Constitutional Torts
Fourth Edition

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2018 Supplement

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Table of Contents

Chapter 1 Constitutional Torts: A First Look

The Court offered guidance on a complex set of questions involving *Bivens* claims during the October 2016 term in *Ziglar* v. *Abbassi*. As in *Iqbal* and *Arar*, plaintiffs' allegations implicated federal officials' decisions and behavior in the aftermath of the September 11 terrorist attacks. Specifically, plaintiffs sought damages against federal officials, contending that these officials authorized their detention in violation of the Fourth and Fifth Amendments to the United States Constitution, and then subsequently allowed them to be subjected to physical and mental abuse without a penological justification.

ZIGLAR v. ABBASI
137 S. Ct. 1843 (2017)

Justice KENNEDY delivered the opinion of the Court, except as to Part IV–B.

After the September 11 terrorist attacks in this country, and in response to the deaths, destruction, and dangers they caused, the United States Government ordered hundreds of illegal aliens to be taken into custody and held. Pending a determination whether a particular detainee had connections to terrorism, the custody, under harsh conditions to be described, continued. In many instances custody lasted for days and weeks, then stretching into months. Later, some of the aliens who had been detained filed suit, leading to the cases now before the Court.

The complaint named as defendants three high executive officers in the Department of Justice and two of the wardens at the facility where the detainees had been held. Most of the claims, alleging various constitutional violations, sought damages under the implied cause of action theory adopted by this Court in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

I.

Given the present procedural posture of the suit, the Court accepts as true the facts alleged in the complaint. See *Iqbal*, 556 U.S., at 678.

A.

In the weeks following the September 11, 2001, terrorist attacks—the worst in American history—the Federal Bureau of Investigation (FBI) received more than 96,000 tips from members of the public. See *id*., at 667. Some tips were based on well-grounded suspicion of terrorist activity, but many others may have been based on fear of Arabs and Muslims. FBI agents "questioned more than 1,000 people with suspected links to the [September 11] attacks in particular or to terrorism in general." Ibid.

While investigating the tips—including the less substantiated ones—the FBI encountered many aliens who were present in this country without legal authorization. As a result, more than 700 individuals were arrested and detained on immigration charges. Ibid. If the FBI designated an alien as not being "of interest" to the investigation, then he or she was processed according to normal procedures. In other words the alien was treated just as if, for example, he or she had been arrested at the border after an illegal entry. If, however, the FBI designated an alien as "of interest" to the investigation, or if it had doubts about the proper designation in a particular case, the alien was detained subject to a "hold-until-cleared policy." The aliens were held without bail.

Respondents were among some 84 aliens who were subject to the hold-until-cleared policy and detained at the Metropolitan Detention Center (MDC) in Brooklyn, New York. The complaint includes these allegations: Conditions in the Unit were harsh. Pursuant to official Bureau of Prisons policy, detainees were held in " 'tiny cells for over 23 hours a day.' " 789 F.3d, at 228. Lights in the cells were left on 24 hours. Detainees had little opportunity for exercise or recreation. They were forbidden to keep anything in their cells, even basic hygiene products such as soap or a toothbrush. When removed from the cells for any reason, they were shackled and escorted by four guards. They were denied access to most forms of communication with the outside world. And they were strip searched often—any time they were moved, as well as at random in their cells.

Some of the harsh conditions in the Unit were not imposed pursuant to official policy. According to the complaint, prison guards engaged in a pattern of "physical and verbal abuse." Ibid. Guards allegedly slammed detainees into walls; twisted their arms, wrists, and fingers; broke their bones; referred to them as terrorists; threatened them with violence; subjected them to humiliating sexual comments; and insulted their religion.

B.

Respondents are six men of Arab or South Asian descent. Five are Muslims. Each was illegally in this country, arrested during the course of the September 11 investigation, and detained in the Administrative Maximum Special Housing Unit for periods ranging from three to eight months. After being released respondents were removed from the United States.

Respondents then sued on their own behalf, and on behalf of a putative class, seeking compensatory and punitive damages, attorney's fees, and costs. Respondents, it seems fair to conclude from the arguments presented, acknowledge that in the ordinary course aliens who are present in the United States without legal authorization can be detained for some period of time. But here the challenge is to the conditions of their confinement and the reasons or motives for imposing those conditions. The gravamen of their claims was that the Government had no reason to suspect them of any connection to terrorism, and thus had no legitimate reason to hold them for so long in these harsh conditions.

As relevant here, respondents sued two groups of federal officials. The first group consisted of former Attorney General John Ashcroft, former FBI Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar. This opinion refers to these three petitioners as the "Executive Officials." The other petitioners named in the complaint were the MDC's warden, Dennis Hasty, and associate warden, James Sherman. This opinion refers to these two petitioners as the "Wardens."

Seeking to invoke the Court's decision in *Bivens*, respondents brought four claims under the Constitution itself. First, respondents alleged that petitioners detained them in harsh pretrial conditions for a punitive purpose, in violation of the substantive due process component of the Fifth Amendment. Second, respondents alleged that petitioners detained them in harsh conditions because of their actual or apparent race, religion, or national origin, in violation of the equal protection component of the Fifth Amendment. Third, respondents alleged that the Wardens subjected them to punitive strip searches unrelated to any legitimate penological interest, in violation of the Fourth Amendment and the substantive due process component of the Fifth Amendment. Fourth, respondents alleged that the Wardens knowingly allowed the guards to abuse respondents, in violation of the substantive due process component of the Fifth Amendment.

C.

The District Court dismissed the claims against the Executive Officials but allowed the claims against the Wardens to go forward. The Court of Appeals affirmed in most respects as to the Wardens, though it held that the prisoner abuse claim against the associate warden should have been dismissed. 789 F.3d, at 264–265. As to the Executive Officials, however, the Court of Appeals reversed, reinstating respondents' claims. Ibid.

II.

The question to be discussed is whether petitioners can be sued for damages under *Bivens* and the ensuing cases in this Court defining the reach and the limits of that precedent.

A.

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*. 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. See 403 U.S., at 397. The Court acknowledged that the Fourth Amendment does not provide for money damages "in so many words." Id., at 396,

91 S.Ct. 1999. 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. Id., at 396–397. The Court, accordingly, held that it could authorize a remedy under general principles of federal jurisdiction. See id., at 392.

In the decade that followed, the Court recognized what has come to be called an implied cause of action in two cases involving other constitutional violations. In *Davis v. Passman*, 442 U.S. 228 (1979), an administrative assistant sued a Congressman for firing her because she was a woman. The Court held that the Fifth Amendment Due Process Clause gave her a damages remedy for gender discrimination. Id., at 248–249. And in *Carlson v. Green*, 446 U.S. 14 (1980), a prisoner's estate sued federal jailers for failing to treat the prisoner's asthma. The Court held that the Eighth Amendment Cruel and Unusual Punishments Clause gave him a damages remedy for failure to provide adequate medical treatment. See id., at 19, 100 S.Ct. 1468. These three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself.

B.

To understand *Bivens* and the two 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," *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), the Court assumed it to be a proper judicial function to "provide such remedies as are necessary to make effective" a statute's purpose, *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself.

C.

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. *Sandoval*, 532 U.S., at 286. If the statute itself does not "displa[y] an intent" to create "a private remedy," then "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id*., at 286–287.

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. 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.

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. *Iqbal*, 556 U.S., at 675. This is in accord with the Court's observation that it has "consistently refused to extend *Bivens* to any new context or new category of defendants." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001). Indeed, the Court has refused to do so for the past 30 years.

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. In most instances, the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability.

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.

