REMEDIES SYMPOSIUM

REEXAMINING *BIVENS* AFTER *ZIGLAR V. ABBASI*

*By Bernard W. Bell**

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[1] the U.S. Supreme Court first recognized a damages cause of action for constitutional violations. The *Bivens* doctrine has had an uncertain history, to say the least. The Supreme Court's decisions last term, *Ziglar v. Abbasi*[2] and *Hernandez v. Mesa*,[3] provide an occasion to revisit the doctrine. In *Ziglar v. Abbasi*, the Court expressed a preference for the array of non-damages remedies, including direct Administrative Procedure Act (APA) review, internal agency review, equitable remedies, and declaratory remedies, *inter alia*, over creating a *Bivens* damages remedy. *Bivens* itself contains the seeds of this approach. Justice Harlan's concurrence explained that the Court had implied a damages remedy because "for people in Bivens' shoes, it is damages or nothing."[4] The Court's "any port in the storm" approach is insufficiently demanding of alternative remedial schemes. This paper will explore the necessary prerequisites for acceptable alternative remedies.

Section I discusses the development of the *Bivens* doctrine and last term's *Bivens* decisions. Section II discusses the relationship between damages and administrative remedies in the context of non-constitutional torts. Section III proposes a contextual approach for determining when *Bivens* relief should be available.

I. *BIVENS*: A BRIEF HISTORY

Section 1983 provides citizens and non-citizens a remedy against state officials who violate their federal constitutional rights.[5] However,

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1. 403 U.S. 388 (1971).
2. 582 U.S. ___, 137 S. Ct. 1843 (2017).
3. *Id.*
4. *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).
5. 42 U.S.C. § 1983.

Congress has never provided an analogous statutory damages remedy for federal officials' constitutional torts. Ordinarily federal courts cannot create damages causes of action. *Bivens*, for the first time, implied a right of action for damages under a provision of the Constitution, namely the Fourth Amendment. The majority relied heavily upon the principle, articulated in *Marbury v. Madison*, that every right must have a remedy.[6] The Court initially expanded the scope of potential *Bivens* actions to encompass gender discrimination in violation of the Equal Protection Clause in *Davis v. Passman*,[7] and deliberate indifference to prisoners' medical needs in violation of the Eighth Amendment in *Carlson v. Green*.[8]

In *Davis v. Passman*, Congressman Passman fired Davis, his deputy administrative assistant, believing the position should be held by a man.[9] *Carlson* involved a federal prisoner, Joseph Jones, Jr., suffering from chronic asthma. On the day Jones died, no prison official called a doctor to examine him even though he remained in the prison hospital for eight hours. Defendant Walters, a non-licensed nurse, tried to use an inoperable respirator on Jones. Walters then administered thorazine, which was contra-indicated for asthma. Jones died 30 minutes after Walters administered a second injection.[10]

Bivens, *Passman*, and *Carlson* each involve an exercise of discretion in the individual case rather than the adoption of broadly-applicable policies. None of the cases provided a meaningful review of the exercise of discretion or the inaction that constituted the constitutional violation. And two of the three, *Bivens* and *Carlson*, arose in a law enforcement context.

Since 1980, the Court has consistently rejected *Bivens* claims, describing expansion of *Bivens* as a "disfavored" activity.[11] Often the Court refuses to imply a damages remedy.[12] The Court has refused to allow *Bivens* claims against federal agencies,[13] held *respondeat superior* liability inappropriate,[14] and crafted robust absolute and qualified

6. 5 U.S. 137, 163 (1803); *see Bivens*, 403 U.S. at 397.
7. 442 U.S. 228 (1979).
8. 446 U.S. 14 (1980).
9. *Davis*, 442 U.S. at 230.
10. Green v. Carlson, 581 F.2d 669, 670-71 (7th Cir. 1978), *aff'd*, 446 U.S. 14 (1980).
11. *Ziglar*, 137 S.Ct. at 1857.
12. *See, e.g.*, Bush v. Lucas, 462 U.S. 367 (1983) (termination from federal employment); Schweiker v. Chilicky, 487 U.S. 412, 414 (1988) (termination of social security benefits).
13. FDIC v. Meyer, 510 U.S. 471 (1994).
14. Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001).

immunity defenses.[15] Often in refusing to imply a cause of action the Court has noted the existence of other remedies,[16] either remedies provided by agency administrative processes, equitable remedies available to courts, or even federal statutory or state tort law damages remedies.[17]

Moreover, even when no alternative remedy exists, some lower courts refrain from creating a *Bivens* remedy unless the absence of alternative remedies can be attributed to legislative oversight.[18] However, remedial lacunae often result from judicially-crafted justiciability rules that reveal little about Congress' preferences regarding the availability of judicial review.[19]

This preference for other remedies could be explained by the Court's legitimacy concerns, which make *any* congressionally-crafted *or* state law remedy preferable to a judicially-created *Bivens* remedy. But in addition, the Court may consider damages remedies a last resort due to their implications for federal officials. In *Butz v. Economou*, Justice Rehnquist observed that *Marbury v. Madison* "leaves no doubt that the high position of a Government official does not insulate his actions from judicial review."[20] *Marbury v. Madison* and similar cases "involved *equitable-type relief by way of mandamus or injunction*."[21] Such equitable remedies offered "better tailoring of the competing need to vindicate individual rights" and "the equally vital need," that "federal officials exercising discretion . . . be unafraid to take vigorous action" in the public interest.[22]

