Center for Constitutional Rights

Discrimination, Detention, and Deportation: Immigration & Refugees

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Public Facing Advocacy Writing

The CCR blog

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Having litigated the case that would become*Ziglar v. Abbasi*for the last fifteen years, since the summer I graduated from law school, my first impressions of the Supreme Courts 4-2 decision were somewhat provincial. I represent six men who were detained after 9/11 for minor immigration violations. Though there was never any reason to suspect my clients of ties to terrorism, they were beaten, harassed, kept from contacting lawyers and loved ones, denied the ability to practice their religion, deprived of sleep and held in solitary confinement until they were cleared of any potential connection to terrorism by the FBI and deported. Last weeks Supreme Court decision denying them an opportunity to sue for monetary damages against the former federal officials that designed the policies that led to their restrictive confinement marks a low point in their long struggle for justice and compensation. Perhaps unsurprisingly, my first thoughts were how they would be impacted and where the case could go from here. With the benefit of a few days distance, I have forced myself to undertake the decidedly unpleasant task of considering the bigger picture: Just how badly does Justice Kennedys opinion eviscerate the*Bivens*doctrine? Spoiler alert: quite a lot.

Some background first: unlike constitutional violations by State officials, there is no statute that allows people to sue federal officials for damages for constitutional violations. Instead, civil rights plaintiffs have relied on a trio of Supreme Court cases, stating with*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,*that implied a damages cause of action directly under theFourth Amendment,the Equal Protection Clauseand theEighth Amendment. Since 1980 the Supreme Court has consistently rejected attempts to expand the*Bivens*doctrine to allow damage actions against federal agencies, private corporations and private actors and to limit its application where Congressional action in the field leaves no room or no need for an implied cause of action. But over the same period, the Supreme Court and the circuits assumed the availability of many other*Bivens*claims that met the central purpose of the doctrine: compensating victims of federal officer wrongdoing where such compensation would otherwise be unavailable, and deterring individual federal officers from future illegality.*Abbasi*stands in sharp contrast to these decades of precedent.

Justice Kennedys decision in*Abbasi*identifies four special factors weighing against recognition of a*Bivens*action. The first factor is that Respondents bring claims against Executive Officials. Having re-read the operative paragraphs about 15 times, I simply cannot tell if Kennedy means to question*all Bivens*actions against executive officials or only*Bivens*challenges to*policies*set by executive officials. If a defendants high-rank is a special factor in every challenge then executive officials may very well enjoy absolute immunity, and Justice Kennedy has effectively overruled*Mitchell v. Forsyth*, a 1985 decision which permitted a damages action to proceed against the former attorney general.

There is however reason to believe that Justice Kennedy is only referring to*policies*set by executive officers, as he takes pains to describe the claims in question as challenging the detention policy and begins his analysis by noting that a*Bivens*action is not a proper vehicle for altering an entitys policy. Perhaps Justice Kennedys concern is that the policy claims at issue in*Abbasi*are the type that would lead to problematic discovery about policy deliberations, distracting or deterring federal officers from doing their jobs. If that is the case, civil rights practitioners will recognize these concerns as nothing new. In fact, they are the reason why federal and state officials already enjoy qualified immunity, which protects government actors from reasonable but mistaken judgments as to what the law might allow. Insulating executive policy from*Bivens*challenges suggests that high-level officials should also be free to make unreasonable mistakes as to what the law allows, without fear of individual liability.

This is new. The Supreme Court recognized decades ago in*Butz v. Economou*that It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizens house . . . but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. After all, unconstitutional polices hurt more people than individual unconstitutional acts, shouldnt we care more about deterring and compensating them? And while the Supreme Court has previously stated that*Bivens*is not a proper vehicle for altering an entitys policy, taken in context, all the Court was saying was that a claim for injunctive relief is the proper way to stop an ongoing constitutional violation by an entity, not a claim for damages*against the entity*brought in hopes the entity would subsequently be deterred from future illegality.

