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Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Search and Seizure

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Zigler v. Abbasi, __ U.S. __ (2017)

Ahmer Iqbal Abbasi was detained by federal officials after the terrorist attacks of September 11, 2001. For months, he claimed, he was kept in a tiny cell, given little opportunity for exercise or recreation, repeatedly strip searched, beaten by guards, and repeatedly subjected to sexual and religious insults. After being released and deported, Abbasi and several other former detainees sued James Ziglar, the Immigration and Naturalization Service Commissioner at the time of their detention; Dennis Hasty, the warden of their detention center; and other federal officials. They claimed the conditions of their detention violated the due process and equal protection components of the Fifth Amendment and the prohibition of unreasonable searches in the Fourth Amendment and that they were entitled to significant monetary damages under Bivens v. Six Unknown Federal Narcotics Agents *(1971), which permits persons to file for damages against government officials who violate their constitutional rights, and* 42 U.S.C. § 1985(3)*., which gives persons a right to sue government officials who conspire to deprive them of the equal protection of the laws. After a complex series of motions and rulings, the Court of Appeals for the Second Circuit allowed the lawsuit to go forward against all named officials. Ziglar and the other named officials appealed to the Supreme Court of the United States.*

The Supreme Court by a 4–2 vote dismissed every claim, with the exception of claims against Hasty, which was remanded to lower courts to determine whether that claim should also be dismissed. Justice Kennedy's majority opinion declared that damages claims against federal officials should be disfavored unless explicitly provided for by federal law or clearly within the Bivens *precedent. Why is Justice Kennedy so hostile to damage suits against federal officials? Is* Ziglar *a step toward eventually overruling* Bivens*? What are the differences between Kennedy and Justice Clarence Thomas with respect to what are called constitutional torts. Justice Stephen Breyer's dissent seems to accept that lawsuits for damages against federal officials are disfavored. Why does he nevertheless think that Abbasi's lawsuit should go forward. Given three other votes, would Breyer still claim that lawsuits for damages against federal officials are disfavored.*

Justice KENNEDY delivered the opinion of the Court

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In 1871, Congress passed a statute that was later codified at Rev. Stat. § 1979, 42 U.S.C. § 1983. It entitles an injured person to money damages if a state official violates his or her constitutional rights. Congress did not create an analogous statute for federal officials. Indeed, in the 100 years leading up to *Bivens*, Congress did not provide a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the Federal Government.

In 1971, and against this background, this Court decided *Bivens v. Six Unknown Federal Narcotics Agents*. The Court held that, even absent statutory authorization, it would enforce a damages remedy to compensate persons injured by federal officers who violated the prohibition against unreasonable search and seizures. The Court acknowledged that the Fourth Amendment does not provide for money damages "in so many words." The Court noted, however, that Congress had not foreclosed a damages remedy in

"explicit" terms and that no "special factors" suggested that the Judiciary should "hesitat[e]" in the face of congressional silence. The Court, accordingly, held that it could authorize a remedy under general principles of federal jurisdiction.

. . . To understand *Bivens* and the . . . other cases implying a damages remedy under the Constitution, it is necessary to understand the prevailing law when they were decided. In the mid-20th century, the Court followed a different approach to recognizing implied causes of action than it follows now. During this "*ancien regime,*" the Court assumed it to be a proper judicial function to "provide such remedies as are necessary to make effective" a statute's purpose. . . . Later, the arguments for recognizing implied causes of action for damages began to lose their force. In cases decided after *Bivens,* and after the statutory implied cause-of-action cases that *Bivens* itself relied upon, the Court adopted a far more cautious course before finding implied causes of action. . . . Following this expressed caution, the Court clarified in a series of cases that, when deciding whether to recognize an implied cause of action, the "determinative" question is one of statutory intent. . . .

The decision to recognize an implied cause of action under a statute involves somewhat different considerations than when the question is whether to recognize an implied cause of action to enforce a provision of the Constitution itself. When Congress enacts a statute, there are specific procedures and times for considering its terms and the proper means for its enforcement. It is logical, then, to assume that Congress will be explicit if it intends to create a private cause of action. With respect to the Constitution, however, there is no single, specific congressional action to consider and interpret.