The first of last term's *Bivens* cases, *Ziglar v. Abbasi*, is one of many that have arisen out of the federal government's response to global terrorism.[23] After the September 11 attacks, the FBI detained over 700 aliens on immigration charges. Many were subject to a "hold-until-cleared policy." Six detainees held at a federal detention facility and subjected to the hold-until-cleared policy initiated a *Bivens* suit. They alleged that they were randomly strip-searched and subjected to a pattern of "physical and

15. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731 (1982) (absolute immunity); Wilson v. Layne, 526 U.S. 603 (1999) (qualified immunity).

16. Minneci v. Pollard, 565 U.S. 118, 127 (2012); Wilkie v. Robbins, 551 U.S. 537, 550 (2007); *Schweiker*, 487 U.S. at 414; *Bush*, 462 U.S. at 368, 381-90.

17. *Carlson*, 446 U.S. 14, 19 (1980); *Bivens*, 403 U.S. at 394-95.

18. Mirmehdi v. United States, 689 F.3d 975, 982 (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2336 (2013); Wilson v. Libby, 535 F.3d 697, 708, 710 (D.C. Cir. 2008), *cert denied*, 557 U.S. 919 (2009); Zuspann v. Brown, 60 F.3d 1156, 1161 (5th Cir. 1995).

19. See *infra* text accompanying notes 82-89.

20. 438 U.S. 478, 523 (1978) (Rehnquist, J., concurring in part and dissenting in part

21. *Id.*

22. *Id.* at 523-24.

23. *See* JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 31-56 (2017).

verbal abuse."[24] They sued former Attorney General John Ashcroft, former FBI Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar. They also sued the detention facility's warden for failing to intervene.

Plaintiffs asserted four constitutional claims. First, that the harshness of their confinement violated their Fifth Amendment substantive due process rights. Second, that such harsh treatment due their race, religion, or national origin deprived them of equal protection. Third, that the punitive strip searches violated the Fourth and Fifth Amendments. Fourth, that the warden's failure to intervene violated the substantive due process component of the Fifth Amendment.[25]

Hernandez v. Mesa was a much simpler case. Mesa, a border patrol agent, fatally shot Sergio Güereca, a 15–year–old Mexican national. At the time, Güereca was standing near a cement culvert that separates El Paso, Texas, from Ciudad Juarez, Mexico. Hernández and several friends had run up the culvert's embankment on the United States side, touched the border fence, and returned to Mexican territory. Agent Mesa had fired the fatal shot from the U.S. side of the border.[26]

A majority refused to permit a *Bivens* claim in *Ziglar*, and, in a brief *per curiam*, remanded *Hernandez*. The decisions hardly clarified the *Bivens* doctrine. The Court kept in place its obvious distaste for *Bivens* liability, while refusing to inter the doctrine. Justice Kennedy outlined a test for recognition of new *Bivens* claims that required reasoning by analogy to the three 1970s/1980s era Supreme Court decisions in which *Bivens* liability was recognized. In particular, lower courts must now determine whether plaintiff's claims differ "in a meaningful way" from the ones raised in the *Bivens* trilogy.[27]

> 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.[28]

Justice Kennedy then demonstrated just how strict lower courts'

24. *Ziglar*, 137 S. Ct. at 1853.
25. *Id.* at 1847.
26. Hernandez v. Mesa, 137 S. Ct. 2003, 2005 (2017).
27. *Ziglar*, 137 S. Ct. at 1859-60.
28. *Id.* at 1860.

analogical reasoning should be, addressing the *Ziglar v. Abbasi* plaintiffs' allegation that the warden had encouraged, or willfully ignored, correctional officers' abuse of detainees.[29] The Court recognized the parallels with *Carlson*, but noted four significant differences between the cases. First, the *Ziglar* plaintiffs were making a *Fifth* Amendment claim, not an *Eighth* Amendment claim. The Court did not explain why the distinction mattered. Second, judicial guidance regarding wardens' supervisory obligations for pre-trial detainees was far less developed than the law governing wardens' supervisory obligations for prisoners serving their sentences. Third, the alternative remedies available to the *Ziglar* plaintiffs, injunctive relief and a potential *habeas corpus* petition, differed from the Federal Tort Claims Act (FTCA) damages action available to the inmate in *Carlson*. Fourth, since *Carlson*, Congress had enacted the Prison Litigation Reform Act of 1995, without making any provision for stand-alone damages claims against federal jailers.[30]

Formally, the Court merely remanded *Hernandez v. Mesa* for further consideration in light of *Ziglar v. Abbasi*.[31] But the majority's approach virtually dooms the case to failure. Though *Hernandez v. Mesa* involved a Fourth Amendment violation like *Bivens*, it can easily be distinguished from *Bivens* in terms of several factors the *Ziglar* Court cited.

