UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, *et al.*, Plaintiffs, v. JOHN ASHCROFT, *et al.*, Defendants.	Case No. 1:02-cv-02307-DLI-SMG

DEFENDANT DENNIS HASTY'S RESPONSE TO PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE GOLD'S REPORT & RECOMMENDATION

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INTRODUCTION

This case is on remand from the Supreme Court and the Second Circuit. It is presented as a purported class action by six men arrested after 9/11, designated "of interest" by the FBI, and detained in the Administrative Maximum Special Housing Unit ("ADMAX SHU"), a unit of the Metropolitan Detention Center ("MDC") specially created at the direction of the Bureau of Prisons ("BOP"). Although the Fourth Amended Complaint contains many paragraphs detailing conditions of plaintiffs' confinement in the SHU, and challenges to policies underlying those conditions, all those claims have been rejected. Plaintiffs' only remaining claim arises from the fact that, in violation of BOP policy while housed in the SHU, plaintiffs were physically and verbally mistreated by certain line-level prison guards.

Plaintiffs, however, do not assert that claim against any guard that abused them. And unlike the detainees that originally brought this action, whose claims were settled by the Government, they do not assert claims under the Federal Tort Claims Act ("FTCA"), which can be settled by the Government. 28 U.S.C. §§ 1346(b), 2671–2680. Rather, they assert a purported constitutional damages claim against the MDC warden Dennis Hasty personally on the theory that he learned of the abuse through various complaints, investigations, and other sources – but was "deliberately indifferent" to it. The premise of plaintiffs' claim is that the Judiciary should now create a constitutional damages action against Warden Hasty under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

In its landmark decision in *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017) – in this very case – the Supreme Court explained that the law has changed dramatically since *Bivens* was decided many decades ago. The approach to judicial remedy-creation that prevailed then is no more. Courts are no longer free to create damages remedies as they see fit. *Ziglar*, 137 S.Ct. at 1855-56. Rather, it is now accepted under basic separation-of-powers principles that the decision whether to create a

damages remedy, and to decide their scope and application of such a remedy, principally belongs to the legislative branch and not the judicial branch. *Id.* at 1856-57. Separation-of-powers principles require that the task of weighing competing costs and benefits of creating a damages action be left to Congress. *Id.* at 1857. If the question whether it is advisable to create a damages action is even debatable, the debate belongs in Congress, not the courts. *Id.*

Under the "*ancien regime,*" *Bivens* actions were authorized in three limited contexts; those cases have not been overruled. *Id.* at 1856. But any extension of *Bivens* to a new context – and this case is a new context, 137 S.Ct. at 1864 – must withstand a searching inquiry into why the Judiciary should create a damages remedy where Congress, the branch of government generally responsible for doing so, has not. That gives rise to two separate inquiries: The first is whether "special factors counsel hesitation" before the Judiciary takes on the task of creating a damages remedy, in light of the option to leave the design of any damages remedy, including weighing competing considerations, to Congress. *Id.* at 1858. The second is whether the existence of alternative remedies on its own counsels the Judiciary not to take the extraordinary step of creating a damages remedy. *Id.*

Guided by *Ziglar*, Magistrate Judge Gold held that both inquiries, special factors and alternative remedies, precluded judicial creation of a new *Bivens* action on plaintiffs' claim against Warden Hasty. Report & Recommendation ("R&R"), ECF No. 834 (filed August 13, 2018). First, he determined that "extending *Bivens* might negatively impact BOP's investigatory procedures and policies, and that Congress is as a result in the best position to weigh the costs and benefits of allowing a cause of action for damages to proceed." R&R at 11. Second, observing that "the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action," R&R at 19 (quoting *Ziglar*, 137 S.Ct. at 1865), he determined that, "[b]ecause plaintiffs could have brought their claims under the FTCA and been awarded damages for their injuries if they prevailed, *Ziglar* counsels that their *Bivens* claims should be dismissed." R&R at 22. Plaintiffs object to both

conclusions. But their arguments rest largely on a misstatement of the applicable standard, a misstatement of Magistrate Judge Gold's ruling, or a misstatement of defendant's position.

Therefore, this response proceeds first by laying out certain background facts (though not nearly in the same detail as presented to Magistrate Judge Gold). It then covers in Part I the applicable standard and briefly explains why plaintiffs' efforts to avoid the application of that standard in this case are legally incorrect.

Part II focuses on a central concern underlying the special factors analysis, the effect of imposing potentially crushing personal damages liability on Executive Branch officials and its impact on government administration, which are issues for Congress, not the courts, to weigh and address. As discussed below, that effect is reflected in two ways. Whereas plaintiffs complain that Warden Hasty "failed to investigate" allegations of abuse, BOP procedures place responsibility for investigating and determining the merits of such claims on OIA and OIG, and specifically *bar* the warden from conducting the investigation and disciplinary action that plaintiffs demand. Secondly, there is a need for flexibility in prison administration to address the potential for false allegations of abuse and prevent actual abuse, particularly in exigent situations such as those presented by BOP's establishment of the ADMAX SHU following 9/11. BOP itself undertook to put in place a procedure that it expected to prevent abuse by videotaping prisoner-guard interactions, not leaving these matters to the warden. In short, plaintiffs' attempt to vest damages liability and responsibility in Warden Hasty is in tension with prison policy and practice establishing that these responsibilities ought not rest with him, but elsewhere.

Part III addresses Magistrate Judge Gold's finding that the alternative damages action available to plaintiffs under the FTCA militates against the courts creating an additional damages remedy directly under the Constitution. Part IV responds briefly to plaintiffs' argument that the Magistrate Judge's ruling is "anomalous."

FACTS

This case involves an effort to impose a legal responsibility, and personal damages liability, on Warden Hasty for his alleged indifference to physical abuse being perpetrated by prison guards against 9/11 detainees in the MDC's ADMAX SHU in the immediate aftermath of 9/11. In particular, plaintiffs assert that, upon being informed of prisoner complaints of abuse, he failed to investigate, discipline those responsible, or take other actions to curb the abuse. Fourth Amended Complaint ("FAC"), ECF No. 726, ¶ 107 (filed Sept. 13, 2010).