Even so, it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation. When determining whether traditional equitable powers suffice to give necessary constitutional protection—or whether, in addition, a damages remedy is necessary—there are a number of economic and governmental concerns to consider. Claims against federal officials often create substantial costs, in the form of defense and indemnification. Congress, then, has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government. In addition, the time and administrative costs attendant upon intrusions resulting from the discovery and trial process are significant factors to be considered. In an analogous context, Congress, it is fair to assume, weighed those concerns in deciding not to substitute the Government as defendant in suits seeking damages for constitutional violations.

. . . [I]n light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today. To be sure, no congressional enactment has disapproved of these decisions. And it must be understood that this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose. *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.

Given the notable change in the Court's approach to recognizing implied causes of action, however, the Court has made clear that expanding the *Bivens* remedy is now a "disfavored" judicial activity. . . .

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When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. The question is "who should decide" whether to provide for a damages remedy, Congress or the courts? The answer most often will be Congress. When an issue

"'involves a host of considerations that must be weighed and appraised,'" it should be committed to "'those who write the laws'" rather than "'those who interpret them.'" . . . The Court's precedents now make clear that a *Bivens* remedy will not be available if there are "'special factors counselling hesitation in the absence of affirmative action by Congress.'"

This Court has not defined the phrase "special factors counselling hesitation." The necessary inference, though, is that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed. Thus, to be a "special factor counselling hesitation," a factor must cause a court to hesitate before answering that question in the affirmative.

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. . . [I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III. In a related way, if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action. For if Congress has created "any alternative, existing process for protecting the [injured party's] interest" that itself may "amoun[t] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages."

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The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

In the present suit, respondents' detention policy claims challenge the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil. Those claims bear little resemblance to the three *Bivens* claims the Court has approved in the past: a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate's asthma. The Court of Appeals therefore should have held that this was a new *Bivens* context. Had it done so, it would have recognized that a special factors analysis was required before allowing this damages suit to proceed.

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With respect to the claims against the Executive Officials, it must be noted that a *Bivens* action is not "a proper vehicle for altering an entity's policy." Furthermore, a *Bivens* claim is brought against the individual official for his or her own acts, not the acts of others. "The purpose of *Bivens* is to deter the *officer*." *Bivens* is not designed to hold officers responsible for acts of their subordinates.

Even if the action is confined to the conduct of a particular Executive Officer in a discrete instance, these claims would call into question the formulation and implementation of a general policy. This, in turn, would necessarily require inquiry and discovery into the whole course of the discussions and deliberations that led to the policies and governmental acts being challenged. These consequences counsel against allowing a *Bivens* action against the Executive Officials, for the burden and demand of litigation might well prevent them—or, to be more precise, future officials like them—from devoting the time and effort required for the proper discharge of their duties.

A closely related problem, as just noted, is that the discovery and litigation process would either border upon or directly implicate the discussion and deliberations that led to the formation of the policy in question. Allowing a damages suit in this context, or in a like context in other circumstances, would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch. . . .

. . . [R]espondents' detention policy claims challenge more than standard "law enforcement operations." They challenge as well major elements of the Government's whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security. Were this inquiry to be allowed in a private suit for damages, the *Bivens* action would assume dimensions far greater than those present in *Bivens* itself, or in either of its two follow-on cases, or indeed in any putative *Bivens* case yet to come before the Court.

National-security policy is the prerogative of the Congress and President. Judicial inquiry into the national-security realm raises "concerns for the separation of powers in trenching on matters committed to the other branches." These concerns are even more pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief. The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy.

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Furthermore, in any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant; and here that silence is telling. In the almost 16 years since September 11, the Federal Government's responses to that terrorist attack have been well documented. Congressional interest has been "frequent and intense," and some of that interest has been directed to the conditions of confinement at issue here. . . . Nevertheless, "[a]t no point did Congress choose to extend to any person the kind of remedies that respondents seek in this lawsuit." *Schweiker*, 487 U.S., at 426, 108 S.Ct. 2460.

It is of central importance, too, that this is not a case like *Bivens* or *Davis* in which "it is damages or nothing." Unlike the plaintiffs in those cases, respondents do not challenge individual instances of discrimination or law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact. Respondents instead challenge large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners. To address those kinds of decisions, detainees may seek injunctive relief. And in addition to that, we have left open the question whether they might be able to challenge their confinement conditions via a petition for a writ of habeas corpus. . . .

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On the other side of the balance, the very fact that some executive actions have the sweeping potential to affect the liberty of so many is a reason to consider proper means to impose restraint and to provide some redress from injury. There is therefore a balance to be struck, in situations like this one, between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation in times of great peril. The proper balance is one for the Congress, not the Judiciary, to undertake. . . .

