Constitutional Remedies — Bivens *Actions* — Ziglar v. Abbasi

Neither the Constitution nor the U.S. Code states that a federal official who violates a person's constitutional rights may be sued for damages. In its landmark 1971 decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[1] the Supreme Court held that a federal agent who commits an unconstitutional search and seizure can be held liable in damages through a right of action implied under the Fourth Amendment. Over the next decade, the Court twice extended the *Bivens* cause of action into new contexts. In *Davis v. Passman*,[2] the Court held that an employee terminated on account of her sex could seek damages from her former employer, a U.S. Congressman, under the Fifth Amendment. In *Carlson v. Green*,[3] the Court permitted a *Bivens* action under the Eighth Amendment against senior prison officials who exhibited deliberate indifference to an inmate's medical needs. The Court then decided eight consecutive cases in which it held that a *Bivens* action did not lie.[4]

Last Term, in *Ziglar v. Abbasi*,[5] the Court ruled that persons detained after the September 11 attacks could not maintain a *Bivens* action against federal officials responsible for their detention under harsh conditions. *Abbasi* is the ninth successive decision, spanning thirty-four years, in which the Court has chosen to distinguish *Bivens*. If the Court wants to continue distinguishing *Bivens*, for the sake of judicial candor and litigative efficiency it should hold that the *Bivens* cause of action is limited to the facts of *Bivens*, *Davis*, and *Carlson*.

In the wake of the September 11 attacks, the federal government detained hundreds of persons unlawfully present in the United States on suspicion of ties to terrorism.[6] Often the detention lasted for months,[7] notwithstanding the flimsiness of the tip that prompted the arrest.[8] Many detainees were held in the Metropolitan Detention Center (MDC)

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

[2] 442 U.S. 228 (1979).

[3] 446 U.S. 14 (1980).

[4] *See* Minneci v. Pollard, 565 U.S. 118 (2012); Wilkie v. Robbins, 551 U.S. 537 (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] 137 S. Ct. 1843 (2017).

[6] *Id.* at 1851. Most detainees were nationals of heavily Muslim countries. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES 21 (2003), https://oig.justice.gov/special/0306/full.pdf [https://perma.cc/H9SD-KW4J].

[7] *Abbasi*, 137 S. Ct. at 1851.

[8] *See, e.g.*, Turkmen v. Hasty, 789 F.3d 218, 227 n.9 (2d Cir. 2015) ("[One plaintiff] came to the FBI's attention when his landlord called the FBI's 9/11 hotline and reported that she rented an apartment in her home to several Middle Eastern men, and she would feel awful if her tenants were involved in terrorism and she didn't call." (internal quotation marks omitted)).

in Brooklyn, where the conditions of confinement were severe. Detainees were frequently strip-searched, could rarely leave their small cells (which were kept lit at all hours), and were often held incommunicado.[9] Guards allegedly abused the detainees.[10]

The instant litigation began in 2002.[11] Several detainees filed a putative class action in federal court, alleging violations of their constitutional rights by executive branch officials Attorney General John Ashcroft, FBI Director Robert Mueller, and INS Commissioner James Ziglar, and by MDC officials, including Warden Dennis Hasty.[12] The operative complaint, filed in 2010,[13] set forth *Bivens* claims under several constitutional amendments and alleged a conspiracy to commit civil rights violations under 42 U.S.C. § 1985(3).[14]

The Eastern District of New York dismissed the case against Ashcroft, Mueller, and Ziglar but allowed most of the claims against the MDC defendants to proceed.[15] A divided Second Circuit panel affirmed in part, reversed in part, and remanded, reviving many of the claims against Ashcroft, Mueller, and Ziglar.[16] In sustaining certain *Bivens* claims, the majority analogized to *Carlson*, which also concerned conditions of confinement.[17] Judge Raggi wrote separately. She thought the instant *Bivens* claims differed meaningfully from those previously recognized by the Supreme Court and would have dismissed the action on that ground.[18] By an evenly divided vote, the Second Circuit denied rehearing en banc.[19]

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[9] *Abbasi*, 137 S. Ct. at 1853.