It is not necessarily a judicial function to establish whole categories of cases in which federal officers must defend against personal liability claims in the complex sphere of litigation, with all of its burdens on some and benefits to others. It is true that, if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations. Yet the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide. Those matters include the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies. These and other considerations may

make it less probable that Congress would want the Judiciary to entertain a damages suit in a given case.

Sometimes there will be doubt because the case arises in a context in which Congress has designed its regulatory authority in a guarded way, making it less likely that Congress would want the Judiciary to interfere. And sometimes there will be doubt because some other feature of a case—difficult to predict in advance—causes a court to pause before acting without express congressional authorization. In sum, if 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.

III.

It is appropriate now to turn to the *Bivens* claims challenging the conditions of confinement imposed on respondents pursuant to the formal policy adopted by the Executive Officials in the wake of the September 11 attacks. The Court will refer to these claims as the "detention policy claims." The detention policy claims allege that petitioners violated respondents' due process and equal protection rights by holding them in restrictive conditions of confinement; the claims further allege that the Wardens violated the Fourth and Fifth Amendments by subjecting respondents to frequent strip searches.

A.

Before allowing respondents' detention policy claims to proceed under *Bivens*, the Court of Appeals did not perform any special factors analysis at all. 789 F.3d, at 237. The reason, it said, was that the special factors analysis is necessary only if a plaintiff asks for a *Bivens* remedy in a new context. And in the Court of Appeals' view, the context here was not new.

To determine whether the *Bivens* context was novel, the Court of Appeals employed a two-part test. First, it asked whether the asserted constitutional right was at issue in a previous *Bivens* case. Second, it asked whether the mechanism of injury was the same mechanism of injury in a previous *Bivens* case. Under the Court of Appeals' approach, if the answer to both questions is "yes," then the context is not new and no special factors analysis is required.

That approach is inconsistent with the analysis in *Malesko*. Before the Court decided that case, it had approved a *Bivens* action under the Eighth Amendment against federal prison officials for failure to provide medical treatment. In *Malesko*, the plaintiff sought relief against a private prison operator in almost parallel circumstances. 534 U.S., at 64. In both cases, the right at issue was the same: the Eighth Amendment right to be

free from cruel and unusual punishment. And in both cases, the mechanism of injury was the same: failure to provide adequate medical treatment. Thus, if the approach followed by the Court of Appeals is the correct one, this Court should have held that the cases arose in the same context, obviating any need for a special factors inquiry.

That, however, was not the controlling analytic framework in *Malesko*. Even though the right and the mechanism of injury were the same as they were in Carlson, the Court held that the contexts were different. The Court explained that special factors counseled hesitation and that the *Bivens* remedy was therefore unavailable.

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.

B.

After considering the special factors necessarily implicated by the detention policy claims, the Court now holds that those factors show that whether a damages action should be allowed is a decision for the Congress to make, not the courts.

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." *Malesko*, supra, at 74. Furthermore, a *Biviens* 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. See Iqbal, 556 U.S., at 676 ("Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior ").

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. These considerations also counsel against allowing a damages claim to proceed against the Executive Officials.

In addition to this special factor, which applies to the claims against the Executive Officials, there are three other special factors that apply as well to the detention policy claims against all of the petitioners. First, respondents' 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. National-security policy is the prerogative of the Congress and President. See U.S. Const. Art. I, § 8; Art. II, § 1, § 2. 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.

There are limitations, of course, on the power of the Executive under Article II of the Constitution and in the powers authorized by congressional enactments, even with respect to matters of national security. Even so, the question is only whether "congressionally uninvited intrusion" is "inappropriate" action for the Judiciary to take. The factors discussed above all suggest that Congress' failure to provide a damages remedy might be more than mere oversight, and that congressional silence might be more than inadvertent. This possibility counsels hesitation "in the absence of affirmative action by Congress." *Bivens*, 403 U.S., at 396, 91 S.Ct. 1999.

[Congress'] silence [in this instance] is notable because it is likely that high-level policies will attract the attention of Congress. Thus, when Congress fails to provide a damages remedy in circumstances like these, it is much more difficult to believe that congressional inaction was inadvertent.

It is of central importance, too, that this is not a case like *Bivens* or *Davis* in which "it is damages or nothing." Bivens, supra, at 410, 91 S.Ct. 1999 (Harlan, J., concurring in

judgment). 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.

Indeed, the habeas remedy, if necessity required its use, would have provided a faster and more direct route to relief than a suit for money damages. A successful habeas petition would have required officials to place respondents in less-restrictive conditions immediately; yet this damages suit remains unresolved some 15 years later. In sum, respondents had available to them other alternative forms of judicial relief. And when alternative methods of relief are available, a *Bivens* remedy usually is not.

There is a persisting concern, of course, that absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution. In circumstances like those presented here, however, the stakes on both sides of the argument are far higher than in past cases the Court has considered. If *Bivens* liability were to be imposed, high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis. 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.

IV.

A.

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.

Warden Hasty argues that *Bivens* ought not to be extended to this instance of alleged prisoner abuse. As noted above, the first question a court must ask in a case like this one is whether the claim arises in a new *Bivens* context, i.e., whether "the case is different in a meaningful way from previous *Bivens* cases decided by this Court."

It is true that this case has significant parallels to one of the Court's previous *Bivens* cases, *Carlson v. Green*, 446 U.S. 14. There, the Court did allow a Bivens claim for prisoner mistreatment. 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. See 446 U.S., at 16, 100 S.Ct. 1468. 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." Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). 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. [T]here might have been alternative remedies available here, for example, a writ of habeas corpus; an injunction requiring the warden to bring his prison into compliance with the regulations discussed above; or some other form of equitable relief.

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. It should have analyzed whether there were alternative remedies available or other "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy" in a suit like this one. Supra, at 1859.

B.

Although the Court could perform that analysis in the first instance, the briefs have concentrated almost all of their efforts elsewhere. Given the absence of a comprehensive presentation by the parties, and the fact that the Court of Appeals did not conduct the analysis, the Court declines to perform the special factors analysis itself. The better course is to vacate the judgment below, allowing the Court of Appeals or the District Court to do so on remand.

* * *

If the facts alleged in the complaint are true, then what happened to respondents 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. The question before the Court, however, is not whether petitioners' alleged conduct was proper, nor whether it gave decent respect to respondents' dignity and well-being, nor whether it was in keeping with the idea of the rule of law that must inspire us even in times of crisis.

Instead, the question with respect to the *Bivens* claims is whether to allow an action for money damages in the absence of congressional authorization. For the reasons given above, the Court answers that question in the negative as to the detention policy claims. As to the prisoner abuse claim, because the briefs have not concentrated on that issue, the Court remands to allow the Court of Appeals to consider the claim in light of the *Bivens* analysis set forth above.

The judgment of the Court of Appeals is reversed as to all of the claims except the prisoner abuse claim against Warden Hasty. The judgment of the Court of Appeals with respect to that claim is vacated, and that case is remanded for further proceedings.

It is so ordered.

[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.

I join the Court's opinion except for Part IV–B. I write separately to express my view on the Court's decision to remand some of respondents' claims under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

I.

With respect to respondents' Bivens claims, I join the opinion of the Court to the extent it reverses the Second Circuit's ruling. The Court correctly applies our precedents to hold that Bivens does not supply a cause of action against petitioners for most of the alleged Fourth and Fifth Amendment violations. It also correctly recognizes that respondents' claims against petitioner Dennis Hasty seek to extend *Bivens* to a new context.

I concur in the judgment of the Court vacating the Court of Appeals' judgment with regard to claims against Hasty. 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.'" *Wilkie v. Robbins*, 551 U.S. 537, 568 (2007) (concurring opinion). 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." Ibid. (internal quotation marks omitted). 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.

Justice BREYER, with whom Justice GINSBURG joins, dissenting.

