Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ZIGLAR *v.* ABBASI ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 15–1358. Argued January 18, 2017—Decided June 19, 2017*

In the immediate aftermath of the September 11 terrorist attacks, the Federal Government ordered hundreds of illegal aliens to be taken into custody and held pending a determination whether a particular detainee had connections to terrorism. Respondents, six men of Arab or South Asian descent, were detained for periods of three to six months in a federal facility in Brooklyn. After their release, they were removed from the United States. They then filed this putative class action against petitioners, two groups of federal officials. The first group consisted of former Attorney General John Ashcroft, former Federal Bureau of Investigation Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar (Executive Officials). The second group consisted of the facility's warden and assistant warden Dennis Hasty and James Sherman (Wardens). Respondents sought damages for constitutional violations under the implied cause of action theory adopted in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, alleging that petitioners detained them in harsh pretrial conditions for a punitive purpose, in violation of the Fifth Amendment; that petitioners did so because of their actual or apparent race, religion, or national origin, in violation of the Fifth Amendment; that the Wardens subjected them to punitive strip searches, in violation of the Fourth and Fifth Amendments; and that the Wardens knowingly allowed the guards to abuse them, in violation of the Fifth Amendment. Respondents also brought a claim under 42 U. S. C. §1985(3), which forbids certain

---

*Together with No. 15–1359, *Ashcroft, Former Attorney General, et al.* v. *Abbasi et al.,* and No. 15–1363, *Hasty et al.* v. *Abbasi et al.*, also on certiorari to the same court.

Syllabus

conspiracies to violate equal protection rights. The District Court dismissed the claims against the Executive Officials but allowed the claims against the Wardens to go forward. The Second Circuit affirmed in most respects as to the Wardens but reversed as to the Executive Officials, reinstating respondents' claims.

Held: The judgment is reversed in part and vacated and remanded in part.

789 F. 3d 218, reversed in part and vacated and remanded in part.

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part IV–B, concluding:

1. The limited reach of the *Bivens* action informs the decision whether an implied damages remedy should be recognized here. Pp. 6–14.

(a) In 42 U. S. C. §1983, Congress provided a specific damages remedy for plaintiffs whose constitutional rights were violated by state officials, but Congress provided no corresponding remedy for constitutional violations by agents of the Federal Government. In 1971, and against this background, this Court recognized in *Bivens* an implied damages action to compensate persons injured by federal officers who violated the Fourth Amendment's prohibition against unreasonable searches and seizures. In the following decade, the Court allowed *Bivens*-type remedies twice more, in a Fifth Amendment gender-discrimination case, *Davis* v. *Passman*, 442 U. S. 228, and in an Eighth Amendment Cruel and Unusual Punishments Clause case, *Carlson* v. *Green*, 446 U. S. 14. These are the only cases in which the Court has approved of an implied damages remedy under the Constitution itself. Pp. 6–7.

(b) *Bivens, Davis,* and *Carlson* were decided at a time when the prevailing law assumed that a proper judicial function was 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. The Court has since adopted a far more cautious course, clarifying that, when deciding whether to recognize an implied cause of action, the "determinative" question is one of statutory intent. *Alexander* v. *Sandoval*, 532 U. S. 275, 286. If a statute does not evince Congress' intent "to create the private right of action asserted," *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 568, no such action will be created through judicial mandate. Similar caution must be exercised with respect to damages actions implied to enforce the Constitution itself. *Bivens* is well-settled law in its own context, but expanding the *Bivens* remedy is now considered a "disfavored" judicial activity. *Ashcroft* v. *Iqbal*, 556 U. S. 662, 675.

When a party seeks to assert an implied cause of action under the Constitution, separation-of-powers principles should be central to the

analysis. The question is whether Congress or the courts should decide to authorize a damages suit. *Bush* v. *Lucas*, 462 U. S. 367, 380. Most often it will be Congress, for *Bivens* will not be extended to a new context if there are " 'special factors counselling hesitation in the absence of affirmative action by Congress.' " *Carlson, supra,* at 18. 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, courts must refrain from creating that kind of remedy. An alternative remedial structure may also limit the Judiciary's power to infer a new *Bivens* cause of action. Pp. 8–14.

2. Considering the relevant special factors here, a *Bivens*-type remedy should not be extended to the claims challenging the confinement conditions imposed on respondents pursuant to the formal policy adopted by the Executive Officials in the wake of the September 11 attacks. These "detention policy claims" include the allegations that petitioners violated respondents' due process and equal protection rights by holding them in restrictive conditions of confinement, and the allegations that the Wardens violated the Fourth and Fifth Amendments by subjecting respondents to frequent strip searches. The detention policy claims do not include the guard-abuse claim against Warden Hasty. Pp. 14–23.

(a) The proper test for determining whether a claim arises in 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. Meaningful differences may include, *e.g.,* the rank of the officers involved; the constitutional right at issue; the extent of judicial guidance for the official conduct; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors not considered in previous *Bivens* cases. Respondents' detention policy claims bear little resemblance to the three *Bivens* claims the Court has approved in previous cases. The Second Circuit thus should have held that this was a new *Bivens* context and then performed a special factors analysis before allowing this damages suit to proceed. Pp. 15–17.