[10] *Id.*; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK 29 (2003), https://oig.justice.gov/special/0312/final.pdf [https://perma.cc/UCD7-2RYZ] ("One detainee stated that when the detainees prayed . . . officers said things like, 'Shut the fuck up! Don't pray. Fucking Muslim. You're praying bullshit.' Another detainee alleged that when the officers were mistreating the detainees, the officers sometimes said, 'Welcome to America.'").

[11] Turkmen v. Ashcroft, 915 F. Supp. 2d 314, 331 (E.D.N.Y. 2013).

[12] Class Action Complaint and Demand for Jury Trial, *Turkmen*, 915 F. Supp. 2d 314 (No. 02-CV-2307), 2002 WL 33002527.

[13] After the Supreme Court's 2009 decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), another 9/11 detainee case arising out of the same facts, the plaintiffs filed the complaint at issue in *Abbasi*. *Abbasi*, 137 S. Ct. at 1852. For a detailed discussion of the litigation's procedural history, see *Turkmen*, 915 F. Supp. 2d at 331–33.

[14] *Turkmen*, 915 F. Supp. 2d at 324, 331. Unlike the more frequently litigated § 1983, § 1985(3) is not limited in scope to state officials. *Compare* 42 U.S.C. § 1983 (2012), *with id.* § 1985(3).

[15] *Turkmen*, 915 F. Supp. 2d at 324, 358. The district court was principally concerned with issues of federal pleading standards and qualified immunity, not *Bivens*.

[16] Turkmen v. Hasty, 789 F.3d 218, 264–65 (2d Cir. 2015).

[17] *Id.* at 235. Although the panel discussed *Bivens* at some length, *see id.* at 233–37, it devoted the bulk of its opinion to an examination of federal pleading standards, qualified immunity, and the alleged underlying constitutional violations.

[18] *See id.* at 265 (Raggi, J , concurring in part in the judgment and dissenting in part).

[19] Turkmen v. Hasty, 808 F.3d 197, 197–98 (2d Cir. 2015).

On certiorari, two types of *Bivens* claims remained live. The plaintiffs' detention policy claims alleged that the executive branch and MDC defendants abridged their Fifth Amendment rights by detaining them under punitive pretrial conditions (a due process violation) on account of their race, religion, or national origin (an equal protection violation).[20] The plaintiffs' prisoner abuse claim alleged that MDC Warden Hasty violated the Fifth Amendment by knowingly allowing his subordinates to engage in abuse.[21]

A shorthanded Supreme Court,[22] through Justice Kennedy,[23] reversed on the detention policy claims and vacated and remanded on the prisoner abuse claim. The Court began by describing the evolution of *Bivens*. *Bivens*, *Davis*, and *Carlson* were decided during an "*ancien regime*," an era when the Court would sometimes imply a cause of action into otherwise-bare statutory or constitutional text.[24] That approach later fell out of favor, first for statutes,[25] then for the Constitution.[26] Today, "expanding the *Bivens* remedy" into a new context is "disfavored."[27]

In a *Bivens* action brought today, the Court explained, the first question is whether the case arises in a new context. Does it "differ[] in a meaningful way" from the Court's three decisions recognizing *Bivens* actions?[28] *Abbasi* provided a set of factors that might so distinguish a case, including "the constitutional right at issue" and "the rank of the officers involved."[29] If the context is familiar, the claim may proceed. But if the context is new, a court must determine whether there are "special factors" that preclude a *Bivens* remedy.[30] Are the courts well

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[20] *See Abbasi*, 137 S. Ct. at 1853–54, 1858–59. The detention policy claims also included the plaintiffs' allegation that the MDC defendants violated their Fourth and Fifth Amendment rights by frequently conducting punitive strip searches. *See id.*

[21] *See id.* at 1853–54, 1858–59, 1863. The § 1985(3) civil conspiracy claim also remained live. *Id.* at 1865.