In *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), this Court held that the Fourth Amendment provides a damages remedy for those whom federal officials have injured as a result of an unconstitutional search or seizure. In *Davis v. Passman*, 442 U.S. 228 (1979), the Court held that the Fifth Amendment provides a damages remedy to an individual dismissed by her employer (a Member of Congress) on the basis of her sex in violation of the equal protection component of that Amendment's Due Process Clause. And in *Carlson v. Green*, 446 U.S. 14 (1980), the Court held that the Eighth Amendment provides a damages remedy to a prisoner who died as a result of prison official's deliberate indifference to his medical needs, in violation of the Amendment's prohibition against cruel and unusual punishment.

The plaintiffs before us today seek damages for unconstitutional conditions of confinement. They alleged that federal officials slammed them against walls, shackled them, exposed them to nonstop lighting, lack of hygiene, and the like, all based upon invidious discrimination and without penological justification. In my view, these claims fall within the scope of longstanding *Bivens* law. If I may paraphrase Justice Harlan, concurring in *Bivens* : In wartime as well as in peacetime, "it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy" "for the most flagrant and patently unjustified," unconstitutional "abuses of official power." 403 U.S., at 410–411 (opinion concurring in judgment).

I.

The majority opinion well summarizes the particular claims that the plaintiffs make in this suit. All concern the conditions of their confinement, which began soon after the September 11, 2001, attacks and "lasted for days and weeks, then stretching into months." Ante, at 1851. At some point, the plaintiffs allege, all the defendants knew that they had nothing to do with the September 11 attacks but continued to detain them anyway in harsh conditions. Official Government policy, both before and after the defendants became aware of the plaintiffs' innocence, led to the plaintiffs being held in "tiny cells for over 23 hours a day" with lights continuously left on, "shackled" when moved, often "strip searched," and "denied access to most forms of communication with the outside world." Ante, at 1853 (internal quotation marks omitted). The defendants detained the plaintiffs in these conditions on the basis of their race or religion and without justification.

Moreover, the prison wardens were aware of, but deliberately indifferent to, certain unofficial activities of prison guards involving a pattern of "physical and verbal abuse," such as "slam[ming] detainees into walls; twist[ing] their arms, wrists, and fingers; [breaking] their bones;" and subjecting them to verbal taunts. Ibid. (internal quotation marks omitted).

I would hold that the complaint properly alleges constitutional torts, i.e., *Bivens* actions for damages.

A.

The Court's holdings in *Bivens*, *Carlson*, and *Davis* rest 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*, 1 Cranch 137 (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." *Id*., at 163. The Chief Justice then wrote: "The government of the United States has been emphatically termed a government of laws, and not of men. It will [not] deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Ibid*. He concluded for the Court that there must be something "peculiar" (i.e., special) about a case that warrants "exclu[ding] the injured party from legal redress." Id., at 163–164,

Much later, in *Bell v. Hood,* 327 U.S. 678, 684 (1946), the Court wrote that, "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." 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." Id., at 392, 397.

Second, our cases have recognized that Congress' silence on the subject indicates a willingness to leave this matter to the courts. In *Bivens*, the Court noted, as an argument favoring its conclusion, the absence of an "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents." Id., at 397, 91 S.Ct. 1999. Similarly, in Davis v. Passman, the Court stressed that there was "no evidence ... that Congress meant ... to foreclose" a damages remedy. 442 U.S., at 247, 99 S.Ct. 2264. In Carlson, the Court went further, observing that not only was there no sign "that Congress meant to pre-empt a Bivens remedy," but there was also "clear" evidence that Congress intended to preserve it. 446 U.S., at 19–20.

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. 446 U.S., at 18–19, 100 S.Ct. 1468. The relevant special factors in those cases included whether the court was faced "with a question of 'federal fiscal policy,' " *Bivens*, supra, at 396, 91 S.Ct. 1999 or a risk of "deluging federal courts with claims," *Davis*, supra, at 248, 99 S.Ct. 2264 (internal quotation marks omitted). Carlson acknowledged an additional factor—that damages suits "might inhibit [federal officials'] efforts to perform their official duties"—but concluded that "the qualified immunity accorded [federal officials] under [existing law] provides adequate protection." 446 U.S., at 19, 100 S.Ct. 1468.

Fourth, as the Court recognized later in Carlson, 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, see Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992), 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;

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." Ante, at 1857. Thus, it has held that the remedy is not available in the context of suits against military officers; in the context of suits against privately operated prisons and their employees; in the context of suits seeking to vindicate procedural, rather than substantive, constitutional protections,; and in the context of suits seeking to vindicate two quite different forms of important substantive protection, one involving free speech, see Bush v. Lucas, 462 U.S. 367, 368, (1983), and the other involving protection of land rights, see *Wilkie v. Robbins*, 551 U.S. 537, 551, (2007). Each of these cases involved a context that differed from that of Bivens, Davis, and Carlson with respect to the kind of defendant, the basic nature of the right, or the kind of harm suffered. That is to say, as we have explicitly stated, these cases were "fundamentally different from anything recognized in Bivens or subsequent cases." *Malesko*, supra, at 70, 122 S.Ct. 515 (emphasis added). In each of them, the plaintiffs were asking the Court to " 'authoriz[e] a new kind of federal litigation.' " *Wilkie*, supra, at 550, 127 S.Ct. 2588 (emphasis added).

Precedent makes this framework applicable here. I would apply it. And, doing so, I cannot get past Step One. This suit, it seems to me, arises in a context similar to those in which this Court has previously permitted Bivens actions.

B.

1.

The context here is not "new," *Wilkie*, supra, at 550, 127 S.Ct. 2588 or "fundamentally different" than our previous *Bivens* cases, *Malesko*, supra, at 70, 122 S.Ct. 515. 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. See *United States v. Verdugo–Urquidez,* 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"). Some or all of the plaintiffs here may have been illegally present in the United States. But that fact cannot justify physical mistreatment. Nor does anyone claim that that fact deprives them of a *Bivens* right available to other persons, citizens and noncitizens alike.

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.

These claimed harms are similar to, or even worse than, the harms the plaintiffs suffered in *Bivens* (unreasonable search and seizure in violation of the Fourth Amendment), *Davis* (unlawful discrimination in violation of the Fifth Amendment), and *Carlson* (deliberate indifference to medical need in violation of the Eighth Amendment).

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.

2.

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." Wilkie, 551 U.S., at 550, 127 S.Ct. 2588. I can find no such "alternative, existing process" here. 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. Some of the plaintiffs allege that for two or three months they were subject to a "communications blackout"; that the prison "staff did not permit them visitors, legal or social telephone calls, or mail"; that their families and attorneys did not know where they were being held; that they could not receive visits from their attorneys; that subsequently their lawyers could call them only once a week; and that some or all of the defendants "interfered with the detainees' effective access to legal counsel." Office of Inspector General (OIG) Report, App. 223, 293, 251, 391; see App. to Pet. for Cert. in No. 15–1359, at 253a (incorporating the OIG report into the complaint).

There being no "alternative, existing process" that provides a "convincing reason" for not applying *Bivens*, we must proceed to Step Three. Doing so, I can find no "special factors [that] counse[l] hesitation before authorizing" this *Bivens* action. 551 U.S., at 550. I turn to this matter next.

II.

A.

The Court describes two general considerations that it believes argue against an "extension" of Bivens. First, the majority opinion points out that the Court is now far less likely than at the time it decided Bivens to imply a cause of action for damages from a statute that does not explicitly provide for a damages claim. See ante, at 1855 – 1856. Second, it finds the "silence" of Congress "notable" in that Congress, though likely aware of the "high-level policies" involved in this suit, did not "choose to extend to any person the kind of remedies" that the plaintiffs here "seek." Ante, at 1861 – 1862 (internal quotation marks omitted). I doubt the strength of these two general considerations.