Part IIIB of the majority opinion in *Ziglar v. Abbasi* may hold the key to *Bivens'* future development. The Court observed that *Bivens* actions are not a "proper vehicle for altering an entity's policy,"[32] repeating a line first used in *Correctional Services Corporation v. Malesko.* Justice Kennedy explained: "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*."[33] Later, the majority returned to the theme, noting that respondent's claims were particularly problematic *Bivens* claims because they "challenge[d] *large-scale policy decisions* concerning the conditions of confinement imposed on hundreds of prisoners."[34]

29. *Id.* at 1864.
30. *Id.* at 1864-65.
31. 137 S. Ct. at 2006-07
32. *Ziglar*, 137 S. Ct. at 1860.
33. *Id.*
34. *Id.* at 1862. ("To address those kinds of decisions, detainees may seek injunctive relief."). A study of 200 *Bivens* complaints over an approximately 2-year span revealed that 6.5% were high-profile efforts to change government policy, using *Bivens* in place of a conventional APA challenge. David Zaring, *Three Models of Constitutional Torts*, 2 J. TORT LAW 1, 12 (2008).

II. THE FEDERAL TORT CLAIMS ACT, THE DISCRETIONARY FUNCTION EXCEPTION, AND THE APA

The Federal Tort Claims Act[35] provides a cause of action for "garden variety" torts.[36] The statute includes several exceptions that retain the federal government's sovereign immunity from particular types of claims.[37] Most importantly for our purposes, is the discretionary function exception,[38] meant to ensure that damages actions did not become a vehicle for challenging contestable policy determinations.[39] Such decisions are to be assessed in the context of direct judicial review of agency action, which requires individuals to participate in the administrative process leading to the final agency decision and if aggrieved, seek a judicial order invalidating the agency action.[40]

The Supreme Court has encountered difficulty in precisely defining the discretionary function exception's scope.[41] However, the Court has repeatedly noted that the exception covers decisions "grounded in social, economic, or political goals," thus ensuring that such decisions are not second-guessed in the context of a tort action.[42] Thus, the exception "protects only governmental actions and decisions based on considerations of public policy."[43]

During the summer of 1946, Congress not only enacted the FTCA, but also the Administrative Procedure Act (APA).[44] The APA specified procedures to facilitate interested parties' participation in agency adjudication and pioneered a notice-and-comment informal rulemaking approach that allowed the public to participate in the formation of informal rules.[45] It also ensured the availability of judicial review, by

35. Aug. 2, 1946, ch. 753, Title IV, 60 Stat. 842 (codified at scattered sections of 28 U.S.C.).

36. 28 U.S.C. § 2674 (1948); Dalehite v. U.S., 346 U.S. 15, 28 & note19 (1953).

37. 28 U.S.C. § 2680 (1948).

38. 28 U.S.C. § 2680(a).

39. *See*, e.g., H.R. REP. NO. 79-1287 (1945); H.R. REP. NO. 77-2285 (1942); *see generally*, Ronald A. Cass, *The Discretionary Function Exception to the Federal Tort Claims Act*, in ADMINISTRATIVE CONFERENCE OF THE U.S., 2 RECOMMENDATIONS AND REPORTS: 1987, 1505-06 (1987).

40. *Cass*, *supra* note 39, at 1513.

41. *Id.* at 1548.

42. U.S. v. Gaubert, 499 U.S. 315, 323 (1991); U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797, 814 (1984).

43. *Gaubert*, 499 U.S. at 323 (quoting Berkovitz v. U.S., 486 U.S. 531 (1988)).

44. June 11, 1946, ch. 324, 60 Stat. 237 (codified at scattered section of 5 U.S.C.).

45. 5 U.S.C. § 553(c) (1978).

reaffirming the presumption of reviewability.[46] However, the APA does not provide a damages remedy.[47] The APA routinized standards of review, establishing a deferential standard of review for most administrative determinations.[48] Agencies' resolution of policy questions would be upheld unless "arbitrary and capricious," so long as the agency action neither violated the Constitution nor federal statute.[49] Much of the subsequent development in administrative law has involved expanding both participatory rights in agency proceedings and the availability of judicial review.[50]

The paradigm case for application of the discretionary function exception is a claim that regulatory choices embodied in statutes or regulations pose an unreasonable risk of physical harm or property damage. Obviously, having aggrieved individuals challenge such actions by way of damages suits is far less preferable than having them participate in the legislative or regulatory process and seek to overturn the statute or regulation if invalid. Striking the optimal balance between the societal goals of enhancing safety and reducing regulatory burdens should primarily be left to Congress or agency rule makers.

III. SECOND-GUESSING IN THE *BIVENS* CONTEXT

Ziglar v. Abbasi evidences the Supreme Court's effort to steer review of policy judgments away from *Bivens* damages actions. Is that appropriate? Indeed, the courts have been quite indiscriminate in finding potential alternative remedies sufficient to foreclose *Bivens* relief.[51] Would the principle that review of policy decisions should not be denied but merely channeled into the standard procedures for reviewing agency action suggest greater judicial circumspection?

Constitutional torts differ significantly from their non-constitutional, unintentional tort cousins in ways that might suggest a broader role for damages actions. Generally, unintentional torts, particularly negligence claims, involve balancing the risks created by a course of conduct against the burden altering the conduct to reduce the risk entailed.[52] Determining the most appropriate regulatory and administrative approaches to properly

46. 5 U.S.C. § 701(a) (2011), § 702 (1966), § 704 (1966).

