

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X
CORRECTIONAL SERVICES :
CORPORATION, :
Petitioner :
v. : No. 00-860
JOHN E. MALESKO. :
- - - - -X

Washington, D.C.
Monday, October 1, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:05 a.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of
the Petitioner.

JEFFREY A. LAMKEN, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the United States, as amicus curiae,
supporting the Petitioner.

STEVEN PASTERNAK, ESQ., Livingston, New Jersey; on behalf
of the Respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF CARTER G. PHILLIPS, ESQ. On behalf of the Petitioner	3
JEFFREY A. LAMKEN, ESQ. On behalf of the United States, as amicus curiae, supporting the Petitioner	19
STEVEN PASTERNAK, ESQ. On behalf of the Respondent	27
REBUTTAL ARGUMENT OF CARTER G. PHILLIPS, ESQ. On behalf of the Petitioner	53

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 00-860, Correctional Services Corporation v. John Malesko.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONER

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court:

The issue in this case is whether an action for damages under Bivens should be applied to a private corporation acting under color of Federal law.

Like many cases, where you come out on a case like this, I think in many ways depends on where you begin, and the parties have put forward to this Court fundamentally conflicting paradigms with respect to the best way to analyze Bivens based on this Court's prior decisions.

The respondent and the court below essentially concluded that Bivens is a ubiquitous remedy that ought, generally, to be available in order to maximize recoveries and to maximize, or at least optimize, deterrent values, and that it is our burden essentially to try to ascertain whether there might be some conflicting or some exception

1 to the Bivens doctrine that would get us out from under
2 liability in the -- in this particular case. The --

3 QUESTION: Mr. Phillips, do you -- this -- this
4 involves only an action against the corporation not
5 against its employees.

6 MR. PHILLIPS: That's correct, Justice O'Connor.

7 QUESTION: Would -- if the action were brought
8 as a Bivens action against the employees, do you concede
9 that there would be a Bivens action against them?

10 MR. PHILLIPS: We have always assumed, from the
11 first day of this litigation, that a Bivens action would
12 lie against the individual employees.

13 QUESTION: Well, there's a difference between
14 assuming it arguendo and conceding it.

15 MR. PHILLIPS: Well, for purposes of this
16 litigation and for purposes of my client, there's no
17 question we would concede that an action would have
18 legitimately been -- been raised against them. To say in
19 a future case whether or not a private employee might
20 raise an argument as to whether Bivens should be extended
21 is a separate question.

22 QUESTION: Now, if that's -- if that's true and
23 that concession holds, if the employee is sued for a
24 wrongful act, under State law would it be permissible in
25 your view, just under standard principles of derivative

1 liability, to hold the corporation for that tort, for the
2 tort of its own employee?

3 MR. PHILLIPS: You mean under a theory of
4 respondeat superior.

5 QUESTION: Yes.

6 MR. PHILLIPS: As a matter of State law, it's
7 going to depend on the State. Most States I think do
8 recognize respondeat superior liability.

9 QUESTION: So, State courts -- State courts
10 could do that without interference with any Federal policy
11 or -- or without any superseding Federal law to the
12 contrary.

13 MR. PHILLIPS: Well, obviously, there's going to
14 be at least the potential argument raised with respect to
15 Boyle and whether or not the -- the decision to hold the
16 individual liable under those circumstances is preempted
17 under Boyle. But I think the argument here is slightly
18 weaker than it was in Boyle, and it probably depends to a
19 certain extent on -- on the -- on whether or not the
20 Federal Government in fact is dictating what both the --
21 what the employer and the employee are doing with respect
22 to --

23 QUESTION: Well, if that's true, the employer, I
24 assume, would routinely be named in the suit. So, you're
25 not doing a whole lot by saying that the employer is

1 independently liable for its own -- for its own
2 participation in the -- or alleged participation in the
3 tort.

4 MR. PHILLIPS: Well, I think you're doing an
5 extraordinary amount, Justice Kennedy. And the
6 Government's brief, I think quite rightly, points out at
7 page 20 in footnote 10, that the availability of a
8 corporate defendant significantly changes the mix with
9 respect to any kind of litigation. And actually, if you
10 look at the three cases that postdate this Court's
11 decision in FDIC v. Meyer, all of those are cases in which
12 the only defendant who was named happened to be the
13 corporation. The individuals were not named under any of
14 those circumstances.

15 QUESTION: But Mr. -- Mr. Phillips, if the -- if
16 the proper way of looking at this is the principal agency
17 relationship, when you're dealing with the Federal
18 Government, the Federal Government is the principal, the
19 agent is the officer. Here, when the Government
20 contracts, the principal agency relationship exists with
21 the corporation. So, I don't see why it doesn't follow
22 that the agent -- the agent in this case is the
23 corporation -- why the agency liability doesn't carry
24 over.

25 MR. PHILLIPS: The -- the premise of your

1 question, Justice Ginsburg, I think is where the -- where
2 the mistake lies in the final outcome of the decision.
3 This Court made quite clear in FDIC v. Meyer that it's not
4 a principal agency relationship because there's no
5 question that the Federal Deposit Insurance Corporation
6 was the agent of the United States Government for purposes
7 of what it did in that particular context. The Court said
8 that's not the right analysis.

9 The right analysis is to go back and look at the
10 Bivens action and make a judgment with respect to whether
11 or not the litigation, as it comes to this Court,
12 adequately serves the two primary purposes of Bivens; that
13 is, that there is relief available and that there is an
14 effective deterrent in place.

15 If those -- if those are satisfied, then the
16 issue of whether you should extend Bivens to a new
17 category of defendants, this Court said, should be
18 answered in the negative, saying that there is no reason
19 to add additional defendants under those circumstances.

20 QUESTION: Mr. Phillips, I wish somebody here
21 were arguing on behalf of the employee. It's -- it's
22 certainly in your interest to say, well, of course,
23 there's liability on the part of the employee. And it's
24 -- it's in the interest of -- of your opponent to -- to
25 say the same. I'm not -- I can see us deciding this case

1 on, you know, well, after all, there's a suit against the
2 employee. Shouldn't we face that in a -- in a case in
3 which somebody is -- is arguing that the employee is not
4 liable?

5 MR. PHILLIPS: No, Justice --

6 QUESTION: And there are arguments to that
7 effect. I mean, after all, the -- the employee you say is
8 an agent of the United States, but if -- if he's acting
9 under color of Federal law as an agent of the United
10 States, he's only an agent of the United States because
11 he's -- he's an agent of -- of your client. So, he's sort
12 of an agent of an agent. It would seem very strange to me
13 to hold -- to hold the employee and not to hold your
14 corporation.

15 MR. PHILLIPS: Well, the question ultimately
16 comes down to this, Your Honor, is that does it make any
17 more sense in this context to resolve this issue at this
18 point in time than it did to decide the FDIC v. Meyer case
19 at that point in time. Because, again, we didn't have the
20 employee involved in the litigation as it came to this
21 Court. He had fallen out in that litigation, just as the
22 employee had fallen out in this litigation. And what the
23 Court said was, we should analyze and, indeed, have to
24 resolve the conflict as to whether a private corporate
25 defendant ought to be liable under these circumstances.

1 So, that issue needs to be resolved.

2 And, what's more, if the Court puts off for
3 another day deciding the liability of the employee, it
4 doesn't affect whether my client ought to be held not
5 responsible in a Bivens action because either one of two
6 things will happen. Either you will conclude that private
7 employees are, in fact, susceptible to an action under
8 Bivens, in which case the adequacy of the remedy and the
9 adequacy of the deterrent by having that direct lawsuit
10 means that there's no reason to extend Bivens to my
11 client. Or you'll conclude that the distinction is
12 between public and private actors and that we have special
13 reasons giving us hesitation and caution into extending
14 the Bivens action, since it's an implied cause of action
15 and not a congressionally adopted one, into the sphere
16 where the private actors are acting under color of Federal
17 right.