[22] Justices Sotomayor, Kagan, and Gorsuch took no part in the consideration or decision of the case. *Id.* at 1869. Six Justices are the minimum required to constitute a quorum of the Court. 28 U.S.C. § 1 (2012).

[23] Justice Kennedy's opinion was joined in full by Chief Justice Roberts and Justice Alito. Justice Thomas joined all but a single paragraph remanding the special factors analysis on the prisoner abuse claim. *See Abbasi*, 137 S. Ct. at 1851, 1865.

[24] *Id.* at 1855 (quoting Alexander v. Sandoval, 532 U.S. 275, 287 (2001)).

[25] *See Alexander*, 532 U.S. 275; Cannon v. Univ. of Chi., 441 U.S. 677 (1979); Cort v. Ash, 422 U.S. 66 (1975).

[26] *See Abbasi*, 137 S. Ct. at 1855–58.

[27] *Id.* at 1857 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).

[28] *Id.* at 1859.

[29] *Id.* at 1860. The other factors are: "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; [and] the presence of potential special factors that previous *Bivens* cases did not consider." *Id.*

[30] *Id.* at 1857 (quoting Carlson v. Green, 446 U.S. 14, 18 (1980)).

suited, in place of Congress, to decide that an action for damages should lie?[31] A special factor "cause[s] a court to hesitate before answering that question in the affirmative."[32] Finally, the presence of an alternative remedy "alone may limit the power of the Judiciary to infer a new *Bivens* cause of action."[33]

Applying this test, the Court dismissed the detainees' detention policy claims.[34] Those claims, which challenged conditions of confinement imposed after a catastrophic terrorist attack, bore "little resemblance to the three *Bivens* claims the Court ha[d] approved in the past."[35] Thus they arose in a new context, prompting a consideration of special factors that amply weighed against permitting a *Bivens* action. Allowing a *Bivens* suit would "requir[e] an inquiry into sensitive issues of national security" and would occasion interference with "sensitive functions of the Executive Branch."[36] Further, in light of Congress's "frequent and intense" interest in the MDC, the legislature's failure to enact a damages remedy was telling.[37] Finally, as an alternative remedy, the detainees might have filed a habeas petition, although the Court acknowledged it had never held that habeas can be used to challenge conditions of confinement.[38]

The Court considered separately the prisoner abuse claim against MDC Warden Hasty. Here the new context question was closer: the suit against Hasty had "significant parallels" to *Carlson*, which also involved a warden's mistreatment of a prisoner.[39] Still, the new context inquiry was "easily satisfied,"[40] in part because the detainees' claim concerned the Fifth Amendment, not the Eighth, as in *Carlson*.[41] The Court then vacated and remanded on the prisoner abuse claim, directing the courts below to conduct the special factors analysis.[42]

The Court also held that each defendant was entitled to qualified immunity on the § 1985(3) civil conspiracy claim. There is a longstanding circuit split on whether officials in the same government department can conspire with each other, the Court noted.[43] It would be "unfair,"

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[31] *Id.*

[32] *Id.* at 1858.

[33] *Id.*

[34] *Id.* at 1863.

[35] *Id.* at 1860.

[36] *Id.* at 1861.

[37] *Id.* at 1862 (quoting Schweiker v. Chilicky, 487 U.S. 412, 425 (1988)).

[38] *See id.* at 1862–63 (citing Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979); Preiser v. Rodriguez, 411 U.S. 475, 499 (1973)).

[39] *Id.* at 1864.

[40] *Id.* at 1865.

[41] *Id.* at 1864. The Court also noted that the judicial guidance available to Hasty wasn't as clear as that available to the prison officials in *Carlson*. *Id.* at 1864–65.

[42] *Id.* at 1865 (opinion of Kennedy, J.).

