

Legal Sidebar

No *Bivens* for You?

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In [Ziglar v. Abbasi](#), a consolidated case in which only two-thirds of the bench participated, the Supreme Court ruled 4-2 against extending the judicially created “*Bivens* remedy” to certain unlawfully present aliens challenging their detention during investigations following the September 11, 2001 terror attacks. However, the Court remanded for further analysis the question whether those plaintiffs could sue for abusive prison conditions. In short, the issue in *Abbasi* centered on the application of the Supreme Court’s 1971 opinion in [Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics](#), which held that a plaintiff may bring a lawsuit for damages against a federal officer for violations of the Fourth Amendment. The *Bivens* remedy has twice been extended to other contexts: (1) in [Davis v. Passman](#), for gender discrimination against a public employee in violation of the equal protection component of the [Fifth Amendment](#); and (2) in [Carlson v. Green](#), for constitutionally inadequate prisoner medical care in violation of the [Eighth Amendment](#). In *Abbasi*, the plaintiffs sought two additional extensions of *Bivens*, which the Supreme Court by and large denied. And though the plaintiffs still have one more bite at the apple before the U.S. Court of Appeals for the Second Circuit, their shot at victory seems unlikely, given the majority’s apparent skepticism of the *Bivens* remedy itself, as well as dicta suggesting that the plaintiffs’ claim is unlikely appropriate for an extension of that remedy.

The plaintiffs in *Abbasi*—six unlawfully present men of Arab or South Asian descent, most of whom are Muslim—were detained for months at a federal detention center in New York City shortly after the 9/11 terror attacks. At the time, the FBI had been investigating tips of suspected terrorist activity (some more well-grounded than others) and detained aliens “of interest” pursuant to a “hold-until-cleared policy.” That is, aliens were detained until the FBI affirmatively cleared them of terrorist ties. Some detainees, including the plaintiffs, purportedly were subject to harsh conditions of confinement to pressure them into cooperating. After plaintiffs’ release and removal from the United States, they [sued](#) seeking money damages under *Bivens* for alleged constitutional harms suffered while detained. Specifically, the plaintiffs brought claims against DOJ officials and the detention facility’s warden under the Fourth and Fifth Amendments, targeting detention policies and resulting conditions of confinement. The [Second Circuit](#) allowed the claims to proceed under *Bivens*, and an appeal to the Supreme Court followed.

Playing a large role in the *Abbasi* [ruling](#) (authored by Justice Kennedy) was the majority’s position on the appropriateness of the *Bivens* remedy, in general. The majority described the era in which *Bivens* and its progeny were decided as an “[ancien regime](#)” in which the Court was more willing to create a judicial remedy when a federally protected right had been invaded, even when Congress had not statutorily provided one expressly. More recently, the Court has curbed this practice. And in *Abbasi*, the majority asserted that “it is a significant step under separation-of-powers principles” for the judiciary “to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation.” But even though the *Abbasi* Court noted that *Bivens* has become a “disfavored” remedy, the Court stated nevertheless that *Bivens*’s protection against unreasonable searches and seizures in violation of the Fourth Amendment is “settled law” that the majority did not intend to disturb.

The Court then turned to the plaintiffs’ claims for *Bivens* relief. To determine whether a *Bivens* remedy may be available, courts must engage in a two-part inquiry. First, courts must ask whether the case meaningfully differs from *Bivens*, *Davis*, or *Carlson*. According to the *Abbasi* Court, meaningful differences may include the constitutional right raised by the suit; the official action at issue; the amount of judicial guidance available for the problem; or the risk of judicial intrusion into the other branches of government, among others. If the case differs meaningfully, a reviewing court moves onto the second part of the inquiry, asking whether “special factors” counsel hesitation against judicial

intrusion. The Supreme Court has never defined those special factors. But the *Abbasi* majority [asserted](#) 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.” Further, the availability of alternative remedies may also give the judiciary pause.

Concerning the policy claims, the Court concluded that *Bivens* cannot provide a remedy for the *Abbasi* plaintiffs. The Court first found that the detention policy claims meaningfully differed from the scenarios in *Bivens*, *Davis* and *Carlson* (involving FBI agents handcuffing someone in his home without a warrant, a Congressman firing his female employee, and a prison’s failure to treat an inmate’s medical condition, respectively). Moving on to the special factors analysis, the Court concluded that *Bivens* is an inappropriate means to challenge a government agency’s policy; rather, *Bivens* is better suited to challenging individual official action. Further, the majority said, allowing a suit for damages in *Abbasi*, which involved an investigation after a major terror attack on U.S. soil, would compel courts to interfere with “sensitive functions of the Executive Branch,” including the responsibility to formulate and implement national security policies. And a judicial inquiry into national security policy, a field that is the responsibility of Congress and the President, raises separation of powers concerns, the Court added, particularly when the judicial inquiry involves a claim for money damages rather than injunctive relief.

As for the *Abbasi* plaintiffs’ conditions claim against the warden, the Supreme Court handed down a mixed ruling, concluding that the plaintiffs were asking for *Bivens* relief in a new context, but declining to decide whether special factors precluded relief. The Court first compared the conditions claim to the claim at issue in *Carlson*. Although both related to prisoner mistreatment, the Court found small, but meaningful differences between the claims. For instance, the conditions claim in *Abbasi* alleged a violation of the Fifth Amendment, rather than the Eighth Amendment, and thus, in the majority’s view, “the judicial guidance available to this warden, with respect to his supervisory duties, was less developed.” Next, the Court rattled off a number of special factors that may discourage extending the *Bivens* remedy (e.g., potential alternative remedies or Congress’s decision not to provide a damages remedy against federal prison officials in the Prison Litigation Reform Act). But the Court stopped short of concluding that those factors were determinative, given that the Second Circuit did not conduct that analysis in the first instance, and the parties did not focus on that analysis in their arguments.

In dissent, Justice Breyer—joined by Justice Ginsburg—contended that the majority improperly characterized the plaintiffs’ claims as an extension of *Bivens*, and thus the Second Circuit’s judgment should have been affirmed. Justice Breyer also seemingly criticized the majority opinion for narrowing the current scope of viable *Bivens* actions, and he cast doubt on the relevancy of the factors the majority stated were pertinent to determining whether applying *Bivens* in a new context is appropriate. And though Justice Breyer agreed that the constitutional right at issue is germane to a *Bivens* analysis, he argued that it is only the substance of the right at issue that matters, not merely the label of the right. Under that view, the dissent reasoned, the *Abbasi* plaintiffs’ claims did meaningfully differ from other *Bivens* cases, most notably *Carlson*. Although brought under different constitutional provisions—one applicable to persons serving a criminal sentence (*Carlson*) and one governing other forms of detention (*Abbasi*)—the harms, in Justice Breyer’s view, were the same: unconstitutional treatment of the confined.

So what does *Abbasi* mean for *Bivens* actions? Notably, the *Bivens* actions already recognized by the Court appear to remain viable. However, it may be harder for plaintiffs to argue that a particular case is not an extension of *Bivens* in closely related, but not identical, constitutional claims. For example, does *Abbasi* preclude all pretrial detainees from bringing a *Bivens* action for harsh conditions of confinement under the Fifth Amendment, even though the Court has recognized that a conditions-of-confinement claim might sometimes be available if brought under the Eighth Amendment by incarcerated criminals? Additionally, the Court seems to be sending a strong message that it will not recognize a money-damages remedy for constitutional harms committed by federal officials where Congress has not created one. Having said that, though, given the highly fact-specific nature of a *Bivens* analysis, it’s unclear how a different case based on a different set of facts would fare before all nine Justices.