CONSTITUTIONAL LAW — *BIVENS* ACTIONS — SECOND CIRCUIT HOLDS THAT ALLEGED VICTIM OF EXTRAORDINARY RENDITION DID NOT STATE A *BIVENS* CLAIM. — *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc).

Decided in 1971, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[1] held that a cause of action arising directly under the United States Constitution was available against federal officers in their individual capacities for a victim of an unlawful search in violation of the Fourth Amendment.[2] While at first *Bivens* was read broadly as "establish[ing] that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right,"[3] more recent cases have persistently confined *Bivens*'s reach.[4] Recently, in *Arar v. Ashcroft*,[5] the Second Circuit held that the presence of several "special factors counselling hesitation" required denial of a *Bivens* remedy to an alleged victim of extraordinary rendition.[6] In doing so, the court added a "step zero"[7] — an explicit inquiry whether a set of circumstances constitutes a "new context"[8] for a *Bivens* remedy — to the traditional two-step analysis.[9] Even though Maher Arar lost his case, the Second Circuit's departure from the path taken by the other courts of appeals raises at least the potential for a

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[1] 403 U.S. 388 (1971).

[2] *See id.* at 389–90, 397.

[3] Carlson v. Green, 446 U.S. 14, 18 (1980); *see also* Note, *Constitutional Law — Federal Agents Conducting Unreasonable Searches and Seizures Are Liable for Damages Under the Fourth Amendment*, 50 TEX. L. REV. 798, 806 (1972) (stating that, as a consequence of *Bivens*, "federal courts now undoubtedly have a reservoir of equitable power to 'adjust their remedies so as to grant the necessary relief' whenever a constitutional guarantee is in danger of becoming a mere 'form of words'" (footnote omitted) (quoting *Bivens*, 403 U.S. at 392; Mapp v. Ohio, 367 U.S. 643, 655 (1961))).

[4] Since 1983, the Supreme Court has made clear in a succession of seven cases that *Bivens* liability, once thought to be so expansive, will be found only in very limited circumstances. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 735–40 (6th ed. 2009) (citing Wilkie v. Robbins, 127 S. Ct. 2588 (2007); Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001); FDIC v. Meyer, 510 U.S. 471 (1994); Schweiker v. Chilicky, 487 U.S. 412 (1988); United States v. Stanley, 483 U.S. 669 (1987); Bush v. Lucas, 462 U.S. 367 (1983); Chappell v. Wallace, 462 U.S. 296 (1983)).

[5] 585 F.3d 559 (2d Cir. 2009) (en banc).

[6] *Id.* at 563–64, 573 (quoting *Wilkie*, 127 S. Ct. at 2598).

[7] This term is adapted from Professors Thomas Merrill and Kristin Hickman, who used it to describe the inquiry that must take place, under *United States v. Mead Corp.*, 533 U.S. 218 (2001), prior to application of the familiar two-step test established in *Chevron U.S.A. Inc. v. Natural Resources Defense Counsil, Inc.*, 467 U.S. 837 (1984), to an agency's interpretation of law. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001).

[8] *Arar*, 585 F.3d at 563.

[9] *See Wilkie*, 127 S. Ct. at 2598 (discussing the "familiar sequence" employed in "consideration of a *Bivens* request").

future *Bivens* framework that is more plaintiff-friendly than the one currently in effect.[10] The decision creates the possibility of a standard of generality that is more favorable to *Bivens* plaintiffs than is the current one, as well as the potential for increased judicial discussion of the existence of new contexts in individual cases, which would likely prove helpful to plaintiffs.

