

# Marshall S. Shapo Festschrift

## CONSTITUTIONAL TORTS AND THE PROBLEM OF GOVERNMENT POLICY: AN ESSAY FOR MARSHALL SHAPO

*James E. Pfander*

**AUTHOR**—Owen L. Coon Professor, Northwestern Pritzker School of Law. Thanks to Alex Reinert and Joanna Schwartz for comments on an early draft, to Leah Regan-Smith for excellent research assistance, and to the editors of *Northwestern University Law Review* for skilled and very helpful engagement with this Essay. Special thanks to Marshall Shapo for teaching me the ropes.

INTRODUCTION .....	241
I. <i>ZIGLAR V. ABBASI</i> AND CHALLENGES TO GOVERNMENT POLICY .....	245
II. THE REALITY OF PERSONAL LIABILITY .....	246
III. LIMITED ALTERNATIVES .....	248
IV. LITIGATING TORTURE POLICIES .....	250
V. CHALLENGING GOVERNMENT POLICY .....	252
CONCLUSION .....	254

## INTRODUCTION

I am delighted to participate in this festschrift for Professor Marshall Shapo—friend, colleague, and leading figure in constitutional torts. Professor Shapo’s paper, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, has been credited with coining the term that now defines the field.<sup>1</sup> How fitting that the paper appeared in the *Northwestern University Law Review* at the very dawn of Professor Shapo’s career as a law professor—a few years after *Monroe v. Pape* came down,<sup>2</sup> a few years before *Bivens v. Six Unknown Named Agents* extended constitutional tort liability from state to federal officials,<sup>3</sup> and several years before Professor Shapo joined the Northwestern Law faculty in 1978. We now celebrate Professor Shapo’s work in the pages of the same Law Review.

Professor Shapo’s paper surveyed and helped to map the emerging field of constitutional tort litigation. Returning to the piece today, one finds a close reading of the legislative history of the Ku Klux Klan Act and § 1983, a careful sifting of the relevant pre-*Monroe* decisions, and a frank appraisal of the issues that would mark the development of constitutional tort litigation for the next several decades.<sup>4</sup> Professor Shapo charted the expansion of § 1983 litigation and wrestled with the federalism implications of federal judicial responsibility for the front-line oversight of local police departments,<sup>5</sup> a role that has grown no less urgent over time.<sup>6</sup>

But Professor Shapo never lost sight of the claims of simple justice that underlie both the congressional attempt to address lawless Klan activity during Reconstruction and the frequent examples of Jim Crow-era police violence that drove the Supreme Court to broaden the federal role of the judiciary during the Second Reconstruction.<sup>7</sup> His simple test—outrageous misconduct—would identify matters appropriate for federal oversight and would leave state courts in control of the more routine matters of prison and police misconduct.<sup>8</sup> In evaluating Professor Shapo’s test, one might

---

<sup>1</sup> Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 323–24 (1965); Michael Wells, Thomas A. Eaton & Sheldon H. Nahmod, *Why Constitutional Torts Deserve a Book of Their Own*, 22 SEATTLE U. L. REV. 857, 857 (1999).

<sup>2</sup> 365 U.S. 167, 167 (1961).

<sup>3</sup> 403 U.S. 388, 388–91 (1971). For an account of the facts that gave rise to the search of the Bivens’s home, see James E. Pfander, *The Story of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, in FEDERAL COURTS STORIES 275, 290–94 (Vicki C. Jackson & Judith Resnik eds., 2010).

<sup>4</sup> Shapo, *supra* note 1.

<sup>5</sup> *Id.* at 282–94, 324–29.

<sup>6</sup> See JARED P. COLE, CONG. RSCH. SERV., R44104, FEDERAL POWER OVER LOCAL LAW ENFORCEMENT REFORM: LEGAL ISSUES 1 (2016).

<sup>7</sup> Shapo, *supra* note 1, at 279–82, 325 n.246.

<sup>8</sup> *Id.* at 327.

acknowledge that outrageousness as the standard of unconstitutional police conduct lacks the crispness of a rule. But then so does the current standard, which allows the recovery of damages only upon a showing that the officer violated clearly established law.<sup>9</sup> In some settings, the tests converge: outrageous conduct enjoys no qualified immunity even when existing Supreme Court precedent does not clearly forbid the conduct in question.<sup>10</sup> In other settings, however, the Court's demanding qualified immunity decisions make it harder to argue that outrageous conduct alone will suffice to justify an award of damages.<sup>11</sup>

Professor Shapo understandably had less to say in that article about *Bivens* and its recognition of constitutional tort claims against federal officers. Writing in the early 1960s, well before the *Bivens* decision came down in 1971, Professor Shapo nonetheless saw such cases looming on the horizon.<sup>12</sup> He referred to *Bell v. Hood*—a 1946 precursor to the *Bivens* decision that left open the issue of whether constitutional tort liability extended to federal officials<sup>13</sup>—as a “fascinating case,” albeit one that presented issues of federal judicial power distinct from those at the heart of the “color of law” inquiry for state and local officials addressed by the *Monroe* line.<sup>14</sup> In subsequent work, he did not take up the *Bivens* problem directly, although his rumination about the creation in *Monroe* of a federal common law of police misconduct<sup>15</sup> and his reflection on the differences between constitutional swords and shields<sup>16</sup> certainly helped to anticipate and provoke future scholarship after *Bivens* was decided.<sup>17</sup> Overall, Professor Shapo's work adds depth and texture to our understanding of policy-based constitutional tort claims.