[43] *Id.* at 1868 (majority opinion).

the Court explained, "to subject officers to damages liability when even 'judges . . . disagree.'"[44]

Justice Breyer dissented.[45] The Court erred at each step in its analysis, he argued.[46] First, the context was not new. Justice Breyer criticized in particular the Court's distinguishing of *Carlson*. On the prisoner abuse claim, "the only difference in constitutional scope consist[ed] of a circumstance" — the lack of a conviction — "that ma[de] the violation here worse."[47] Second, there was likely no alternative remedy available to persons detained under a "communications blackout."[48] Third, there were no special factors counselling hesitation. He regarded each factor discussed by the Court as nondeterminative.[49]

Justice Breyer did not share the Court's aversion to *Bivens*.[50] Because 42 U.S.C. § 1983 provides a damages remedy to those whose constitutional rights are infringed by *state* officials, the absence of a *Bivens* remedy would "amount to a constitutional anomaly."[51] He rejected "the Court's strongest argument": "that *Bivens* should not apply to policy-related actions taken in times of national-security need."[52] Invoking *Korematsu v. United States*,[53] he concluded his dissent by observing that *Bivens* actions may prove essential when the government claims wartime exigency as an excuse.[54]

"Cases that get distinguished often enough are commonly said to die — or at least to suffer near-death experiences."[55] So too for *Bivens*, *Davis*, and *Carlson*. Through *Abbasi* and its forebears, those cases have "slowly become mere ghosts of their former selves, barely clinging to

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[44] *Id.* (quoting Wilson v. Layne, 526 U.S. 603, 618 (1999) (alteration in original)). Justice Thomas, concurring in part and concurring in the judgment, wrote separately. He reiterated his refusal to extend *Bivens* in any manner whatsoever and would have reversed, not vacated and remanded, the Second Circuit's disposition of the claim against Hasty. *Id.* at 1870 (Thomas, J., concurring in part and concurring in the judgment). He also expressed qualms about the Court's qualified immunity jurisprudence, which he felt should more closely track the nineteenth-century common law. *Id.* at 1870–72.

[45] Justice Ginsburg joined Justice Breyer's dissent.

[46] He also criticized the Court for muddling the *Bivens* steps. *See Abbasi*, 137 S. Ct. at 1881–82 (Breyer, J., dissenting).

[47] *Id.* at 1877.

[48] *Id.* at 1879.

[49] *Id.* at 1880–82.

[50] "Congress has ratified *Bivens* actions, plaintiffs frequently bring them, courts accept them, and scholars defend their importance." *Id.* at 1872.

[51] *Id.* at 1875 ("[Our] 'constitutional design' . . . 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." (alteration in original) (quoting Carlson v. Green, 446 U.S. 14, 22 (1980))).

[52] *Id.* at 1882.

[53] 323 U.S. 214 (1944).

[54] *Abbasi*, 137 S. Ct. at 1884 (Breyer, J., dissenting).

[55] BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 101 (2016).

existence."[56] The Court's decision in *Abbasi* hastens the spectral process. Most actions will not survive its three-part test, due in part to *Abbasi*'s unorthodox manner of distinguishing cases. If the Court wants to persist in distinguishing *Bivens* at every turn, in the interest of judicial candor and litigative efficiency it should hold that the *Bivens* action is limited to the facts of its original three *Bivens* decisions.

The Court is already close to limiting the *Bivens* cause of action to the circumstances of *Bivens*, *Davis*, and *Carlson*, as it will be very difficult for any case not presenting those facts to survive *Abbasi*'s three-part test.[57] Consider the new context analysis and the Court's distinguishing of *Carlson*. Despite the "modest"[58] difference between the warden claims in *Carlson* and *Abbasi*, the Court found the new context inquiry "easily satisfied."[59] As Justice Breyer observed, the principal difference between the two cases — that *Carlson* involved the Eighth Amendment and *Abbasi* the Fifth — served only to make "the violation here *worse*."[60] Detainees, unlike convicted prisoners, cannot invoke the Cruel and Unusual Punishments Clause only because they cannot, in a legal sense, be punished at all.[61] The new context inquiry is quite exacting if the Court can distinguish *Carlson* on this ground.[62]

Often then the context will be new, prompting a court to ask whether a sufficient alternative remedy exists. After *Abbasi*, an alternative remedy like habeas may suffice even if: (1) the plaintiffs, held incommunicado, had no way to avail themselves of the remedy;[63] (2) the nation was so anxious that a court might have hesitated to grant relief;[64] and (3) there is a credible argument that the suggested remedy did not, as a

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[56] WILLIAM O. DOUGLAS, WE THE JUDGES 199 (1956).