(b) The special factors here indicate that Congress, not the courts, should decide whether a damages action should be allowed.

With regard to the Executive Officials, a *Bivens* action is not "a proper vehicle for altering an entity's policy," *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 74, and is not designed to hold officers responsible for acts of their subordinates, see *Iqbal*, *supra,* at 676. Even an action confined to the Executive Officers' own discrete conduct would call into question the formulation and implementation of a high-level executive policy, and the burdens of that litigation could prevent officials from properly discharging their duties, see *Cheney* v.

Syllabus

United States Dist. Court for D. C., 542 U. S. 367, 382. The litigation process might also implicate the discussion and deliberations that led to the formation of the particular policy, requiring courts to interfere with sensitive Executive Branch functions. See *Clinton* v. *Jones*, 520 U. S. 681, 701.

Other special factors counsel against extending *Bivens* to cover the detention policy claims against any of the petitioners. Because those claims challenge major elements of the Government's response to the September 11 attacks, they necessarily require an inquiry into national-security issues. National-security policy, however, is the prerogative of Congress and the President, and courts are "reluctant to intrude upon" that authority absent congressional authorization. *Department of Navy* v. *Egan*, 484 U. S. 518, 530. Thus, Congress' failure to provide a damages remedy might be more than mere oversight, and its silence might be more than "inadvertent." *Schweiker* v. *Chilicky*, 487 U. S. 412, 423. That silence is also relevant and telling here, where Congress has had nearly 16 years to extend "the kind of remedies [sought by] respondents," *id.,* at 426, but has not done so. Respondents also may have had available " 'other alternative forms of judicial relief,' " *Minneci* v. *Pollard*, 565 U. S. 118, 124, including injunctions and habeas petitions.

The proper balance in situations like this, between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation in times of great peril, is one for the Congress to undertake, not the Judiciary. The Second Circuit thus erred in allowing respondents' detention policy claims to proceed under *Bivens*. Pp. 17–23.

3. The Second Circuit also erred in allowing the prisoner abuse claim against Warden Hasty to go forward without conducting the required special factors analysis. Respondents' prisoner abuse allegations against Warden Hasty state a plausible ground to find a constitutional violation should a *Bivens* remedy be implied. But the first question is whether the claim arises in a new *Bivens* context. This claim has significant parallels to *Carlson*, which extended *Bivens* to cover a failure to provide medical care to a prisoner, but this claim nevertheless seeks to extend *Carlson* to a new context. The constitutional right is different here: *Carlson* was predicated on the Eighth Amendment while this claim was predicated on the Fifth. The judicial guidance available to this warden with respect to his supervisory duties was less developed. There might have been alternative remedies available. And Congress did not provide a standalone damages remedy against federal jailers when it enacted the Prison Litigation Reform Act some 15 years after *Carlson*. Given this Court's expressed caution about extending the *Bivens* remedy, this context

Syllabus

must be regarded as a new one. Pp. 23–26.

4. Petitioners are entitled to qualified immunity with respect to respondents' claims under 42 U. S. C. §1985(3). Pp. 26–32.

(a) Assuming that respondents' allegations are true and well pleaded, the question is whether a reasonable officer in petitioners' position would have known the alleged conduct was an unlawful conspiracy. The qualified-immunity inquiry turns on the "objective legal reasonableness" of the official's acts, *Harlow* v. *Fitzgerald*, 457 U. S. 800, 819, "assessed in light of the legal rules that were 'clearly established' at the time [the action] was taken," *Anderson* v. *Creighton*, 483 U. S. 635, 639. If it would have been clear to a reasonable officer that the alleged conduct "was unlawful in the situation he confronted," *Saucier* v. *Katz*, 533 U. S. 194, 202, the defendant officer is not entitled to qualified immunity. But if a reasonable officer might not have known that the conduct was unlawful, then the officer is entitled to qualified immunity. Pp. 27–29.

(b) Here, reasonable officials in petitioners' positions would not have known with sufficient certainty that §1985(3) prohibited their joint consultations and the resulting policies. There are two reasons. First, the conspiracy is alleged to have been among officers in the same Department of the Federal Government. And there is no clearly established law on the issue whether agents of the same executive department are distinct enough to "conspire" with one another within the meaning of 42 U. S. C. §1985(3). Second, open discussion among federal officers should be encouraged to help those officials reach consensus on department policies, so there is a reasonable argument that §1985(3) liability should not extend to cases like this one. As these considerations indicate, the question whether federal officials can be said to "conspire" in these kinds of situations is sufficiently open that the officials in this suit would not have known that §1985(3) applied to their discussions and actions. It follows that reasonable officers in petitioners' positions would not have known with any certainty that the alleged agreements were forbidden by that statute. Pp. 29–32.

KENNEDY, J., delivered the opinion of the Court with respect to Parts I, II, III, IV–A, and V, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined, and an opinion with respect to Part IV–B, in which ROBERTS, C. J., and ALITO, J., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined. SOTOMAYOR, KAGAN, and GORSUCH, JJ., took no part in the consideration or decision of the cases.

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.