---

<sup>9</sup> See *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))).

<sup>10</sup> See *Hope v. Pelzer*, 536 U.S. 730, 745–46 (2002) (holding that the “obvious cruelty” of shackling a prisoner to a hitching post for hours at a time provided respondents with adequate notice that their conduct was unconstitutional).

<sup>11</sup> See, e.g., *Mullenix v. Luna*, 136 S. Ct. 305, 306–08 (2015) (extending qualified immunity to an officer who, against the orders of his superior, fatally shot a suspect fleeing in his vehicle); *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 368 (2009) (conferring qualified immunity on a school official who, suspecting the presence of contraband, conducted a strip search of a thirteen-year-old girl).

<sup>12</sup> Shapo, *supra* note 1, at 287 n.45.

<sup>13</sup> 327 U.S. 678, 684–85 (1946).

<sup>14</sup> Shapo, *supra* note 1, at 287 n.45.

<sup>15</sup> *Id.* at 326–27.

<sup>16</sup> *Id.* at 303 (invoking the sword and shield metaphor to distinguish defensive use of constitutional rights to block criminal enforcement and offensive use of constitutional rights to bring civil actions for damages against government officials).

<sup>17</sup> See, e.g., Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1541 (1972); Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 23–24 (1975).

*Monroe* is best known for expanding § 1983 to reach all constitutional violations that take place under color of state law.<sup>18</sup> Tracing its history, Professor Shapo reports that § 1983 litigation began to grow after the Court held that, in the criminal context, “color of law” extended to actions taken by local officials under the pretense of law.<sup>19</sup> Intriguingly, Professor Shapo reports that many of the pre-*Monroe* cases from the 1940s and 1950s arose as claims of police brutality, only some of which appear, in his telling, to have been racially motivated.<sup>20</sup> The early judicial focus on police brutality suggests that the rise of constitutional tort litigation owes much to the Court’s efforts to address extreme forms of policing that had come to include home invasion, unwarranted detention, and third-degree police interrogation. *Monroe* and *Bivens* both alleged precisely these forms of police misconduct and both included a racial subtext.<sup>21</sup>

Subsequent cases refined the *Monroe* standard. *Monell v. Department of Social Services* clarified that local governments were subject to liability under § 1983, overruling the contrary conclusion in *Monroe*.<sup>22</sup> But the *Monell* Court also held that cities and counties were not liable on a theory of respondeat superior for the wrongful acts of their officers and employees; they were only liable where the local government itself had a custom or policy that violated federal law.<sup>23</sup> Today, much of the litigation over the nature of *Monell* liability focuses on whether city and county practices rise to the level of a custom or policy for § 1983 purposes.<sup>24</sup> Some high officials in city or county governments effectively make policy; the decisions and

---

<sup>18</sup> See Shapo, *supra* note 1, at 277–78.

<sup>19</sup> *Id.* at 284–87.

<sup>20</sup> *Id.* at 288–90.

<sup>21</sup> Both *Bivens* and *Monroe* were Black men, living in major cities, and both were the targets of aggressive policing in their own homes. *Bivens* alleged that he was manacled while police entered his entire house and was then taken to a courthouse “where he was interrogated, booked, and subjected to a visual strip search.” *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). *Monroe*’s claim arose out of a similar warrantless raid and arrest: police broke into petitioner’s home while he slept and made him “stand naked in the living room” while officers ransacked the house. *Monroe v. Pape*, 365 U.S. 167, 169 (1961). On the racial subtext of the two cases, see Myriam E. Gilles, *Police, Race and Crime in 1950s Chicago: Monroe v. Pape as Legal Noir*, in *CIVIL RIGHTS STORIES* (Myriam E. Gilles & Risa L. Goluboff eds., 2007).

<sup>22</sup> 436 U.S. 658, 662–63 (1978).

<sup>23</sup> *Id.* at 691, 694.

<sup>24</sup> See, e.g., *Connick v. Thompson*, 563 U.S. 51, 57 (2011) (addressing claim that failure to train prosecutors constituted a policy or practice); *Los Angeles County v. Humphries*, 562 U.S. 29, 32–33 (2010) (considering claim that defendant had established a policy of listing parents on Abuse Index); *Shields v. Ill. Dep’t of Corr.*, 746 F.3d 782, 785, 789 (7th Cir. 2014) (addressing claim that provision of substandard medical care represented an unconstitutional policy or custom).

actions of such policymakers can sometimes translate directly into city or county liability if the policy happens to violate the Constitution.<sup>25</sup>