The facts of the *Arar* case are well-known[11] and highly provocative. Maher Arar is a dual citizen of Canada and Syria and resides in Canada, to which he immigrated with his family when he was seventeen.[12] In September 2002, during a layover at John F. Kennedy Airport in New York,[13] he was detained by U.S. officials as a possible terrorist.[14] Arar alleged that, during his detention in the United States, he was denied access to counsel[15] and was subjected to coercive questioning and abusive conditions of detention.[16] Arar was then transported, without his consent, to Syria.[17] He alleged that, while in Syria, he was tortured[18] and interrogated pursuant to instructions from U.S. officials.[19] In October 2003, Arar was released into the custody of Canadian officials, and he returned to Canada.[20]

Arar filed suit in the Eastern District of New York against several federal officials in their personal capacities,[21] alleging that his Fifth Amendment rights were violated by his detention in the United States ("domestic claim"), as well as by his incarceration and torture in Syria ("Syrian claims").[22] The district court dismissed with prejudice Arar's Syrian claims on the grounds that "the foreign policy and national-security concerns raised [by these claims] are properly left to the political branches of government."[23] It also dismissed his domestic claim on

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[10] Whether a more plaintiff-friendly framework is desirable as a policy matter is of course an entirely separate issue and one that is not broached here.

[11] Arar's allegations have generated a high level of interest in the press and the public in general. *See, e.g.*, Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106, *available at* http://www.newyorker.com/archive/2005/02/14/050214fa_fact6.

[12] *Arar*, 585 F.3d at 565.

[13] Arar was en route to Montreal from a vacation in Tunisia. *See* Arar v. Ashcroft, 414 F. Supp. 2d 250, 252–53 (E.D.N.Y. 2006).

[14] *Id.* at 253.

[15] *See id.* at 253–54.

[16] *See id.* at 253.

[17] *Id.* at 254.

[18] *Id.* at 254–55.

[19] *Id.* at 255.

[20] *Id.*

[21] Arar also sued some of the officials in their official capacities, but the district court dismissed this part of the suit on standing grounds, *see id.* at 287, and the Second Circuit panel affirmed, *see* Arar v. Ashcroft, 532 F.3d 157, 193 (2d Cir. 2008). Arar did not contest this dismissal in the en banc rehearing.

[22] *See Arar*, 414 F. Supp. 2d at 257–58.

[23] *Id.* at 280, 287.

the grounds that Arar had failed to show which defendants, if any, were personally involved in the alleged constitutional violations that occurred in the United States.[24] The court gave Arar leave to "replead [this] claim[] without regard to [the Syrian claims] and name those defendants that were personally involved in the alleged unconstitutional treatment."[25]

Writing for a panel of the Second Circuit, Judge Cabranes[26] affirmed the district court's dismissal of Arar's Syrian claims, both because an alternative remedial scheme existed[27] and because national security and foreign relations concerns constituted "special factors" that "counsel[ed] against creation of a *Bivens* remedy."[28] He dismissed Arar's domestic detention claim for failure to state a claim.[29]

The Second Circuit affirmed en banc.[30] Writing for the majority, Chief Judge Jacobs[31] concluded that Arar's claims of substantive due process violations during detention in the United States must be dismissed as inadequately pled[32] under *Bell Atlantic Corp. v. Twombly*[33] and *Ashcroft v. Iqbal*.[34] He decided Arar's Syrian claims using a three-step analysis. First, he concluded that the claims constituted a "new context" for *Bivens* purposes, because a *Bivens* claim had never been recognized in the context of extraordinary rendition.[35] Therefore, the court had to determine if "there [was] an alternative remedial scheme available to the plaintiff" or if there were "special factors" that "counsel[ed] hesitation" in the creation of a *Bivens* remedy.[36] Second, the majority declined to decide whether an "alternative remedial scheme" was available, noting that, while the Immigration and Nationality Act[37] seemed at first glance to provide a complex alternative remedial scheme, access to that scheme was limited for Arar.[38] Finally, the court held that in this instance "special factors" — such as judicial hesitance to intrude in national security affairs,[39] the importance of

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[24] *See id.* at 286.

[25] *Id.* at 287.

[26] Judge Cabranes was joined by Judge McLaughlin. Judge Sack filed an opinion concurring in part and dissenting in part.