47. *See* 5 U.S.C. § 703 (1966).

48. 5 U.S.C. § 706(2) (1966).

49. 5 U.S.C. § 706(2) (A) (1966).

50. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1716 (1975).

51. *See supra* notes 16-18 and accompanying text.

52. RESTATEMENT (THIRD) OF TORTS § 3 (2005).

balance such risks and burdens are tasks peculiarly within the competence of administrative agencies (or other executive and legislative actors). Respect for agency expertise justifies according agency officials primacy in determining the balance between the risk of physical or economic injury and the government's programmatic objectives. By contrast, controversies over constitutional rights are particularly appropriate for judicial resolution. The federal courts consider themselves the preeminent expositors of the U.S. Constitution.[53]

Nevertheless, the executive and legislative branches have long played a critical role in protecting judicially-declared constitutional rights, and more broadly, loosely-defined constitutional values. Judicially-declared constitutional rights often establish a floor of protection and are frequently supplemented by legislative and executive action.[54] Indeed, institutional competence concerns often lead courts to under-define constitutional norms.[55]

Moreover, given the importance and intangibility of constitutional rights[56] which makes constitutional harms particularly difficult to quantify, constitutional violations should be invalidated or reversed rather than tolerated and "remedied" by way of damages awards. Indeed, in the context of motions for preliminary injunction, violations of constitutional rights ordinarily qualify as "irreparable harm."[57]

In this regard, the Supreme Court's approach in section 1983 malicious prosecution cases is instructive.[58] In *Heck v. Humphrey*, the Court adverted to "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments."[59] Accordingly, it held that when a section 1983 damages action turns on "the unlawfulness of his conviction or confinement," the plaintiff must prove that the conviction or sentence has been invalidated or otherwise rendered nugatory.[60]

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53. Marbury v. Madison, 5 U.S. 137, 177 (1803); City of Boerne v. Flores, 521 U.S. 507, 523-4, 536 (1997).

54. *See, e.g.*, Employment Division v. Smith, 494 U.S. 872, 890 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb, *as stated in* Holt v. Hobbs, 135 S. Ct. 853 (2015).

55. *See* Bernard W. Bell, Marbury v. Madison *and the Madisonian Vision*, 72 GEO. WASH. L. REV. 197, 202 (2003).

56. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 707-09 (1990).

57. *See* 11A CHARLES ALLEN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2d ed. 1995).

58. Heck v. Humphrey, 512 U.S. 477, 484-87 (1994).

59. *Id.* at 486.

60. *Id.* The analogy to *Bivens* is not complete. Unlike under *Bivens*, the right challenge to the

In short, steering constitutional litigation away from damages actions seems sensible. But before the Court declares *Bivens* actions inappropriate in a particular context, it should critically examine the alternative means of either vindicating constitutional rights or at least restraining government officials' unconstitutional actions. Important aspects of any such mechanisms are: (1) a process affording individuals effected to have "an opportunity to be heard" before the impact of the government's decision is permanently felt, *i.e.*, a participatory administrative process, (2) judicial review of the validity of the government official's action before the impact of that action becomes irreversible, and (3) transparency. These aspects ensure that effected citizens can participate in the process before the official actions becomes final and that an independent body sensitive to constitutional rights reviews the decision.

A. The Contextual Analysis

Sometimes government officials act in ways that cause permanent harm without the constraint of either meaningful administrative supervision or judicial review. The 1970s/1980s *Bivens* trilogy all involve such situations. Often, however, there is some supervision or review of official action before it becomes irrevocable. There are at least four modes of constraining official action: (1) *ex ante* judicial determination, (2) participatory agency processes followed by judicial review, (3) *ex post* judicial review providing "specific" remedies, and (4) non-*Bivens* damages actions. Each will be assessed in terms of participatory rights, judicial review, and transparency. In some circumstances justiciability doctrines and secrecy partially undermine the effectiveness of these potential avenues of review.

1. Official Action Not Subject to Meaningful Supervision or Judicial Review

Bivens liability is particularly critical where official action is unconstrained by either internal administrative review or judicial review. Federal agencies ordinarily establish some internal mechanism for hierarchical control. Such mechanisms enable managerial control over agency officials, and seek to ensure consistent treatment of regulated

validity of a conviction does not *bar* plaintiff's § 1983 action. *Heck v. Humphrey* merely requires that such challenge be made, and made successfully, before a damages action is commenced.

entities, program beneficiaries, and the public.[61] Managerial controls will typically neither incorporate participation by those subject to official action nor judicial review. Neither do they routinely ensure transparency. Sometimes these managerial controls leave capacious discretion to lower level employees as a matter of necessity. In such instances, some decisions by low-level employees implementing policy may largely be uncontrollable, as a practical matter, at least before those employees act in ways that irreparably breach individuals' constitutional rights. The prototypical example is the law enforcement officer deciding whether to conduct a warrantless search.

The three cases in which the Court has upheld a *Bivens* remedy all involve officials who were not subject to meaningful constraint in acting or failing to act in ways that infringed upon plaintiffs' constitutional rights. *Bivens* involved a warrantless search.[62] *Carlson v. Green* involved low-level prison officials' failure to summon a physician for an inmate in acute distress. The officials did not need authorization to refrain from calling in a physician; their exercise of discretion was not subject to *ex ante* review, even by supervisors. The Congressman in *Davis v. Passman* possessed unconstrained and unreviewable discretion over his personal congressional staff.