In this Essay honoring Professor Shapo, I tackle a growing problem in constitutional litigation: the problem of how to litigate clandestine federal government policies. In addition to its well-known hostility to *Bivens* litigation as a general matter, the Supreme Court has expressed particular antipathy toward the use of a *Bivens* suit to test the legality of government policies. Chief Justice Roberts gave voice to that view during the oral argument of *Ziglar v. Abbasi*;<sup>26</sup> he observed that *Bivens* provided an improper vehicle for challenges to a detention policy of the federal government, such as the detain-clear-and-deport policy that lay at the center of the *Ziglar* litigation.<sup>27</sup> To the Chief Justice's way of thinking, such policy challenges were best mounted in suits for injunctive and declaratory relief.<sup>28</sup> Sure enough, Justice Kennedy's majority opinion in *Ziglar*, denying any right to sue for damages when contesting detention policy, echoed the Chief Justice's comment about the inapplicability of *Bivens* to policy disputes.<sup>29</sup> During oral arguments in *Hernandez v. Mesa*, a cross-border shooting case, counsel was careful to point out that the victim's family was challenging not the policy of the Customs and Border Patrol but the rogue activities of a single border patrol officer.<sup>30</sup>

Whatever one's view of the Court's turn against *Bivens* litigation as a general matter, one might doubt the wisdom of this new hostility to the use of *Bivens* to evaluate federal government policies. This Essay gives voice to such doubts in one specific context: While litigants can test the constitutionality of most federal action by using habeas, injunctive, or APA forms of action, clandestine government policies evade review through such channels. Rather than placing such policy-testing *Bivens* litigation beyond the reach of federal courts, the Supreme Court should recognize its essential role in clarifying constitutional boundaries.

---

<sup>25</sup> Policy-based *Monell* liability does not attach to federal agencies under the *Bivens* doctrine. See *FDIC v. Meyer*, 510 U.S. 471, 486 (1994).

<sup>26</sup> 137 S. Ct. 1843 (2017).

<sup>27</sup> See Transcript of Oral Argument at 30–33, *Ziglar*, 137 S. Ct. 1843 (No. 15-1358).

<sup>28</sup> *Id.* at 47; see 5 U.S.C. §§ 701–706 (2018) (providing for the judicial review of agency action).

<sup>29</sup> See *Ziglar*, 137 S. Ct. at 1860 (citation omitted) (“[A] *Bivens* action is not ‘a proper vehicle for altering an entity’s policy.’”).

<sup>30</sup> Transcript of Oral Argument at 24, *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) (No. 17-1678) (“[W]e are not challenging a policy of the government. We are claiming Respondent himself did not comply with that policy.”).

I. *ZIGLAR V. ABBASI* AND CHALLENGES TO GOVERNMENT POLICY

The Supreme Court's hostility toward policy-testing *Bivens* litigation became clear in *Ziglar*. The suit was brought to challenge the constitutionality of the federal government's decision in the wake of the September 11th attacks to round up and detain immigrants on the basis of their religious (Muslim) and ethnic (Arab and South Asian) identities.<sup>31</sup> Those rounded up were held in punitive conditions of confinement until cleared of involvement with the terrorist attacks.<sup>32</sup> Errors, poor judgment, and deliberate cruelty were in plentiful supply.<sup>33</sup> After the Second Circuit allowed the case to proceed on claims based on the Fourth Amendment (punitive strip searches) and the Fifth Amendment (equal protection and substantive due process),<sup>34</sup> the Court granted review and rejected the viability of all such policy-focused *Bivens* claims.<sup>35</sup>

The question of the proper role of *Bivens* litigation arose both during the argument and in Justice Kennedy's opinion. In expressing his concern, the Chief Justice observed that the high government officials responsible for formulating an anti-terrorism policy in the heat of the moment may worry about the threat of individual liability.<sup>36</sup> Such worries might wrongly influence the direction of the policies adopted; "we don't want people forming policy to have to worry about [if] they're going to have to—to pay if the—if the policy is found infirm."<sup>37</sup> Later, returning to the point, the Chief Justice expressed a preference for reliance on "normal injunctive action" as the best way to challenge the constitutionality of the policy, calling it "a more appropriate way of doing it than . . . individual damages actions against officials responsible."<sup>38</sup>

The Chief Justice's concerns found their way into Justice Kennedy's majority opinion. Justice Kennedy characterized the claims against Attorney General John Ashcroft and FBI Director Robert Mueller as matters of

---

<sup>31</sup> *Ziglar*, 137 S. Ct. at 1852–53.

<sup>32</sup> *Id.* at 1853.

<sup>33</sup> See Brief for Respondents at 3–10, *Ziglar*, 137 S. Ct. 1843 (No. 15-1358) (detailing the round-up and abuse of Plaintiffs).

<sup>34</sup> *Turkmen v. Hasty*, 789 F.3d 218, 233–38 (2d Cir. 2015).

<sup>35</sup> See *Ziglar*, 137 S. Ct. at 1853–54, 1869 (overruling the Second Circuit). Only the claims against Warden Hasty, challenging the conditions of confinement, were allowed to proceed. *Id.* at 1869.