Dennis Hasty was warden of the MDC when he was directed to establish the ADMAX SHU immediately after 9/11.[1] OIG Rep. at 117 n.94, 119. The unit was created to hold inmates "under the most secure conditions possible." OIG Rep. at 113. From the beginning, BOP was intimately involved with creating the conditions at the ADMAX SHU. *See id.*

In the days following 9/11, BOP recognized the significant potential for guard abuse and for false allegations of the same by those held in the ADMAX SHU ostensibly in connection with the terrorism investigation. BOP sought to provide a method for refuting false allegations of abuse that it expected from detainees – as such false allegations were part of the terrorist playbook – and at the same time "prevent potential staff abuse by installing security cameras in each 9/11 detainee's cell in the ADMAX SHU." OIG Rep. at 149-50. On October 9, 2001, BOP issued a further directive requiring detainee movements outside of their cells to be videotaped. *Id.* at 150. BOP's expansion

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[1] Many of these facts come from reports issued by the United States Department of Justice Office of Inspector General, incorporated into plaintiffs' Fourth Amended Complaint: Office of the Inspector General, U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003) ("OIG Rep.") and Office of the Inspector General, U.S. Dep't of Justice, *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, NY* (December 2003) ("Supp. OIG Rep."). FAC at ¶¶ 3 n.1, 4 n.2.

These reports confirmed abuse by line-level guards. Supp. OIG Rep. at 1-2. They did not, however, find any evidence of supervisory acquiescence or complicity in that abuse. OIG Rep. at 162 n.130

of its original videotape directive was "to deter unfounded allegations of abuse made by September 11 detainees and to substantiate abuse if it occurred." *Id.* Thus, whatever might have been the ordinary allocation of responsibility for preventing prisoner abuse by prison guards, BOP here intervened directly into such matters in the ADMAX SHU from the outset.

These "proactive steps taken to prevent or document incidents of physical abuse" by videotaping, OIG Rep. at 163, were an effective deterrent that limited – though did not eliminate – mistreatment by the guards. Supp. OIG Rep. at 45 ("incidents and allegations of physical and verbal abuse significantly decreased" after implementation of videotaping). Later, these videotapes were used as evidence to substantiate allegations of guard misconduct. Supp. OIG Rep. at 46-47.

Of perhaps even greater significance to plaintiffs' claims, under BOP policy all investigations concerning allegations of physical abuse of prisoners is the responsibility of the Office of Internal Affairs ("OIA") and the Office of the Inspector General ("OIG") of the United States Department of Justice.[2] P.S. 17 §§ 1, 5; P.S. 22 §§ 1, 6. The warden's role is to report all allegations of abuse to OIA, which may bring them to the attention of OIG. P.S. 22 § 8.b(1)); P.S. 17 § 6. Unless OIA has specifically remanded the investigation to the warden, the warden is barred from conducting any investigation. P.S. 17 § 6.g ("Allegations of staff misconduct must not be investigated locally until OIA approval is obtained."); P.S. 22 § 8.b.3 (prohibiting the warden from "question[ing] or interview[ing]" "[t]he subject of the allegation or complaint"). And if OIG takes on the case, no

[2] The relevant policies in effect during plaintiffs' detention are BOP Program Statement 1210.22 ("P.S. 22"), U.S. Dep't of Justice, Fed. BOP, Ex. C to Def. Hasty's Remand Mem., ECF No. 808-4 (Jan. 19, 2018) *available at* https://web.archive.org/web/20021022125738/http://www.bop.gov:80/progstat/1210_22.html, which on October 1, 2001 replaced the prior version, BOP Program Statement 1210 ("P.S. 17"), U.S. Dep't of Justice, Fed. BOP, Ex. D to Def. Hasty's Remand Mem., ECF No. 808-5 (Jan. 19, 2018) *available at* https://web.archive.org/web/19990202040643/https://www.bop.gov/progstat/12100017.html.

action may be taken absent OIG approval. P.S. 17 § 6.f ("If OIG or CRT accepts the case, no further action may be taken at the institution, regional, or Central Office level without OIG's or CRT's approval."); P.S. 22 § 8.c (language similar to P.S. 17 § 6.f).

Even if a case is remanded for local investigation, the investigation is directed and monitored by OIA. P.S. 22 § 9; P.S. 17 § 8 ("OIA is responsible for the oversight of all investigations, whether OIA or non-OIA Bureau personnel actually investigate the case"). At the conclusion of an internal investigation, the investigator prepares a report, which OIA reviews "to ensure they address the salient issues and that the conclusions are factually supported." P.S. 17 § 11.b; *see also* P.S. 22 § 12.b. Thus, BOP – through OIA – is obliged to manage all investigations of allegations of physical abuse and determine whether those allegations are substantiated. *See id.*

Here, OIA and OIG investigated complaints of abuse at the ADMAX SHU, as BOP policies require. Neither the Fourth Amended Complaint, nor the incorporated OIG Reports identify any violations of this controlling BOP Program Statement directing investigation and the determination of the merits of any allegation away from the warden, and up the chain to OIA and OIG. Nor is there any allegation that any relevant investigation was remitted back to the warden. To the contrary, OIA was made aware of complaints at the ADMAX SHU, which were then elevated to OIG. Supp. OIG Rep. at 5 ("In mid-October 2001, the BOP's Office of Internal Affairs (OIA) first referred to the OIG several allegations of physical abuse at the MDC."). In fact, the only specific allegation plaintiffs make about an incident where they had complained of physical and verbal abuse, FAC ¶ 110 (February 11, 2002 incident), was investigated by OIG. OIG Rep. at 144 (describing investigation of February 11, 2002 incident).