One of respondents' claims under *Bivens* requires a different analysis: the prisoner abuse claim against the MDC's warden, Dennis Hasty. The allegation is that Warden Hasty violated the Fifth Amendment by allowing prison guards to abuse respondents.

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It is true that this case has significant parallels to one of the Court's previous *Bivens* cases, *Carlson v. Green* (1980). There, the Court did allow a *Bivens* claim for prisoner mistreatment—specifically, for failure to provide medical care. . . . Yet even a modest extension is still an extension. And this case does seek to extend *Carlson* to a new context. As noted above, a case can present a new context for *Bivens* purposes if it implicates a different constitutional right; if judicial precedents provide a less meaningful

guide for official conduct; or if there are potential special factors that were not considered in previous *Bivens* cases.

The constitutional right is different here, since *Carlson* was predicated on the Eighth Amendment and this claim is predicated on the Fifth. And the judicial guidance available to this warden, with respect to his supervisory duties, was less developed. The Court has long made clear the standard for claims alleging failure to provide medical treatment to a prisoner—"deliberate indifference to serious medical needs." The standard for a claim alleging that a warden allowed guards to abuse pre-trial detainees is less clear under the Court's precedents.

This case also has certain features that were not considered in the Court's previous *Bivens* cases and that might discourage a court from authorizing a *Bivens* remedy. As noted above, the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action. *Supra,* at ——. And there might have been alternative remedies available here, for example, a writ of habeas corpus, *Wolfish,* 441 U.S., at 526, n. 6, 99 S.Ct. 1861; an injunction requiring the warden to bring his prison into compliance with the regulations discussed above; or some other form of equitable relief.

Furthermore, legislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation. Some 15 years after *Carlson* was decided, Congress passed the Prison Litigation Reform Act of 1995, which made comprehensive changes to the way prisoner abuse claims must be brought in federal court. . . . But the Act itself does not provide for a standalone damages remedy against federal jailers. It could be argued that this suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment.

The differences between this claim and the one in *Carlson* are perhaps small, at least in practical terms. Given this Court's expressed caution about extending the *Bivens* remedy, however, the new-context inquiry is easily satisfied. Some differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context. But here the differences identified above are at the very least meaningful ones. Thus, before allowing this claim to proceed under *Bivens,* the Court of Appeals should have performed a special factors analysis. . . .

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The qualified immunity rule seeks a proper balance between two competing interests. On one hand, damages suits "may offer the only realistic avenue for vindication of constitutional guarantees." "On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." As one means to accommodate these two objectives, the Court has held that Government officials are entitled to qualified immunity with respect to "discretionary functions" performed in their official capacities. The doctrine of qualified immunity gives officials "breathing room to make reasonable but mistaken judgments about open legal questions." . . . Th[e] requirement—that an official loses qualified immunity only for violating clearly established law—protects officials accused of violating "extremely abstract rights." *Anderson, supra,* at 639, 107 S.Ct. 3034.

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In light of these concerns, the Court has held that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." To determine whether a given officer falls into either of those two categories, a court must ask whether it would have been clear to a reasonable officer that the alleged conduct "was unlawful in the situation he confronted." If so, then the defendant officer must have been either incompetent or else a knowing violator of the law, and thus not entitled to qualified immunity. If not, however—*i.e.,* if a reasonable officer might not have known for certain that the conduct was unlawful—then the officer is immune from liability.

Under these principles, it must be concluded that reasonable officials in petitioners' positions would not have known, and could not have predicted, that § 1985(3) prohibited their joint consultations and the resulting policies that caused the injuries alleged.

At least two aspects of the complaint indicate that petitioners' potential liability for this statutory offense would not have been known or anticipated by reasonable officials in their position. First, the conspiracy recited in the complaint is alleged to have been between or among officers in the same branch of the Government (the Executive Branch) and in the same Department (the Department of Justice). Second, the discussions were the preface to, and the outline of, a general and far-reaching policy.

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. . . [T]he fact that the courts are divided as to whether or not a § 1985(3) conspiracy can arise from official discussions between or among agents of the same entity demonstrates that the law on the point is not well established. When the courts are divided on an issue so central to the cause of action alleged, a reasonable official lacks the notice required before imposing liability.