18 QUESTION: Strictly speaking, Mr. Phillips, for
19 you to say that you're making a concession that the
20 employee -- I mean, that's like a lawyer representing A
21 saying he concedes B would be liable.

22 MR. PHILLIPS: I was only --

23 QUESTION: I mean, it's not much of a
24 concession.

25 MR. PHILLIPS: I was simply answering Justice

1 Kennedy and Justice O'Connor's question. They phrased it
2 in the form of a concession, to be sure.

3 QUESTION: I know they did.

4 MR. PHILLIPS: I'm not giving up much in that
5 regard.

6 But as I say, the important element here, at
7 least in my judgment, about how all this plays out is that
8 if the Court decides that employees are amenable to suit,
9 there's no reason to sue the corporation. If they decide
10 they are not amenable to suit, it's going to be because of
11 the public/private distinction. And again, under that
12 theory, we're not amenable to suit.

13 QUESTION: Mr. Phillips --

14 QUESTION: Well, it could be on -- on the basis
15 that they're an agent of an agent, that we're not going to
16 track it that far down. I mean, you -- it's your
17 corporation that has been hired directly by the
18 Government, not the individual employees of your
19 corporation. I mean, that's certainly another basis on
20 which one could draw --

21 MR. PHILLIPS: That would be an argument, but in
22 order to do that, Justice Scalia, you would then have to
23 abandon what was one of the principal legs of Bivens in
24 the first instance, which is that the litigation against
25 the private individual and the deterrent value of

1 litigation against the private individual is the most
2 significant way to achieve the overall objectives --

3 QUESTION: Well, I don't know that we would have
4 to abandon that because the -- the concern, as I
5 understand it, that the action against the individual has
6 a more significant deterrent effect than the action
7 against the agency, was a concern that was expressed in
8 the context of dealing with a public agency.

9 Here we're dealing, in the case of your client,
10 with a private corporation. And I would suppose that the
11 deterrent effect of holding the private corporation liable
12 for the acts of its employee would be very significant. I
13 assume that a private corporation like yours is going to
14 be very careful about employees who, in effect, saddle it
15 with significant liability. So, on the deterrence theory,
16 it seems to me you -- you would lose the argument.

17 MR. PHILLIPS: I think the flaw in your analysis
18 of the deterrence theory, Justice Souter, is that you're
19 looking to figure out what is sort of the optimal answer
20 for deterrence. And the way I read this Court's decision
21 in FDIC v. Meyer is that what we satisfy ourselves about
22 is, is there an effective deterrent and an effective
23 damages remedy in place and available to the individual
24 plaintiff in a particular instance. And that -- it seems
25 to me that's the gap-filler role that Bivens calls on the

1 Court to -- to provide.

2 When you go beyond -- I'm sorry.

3 QUESTION: I'm sorry. You finish.

4 MR. PHILLIPS: But when you go beyond that, it
5 seems to me you then assume much more of a legislative
6 role. Then you're trying to balance the relative optimal
7 deterrence values. Then you have to take into account the
8 effect on the Federal fisc or the relationship between the
9 -- the Federal contractor and the Federal Government. And
10 that's a series of questions, I submit to Your Honors, you
11 ought to leave to Congress.

12 And that's exactly what the Court said in Meyer.
13 It analyzed and said, questions of optimal deterrence,
14 questions of effect on the Federal treasury, those are
15 issues that we think are better dealt with by Congress as
16 long as we have an adequate --

17 QUESTION: Yes, but if you carry -- if the carry
18 the logic of that argument far enough, then there would be
19 no liability at all because we know that if we hold, for
20 example, the individual liable, there is going to be a
21 tendency there to shift that liability either by insurance
22 or by respondeat superior and insurance, ultimately to the
23 cost of contracting. And we know, even in the
24 governmental situation, if you hold the individual liable,
25 chances are there is going to be some kind of liability

1 mitigating mechanism, whether it be insurance or whatnot,
2 that ultimately is going to find its way into the wage
3 structure. So, if -- if we start getting too fussy about
4 that, we better call the whole thing off and -- and
5 overrule Bivens.

6 MR. PHILLIPS: Well -- obviously, we don't ask
7 the Court to overrule Bivens. At least, we make that
8 argument in the brief.

9 But the -- I think the answer to that is there
10 are two components of Bivens. One is, is there in place
11 the gap-filler adequate remedy? Is there a damages remedy
12 and a deterrent effect from that damages remedy? Is that
13 in place? Then sometimes, even though that's in place,
14 there will be a serious question as to whether or not,
15 nevertheless, special circumstances suggest that there
16 ought to be caution. And it's frankly the -- the
17 respondents burden to satisfy both elements of that.

18 What I'm suggesting to you in this context is
19 you don't have to look at what the impact would be on the
20 Federal Government at the end of the day. What you have
21 to look at is whether there is an adequate remedy in
22 place, and if you didn't have that, I think there would be
23 a serious --

24 QUESTION: How is this adequate remedy? The --
25 as far as deterrence is concerned, I thought Richardson

1 explains why the deterrence considerations with the
2 private company work perfectly, but they don't work at all
3 where the principal is the Federal agency. And that's
4 what I think Justice Souter was pointing out.

5 MR. PHILLIPS: Right.

6 QUESTION: As far as alternative remedy is
7 concerned, which alternative remedy? If you mean would
8 there be a remedy under State law, that of course exists
9 in Bivens too. If you mean that you could sue the private
10 person under Bivens but not the company, if that's what
11 you mean, the individual but not the company --

12 MR. PHILLIPS: Correct.

13 QUESTION: -- well, the next case the
14 individual, if we say you can sue the company, would say
15 the same thing. So, I mean, you see it's six of one, half
16 a dozen of the other. The private person would say you
17 have an adequate -- do you see my point?

18 MR. PHILLIPS: Well, you made two -- you made
19 two points, Justice Breyer.

20 QUESTION: The private person -- you -- you
21 could have -- if -- if you're going to allow corporations,
22 they say, oh, no, you have a private remedy against the
23 individual, which I'm sure you conceded for that reason.
24 The individual would say, oh, no, you have a perfectly
25 adequate remedy against the corporation.

1 QUESTION: I concede that you have a perfectly
2 valid remedy, yes.

3 (Laughter.)

4 QUESTION: What?

5 QUESTION: He would say, I concede that you have
6 a perfectly --

7 (Laughter.)

8 QUESTION: Exactly. That's right.

9 MR. PHILLIPS: Indeed, I may be making the
10 argument --

11 QUESTION: So, why then, given that conundrum,
12 deterrence: Richardson. Adequate remedy: the problem we
13 stated. Conclusion: make it a parallel to 1983.

14 MR. PHILLIPS: Well, now you've made three
15 points, Justice Breyer. And let me try to take them up in
16 -- in turn.

17 First of all, with -- with respect to
18 Richardson, I mean, that's an immunity case, and the Court
19 is in a world where it has to resolve optimization in the
20 immunity context. That's a judge-made set of rules, and
21 this Court is obliged to resolve it in the best way that
22 it can under those circumstances. It's a fundamentally
23 different question about whether you hold the defendant
24 liable in the first instance in a private -- privately
25 implied cause of action derived directly under the

1 Constitution.

2 We could differ and disagree about what's the
3 right method of -- of achieving optimization, but I don't
4 think you can read Richardson as saying categorically that
5 you will -- you will lose all your deterrent effect. To
6 say that is I think to both abandon what you said in
7 Bivens and clearly abandon what you said in Meyer.