ARGUMENT

I. PLAINTIFFS CANNOT DEMONSTRATE THAT THE COURTS SHOULD CREATE A CONSTITUTIONAL DAMAGES REMEDY AGAINST A WARDEN FOR ABUSE BY GUARDS ON THE FACTS OF THIS CASE.

A. Any Extension Of *Bivens* Is Now "Disfavored."

The Supreme Court has been explicit. Any extension of *Bivens* remedies to a new context is now "disfavored." *Ziglar*, 137 S.Ct. at 1857 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)). Although the Court did not overrule the three prior cases, the product of the *ancien regime*, the Court explained how its approach to the question of judicially-creating damages remedies has turned since it last created such a damages action. *Id.* at 1855-57. Indeed, it even allowed that the outcome in its three prior "*Bivens* cases might have been different if they were decided today." *Id.* at 1856.

When the three earlier cases, including *Carlson v. Green*, 446 U.S. 14 (1980), were decided, courts simply presumed that it was their role to create damages remedies. But later cases explained that under separation-of powers principles, the creation of damages remedies is primarily for Congress. *Ziglar*, 137 S.Ct. at 1855-56. The determination whether a damages remedy should be created and how it should operate, the weighing of its costs and benefits, and the inquiry whether it might interfere with the proper management of government business and employee discipline are matters for Congress, not the Judiciary. *See id.* at 1857. If such considerations are at issue, courts may not intervene.

Thus, once it is determined – as the Court determined here – that plaintiffs' claim would extend *Bivens* to a new context, courts must not do so if there are factors that "counsel hesitation." *Ziglar*, 137 S.Ct. at 1857-58. This threshold for finding special factors, and thus *declining* to create a damages remedy, is "remarkably low." *See Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009). Courts must not act 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 . . . ." *Ziglar*,

137 S.Ct. at 1858 (emphasis added). As the Second Circuit explained, to "counsel hesitation" sets a very low bar:

> The only relevant threshold—that a factor "counsels hesitation"—is remarkably low. . . . Hesitation is a pause, not a full stop, or an abstention; and to counsel is not to require. "Hesitation" is "counseled" whenever thoughtful discretion would pause even to consider.

Arar, 585 F.3d at 574.

Moreover, courts should act only where the circumstances require it. Thus, the existence of an "alternative remedial structure . . . alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Ziglar*, 137 S.Ct. at 1858.

B. Plaintiffs Cannot Side-Step The "Remarkably Low" Bar For Finding Special Factors Counselling Hesitation.

All of plaintiffs' efforts to try to lower the bar to the judicial creation of a new remedy by likening this case to *Carlson*, or to various lower court prison cases where the courts failed to conduct a special factors analysis, are misguided.

1. Since it has been determined that this case presents a new context, this Court must apply current law.

First, plaintiffs argue that this case involves only a modest extension of *Carlson*, Pls. Remand Mem., ECF No. 808-7 at 17 (Jan. 19, 2018), and that the analysis of special factors must begin by comparing this case to *Carlson*. Pls. Obj., ECF No. 838 at 11 (Sep. 10, 2018). But the Supreme Court has already held that modest or not, this case presents a new context and as such requires a fresh application of the special factors analysis. As the Magistrate Judge noted, he specifically queried the parties on this point:

> [T]he parties agree that the strength and number of applicable special factors need not be greater before hesitation is warranted in cases involving so-called "modest" extensions as opposed to more substantial ones. In other words, the magnitude of a potential extension of *Bivens* does not affect the 'special factors analysis.'"

R&R at 10.

Despite this concession, plaintiffs argue that, because their claim presents only a modest extension, it "must be treated accordingly." Pls. Obj. at 17. Plaintiffs rely on various precedents rendered under the now-superseded "*ancien regime*," *Ziglar*, 137 S.Ct. at 1856, and seek to apply them here. *See* Pls. Obj. at 18-19. But that reasoning is flatly wrong. Once it has been determined that there is a new context, the special factors analysis directed by the Court must be conducted under current law, not under the *ancien regime*. That is why the Court was at pains to point out that the three cases where the Court did create a damages remedy, including *Carlson*, would likely be decided differently if decided today. *Ziglar*, 137 S.Ct. at 1856.

Plaintiffs' argument seeks to side-step the basic change in the law that has taken place over the last 40 years, including recognition of the fundamental separation-of-powers issue that is now at the heart of any attempt to extend *Bivens*: "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." R&R at 7 (quoting *Ziglar*, 137 S.Ct. at 158) (internal quotation marks omitted). Courts endorsing *Bivens* claims in the past have largely done so without undergoing this requisite inquiry, and therefore cannot be relied upon here.

Plaintiffs also argue that there is no "sound reason to believe Congress would disapprove of a damages remedy." *See* Pls. Obj. at 18. But that argument turns *Ziglar* on its head. *Ziglar* asks 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[.]" 137 S.Ct. at 1858 (emphasis added). Asking if Congress "might doubt" something is a much lower standard than determining whether Congress "would disapprove" of it. Plaintiffs' argument that congressional silence somehow amounts to an endorsement of *Bivens* flies in the face of the Supreme Court's refusal to expand *Bivens* in case after case over the last 40 years. Moreover, congressional silence cannot be taken as an endorsement of whatever lower court cases had previously decided without conducting

the kind of special factors analysis that *Ziglar* now requires. As a general proposition, no significance can be divined from an absence of congressional reaction to lower court decisions. *United States v. Powell*, 379 U.S. 48, 55 n.13 (1964) (rejecting as unjustified the contention that "Congress must have been aware of, and acquiesced in, decisions of lower courts").

2. This is not a *Carlson* case.

Plaintiffs liken this case to *Carlson* and a variety of pre-*Ziglar* prison cases where the courts improperly allowed *Bivens* actions to proceed without conducting a special factors analysis. Plaintiffs' arguments essentially seek to circumvent the special factors analysis that precludes a *Bivens* extension to their claim and distinguishes this case from what may have come before. Plaintiffs seek to impose responsibility on one supervisor for misconduct by subordinates that he neither ordered nor witnessed. Such a claim flies in the face of important managerial policies in the prison setting, none of which were present in *Carlson*. Likewise, this case arises in the aftermath of 9/11, where – notwithstanding the ordinary command structure – BOP directed creation of the ADMAX SHU and intervened to impose practices to prevent abuse. Both policies undermine plaintiffs' proposal to lay responsibility solely at the feet of the warden.