The Court has recognized the unique problem caused by individual official's unrestrained discretion in both the *Bivens* and procedural due process contexts. In *Ziglar v. Abbasi*, Justice Kennedy asserted that, by "their very nature," individual instances of discrimination or law enforcement overreach are difficult to address except by way of damages actions after the fact**."**[63] For the Court, this seems an intuitive proposition. However, the inability to provide *ex ante* remedies is attributable to the breadth of the direction certain government officials enjoy, not the nature of the constitutional right is involved.

In the procedural due process setting, the Court has held that a failure to prevent random or unauthorized intentional deprivation of property by government officials is not a violation of due process, because no prior hearing could possibly be held.[64] As the Court explained in *Parratt v. Taylor*, such deprivations do not "occur as a result of some established

61. Sun Ray Drive-In Diary v. Oregon Liquor Control Comm'n, , 517 P.2d 289, 293 (Ore. App. 1973); *See also*, JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 26 (1985).

62. *Bivens*, 403 U.S. 388 (1971).

63. *Ziglar*, 137 S. Ct. at 1862; *accord Bivens*, 403 U.S. at 409-10 (Harlan, J., concurring).

64. Hudson v. Palmer, 468 U.S. 517, 533-34 (1984); Parratt v. Taylor, 451 U.S. 527, 543 (1981), *overruled by* Daniels v. Williams, 474 U.S. 327 (1986).

state procedure" but "as a result of the unauthorized failure of agents of the State to follow established state procedure."[65] But often official action is subject to meaningful supervision, control, review, and correction. Four types of mechanisms to cabin official discretion are discussed below.

2. Four Modes for Constraining Unconstitutional Conduct

a. Ex Ante Judicial Determinations

In some circumstances, procedures exist for an *ex ante de novo* judicial determination of the constitutional validity of a government official's contemplated action. The warrant requirement governing searches and seizures provides a prime example.[66] It seeks to ensure that the existence of probable cause is determined by a neutral magistrate rather than law enforcement agents "engaged in the often competitive enterprise of ferreting out crime."[67] And the judicial determination is *de novo*, the judge must decide whether there is probable cause; agents' "reasonable" belief that probable cause exists is insufficient.[68] As Justice Rehnquist observed in his *Butz v. Economou* concurrence, "the safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct."[69] This trust in the protections offered by interposing a neutral magistrate in the investigative process led the Court to craft a "good faith" exception to the exclusionary rule, permitting use of the fruits of a search even if the magistrate erred in finding probable cause for the search to exist.[70]

Granted, the warrant process does not offer pre-search transparency, nor does the target of the search enjoy any participatory rights in that process.[71] Nevertheless, permitting *Bivens* claims against officers conducting searches authorized by warrants is inappropriate, because the pre-search *de novo* judicial review of the warrant offers adequate

65. *Parratt*, 451 U.S. at 543. (Thus, random or unauthorized deprivations of property become due process violations only if state common law remedies fail to provide full *ex post* relief).

66. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 738 (2011).

67. *See* Johnson v. United States, 333 U.S. 10, 14 (1948).

68. *See* Franks v. Delaware, 438 U.S. 154, 165 (1978).

69. 438 U.S. at 512.

70. United States v. Leon, 468 U.S. 897, 913 (1984).

71. While a third party holding the target's records may receive notice, their interests may not be congruent with the target's. *See, e.g.*, Claire Cain Miller, *Tech Companies Concede to Surveillance Program*, N.Y. TIMES, June 7, 2013, http://www.nytimes.com/2013/06/08/technology/tech-companies-bristling-concede-to-government-surveillance-efforts.html; *see generally*, Rainey Reitman, *Who Has Your Back: Government Data Requests 2017* (July 10, 2017), https://www.eff.org/who-has-your-back-2017#major-findings-trends.

protection.

However, law enforcement officials should not be relieved of *Bivens* liability if they abuse the warrant process. Issuance of a warrant based on a knowingly false assertion by the law enforcement officers should not serve to immunize from *Bivens* liability either the officer making the false assertion or officers executing the warrant with knowledge of the falsehood. Such a rule is consistent with the limits on the "good faith" exception to the exclusionary rule[72] and *Franks v. Delaware*, which allows defendants to challenge the veracity of the affidavits supporting warrants that have already been executed.[73]

b. Participatory Agency Process Followed by Judicial Review

Sometimes Congress establishes a participatory agency process followed by deferential judicial review *before* the government action can be completed. *Bush v. Lucas*, involving the termination of public employment, and *Schweiker v. Chillicky*, regarding the award of social security disability benefits, involved just such administrative schemes.[74] Indeed, both cases involve trial-type processes. Any deprivation of a right while such processes move forward is often temporary, and reversible. Indeed, the remedial scheme itself may allow compensation for the temporary deprivations should the party deprived of the right prevail. *Bush v. Lucas* and *Schweiker v. Chillicky* seem to have outsized influence in *Bivens* cases. The Court cites them in finding that sufficient means to vindicate constitutional violations exist to preclude *Bivens* relief, even when the processes identified are quite unlike the trial-type process involved in those two cases.