[57] *See* Michael Dorf, *SCOTUS Severely Narrows Civil Rights Suits Against Federal Officers*, DORF ON LAW (June 19, 2017, 12:44 PM), http://www.dorfonlaw.org/2017/06/scotus-severely-narrows-civil-rights.html [https://perma.cc/5HAQ-4PCP] ("The *Abbasi* decision now all but overrules *Bivens*."). *But see* Richard M. Re, *The Nine Lives of* Bivens, PRAWFSBLAWG (June 22, 2017, 8:30 AM), http://prawfsblawg.blogs.com/prawfsblawg/2017/06/the-nine-lives-of-bivens.html [https://perma.cc/ZV77-3SYH] (arguing that the contention that *Abbasi* has limited *Bivens* to its facts is overstated).

[58] *Abbasi*, 137 S. Ct. at 1864; *see also id.* (noting the "significant parallels"); *id.* at 1865 (conceding that "[t]he differences between this claim and the one in *Carlson* are perhaps small").

[59] *Id.* at 1865.

[60] *Id.* at 1877 (Breyer, J., dissenting) (emphasis added).

[61] *Id.* at 1877–78.

[62] *Carlson* aside, the *Abbasi* Court listed seven differences "meaningful enough to make a given context a new one." *Id.* at 1859–60 (majority opinion). The list includes a catch-all: "the presence of potential special factors that previous *Bivens* cases did not consider." *Id.* at 1860. The explicit inclusion of such a factor can be read as a further invitation to distinguish cases. *Cf.* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 20 (1989) (observing that if a court "could escape the constraint of a precedent rule by citing *any* factual distinctions," the precedent would have little force indeed).

[63] *See Abbasi*, 137 S. Ct. at 1879 (Breyer, J., dissenting).

[64] *See id.* at 1884.

matter of law, exist.[65] This is a lenient standard. Further, even the *absence* of alternative relief may undermine a *Bivens* action. In *Abbasi*, the Court cited as a special factor Congress's failure to enact a damages remedy for the alleged abuse at the MDC.[66] If either the existence or absence of an alternative remedy can defeat a claim, *Bivens* plaintiffs are in a double bind.

Absent the new context inquiry, it is unlikely that even *Bivens*, *Davis*, or *Carlson* would survive the *Abbasi* Court's test. At a minimum the alternative remedy available in each case would likely suffice to defeat a *Bivens* claim. Webster Bivens had state trespass law.[67] A modern-day plaintiff in Shirley Davis's shoes could invoke the Congressional Accountability Act of 1995.[68] The *Carlson* plaintiff could sue under a federal tort statute.[69] When the Court writes that the analysis in its three *Bivens* cases might have been different if decided today,[70] it's true not only because the background principles governing implied causes of action have changed. Without a saving clause — the new context inquiry — those cases would not survive *Abbasi*.

This is an unusual way to distinguish cases. On one familiar theory, to distinguish a precedent a court will take a rule from an earlier case and add a condition. But the refined rule must fit the facts and outcome of the earlier case.[71] Soon after *Bivens* was decided, for example, some lower courts held that its implied cause of action was limited to Fourth Amendment violations.[72] That narrow rule fit the facts and outcome of *Bivens*, at least until *Davis* was decided. In contrast, *Abbasi*'s alternative remedy inquiry likely precludes the outcomes of *Bivens*, *Davis*, and

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[65] There is a deep circuit split on whether plaintiffs may use habeas to challenge their conditions of confinement. *See* Spencer v. Haynes, 774 F.3d 467, 470–71 (8th Cir. 2014); Aamer v. Obama, 742 F.3d 1023, 1031–38 (D.C. Cir. 2014).