<sup>36</sup> Transcript of Oral Argument at 33, *Ziglar*, 137 S. Ct. 1843 (No. 15-1358).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 47. The Chief Justice's preference for injunctive forms of constitutional adjudication calls to mind an influential argument that prospective relief encourages constitutional change by lessening the cost to government that would accompany the imposition of retrospective damages liability. See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 *YALE L.J.* 87, 90 (1999).

“detention policy.”<sup>39</sup> If such suits were permitted, “high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis.”<sup>40</sup> This was the very concern with overdeterrence that the Chief Justice had identified. Justice Kennedy added that the “burden and demand” of litigating policy issues would distract officials from the “discharge of their duties” and would raise sensitive national security concerns.<sup>41</sup>

After addressing the problem of overdeterrence, Justice Kennedy picked up the Chief Justice’s expressed preference for litigation of such policy matters through suits for other forms of relief. Justice Kennedy explained that the plaintiff’s detention policy claims did not focus on “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.”<sup>42</sup> Rather, they sought to challenge “large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners.”<sup>43</sup> Such issues were, in Justice Kennedy’s view, more properly addressed through suits for injunctive relief or perhaps “via a petition for a writ of habeas corpus.”<sup>44</sup>

## II. THE REALITY OF PERSONAL LIABILITY

In assessing *Ziglar*, one must reckon with the Supreme Court’s antipathy to the use of *Bivens* as a vehicle to challenge government policy. One key concern was familiar: the Court has long worried that a regime of personal liability may over-deter federal officers.<sup>45</sup> But in the past, the Court had focused its overdeterrence concern on the calibration of its (judge-made) qualified immunity doctrine.<sup>46</sup> In that setting, the Court has moved steadily to an ever more protective standard, first by immunizing officers except where they violate clearly established law, and then by redefining the clear-law requirement to demand exceptionally clear statements of controlling

---

<sup>39</sup> *Ziglar*, 137 S. Ct. at 1858.

<sup>40</sup> *Id.* at 1863.

<sup>41</sup> *Id.* at 1860–61.

<sup>42</sup> *Id.* at 1862.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1862–63.

<sup>45</sup> See James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561, 574–76 (2020).

<sup>46</sup> See, e.g., *Butz v. Economou*, 438 U.S. 478, 512–16 (1978) (remedying the concern of overdeterrence by extending absolute immunity to federal administrative agents who make independent adjudicatory or prosecutorial determinations in the course of their official conduct).

law.<sup>47</sup> As a result of the qualified immunity doctrine, officials acting to craft and implement federal policy with Department of Justice (DOJ) advice enjoy a substantial margin of appreciation (to borrow the European construct) and face little risk of personal liability.<sup>48</sup> *Ziglar* goes further, treating the threat of personal liability for officers as a basis for denying an individual's right to sue under *Bivens*.<sup>49</sup> More than a source of protection for officers acting in the shadow of uncertain law, *Ziglar* immunizes even the most clear-cut violations of law.

One can question the concern with personal liability on both logical and practical grounds. As a logical matter, the doctrine already takes account of the threat of overdeterrence, having conferred a qualified immunity defense to moderate personal liability. *Ziglar* double-counts that concern by folding it into the evaluation of the plaintiff's right to sue as well. As a practical matter, recent scholarship casts serious doubt on the Court's assumption that the incidence of *Bivens* liability falls on the officers held responsible for constitutional torts. In a study of who pays when *Bivens* claims succeed, my two co-authors and I found that the federal government pays the entire amount of the judgment in over 95% of the successful claims brought against federal officers by inmates of the Bureau of Prisons (BOP).<sup>50</sup> While the study focused on only one Bureau within the DOJ, its findings suggest that the federal government takes steps to indemnify or hold federal officials harmless from any liability they incur on the job.<sup>51</sup> One might well doubt that the imposition of *Bivens* liability for policies adopted by high-ranking government officials would ever result in their paying the ultimate award out of their personal assets.<sup>52</sup>

---

<sup>47</sup> In *Harlow v. Fitzgerald* the Court established that officers have immunity unless they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818 (1982). Since then the Court has narrowed what constitutes an established right, with a recent case defining it as "one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right . . . . [E]xisting precedent must have placed the statutory or constitutional question beyond debate. Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (emphasis added) (internal citations and quotation marks omitted).

<sup>48</sup> Margin of appreciation is a doctrine of judicial deference. It is applied by the European Court of Human Rights to allow party states to vary their application and enforcement of the terms of the Convention based on national norms and pressing state interests. See Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 35–39 (2016).

<sup>49</sup> See Pfander, Reniert & Schwartz, *supra* note 45, at 561.

<sup>50</sup> *Id.* at 566.

<sup>51</sup> *Id.*

<sup>52</sup> The practice of indemnity has a long history, stretching back to the early Republic. See James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1866 (2010).

As a consequence, *Bivens* litigation closely resembles the suits for injunctive, declaratory, and habeas relief that the Court favors as vehicles for the contestation of government policy. All these forms of litigation proceed by naming an official of the federal government, rather than the government itself, and all pose threats of burdensome discovery and litigation. Moreover, in all of these forms of litigation, the government regards the resulting judgment as a binding determination of the applicable law, including the law specifying the government's obligations. Even the vanishingly small prospect of personal liability has been imposed exclusively on low-level line employees: our study found no pre-*Ziglar* dispositions that had imposed personal liability on high-level, policy-making government officials.<sup>53</sup> The threat of personal monetary liability under *Bivens* for policymakers can thus be best described as theoretically possible, but practically nonexistent.