8 With respect to the ability of the private
9 person to come in and argue the next time around, his
10 argument I think, frankly, is going to be a tough one
11 because what he's got to say is even though you have now
12 held the corporation not to be liable -- I'm assuming for
13 purposes of the moment that I win here -- that -- that we,
14 nevertheless, also ought not to be liable. And, again, as
15 I said earlier, I think the distinction there is between
16 the -- having a remedy in place that is in any meaningful
17 way effect or not, and therefore it is a tougher argument
18 for the private employee under those circumstances to make
19 that particular argument.

20 And then your last point with respect to section
21 1983 simply disregards what I perceive to be the
22 fundamental difference between having a congressional
23 enactment that comprehensively regulates a particular area
24 provide liability against any person and sets up a set of
25 rules in -- in order to effectuate that particular remedy

1 and the situation we face in Bivens where, heretofore, we
2 have never imposed -- this Court has never --

3 QUESTION: And -- and --

4 MR. PHILLIPS: I'm sorry.

5 QUESTION: -- in 1983, too, in Monell we
6 rejected the idea there could be any sort of respondeat
7 superior liability. You had to show that the -- there was
8 a policy maker involved and that sort of thing.

9 MR. PHILLIPS: That's absolutely correct, Mr.
10 Chief Justice.

11 QUESTION: Is that not present here, Mr.
12 Phillips? Because the policy of saying people who live
13 above -- below the fifth floor, that's a policy set by the
14 employer. So, this is a case where it's not an assault by
15 a guard. This is a case of policies set by the
16 corporation itself.

17 MR. PHILLIPS: Well, there are two answers to
18 that, Justice Ginsburg.

19 First of all, no policy gets set by a
20 corporation as such. All -- all policies, just like all
21 actions of corporations, have to be undertaken by
22 individuals. Somebody had to have adopted that policy.

23 But second of all, I don't read the respondent's
24 complaint here to have alleged any policy of the
25 corporation was at fault here. The -- the complaint

17

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202) 289-2260
(800) FOR DEPO

1 itself specifically says there was an exception made for
2 the respondent so that he could take the elevator. A
3 specific employee who was named as a defendant --

4 QUESTION: Not in -- not in the written policy.
5 It wasn't written down and that's why this guard didn't
6 get it. But anyway, at this stage, we have to construe
7 the complaint most favorably to the plaintiff. Is that
8 not so?

9 MR. PHILLIPS: Well, I -- you can construe it
10 most favorably to the plaintiff, but not necessarily to
11 embrace a complete different theory of the case that is
12 far from clear.

13 And this is -- and remember, this was written by
14 counsel. This is not a pro se complaint we're talking
15 about. This was counsel's complaint. I think if they had
16 meant for this to be a policy or practice case, they would
17 have said so.

18 But I think the more fundamental point here is
19 -- is that -- is that there has to be a policy maker. If
20 that policy was unconstitutional, then it's still
21 available to the plaintiff in a Bivens action to sue that
22 policy maker directly for having adopted the
23 unconstitutional policy and to sue the employee for having
24 implemented the policy in an unconstitutional fashion.
25 So, there are adequate remedies, which means that the

1 remedy against us is inappropriate.

2 If there are no further questions, I'd reserve
3 the balance of my time.

4 QUESTION: Very well, Mr. Phillips.

5 Mr. Lamken, we'll hear from you.

6 ORAL ARGUMENT OF JEFFREY A. LAMKEN
7 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
8 SUPPORTING THE PETITIONER

9 MR. LAMKEN: Mr. Chief Justice, and may it
10 please the Court:

11 When an inmate in a federally operated facility
12 is subjected to a constitutional deprivation, that inmate
13 has a remedy against the individual Federal officers who
14 committed the constitutional deprivation. There is no
15 indication that that Federal remedy is inadequate for --

16 QUESTION: Are you making that as arguendo, or
17 are you conceding that? Now, your brief seems to make a
18 concession to that effect.

19 MR. LAMKEN: In the first instance, we think it
20 should be assumed arguendo because if there's a reason not
21 to subject the individuals, the private individuals, to
22 liability under Bivens, it would be that private
23 individuals have so few immunities and so few defenses,
24 compared to their governmental counterparts, that there's
25 no reason to infer a Federal cause of action. If it's

1 true with respect to them, then it's a fortiori true with
2 respect to the corporation as well.

3 QUESTION: Why couldn't you say the same about
4 joint tortfeasors?

5 MR. LAMKEN: Pardon? Oh.

6 QUESTION: Why couldn't you make the same kind
7 of argument about joint tortfeasors? You'd say there's no
8 reason to hold two. We have one.

9 MR. LAMKEN: Well, in fact, with respect to
10 joint tortfeasors, you have two separate actions. They're
11 both liable for their --

12 QUESTION: Why wouldn't the second -- you'd say
13 we'd only give you one, whoever you sue first, because
14 it's adequate.

15 MR. LAMKEN: Well, you need to deter both of the
16 joint -- the actions by the joint tortfeasors.

17 QUESTION: And here we have to deter the
18 policies of the corporation.

19 MR. LAMKEN: Yes, but the corporation is an
20 unusual tortfeasor in this sense, in that it cannot act
21 except through other individuals, through its employees.
22 So long as you deter --

23 QUESTION: But that's true across the whole law
24 of torts. I mean, I've been lumbering along for half a
25 century under respondeat superior. I thought this -- this

1 was a deterrent to the employer if the employer is liable
2 for the employee's wrong. Why is it suddenly different?

3 MR. LAMKEN: Well, if this were a common law
4 court or a legislature, I could certainly see adopting the
5 common law rule. But the Court -- this is not a common
6 law court, and what -- Congress has the principal role of
7 establishing causes of actions, Federal cause of action,
8 for damages. So, the role of the Court is not to
9 establish --

10 QUESTION: It just rings -- it just doesn't ring
11 true to me that there's no deterrence by holding the
12 corporation liable. I -- I thought the whole law of torts
13 was based on a contrary assumption.

14 MR. LAMKEN: Well, in fact, Your Honor, if you
15 look at, for example, the fifth edition of Prosser &
16 Keeton on Torts, William Prosser tells us that that
17 argument is makeweight, and that the real reason for
18 holding the corporation liable under respondeat superior
19 is to ensure that the costs of accidents are incorporated
20 into the price of products and, therefore, spread to
21 society at large.

22 In a context like this one, where you have one
23 purchaser, the Government, and the cause of action is
24 unique to where the Government is the purchaser of the
25 service, that type of rationale can't hold water. This

1 Court is generally very cautious about imposing liability
2 for the purpose of distributing money --

3 QUESTION: Except that one purchaser gets its
4 money from everybody. I -- I think nobody can spread --
5 can spread the cost as well as the Government.

6 (Laughter.)

7 MR. LAMKEN: Yes, Your Honor. But it is
8 typically -- this Court is typically most cautious about
9 establishing rules that would have the effect of taking
10 money from the treasury, which is under Congress' control
11 and to be spent for the public good and spending it
12 according to --

13 QUESTION: That's -- that's a different argument
14 which -- which you make, that we shouldn't --

15 QUESTION: May I ask you --

16 MR. LAMKEN: That -- that --

17 QUESTION: It would be, in effect, the same as
18 holding the Government liable.

19 MR. LAMKEN: Well, in this case, where you have
20 a uniquely governmental purchaser and a uniquely
21 governmental cause of action, it does tend to have that
22 effect, Your Honor.