As an initial matter, this case is clearly not about whether prison guards may abuse prisoners. As the Supreme Court noted, abuse by prison guards is prohibited by prison policy. *Ziglar*, 137 S.Ct. at 1864. This case, in contrast, is solely about supervisory liability, and the standards to judge a supervisor's responsibility are far less clear. *Id.* ("[T]he judicial guidance available to this warden, with respect to his supervisory duties, was less developed."). Such a "deliberate indifference" claim is quite unlike the kind of deliberate indifference to medical needs at issue in *Carlson*. In *Ziglar*, the Supreme Court readily acknowledged this difference, noting that in contrast to a claim for deliberate indifference to serious medical needs, the "standard for a claim alleging that a warden allowed

guards to abuse pre-trial detainees is less clear under the Court's precedents." *Ziglar*, 137 S. Ct. at 1864-65.

Plaintiffs argue that, except that this case involves the Fifth Amendment rather than the Eighth Amendment, there is not much difference between this case and *Carlson*. But Warden Hasty has not suggested that the difference between an Eighth and a Fifth Amendment claim arising from the same conduct is the crux of the special factors analysis here. *See* Def. Hasty's Response Mem., ECF No. 808-8, at Part III, "While the Amendment's Number May Not Be A Special Factor, The Nature of the Claim Is."). Moreover, plaintiffs' effort to compare the case to *Carlson* because both are based on "deliberate indifference" is misguided. *Carlson* addressed deliberate indifference to known, serious medical needs, resulting in the inmate's death. 446 U.S. at 16 n.1. The basic notion is that where a defendant knows of the medical condition, and has the power to order or arrange treatment, but does nothing, liability may be imposed. Such claims invariably involve knowledge of some specific objectively observable circumstance that calls for some clear form of medical intervention. *See, e.g.*, *Thomas v. Ashcroft*, 470 F.3d 491, 497 (2d Cir. 2006) (failure to provide glaucoma medication that officials knew plaintiff needed, causing plaintiff's blindness); *Walker v. Schult*, 717 F.3d 119 (2d Cir. 2013) (failure to address extreme temperatures, unsanitary conditions and overcrowding).

Claims of deliberate indifference to serious medical needs present none of the issues, or special procedures, associated with how conflicting stories by prisoners and guards concerning alleged abuse are to be resolved.[3] The gravamen of plaintiffs' claim is that from various

[3] Cases cited by plaintiffs *not* involving serious medical needs are mostly based on failure to protect from inmate-on-inmate violence. Pls. Obj. at 12 (citing *Cuevas v. United States*, No. 16-cv-00299, 2018 WL 1399910 (D.Colo. Mar. 19, 2018) and *Doty v. Holingsworth,* No. 15-cv-3016, 2018 WL

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circumstances – mostly reports of abuse – Warden Hasty should have inferred that there was an excessive risk to inmate health and safety not *already* being adequately addressed by (1) the videotape policies that were being implemented in order to deter abuse, (2) BOP's regulations on complaint investigation and resolution, and (3) OIG's and OIA's ongoing presence and involvement in the investigation into complaints of abuse. The conflicting accounts, the absence of constant observable facts, the requirement that other parties make the requisite inquiries and factual determinations, the overlaps of and limitations on authority to address such issues, and the judgment calls at issue, all readily distinguish this kind of case from a *Carlson* case.

II. THE TENSION BETWEEN PLAINTIFFS' CLAIM AGAINST THE WARDEN AND THE PRISON MANAGEMENT STRUCTURE PRESENTS CONSIDERATIONS MORE APPROPRIATELY ADDRESSED BY CONGRESS.

Magistrate Judge Gold properly considered the potential effect of plaintiffs' claim on prison management and administration as a special factor. *See generally Turner v. Safley*, 482 U.S. 78, 85 (1987) (the "inordinate" difficulty of running a detention facility counsels judicial restraint). He concluded that the creation of a *Bivens* action in this setting had the potential to disrupt BOP policies for investigating allegations of guard misconduct, and work against the allocation of responsibility for deterring abuse in which BOP had direct involvement following 9/11. That such considerations had to be balanced against any potential benefit of creating a damages action was precisely the kind of special factor that "counseled hesitation." R&R at 16-19; *cf. Ziglar*, 137 S.Ct. at 1857 ("[T]he Legislature is in the better position to consider if 'the public interest would be served' by imposing a 'new substantive legal liability.'"). As the Magistrate Judge explained, plaintiffs' effort to impose

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1509082 (D.N.J. Mar. 27, 2018)). This context likewise raises neither the BOP Program Statements nor managerial issues in play here. *See* Part II.A *infra*.

damages liability on a supervisor for such actions by the guards posed a threat to well-conceived policies and practices of prison administration. R&R at 18. Therefore, the difficult issues of allocating responsibility for such matters, and the threat to administrative procedures of imposing personal damages liability on the warden, should more properly rest with Congress.

Plaintiffs suggest there is something novel in the Magistrate Judge being concerned that plaintiffs' proposed cause of action applies pressures that are inconsistent with the sound prison administration BOP policies and practices already in place. But his reasoning actually addresses the central question presented by the special factors inquiry: How would the proposed cause of action, and the potentially crushing personal damages liability imposed on an Executive Branch official, affect government operations? The potential effect on established lines of authority and responsibility, particularly in emergency settings, should alone ward off judicial interference. Congress is far better suited to make such judgments, as explained by the Supreme Court:

> [T]he decision to recognize a damages remedy requires an assessment of its impact on government operations system wide. Those matters include the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies. These and other considerations may make it less probable that Congress would want the Judiciary to entertain a damages suit in a given case.