The first consideration, in my view, is not relevant. The [*Bivens*] Court believed such a remedy was necessary to make effective the Constitution's protection of certain basic individual rights. See id., at 392 (opinion of Harlan, J.). Similarly, as the Court later explained, a damages remedy against federal officials prevented the serious legal anomaly I previously mentioned. Its existence made basic constitutional protections of the individual against Federal Government abuse (the Bill of Rights' pre-Civil War objective) as effective as protections against abuse by state officials (the post-Civil War, post selective-incorporation objective). See supra, at 1875.

Nor is the second circumstance—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. See Pfander, Constitutional Torts, at 102.

B

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." In the Court's view, a "case might differ" from *Bivens* "in a meaningful way because of [1] the rank of the officers involved; [2] the constitutional right at issue; [3] the generality or specificity of the individual action; [4] the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; [5] the statutory or other legal mandate under which the officer was operating; [6] the risk of disruptive intrusion by the Judiciary into the functioning of other branches; [7] or the presence of potential special factors that previous Bivens cases did not consider." In my view, these factors do not make a "meaningful difference" at Step One of the *Bivens* framework. Some of them are better

cast as "special factors" relevant to Step Three. But, as I see it, none should normally foreclose a *Bivens* action and none is determinative here.

C

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. As the Court correctly points out, the Constitution grants primary power to protect the Nation's security to the Executive and Legislative Branches, not to the Judiciary. But the Constitution also delegates to the Judiciary the duty to protect an individual's fundamental constitutional rights. Hence when protection of those rights and a determination of security needs conflict, the Court has a role to play. The Court most recently made this clear in cases arising out of the detention of enemy combatants at Guantanamo Bay. Justice O'Connor wrote that "a state of war is not a blank check." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion). In Boumediene, 553 U.S., at 732–733, the Court reinforced that point, holding that noncitizens detained as enemy combatants were entitled to challenge their detention through a writ of habeas corpus, notwithstanding the national-security concerns at stake.

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. We have read about the Alien and Sedition Acts, the thousands of civilians imprisoned during the Civil War, and the suppression of civil liberties during World War I. See W. Rehnquist, All the Laws but One: Civil Liberties in Wartime 209–210, 49–50, 173–180, 183 (1998); *see also* Ex parte Milligan, 4 Wall. 2 (1866) (decided after the Civil War was over).

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? Complaints seeking that kind of relief typically come during the emergency itself, when emotions are strong, when courts may have too little or inaccurate information, and when courts may well prove particularly reluctant to interfere with even the least well-founded Executive Branch activity. 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.

As is well known, Lord Atkins, a British judge, wrote in the midst of World War II that "amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace." Liversidge v. Anderson, [1942] A.C. 206 (H.L. 1941) 244. The Court, in my view, should say the same of this *Bivens* action.

With respect, I dissent.

* * *

1. Under a line of cases that includes *Iqbal* and *Ziglar*, when a plaintiff seeks a *Bivens* remedy in a new context, a court should hesitate if there are special factors that caution against awarding such a remedy. In *Ziglar*, the Court provides considerable guidance both as to whether a context is new, and how to determine if there are special factors that counsel hesitation. On the question of whether a plaintiff is attempting to expand *Bivens* to a new context, it is now apparent context can be considered new for factual, legal, and policy reasons. Factual distinctions include the rank of the officer and how general or specific a federal official's actions were. Legal distinctions include the constitutional right at issue and prior guidance that would have put officers on notice that they were violating the law. Policy distinctions include separation-of-powers principles, as well as the presence of "potential special factors." Special factors include national security concerns, as well as the need to balance policy determinations that belong to Congress.

2. The *Ziglar* Court reasons that implementing a *Bivens* remedy in a new context is disfavored, noting that the Court has not expanded this remedy in over thirty years. The Court further observes that Congress is often better equipped to weigh when damages will deter unconstitutional conduct, without deterring lawful conduct. Are you persuaded that Congress is better equipped to make this judgment? Does your view change when officials violate the Constitution in the aftermath of an emergency related to national security? How far does Congress's control over judicial remedies extend? Could Congress pass an act that precludes damages remedies for unconstitutional conduct? Could Congress pass an act that precludes *all* remedies for unconstitutional conduct during times of crisis that implicate national security? Could Congress pass an act that precludes all remedies for unconstitutional conduct under all circumstances? If your answer is different with respect to any of the last three questions, why?

3. As you have read, in prior cases, such as *Minneci v. Pollard*, the Court focused on whether plaintiffs had an "adequate" alternative remedy, such as a state law tort action. In *Ziglar*, the Court observes that the plaintiffs potentially had alternative remedies, citing injunctive relief and habeas petitions as examples. The Court does not assess, however, whether these alternative remedies are adequate. Does this mark a shift in the law? Would the reasoning of *Ziglar* have changed in meaningful ways if the Court analyzed whether injunctive relief or the writ of habeas corpus were remedies that were both available and adequate enough to defer unconstitutional conduct? Consider that prospective relief, such as injunctions, are generally not available in Article III courts for past constitutional violations. *Los Angeles* v. *Lyons*, 461 U.S. 95 (1983).

4. The *Ziglar* opinion has already taken front stage in another highly-watched Supreme Court case decided the same term, *Hernández v. Mesa*, 137 S.Ct. 2003 (2017). The case involved the shooting of a 15-year-old named Sergio Hernandez who was shot by Jesus Mesa, a U.S. Border Patrol agent. At the time of the shooting, Hernandez was playing with his friends in Mexico, just across the United States border. Hernandez's

parents brought a federal suit, alleging that the shooting violated the Fourth Amendment's protection against unreasonable seizures. The Fifth Circuit had held that, under these circumstances, the Fourth Amendment did not apply to foreign nationals who lacked voluntary connections to the United States and who were physically in another country.

In a 5-3 opinion, The Supreme Court vacated that ruling and remanded the case, concluding that the Fifth Circuit should consider whether, in light of *Ziglar*, a Border Agent's use of deadly force against a person across a national border constitutes a "new context" with "special factors" that counsel against permitting a damages suit to go forward. Justice Thomas dissented on the grounds that the "case involves cross-border conduct, and [prior] cases did not." Accordingly, he would have affirmed the judgment of the Court of Appeals because supplying a damages remedy here would necessarily be an expansion of a doctrine that, in his view, should be treated as a relic of the past.

Justice Breyer, joined by Justice Ginsburg, also dissented, but on the grounds that they would have reversed the Fifth Circuit's holding that the Fourth Amendment did not apply across the border. In their view, there is a significant relationship between the United States and areas just across the Mexican border, especially areas that lack a clear, physical dividing point. They also observed that the agent was in the United States at the time of the shooting. They thereby contended that the Fourth Amendment applies to cross-border shootings under these circumstances. They agreed, however, that the case should be remanded to decide whether *Ziglar* forecloses a *Bivens* remedy here.

Do you have a prediction as to whether *Bivens* will ultimately apply to non-military cross-border shootings? On the one hand, like *Hernandez*, *Bivens* is a Fourth Amendment case. On the other hand, are their special factors that are sufficient to preclude a damages remedy?

Chapter 3 "Secured by the Constitution and Laws"

The Supreme Court resolved a § 1983 Fourth Amendment malicious prosecution issue as to which the Seventh Circuit was an outlier.