### III. LIMITED ALTERNATIVES

If the facts surrounding its actual operation cast doubt on the *Ziglar* Court's conclusion that the *Bivens* personal liability regime skews the incentives of policymakers, consider the comparative effectiveness of the alternative forms of litigation. The law of standing restricts suits for injunctive and declaratory relief, as well as petitions for habeas relief from unlawful custody; only those in custody have standing to challenge the fact and conditions of their confinement through injunctive and declaratory litigation or through habeas petitions.<sup>54</sup> The well-known decision in *City of Los Angeles v. Lyons*, in which the plaintiff sought to contest the chokehold policy of the LAPD, illustrates the standing problem.<sup>55</sup> Lyons sought two forms of relief: damages for a past chokehold (which, the Court held, Lyons had standing to pursue) and injunctive and declaratory protection from the continuation of the city's chokehold policy.<sup>56</sup> The Court found that Lyons, though subjected to chokeholds in the past, lacked standing to mount a prospective challenge.<sup>57</sup> He was viewed as no more likely than anyone else in Los Angeles to suffer a future chokehold.<sup>58</sup>

*Lyons* means that the plaintiffs in cases like *Ziglar* will almost always lack standing to pursue prospective challenges to the detention policy at

---

<sup>53</sup> See Pfander, Reniert & Schwartz, *supra* note 45, at 580–81.

<sup>54</sup> See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (finding that after defendant was released from custody he could no longer show a sufficiently plausible threat of future injury); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (explaining that to file a habeas petition, the defendant must be in custody in violation of federal or constitutional law).

<sup>55</sup> 461 U.S. at 98.

<sup>56</sup> *Id.* at 98, 109.

<sup>57</sup> *Id.* at 105.

<sup>58</sup> See *id.* at 111.

issue. After they have been cleared and deported, those who were once subject to the government's detention policy no longer have standing to maintain a challenge to its constitutionality. To be sure, some plaintiffs may be able to evade this barrier and contest detention policy by initiating a class action while still subject to the conditions in question.<sup>59</sup> In other words, had Lyons filed suit on behalf of a class during the course of being subjected to a chokehold, the action may have been allowed to proceed. Similarly, had the plaintiffs in *Ziglar* filed suit while subject to custody, those challenges to detention policy might have gone forward. But the conditions in which the *Ziglar* plaintiffs were held prevented contact with lawyers or others who might have gotten such litigation underway before it was mooted by deportation.<sup>60</sup> Even if a class action had proceeded, the termination of the program would have effectively ended any live dispute.<sup>61</sup> These standing and mootness problems with coercive (injunctive and habeas) forms of relief cast doubt on Justice Kennedy's easy assumption that plaintiffs had alternative means to challenge the detention policy in *Ziglar*.<sup>62</sup>

Generalizing, the standing problems that undercut the use of coercive relief to challenge policies in *Ziglar* will virtually foreclose injunctive-style challenges to most clandestine government practices. Consider, for example, the Bush Administration's programs of "enhanced interrogation," "extraordinary rendition," and "black site detention."<sup>63</sup> All of these policies were approved by the DOJ without fanfare. The highly confidential torture memos were not made the subject of notice-and-comment rulemaking and were not subject to judicial review through the processes of the APA.<sup>64</sup> Instead, the torture memos provided the confidential, internal legal predicate for a program of disappearance and torture that was overseen by members of the Central Intelligence Agency and the Department of Defense.<sup>65</sup> Individuals, like Maher Arar and Khaled El-Masri, who were shipped to

---

<sup>59</sup> See, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 106–07, 110 n.11 (1975) (stating that conviction of the named respondents did not moot the unnamed class members' claim for injunctive relief from denial of a hearing to determine the legality of their pretrial detention); *Sosna v. Iowa*, 419 U.S. 393, 399 (1975) (holding that the fact that the named plaintiff now meets the residency requirement she was challenging does not moot the claims of other class members).

<sup>60</sup> Brief for Respondents at 6–8, *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (No. 15-1358).

<sup>61</sup> See *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (holding that the City's amendment to its handgun transport scheme that removed the prohibitions challenged by the defendants mooted their claims for declaratory and injunctive relief).

<sup>62</sup> See *Ziglar*, 137 S. Ct. at 1862–63.

<sup>63</sup> For an account of these practices and evaluation of the viability of *Bivens* litigation to contest them, see JAMES E. PFANDER, *CONSTITUTIONAL TORTS AND THE WAR ON TERROR* 35–37, 42–56 (2017).

<sup>64</sup> On the development of the torture memos, see JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2009).

<sup>65</sup> *Id.* at 219–37.