Ziglar, 137 S. Ct. at 1858.

Those considerations are paramount here for two related reasons. First, the proposed cause of action would defy the basic division of responsibility for investigation of abuse by prison guards. Plaintiffs insist that Warden Hasty's indifference is manifested in his failures to investigate abuse, examine videotape evidence of abuse, and punish abuse, Pls. Remand Mem. at 5, but BOP procedures purposely take the determination whether the prisoner complaints have any merit out of the hands of the warden and place it in the hands of OIA. Second, vesting responsibility in the warden, on pain of personal damages liability, would undermine BOP's ability to respond flexibly to

the possibility of guard abuse of prisoners in exigent circumstances, as it did here, where BOP inserted itself directly into the management of the ADMAX SHU by directing new preventive and corrective measures designed to address potential prisoner abuse by the guards in the form of videotaping of guard-prisoner interactions.

Both concerns require a policymaker to "pause even to consider" before imposing liability on a prison warden in the manner that would follow under plaintiffs' proposed cause of action. *Arar*, 585 F.3d at 574. Magistrate Judge Gold properly found that Congress – not the Judiciary – was the proper body to assess the potential impact of a *Bivens* action on government operations in this setting:

> Measured against this 'remarkably low' bar, the concerns discussed above – and, in particular, the question of who should decide how those concerns should be balanced against affording detainees a cause of action against a supervisory official who is deliberately indifferent to abuse – rises to the level of a special factor counseling hesitation.

R&R at 18-19

A. Plaintiffs' Proposed *Bivens* Action Conflicts With The Investigative Structure Embedded In Federal Prison Policy.

Plaintiffs' proposed damages remedy would impose liabilities on the warden that *conflict* with his duties under the existing investigative and remedial structure. The anomaly of imposing personal liability on a warden for not acting, where prison procedure tells him to stay his hand, is an extraordinarily strong reason for not extending *Bivens* to this context.

Plaintiffs' core claim against Warden Hasty rests on the assertion that after, learning or receiving complaints of abuse by prison guards in the ADMAX SHU, he did not investigate, examine the evidence, or punish abusers – manifesting "deliberate indifference." Plaintiffs explicitly alleged, and then argued to the Magistrate Judge, that Warden Hasty should be held liable because:

> Numerous complaints of abuse led the BOP to institute a policy of videotaping all 9/11 detainee transports, and resulted in two OIG investigations, as well as investigations by the BOP Office of Internal Affairs and the FBI. Knowing of these

> complaints and investigations, Hasty nevertheless failed to investigate the abuse, punish the abusers, train his staff, or implement any process at MDC to review the videotapes for evidence of abuse.

Pls. Remand Mem. at 5; *see also* FAC ¶ 107.

But the actual procedure for handling allegations of such abuse and conducting investigations was set forth in official BOP documents, known as Program Statement 17 (before October 1, 2001) and Program Statement 22 (after). *Supra*, note 2. Both versions require that any and all complaints of abuse brought to the warden's attention be forwarded to OIA either for OIA to investigate, for OIA to elevate the investigation to OIG, or for OIA to direct and oversee local investigation. P.S. 22 §§ 8, 9; P.S. 17 §§ 6, 8. These directives strictly *prohibit* the warden from engaging in any investigation of allegations of physical abuse by the guards unless and until directed specifically by OIA. *See* P.S. 17 § 6.g ("Allegations of staff misconduct must not be investigated locally until OIA approval is obtained."); P.S. 22 § 8.b.3 ("The subject of the allegation or complaint must not be questioned or interviewed prior to OIG clearance and OIA's approval."). Indeed, the Warden and OIA are barred from further action once OIG accepts a case. *See* P.S. 17 § 6.f ("If OIG or CRT accepts the case, no further action may be taken at the institution, regional, or Central Office level without OIG's or CRT's approval. OIA shall serve as the contact point for all communication between institution, regional, and Central Office staff and OIG or CRT in these cases."); P.S. 22 § 8.c. Here, OIG received complaints of abuse from OIA as early as mid-October, Supp. OIG Rep. at 5, and, as the Magistrate Judge noted, was investigating at the MDC after October. R&R at 18.

The reasons why the warden is removed from direct responsibility for investigating detainee abuse are evident and many. First, the accused employee is entitled to due process. The policy elevating responsibility for investigations of staff misconduct to OIA and OIG professionals balances the needs of detainees against the due process rights of guards accused of misconduct who

may face severe discipline if charges are sustained. *See* P.S. 22 § 8.b(3) ("The subject of the allegation or complaint must not be questioned or interviewed prior to OIG clearance and OIA's approval. This is to ensure against procedural error and safeguard the rights of the subject."). Second, claims by prisoners that they were abused by guards will invariably involve conflicting accounts, as was the case here. *See, e.g.*, Supp. OIG Rep. at 42 ("In our interviews, most staff members, particularly ones still employed by the BOP, denied all detainees' allegations of physical and verbal abuse."). Investigations requiring credibility determinations in such a context require technical expertise. *See* P.S. 17 § 5.b ("It is OIA's responsibility to provide technical guidance and expertise."); P.S. 22 § 6.b.

Third, and most important, making the warden the responsible investigator and fact-finder may be managerially undesirable. Virtually every such claim gives rise to conflicting accounts by guards and prisoners – prisoners accusing, guards denying – as was the case here. Supp. OIG Rep. at 13, 15-19, 22 (discussing how guards denied engaging in misconduct). Taking the word of prisoners over the word of staff could create a difficult managerial situation by creating disruptive and dangerous friction between a warden and staff. Conversely, this possibility could create pressure in the other direction to credit staff over prisoners.

Either way, plaintiffs' liability theory, by pressuring the warden to act on threat that failure to do so will make him personally liable in damages, is plainly in tension with these well-considered policies. The Magistrate Judge recognized this. He noted the kinds of pressures that would be placed on a warden if *courts* were to hold that he could be made personally subject to ruinous personal liability for not investigating conduct that BOP policy requires him not to investigate. *See* R&R at 18. The Magistrate Judge found that imposing personal liability on the warden in the manner plaintiffs advocate for here "might impede, or at least affect, the efficacy of these practices and procedures." R&R at 18.

