What *Abbasi* Should Have Said

Author : Steve Vladeck

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James E. Pfander, Constitutional Torts and the War on Terror (2017).

It is a common rhetorical trope among far too many federal judges (including Supreme Court Justices) that legal scholarship is of diminishing utility to them and their work, at least in part because scholars have turned their gaze to topics too far removed from those relevant to the deliberations of contemporary jurists. Most famously, Chief Justice Roberts (who does and should know better) echoed this lament at the 2011 Fourth Circuit conference: "Pick up a copy of any law review that you see and the first article is likely to be . . . the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar." The Chief Justice's ill-informed quip may have gotten the most attention, but he is hardly alone.

There is a lot to say about this general claim. In the specific case of the Chief Justice, much of it has already been said by Orin Kerr.

But the juxtaposition of Jim Pfander's erudite and magisterial new monograph, *Constitutional Torts and the War on Terror*, and the Supreme Court's June 19 decision in Ziglar v. Abbasi, suggests a different (and more alarming) possibility: The problem is not that law professors are failing to produce scholarship of utility to contemporary judges; the problem is that the scholarship that is out there just is not getting read. How else to explain both the result and the reasoning in *Abbasi*—a decision deeply hostile to judge-made damages remedies for constitutional violations by federal officers, and one that is shamelessly indifferent and stunningly oblivious to the rich history and tradition of such remedies that has been well- and long-documented in the academic literature, most powerfully in Pfander's book.

I

As Pfander demonstrates, for most of the country's history, courts and commentators alike unflinchingly embraced the "common-law model of government accountability" (xviii), pursuant to which U.S. officials were routinely subjected to damages liability whenever they invaded the rights of individuals, even foreigners. Whether the liability arose under state common law or the pre-*Erie* body of federal "general" law, the theory was the same: Judges could—and, indeed, should—fashion remedies to vindicate individual rights, including damages for misconduct that had ceased by the time of the lawsuit. As late as 1963, the Supreme Court was still insisting that "When it comes to suits for damages for abuse of power, federal officials are usually governed by local law."

Against that backdrop, the Supreme Court's 1971 decision in Bivens, recognizing that federal judges could imply a damages remedy directly into federal constitutional provisions, was part of a larger shift in patterns of official accountability during the same era—not in favor of increased judicial power, as such, but in favor of federal remedies over state remedies, especially where federal misconduct was at issue. Indeed, there were in 1971 (and remain today) any number of reasons why it makes more sense to treat a case like *Bivens* as a Fourth Amendment violation, rather than, as the Nixon administration argued, a dispute that could be settled by resort to ordinary state-law trespass principles. Thus, as the second Justice Harlan put it in his concurring opinion in *Bivens*, once the Court began to prefer federal remedies

(including, for example, in suits seeking injunctive relief), allowing judges to imply damages remedies into the Constitution seemed to follow, since "it would be . . . anomalous to conclude that the federal judiciary . . . is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will."

Much of the rest of Pfander's book unpacks how, since *Bivens* was decided, we have lost sight of this understanding—and of Congress's role, in 1974 and 1988, in taking affirmative steps to bolster, if not enshrine, *Bivens*. And the real proof of this drift, Pfander persuasively demonstrates, is in lower-court decisions arising out of challenges to post-September 11 counterterrorism policies, where courts have allowed an array of debatable (if not dubious) policy judgments to weigh against recognition of a judge-made damages remedy even for egregious violations of clearly established constitutional rights, most notably the torture of terrorism suspects.

What's more, these decisions would have left victims of constitutional abuses to state law remedies at the time *Bivens* was decided. But even that limited avenue is no longer an option, thanks to the 1988 Westfall Act, which has been read to convert all scope-of-employment state tort claims against federal officers into FTCA claims against the federal government. All told, then, the book aspires to "provide[] the tools needed for the Supreme Court to rethink its *Bivens* jurisprudence," tools that include (1) a proper understanding of the rich history of judge-made remedies for federal official misconduct; (2) a reassessment of which branch is in the best position to consider the significance of deterrence and indemnification in remedies against government officers; and (3) a recalibration of the doctrine to channel considerations better dealt with elsewhere (*e.g.*, qualified immunity and state secrets) into those avenues. "Only the Supreme Court can implement this new model of litigation," Pfander concludes, but such a model would "harken[] back to the common-law model that the founders of our Constitution borrowed from England," and would "enable a federal court to follow the 'plain path of duty' identified by Justice Story and 'to administer the law as it finds it.'"

II

Contrast Pfander's exhaustive work (both in this monograph and in his vast body of work on related topics) with the sum total of what Justice Kennedy had to say about all of this history and analysis in his opinion for the 4-2 majority in *Abbasi*:

> In 1871, Congress passed a statute that was later codified at Rev. Stat. § 1979, 42 U.S.C. § 1983. It entitles an injured person to money damages if a state official violates his or her constitutional rights. Congress did not create an analogous statute for federal officials. Indeed, in the 100 years leading up to *Bivens*, Congress did not provide a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the Federal Government.
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> In 1971, and *against this background*, this Court decided *Bivens*.

No wonder, then, that Justice Kennedy thought it such "a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation." As Pfander's book (and plenty of other scholarship by Pfander and other scholars) shows, it was never understood to be such a significant step until *Bivens* constitutionalized what had to that point been common-law damages remedies. Justice Kennedy's response is that damages remedies are especially problematic in national security cases. But his argument to that effect, as I have suggested elsewhere, is normatively incoherent. Instead, as Pfander argues, national security cases are

particularly important contexts for robust judicial remedies, especially after the fact.

Even Justice Breyer's pointed (for him, anyway) dissent, which cites Pfander's book, misses the forest for the trees—invoking it in support of the proposition that "It is *by now* well established that federal law provides damages actions at least in similar contexts, where claims of constitutional violation arise. Congress has ratified *Bivens* actions, plaintiffs frequently bring them, courts accept them, and scholars defend their importance." (Emphasis added). A cursory perusal of the cited authority—Pfander's book—shows that the story is so much richer and the Court's abandonment of that history in *Abbasi* so much more troubling.

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Pfander's book is a Thing I Like Lots for several reasons. Its substance is, in my view, unanswerable (although it would certainly be useful to see what a thoroughgoing academic response would look like). Its bottom line about the significance of a robust judicial role in national security cases, in particular, could not be timelier. And the extent to which the Supreme Court just ran roughshod over the rich historical and doctrinal analysis it provides is, I fear, a powerful indictment not of the utility of contemporary legal scholarship, but of the Justices' interest in taking it seriously. I am often reminded, when thinking about how judges use scholarship, of the Scottish writer Andrew Lang's quip about those who use statistics the way drunks use lampposts—seeking support rather than illumination. Pfander's book is, and should have been, intensely illuminating. That a majority of the Supreme Court saw otherwise is, and ought to be, far more vexing to legal scholars than the suggestion that we are all too busy writing about "the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria."

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