Specifically, the Supreme Court granted certiorari in *Manuel v. City of Joliet*, 137 S. Ct. (2017), and reversed an unreported Seventh Circuit § 1983 malicious prosecution decision that rejected the applicability of the Fourth Amendment after legal process had begun. In an opinion by Justice Kagan, the Court held that there is a Fourth Amendment right to be free from seizure without probable cause that extends through the pretrial period, even though the seizure is "pursuant to legal process." Specifically, the seizure occurs both *before*, e.g., the arrest, and *after* the onset of criminal proceedings, e.g., where a judge's probable cause determination is based solely on a police officer's false statements, as was allegedly the case in *Manuel*. However, the Court remanded to the Seventh Circuit on the accrual question after making some comments about the opposing positions on the issue, including the observation that the United States agreed with the plaintiff in *Manuel*, as did eight of the ten circuits that have favorable termination requirements.

This was the Question Presented in *Manuel*: "Whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment." According to the Petition for Writ of Certiorari, the First, Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh and D.C. Circuits had all answered this question in the affirmative, while only the Seventh Circuit had answered in the negative.

Chapter 6 "[S]ubjects or Causes to be Subjected": Causation

County of Los Angeles v. Mendez: Supreme Court Rejects "Provocation Rule," Remands on Proximate Cause

The Supreme Court addressed a potentially significant proximate cause issue in *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017).

In *Mendez*, police officers, looking for a felony parolee-at-large with an outstanding arrest warrant, engaged in a warrantless entry into plaintiff's residence (a shack) without exigent circumstances (they should have secured a search warrant), and without knocking and announcing, both actions in violation of the Fourth Amendment. They thereby allegedly provoked the plaintiff resident's grabbing a gun (it turned out to be a BB gun that resembled a small caliber rifle), which in turn led to their shooting and seriously injuring the plaintiff. The question was whether the plaintiff had a § 1983 Fourth Amendment claim against the officers for damages resulting from the use of deadly force. The two theories underlying such liability were that the warrantless entry into the shack either (1) provoked the subsequent events within the meaning of the Ninth Circuit's provocation rule, or (2) proximately caused the use of the deadly force which—even if reasonable when viewed in isolation—was the reasonably foreseeable result of the warrantless entry that violated the Fourth Amendment. Or was the reasonable use of deadly force an intervening, superseding event that broke the chain of causation under the second theory?

In the posture of the case when it arrived at the Supreme Court, the Ninth Circuit had determined that even though the officers violated the Fourth Amendment by not knocking and announcing, they were protected by qualified immunity from damages liability for this constitutional violation. This effectively eliminated that particular Fourth Amendment violation—the failure to knock and announce—from serving as the basis of § 1983 liability for the shooting.

However, and crucial for present purposes, the Ninth Circuit concluded that the warrantless entry into the shack violated the Fourth Amendment and was *not* protected by qualified immunity. And even though the shooting was reasonable and not excessive under *Graham v. Connor*,**7** the officers were still liable under the circuit's provocation rule: they had intentionally and recklessly provoked the shooting by entering the shack without a search warrant in violation of the Fourth Amendment. In the alternative, the Ninth Circuit further reasoned that the officers were liable because they proximately caused the shooting of the plaintiff.

The Supreme Court unanimously reversed. It rejected the Ninth Circuit's provocation rule: "The rule's fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." It emphasized that *Graham v. Connor* was the settled and exclusive framework for determining whether force used was excessive. This framework, focusing on the

reasonableness of the force used, was objective in nature, it addressed the facts and circumstances in each particular case and *it determined reasonableness from the perspective of a reasonable officer on the scene*, rather than with hindsight.

According to the Court, the Ninth Circuit's provocation rule was inconsistent with *Graham* because it provided a "novel and unsupported path to liability" where the use of force was reasonable. The rule improperly "conflates distinct Fourth Amendment claims." In so doing, it "permits excessive force claims that cannot succeed on their own terms." The Court then went on to reject the plaintiff's attempts to limit the provocation rule to cases where (1) the separate constitutional violation creates the situation that led to the use of force and (2) the separate constitutional violation is committed intentionally or recklessly. Neither limitation solved the basic problem: the "unwarranted and illogical expansion of *Graham*."

The Court concluded its analysis by reaffirming that the officers might conceivably be liable for damages proximately caused by their Fourth Amendment violation, namely, their warrantless entry into plaintiff's shack. However, the Court emphasized that the proper proximate cause analysis "required consideration of the 'forseeeability or the scope of the risk created by the predicate conduct,' " and the Ninth Circuit had not used this analysis in its alternative proximate cause ruling. Accordingly, the Court vacated the Ninth Circuit's judgment and remanded to deal with the proximate cause issue.

Several observations are worth making. First, the provocation rule was unique to the Ninth Circuit and its rejection in *Mendez* did not change § 1983 doctrine elsewhere.

Second, the oral argument in Mendez focused on causation as well as the provocation rule. Several justices inquired into the proximate cause relationship between the *failure to get a search warrant* and the resulting (reasonable) use of deadly force. They asked whether the failure to get the search warrant made a difference in the plaintiff's reaching for his BB gun, which resulted in the use of deadly force. They also asked whether the plaintiff's reaching for his BB gun—and the officers' subsequent use of deadly force—was within the *scope of the risk* created by the officers' failure to get a search warrant. (This is classic tort law proximate cause talk). These justices thereby appeared to signal to the lower courts and to the parties (on remand) that they were highly skeptical about the alleged proximate cause (and cause in fact?) link between the failure to obtain a search warrant and the shooting of the plaintiff.

This is in contrast to the plaintiff's far stronger proximate cause argument with regard to the risk of the plaintiff's reaching for his BB gun—followed by the officers' use of deadly force—that was created by the officers' failure to *knock and announce*. But this Fourth Amendment violation was removed by the Ninth Circuit from the proximate cause analysis (and potential damages liability) by qualified immunity, as noted above.

Finally, *Mendez* did not change the circuits' (and the Court's) prevailing approach to proximate cause which focuses on reasonable foreseeability and the scope of the risk

created by unconstitutional conduct. The results in individual cases will turn on how broadly or narrowly the scope of the risk created by the constitutional violation is defined. As in tort law, this is an issue of policy.

Lozman v. City of Riviera Beach and First Amendment Retaliatory Arrest Damages Claims: The Court Again Sidesteps the Probable Cause Issue

In *Lozman v. City of Riviera Beach*, 133 S. Ct. 735 (2013), the Supreme Court once again avoided ruling generally on the question whether a section 1983 plaintiff who alleges a retaliatory arrest in violation of the First Amendment must allege and prove the absence of probable cause in addition to impermissible First Amendment motive. Or, to put it another way, whether probable cause to arrest is a defense to a First Amendment retaliatory arrest damages claim. Instead, it ruled narrowly for the plaintiff based on the particular facts of his case.

In *Lozman*, the plaintiff alleged that a city (through its policymakers) had him arrested in retaliation for the exercise of his First Amendment rights. He claimed that he was arrested at a city council meeting when he got up to speak because he *previously* had criticized the city's eminent domain redevelopment efforts and had also sued the city for violating the state's Sunshine Act. He was never prosecuted. However, the plaintiff conceded that there was probable cause for his arrest for violating a Florida statute prohibiting interruptions or disturbances at certain public assemblies, because he had refused to leave the podium after receiving a lawful order to do so.

Ordinarily, such a plaintiff, in order to make out a section 1983 First Amendment *retaliatory arrest* claim, would only have to allege and prove that this impermissible retaliatory motive caused him harm, and the defendant would have the burden of *disproving* the absence of but-for causation in order to escape liability. *Mt. Healthy Bd. of Education v. Doyle*, 429 U.S. 274 (1977). But here, the city argued that even if its motive was impermissible under the First Amendment, there was probable cause — an objective Fourth Amendment standard — to arrest the plaintiff anyway, and that *this constituted a defense to the plaintiff's First Amendment retaliation claim.*

In *Lozman*, the Eleventh Circuit had ruled that probable cause was indeed a defense to a section 1983 First Amendment retaliatory arrest claim. Specifically, it determined that a section 1983 retaliatory arrest plaintiff must allege and prove not only the retaliatory motive but the absence of probable cause as well. In other words, the absence of probable cause was an element of the section 1983 plaintiff's retaliatory arrest claim.