Plaintiffs unfairly twist the Magistrate Judge's illustration of the conflict between the established policies for assessing and investigating abuse and plaintiffs' desire to lay responsibility and damages liability at the feet of the warden. They assert that the Magistrate Judge engaged in "speculation that a government official would violate federal policy" in order to avoid personal liability. Pls. Obj. at 14 (citing R&R at 18). Plaintiffs argue that "[l]ogically, a warden seeking to avoid liability for allowing abuse would follow the relevant policy about investigating abuse scrupulously." *Id.* at 15-16. But the fact that the warden followed procedures is no protection against plaintiffs pursuing a lawsuit. Indeed, it has not prevented plaintiffs in this very case from pressing their claims against him, over a period of nearly a decade, on the theory that he should have conducted investigations, examined the evidence, and meted out punishment anyway. *See* Pls. Remand Mem. at 5. The Magistrate Judge's conclusion did not revolve around whether a warden would actually disobey prison policy, but rather focused on the fact that the fear of personal liability would pressure the warden to take actions inconsistent with these policies.

The rules removing the warden from the investigation of abuse reflect reasoned policy judgments. How best to address accusations of abuse by guards from a *supervisory* perspective reflects the kind of delicate balancing of interests that the Judiciary is ill-equipped to handle. The Supreme Court itself has emphasized the pressures on Executive Branch officials that arise from the judicial creation of causes of action imposing personal damages liability on a government servant: They include not only meritorious lawsuits, but the costs, burdens and risks of non-meritorious lawsuits as well.[4] *See* R&R at 18 ("[T]he time and attention required to participate in a litigation as a

[4] Those pressures might affect how a public servant responds to a particular crisis or circumstance. But the fear of such liability – and the burden of costly litigation, whether meritorious or not – can affect the willingness of qualified individuals even to seek employment in the public sector in positions where such lawsuits are a possibility. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)

(Continued...)

party may distract supervisory officials, such as wardens, from their management responsibilities.") (citing *Ziglar*, 137 S.Ct. at 1856). The cost of lawsuits, the time that must be devoted to lawsuits, and the threat of lawsuits – even unjustified lawsuits – can have a very real and direct impact on the way that government employees conduct themselves. As the Magistrate Judge explained, whether that threat is to be deemed beneficial or counterproductive in the scheme of things is something that Congress is better equipped to evaluate than is the Judiciary. R&R at 19; *see* also *Ziglar*, 137 S.Ct. at 1856; *Chappell v. Wallace*, 462 U.S. 296, 304 (1983)(noting how the threat of lawsuits could undermine the chain of command in the military); *United States v. Stanley,* 483 U.S. 669, 681 (1987) (observing that the degree to which one might apply *Bivens* in the military depends in part on "how harmful and inappropriate judicial intrusion on military discipline is thought to be" and is "essentially a policy judgment").

As plaintiffs pleaded their case and argued it to the Magistrate Judge, their claim centers on Warden Hasty's failure to investigate and punish the abusers. Pls. Remand Mem. at 5 ("Knowing of these complaints and investigations, Hasty . . . failed to investigate the abuse, punish the abusers, train his staff, or implement any process at MDC to review the videotapes for evidence of abuse."); *see also* FAC ¶ 107. Because those arguments are unsustainable, plaintiffs now attempt to walk away from the claim that they actually pleaded, and have relied on throughout this case.

Plaintiffs now assert that the warden could do other, ancillary things, "like making rounds, reassigning guards, informing his staff that he takes abuse seriously, or reminded guards that the detainees had not even been charged – much less convicted – of involvement in 9/11." Pls. Obj. at

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(Continued...)

("[F]ear of being sued will dampen the ardor of all but the most resolute, or most irresponsible public officials, in the unflinching discharge of their duties.").

15. But this change in focus comes far too late, after years and years of litigation, and it is unavailing in any event. The warden cannot take special steps to respond to abuse unless and until he knows that such abuse, as opposed to false allegations of abuse, has occurred. And he may not investigate the allegation or question the accused officer until directed to do so by OIA. P.S. 17 § 6.c, f-g; P.S. 22 § 8.c-d. Moreover, plaintiffs' invocation of "training" is pap. *See* Pls. Obj. at 5-6. The bulk of plaintiffs' allegations address alleged intentional abuse, not that the guards who engaged in that abuse failed to understand that their actions were prohibited. Furthermore, the implicit notion that no steps were being taken to prevent abuse is wrong as well, as plaintiffs' allegations incorporated facts about the videotaping policies that were instituted in the ADMAX SHU. *See* Part II B, *infra.* Plaintiffs' effort to place responsibility on the warden, on pain of personal liability, for an alleged failure to respond to complaints of abuse would create clear and manifest tension with well-conceived prison policies. The question of where to draw the balance and reconcile the competing interests is not one for the Judiciary, and thus "rises to the level of a special factor counseling hesitation." R&R at 19.

B. That BOP, OIA And OIG Were Acting To Deter Abuse And Address Detainee Allegations Of Abuse Further Counsels Hesitation.

Aside from the BOP procedure for investigating and disciplining abuse, the context of this case reflects BOP's, OIA's, and OIG's active engagement with the issue of 9/11 detainee allegations of abuse at the MDC. This is true both with respect to investigating alleged misconduct, which involved OIG on site examining misconduct, and for preventing such misconduct (or weeding out false allegations of misconduct), which involved BOP in the earliest days following the establishment of the ADMAX SHU. Whatever might have been the ordinary chain of command and responsibility for deterring guard abuse of prisoners in the MDC, and the warden's responsibility in that regard, with BOP's creation of the ADMAX SHU, BOP intervened directly

and proactively into the issue of addressing and preventing potential abuse of prisoners in that SHU. It was not the warden's role to supersede BOP's efforts on that issue.