Syria and Afghanistan respectively, to undergo torture under the watchful eye of federal officials, had no access to lawyers or to courthouses in which to mount a challenge to their treatment.<sup>66</sup> The whole point of the extraordinary rendition of high-value suspects to black sites was to evade the possibility of any judicial oversight.<sup>67</sup>

Both Arar and El-Masri were denied damages relief under *Bivens*.<sup>68</sup> Given the law of standing, how might such individuals bring suit to prospectively challenge the policies to which they were subjected? Obviously, individuals subject to waterboarding cannot politely request leave during a break in the proceedings to file a petition for judicial review. From any practical perspective, litigation to test the constitutionality of torture must take the form of a suit for damages, filed after the challenged proceedings have ended and the subject has gained some measure of freedom. Justice Kennedy's statement in *Ziglar*, that *Bivens* does not provide a proper vehicle for the assertion of policy challenges, in effect immunizes many government policies (like torture) from judicial review, even when those implementing the policy predictably inflict grievous injuries.

#### IV. LITIGATING TORTURE POLICIES

*Ziglar*'s prohibition against policy-based challenges makes it essentially impossible to test the legality of clandestine torture programs. Imagine a suit brought by an individual who credibly alleges that she was tortured in a federal detention facility in the United States pursuant to a government-sponsored policy of enhanced interrogation. Instead of suing the architects of the torture policy (officials comparable to the policymakers immunized in *Ziglar*), the suit is brought against the low-level officials of the FBI or BOP who inflicted the torture. As a matter of international law, the Convention Against Torture makes every official responsible for his or her own violations of the Convention.<sup>69</sup> But the Convention Against Torture

---

<sup>66</sup> See *Arar v. Ashcroft*, 585 F.3d 559, 565–69 (2d Cir. 2009) (detailing defendant's detention and torture); *El-Masri v. United States*, 479 F.3d 296, 300–01 (4th Cir. 2007) (same). For a first-hand account of the kidnap and torture of El-Masri, a German car salesman with no connection to any terrorist organization, see Khaled El-Masri, *America Kidnapped Me*, L.A. TIMES (Dec. 18, 2005 12:00 AM), <https://www.latimes.com/archives/la-xpm-2005-dec-18-oe-masri18-story.html> [<https://perma.cc/7ZBB-KL7E>].

<sup>67</sup> On the role of the United States in the overseas detention of terrorism suspects, see Ben Taub, *Guantánamo's Darkest Secret*, NEW YORKER (Apr. 15, 2019), <https://www.newyorker.com/magazine/2019/04/22/guantanamos-darkest-secret> [<https://perma.cc/K3HB-W8BF>].

<sup>68</sup> See *Arar*, 585 F.3d at 563; *El-Masri*, 479 F.3d at 300.

<sup>69</sup> See United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2–4, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (signed by U.S. April 18, 1988). Treaty effectiveness often dates from the President's ratifying a treaty to which the Senate has consented, not the Senate's vote to consent to a treaty. See RESTATEMENT (THIRD) OF

has no federal implementing statute that authorizes individuals to seek civil redress for acts of torture. Instead, Congress and the State Department relied on the existence of the *Bivens* suit and § 1983 litigation as the mechanisms by which the United States (and the individual states) were to comply with the Convention's requirement that signatory nations create a framework for individuals to seek civil redress for acts of torture.<sup>70</sup>

How well will the *Bivens* action perform its torture civil-redress function? The victim might try to persuade the Court that she has suffered an improper seizure under the Fourth Amendment so as to bring her claim within an established *Bivens* context. But torture obviously differs in important ways from a domestic drug enforcement search and seizure at an apartment in New York (the context in *Bivens*).<sup>71</sup> And, moreover, the officers responsible for the hypothesized torture do not report to the same agency (the Federal Bureau of Narcotics) that conducted the search of the *Bivens* home.<sup>72</sup> The government would doubtless argue that the torture claim arises in a "new" context for purposes of *Ziglar* analysis, creating a higher threshold for plaintiffs to overcome in persuading a court to allow the action to proceed.<sup>73</sup> Moreover, most of the torture claims in the law reports of the federal courts raise substantive due process issues.<sup>74</sup> The Court in *Ziglar* was careful to treat the Fifth Amendment punitive–confinement substantive due process claims against Warden Hasty as presenting a separate issue than those raised by Eighth Amendment cruel and unusual punishment claims.<sup>75</sup>

Recognition that it arises in a new context under *Ziglar* may defeat the proposed *Bivens* claim for torture. But the official can tender a policy-based defense as well. The torture memos were designed to furnish federal officers with a defense to criminal liability for torture overseas;<sup>76</sup> one might suppose that similar memos would serve equally well in supplying a defense against civil liability for torture in the United States. Note that the officers carrying out torture protocols in the United States can claim that their actions were

---

FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 reporter's notes 3 (AM. LAW INST. 1987) (recognizing that it is the "President [who] makes, ratifies, or accedes to a treaty on behalf of the United States," while "the Senate gives its consent to ratification"). A treaty may enter into force in accordance with its terms among other signatory nations before the United States accedes to its terms.

<sup>70</sup> See PFANDER, *supra* note 63, at 107–10.

<sup>71</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

<sup>72</sup> *Id.*

<sup>73</sup> *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1864 (2017).