[27] *See* Arar v. Ashcroft, 532 F.3d 157, 179–81 (2d Cir. 2008).

[28] *Id.* at 181.

[29] *See id.* at 192–93.

[30] *Arar*, 585 F.3d at 563.

[31] Chief Judge Jacobs was joined by Judges McLaughlin, Cabranes, Raggi, Wesley, Hall, and Livingston.

[32] *See Arar*, 585 F.3d at 569.

[33] 127 S. Ct. 1955 (2007).

[34] 129 S. Ct. 1937 (2009).

[35] *See Arar*, 585 F.3d at 572.

[36] *Id.*

[37] Pub. L. No. 414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)).

[38] *See Arar*, 585 F.3d at 572–73.

[39] *See id.* at 574–76.

maintaining the security of classified information,[40] an interest in the appearance of openness in the court system,[41] and the potential for graymail[42] — counseled hesitation, which in turn defeated Arar's *Bivens* claim.

The majority opinion provoked four strong dissents. Judge Sack[43] took issue with several of the majority's conclusions, including the characterization of the context of Arar's *Bivens* claim as extraordinary rendition.[44] He argued that the *Bivens* context in this case should include all of Arar's allegations of mistreatment, not just those involving extraordinary rendition,[45] and that, considered in this light, the context was one in which a *Bivens* remedy had been awarded in the past.[46] He then argued that the court, instead of ruling on whether a *Bivens* claim was available in the extraordinary rendition context, should have remanded for a ruling on the state secrets doctrine.[47] Judges Calabresi, Pooler, and Parker also dissented, echoing many of the points made by Judge Sack.[48]

The *Arar* opinion contains a substantial amount of analysis that could further confine *Bivens* remedies.[49] The court, however, also included one analytical move that could actually prove *beneficial* to plaintiffs: it added an additional, explicit step to the *Bivens* analysis.[50]

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[40] *See id.* at 576, 578.

[41] *See id.* at 576–77.

[42] *See id.* at 578–79. Graymail is the use of the threat of litigation that would expose sensitive secrets to obtain cash or other objectives. *See id.*

[43] Judge Sack was joined in his opinion by Judges Calabresi, Pooler, and Parker.

[44] *See Arar*, 585 F.3d at 596–99 (Sack, J., concurring in part and dissenting in part).

[45] *See id.* at 596–97.

[46] *See id.* at 598–99.

[47] *See id.* at 605–10.

[48] Judge Calabresi wrote an especially passionate dissent, criticizing "the majority's unwavering willfulness" in violating the constitutional avoidance canon by reaching the *Bivens* claim when the case could have been resolved on the basis of the state secrets doctrine, and writing that "when the history of this distinguished court is written, today's majority decision will be viewed with dismay." *Id.* at 630 (Calabresi, J., dissenting).

[49] Such analysis includes what the dissents characterized as a departure from precedent by treating the very existence of special factors as dispositive, instead of comparing the special factors with any factors counseling in favor of a *Bivens* remedy, *see id.* at 600–01 (Sack, J., concurring in part and dissenting in part); *id.* at 621–22 (Parker, J., dissenting), as well as the majority's extreme deference to the executive in matters of national security, *see id.* at 574–76 (majority opinion), which does not bode well for future plaintiffs in terror-related cases.

[50] It is not necessary or even possible here to determine whether the net effect of the analysis discussed in the previous footnote, together with the more plaintiff-friendly analysis discussed throughout, on balance favors *Bivens* plaintiffs or defendants. This question depends entirely on which strains of analysis later courts choose to follow. The single plaintiff-friendly component of the court's analysis is discussed here because other writers have focused on the defendant-friendly parts of the analysis. *See, e.g.*, Glenn Greenwald, *A Court Decision that Reflects What Type of Country the U.S. Is*, SALON, Nov. 3, 2009, http://www.salon.com/opinion/greenwald/2009/11/03/arar (criticizing the decision's deference to the executive in matters of national security);

This new "step zero" explicitly asks whether a given scenario constitutes a "new context" before a court applies the two-prong analysis from *Wilkie v. Robbins*.[51] By making this change, the Second Circuit has created the potential for significant benefits to plaintiffs.