Here, of course, OIG did exercise jurisdiction over investigations into complaints of abuse at the MDC. Supp. OIG Rep. 5 (describing OIG investigation as stemming from "several allegations of physical abuse" referred to it by OIA in mid-October 2001); *see* Pls. Remand Mem. at 5 (noting that Warden Hasty was aware of these investigations being conducted). Its investigation continued throughout the remainder of Warden Hasty's tenure, and long after. OIG Rep. at 5 (describing "interviews, field work, and analysis" conducted between March 2002 and March 2003). There is no indication or allegation that OIG asked for assistance from the warden or did not receive his full cooperation.

BOP was also actively involved in *preventing* misconduct in the newly created ADMAX SHU. At the very outset, BOP tried to head off false claims of abuse, and actual abuse, through special means: rather by directing the videotaping of 9/11 detainees' cells. OIG Rep. at 149-50. Later, when there were reports of abuse outside the range of the cameras, BOP took the further step of requiring the videotaping of all prisoner movements. *Id.*; Supp. OIG Rep. at 39. The videotaping policy was thus a response to the risk of abuse. And it was effective: "Once the MDC began videotaping all detainee movements, incidents and allegations of physical and verbal abuse significantly decreased." Supp. OIG Rep. at 45; *see also* FAC ¶ 105. With this major reform in place, the notion that the warden should, upon of personal liability, have been required to do something more frustrates BOP's allocation of responsibility for these matters during this difficult period. Plaintiffs' claim seeks to impose a constitutional responsibility on the warden for matters on which, in the aftermath of 9/11, OIG and BOP had primary or shared responsibility in the context of this case. Whatever the ordinary chain of command and responsibility for preventing guard abuse of prisoners, the actions of BOP following 9/11 demonstrate that there is a need for flexibility in

supervisory responsibility of such matters. That flexibility is inconsistent with a cause of action that purports to vest constitutional responsibility in the warden for such matters.

With respect to both the investigation of claims of abuse, and the implementation of protective measures, plaintiffs' proposed cause of action is in marked tension with the policies and practices that were in place. In these circumstances, the Magistrate Judge properly held that "imposing personal liability on a warden" based on his alleged indifference to abuse by "corrections officers under his command might impede, or at least affect, the efficacy of these practices and procedures." R&R at 18. Because there is a balance to be drawn in this new context, these circumstances "counsel hesitation" prior to the extraordinary exercise of judicial power to create a now-disfavored remedy in damages. *See* R&R at 19.

III. THE FTCA PROVIDES AN ALTERNATIVE REMEDY BARRING PLAINTIFFS' *BIVENS* CLAIM.

Separate from the special factors inquiry, "the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action." *Ziglar*, 137 S.Ct. at 1865. Plaintiffs could have – but did not – bring tort claims under the FTCA against the guards based on the underlying conduct alleged here. *See* R&R at 19. That is what many previous plaintiffs in this case did, settling out years ago. *See* Meeropol Letter, ECF No. 683 (filed Nov. 2, 2009) (notifying the court of plaintiffs' settlement of their claims); *see also* R&R at 19. The Magistrate Judge held that the redress provided by the FTCA was an alternative remedy that should preclude a court from authorizing a new form of *Bivens* action to cover the facts of this case. R&R at 22.

In so holding, the Magistrate Judge's ruling was consistent with that of many courts that have, in light of *Ziglar*, recently held that the FTCA is an alternative remedy precluding the expansion of *Bivens*. *See, e.g.*, *Huckaby v. Bradley*, No. 1:16–cv–4327, 2018 WL 2002790, at *6 (D.N.J. Apr. 30, 2018) (finding that "the availability of a remedy against the United States on a claim of negligence under the FTCA, in light of *Ziglar*, is a factor weighing against . . . recognizing a *Bivens*

remedy"), *appeal filed*, No. 18-2204 (3d Cir. June 1, 2018); *Abdoulaye v. Cimaglia*, No. 15-cv-4921, 2018 WL 1890488, at *7 (S.D.N.Y. Mar. 30, 2018) (questioning whether the analysis of the FTCA as an alternative remedy in *Carlson* survives *Ziglar* and finding that "the existence of the FTCA as a potential remedy counsels hesitation in extending a *Bivens* remedy"); *Free v. Peikar*, No. 17-cv-00159, 2018 WL 905388, at *5-6 (E.D. Cal. Feb. 15, 2018), *report and recommendation adopted by* No. 17-cv-00159, 2018 WL 1569030 (E.D. Cal. Mar. 30, 2018) (declining to extend *Bivens* to a First Amendment claim because the FTCA is an adequate alternative remedy); *Morgan v. Shivers*, No. 14-cv-7921, 2018 WL 618451, at *5-6 (S.D.N.Y. Jan. 29, 2018) (declining to extend *Bivens* to pre-trial detainee's Fifth Amendment excessive force and sexual assault claims because the FTCA is an alternative remedy). While the case law is not unanimous, the Magistrate Judge concluded that the better reasoned cases confirm that the FTCA precludes the judicial creation of damages remedies here. R&R at 21-22.

Plaintiffs argue that such rulings conflict with *Carlson*, where the Supreme Court held that the possible FTCA remedies available in that case did *not* preclude the Court from creating a damages action for the failure to provide medical care at issue there. Plaintiffs allude to *Carlson*'s "holding" on this point. Pls. Remand Mem. at 3, 19, 21. As applied to the context in which *Carlson* ruled – an Eighth Amendment failure to treat serious medical need claim – it would indeed be a holding. But any attempt to apply that ruling here requires an extension of that holding. *See Ziglar*, 137 S.Ct. at 1864. A new context requires a new analysis. As explained above, once it has been determined that plaintiffs are asking to extend *Carlson* to a new context, then the court must apply current standards in answering that question. That is basic law. But it is also central to *Ziglar*'s holding. The whole point of the Court's clearly expressed reluctance to extend *Bivens* in *Ziglar* was to insist that its extension to any new context be judged by current standards.