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. . . [O]pen discussion among federal officers is to be encouraged, so that they can reach consensus on the policies a department of the Federal Government should pursue. . . . Were those discussions, and the resulting policies, to be the basis for private suits seeking damages against the officials as individuals, the result would be to chill the interchange and discourse that is necessary for the adoption and implementation of governmental policies. These considerations suggest that officials employed by the same governmental department do not conspire when they speak to one another and work together in their official capacities. Whether that contention should prevail need not be decided here. It suffices to say that the question is sufficiently open so that the officials in this suit could not be certain that § 1985(3) was applicable to their discussions and actions. . . .

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Justice SOTOMAYOR, Justice KAGAN, and Justice GORSUCH took no part in the consideration or decision of these cases.

Justice THOMAS, concurring in part and concurring in the judgment.

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I have previously noted that "'*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action.'" I have thus declined to "extend *Bivens* even [where] its reasoning logically applied," thereby limiting "*Bivens* and its progeny . . . to the precise circumstances that they involved." This would, in most cases, mean a reversal of the judgment of the Court of Appeals is in order. However, in order for there to be a controlling judgment in this suit, I concur in the judgment vacating and remanding the claims against petitioner Hasty as that disposition is closest to my preferred approach.

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The Civil Rights Act of 1871, of which § 1985(3) and the more frequently litigated § 1983 were originally a part, established causes of action for plaintiffs to seek money damages from Government officers who violated federal law. Although the Act made no mention of defenses or immunities, "we have read it in harmony with general principles of tort immunities and defenses rather than in derogation of them." We have done so because "[c]ertain immunities were so well established in 1871 . . . that 'we presume that Congress would have specifically so provided had it wished to abolish' them." Immunity is thus available under the statute if it was "historically accorded the relevant official" in an analogous situation "at common law," unless the statute provides some reason to think that Congress did not preserve the defense.

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In further elaborating the doctrine of qualified immunity for executive officials, however, we have diverged from the historical inquiry mandated by the statute. . . . Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's

claim under § 1983, we instead grant immunity to any officer whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." . . .

Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in "interpret[ing] the intent of Congress in enacting" the Act. Our qualified immunity precedents instead represent precisely the sort of "freewheeling policy choice[s]" that we have previously disclaimed the power to make. . . . Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence.

Justice BREYER, with whom Justice GINSBURG joins, dissenting.

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The Court's holding() in *Bivens* . . . rest(s) upon four basic legal considerations. First, the *Bivens* Court referred to longstanding Supreme Court precedent stating or suggesting that the Constitution provides federal courts with considerable legal authority to use traditional remedies to right constitutional wrongs. That precedent begins with *Marbury v. Madison* (1803), which effectively placed upon those who would deny the existence of an effective legal remedy the burden of showing why their case was special. Chief Justice John Marshall wrote for the Court that "[t]he very essence of civil liberty [lies] in the right of every individual to claim the protection of the laws, whenever he receives an injury." . . . The *Bivens* Court reiterated these principles and confirmed that the appropriate remedial "adjust[ment]" in the case before it was an award of money damages, the "remedial mechanism normally available in the federal courts." . . .

Second, our cases have recognized that Congress' silence on the subject indicates a willingness to leave this matter to the courts. . . . Third, our *Bivens* cases acknowledge that a constitutional tort may not lie when "special factors counse[l] hesitation" and when Congress has provided an adequate alternative remedy. . . . Fourth, . . . a *Bivens* remedy was needed to cure what would, without it, amount to a constitutional anomaly. Long before this Court incorporated many of the Bill of Rights' guarantees against the States, federal civil rights statutes afforded a damages remedy to any person whom a state official deprived of a federal constitutional right, see 42 U.S.C. § 1983. But federal statutory law did not provide a damages remedy to a person whom a federal official had deprived of that same right, even though the Bill of Rights was at the time of the founding primarily aimed at constraining the Federal Government. Thus, a person harmed by an unconstitutional search or seizure might sue a city mayor, a state legislator, or even a Governor. But that person could not sue a federal agent, a national legislator, or a Justice Department official for an identical offense. "[Our] 'constitutional design,'" the Court wrote, "would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression."