[66] The Court found "the silence of Congress . . . relevant" and "telling." *Abbasi*, 137 S. Ct. at 1862.

[67] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390–91 (1971); *cf.* Minneci v. Pollard, 565 U.S. 118, 125–31 (2012) (holding that the existence of state tort law as an alternative remedy defeated the plaintiff's *Bivens* claim).

[68] 2 U.S.C. §§ 1301–1438 (2012). The Act, which extended Title VII's coverage to congressional employees, *see* §§ 1301(3), 1302(a)(2), 1311, may have effectively abrogated *Davis*. Some courts have held that the Act, as an alternative remedy, precludes congressional employees from bringing a *Bivens* action challenging an employment decision. *See* Hamilton-Hayyim v. Jackson, No. 12-CV-06392, 2013 WL 3944288, at *11 (N.D. Ill. July 31, 2013); Packer v. U.S. Comm'n on Sec. & Cooperation in Eur., 843 F. Supp. 2d 44, 47–49 (D.D.C. 2012).

[69] Carlson v. Green, 446 U.S. 14, 16–23 (1980). Further, both *Davis* and *Carlson*, as suits against a U.S. Congressman and the Director of the Federal Bureau of Prisons, would likely have triggered *Abbasi*'s factor weighing the "rank of the officers involved." *Abbasi*, 137 S. Ct. at 1860.

[70] *Abbasi*, 137 S. Ct. at 1856.

[71] *See* JOSEPH RAZ, THE AUTHORITY OF LAW 186 (1979).

[72] *See, e.g.*, Archuleta v. Callaway, 385 F. Supp. 384, 388 (D. Colo. 1974); Moore v. Schlesinger, 384 F. Supp. 163, 165 (D. Colo. 1974); Davidson v. Kane, 337 F. Supp. 922, 924 (E.D. Va. 1972).

Carlson. So the Court has grandfathered them in as "old contexts," legacy exceptions to the general rule.

This unusual manner of distinguishing is understandable, because there is no coherent theory that would allow a remedy on the facts of *Bivens*, *Davis*, and *Carlson* and only on those facts. In other words, there is no common logical thread that links those three cases and also excludes the Court's nine decisions rejecting *Bivens* claims. After deciding *Bivens*, the Court might have followed an internally coherent course. It could have expanded the remedy into the federal-official equivalent of § 1983.[73] When its approach to implied causes of action shifted, the Court could have done away with *Bivens* altogether. Or it could have found a justifiable middle ground, like "*Bivens* for only the most egregious violations."[74] The Court has done none of those things, instead choosing to distinguish *Bivens*, one case at a time, for thirty-four years. Path dependence best explains why some fact patterns support a *Bivens* action today and others not.[75] But that is a matter of chance — that certain cases were heard in one era and others later — and not logic.

If the Court wants to continue distinguishing *Bivens*, it could promote the values of judicial candor and litigative efficiency by expressly limiting the *Bivens* action to the facts of *Bivens*, *Davis*, and *Carlson*.[76] The Court acts candidly when it says what it means.[77] With *Abbasi*, the Court has sent its clearest signal yet that it wants to confine *Bivens* to its three old contexts. But until the Court so states, *Bivens* will continue to provoke (or prolong) litigation that is unlikely to succeed.[78]

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[73] *See Abbasi*, 137 S. Ct. at 1855.

[74] The Court certainly has not created a *Bivens* remedy that lies only for the most harmful constitutional violations. *Compare, e.g.*, Davis v. Passman, 442 U.S. 228 (1979) (permitting *Bivens* action for discriminatory termination resulting in loss of job), *with* United States v. Stanley, 483 U.S. 669 (1987) (rejecting *Bivens* action for secret medical experimentation resulting in hallucinations, memory loss, and divorce).

[75] *Cf.* Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 650 (2001).