And those standards have markedly changed. What had been essentially a presumption in favor of creating damages remedies, *see Ziglar*, 137 S.Ct. at 1855, is now recognized as a violation of separation-of-powers principles and a "disfavored" practice. *Id.* at 1857. Under current law, the creation of new damages remedies is an extraordinary judicial leap. The Judiciary must be sure that leap is warranted before it is undertaken. *See Ziglar*, 137 S.Ct. at 1858. Even if courts have the power to create such remedies, they should exercise restraint, and refrain if other remedies protect the constitutional interest involved. *Id.*

The Magistrate Judge illustrated how differently the alternative remedies analysis was described in *Carlson* and *Ziglar*. R&R at 20. *Carlson* addressed the FTCA primarily from a standpoint of statutory interpretation and congressional intent. *Carlson*, 446 U.S. at 18-20 ("The second [circumstance where a *Bivens* claim may be defeated] is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective."). In contrast, the Court now treats alternative remedies is an independent reason for the Judiciary to resist any impulse to create a new constitutional cause of action. *Ziglar*, 137 S.Ct. at 1858 ("[I]f there is an alternative remedial structure present in a certain case, that *alone* may limit the power of the Judiciary to infer a new *Bivens* cause of action") (emphasis added). Thus, injunctions can be an alternative, even when not declared so by Congress. *See Ziglar,* 137 S.Ct. at 1849, 1858, 1865. Similarly, state tort law may preclude the creation of new constitutional remedies, irrespective of congressional intent. *See Minneci v. Pollard*, 565 U.S. 118, 129-30 (2012) (holding state tort law provided alternative remedies precluding a *Bivens* action against the employee of a private operator of a federal prison).

The current alternative remedy inquiry, prescribed by *Ziglar*, asks whether there is an alternative remedy that protects the constitutional interest involved. *Id.* at 1862-63. In this respect, the Court has made clear that the remedy does not have to precisely mirror the constitutional

remedy that the courts might establish. It is sufficient that it protects the constitutional interest in some significant way. *Minneci*, 565 U.S. at 125-26. Indeed, the Supreme Court specifically held in *Ziglar* that injunctive relief – available to address the "official policies" in *Ziglar* – was such an alternative remedy. *Ziglar*, 137 S.Ct. at 1849. It so held even though injunctive remedies only prevent future violations and do not provide compensation for any harm previously caused.

Under these standards, it is plain that the FTCA is an alternative remedy that precludes creation of a new constitutional damages remedy in a case like this. The FTCA specifically allows for a compensatory tort remedy, which is well understood to be what the law prescribes for injuries that have already taken place. To be sure, as pointed out in *Ziglar*, personal damages liability adds an additional measure of deterrence. *See id.* at 1863. But deterrence policies are generally not for the courts to opine on; they are more properly matters for legislative debate. It stretches the judicial role beyond the breaking point to create a damages remedy simply to implement a judicially-perceived need for deterrence. Indeed, as described above, the fear of crushing damages liability and subsequent deterrence (and over-deterrence that goes along with it) is not necessarily beneficial, particularly at a supervisory level where difficult judgments have to be made. As the Court explained in *Ziglar*, drawing the balance between deterrence on the one hand, and negative impacts of damages liability on management on the other, is "for the Congress to undertake, not the Judiciary." *Id.* at 1849-50.

Even if the FTCA alone were not enough to preclude the creation of a new damages remedy, it is certainly sufficient in combination with other available remedies. The FTCA assuredly offers a compensatory remedy for past harm. But unlike the single incident situation in *Bivens,* or in *Carlson* where the plaintiff was deceased so damages was the only remedy, injunctive relief to address the pattern of conduct alleged was available here. *See* Def. Hasty Obj., ECF No. 839 at 10-14 (Sept. 10, 2018). Further, the existing administrative and disciplinary process – under which physically

abusive guards can be subjected to harsh employment sanctions, as well as criminal prosecution[5] – adds a strong deterrent element as well.

IV. DENYING PLAINTIFFS' *BIVENS* CLAIM WOULD NOT BE ANOMALOUS.

Plaintiffs say that a ruling against them would be anomalous because courts that have improperly failed to conduct the required special factors analysis, pre-*Ziglar*, have allowed various kinds of prisoner cases to go forward. But *Ziglar* changes all that; this Court must apply the principles announced in *Ziglar*, not prior law from lower courts.

Plaintiffs cite only two cases that post-date *Ziglar,* both from the Ninth Circuit. *See* Pls. Obj. at 23. But these two cases are easily distinguishable. *Lanuza v. Love* makes it clear that its holding is limited to the "narrow and egregious facts" where the defendant committed intentional fraud. No. 15-35408, 2018 WL 384507 (9th Cir. Aug. 14, 2018) (permitting a *Bivens* remedy where an ICE attorney forged a document to make plaintiff ineligible for cancellation of removal)). And *Rodriguez v. Swartz* arose in the context of a claim against a border patrol agent for shooting an individual across the Mexican border where the plaintiff was excluded from pursuing a remedy under the FTCA. 899 F.3d 719 (9th Cir. 2018). Neither case involves the special factors or alternative remedies present here.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court adopt the conclusions of the Magistrate Judge's Report and Recommendation supporting its recommendation that the Court dismiss plaintiffs' claim against Warden Hasty.

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[5] The OIG had the ability to pursue cases against Bureau of Prison (BOP) employees both administratively and criminally. Office of the Inspector General, U.S. Dep't of Justice, *Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act* ("Patriot Act Report"), July 17, 2003, at 5 n.3, available at https://oig.justice.gov/special/0307/index.htm.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2018, the foregoing document was electronically filed with the Clerk of Court and served in accordance with the Federal Rules of Civil Procedure, and/or the Eastern District's Local Rules, and/or the Eastern District's Rules on Electronic Service via the CM/ECF system, which will send notification of such filing to all counsel of record, including the following parties and participants:

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