In *Wilkie*, the Supreme Court outlined the "familiar sequence" used to decide "whether to recognize a *Bivens* remedy":[52] first, a court 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";[53] second, it asks whether there are "any special factors counselling hesitation before authorizing a new kind of federal litigation."[54] *Wilkie* was unclear about whether this test applies only to decisions whether to extend new *Bivens* remedies[55] or also to decisions whether to grant a Bivens remedy in a context in which a remedy has previously been granted,[56] accordingly also leaving unclear whether a finding that a plaintiff seeks a new *Bivens* remedy is necessary before deployment of the two-prong test. This lack of clarity has resulted in confusion in the lower courts (including variation from case to case within individual courts). Sometimes courts perform the *Wilkie* test without first asking whether the case at bar falls within precedent granting a remedy,[57] while at other times they state without discussion that the case at bar falls outside previous precedent before discussing special factors and alternative remedial schemes.[58]

Scott Horton, *Second Circuit Affirms Dismissal of Arar*, HARPER'S MAG., Nov. 2, 2009, http://harpers.org/archive/2009/11/hbc-90006024 (same).

[51] 127 S. Ct. 2588, 2598 (2007).

[52] *Id.*

[53] *Id.* (citing Bush v. Lucas, 462 U.S. 367, 378 (1983)).

[54] *Id.* (quoting *Bush*, 462 U.S. at 378). While *Wilkie* is the first Supreme Court case explicitly to set out these two prongs in "test" form, the inquiries they represent — whether an alternative remedial scheme is available, and whether special factors weigh against granting a *Bivens* remedy — have been recognized as the two essential questions in *Bivens* analysis at least since *Carlson v. Green*, 446 U.S. 14, 18–19 (1980).

[55] *See Wilkie*, 127 S. Ct. at 2597 ("The first question is whether to devise a new *Bivens* damages action . . . .").

[56] *See id.* at 2598 ("[O]ur consideration of a *Bivens* request follows a familiar sequence . . . .").

[57] *See, e.g.*, W. Radio Servs. Co. v. U.S. Forest Serv., 578 F.3d 1116, 1122–23 (9th Cir. 2009) (neglecting to inquire whether the context at hand was new, despite acknowledging that the *Wilkie* test is designed to determine the appropriateness of "devising . . . an implied right of action," *id.* at 1120); Rainer v. Union Carbide Corp., 402 F.3d 608, 623–24 (6th Cir. 2005) (considering alternative remedial schemes without first explicitly stating that the case at bar constituted a new context); *see also* Wilson v. Libby, 535 F.3d 697, 704–05 (D.C. Cir. 2008); Hardison v. Cohen, 375 F.3d 1262, 1264–65 (11th Cir. 2004). While two of these cases were decided before *Wilkie*, they are still informative because *Wilkie* merely formalized as a single "test" the two questions of an alternative remedial scheme and special factors counseling hesitation that had long been the essential inquiries in a *Bivens* case.

[58] *See, e.g.*, Giesse v. Sec'y of Dep't of Health and Human Servs., 522 F.3d 697, 708 (6th Cir. 2008) (stating, without discussion, that the circuit had never "addressed whether *Bivens* provides

Arar v. Ashcroft takes a third approach. It is the first case, in any circuit, in which a court has both conditioned application of the *Wilkie* two-prong test on a finding that the case at bar constitutes a new context for a *Bivens* remedy[59] and actually engaged in discussion of whether the case constitutes a new context.[60] This change is significant for two reasons: it creates the possibility that a different standard of generality will be applied at step zero than at steps one and two of the *Wilkie* test,[61] and it encourages judges to give real consideration to the question whether *Bivens* precedent dictates that the *Wilkie* test not apply.