23 QUESTION: May I ask you a hypothetical that Mr.
24 Phillips' last argument suggested to me? Supposing you
25 have a case in which an executive sets the policy that

1 everybody has to climb the -- the six flights of stairs
2 every day. Then the executive quits. Five years later,
3 an employee is compelled to climb the steps because that
4 policy is in place. Whom can he sue?

5 MR. LAMKEN: Well, Your Honor, when -- when
6 prisoners in public institutions, federally operated
7 institutions, encounter precisely that situation --

8 QUESTION: No. I'm assuming, of course, there's
9 a corporation involved here.

10 MR. LAMKEN: But it shows that this -- that type
11 of situation is hardly unique to a private corporation.
12 It -- it occurs all the time in Federal institutions. And
13 he would be able to sue first any employee who enforced
14 the -- the policy.

15 QUESTION: All the employee is doing is carrying
16 out his instructions.

17 MR. LAMKEN: Right, but there is under Bivens no
18 Nuremberg defense. Each -- one of the teachings of Bivens
19 is that the responsibility for respecting constitutional
20 rights is personal and individual, and therefore,
21 liability for violating constitutional rights is also
22 personal and individual. It ill-serves that notion of
23 personal responsibility to shift the liability from the --
24 from individual -- individuals who violate constitutional
25 rights to some other source of money such as the

1 shareholders or the Government.

2 QUESTION: Supposing the policy also said any
3 employee who fails to carry out this policy gets fired
4 forthwith.

5 MR. LAMKEN: That would be the same thing if a
6 -- if an individual Bureau of Prisons employee --

7 QUESTION: -- the individual liable for --

8 MR. LAMKEN: Individually liable. Plus you also
9 get to sue the policy maker and anybody who exhibited
10 deliberate indifference in carrying on that policy. It's
11 precisely the same rule that exists in the Federal context
12 when you have a -- a Bureau of Prisons-run facility.

13 QUESTION: Why does it make a large difference
14 whether you sue the CEO or the corporation itself?
15 Practically in terms of your interest as the Government
16 money, if the corporation is going to pick up the tab, why
17 does the Government care?

18 MR. LAMKEN: Well, Justice Ginsburg, I think the
19 rub is in the question, if the corporation is going to
20 pick up the tab. The corporation will not necessarily
21 pick up the tab. The Government, for example, does not
22 routinely indemnify its employees before a judgment or
23 even necessarily after judgment. On occasion, we both
24 decline to indemnify them. Sometimes we decline to
25 represent them. Sometimes we criminally prosecute them

1 ourselves. The point of the matter is to avoid moral
2 hazard, to ensure that there is that deterrent effect,
3 both corporations and the Government alike are wise not to
4 indemnify their employees in advance and refer only to
5 indemnify in those circumstances where it's both in the
6 corporate interest and in the interest of ensuring that
7 the corporation or the individuals --

8 QUESTION: You also may get larger judgments
9 against the corporation than -- than against Jack
10 Armstrong personally. No?

11 MR. LAMKEN: That is one of the difficulties and
12 that is one of the reasons why there is concern that
13 individuals, if given the opportunity, will choose to sue
14 only the corporation and not the individuals. And as Mr.
15 Phillips pointed out, in the three post-Meyer cases where
16 this issue has come up, in each of them, the individual
17 chose to sue only the corporation and not the individual.
18 And, therefore, the direct deterrent effect on the
19 individual, the direct deterrent effect that exists and
20 operates within the Federal Government, would be absent in
21 the other context if the Court were to recognize a Bivens
22 against corporations as well as the individuals who
23 violate --

24 QUESTION: If -- if the Government --

25 QUESTION: If we reject your position and impose

1 Bivens liability on the corporation, I assume Congress
2 can't do anything about that absent some supplemental
3 scheme that's equally effective?

4 MR. LAMKEN: Your Honor, it's not clear the
5 degree to which Congress can replace Bivens liability. I
6 would believe that Congress would have the ability to
7 either -- if this Court were to decide not to have
8 corporate liability, Congress could act to establish that
9 liability, or if the Court were to say that there is --

10 QUESTION: The other way around.

11 MR. LAMKEN: The other way around is a more
12 difficult question. I don't believe this Court's cases
13 are clear. However, if Congress does establish an
14 alternative remedy, I believe the Court would be very
15 likely to respect it unless it is clearly inadequate for
16 the purposes.

17 QUESTION: I don't understand that. If Congress
18 established an alternative remedy, we might say that the
19 Constitution no longer requires the Bivens -- the Bivens
20 remedy.

21 MR. LAMKEN: No, Your Honor. As I read
22 Bivens --

23 QUESTION: But if Congress just -- just decides
24 that we're wrong in saying that there's a Bivens remedy
25 here, what could -- what could Congress possibly do about

1 it? I mean, if -- if there is a Bivens remedy here, it's
2 one that's demanded by the Constitution. Right?

3 MR. LAMKEN: Well, Your Honor, it depends on how
4 you read Bivens. Bivens itself doesn't purport to be
5 compelled by the Constitution, that the Constitution
6 requires it. It very much relied on cases like J.I. v.
7 Borak where the Court felt that it was in a position to
8 sort of assist in the vindication of constitutional
9 rights, even if it were not mandated or compelled by the
10 Constitution.

11 Where the Court -- where the Court uses its
12 discretion to do that, however, the Court must be
13 particularly cautious about it so that it does not usurp
14 the role of Congress as the principal creator of -- of
15 causes of action for damages under the Constitution.

16 If there are no further questions.

17 QUESTION: Thank you, Mr. Lamken.

18 Mr. Pasternak, we'll hear from you.

19 ORAL ARGUMENT OF STEVEN PASTERNAK

20 ON BEHALF OF THE RESPONDENT

21 MR. PASTERNAK: Mr. Chief Justice, and may it
22 please the Court:

23 The question before the Court today is whether
24 the Bivens cause of action is applicable to a for-profit
25 corporation carrying out a core function of the Federal

1 Government. There's no dispute that in operating the Le
2 Marquis Prison, CSC was performing a core governmental
3 function.

4 There's an important distinction, both as a
5 matter of history, constitutional law, and common sense,
6 between Government and private corporations, between the
7 Government way of doing things or the Government model and
8 the private market model. The Solicitor General so
9 recognized 4 years ago in the oral argument in Richardson
10 v. McKnight. And the distinction exists due to the
11 differences in accountability, its mission, and the degree
12 of control that exists over the employees.

13 As far as accountability, the Bureau of Prisons,
14 as a Federal Government agent, is accountable to Congress
15 and to the public, as opposed to a private for-profit
16 corporation, like CSC, which is responsible to its
17 shareholders. It has no one appointed onto its board from
18 either Congress or the President.

19 QUESTION: Well, Mr. Pasternak, if Bivens
20 remedies are available against the employees of the
21 corporation, why isn't that enough?

22 MR. PASTERNAK: Because of the mentality that
23 exists as far as the corporation, Your Honor. It's the
24 corporation that has a direct relationship with the
25 Federal Government. It's the one that has the contract.

1 QUESTION: Yes, but the corporation can only act
2 through its employees, and if those employees are subject
3 to Bivens liability, if they are, why isn't that enough to
4 deter any unconstitutional conduct?

5 MR. PASTERNAK: It wouldn't be sufficient
6 because the employees are at-will employees. Their job is
7 on the line. Their promotions are on the line. They're
8 following the directions as far as the corporation in
9 order to get ahead. While the --

10 QUESTION: How can you generalize that the
11 employees are at-will employees? I mean, that would vary
12 perhaps from case to case.