Thus,*Abbasi*special factor number one calls into question the continued vitality of any*Bivens*claim against a high ranking official, and establishes for the very first time a presumption against a*Bivens*challenge to high-level policies that violate the Constitution.

Justice Kennedy identifies three other special factors, all closely related: (1) that the policy in question involves national security; (2) that Congress has been silent about a remedy for 9/11 detainees, and (3) that Respondents could have sought injunctive relief. As for the first, it initially appears to be something of a wash even by Kennedys reasoning. On the one hand, courts must defer to what the Executive branch has determined is essential for national security. But on the other hand, there are limitationson the power of the

Executive even with respect to national security. This tension is overstated in context, as *Abbasi* is not a case about men whom the executive thought presented a national security threat. To the contrary, the Office of the Inspector General found that the 9/11 detainees were treated as suspected terrorists and subjected to harsh conditions of confinement because the FBI could not say whether or not it had any interest in investigating them further. The sensitive issue of national security which Kennedy insulates from review is the determination to treat every Muslim man of Arab or South Asian descent who has overstayed his visa as a national security threat until he is proven harmless. Thus, under special factor number two, *any* racist or arbitrary policy decision is insulated from judicial review so long as it is undertaken in the name of national security, regardless of whether it has any factual basis whatsoever.

Next, Kennedy discusses Congressional silence as a special factor counseling against implying a *Bivens* remedy. This is both factually and doctrinally incoherent. It is true that Congress was interested in the 9/11 detentions and heard evidence about the detainees conditions of confinement. And it is also true that Congress did not create a cause of action for damages in response to this information. Missing from Kennedys analysis, however, is the highly relevant fact that Congress was told in those same hearings that 9/11 detainees were bringing *Bivens* claims that were working their way through the courts. And at the time of those hearings, the availability of such a *Bivens* claim was not even questioned by Defendants. Congressional action was therefore totally unnecessary, and evidences nothing.

Finally, Kennedy finds it of central importance that this is not a case like *Bivens* or *Davis* in which it is damages or nothing because Respondents could have challenged their conditions of confinement by seeking injunctive relief. Actually, Respondents *did* seek injunctive relief. But as they were kept from contacting attorneys until late in their detention, their injunctive claims were mooted before judicial review was possible. In this way, Respondents situation is precisely like that in *Davis* - where injunctive relief was theoretically available at the time of the Constitutional violation but unavailable by the time the case reached the Supreme Court, prompting the Courts adoption of Justice Harlans famous damages or nothing language. Thus under *Abbasi* special factor four, Kennedy transforms the Courts previous inquiry into whether *Bivens* is, at the time of review, the only available remedy, into an inquiry into whether some other relief *might theoretically* have been available at the moment the violation occurred.

With these four special factors in mind, Kennedy comes to his conclusion: a balance must be struck between deterring constitutional violations and freeing high-level officials to act. But no balancing follows; for Kennedy, the fact that there is a balance to strike means Congress must strike it. Never mind *Marbury v. Madison;* the Court has no special role to play.

What does this mean for future civil rights plaintiffs, injured by federal officials? Kennedy does not opine that any one of these factors alone would be enough to foreclose *Bivens*, and for now at least, *Bivens* challenges to Constitutional violations by low-ranking officials will likely continue. It is not the small injustices that have been foreclosed from compensation; it is the large ones, the outrageous ones, the ones we thought maybe, in this day and age, the Court would care to consider. Instead, should the attorney general decide tomorrow that every single American Muslim is a potential threat to national security and must be rounded up and detained, a lawsuit to enjoin that policy might succeed, but those unlucky few detained before the court could rule would have no recourse. The injury to their rights would be collateral damage; regrettable, but of no constitutional consequence. And the officials who planned and ordered this gruesome violation of the Constitution; they would remain undeterred from trying again, perhaps with a few tweaks, the following week. Somehow I doubt this outcome would be the same if the conservatives on the Court felt any real kinship at all toward the Brown and Black communities likely to be the target of future discriminatory policies. The Courts kinship for high-level federal policy-makers forced to make tough decisions about other peoples freedom, on the other hand, is on clear display.

View the discussion thread.

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