[76] To be sure, there are other values besides candor and efficiency. One instrumental argument for maintaining the *Bivens* doctrine in its present state is that the Court's lack of clarity may deter a wider range of official misconduct than would an explicit holding that *Bivens* is limited to certain facts. *Cf.* John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 966 (1984). But this argument involves several assumptions. It assumes that federal officials are aware of *Bivens*'s existence, that they modify their conduct in light of its existence, that they perceive *Bivens*'s scope as wider than it truly is, and that an explicit holding otherwise would correct their misperception.

[77] *See* David L. Shapiro, Essay, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 734, 739, 750 (1987).

[78] There is some play left in the joints even after *Abbasi*. *Cf.* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 46 (2010) ("The first evil of stealth overruling is that . . . it makes it difficult if not impossible for the lower courts to know what they are being instructed to do."); Suzanna Sherry, *The Unmaking of a Precedent*, 2003 SUP. CT. REV. 231, 255–56.

The two *Bivens* cases that continue on remand after last Term illustrate how clearer guidance would help resolve long-running litigation. *Abbasi* has lasted fifteen years; the other, involving the cross-border shooting of a Mexican national,[79] has lasted seven. Both cases likely will be resolved against the plaintiffs — eventually. On the prisoner abuse claim in *Abbasi*, the Court described special factors and alternative remedies that will be difficult for the plaintiffs to overcome.[80] The cross-border case assuredly arises in a new context.[81] Yet that litigation alone has prompted more than a dozen opinions at four stages of litigation, with more to come.[82]

The Court does occasionally limit a disfavored decision to its facts in order to quiet litigation.[83] In 1922, the Court held that professional baseball teams, despite their "constantly repeated travelling" across interstate lines, did not engage in interstate commerce and thus were exempt from the Sherman Antitrust Act.[84] Later the Court's conception of commerce changed, calling the 1922 holding into serious doubt.[85] In a series of cases heard in the 1950s, the Court refused either to extend baseball's antitrust exemption to similar forms of sport and entertainment[86] or to overrule the earlier decision, citing Congress's failure to act.[87] Still litigation persisted as parties argued for the extension of the exemption to new industries.[88]

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[79] Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (per curiam).

[80] *See Abbasi*, 137 S. Ct. at 1865.

[81] *See Hernandez*, 137 S. Ct. at 2008 (Thomas, J., dissenting) ("This case arises in circumstances that are meaningfully different from those at issue in *Bivens* and its progeny. Most notably, this case involves cross-border conduct, and those cases did not.").

[82] *See id.*; Hernandez v. United States, 785 F.3d 117 (5th Cir. 2015) (en banc) (per curiam); Hernandez v. United States, 757 F.3d 249 (5th Cir. 2014); Hernandez v. United States, 802 F. Supp. 2d 834 (W.D. Tex. 2011).

[83] For additional examples of the Court limiting a case to its facts, see generally Chad Flanders, Comment, Bush v. Gore *and the Uses of "Limiting*,*"* 116 YALE L.J. 1159 (2007). For examples of the Court narrowing a precedent into near-oblivion, a related phenomenon, see Richard M. Re, Essay, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1889–95 (2014); Frederick Schauer, *The* Miranda *Warning*, 88 WASH. L. REV. 155, 156 n.9 (2013); Friedman, *supra* note 78, at 16–25. *Bivens* is little discussed in the scholarship on limiting and narrowing.

[84] Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208 (1922).

[85] *See, e.g.*, Gardella v. Chandler, 172 F.2d 402, 409 (2d Cir. 1949) (opinion of Frank, J.) (referring to the *Federal Baseball* decision as "an impotent zombi").

[86] United States v. Int'l Boxing Club of N.Y., Inc., 348 U.S. 236, 241–42 (1955) (refusing to extend the *Federal Baseball* exemption to boxing exhibitions); United States v. Shubert, 348 U.S. 222, 227–28 (1955) (same for theatrical exhibitions). The Court acknowledged that these distinctions were "unrealistic, inconsistent, [and] illogical." Radovich v. Nat'l Football League, 352 U.S. 445, 452 (1957).

[87] Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953) (per curiam).