The Eleventh Circuit's decision was based on the Supreme Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), which held that for section 1983 *retaliatory prosecution* claims against law enforcement officers (prosecutors themselves are absolutely immune from damages liability for their decision to prosecute), the plaintiff must allege and prove not only the impermissible motive but the absence of probable

cause as well. The Court reasoned that there was a presumption of prosecutorial regularity that the section 1983 plaintiff must overcome as an element of his retaliatory prosecution case. Accordingly, as a matter of section 1983 statutory interpretation and policy (but not of constitutional law), the plaintiff should have this twin burden in retaliatory prosecution cases.

The Court in *Hartman* explained that a *retaliatory prosecution* case was very different from the usual First Amendment retaliation case that involved a relatively clear causal connection between the defendant's impermissible motivation and the resulting injury to the plaintiff. It was appropriate in such cases to apply the *Mt. Healthy* burden-shift rule under which the defendant has the burden of *disproving* but-for causation in order to prevail.

The Court previously had a similar First Amendment retaliatory arrest issue before it in *Reichle v. Howards*, 566 U.S. 658 (2012). But it avoided addressing the merits by ruling for the individual defendants on qualified immunity grounds.

In our view, the Court's decision in *Hartman* should *not* be applied to First Amendment retaliatory arrest cases. The express reason for the *Hartman* rule is that First Amendment retaliatory prosecution cases involve a presumption of prosecutorial regularity. But this reason is clearly inapplicable where there is no prosecution and the constitutional challenge is to the arrest itself.

Moreover, First Amendment retaliatory arrest claims involve the impermissible motivation (a subjective inquiry) of law enforcement officers irrespective of probable cause, which is an objective (*could have* arrested) inquiry. Under this objective inquiry, the existence of probable cause precludes a Fourth Amendment violation based on an arrest even where that arrest is grounded on an offense different from the offense for which probable cause is deemed to be present. This provides a great deal of protection for police officers who allegedly make arrests in violation of the Fourth Amendment.

However, if a police officer arrests a person for racial reasons, and the claimed injury is grounded on those racial reasons, it should not matter for the Equal Protection claim — even if it would for a Fourth Amendment claim — that the officer had probable cause to do so, namely, that the officer *could have* arrested the plaintiff. This reasoning should apply as well to § 1983 First Amendment retaliatory arrest claims.

It was always questionable whether the Court in *Hartman* should have allowed policy considerations to change the usual section 1983 causation rules in First Amendment retaliatory prosecution cases. Regardless, that reasoning should most definitely not be extended to First Amendment retaliatory arrest cases. Such policy considerations as are discussed in *Hartman* are most appropriately addressed, if they are to be addressed at all, as part of the qualified immunity inquiry, *not* the elements of the section 1983 retaliatory arrest claim.

In any event, in *Lozman*, the Court, in an opinion by Justice Kennedy, reversed the Eleventh Circuit and ruled that *in this particular case*, the plaintiff did not have to allege and prove the absence of probable cause, and probable cause was not a defense to his First Amendment retaliatory arrest claim.

Emphasizing the narrowness of its decision, the Court pointed out that the plaintiff only challenged the lawfulness of his arrest under the First Amendment; he did not make an equal protection claim. Further, he conceded there was probable cause for his arrest, namely, that he *could have* been arrested for violating the Florida statute. Thus, the only question was whether the existence of probable cause barred his First Amendment retaliation claim in this case.

The Court went on to observe that the issue in First Amendment retaliatory arrest cases was whether *Mt. Healthy* or *Hartman* applied. It addressed what it considered to be the strong policy arguments on both sides of the issue. The Court then determined that resolution of the matter would have to wait for another case: "For Lozman's claim is far afield from the typical retaliatory arrest claims, and the difficulties that might arise if *Mt. Healthy* is applied to the same mine run of arrests made by police officers are not present here." For one thing, the plaintiff did not sue the officer who made the arrest. For another, since he sued the city, he had to allege and prove an official policy or custom, which "separates Lozman's claim from the typical retaliatory arrest claim." Moreover, the causation issues here were relatively straightforward, because the plaintiff's allegations of an official policy or custom of retaliation were unrelated to the criminal offense for which the arrest was made but rather to prior, protected speech. In short, the causal connection between the alleged animus and the injury would not be "weakened by [an official's] legitimate consideration of speech." (quoting *Reichle*, 566 U.S. at 668).

This did not mean that the *Lozman* plaintiff would necessarily win on remand. A jury might find that the city did not have a retaliatory motive. Or, under *Mt. Healthy*, the city might show that it would have had the plaintiff arrested anyway regardless of any retaliatory motive.

Justice Thomas was the sole dissenter. He maintained that the Court had simply made up a narrow rule to fit this case. Instead, he argued that plaintiffs in First Amendment retaliatory arrest cases have the burden of pleading and proving the absence of probable cause. That is, probable cause "necessarily defeats First Amendment retaliatory-arrest claims." Accordingly, the plaintiff should lose here.

Comments

The better approach, as indicated above, is to apply *Mt. Healthy* in all retaliatory arrest cases. *Hartman* should be limited to retaliatory prosecution cases. Nevertheless, after *Lozman*, the question is still open in the Supreme Court. This means, among other things, the retaliatory arrest individual defendants will continue to have a powerful qualified immunity argument, namely, that the law is not clearly settled even now, per *Reichle v. Howards*.

Note, however, that the Court may yet resolve this question in its forthcoming 2018 Term. On June 28, 2018, it granted certiorari in *Nieves v. Bartlett,* 712 Fed. Appx. 613 (9th Cir. 2017) (No.17-1174), to address once again whether probable cause is a defense to a section 1983 First Amendment retaliatory arrest claim. In this unreported decision, the Ninth Circuit ruled that probable cause is *not* a defense to First Amendment retaliatory arrest damages claims.

Chapter 8: "Every Person": Qualified Immunity

Note that *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), discussed earlier in this Supplement in connection with *Bivens* claims, also involved § 1985(3) civil conspiracy claims alleging unconstitutional prisoner abuse and unconstitutional conditions of confinement created by high-ranking federal officials — executives and wardens — after the 9-11 terrorist attacks. The plaintiffs were of Arab or South Asian descent. The Supreme Court ruled that the defendants were protected by qualified immunity from the § 1985(3) civil conspiracy claims. It stated: "[R]reasonable officials in [defendants'] position 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."

In reaching its qualified immunity conclusion, the Court emphasized the alleged conspiracy was between or among officers in the same branch of the federal government (the Executive), and in the same department (the Department of Justice). The Court then commented that it had not approved of the use of the intracorporate conspiracy doctrine in the § 1985(3) setting. In addition, the circuits were divided on this issue. For these reasons, the defendants were protected by qualified immunity: "When the courts of appeals are divided on an issue so central to the cause of action alleged, a reasonable official lacks the notice required before imposing liability." In light of *Ziglar*, then, it is fair to say that the applicability of the intracorporate conspiracy doctrine in the § 1983 setting is similarly an open question.