The APA's procedural requirements for informal rulemaking do not require trial-type proceedings. Nevertheless, as with trial-type adjudicatory proceedings, interested parties have a right to participate in the proceeding in the form of submission of written comments at a minimum, and to secure judicial review, again on a deferential basis.

Of course, doctrines of standing, ripeness, or non-reviewability might inhibit judicial review.[75] But often, at least these sorts of agency adjudicatory schemes, particularly those that involve trial type hearings,

72. *Leon*, 468 U.S. at 914.

73. *Franks*, 438 U.S. at 155-56, 168. *See generally*, Wilson v. Russo, 212 F.3d 781, 787-88 (3d Cir. 2000).

74. *Bush*, 462 U.S. at 368, 381-90 ("[t]he question is . . . whether an elaborate remedial system that has been constructed . . . should be augmented by the creation of a new judicial remedy" for constitutional violations); *Schweiker*, 487 U.S. at 414.

75. *See infra* notes 83-90 and accompanying text.

incorporate a right of review that is rarely frustrated by such doctrines. Such processes might also be frustrated by government secrecy and the use of secret law,[76] but secrecy in such circumstances is not the norm.

c. Ex post Judicial Review Providing "Specific" Remedies

Some administrative processes do not permit outside participation in the administrative process. Nevertheless, the resulting agency decision may be subject to judicial review. And such judicial review may produce an order declaring the agency action invalid and thus nugatory. While the standard specific relief might consist of an order declaring the government's action invalid, an order requiring corrective relief or issuance of a writ of habeas corpus addressing a detainee's conditions of confinement might also qualify as *ex post* specific remedies.[77]

Neal Katyal has provided the impetus for a school of thought that seeks to structure internal agency processes in ways that protect constitutional rights.[78] The structures recommended do not necessarily involve increasing potential subject's participation in agency processes. Indeed, they may be designed for processes in which such participation is impractical. Katyal, for example, focuses on foreign policy decision-making.[79] But these techniques may provide for more robust debate among government officials about the relevant constitutional constraints, enhancing constitutional protections.[80]

Agencies often craft general policies governing agency officials' conduct that such officials must apply. The policy may be adopted by regulation or more informally well before an agency official applies it to a particular person in a manner that may infringe upon his constitutional rights. Ideally a concern about protecting high-level policy decisions from second-guessing through the medium of tort litigation might suggest that

76. City of New York v. Heckler, 742 F.2d 729, 733 (1984), *aff'd*, Bowen v. City of New York, 476 U.S. 467, 468 (1986) (excusing exhaustion requirement because of agency's use of secret law); Center for Effective Government v. U.S. Department of State, 7 F. Supp. 3d 16, 29-30 (D.D.C. 2013) (FOIA designed to preclude development of "secret law"); see 5 U.S.C. § 552(a)(1)(D), § 552(a)(2) (requiring publication of substantive rules of general applicability and the like).

77. For the distinction between "specific" remedies and "substitutionary" remedies, s*ee* Laycock, *supra* note 56, at 696.

78. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 YALE L.J. 2314 (2006).

79. *Id.*

80. PFANDER, *supra* note 23, at 95. ("The resulting culture of law compliance within the Department of Justice pervades the various agencies of government, providing the basis for an argument that the executive branch itself does a credible job of ensuring its own compliance with legal norms.").

any policy with constitutional implications should be subject to judicial review once promulgated. Concomitantly, consideration of the policy should not occur for the first time in a *Bivens* action against the agency officials who promulgated the policy or the lower-level employee who followed it. If the policy is upheld against post-promulgation attack, a *Bivens* remedy should be available only against agency officials who violate the policy and, in doing so, contravene an individual's constitutional rights. Moreover, perhaps an express, reasonable consideration of constitutional issues might be considered relevant to the imposition of *Bivens* liability, all the more so if the agency's constitutional determination is publicly available, allowing members of the public to participate in the process or at least challenge the policy prior to its implementation.

Consider the law enforcement practice of permitting journalists to accompany them during law enforcement operations, including execution of search warrants, *i.e.*, media ride-alongs. Such ride-alongs have potential constitutional implications, particularly when private dwellings are searched. In 1999, the Court held that such ride-alongs violated homeowners' Fourth Amendment rights.[81] Before 1999, the U.S. Marshals Service had issued a pamphlet regarding ride-alongs to guide Deputy Marshals. The policy did not address potential constitutional issues, except for one passing reference to privacy considerations, and did not seek to constrain Deputy Marshals' exercise of discretion. However, suppose the policy had sought to constrain Deputy Marshals' discretion, but concluded that Deputy Marshals could permit journalists to accompany them into private homes. Ideally, the policy would have been subject to judicial review upon promulgation, eliminating the need for a damages action to challenge the constitutionality of ride-alongs involving entry into private residences. A *Bivens* action could remain available for circumstances in which a Deputy Marshal's action was both unauthorized by the agency's ride-along policy and violative of Fourth Amendment. Such an approach would limit *Bivens* actions to inappropriate applications of policies that had already been subject to direct review.