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As the majority opinion points out, this Court in more recent years has indicated that "*expanding* the *Bivens* remedy is *now* a 'disfavored' judicial activity." . . . Thus the Court, as the majority opinion says, repeatedly wrote that it was not "expanding" the scope of the *Bivens* remedy. But the Court nowhere suggested that it would narrow *Bivens*' existing scope. In fact, to diminish any ambiguity about its holdings, the Court set out a framework for determining whether a claim of constitutional violation calls for a *Bivens* remedy. At Step One, the court must determine whether the case before it arises in a "new context," that is, whether it involves a "new category of defendants," or (presumably) a significantly different kind of constitutional harm, such as a purely procedural harm, a harm to speech, or a harm caused to physical property. *If the context is new, then* the court proceeds to Step Two and asks "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *If there is none, then* the

court proceeds to Step Three and asks whether there are "'any special factors counselling hesitation before authorizing a new kind of federal litigation.'"

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The context here is not "new," or "fundamentally different" than our previous *Bivens* cases. First, the plaintiffs are civilians, not members of the military. They are not citizens, but the Constitution protects noncitizens against serious mistreatment, as it protects citizens. . . . Second, the defendants are Government officials. They are not members of the military or private persons. Two are prison wardens. Three others are high-ranking Department of Justice officials. Prison wardens have been defendants in *Bivens* actions, as have other high-level Government officials. One of the defendants in *Carlson* was the Director of the Bureau of Prisons; the defendant in *Davis* was a Member of Congress. . . . Third, from a *Bivens* perspective, the injuries that the plaintiffs claim they suffered are familiar ones. They focus upon the conditions of confinement. The plaintiffs say that they were unnecessarily shackled, confined in small unhygienic cells, subjected to continuous lighting (presumably preventing sleep), unnecessarily and frequently strip searched, slammed against walls, injured physically, and subject to verbal abuse. They allege that they suffered these harms because of their race or religion, the defendants having either turned a blind eye to what was happening or themselves introduced policies that they knew would lead to these harms even though the defendants knew the plaintiffs had no connections to terrorism.

. . . It is true that the plaintiffs bring their "deliberate indifference" claim against Warden Hasty under the Fifth Amendment's Due Process Clause, not the Eighth Amendment's Cruel and Unusual Punishment Clause, as in *Carlson*. But that is because the latter applies to convicted criminals while the former applies to pretrial and immigration detainees. Where the harm is the same, where this Court has held that both the Fifth and Eighth Amendments give rise to *Bivens'* remedies, and where the only difference in constitutional scope consists of a circumstance (the absence of a conviction) that makes the violation here worse, it cannot be maintained that the difference between the use of the two Amendments is "fundamental."

Nor has Congress suggested that it wants to withdraw a damages remedy in circumstances like these. By its express terms, the Prison Litigation Reform Act of 1995 (PLRA) does not apply to immigration detainees. . . .

I recognize that the Court finds a significant difference in the fact that the confinement here arose soon after a national-security emergency, namely, the September 11 attacks. The short answer to this argument, in respect to at least some of the claimed harms, is that some plaintiffs continued to suffer those harms up to eight months after the September 11 attacks took place and after the defendants knew the plaintiffs had no connection to terrorism. . . .

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Even were I wrong and were the context here "fundamentally different," the plaintiffs' claims would nonetheless survive Step Two and Step Three of the Court's framework for determining whether *Bivens* applies. Step Two consists of asking whether "any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages I can find no such "alternative, existing process" here.

The Court does not claim that the PLRA provides plaintiffs with a remedy. *Ante,* at ——— – ———. Rather, it says that the plaintiffs *may* have "had available to them" relief in the form of a prospective injunction or an application for a writ of habeas corpus. Neither a prospective injunction nor a writ of habeas corpus, however, will normally provide plaintiffs with redress for harms they have *already* suffered. And here plaintiffs make a strong claim that neither was available to them—at least not for a considerable time. . . .

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. . . I concede that the majority and concurring opinions in *Bivens* looked in part for support to the fact that the Court had implied damages remedies from *statutes* silent on the subject. But that was not the

main argument favoring the Court's conclusion. Rather, the Court drew far stronger support from the need for such a remedy when measured against a common-law and constitutional history of allowing traditional legal remedies where necessary. . . .

Nor is . . . congressional silence relevant in the manner that the majority opinion describes. The Court initially saw that silence as indicating an absence of congressional hostility to the Court's exercise of its traditional remedy-inferring powers. Congress' subsequent silence contains strong signs that it accepted *Bivens* actions as part of the law. After all, Congress rejected a proposal that would have eliminated *Bivens* by substituting the U.S. Government as a defendant in suits against federal officers that raised constitutional claims. . . .