13 MR. PASTERNAK: In the State of New York,
14 they're at-will employees.

15 QUESTION: But we're deciding a case not just on
16 the basis of the State of New York, but maybe in some
17 other States, they have a 3-year contract.

18 MR. PASTERNAK: It may vary from State to State.
19 It may vary from individual to individual, but the focus
20 still has to be that it's the corporation that has the
21 control, and to determine whether or not there's a breach
22 as far as the employee's contract or whatever, it's the
23 one that's setting the policies that the individuals have
24 been following.

25 QUESTION: Mr. Pasternak, do you think running a

1 municipally owned utility is a core governmental function?

2 MR. PASTERNAK: It's possible that it may be.

3 QUESTION: May be.

4 What about running a national park or a public
5 park? Is that a core governmental function?

6 MR. PASTERNAK: Getting further removed. I
7 think it might be, but again, it's not a prison situation.

8 QUESTION: We're going to develop a whole new
9 area of constitutional or quasi-constitutional law
10 deciding case by case what is a core governmental function
11 and what isn't a core government -- you assert that only
12 -- only those corporations that are performing core
13 governmental functions would -- would be subject to Bivens
14 liability, not all corporations who are under contract
15 with the Government.

16 MR. PASTERNAK: If I may respond. As far as the
17 1983 analysis or under the Federal Tort Claims Act, the
18 same type of analysis has to be done to determine whether
19 or not you have a Government actor and then whether or not
20 there was a violation that takes place.

21 In our fact pattern here, there's no real
22 question that in operating the prison, it is a core
23 governmental function. They are authorized to act because
24 the -- the Government has contracted with the corporation
25 and has embodied it with the power, in order to act and to

1 run that facility.

2 QUESTION: Have -- is there a whole line of
3 cases under section 1983 dealing with this subject of what
4 is a core governmental function?

5 MR. PASTERNAK: There's not a whole line of
6 cases, but there is -- there are cases, Your Honor, that
7 have to be addressed as far as either a Federal Tort
8 Claims Act case or a section 1983 as to the issue of
9 whether or not Amtrak, for instance -- whether it would be
10 acting as a Government agent or not.

11 QUESTION: Does it have to do with whether it's
12 performing a core governmental function or not? It has to
13 do with whether it's a Federal agency or not. That's
14 quite a different question from whether it's performing a
15 core governmental function. I'm talking about a
16 concededly private corporation, and -- and you want us to
17 decide case by case when -- when you hire a private
18 corporation to manage concessions at a -- at a national
19 park, whether that is a core governmental function or not.

20 MR. PASTERNAK: I think anytime you're dealing
21 with a corporation as opposed to a Government agency,
22 there are different things that come into play as far as
23 what their motives are.

24 QUESTION: I thought you just wanted us to
25 decide a case involving prisons, which can be run by a

1 State, by the Federal Government, or can be contracted out
2 by either.

3 MR. PASTERNAK: That is what our fact pattern
4 is.

5 QUESTION: And this is a substitute for a
6 Federal prison just as sometimes Federal prisoners are
7 housed in State prisons.

8 MR. PASTERNAK: That's correct.

9 QUESTION: And would there be liability in that
10 situation? Suppose this halfway house had been run by the
11 State of New York.

12 MR. PASTERNAK: Then there would be liability
13 for the violation of the Federal Constitution, and there
14 would be no difference. In fact, this particular facility
15 housed both State and Federal prisoners --

16 QUESTION: And as to the -- so, if -- if Mr.
17 Malesko had been a State prisoner?

18 MR. PASTERNAK: Then he would have his claim.
19 We would literally have to be checking the dog tags of the
20 individual housed at this particular facility under the
21 same fact pattern to determine, under the CSC's argument,
22 whether or not there would be liability. And we submit
23 that that's the wrong analysis to make, that a Federal
24 prisoner should certainly have equal, the same rights as a
25 State prisoner.

1 QUESTION: May I clarify a point that I raised
2 to Mr. Phillips? Is your complaint one of a pattern or
3 practice attributable to the corporation as distinguished
4 from the action of the individual guard? He said that you
5 did not plead any kind of policy on behalf of the
6 corporation.

7 MR. PASTERNAK: There are different elements as
8 far as what was pleading in the complaint. There was
9 initially a pro se complaint that was filed. The only
10 substitution that really took place at the time of the
11 pleading was to name the individual guard. That was ruled
12 to be untimely by the court because Mr. Malesko should
13 have known -- arguably should have known or should have
14 been trying to find out who that individual was.

15 The problem that exists, obviously, is trying to
16 identify who the individuals are that set the corporate
17 policy.

18 As far as the specific policy, there was the
19 policy of putting Mr. Malesko up on the firth floor, as
20 opposed to a lower floor.

21 QUESTION: Was that pleaded as a policy?

22 MR. PASTERNAK: Not pleaded directly as a
23 policy, no.

24 QUESTION: You say not pleaded directly as a
25 policy. What do you mean by that?

1 MR. PASTERNAK: Well, again, we're going back to
2 the language of the pro se complaint.

3 QUESTION: Yes. And that's what I was asking
4 you about. What did the pro se complaint say about it?

5 MR. PASTERNAK: He did not allege it as a policy
6 per se. He alleged it that it was improper as far as the
7 housing. We have the situation where you have him
8 housed --

9 QUESTION: In fact, he did allege that he was
10 permitted to use the elevator usually, didn't he?

11 MR. PASTERNAK: He did.

12 QUESTION: Yes. So, he couldn't have been
13 complaining about the policy then.

14 MR. PASTERNAK: Well, there's still a complaint
15 that would exist -- I mean, there is a possible claim as
16 far as the ADA and just the general logic of housing
17 somebody with a known heart condition on the fifth floor
18 where he would be susceptible to being ill in the event of
19 a fire. I mean, it doesn't make any sense, as they
20 acknowledged in discovery, in order to have someone housed
21 on that higher floor if there's a danger that exists. It
22 just doesn't make any sense.

23 QUESTION: I thought his heart attack made it
24 hard to climb stairs, but going down stairs might be
25 different.

1 (Laughter.)

2 QUESTION: I would like to hear directly your --
3 your response. The Chief Justice had a point I hadn't
4 thought of, which is true, that in Monell, there isn't
5 direct respondeat superior liability in a case involving
6 an entity that does not have sovereign immunity, namely
7 the municipality.

8 All right. How -- how does that play out here?

9 MR. PASTERNAK: Here --

10 QUESTION: What is that -- should there be
11 respondeat superior? Is it necessary to parallel the
12 Monell? What's your opinion?

13 MR. PASTERNAK: I would argue that under either
14 situation, we would satisfy the requirement. Under the
15 respondeat superior, we would certainly satisfy it. Under
16 the Monell standard, it's the failure to adequately train
17 and supervise the guards.

18 QUESTION: All right. So, you can go either
19 way. But what in your opinion is the correct rule of law?

20 MR. PASTERNAK: If we're looking for parallelism
21 between the two, then it would make sense to have the
22 Monell standard, but it not necessarily has to follow
23 because under common law, we would have the respondeat
24 superior. I would argue for the respondeat superior and
25 to have it as a normal liability as you do in normal

1 cases.

2 QUESTION: Well, we rejected parallelism in
3 Richardson. Parallelism -- symmetry is very difficult to
4 achieve in this area as of this point, no matter what we
5 do.