But this approach has drawbacks. First, judicially-crafted justiciability and reviewability doctrines may preclude early challenges to general policies. Second, secrecy may prevent the public from learning of the governments' policies or techniques until after they have been applied in numerous instances. Third, sometimes impacted individuals may have little incentive to mount a challenge to a government policy until the

81. Wilson v. Layne, 526 U.S. 603, 614 (1999).

policy is applied to them.

General reviewability doctrines, including APA-specific doctrines, as well as justiciability doctrines such as ripeness and standing may, and perhaps often will cause problems for plaintiffs seeking to challenge general policies, or even more specific official actions, before they become irrevocable.

Wilkie v. Robbins,[82] is a *Bivens* case in which APA-specific doctrines might well have stood in the way of securing meaningful injunctive relief by other avenues. Plaintiff alleged that federal officials had taken a series of actions in retaliation for his refusal to confer an easement over his property. The landowner could have, and in fact did, contest many of those actions.[83] But the crux of his complaint was that the series of retaliatory actions, taken together, infringed upon his Fifth Amendment right to enjoyment of his property. In short, plaintiff was complaining about being subject to "death by a thousand cuts."[84] Robbins might have been unable to bring an APA claim to stop the harassment. *Norton v. Southern Utah Wilderness Alliance ("SUWA")*, precludes plaintiffs from bringing programmatic challenges to government administration of programs, and thus limits plaintiffs to challenging discrete actions.[85]

Clapper v. Amnesty International, U.S.A.,[86] provides an example of standing doctrine posing a potential bar to challenging unconstitutional policies. Even though the government was likely to use authority conferred by a Foreign Intelligence Surveillance Act (FISA) amendment to intercept communications of foreign nationals, the prospect of such interception was too remote to confer standing on organizations that maintain frequent confidential communications with foreign nationals as clients, partners, and sources. The Court explained that the "threatened injury must be certainly impending to constitute injury in fact."[87] It found the likelihood of interception of conversations too speculative. Given the secrecy of the FISA warrants, at best plaintiffs could establish that their conversations were being intercepted when the Government sought to use the communication of the foreign national in a criminal prosecution.[88]

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82. Wilkie v. Robbins, 551 U.S. 537 (2007).

83. *Id*. at 551-54.

84. *Id*. at 555.

85. 542 U.S. 55, 64-65 (2004). While *SUWA* is an "inaction" case, it suggests that APA challenges with broad programmatic complaints rather than circumscribed, discrete agency actions are not justiciable under the APA.

86. 568 U.S. 398 (2013).

87. *Id*. at 409.

88. *See* Obama v. Klayman, 800 F.3d 559 (D.C. Cir. 2015) (plaintiffs lacked standing to challenge the NSA's bulk metadata collection program because they had not yet established that NSA

Secrecy may mean that government policies will not be challenged before widely applied. Indeed, such secrecy may mean that even the application of the policy to particular individuals cannot be challenged until after their effect has become irreversible. Often law enforcement techniques or military action outside the United States remain secret for significant periods.[89] The Freedom of Information Act ("FOIA") includes exceptions for law enforcement records, particularly those revealing law enforcement techniques,[90] as well as for properly classified national security information.[91] The APA "notice and comment" requirements for informal rulemaking exempt the country's military and foreign affairs functions.[92]

Thus, many people were no doubt subjected to targeted drone strikes, extraordinary rendition, and pervasive National Security Agency wiretaps and bulk metadata collection before such matters come to light. Even domestic programs involving non-consensual human testing on military personnel and civilians continued for years in secrecy.[93] The effect of such programs on individuals before the government's conduct is revealed cannot be undone. At that point, only a damages remedy will do.

A third reason precluding *Bivens* claims that challenge policy as unworkable is suggested by the ride-along hypothetical. In that context, limiting *Bivens* actions for Fourth Amendment violations that result from failure to follow agency guidelines is troubling because homeowners have little reason to mount a challenge to any general policy guidance involving ride-alongs before it affects them.

d. Non-*Bivens* Damages Remedies

Non-*Bivens* damages remedies can provide recompense for a government official's infringements of citizens' rights. Various federal statutes, like the FTCA, the Religious Freedom Restoration Act,[94] the

had collected their metadata).

89. *See* Mitchell v. Forsythe, 472 U.S. 511, 522 (1985) (national security tasks are conducted in secret, making it "far more likely that actual abuses will go uncovered than that fancied abuses" will give rise to litigation.). With respect to foreign affairs, see U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

90. 5 U.S.C. § 552(b)(7)(E) (2016).

91. 5 U.S.C. § 552(b)(1) (2016). Indeed, under subsection (c)(3), an agency need not acknowledge the existence of records "pertaining to foreign intelligence or counterintelligence, or international terrorism."

92. 5 U.S.C. § 553(a)(1) (1978).

93. *See, e.g.*, United States v. Stanley, 483 U.S. 669 (1987) (secret experiment involving administering LSD to Army personnel).

94. 42 U.S. Code § 2000bb–1(c) (1993).