The majority opinion also sets forth a more specific list of factors that it says bear on "whether a case presents a new *Bivens* context." . . .

(1) *The rank of the officers*. I can understand why an officer's rank might bear on whether he violated the Constitution, because, for example, a plaintiff might need to show the officer was willfully blind to a harm caused by lower ranking officers or that the officer had actual knowledge of the misconduct. . . . But *if*—and I recognize that this is often a very big if—a plaintiff proves a clear constitutional violation, say, of the Fourth Amendment, *and* he shows that the defendant does not possess any form of immunity or other defense, *then* why should he not have a damages remedy for harm suffered? What does rank have to do with *that* question, namely, the *Bivens* question? Why should the law treat differently a high-level official and the local constable where each has similarly violated the Constitution and where neither can successfully assert immunity or any other defense?

(2) *The constitutional right at issue*. . . . [F]or reasons I have already pointed out, there is no relevant difference between the rights at issue here and the rights at issue in our previous *Bivens* cases, namely, the rights to be free of unreasonable searches, invidious discrimination, and physical abuse in federal custody.

(3) *The generality or specificity of the individual action*. I should think that it is not the "generality or specificity" of an official action but rather the nature of the official action that matters. *Bivens* should apply to some generally applicable actions, such as actions taken deliberately to jail a large group of known-innocent people. And it should not apply to some highly specific actions, depending upon the nature of those actions.

(4) *The extent of judicial guidance*. . . . I do not see how, assuming the violation is clear, the presence or absence of "judicial guidance" is relevant to the existence of a damages remedy.

(5) *The statutory (or other) legal mandate under which the officer was operating*. This factor too may prove relevant to the question whether a constitutional violation exists or is clearly established. But, again, assuming that it is, I do not understand why this factor is relevant to the existence of a damages remedy. . . .

(6) *Risk of disruptive judicial intrusion*. All damages actions risk disrupting to some degree future decisionmaking by members of the Executive or Legislative Branches. Where this Court has authorized *Bivens* actions, it has found that disruption tolerable, and it has explained why disruption is, from a constitutional perspective, desirable. . . .

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In my view, the Court's strongest argument is that *Bivens* should not apply to policy-related actions taken in times of national-security need, for example, during war or national-security emergency. . . . We have not, however, answered the specific question the Court places at issue here: Should *Bivens* actions continue to exist in respect to policy-related actions taken in time of war or national emergency? In my view, they should.

For one thing, a *Bivens* action comes accompanied by many legal safeguards designed to prevent the courts from interfering with Executive and Legislative Branch activity reasonably believed to be necessary to protect national security. . . . The Constitution itself takes account of public necessity. Thus,

for example, the Fourth Amendment does not forbid *all* Government searches and seizures; it forbids only those that are "unreasonable." . . . What is unreasonable and illegitimate in time of peace may be reasonable and legitimate in time of war.

Moreover, *Bivens* comes accompanied with a qualified-immunity defense. Federal officials will face suit only if they have violated a constitutional right that was "clearly established" at the time they acted. Further, in order to prevent the very presence of a *Bivens* lawsuit from interfering with the work of a Government official, this Court has held that a complaint must state a claim for relief that is "plausible." . . . Finally, where such a claim is filed, courts can, and should, tailor discovery orders so that they do not unnecessarily or improperly interfere with the official's work. . . .

Given these safeguards against undue interference by the Judiciary in times of war or national-security emergency, the Court's abolition, or limitation of, *Bivens* actions goes too far. If you are cold, put on a sweater, perhaps an overcoat, perhaps also turn up the heat, but do not set fire to the house.

At the same time, there may well be a particular need for *Bivens* remedies when security-related Government actions are at issue. History tells us of far too many instances where the Executive or Legislative Branch took actions during time of war that, on later examination, turned out unnecessarily and unreasonably to have deprived American citizens of basic constitutional rights. . . . Can we, in respect to actions taken during those periods, rely exclusively, as the Court seems to suggest, upon injunctive remedies or writs of habeas corpus, their retail equivalent? . . . A damages action, however, is typically brought after the emergency is over, after emotions have cooled, and at a time when more factual information is available. In such circumstances, courts have more time to exercise such judicial virtues as calm reflection and dispassionate application of the law to the facts. We have applied the Constitution to actions taken during periods of war and national-security emergency. I should think that the wisdom of permitting courts to consider *Bivens* actions, later granting monetary compensation to those wronged at the time, would follow *a fortiori*.

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