In any system that relies on the value of precedent as an authoritative factor in making judicial decisions, the question of the generality of precedent is of the foremost importance. In the American federal judicial system, there is no unified approach to this question; instead, the standard the courts impose differs from situation to situation.[62]

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an implied right of action in the Medicare context," before proceeding to discuss the existence of an alternative remedial scheme); Holly v. Scott, 434 F.3d 287, 289–90 (4th Cir. 2006) (questioning whether the Supreme Court's expansion of *Bivens* remedies against federal prison officials in *Carlson v. Green*, 466 U.S. 14 (1980), "should itself be extended to allow a similar remedy against employees of a private corporation operating a prison," but failing to discuss whether the case at bar constituted a new context for *Bivens* purposes); *see also* Neb. Beef, Ltd. v. Greening, 398 F.3d 1080, 1084 (8th Cir. 2005). Under both approaches, courts look to *Bivens* precedent during the alternative remedial scheme and special factors analyses. *See, e.g.*, *Holly*, 434 F.3d at 291–92; *Hardison*, 375 F.3d at 1264–66.

[59] "To decide the *Bivens* issue, we must determine whether Arar's claims invoke *Bivens* in a new context; and, if so, whether an alternative remedial scheme was available to Arar, or whether (in the absence of affirmative action by Congress) 'special factors counsel[] hesitation.'" *Arar*, 585 F.3d at 563 (alteration in original) (quoting *Wilkie*, 127 S. Ct. at 2598) (internal quotation marks omitted). The fact that there is a new *Bivens* step zero in no way dictates that courts following *Arar*'s lead must stop consulting *Bivens* precedent while carrying out the *Wilkie* test, if the plaintiff does not prevail at step zero. *See Arar*, 585 F.3d at 579 (citing *Bivens* precedent *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70 (2001)).

[60] *See Arar*, 585 F.3d at 572.

[61] Of course, those courts that already condition application of the *Wilkie* test on a finding of a new context can in theory, under their present frameworks, consult precedent outside the alternative remedial scheme and special context inquiries, but as noted above, these courts do not actually conduct a full investigation of whether a new context exists, but simply state the existence of a new context before moving to the *Wilkie* analysis. This fact is one reason that *Arar*'s decision actually to discuss the new context question is so important. The following discussion of the potential benefits to *Bivens* plaintiffs of a change in the level of generality, then, concerns primarily those courts that do not already condition application of the *Wilkie* test on the existence of a new context, and concerns the others to the extent that their new context "inquiry" is merely pro forma.

[62] *Compare, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J., writing for himself and Rehnquist, C.J.) (stating, in the context of determining whether a liberty interest has sufficient roots in history to merit protection under the Due Process Clause, that "[w]e refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified"), *with* Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) (stating, in the context of Alien Tort Statute jurisprudence, that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized

The *Arar* majority failed to make clear what standard of generality it used to determine that Arar's requested relief fell outside *Bivens* precedent. After noting that "'[c]ontext' is not defined in the case law,"[63] the court "construe[d] the word 'context' as it is commonly used in law: to reflect a potentially recurring scenario that has similar legal and factual components."[64] This definition is not particularly helpful, since it simply shifts the question of generality from the word "context" to the word "similar." The court then defined the "context" in this situation as extraordinary rendition, based on the fact that "[e]xtraordinary rendition is treated as a distinct phenomenon in international law,"[65] and concluded that, because "no court has previously afforded a *Bivens* remedy for extraordinary rendition," the case at bar fell within a "new context."[66] The court did not make clear how extraordinary rendition's status as a "distinct phenomenon in international law" led to its apparent conclusion that Arar's situation had "legal and factual components" that were dissimilar to earlier precedent.

