

SCALIA, J., concurring

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 SCALIA, with whom JUSTICE THOMAS joins,
concurring.

I join the opinion of the Court because I agree that a narrow interpretation of the rationale of *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), would not logically produce its application to the circumstances of this case. The dissent is doubtless correct that a broad interpretation of its rationale *would* logically produce such application, but I am not inclined (and the Court has not been inclined) to construe *Bivens* broadly.

In joining the Court’s opinion, however, I do not mean to imply that, *if* the narrowest rationale of *Bivens* *did* apply to a new context, I *would* extend its holding. I would not. *Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be “implied” by the mere existence of a statutory or constitutional prohibition. As the Court points out, *ante*, at 5, and n. 3, we have abandoned that power to invent “implications” in the statutory field, see *Alexander v. Sandoval*, 532 U. S. 275, 287 (2001). There is even greater reason to abandon it in the constitutional field, since an “implication” imagined in the Constitution can presumably not even be repudiated by Congress. I would limit *Bivens* and its two follow-on cases (*Davis v. Passman*, 442 U. S. 228 (1979), and *Carlson v. Green*, 446

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U. S. 14 (1980)) to the precise circumstances that they involved.