6 MR. PASTERNAK: It was rejected and symmetry is
7 difficult to achieve. However, we are seeking symmetry in
8 the sense that a private corporation should be held
9 accountable the same way it is acting under a contract
10 with the Government and the same way a State prisoner
11 would have the same remedy against the corporation --

12 QUESTION: Well, you're arguing the so-called
13 parallelism with section 1983 actions. But it's been
14 pointed out that was a congressional enactment, and there
15 is no parallel enactment for Bivens type claims. That was
16 a Court-created doctrine and it's been rather limited.

17 MR. PASTERNAK: It has been limited. It is
18 Court-created, in order to address deterrence, but it has
19 been applied to the situation of a nongovernmental --
20 nongovernment or to a nongovernment agency.

21 In this situation, the question that arises is
22 where does a private for-profit corporation fall on the
23 spectrum. Is it more akin to a Government agency which
24 has to be responsible to Congress, to the President, and
25 to the public, or is it more akin to a regular Federal

1 employee? We would submit that it's closer to a Federal
2 employee, only it has certain negatives worse than a
3 Federal employee in the sense that it has a duty, a
4 fiduciary duty, to try and maximize profits, a factor that
5 would not normally enter into the situation of a Federal
6 employee who's just going along and doing his job and
7 fulfilling his requirements. But here you have a specific
8 fiduciary duty to maximize the profits.

9 They also -- the person who were in control.
10 There, the corporation is the one that controls its
11 employees and sends the directives as far as hiring,
12 firing, promotions, benefits. It is the one that has the
13 control and can send the signals on to each individual
14 employee. So, as far as where it falls in the scheme, we
15 would submit it is more akin to a Federal employee, only
16 there are greater dangers which would warrant the
17 imposition of the Bivens liability in order to have the
18 proper deterrence.

19 QUESTION: Why shouldn't we leave this to the
20 Federal Government, to the Congress, to determine, rather
21 than doing it ourselves?

22 MR. PASTERNAK: For the same --

23 QUESTION: I mean, we can say this is a totally
24 different situation from what Bivens, whether it was right
25 or wrong, decided. That decided a case where you have a

1 Federal officer acting. These are not technically Federal
2 officers. If there is going to be a cause of action,
3 Congress can create it. If Congress hasn't created it,
4 there's no cause of action, which is the usual situation
5 in the world, isn't it?

6 MR. PASTERNAK: Oftentimes. However, the issue
7 here is the Federal employee under Bivens is acting
8 because the Government has delegated that responsibility
9 to him to act. In a sense it's a contract. He's been
10 hired to act. So too, you have the corporation who has
11 been hired by the Federal Government pursuant to the
12 contract in order to act and to satisfy what the
13 requirements are.

14 QUESTION: It may be logical to extend it. It
15 may well be. And if it's logical, presumably Congress
16 will do it.

17 QUESTION: And also, there -- there is
18 undoubtedly a State law cause of action in negligence that
19 would lie against both the employee and the employer under
20 respondeat superior.

21 MR. PASTERNAK: There would be a common law
22 cause of action. However, that would not necessarily
23 address the separate constitutional violation that
24 occurred that needs its own deterrence.

25 QUESTION: Would there have been a State cause

1 of action against Federal agents acting under -- under
2 Federal law?

3 MR. PASTERNAK: You would have the issue as far
4 as normally you would have the immunity that would be
5 granted under the State law, and you would have the
6 problems in that direction. But we do not have --

7 QUESTION: Which means that there's a special
8 reason for the court to invent a cause of action that does
9 not appear anywhere in the Constitution or in a statute
10 for Federal agents who perhaps can't be sued under State
11 law. But when you're not talking about Federal agents --
12 you're talking about private employees -- normal tort law
13 undoubtedly applies. And why -- why can't we leave it
14 there? And -- and if Congress wants to extend an
15 additional cause of action, let -- let Congress do it.

16 MR. PASTERNAK: Since we are dealing with a
17 violation of the Federal Constitution, we would submit
18 that there should be one uniform body of decisions coming
19 out as far as what that Federal law should be and how it
20 should be interpreted, that we should not be subjected to
21 the vagaries of the differences in the various States as
22 to their rules as far as procedure, discovery, but there
23 should be one -- one body of law encompassing, from the
24 Federal side, a violation of a Federal constitutional
25 right. It's not sufficient to just leave it to the

1 States.

2 QUESTION: Well, is it clear that the employee
3 would be liable under State law in light of Boyle v.
4 United Technologies?

5 MR. PASTERNAK: In McKnight, the argument --
6 rejected the argument of Boyle, as far as a corporation
7 being -- not being liable and a danger as far as the
8 public fisc. In this type of a situation, we would submit
9 that it would be appropriate to find the corporation
10 liable and that the dangers to the public fisc are
11 minimal, certainly more minimal than you would have in the
12 normal Bivens case, we would submit.

13 QUESTION: Well, of course, McKnight rejected
14 parallelism, and -- and you -- you want it. McKnight is
15 not your best precedent.

16 MR. PASTERNAK: Not entirely, but we are seeking
17 to have the parallelism also as far as a -- rights of a
18 Federal prisoner and a State prisoner, to both be able to
19 go and sue the corporation that is --

20 QUESTION: But you have an anomaly either way
21 because why shouldn't the symmetry be between someone who
22 is a Federal prisoner in the Federal prison and someone
23 who's a Federal prisoner in a private prison? You
24 recognize that there would be no action against the Bureau
25 of Prisons if the Bureau of Prisons had been the jailer.

40

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202) 289-2260
(800) FOR DEPO

1 So, why should it be -- why shouldn't that be the
2 symmetry?

3 MR. PASTERNAK: Because the Correctional
4 Services Corporation is not the Government. It operates
5 under a different set of rules and regulations.

6 QUESTION: But you want it to be like the State
7 government, because if it were a State -- if a State were
8 running this prison, then there would be liability.

9 MR. PASTERNAK: Yes, but what I'm looking for is
10 it for not -- for it to be recognized by this Court that
11 the private corporation, just like the State, is not the
12 Federal Government. There is no Federal Government
13 immunity that applies. That's the reason we can sue the
14 States if there's a violation. So too, we should
15 certainly be able to sue a private corporation, a private
16 corporation which is operating under a different set of
17 rules and regulations than is the norm for the Federal
18 Government and for a Federal agency.

19 QUESTION: With respect to the adequacy of a
20 remedy in the State court, is it not so that the liability
21 would be greater as to a private employee because the
22 private employee would not have a defense of qualified
23 immunity that would be available to a Federal officer?

24 MR. PASTERNAK: There would be less defenses
25 raised as far as a private individual. That's correct.

1 QUESTION: And that would tend to make the State
2 law remedy more adequate?

3 MR. PASTERNAK: Possibly more adequate but still
4 inadequate in order to address a Federal constitutional
5 violation.

6 QUESTION: Well, you're saying that -- I think
7 you're saying the State law remedy simply doesn't address
8 the constitutional violation. The State law remedy may be
9 a State tort remedy, but it's not an Eighth Amendment
10 remedy. Is that you're --

11 MR. PASTERNAK: That is correct.

12 QUESTION: You know, there's one puzzling thing
13 about this case. You don't really cite the Eighth
14 Amendment in your complaint, as I read it, do you? That
15 is, it isn't an Eighth Amendment claim where you're
16 claiming deliberate indifference on behalf of the prison
17 officials? Is that the nature?

18 MR. PASTERNAK: It does -- it is an Eighth
19 Amendment, but it is not cited.

20 QUESTION: And then, therefore, your burden in
21 the Federal claim under the Eighth Amendment is heavier
22 than an ordinary negligence case, isn't it? So, by going
23 into Federal court, you -- you've assumed a higher burden
24 than if you brought a negligence case. Am I correct in
25 that?