In another *Bivens* case, *Hernandez v. Mesa*, 137 S. Ct. – (2017), also noted earlier, this one involving the allegedly unconstitutional cross-border shooting of an unarmed Mexican citizen by a U.S. border guard in an enclosed area controlled by the United States, the question was: "May qualified immunity be granted or denied based on facts—such as the victim's legal status—unknown to the officer at the time of the incident?" The Court answered in the negative. Addressing the victim's parents' Fifth Amendment *Bivens* claim against the border guard, it reversed the Fifth Circuit *en banc* which, in granting qualified immunity, had erroneously relied on the fact that the victim was "an alien who had no significant voluntary connection to… the United States." The Court observed it was undisputed that the victim's nationality and ties to the United States were unknown to the border guard at the time of the shooting. Thus, the Fifth Circuit en banc's reasoning was fundamentally flawed: "Facts an officer learns after the incident ends—whether those facts would support granting [qualified] immunity or denying it—are not relevant."

Finally, in a qualified immunity excessive force case, *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam), the Supreme Court continued to signal lower federal courts and litigants that the clearly settled law inquiry must be made at a relatively fact specific level. In the Court's words: "This case addresses the situation of an officer who—having arrived late at an ongoing police action and having witnessed shots being fired by one of several individuals in a house surrounded by other officers— shoots and kills an armed

occupant of the house without first giving a warning." The Court ruled that the officer was protected by qualified immunity.

The plaintiff in *White*, representing the estate of his deceased brother, alleged that three police officers violated the Fourth Amendment's prohibition against the use of excessive force. The plaintiff was involved in a road-rage incident with two women who called 911 to report him as "drunk" and "swerving all crazy." After a brief, nonviolent encounter with the women, the plaintiff drove off to a secluded house where he lived with his brother. Thereafter, two police officers—not including Officer White at the time—drove to the house (it was 11 pm) and were moving around outside. The plaintiff and his brother became aware of persons outside and yelled "Who are you?" and "What do you want?" The plaintiff maintained that he and his brother never heard the two officers identify themselves as police— only that the officers said they were armed and coming in. The brothers then armed themselves and began shooting. At that point Officer White, who had been radioed by the two officers, was walking toward the house when he heard the shots apparently directed at the two officers. Plaintiff's brother then opened a front window and pointed a handgun in Officer White's direction. One of the other two officers shot at the brother but missed him, followed immediately by White's shooting and killing the plaintiff's brother. The district court denied all three defendants' motions for summary judgment, and a divided panel of the Tenth Circuit affirmed.

As to the two officers, the Tenth Circuit determined that taking the evidence most favorably to the plaintiff, reasonable officers should have understood that their conduct would cause the brothers to defend their home and might result in the use of deadly force against the deceased brother. As to Officer White, the Tenth Circuit ruled that the rule "that a reasonable officer in White's position would believe that a warning was required despite the threat of serious harm" was clearly established at the time by statements from the Supreme Court's case law.

The Supreme Court then reversed the Tenth Circuit, vacating the judgment against Officer White on the ground that he did not violate clearly established law on the record before the Tenth Circuit. The Court emphasized that it had regularly and repeatedly declared that clearly established law should not be articulated at a high level of generality. In the Court's view, the Tenth Circuit "failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment." Instead, the Tenth Circuit improperly relied on general statements from the Supreme Court and circuit court "progeny" that set out excessive force principles "at only a general level." Furthermore, this case did not present an obvious Fourth Amendment violation: the Tenth Circuit majority did not conclude that the failure to shout a warning was a "run-of-the-mill Fourth Amendment violation." Finally, the Court expressed no opinion on the question whether the other two officers were protected by qualified immunity.

Justice Ginsburg concurred, pointing out her "understanding" that the Court's opinion did not foreclose denying summary judgment to the two other officers.

Qualified Immunity, False Arrest and District of Columbia v. Wesby

District of Columbia v. Wesby 138 S. Ct. 577 (2018), involved § 1983 Fourth Amendment claims against police officers and the District of Columbia arising out of the arrests of plaintiffs in a vacant house in the middle of the night. The officers had responded to a called-in complaint about loud music and various illegal activities, and discovered that the inside of the house was barren and in disarray. The officers smelled marijuana, saw beer bottles and liquor cups on the floor; they found a make-shift strip club, and a woman and several men in an upstairs bedroom. Then then got inconsistent stories about a "Peaches," supposedly the tenant who gave the partygoers permission for the party. When Peaches was contacted by phone, she eventually admitted that she did not have permission to use the house, and the real owner thereafter confirmed this. The defendants then arrested the plaintiff party-goers for unlawful entry.

After charges were dropped, many the partygoers sued, alleging Fourth Amendment violations for unlawful arrest. The district court found that the officers violated the Fourth Amendment and, moreover, that they were not entitled to qualified immunity, because they knew when they entered that they had no evidence the partygoers' entry was against the will of the owner. A divided panel of the D.C. Circuit affirmed: Peaches' "invitation" was central to the majority's determination that the officers lacked probable cause to enter: this vitiated the plaintiffs' intent to enter against the will of the owner.

The Supreme Court unanimously reversed in an opinion by Justice Thomas. It found that the officers had probable cause to arrest the plaintiffs. It stated: "Considering the totality of the circumstances, the officers made an 'entirely reasonable inference' that the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party." The Court chastised the D.C. Circuit majority for viewing each fact in isolation rather than as a factor in the totality of the circumstances. It also criticized the majority for dismissing as relevant circumstances that were "susceptible of innocent explanation." Here, all of the circumstances suggested criminal activity.

Qualified Immunity and the Need for Specificity in the Clearly Settled Law Inquiry

Because the D.C. Circuit had also ruled against the officers on qualified immunity grounds, the Court in *Wesby* went on to determine that the officers were protected by qualified immunity as well. It explained: "It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." Emphasizing the need for specificity in making the clearly settled law determination, the Court "readily" concluded that the officers were protected by qualified immunity:

> The officers found a group of people in a house that the neighbors had identified as vacant, that appeared to be vacant, and that the partygoers were treating as vacant. The group scattered, and some hid, at the sight of law enforcement. Their explanations for being at the house were full of

> holes. The source of their claimed invitation admitted that she had no right to be in the house, and the owner confirmed that fact.

The Court further pointed out that the plaintiffs did not identify a single precedent finding a Fourth Amendment violation in similar circumstances. The D.C. Circuit majority had relied on "only" one of its decisions, from 1971, which "did not say anything about whether the officers here could infer from all the evidence that the partygoers knew that they were trespassing." In addition, existing District of Columbia precedent "would have given the officers reason to doubt that they had to accept the partygoers' assertion of a bona fide belief." Consequently, a reasonable officer would have interpreted the law as permitting the arrests here. "There was no controlling case holding that a bona fide belief of a right to enter defeats probable cause, that officers cannot infer a suspect's guilty state of mind based on his conduct alone, or that officers must accept a suspect's innocent explanation at face value."

Justice Sotomayor concurred in part and concurred in the judgment, agreeing on qualified immunity. Justice Ginsburg concurred in the judgment in part, arguing that the Court's Fourth Amendment jurisprudence "sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection." In her view, the relevant jurisprudence should sometimes take account of a police officer's reason for acting.

Wesby signals to federal courts and litigants that it takes qualified immunity very seriously in the false arrest setting as well. It insists on a particularized pro-defendant approach to the clearly settled law inquiry. In a very real sense, the Court's instruction to federal courts is: *Decide qualified immunity summary judgment motions exactly as we would.*

It is worth noting in *Wesby* that the Court commented in footnote 8 that "[w]e have not yet decided what precedents — other than our own — qualify as controlling authority for purposes of qualified immunity." The Court cited *Reichle v. Howards,* 566 U.S. 658 (2012), a First Amendment qualified immunity retaliatory arrest case, as "reserving the question whether courts of appeals decisions can be 'a dispositive source of clearly established law' [and] express[ed] no view on that question here." The Court went on to explain that it was only addressing how a reasonable official could have interpreted those circuit court decisions.