<sup>74</sup> See, e.g., *Arar v. Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009); *El-Masri v. United States*, 479 F.3d 296, 300 (4th Cir. 2007).

<sup>75</sup> See *Ziglar*, 137 S. Ct. at 1863–64.

<sup>76</sup> MAYER, *supra* note 64, at 151–55, 230 (discussing the memos' rationale of using wartime powers as a defense to criminal liability).

taken pursuant to official policy and thus arguably enjoy immunity from scrutiny under the *Bivens* doctrine. The low-level officers involved in implementing the detain-clear-and-deport policy at issue in *Ziglar* were, like Ashcroft and Mueller, apparently immune from *Bivens* liability.<sup>77</sup>

As previously explained, the Convention Against Torture provides that superior orders or policies cannot immunize inferior officers from liability for torture.<sup>78</sup> One might argue that the Convention countermands *Ziglar* and vitiates any policy defense that the officers might tender to claims of torture. But the Supreme Court's approach to the effectuation of the nation's treaty obligations would not obviously call for the treatment of the Convention Against Torture as self-enforcing on this point. The Court held in *Medellin v. Texas* that treaties bind the United States in its relations with its treaty partners but presumptively require Congress to enact legislation to make the treaty effective in the domestic legal order.<sup>79</sup> Federal courts accordingly take the same cautious approach to recognizing implied rights to enforce treaty obligations that they apply to the recognition of *Bivens* suits: in general, they refuse to give effect to treaties without an act of Congress.<sup>80</sup> That presumptive conclusion may gain force in the interpretation of the Convention Against Torture: Congress recognized that implementing legislation was necessary to make certain Convention obligations effective but it did not codify a civil redress scheme for torture and did not explicitly countermand the invocation of policy-based defenses to any existing *Bivens* torture claims.<sup>81</sup> With injunctive and habeas relief practically unavailable, one sees little prospect for civil redress of government-sponsored torture claims.

## V. CHALLENGING GOVERNMENT POLICY

Government policy played a central part in the debate over § 1983 liability, albeit one quite different from its role in *Ziglar*. Writing for the *Monroe* majority, Justice Douglas defined color of law along lines specified

---

<sup>77</sup> See *Ziglar*, 137 S. Ct. at 1869 (dismissing all of the detention policy *Bivens* claims against federal officials but allowing claims for prison conditions to proceed against Warden Hasty).

<sup>78</sup> The Convention states that “[a]n order from a superior officer or a public authority may not be invoked as a justification of torture.” United Nations Convention Against Torture, *supra* note 69, at art. 2(3).

<sup>79</sup> 552 U.S. 491, 504–06 (2008) (establishing a presumption that treaties require implementing legislation to take effect in the domestic order).

<sup>80</sup> See *id.*

<sup>81</sup> See generally MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RL32428, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES (2009) (providing an overview of U.S. implementing legislation related to the Convention Against Torture). The Torture Victim Protection Act, 106 Stat. 73, provides civil redress for victims of torture imposed under color of the law of foreign nations. See 28 U.S.C. § 1350 (2006).

in earlier decisions to include all actions under pretense of government authority, including those that may also violate the law or policy of the local jurisdiction.<sup>82</sup> Seeking to preserve local judicial control of unlawful police conduct, Justice Frankfurter dissented from this broad conception of § 1983's reach.<sup>83</sup> For Justice Frankfurter, the random and unauthorized actions of rogue police officers were not properly attributed to the government for which they worked and were not actions under color of law for purposes of § 1983.<sup>84</sup> Only where the action of an officer was taken pursuant to a state governmental policy could it be properly treated as having occurred under color of state law.<sup>85</sup> Justice Frankfurter illustrated his suggested distinction by ruling out § 1983 claims for much of Officer Pape's misconduct in searching the plaintiff's home without a warrant and threatening members of his family.<sup>86</sup> But as to the allegations that the plaintiff had been detained in a criminal investigation on open charges, pursuant to a local custom or policy to that effect, Justice Frankfurter agreed that the allegations satisfied the color of law standard.<sup>87</sup> For the *Monroe* Court, then, constitutional tort-based challenges to government policy, through suits brought against responsible officials, were the *least* controversial feature of the new regime.

Although the instinctive opposition to suits for money in *Ziglar* has also reshaped § 1983 norms to a significant degree, it may be worth considering how one might incorporate the § 1983 view of policy into litigation against federal officers. It no longer seems possible to count on state law (as Justice Frankfurter urged in *Monroe*) to provide civil redress against unauthorized federal police conduct; the 1988 Westfall Act largely displaces state law as a source of official liability whenever the federal officers were acting in the course and scope of their employment.<sup>88</sup> But one might treat the Federal Tort Claims Act (FTCA) as the vehicle for the assertion of intentional tort claims against rogue federal law enforcement officers. Under the FTCA, the federal government would bear financial responsibility for all such successful tort claims.<sup>89</sup> By incorporating state law norms, however, the FTCA makes no

---

<sup>82</sup> *Monroe*, 365 U.S. at 171–72, 184, 187.

<sup>83</sup> *Id.* at 239–43 (Frankfurter, J., dissenting).