1 MR. PASTERNAK: Well, both theories would be
2 applicable as far as being -- bringing the suit. There
3 would be a higher standard in the Federal court as far as
4 the deliberate in difference --

5 QUESTION: Right.

6 MR. PASTERNAK: -- a standard which we submit we
7 would -- my client, in filing the suit pro se, satisfied.
8 He would also be satisfying a lower standard as far as the
9 negligence as well.

10 QUESTION: Was this complaint ever amended since
11 your client gained representation, or are we still
12 operating under the pro se complaint?

13 MR. PASTERNAK: It was amended only for the
14 purposes of -- of attempting to name Mr. Urena as a
15 defendant, and then there was a proposed second amended
16 complaint which would be naming additional defendants,
17 which -- and I believe also different causes of actions,
18 but that was denied at that time.

19 QUESTION: At -- at -- it's puzzling why there
20 wasn't enough time to identify that individual, that Mr.
21 Urena. I could understand the pro se litigant having a
22 limited ability, but once lawyers came into it, why wasn't
23 -- why was it so hard to find out who was John Doe I?

24 MR. PASTERNAK: My appearance came after the
25 time period. Mr. Malesko had the case, and there was a

1 motion that was initially made to dismiss the case. It
2 was only after that case, that that motion was denied,
3 that my -- that I came into the case. So, he had the case
4 pro se for the entire time period where he would have had
5 to identify who the John Doe was and would have had to
6 know how to conduct the discovery in order to ascertain
7 who the John Does were and the difficulty that he would
8 have, as far as the corporation's responsiveness to
9 identifying who Mr. Urena was, who set the policy as far
10 as the elevator, who set the policy as far as the
11 medication, who set all of the policies.

12 It's not an easy burden for someone to try and
13 identify who the specific person is that would have to be
14 sued, which is why the suing of the corporation is a more
15 manageable one from the plaintiff's point of view.

16 It would also be a more manageable one from the
17 defendant's point of view, we would submit, also because
18 it would allow the corporation to be the one who's
19 controlling the litigation.

20 It would be avoiding potential conflicts that
21 exist by naming the individual employees and having them
22 go out and retain their own counsel. It would limit the
23 -- it would reduce the cost of the litigation for the
24 defendant because you're ultimately looking at the
25 corporation, and it would only have to have one set of

1 attorneys as opposed to a multiple set of attorneys. So,
2 the cost to defend would go down as far as the
3 corporation.

4 If we're also operating under a claim under
5 Federal law, then the rules of the game, as far as the
6 discovery, as far as the motion practice and general
7 procedure, would also be under the Federal law as opposed
8 to the State law, so that it would be easier for the
9 corporations to control their costs because they would
10 know how to be defending this type of an action.

11 And in fact, hopefully, these types of actions
12 would be decreasing as the liability would be there.
13 There are certain programs that would be going into place
14 by the companies to make certain that everybody has the
15 proper training in order to avoid these types of
16 constitutional violations.

17 Indeed, that's one of the reasons that we submit
18 that there would really be no danger to the public fisc.
19 In the normal situation, you have a suit against a
20 Government employee where the Government afterwards comes
21 in and it either has provided counsel and will also pay
22 any judgment that exists.

23 QUESTION: Mr. Lamken said that's not
24 necessarily so, that the Government would pay.

25 MR. PASTERNAK: Not necessarily so, but it is

1 usually the case that happens.

2 So too, you have a situation where CSC has
3 acknowledged that it normally does indemnify its
4 employees. And in our situation, there's a contract that
5 exists between the Bureau of Prisons, which is a Federal
6 agency here, and the private for-profit corporation, CSC,
7 which required CSC to indemnify the Bureau of Prisons.

8 In addition, it required CSC to have insurance.
9 So, before any danger could take place to the public fisc,
10 the first thing that would happen, as far as a judgment
11 which would be rendered, is that it would be coming from
12 the insurance company.

13 The insurance company would then have to make a
14 determination, is this something that would justify an
15 increase in premiums or can it be more properly addressed
16 solely by the implementation of special programs and
17 trainings and seminars to the individual employees?

18 If it were to increase its premiums, then the
19 corporation would have to make a determination whether or
20 not to pay it or to seek other insurance to get a better
21 rate. Only if that rate is increased, then the
22 corporation would then have to turn around and say, well,
23 is this a cost that we should be absorbing or to try and
24 pass it along to the Federal Government?

25 QUESTION: All insurance companies are going to

1 increase rates if the corporation -- if they know that the
2 corporations are going to be liable.

3 MR. PASTERNAK: Well, right now, respectfully --

4 QUESTION: I mean, you know, they're -- they're
5 not dumb and they're competitive. If corporations are not
6 liable, the rates are going to be lower. If corporations
7 are liable, the rates of all the insurance companies are
8 going to be higher. That's going to be passed on to the
9 United States Government. I mean, you know, that has to
10 be -- that has to be the outcome.

11 MR. PASTERNAK: But no one is -- respectfully,
12 no one is arguing that there could not be a theory for CSC
13 to be liable under common law, respondeat superior, or
14 under the ADA or any other theory for the corporation to
15 be liable. It's only a question under what theory the
16 corporation would become liable. So, that the damages, or
17 the claims against the private corporation, would still
18 exist. They would still have to be defending the claims.
19 They would still ultimately, we would submit, be found
20 liable for it.

21 QUESTION: You can't have it both ways. You're
22 now telling me that you don't really need these cause of
23 action -- causes of action because there -- there are
24 other ways to get relief out there, which the insurance
25 companies are already taking into account.

1 I mean, there's either a substantial difference
2 in what you're urging this Court to adopt or not. If
3 there's a substantial difference, it's going to come out
4 of the Government's pocket. If there isn't a substantial
5 difference, why should -- why do we have to create a cause
6 of action that does not appear in the Constitution or in a
7 statute?

8 MR. PASTERNAK: If I may, I don't think that it
9 necessarily comes out of the Government, because, A, you
10 have the insurance, and B, if the rates get increased to
11 the company, then the company then has to turn around and
12 bid it out to the Federal Government, and the Federal
13 Government can turn around and go through a different
14 contractor. So, you have a different situation as far as
15 the ability to pass it along, as opposed to the Federal
16 Government where it comes in and indemnifies the
17 employees --

18 QUESTION: This other contractor that it would
19 pass it on to would not be subject to the same law that --
20 that we hold today?

21 MR. PASTERNAK: He would be subject to the same
22 law.

23 QUESTION: And therefore, his rates would be
24 higher too, wouldn't it?

25 MR. PASTERNAK: Well, we would also -- anytime

1 an insurance company is setting rates, they're going to be
2 looking to the past history of the individual applicant to
3 ascertain what the potential is and what programs are in
4 place in order to try and control what those potential
5 dangers are.

6 QUESTION: Mr. Pasternak, compare for a moment,
7 if you will, the elements of damages you would be seeking
8 under the kind of claim you have in mind and the elements
9 of damages you might be seeking under a State -- State law
10 negligence action as -- as to amounts, amounts of money.
11 Are there elements that you could recover for under the
12 Federal claim that you couldn't recover for under a State
13 negligence claim?

14 MR. PASTERNAK: As far as amounts, it's
15 difficult to quantify as to what it is. As far as the
16 Federal claim, we would have the claim of violation of the
17 Federal Constitution.