[88] *See, e.g.*, Radovich v. Nat'l Football League, 231 F.2d 620 (9th Cir. 1956), *rev'd*, 352 U.S. 445 (1957); Pappas v. Am. Guild of Variety Artists, 125 F. Supp. 343 (N.D. Ill. 1954); United States v. Shubert, 120 F. Supp. 15 (S.D.N.Y. 1953), *rev'd*, 348 U.S. 222 (1955).

Finally, seemingly exasperated by the failure of litigants and lower courts to get the message,[89] the Court made clear that its 1922 decision was "specifically limit[ed] . . . to the facts there involved, i.e., the business of organized professional baseball."[90] The Court could say the same for *Bivens*, *Davis*, and *Carlson*. Here as there, the legal underpinnings of a precedent have eroded and the Court has stated that any extension must be legislative, not judicial.[91] Having refused to extend *Bivens* on nine occasions yet apparently unwilling to overrule it outright,[92] the explicit limitation of *Bivens*, *Davis*, and *Carlson* to their facts is a logical next step.[93]

The foregoing is offered in service of moving the *Bivens* doctrine to a more sensible resting place. But we should be mindful that *Bivens*, unlike baseball, is not a game. It is deeply troubling that the *Abbasi* plaintiffs and those like them are left without an effective remedy for constitutional wrongs by federal officials.[94] With *Bivens* now at a low ebb — whether limited to its facts or not — the courts are unlikely to afford relief in all but the narrowest circumstances. *Abbasi* makes plain that real redress will be scant unless Congress acts.[95]

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89 "It seems that [discussions of *Federal Baseball* in recent decisions] would have made it clear that the Court intended to isolate these cases by limiting them to baseball, but . . . *Toolson* and *Federal Baseball* are still cited as controlling authority in antitrust actions involving other fields of business . . . ." *Radovich*, 352 U.S. at 451.

90 *Id.*

91 Of course *Bivens*, unlike *Federal Baseball*, has constitutional dimensions. *See* Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 23–24 (1975); Ryan D. Newman, Note, *From* Bivens *to* Malesko *and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L. REV. 471, 506 n.214 (2006). Insofar as there are different stare decisis principles for statutory and constitutional cases, *see* GARNER ET AL., *supra* note 55, at 333–45, 352–69, perhaps the principles that govern narrowing a precedent to its facts also differ for different types of cases.

92 The prospect of overruling *Bivens* is not as radical as it might have once seemed. It does not bode well for *Bivens* when the Court feels compelled to note that its "opinion is not intended to cast doubt on the continued force" of that precedent. *Abbasi*, 137 S. Ct. at 1856; *see also id.* at 1884 (Breyer, J., dissenting) (criticizing "the Court's abolition, or limitation of, *Bivens* actions"). While the *Abbasi* Court invoked reliance as a reason to retain *Bivens*, *see id.* at 1857 (majority opinion), whatever reliance *Bivens* has engendered is not the same as that typically meant in the stare decisis sense. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (noting that "the classic case for weighing reliance heavily . . . occurs in the commercial context"); GARNER ET AL., *supra* note 55, at 401; Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 947 (1962).

93 For thoughtful criticism of the call for a principled stopping point for oft-distinguished cases, see Re, *supra* note 83, at 1885–86.

94 The Court seems to agree. *See Abbasi*, 137 S. Ct. at 1869 ("If the facts alleged in the complaint are true, then what happened to [the plaintiffs] in the days following September 11 was tragic. Nothing in this opinion should be read to condone the treatment to which they contend they were subjected."); *see also* Hernandez v. Mesa, 137 S. Ct. 2003, 2007 (2017) (per curiam).

95 "In a rational world, Congress would step in by expanding Section 1983 to include suits against federal officers." Dorf, *supra* note 57. Real redress may be scant even then. *See Abbasi*, 137 S. Ct. at 1883 (Breyer, J., dissenting) (noting that *Bivens* plaintiffs must also surmount qualified immunity and *Iqbal* pleading hurdles).