The brevity and lack of clarity in *Arar*'s discussion of the standard of generality to use for *Bivens* step zero creates the potential for later courts to define the standard. Currently, courts consult *Bivens* precedent only during the alternative remedial scheme and special factors analyses. Focusing the precedential inquiry on these two issues tends to be very harmful to plaintiffs, since the courts have set a very low bar for finding alternative remedial schemes and special factors counseling hesitation.[67] Under *Arar*, courts at step zero are not limited to examining only precedent that is relevant to the two prongs of the *Wilkie* test; instead, they may consider other factors (such as the fact that a previous *Bivens* case may have granted protection to the same interest as is asserted in the case at bar or granted a remedy for violation of the same right) in determining whether precedent requires finding a *Bivens* remedy available. Judge Sack, in his dissent in *Arar*, exemplified the possibilities of this approach by looking to the right allegedly violated (the substantive due process right to liberty) instead of possible special factors and alternative remedial schemes in his de-

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world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized").

63 *Arar*, 585 F.3d at 572.

64 *Id.* The court did not cite to any authority for this definition. *Id.*

65 *Id.*

66 *Id.* (internal quotation marks omitted).

67 *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 69 (2001) ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability." (citing Schweiker v. Chilicky, 487 U.S. 412, 425–27 (1988))); *Arar*, 585 F.3d at 574 ("The only relevant threshold — that a factor 'counsels hesitation' — is remarkably low. . . . Hesitation is a pause, not a full stop, or an abstention; and to counsel is not to require.").

termination that the context of the case was not a new one for a *Bivens* remedy.[68] Because of the possibility that the step zero precedential inquiry will look to factors more favorable to plaintiffs, *Arar*'s new formulation holds at least the potential for significant benefit for future *Bivens* plaintiffs.

Of course, some courts in theory already hinge application of the *Wilkie* test on the existence of a new context. *Arar*'s analysis differs from this framework by making the question of whether a new context exists an explicit part of the *Bivens* test. This encourages actual discussion of whether a new context exists, instead of mere assumption of its existence. While it is unknown whether these discussions will produce outcomes more favorable to plaintiffs, especially given the fact that some judges and Justices wish to circumscribe narrowly the reach of *Bivens* precedent,[69] on balance this development seems to favor plaintiffs, since, as discussed above, the default position of the courts that hinge application of the *Wilkie* test on the existence of a new context is that such a new context does exist (a position hostile to *Bivens* plaintiffs). Furthermore, even an unfavorable outcome at step zero would not necessarily make *Bivens* remedies more unobtainable than they are now.

The Second Circuit's opinion in *Arar v. Ashcroft* is hardly a model of clarity regarding its new *Bivens* step zero. However, by reconstructing the *Bivens* test as a three-step inquiry, with the new context question as step zero, and by explicitly discussing the question of whether a new context exists, the opinion introduces an analytical move that may increase the availability of the *Bivens* remedy to plaintiffs. Whether that potential will be realized is now a question for the courts interpreting *Arar*.

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[68] *See Arar*, 585 F.3d at 597–99 (Sack, J., concurring in part and dissenting in part).

[69] *See* Wilkie v. Robbins, 127 S. Ct. 2588, 2608 (2007) (Thomas, J., concurring) (noting that "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action," and concluding that "*Bivens* and its progeny should be limited 'to the precise circumstances that they involved'") (quoting *Malesko*, 534 U.S. at 75 (Scalia, J., concurring) (internal quotation marks omitted)). Justices Thomas and Scalia might not be the only ones to feel this way. *See* Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2006–2007 CATO SUP. CT. REV. 23, 63 ("Justice Souter's opinion [in *Wilkie*], however, suggests so strong an antipathy to the *Bivens* cause of action as to call into question any meaningful distinction between the Court's purported application of *Bivens*, on the one hand, and Justice Thomas's avowal, on the other, that he [would limit *Bivens* to its facts].").