Religious Land Use and Institutionalized Persons Act,[95] and the Privacy Act,[96] create damages causes of action. Indirectly, state common law tort actions might provide a remedy for injuries arising out of unconstitutional conduct. These remedies offer an advantage over *Bivens* only with respect their constitutional legitimacy; unlike the *Bivens* remedy they need not be created by federal courts. They provide the same types of relief available in a *Bivens* action, namely damages awards. Such damages actions involve judges second-guessing decisions made by others, as do *Bivens* actions. Federal statutory damages causes of action have a significant advantage over state common law tort (or FTCA) causes of action; they do not turn on the vagaries of state tort law to control federal actors. These focused federal statutes may offer a more protective standard than the judicially-declared constitutional right at issue and can be tailored to the right at issue. This aspect of the statutes may make them more appropriate to deem alternative remedies preemptive of *Bivens* liability.

B. The Contextual Approach and the Court's Ziglar *Factors*

In the *Bivens* area certainty is desirable, given government officials' potential personal liability. Consideration of context, as suggested above, can be quite complex. For that reason alone, perhaps embracing a contextual approach seems problematic. However, the suggested contextual analysis may be no more complex than the analogical exercise the *Ziglar v. Abbasi* Court imposed upon federal judges. The Court's listing of multiple factors whose significance it leaves unexplained provides little certainty, unless one considers it a subterfuge obscuring the Justices' decision not recognize any new *Bivens* actions.

Consideration of the contours of a regime for constraining unconstitutional conduct surely seems more relevant to the appropriateness of implying a *Bivens* remedy than most of the *Ziglar v. Abbasi* factors. Why does the constitutional right at issue matter? The Court does not explain why some constitutional rights give rise to *Bivens* claims, but others do not. A remedial context analysis may provide a rationale. In particular, some rights are less likely to be violated absent judicial error (because they are related to criminal adjudication). Others, like procedural due process violations, may more readily be rectified. For others, a damages-type remedy may already exist, such as inverse condemnation actions to remedy Takings Clause violations.

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95. 42 U.S. Code § 2000cc–2 (2000) (judicial relief provision).

96. 5 U.S. Code § 552(a)(g)(1) (2016) ((civil action); 5 U.S. Code § 552(a)(i)(1) (2016) (criminal action).

Consideration of the defendant's rank may simply seem elitist. Or it may merely serve to ensure that one official does not have extensive *Bivens* liability for broadly-applicable policies.[97] A contextual approach suggests an additional explanation. High-level officials *ordinarily* make decisions only after some process of deliberation involving subordinates. Low-level officials are much more likely to act without the same level of intra-agency deliberation. High-ranking officials' reduced risk of *Bivens* liability might best be conceived as a reflection of the likelihood that serious institutional deliberation occurs before such officials act.

The "generality or specificity of the official action" may matter in terms of the likelihood of some meaningful process preceding the taking of the action. Promulgating a guideline authorizing ride-along searches is more likely to involve broad-scale consideration, which encompasses agency lawyers, than an officer's decision to permit a ride-along in a particular case. But aside from this, it is not clear what relevance the generality of specificity of the official action has, except a concern for the extensiveness of potential liability based on a broadly applicable decision.

How is "the extent of judicial guidance" regarding the problem the officer confronted relevant to whether a *Bivens* action should be implied? The Court does not tell us. Seemingly such a consideration is fully considered in the qualified immunity analysis, which is relevant only after the Court decides a *Bivens* cause of action can be implied.

The Court does not explain how and why "the statutory or other legal mandate under which the officer was operating" matters. It is not clear what aspect of the mandate of the Drug Enforcement officer in *Bivens*, for instance, was important. Why should it make a difference that the National Park Service's Law Enforcement Division or the U.S. Customs and Border Protection Agency statutory authorizations diverge from each other or that of the DEA? Perhaps the difference, if any, relates to the importance of the law enforcement mission and a particular need for its fearless execution. But a contextual analysis suggests that the key should be whether the statutory or legal mandate specifies constraints that limit the officer's authority so as to safeguard constitutional rights.[98]

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97. Some courts have suggested that the scale of high-level officials' liability for unconstitutional action could be limited by requiring a finding that the official had personal responsibility for the constitutional violation before *Bivens* liability could be imposed. *See* Vance v. Rumsfeld, 701 F.3d 193, 203-05 (7th Cir. 2012); Padilla v. Yoo, 678 F.3d 748, 768 (9th Cir. 2012).

98. The relevance of some of the factors are more discernable, such as "[t]he risk of disruptive intrusion by the Judiciary into the functioning of other branches" and "the presence of potential special factors that previous *Bivens* cases did not consider."

IV. CONCLUSION

The Court's statements in *Ziglar v. Abbasi* regarding second-guessing policy decisions should not dismissed as stray remarks; they will likely become a part of the Court's mantra in future *Bivens* cases. Inherent in those statements is a preference for direct review of official decisions over indirect review via damages actions. But the Court should refine its consideration of the available means of, at the very least, controlling government officials' potentially-unconstitutional conduct, and ideally, giving individuals the right to secure invalidation and reversal of such conduct. There are several means by which these opportunities to invalidate and rectify unconstitutional conduct may be provided, but not all should be considered adequate to redress potential constitutional injuries. An analysis focused on alternative means to control official conduct and provide individuals a means for redress may make some sense of the list of factors the *Ziglar v. Abbasi* Court offers lower courts deciding whether to recognize a new *Bivens* cause of action. And such an approach would focus courts on aspects of potential *Bivens* claims that seem most relevant.