18 QUESTION: Yes, but what you want as a result of
19 the claimed violation is money damages, I take it.

20 MR. PASTERNAK: That is correct.

21 QUESTION: And I'm -- I'm asking you would the
22 money damages be any different under -- under a theory of
23 negligence as opposed to the theory you're proposing.
24 Could some element of damages be permitted under one and
25 not under the other, or would they be the same?

1 MR. PASTERNAK: I think it would depend on how a
2 jury viewed the elements --

3 QUESTION: Well, but I -- I mean -- I realize
4 one jury can give you one result and one another. But
5 let's suppose it's the same jury. Or just -- just -- I
6 mean, the testimony as -- as to physical suffering and
7 that sort of thing, it would be pretty much the same,
8 wouldn't it?

9 MR. PASTERNAK: That would be.

10 QUESTION: Except you might have punitive
11 damages under State law, mightn't you, if -- if indeed it
12 was -- it was gross negligence or indeed virtually -- an
13 intentional harming of -- of the prisoner? Under many
14 State laws, you'd be able to get punitive damages,
15 wouldn't you?

16 MR. PASTERNAK: There would be a potential under
17 certain situations under State law to obtain punitive
18 damages.

19 QUESTION: And you can't -- as far as I know, we
20 haven't held that punitive damages are available under
21 Bivens, have we?

22 MR. PASTERNAK: That's correct.

23 QUESTION: A State cause of action -- could --
24 could a State just incorporate the Eighth Amendment
25 standard as a matter of State tort law?

1 MR. PASTERNAK: I'm sorry. I didn't --

2 QUESTION: Could the State, as part of a State
3 cause of action, simply incorporate the Eighth Amendment
4 as part of a State tort standard? There could be no
5 reckless indifference or you're -- you're liable under
6 State law.

7 MR. PASTERNAK: It could. The States would have
8 the power to do whatever it pleased. Each State would
9 have its own decision making.

10 QUESTION: So, then you don't need the Bivens
11 cause of action even for the Eighth Amendment because
12 States are free to enact it if they choose.

13 MR. PASTERNAK: But that would leave to each
14 individual State to ascertain and decide whether or not
15 there should be a remedy that exists as far as a Federal
16 constitutional violation, which is a separate and distinct
17 harm that needs to be addressed.

18 QUESTION: Is the same thing true about other
19 Bivens actions?

20 MR. PASTERNAK: This Court -- yes, it is. And
21 this Court has routinely held that just the fact that
22 there is a common law claim that might exist is not
23 sufficient in order to find that there should not also be
24 Bivens liability.

25 QUESTION: Well, you have no authority to say

1 that a State can create a cause of action against a
2 Federal officer.

3 MR. PASTERNAK: Not as to a Federal officer,
4 correct.

5 In here, though, where we have a private
6 corporation, who is operating pursuant to its contract
7 with the Government, where it has a separate motive, a
8 fiduciary duty in order to maximize its profits, and there
9 the danger to the Federal fisc is less, we submit, or
10 certainly no greater than if there were an additional
11 Bivens situation, we would submit that the greatest
12 deterrence that could exist is to go and permit the suit
13 against the corporation and not impose the duty in order
14 to try and ascertain which employee would it be, whether
15 or not it's a former employee who set a policy who's no
16 longer there, but to permit it because it is the
17 corporation who has control of its individual employees
18 based on the relationship, whether it be for a limited
19 contract and what contract terms are or whether it be an
20 at-will employee, and also based on respondeat superior,
21 that we need to recognize that we are dealing with a
22 private corporation. We are not dealing with the FDIC or
23 the Government or a Government agency. In light of the
24 fact that there's a direct relationship of contract that
25 exists between the Government and the corporation, which

1 is allowing it to act, that this Court should find that
2 there is Bivens liability and the case should be permitted
3 to proceed on that basis.

4 Thank you.

5 QUESTION: Thank you, Mr. Pasternak.

6 Mr. Phillips, you have 3 minutes remaining.

7 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF THE PETITIONER

9 MR. PHILLIPS: Thank you, Mr. Chief Justice.

10 I'd like to address what I think are sort of two
11 pivotal points here.

12 One, derive -- I derive from Justice Kennedy's
13 question asking Mr. Pasternak about the effect of the
14 Richardson decision because it seems to me the Court,
15 obviously, should be concerned about what its prior
16 precedents tell us about the appropriate way to proceed.
17 He concedes, too, that Richardson, a case on which he
18 relied very heavily in his brief, frankly does not provide
19 him with much comfort.

20 I would have asked him, in -- in turn, the
21 extent to which he derives comfort from the FDIC v. Meyer
22 decision in which this Court, it seems to me, essentially
23 addressed the same issue we have here and told litigants
24 going forward look to the private employee, look to the
25 employees as the primary source to obtain remedies and to

1 obtain maximum deterrence. And once you satisfy that,
2 then you're done with the inquiry because the Court
3 specifically addressed in Meyer the -- the question of do
4 you -- do you extend Bivens to a new category of
5 defendants.

6 And that takes me to the second point I think is
7 worth keeping in mind, and that was the question that
8 Justice Scalia asked, which is why don't we simply leave
9 this to Congress to resolve at the end of the day. And it
10 seems to me a -- an intricate debate about questions of
11 indemnification, where we don't know what the final answer
12 is about who has what rights of indemnification, questions
13 of respondeat superior where we don't even know specifics
14 about what -- what causes of action may or may not be
15 available, questions of the availability of punitive
16 damages, all of these questions are left on the table
17 completely unknown at this point.

18 It seems to me, in the context of that kind of a
19 circumstance, the Court was correct in Meyer in saying
20 that we should leave these questions to Congress, and if
21 Congress acts, then you can seek out the kind of
22 parallelism between 1983 and a Federal cause of action, or
23 if you don't, presumably Congress will have explained to
24 you why there are disparities between the various
25 approaches. It seems to me that the best solution for

1 this Court is to recognize that a hands-off approach is
2 the final answer.

3 QUESTION: Mr. Phillips, can I ask one quick
4 question? Do you concede, for purpose of -- of review of
5 the case and based on your question presented, that the
6 complaint states a cause of action?

7 MR. PHILLIPS: For purposes of where the case is
8 right at the moment, yes.

9 QUESTION: Yes.

10 MR. PHILLIPS: I think on remand, obviously we
11 would fight -- if -- if the case were to go forward, we
12 would continue to fight that issue.

13 QUESTION: Mr. Phillips, is it, -- is it correct
14 -- and some of the questions, including my own, have
15 assumed that you can't sue a Federal officer in State -- you
16 can't sue a Federal officer for a tort committed in the
17 course of his official duties. I'm not sure that's right.
18 You can't sue him in State -- or you can sue him in State
19 court, but it is removable to Federal court.

20 MR. PHILLIPS: It's immediately removable.

21 QUESTION: But there's -- there's no Federal
22 prohibition against the suit, is there?

23 MR. PHILLIPS: Well, there will be a preemption
24 issue that's going to immediately arise as to whether or
25 not he's immune -- whether he's immune. And -- you know,

1 if it's within the scope of his responsibilities, then
2 he'll have -- he'll have an immunity --

3 QUESTION: Qualified immunity, but -- but you --
4 if it's not, you -- you can sue him and -- and the only
5 prohibition is, if he wants, he can remove it to Federal
6 court.

7 MR. PHILLIPS: That's correct.

8 QUESTION: Okay.

9 MR. PHILLIPS: Thank you, Your Honor.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
11 Phillips.

12 The case is submitted.

13 (Whereupon, at 11:00 a.m., the case in the
14 above-entitled matter was submitted.)

15

16

17

18

19

20

21

22

23

24

25