<sup>84</sup> *See id.* at 236–39 (Frankfurter, J., dissenting).

<sup>85</sup> *Id.* at 236–37 (Frankfurter, J., dissenting).

<sup>86</sup> *Id.* at 203, 258 (Frankfurter, J., dissenting).

<sup>87</sup> *Id.* at 258–59 (Frankfurter, J., dissenting).

<sup>88</sup> *See* James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 121–23 (2009).

<sup>89</sup> *See, e.g.*, 28 U.S.C. § 2674 (2018) (“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under

provision for the assertion of constitutional tort claims.<sup>90</sup> That remains the province of *Bivens* litigation, for better or worse.<sup>91</sup> If, as Frankfurter and the *Monroe* Court agreed, challenges to unconstitutional policies deserve a hearing, then the preservation of the *Bivens* action for that purpose likely provides the only effective mechanism for ensuring review of classified government programs.<sup>92</sup>

#### CONCLUSION

It seems quite surprising, when taking stock of the current status of federal official accountability, to reflect on the changes of the past century. The twentieth century began with the presumptive viability of common law tort claims against federal officers.<sup>93</sup> Suits for injunctive relief to challenge federal government action were also widely available to supplement federal statutes that created their own modes of judicial review.<sup>94</sup> Many of the major legislative and judicial developments of the twentieth century aimed to supplement, rather than displace, the common law baseline. Thus, the APA preserves non-statutory review as a supplement to suits under agency organic statutes;<sup>95</sup> the *Bivens* line of cases established a federal right of action but said nothing to suggest that the state common law remedy had been displaced;<sup>96</sup> the FTCA was amended to supplement rather than displace the *Bivens* action;<sup>97</sup> and the Westfall Act eliminated the state law tort claim

---

like circumstances . . .”). For an overview of the FTCA, see KEVIN M. LEWIS, CONG. RSCH. SERV., RL45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW (2019).

<sup>90</sup> See, e.g., *FDIC v. Meyer*, 510 U.S. 471, 478 (1994) (“[T]he United States . . . has not rendered itself liable under [the FTCA] for constitutional tort claims.”).

<sup>91</sup> See *Loumiet v. United States*, 828 F.3d 935, 945 (D.C. Cir. 2016) (“Federal constitutional claims for damages are cognizable only under *Bivens* . . .”).

<sup>92</sup> To be sure, the state secrets privilege may pose challenges to the litigation of suits that implicate national security concerns. For an account, see Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 78–81, 87–91 (2010) (detailing how the federal government invokes state secret privilege to thwart litigation).

<sup>93</sup> See James E. Pfander, *Dicey’s Nightmare: An Essay on the Rule of Law*, 107 CALIF. L. REV. 737, 754–57 (2019).

<sup>94</sup> See James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 STAN. L. REV. 1269, 1346–48 (2020).

<sup>95</sup> See *Air Courier Conf. of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3, (1991) (explaining that congressional preclusion of judicial review under the APA does not affect the jurisdiction of federal courts); *Leedom v. Kyne*, 358 U.S. 184, 188–89 (1958) (holding that non-statutory review of federal agency action is available when the agency has violated a mandatory legal requirement); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689–90 (1949) (stating that non-statutory review of federal agency action is available when the agency action is *ultra vires*).

<sup>96</sup> For an in-depth analysis of this issue, see Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 542–50 (2013).

<sup>97</sup> See Pfander & Baltmanis, *supra* note 88, at 132–33.

against the officer on the assumption that the combined force of *Bivens* and the FTCA would assure government accountability.<sup>98</sup>

Despite these legislative efforts to preserve the common law baseline, suits to hold federal officials accountable for certain kinds of constitutional violations have become almost entirely futile. The common law right to sue, cornerstone of nineteenth century understandings of the rule of law, has largely disappeared. While some Justices continue to urge the relevance of the common law baseline to notions of due process,<sup>99</sup> others have expressed a surprising impatience with any discussion of the subject. Thus, in the recent oral argument in *Hernandez v. Mesa*, Chief Justice Roberts expressed open disdain for the lessons of the nineteenth century's commitment to accountability at common law.<sup>100</sup> Instead, the Chief Justice emphasized cases from the last several years that have slowly dismantled the *Bivens* action.<sup>101</sup> Even the "outrageous misconduct" that Professor Marshall Shapo rightly viewed as obviously actionable now evades adjudication, especially when the action in question has been taken pursuant to federal government policy. As we celebrate his contributions to the field, that is a dispensation that I am honored to join Professor Shapo in rejecting.

---

<sup>98</sup> *Id.* at 134–38 (arguing that the Constitution requires remedies for government wrongdoing and that the Westfall Act, properly interpreted, seeks to ensure their availability).

<sup>99</sup> See *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224–25 (2018) (Gorsuch, J., concurring) ("[T]he weight of the historical evidence shows that the [Due Process Clause] sought to ensure that the people's rights are never any less secure against governmental invasion than they were at common law.").

<sup>100</sup> Transcript of Oral Argument at 9–10, *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) (No. 17-1678).

<sup>101</sup> *Id.*