It is not entirely clear what this footnote means. One possibility is that it is a justification for the Court's willingness in so many qualified immunity summary judgment cases to second-guess how the circuits have interpreted *their own precedents* in making the clearly settled law inquiry. Another possibility is that the Court may be hinting that only Supreme Court decisions can make clearly settled law, with the result that even if the relevant constitutional law is clearly settled in the forum circuit, the law remains unsettled in the absence of a Supreme Court decision. If that is correct, then this footnote has the potential to significantly expand the already broad protections of qualified immunity. But this reading is a stretch, at least at this point.

For more — perhaps too much more — on qualified immunity, see Ch. 8 of Professor Nahmod's treatise, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (4th ed. 2017).

Kisela v. Hughes: Another Predictable Supreme Court Excessive Force Qualified Immunity Decision

The Supreme Court in *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam), handed down on April 2, 2018, reached out per curiam to reverse the Ninth Circuit in an excessive force qualified immunity case. The Ninth Circuit had itself reversed the district court's grant of summary judgment to law enforcement officers on the ground that they violated clearly settled Fourth Amendment law. In the course of its opinion, the Court yet again chastised the Ninth Circuit (and implicitly other federal courts) for making the clearly settled law inquiry at too general a level.

In *Kisela*, police officers heard on a police report that a woman was engaging in "erratic behavior" with a knife, including hacking at a tree. When three officers arrived at the scene, they saw a woman, the plaintiff, holding a large kitchen knife at her side and moving toward another woman standing nearby, although the plaintiff never got closer than six feet. The other woman told the officers to "take it easy." The three officers drew their guns, but one of them, the defendant, shot her four times through a chain link fence when she did not acknowledge their presence or drop the knife. She had refused to drop the knife after at least two commands to do so. All of this took place in less than a minute.

The officers later discovered that the plaintiff and the other woman were roommates, that the plaintiff had a history of mental illness and that the plaintiff was upset with her roommate because of a debt. The roommate stated in an affidavit that she never felt threatened, while the officers said that they "subjectively believed" that the plaintiff was a threat to the other woman.

The district court granted summary judgment to the defendant, but the Ninth Circuit reversed because of circuit precedent that it considered analogous for clearly settled law purposes. On defendant's petition for rehearing en banc, seven judges dissented from its denial. The Supreme Court in turn summarily reversed in a per curiam opinion.

The Court emphasized that it had "repeatedly told courts — and the Ninth Circuit in particular — not to define clearly settled law at a high level of generality." This was particularly appropriate in the excessive force Fourth Amendment setting where the results are always so fact-dependent. Here, the defendant had to make a split-second decision based on what he saw and knew. This was not an "obvious case," where any competent officer would have known that shooting the plaintiff would violate the Fourth Amendment. In addition, the Ninth Circuit relied on precedents that were distinguishable

from this case, including one that was decided after the incident here and another that did not pass the "straight-face test." Accordingly, the Court summarily reversed the Ninth Circuit and ruled that the defendant was protected by qualified immunity.

Justice Sotomayor dissented, joined by Justice Ginsburg. She argued that the defendant violated clearly settled law in shooting the plaintiff. "[Plaintiff] was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of [her roommate] or anyone else." Also, the other officers held their fire, while the defendant shot the plaintiff four times without warning. Thus, the defendant acted unreasonably and violated the Fourth Amendment. She then went on to address the clearly settled law inquiry, with the relevant question being: did the defendant have fair notice that his conduct was unconstitutional? Here, under Ninth Circuit precedent, the answer was yes. In her view, the Court's attempt to distinguish those precedents was strained. Also, the decisions of other circuits indicated that the defendant violated clearly settled Fourth Amendment law.

Furthermore, Justice Sotomayor, went on, the Court made the mistake of drawing factual inferences in favor of the defendant rather than, as required, in favor of the plaintiff. Finally, she accused the Court of effectively, and improperly, requiring an identical case to establish clearly settled law: the Ninth Circuit had gotten it right. Justice Sotomayor concluded by asserting that the Court's summary reversal was "symptomatic" of the Court's "disturbing trend" in qualified immunity cases of intervening where law enforcement officers were perhaps improperly *denied* qualified immunity by lower courts but not intervening where law enforcement officers were perhaps improper *granted* qualified immunity. This "one-sided approach" was troubling and "asymetric" and in effect converted qualified immunity into absolute immunity.

Comments

1. Regardless of the particular Fourth Amendment and clearly settled law merits of *Kisela*, there is little doubt that the dissent was correct as an empirical matter in accusing the Court of asymmetry in the qualified immunity setting. Time and again, the Court has reached out, sometimes without briefing and oral argument, as in *Kisela* itself, to reverse a pro-plaintiff qualified immunity determination.

2. In addition, both the Court and the dissent yet again informed other federal courts and litigants that the Court insists on almost identical precedent (except in obvious cases) as a condition precedent to finding a violation of clearly settled law.

3. Decades ago, Professor Nahmod predicted in prior editions of CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 ch. 8 (4th ed. 2017) (West), that the Court's qualified immunity decisions in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) (eliminating the subjective part of qualified immunity *as a matter of policy*), and *Mitchell v. Forsyth,* 472 U.S. 511 (1985) (making denials of qualified immunity motions for summary judgment immediately appealable), would convert qualified immunity into

absolute immunity. The Court's qualified immunity decisions, especially in the last decade but even before then, have borne out this prediction.

Chapter 10: Procedural Defenses

The Supreme Court addressed exhaustion of judicial remedies and the Prison Litigation Reform Act.

In *Ross v. Blake*, 137 S. Ct. – (2016), the Court declared:

> The Prison Litigation Reform Act of 1995 (PLRA) mandates that an inmate exhaust "such administrative remedies as are available" before bringing suit to challenge prison conditions. The [Fourth Circuit] adopted an unwritten "special circumstances" exception to that provision, permitting some prisoners to pursue litigation even when they have failed to exhaust available administrative remedies. Today we reject that freewheeling approach to exhaustion as inconsistent with the PLRA. But we also underscore that statute's built-in exception to the exhaustion requirement: A prisoner need not exhaust remedies if they are not "available."

Chapter 12 Attorney's Fees

The Supreme Court dealt with a court's inherent authority to award fees as sanctions.

In *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017) (Justice Gorsuch did not participate), a non-§ 1983 case involving the failure of a tire that caused plaintiffs' motorhome to swerve and flip over, the Court addressed a district court's inherent authority to award fees as sanctions against the defendant for its bad faith conduct. The district court, several years after settlement— and after the plaintiffs independently found out about the defendant's dishonesty regarding test results— awarded the plaintiffs $2.7 million in sanctions, the entire amount they spent in legal fees from the time the defendant first engaged in bad faith discovery response. The district court determined that timely and honest disclosure of the test results would likely have led the defendant to settle much earlier. The Ninth Circuit affirmed.

However, the Supreme Court unanimously reversed and remanded in an opinion by Justice Kagan. It explained:

> We hold that such an order [under the district court's inherent authority] is limited to the fees the innocent party incurred solely because of the misconduct—or put another way, to the fees that party would not have incurred but for the bad faith. A district court has broad discretion to calculate fees under that standard. But because the court here granted legal fees beyond those resulting from the litigation misconduct, its award cannot stand.

The Court emphasized that attorney's fees as sanctions are compensatory, not punitive. It also relied on its decision in *Fox v. Vice* (discussed in Chapter 12) dealing with the question of how to compute fees awards to a prevailing defendant where the plaintiff asserted both frivolous and non-frivolous claims. In *Fox*, the Court held that the district court could only award fees that the defendant would not have incurred but for the frivolous claims. According to the Court in *Haeger*, the same but-for approach was appropriate here.