors counseling hesitation'.

As indicated above, John, I find that both of these considerations strongly support denial of a Bivens action in this case.

I cannot recall a single example of Congress having declared that remedies it prescribed were exclusive. Nor can I recall a legislative history, comparable to that before us in this case, that demonstrates so clearly that over several decades Congress has considered with care the rights and remedies of the government's own employees. It is imply unreasonable to suggest either that Congress simply overlooked the possibility of a damages remedy (Bivens has been on the books for more than a decade) or that it intended - as the Court found in Carlson - that the legislative remedies were merely "parallel or complementary" to those elaborately provided. Indeed, as I recall Harry saying at
Conference, in some respects the statutory remedies are considerably more protective than any damages remedy. After all, they have demonstrated their effectiveness in assuring continuity of federal employment that ends with retirement benefits that are the envy of many in the private sector.

Given the foregoing views, I would have difficulty in joining the final paragraph in your opinion unless you are willing affirmatively to decide the merits of this case. Nor do I think it is at all necessary for us to volunteer any observation as to whether a Bivens remedy would or would not be "good policy". Surely, few subjects have been considered with greater care over a longer period of years than the civil service.

I would like very much to join your opinion. I recognize the problems inherent in some of our past decisions that you endeavored in a scholarly to obviate. If you could make it clear that these problems, though requiring discussion, are really not at all serious in light of the long history of congressional concern for the civil service and also in view of the "range of policy considerations" that surely Congress already has considered.
May 23, 1983

No. 81-469 Bush v. Lucas

Dear John,

I agree with the changes proposed in response to Bill Rehnquist's suggestions.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference