

ARTICLES

“COUNTER-COUNTER-TERRORISM VIA LAWSUIT”—THE *BIVENS* IMPASSE

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ABSTRACT

This Article deals with one of the most difficult questions arising out of the war on terror: what to do about the victims. How should the legal system respond to claims of collateral damage to constitutional rights when the government has tilted in favor of security at the expense of liberty? The war on terror has already put the American legal system to a severe test, exacerbated by the divide between those who see the problem as essentially one of preserving civil liberties and those who see it as one of preserving national security.

*Increasingly, the system will have to grapple with suits by terrorism suspects who seek damages for the governmental conduct to which they have been subjected. The Supreme Court has already decided one such case; others are on their way. Apart from damages for the victims, these suits present the question of potential civil liability for federal officials, particularly those of the previous administration. Much of this litigation will be based on the *Bivens* doctrine, which permits damages actions for constitutional torts committed by federal officials. This Article contends*

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that the Bivens doctrine exists in two forms: the Marbury-rights model and the prudential-deferential model. The former focuses on the plaintiff and points toward allowing the suit to proceed. The latter focuses on the subject matter and leads to emphasis on protecting the government. It is closely related to the political question doctrine and has prevailed since the 1980s.

Thus, war on terror Bivens plaintiffs face obstacles, but they are not insurmountable. The Supreme Court's recent habeas corpus cases in the context of the war on terror have emphasized a heightened judicial role in protecting individual rights. These cases might portend a return to the Marbury-rights model. As an alternative, the Court may be exploring the possibility of a middle ground: a balancing approach to Bivens that would permit some suits to proceed. In war on terror suits, this approach has an initial appeal. It avoids the Bivens dilemma: a choice between the prudential-deferential model, which will generally lead to dismissal, and the Marbury-rights model, which points toward allowing the suit to proceed. The Article contends, however, that while superficially appealing, this balancing alternative will not work, at least in the context of the war on terror. The same competing values will always be present in the balancing process: vindication of constitutional rights and judicial checking of the political branches versus deference to government actions to fight terrorism and concern over the detrimental effects of litigation on those efforts. The Bivens doctrine is, in effect, at an impasse. Courts are faced with an either/or choice that they, rightly, may not feel competent to make.

Yet the constitutional order can hardly ignore the need to strike some balance between individual liberty and national security. The issue of compensation is particularly acute. This Article contends that Congress, not the judiciary, should resolve the Bivens impasse. This approach would respond to the Supreme Court's call for Congress to take the lead in the national debate over striking the balance and would be consistent with the prudential-deferential model's reliance on congressional primacy in devising constitutional remedies. The Article concludes by considering steps Congress might take, including substituting governmental for individual liability, using a specialized court, and establishing administrative processes.

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I. INTRODUCTION—*BIVENS* MEETS THE WAR ON TERROR

The war on terror has put the American legal system to a severe test. Issues as diverse as the legitimacy and procedures of nontraditional

military tribunals,¹ the availability of and procedures for habeas corpus,² and the power of Congress over the “Great Writ”³ have generated substantial, widely publicized litigation. Until now, attention has focused on terrorism suspects who seek to block the government actions to which they are subjected. The most dramatic examples have been habeas corpus petitions seeking outright release.⁴

These suits are not about to go away,⁵ but a new form of litigation will become increasingly important: damages suits claiming violations of constitutional and other rights brought against the federal officials who participated in the contested measures, either at the operational or higher levels. One commentator calls this phenomenon “counter-counter-terrorism via lawsuit.”⁶ High profile examples have already emerged⁷: the suit by Jose Padilla against former Justice Department official John Yoo⁸ and the damages action by Canadian citizen Maher Arar based on his “extraordinary rendition” to Syria.⁹

A cornerstone of these suits is the *Bivens* doctrine, often referred to as the federal analogue of 42 U.S.C. § 1983.¹⁰ *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*¹¹ arose out of alleged Fourth Amendment violations by federal law enforcement officials. The Supreme Court ruled that federal officials who violate individuals’ constitutional

1. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

2. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

3. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *id.* at 2293 (Roberts, C.J., dissenting).

4. See, e.g., *Rasul v. Bush*, 542 U.S. 466 (2004). The courts are also often involved in the prosecution of terrorism-related offenses. Typical are the numerous criminal enforcement actions based on statutes forbidding support for terrorists and terrorist organizations such as 18 U.S.C. § 2339A (2006), which imposes criminal liability for providing material support to terrorists. See, e.g., *United States v. Al-Arian*, 308 F. Supp. 2d 1322 (M.D. Fla. 2004).

5. The Supreme Court’s 2008 decision in *Boumediene v. Bush* adopts a flexible approach to the availability of habeas corpus to aliens not on U.S. soil. *Boumediene*, 128 S. Ct. at 2267. It is likely that this approach will generate future litigation.

6. Richard Klinger, *The Court, the Culture Wars, and Real War*, 30 A.B.A. NAT’L SECURITY L. REP., June 2008, at 1, 4.

7. See Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 715 (2006) (stating that the victims of U.S. torture “have begun to sue”).

8. *Padilla v. Yoo*, No. C 08-00035 JSW, 2009 WL 1651273 (N.D. Cal. June 18, 2009).

9. *Arar v. Ashcroft*, 532 F.3d 157, 166 (2d Cir.), *reh’g en banc granted* (Aug. 12, 2008). In August 2008, the Second Circuit granted Arar a rehearing en banc. Mark Hamblett, *Full Court to Rehear Rendition Case*, N.Y. L.J., Aug. 15, 2008, at 1. The argument was held on December 9, 2008.

10. See, e.g., *Wilkie v. Robbins*, 551 U.S. 537, 585 (2007) (Ginsburg, J., concurring in part, dissenting in part) (“The *Bivens* analog to § 1983 . . . is hardly an obscure part of the Court’s jurisprudence.”).

11. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

rights can be held liable for damages.¹² This holding might seem little more than an application of Chief Justice Marshall's famous statement in *Marbury v. Madison* that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."¹³ Yet from the outset, the *Bivens* doctrine has contained an equally important, diametrically opposed strand: a high degree of judicial discretion coupled with deference to Congress—both its expertise in the particular subject matter of the suit and its role in making the basic remedial decision of whether damages are available for constitutional violations. Over the last two decades, the latter strand has prevailed. The Supreme Court has rejected the last seven attempts to fashion a *Bivens* action in new contexts.¹⁴ Commentators have declared *Bivens* moribund, if not dead.¹⁵

In this Article, I contend that things are not so simple. The terrorism-based cases will force the judiciary, and ultimately the Supreme Court, to reexamine the status of *Bivens*. It may well be that efforts to fashion damages remedies for possible constitutional violations will fail. At the general level, the Court's apparent hostility to *Bivens*—or at least the Court's emphasis on the discretionary-deferential nature of the doctrine—is there for all to see. At a specific level, some lower court judges have seized on one aspect—what might be called the “political question” dimension of *Bivens*—to justify refusals to hear cases where claims of constitutional violations seem strong.¹⁶ These judges may see terrorism-based *Bivens*

12. See *id.* at 395–96.

13. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), quoted in *Bivens*, 403 U.S. at 397.

14. See *Wilkie*, 551 U.S. 537; *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *FDIC v. Meyer*, 510 U.S. 471 (1994); *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *United States v. Stanley*, 483 U.S. 669 (1987); *Bush v. Lucas*, 462 U.S. 367 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983). *But see Hartman v. Moore*, 547 U.S. 250 (2006) (accepting the availability of *Bivens* for First Amendment claims); *McCarthy v. Madigan*, 503 U.S. 140 (1992) (discussing the role of the exhaustion doctrine in prisoner *Bivens* suits), superseded by statute, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, sec. 803(d), § 7(a), 110 Stat. 1321-66, 1321-71 (1996). *McCarthy* is best seen as an example of the Court's treatment of the *Bivens* doctrine as a given, albeit one it did not wish to extend.

15. E.g., Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 294 (1995) (“[T]here is little left of the *Bivens* principle.”); Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2007 CATO SUP. CT. REV. 23, 26 (“[T]he best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of recovery.”). See also James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. (forthcoming Nov. 2009) (manuscript at 30, on file with author) (citing “recent hostility to new *Bivens* claims”).

16. See, e.g., *Arar v. Ashcroft*, 532 F.3d 157, 181–82 (2d Cir. 2008), *aff'g* 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *reh'g en banc granted* (Aug. 12, 2008); *Rasul v. Myers*, 512 F.3d 644, 672–73 (D.C. Cir.) (Brown, J., concurring), *vacated*, 129 S. Ct. 763 (2008) (mem.). On remand the District of Columbia Circuit adopted Judge Brown's position as an alternative ground for refusing to hear the suit.

cases as forcing them not just to evaluate individual conduct, but also to evaluate entire government programs in the sensitive area of national security.¹⁷ On the other hand, many of the cases present what might be called “heartland” *Bivens* issues—egregious conduct by law enforcement or similar officials.¹⁸ Even if confined to its original facts, as Justices Scalia and Thomas have advocated,¹⁹ the doctrine would arguably allow these damages actions to proceed. Its *Marbury* roots point in this direction. So do the Supreme Court’s recent terrorism cases. Thus, a rebirth of *Bivens* is a distinct possibility, as seemingly arcane points of federal jurisdiction play a central role in the world of counter-counter-terrorism litigation.

The Article proceeds as follows. In Part II, I trace the evolution of *Bivens* and its inherent duality. I contend that there is not one single model of *Bivens*, but two contrasting ones that have coexisted since the original decision. I label these the *Marbury*-rights model and the prudential-deferential model. The former encourages constitutional damages litigation; the latter discourages it. The Supreme Court’s *Bivens* decisions are examined in depth in order to develop these models. Part III takes a preliminary look at possible war on terror constitutional damages suits. I focus on *Arar v. Ashcroft*,²⁰ an extraordinary rendition case. That case is a good example of the prudential-deferential model in action and shows its close relationship to the political question doctrine. Part IV presents a proposed general analysis for future war on terror *Bivens* suits. It also considers the impact of the recent Supreme Court decisions on habeas corpus. These cases appear to support the *Marbury*-rights model but do not provide a definitive answer. This part also considers (and rejects) balancing as a possible compromise approach to the impasse. Part V concludes with a consideration of steps Congress might take as a way out of the *Bivens* impasse.

The war on terror cases will force the Supreme Court to confront several issues. The first is whether to retain its current position on *Bivens*—

Rasul v. Myers, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009).

17. See *Rasul*, 512 F.3d at 673 (“Judicial involvement in this delicate area could undermine these military and diplomatic efforts and lead to ‘embarrassment of our government abroad.’” (quoting *Baker v. Carr*, 369 U.S. 186, 226 (1962))).

18. In *Malesko*, Justice Stevens referred to an alleged Eighth Amendment violation by a prison guard as falling “in the heartland of substantive *Bivens* claims.” *Malesko*, 534 U.S. at 78 (Stevens, J., dissenting).

19. See *Wilkie*, 551 U.S. at 568 (Thomas, J., concurring) (quoting *Malesko*, 534 U.S. at 75 (Scalia, J., concurring)) (arguing that *Bivens* should be limited “to the precise circumstances” it involved); *Malesko*, 534 U.S. at 75 (Scalia, J., concurring) (same).

20. *Arar*, 532 F.3d 157.

the prudential-deferential model. As an alternative, it might return to the *Marbury*-rights model or seek a compromise approach that allows some suits to proceed.²¹ Deterring rogue agents is one thing, but individual liability for those who are protecting the nation in accordance with government policy should give us pause. While it would be consistent with our constitutional tradition for the judiciary to use *Bivens* constitutional tort actions as a means of “checking” official policy,²² there may be a lack of fit between the “A v. B” tort configuration of suits like the original *Bivens* case and broad challenges to government programs. Yet individual suits will often be the only available vehicle. They also highlight the issue of supervisory liability, including the potential for holding liable officials at the highest level. In such a case, the individual non-official-capacity suit becomes an attack on the policy itself.

The Court must confront an additional issue: the extent to which its recent habeas corpus decisions portend a broader judicial role in the war on terror. The cases certainly point in this direction. In her plurality opinion in *Hamdi v. Rumsfeld*, Justice O’Connor stated:

While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.²³

Thus, a question arises as to how much this approach, with its strong tilt toward the *Marbury*-rights model, will carry over to the *Bivens* doctrine when the inevitable war on terror suits arise.

21. This possibility is discussed and rejected in Part IV.B *infra*.

22. See BENJAMIN WITTES, *LAW AND THE LONG WAR* 113 (2008) (“The broad vision of judicial power in the overseas fight against terrorists has two interconnected sources. One involves the right of individuals detained to their day in court. The other involves the power of the courts themselves to review administrative action for compliance with legal norms the administration may be flouting.”); Bandes, *supra* note 15, at 317–19 (noting the importance of the Court’s checking function). David Zaring states that “[p]ersonal liability has become an important alternative to administrative procedure.” David Zaring, *Personal Liability as Administrative Law*, 66 WASH. & LEE L. REV. 313, 316 (2009). Cornelia Pillard argues that government practice concerning defense costs and possible indemnification has made the government “the real defendant party in interest in *Bivens* litigation.” Cornelia T. L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 GEO. L.J. 65, 67 (1999). Yet the Court continues to insist that *Bivens* actions are aimed at the individual defendants.

23. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004). Justice O’Connor also cited Justice Murphy’s dissent in *Korematsu v. United States*. See *id.* (citing *Korematsu v. United States*, 323 U.S. 214, 233–34 (1944) (Murphy, J., dissenting)).

In the end, one must ask whether *Bivens* suits are the best method of responding to the constitutional questions that the war on terror litigation brings before the courts. This is a hard question. The *Bivens* action is a valuable component of the legal order, even if it is used sparingly under the prudential-deferential model. This Article contends that precedent and policy argue for a generally negative answer in the war on terror context. This context provides a strong example of the need for judicial deference to the political branches and judicial recognition of the danger of a situation that Benjamin Wittes describes as “one in which legalisms pervasively hamper governmental pursuit of a goal that nearly all Americans support.”²⁴ My rejection of a broad role for *Bivens* also rests on the view that war on terror litigation cannot just be shoehorned into the “law enforcement” model, in which a *Bivens* action looks like a typical police misconduct case. The issues raised by these actions must be viewed through the lenses of the intelligence and military models as well.²⁵ On the other hand, I recognize that there is a real risk that constitutional violations will not be redressed. Furthermore, the judiciary’s checking function will be circumscribed in an area where it may be essential.

This is the *Bivens* impasse that confronts the courts and that the courts may not be able to resolve. One approach would be for Congress to pass legislation to provide non-*Bivens* relief to those aggrieved by actions against them as terrorism suspects.²⁶ Indeed, the ultimate impact of *Bivens* suits may be to prod Congress into actions that reflect its view on how best to strike the balance between individual liberty and national security and that represent a more assertive congressional role in the war on terror. Wittes writes that Congress “has sat on its hands and refused to assert its own proper role in designing a coherent legal structure for the war; to this day, America’s national legislature continues to avoid addressing the questions only it can usefully answer.”²⁷ Wittes views both the executive and the judiciary as incapable of developing “a stable long-term architecture for a war that defies all of the usual norms of war. The only institution capable of delivering such a body of law is the Congress of the

24. WITTES, *supra* note 22, at 150.

25. See, e.g., AMOS N. GUIORA, FUNDAMENTALS OF COUNTERTERRORISM 27–28 (2008) (discussing the criminal, intelligence, and war models for shaping counterterrorist policy).

26. See generally Seamon, *supra* note 7, at 757–62 (emphasizing the possibility of holding the United States, as well as individual officials, liable, at least in the torture context). This Article discusses alternative possibilities for compensating aggrieved suspects in Part V *infra*.

27. WITTES, *supra* note 22, at 8. *But see infra* text accompanying notes 303–06 (noting that “Congress has enacted a broad array of statutes to deal with terrorism, both before and after September 11, 2001”).

United States”²⁸

II. *BIVENS*—DUALITY FROM THE OUTSET

A. THE ORIGINAL DECISION AND THE TWO EXCEPTIONS

The plaintiff in *Bivens* sought damages from federal narcotics agents based on an alleged warrantless search and seizure in violation of the Fourth Amendment.²⁹ The Supreme Court’s 1971 decision, by a 6-3 margin, gave an affirmative answer to the previously unresolved question of whether a damages remedy was available in such a case.³⁰ Justice Brennan’s majority opinion treated the case as somewhat unremarkable, dismissing possible federalism issues,³¹ and making the *Marbury*-based assertion that the fact “[t]hat damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly come as a surprising proposition.”³²

He brushed aside the dissenters’ suggestion that congressional authorization of such a remedy was necessary.³³ He quoted *Bell v. Hood* to the effect that “it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”³⁴ However, in the course of his analysis he posited two exceptions that might suffice to take away the judicially created remedy. Justice Brennan first noted that “[t]he present case involves no special factors counselling hesitation in the absence of affirmative action by Congress.”³⁵ He then noted that “we have here no explicit congressional declaration that persons injured by a federal officer’s violation of the

28. WITTES, *supra* note 22, at 10.

29. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389–90 (1971).

30. *See id.* at 388.

31. *See id.* at 391–95.

32. *Id.* at 395. *See also id.* at 397 (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803))).

33. *See id.* at 396 (“Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation.”). Writing in dissent, both Chief Justice Burger and Justice Black contended that the Court could not authorize a damages remedy absent explicit congressional authorization. *See, e.g., id.* at 412 (Burger, C.J., dissenting) (“Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not.”).

34. *Id.* at 396 (majority opinion) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

35. *Id.*

Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.”³⁶

The second exception is the more straightforward of the two. The notion that Congress has a role equal, if not superior, to the courts in fashioning remedies for constitutional wrongs seems unremarkable. The enactment of § 1983 and related statutes³⁷ is a clear example. The only serious uncertainty created by the exception is whether there might be a judicial role in evaluating the effectiveness of any remedies Congress did create. Perhaps the most important point about the second exception is that deference to Congress is explicit.

The first exception presents textual and conceptual difficulties. It refers to special factors counseling hesitation “in the absence of affirmative action by Congress.” What does this mean? The most logical reading is that the Court is already on weak ground in fashioning a damages remedy without congressional authorization; the presence of special factors would make that ground even weaker, which would counsel hesitation. The main problem with this reading is that it would go far toward accepting the dissents’ premise³⁸ that congressional authorization was necessary in the first place. Perhaps sensing this weakness, Justice Brennan tried to rewrite the sentence in a later case by inserting the word “even” in front of “in the absence of affirmative action by Congress.”³⁹ But this suggests a type of congressional action that is different from congressional authorization of a judicial remedy. Instead, it suggests action like that evoked in the *second* exception: congressional provision of alternative remedies. Thus, the first exception would ask not, “Should some factor(s) make us hesitate *since* we are already on weak ground?” but rather, “Is there some reason for hesitating *even though* Congress has not provided an alternative to what the plaintiff seeks?” The latter inquiry diverts focus from the basic question of judicial authority. There is, of course, a way out of this tangle: simply to ignore the last eight words of the exception and to focus on the judicial role. Several courts, including the Supreme Court, have done just that. The question then becomes whether the case presents special factors counseling

36. *Id.* at 397.

37. *E.g.*, 42 U.S.C. § 1988(b) (2006) (providing for awarding attorney’s fees).

38. *E.g.*, *Bivens*, 403 U.S. at 428 (Black, J., dissenting) (stating that the Court’s creation of a remedy was “an exercise of power that the Constitution does not give us”).

39. *See Schweiker v. Chilicky*, 487 U.S. 412, 435 (1988) (Brennan, J., dissenting). *See also* George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the Bivens Dissenters Prevailed?*, 64 IND. L.J. 263, 272 (1989).

hesitation.⁴⁰

Two points should be made about this reading. First, there are distinct echoes of the political question doctrine,⁴¹ at least in some of its prudential formulations.⁴² Second, whether or not there is a prudential political question doctrine, the first *Bivens* exception strongly suggests a high degree of judicial discretion in determining the availability of damages for constitutional violations by federal officials. The first exception points away from a *Marbury*-like strict linkage between rights and remedies,⁴³ and toward a degree of judicial discretion, which obviously includes the power to deny a remedy. The outline of the *Bivens* doctrine that seems to emerge from the decision and the two exceptions might be described in the following terms: (1) a presumption of the availability of damages relief against federal officials for constitutional violations (which a court has inherent power to award); coupled with (2) discretion not to award that relief (if special factors counseling hesitation are present); and (3) an overriding power in Congress to negate that relief, at least by providing an alternative that Congress deems equally effective. In sum, the *Bivens* majority opinion points resolutely in two directions.⁴⁴

Justice Harlan's important concurrence in *Bivens* is devoted mainly to countering the dissents' arguments that the Court lacked power to grant a damages remedy without congressional authorization.⁴⁵ He pointed in part

40. See, e.g., *Chappell v. Wallace*, 462 U.S. 296, 298 (1983).

41. The last four factors in *Baker v. Carr* provide examples of elements of political questions: the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). Any one of these could constitute a special factor counseling hesitation. See Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1146, 1150, 1152 (1989) (discussing the elements of the political question doctrine in *Bivens* cases).

42. Erwin Chemerinsky states:

The political question doctrine might be treated as constitutional if it is thought to be based on separation of powers or textual commitments to other branches of government. On the other hand, the doctrine is prudential if it reflects the Court's concerns about preserving judicial credibility and limiting the role of an unelected judiciary in a democratic society.

ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 134 (3d ed. 2006).

43. See *Bivens*, 403 U.S. at 402 n.3 (Harlan, J., concurring) (citing the "jurisprudential thought" at the time of *Marbury* that linked rights and remedies).

44. See *Brown*, *supra* note 39, at 270; Nichol, *supra* note 41, at 1129 (discussing "judicial ambivalence about the validity of the entire *Bivens* enterprise").

45. See *Bivens*, 403 U.S. at 399 (Harlan, J., concurring) ("I am of the opinion that federal courts do have the power to award damages for violation of 'constitutionally protected interests' . . .").

to “the presumed availability of federal equitable relief”⁴⁶ and contended that the constitutional source of the rights asserted argued strongly for a judicial role in remedying them.⁴⁷ There are strong echoes of *Marbury* in his opinion, such as the assertion that “the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment.”⁴⁸

A particularly significant aspect of Justice Harlan’s opinion is his emphasis on the policymaking nature of the remedial decision.⁴⁹ He drew heavily on the Court’s approach to implied statutory rights of action exemplified by *J.I. Case Co. v. Borak*.⁵⁰ *Borak* stood for the general proposition that courts can vindicate federal policies embodied in substantive law without the need for “express authorization of a damage remedy.”⁵¹ With respect to constitutional remedial questions, he stated that “the range of policy considerations we may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy.”⁵²

Justice Harlan’s opinion certainly looks at first blush a lot like the majority’s, which, for example, also cited *Borak*.⁵³ Like the majority, his analysis reflects a *Marbury*-based view of the legal system.⁵⁴ An important distinction is that Justice Harlan relied far more heavily on the possibility of implying rights of action from *statutes* as justification for judicial fashioning of *constitutional* damages actions.⁵⁵ The two practices are quite different, however. The Constitution not only occupies a higher position in the legal order, but it also does not, in Chief Justice Marshall’s words, “partake of the prolixity of a legal code.”⁵⁶ Thus, one might not expect to find in a constitution the same specificity as to remedies that could, and perhaps should, be included in a statute. The interpretation and application of a constitution is a substantially different exercise from the interpretation

46. *Id.* at 404.

47. *Id.* at 403, 407.

48. *Id.* at 407.

49. *See id.* at 403–04.

50. *See id.* at 402 (citing *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964)).

51. *Id.* *See also Borak*, 377 U.S. at 433 (stating that under certain circumstances “it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose”).

52. *Bivens*, 403 U.S. at 407 (Harlan, J., concurring).

53. *Id.* at 397 (majority opinion).

54. *See id.* at 407 (Harlan, J., concurring).

55. *See id.* at 403–04.

56. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). *See also* Bandes, *supra* note 15, at 315.

and application of statutes. If Congress wants a particular remedy, it can provide for it expressly, rather than rely on courts to imply it. A post-*Borak* Court might decide to curtail sharply the practice of implying rights of action from statutes. There is substantial evidence that this has happened.⁵⁷ Linking the *Bivens* constitutional action so strongly to implied statutory rights creates the real risk that a collapse of the link could carry *Bivens* with it.⁵⁸

By this point it should be apparent that war on terror *Bivens* plaintiffs will be relying on a doctrine that is beset by weaknesses and uncertainties of the sort that would not exist if a federal statutory analogue to § 1983 were available.⁵⁹ The *Bivens* doctrine faces two key problems that make it vulnerable. The first is the persistent view that it is illegitimate, given its lack of congressional authorization.⁶⁰ The second is that the exceptions are capable of swallowing the rule.⁶¹ A Supreme Court bent on narrowing the decision, rather than overruling it, would have little difficulty finding some form of special factors counseling hesitation, or perhaps a congressionally created alternative remedy. After an initial period of growth and apparent acceptance of *Bivens*, the second form of vulnerability appears to have become the driving force.

Although I find the above analysis helpful and plausible—and have indeed contributed to it⁶²—I wish to outline an alternative way of looking at *Bivens*. There is not simply one form of what the Supreme Court has called “the *Bivens* model.”⁶³ There are two models. I label the first the “*Marbury*-rights” model. It is obviously present in the original decision and, particularly, in Justice Brennan’s opinion in *Davis v. Passman*,⁶⁴ discussed below. This relatively straightforward view of constitutional torts

57. See, e.g., ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 397–400 (5th ed. 2007); RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 781–93 (5th ed. 2003).

58. See Pfander & Baltmanis, *supra* note 15 (manuscript at 18).

59. See generally Seamon, *supra* note 7 (claiming that current law is inadequate and that a federal statutory analogue to § 1983 should be created).

60. See, e.g., *Carlson v. Green*, 446 U.S. 14, 32–34 (1980) (Rehnquist, J., dissenting).

61. See, e.g., Bandes, *supra* note 15, at 296 (noting the presence of “seeds of deference to the judgment of the political branches” in the original opinion).

62. See Brown, *supra* note 39.

63. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Tribe appears to accept the existence of one model, which lasted at least until *Schweiker v. Chilicky*, 487 U.S. 412 (1988), but may have ended with *Wilkie*. See Tribe, *supra* note 15, at 66–67. A student comment on *Wilkie* also describes a model embodied in that case, which gave “force to the concepts of a limited judicial role and deference to the political branches” and constrained itself to “ensuring minimally necessary protection for constitutional rights.” *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 190–91 (2007).

64. *Davis v. Passman*, 442 U.S. 228 (1979).

builds on the judiciary's classic role as interpreter and enforcer of the Constitution, the presence of a plaintiff with a constitutional claim, and the presence of a court with jurisdiction to hear it.⁶⁵ The court reaches the merits because hearing such suits is an important part of its Article III business.

I label the second model the "prudential-deferential" model. It can be found in nascent form in the two original exceptions and in Justice Harlan's concurrence. However, my identification of this model also reflects what has happened over nearly three decades. The Supreme Court has turned down every opportunity to expand *Bivens* to come before it since 1983.⁶⁶ The concept of special factors counseling hesitation has been central to the development of this model. The factors usually turn out to be some combination of Congress's expertise in the area of the suit's subject matter, particularly if Congress has acted, and its presumed expertise in providing for enforcement of federal law, including the Constitution. Here, we see deference at work, leading to the conclusion that the judiciary should not participate in the determination. The model also has a prudential component, which the Supreme Court has referred to as "judgment."⁶⁷

I have used the term "prudential" to capture not only the model's discretionary nature, but also to emphasize the public law dimension of the *Bivens* action. Under the prudential model, the Court takes into consideration the best method of advancing the constitutional order in the context of a proposed damages action. In Justice Harlan's terms, it makes policy. As Chemerinsky puts it in describing the general concept of prudential doctrines, "[A]lthough the Constitution permits federal court

65. See *id.* at 236. Tribe states that "the core premise of *Bivens* [is] that the importance of constitutional rights justified implying a cause of action directly from the Constitution." Tribe, *supra* note 15, at 25. See also Bandes, *supra* note 15, at 311 ("*Bivens* is a short step from *Marbury*. To uphold the rights of individuals before the Court, the Court must prevent encroachment on those rights by the political branches. More than a century and a half after *Marbury*, *Bivens* ratified judicial enforcement of the limits on governmental excess. The use of the Constitution as a sword; the willingness to enforce limits, which is the animating principle behind *Bivens*, rests on the notion of positive checks on government espoused in *Marbury*. It is inconsistent with a version of the separation of powers doctrine which views the tripartite functions as sharply separated, and the judiciary as passive in the face of incursions by the political branches." (footnotes omitted)). For a similar exposition of the model, see Nichol, *supra* note 41, at 1153.

66. See *supra* note 14.

67. *Wilkie*, 551 U.S. at 550. Nichol questions the propriety of "judicial 'discretion' to grant or withhold relief." See Nichol, *supra* note 41, at 1150. He cites the earlier debate on prudential restraint between Martin Redish and David Shapiro. *Id.* (citing Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 349-60 (1988); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985)).

adjudication, the Court has decided that in certain instances wise policy militates against judicial review.”⁶⁸

The contrast with the *Marbury*-rights model is clear. Here is how the Court recently described its approach to *Bivens* actions:

[W]e have . . . held that any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified.⁶⁹

At the moment, the prudential-deferential model is in the ascendancy. It poses a serious obstacle to war on terror *Bivens* actions. The model encourages a court to focus not on the rights asserted but on the governmental activity in question, Congress’s competence in dealing with it, and the negative consequences of judicial “intrusion” into the area. It is possible, however, that plaintiffs seeking to bring war on terror *Bivens* actions will overcome the obstacles the prudential-deferential model presents. Indeed, those actions may breathe new life into the *Marbury*-rights model. Finding a way out of the *Bivens* impasse presents the legal system with a puzzle. The best way to begin to solve this puzzle is to trace the history of *Bivens*.

B. THE HEYDAY OF THE *MARBURY*-RIGHTS MODEL: *DAVIS* AND *CARLSON*

*Davis v. Passman*⁷⁰ was the first Supreme Court decision to apply *Bivens*. The divisions within the Court showed that the doctrine faced the inevitable growing pains.⁷¹ *Davis* extended *Bivens* to a substantive due process/equal protection claim by a former congressional staff member.⁷² Perhaps aware of the analytical trap discussed above,⁷³ Justice Brennan’s

68. CHEMERINSKY, *supra* note 42, at 50.

69. *Wilkie*, 551 U.S. at 550. In an important recent article, John Preis makes a similar distinction. He describes the Court’s task as “accommodat[ing] two competing principles.” John F. Preis, *Alternate State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 760 (2008). He labels the first principle as “the very essence of civil liberty” and refers to the second principle as the “separation of powers.” *Id.* Unlike the analysis presented here—one that views the two principles as always in potential conflict, with the exceptions fortifying the non-*Marbury* approach—Preis views the exceptions as an effort to harmonize the two approaches. *See id.* at 760–62.

70. *Davis v. Passman*, 442 U.S. 228 (1979).

71. There were three separate dissents, with a total of four Justices dissenting.

72. For a discussion of the facts, see *Davis*, 442 U.S. at 230. The case was complicated by the congressman’s defeat after the employee dismissal that had prompted the case. *See id.* at 231 n.4.

73. *See supra* text accompanying notes 55–58.

majority opinion specifically uncoupled the *Bivens* remedy from statutory implied rights of action.⁷⁴ He relied on the foundational decisions of *Marbury* and *McCulloch* to establish that the Constitution “speaks . . . with a majestic simplicity”⁷⁵ and that “[o]ne of ‘its important objects’ is the designation of rights.”⁷⁶ The judiciary is “the primary means through which these rights may be enforced.”⁷⁷ The availability of *Bivens* relief thus became a form of presumption in this statement of the *Marbury*-rights model.⁷⁸

Justice Brennan then turned to the two exceptions. The fact that the plaintiff’s former employer was a congressman might present special factors, but they extended no further than the protections afforded him by the Speech or Debate Clause.⁷⁹ Although he did not link it to the special factors exception, Justice Brennan had previously rejected the possibility that the political question doctrine was relevant.⁸⁰ This left the second *Bivens* exception, but there was no explicit prohibition against judicial remedies for those in the plaintiff’s position, nor had Congress created equally effective alternative remedies.⁸¹ Thus, in the end, the *Bivens* question was relatively straightforward.

Davis can be seen as an acceptance of *Bivens* as the general framework for constitutional tort claims. In particular, it was a victory for the *Marbury*-rights model, but the fact that four Justices dissented indicated disagreement within the Court over how to apply *Bivens*.⁸² Much of the disagreement focused on the role of the Speech or Debate Clause on the facts of the case, given the former congressman’s status. Justice Powell put forth an early version of the prudential-deferential model. He invoked the judicial discretion emphasized in Justice Harlan’s *Bivens* concurrence, and treated as “settled that where discretion exists, a variety of factors rooted in

74. See *Davis*, 442 U.S. at 240–42.

75. *Id.* at 241.

76. *Id.* (citation omitted) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)).

77. *Id.*

78. See *id.* at 242. Tribe states that “powerful principles underlying the Constitution itself give rise to a strong presumption that violations of federal constitutional rights are redressable by appropriate relief in the federal courts.” Tribe, *supra* note 15, at 70. Justice Brennan indicated an exception for political questions. See *Davis*, 442 U.S. at 242.

79. See *id.* at 246 (citing U.S. CONST. art. I, § 6, cl.1).

80. See *id.* at 235 n.11. However, he based his political question analysis on the reach of the Speech or Debate Clause.

81. See *id.* at 246–48.

82. See, e.g., *id.* at 249 (Burger, C.J., dissenting) (arguing that the problem was one of respect for a coequal branch, not the Speech or Debate Clause); *id.* at 251 (Stewart, J., dissenting); *id.* at 254 n.3 (Powell, J., dissenting).

the Constitution may lead a federal court to refuse to entertain an otherwise properly presented constitutional claim.”⁸³ The dissenting opinions were not necessarily a rejection of *Bivens*. Rather, they stressed that reasons may exist for denying the action in particular cases, whether labeled separation of powers, special factors, or discretion.

In *Carlson v. Green*,⁸⁴ the focus was on the second exception. *Carlson* involved a suit against federal prison officials based on the death of a prisoner. The Court viewed the plaintiff as also able to sue the government under the Federal Tort Claims Act (“FTCA”).⁸⁵ Before getting to either exception, Justice Brennan, again writing for the majority, presented the *Bivens* doctrine in presumptive terms that reflected the *Marbury*-rights model, saying, “The victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.”⁸⁶ He then stated the two exceptions but disposed quickly of the first. The defendants had no special status in the government, and qualified immunity was available to prevent any inhibition of their performance of their duties.⁸⁷ The second exception was trickier. Congress had provided persons like the plaintiff with *some* remedy. Justice Brennan concluded that Congress intended the FTCA and *Bivens* remedies to be parallel.⁸⁸ Justice Powell, joined by Justice Stewart, concurred in the result but again criticized the rule-like approach to *Bivens* as eliminating necessary judicial discretion.⁸⁹ He also criticized the Court for apparently requiring magic words that a particular remedy was a substitute for *Bivens*.⁹⁰ Only Justice Rehnquist’s lengthy dissent questioned the legitimacy of *Bivens* itself.⁹¹ Thus, within a decade of the original decision, one could conclude that the *Bivens* doctrine was an established component of the legal landscape. Individual Justices might differ over how to apply it—specifically, what the breadth of the exceptions was.⁹²

83. *Id.* at 253 n.2 (Powell, J., dissenting). Justice Powell emphasized “comity toward an equal and coordinate branch of government.” *Id.* at 253.

84. *Carlson v. Green*, 446 U.S. 14 (1980).

85. *Id.* at 20.

86. *Id.* at 18.

87. *Id.* at 19.

88. *See id.* at 19–20.

89. *See id.* at 25–26 (Powell, J., concurring); *id.* at 28 (questioning the majority opinion’s “absolute” language).

90. *See id.* at 27. Overall Justice Powell’s opinion indicates that judicial discretion should frequently be exercised to deny a *Bivens* remedy.

91. *See id.* at 32 (Rehnquist, J., dissenting). Chief Justice Burger stated that he would be “prepared to join an opinion giving effect to *Bivens*,” which he thought was “wrongly decided.” *Id.* at 30 (Burger, C.J., dissenting).

92. In *Carlson*, Justice Powell criticized the Court for not giving guidance on the meaning of the

Still, they were exceptions within the overall framework of the *Marbury*-rights model. However, it took less than a decade for the exceptions to largely swallow the rule, and for the prudential-deferential model to replace the *Marbury*-rights model as the dominant mode of analysis.

C. THE 1980S RETRENCHMENT

War on terror *Bivens* actions will confront a very different doctrine from that in the cases described above, which presumed that constitutional damages actions should go forward. In the 1980s, the Court rejected the availability of a *Bivens* action in all four cases that came before it.⁹³ In *Chappell v. Wallace*, it held that servicemen could not sue superior officers for racial discrimination.⁹⁴ *Bush v. Lucas* denied the possibility of *Bivens* relief for a federal employee who claimed violation of his First Amendment rights.⁹⁵ *United States v. Stanley* also involved the military; it denied *Bivens* relief to servicemen who alleged they had unknowingly been administered LSD.⁹⁶ *Schweiker v. Chilicky* rejected a *Bivens* action by social security disability benefits recipients who claimed violation of due process in the termination of benefits.⁹⁷ I do not propose to examine each case in detail, but to extract from them common themes which explain both the 1980s retrenchment and the current doctrinal status of the constitutional damages action.

These cases are often described as refusals to extend *Bivens* into new contexts.⁹⁸ However, the term “context” can make this description imprecise. It might mean the field in which the government has acted, the defendant sought to be held liable, or the constitutional provision invoked. Although the “refusal to extend” description is somewhat helpful, I think it

special factors exception. *See id.* at 27 (Powell, J., concurring).

93. *See Schweiker v. Chilicky*, 487 U.S. 412 (1988); *United States v. Stanley*, 483 U.S. 669 (1987); *Bush v. Lucas*, 462 U.S. 367 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983).

94. *Chappell*, 462 U.S. 296.

95. *Bush*, 462 U.S. 367.

96. *Stanley*, 483 U.S. 669.

97. *Schweiker*, 487 U.S. 412.

98. “Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001). The Court also referred to its “caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for three decades.” *Id.* at 74. An alternative phraseology would describe these cases as refusals to expand the availability of the *Bivens* remedy. The Court’s most recent decision involving a *Bivens* claim is *Ashcroft v. Iqbal*. The majority opinion repeated the view that “the Court has been reluctant to extend *Bivens* liability ‘to any new context or any new category of defendants.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) (quoting *Malesko*, 534 U.S. at 68). Although *Iqbal* did not directly present the question of the availability of a *Bivens* claim, the Court indicated it would take a negative approach to at least a portion of plaintiff’s *Bivens* contentions. *See id.* at 1948–49.

is more helpful to view the 1980s cases as a period of retrenchment, one in which the notion of special factors came to play a greatly expanded role, and in which the prudential-deferential model became dominant. The Court not only fastened on special factors as a way of limiting *Bivens*, but the Justices also emphasized Congress's role—both what it had done and had the authority to do—as itself a special factor in a way that cast doubt on the original premise of *Bivens*: that the judiciary could proceed to fashion a constitutional damages remedy without authorization from Congress.⁹⁹ These decisions also cast doubt on the *Marbury*-rights presumption of the availability of such a remedy.

There are several aspects of this development that merit particular attention. As noted, the Court's general approach was to place more emphasis on the presence of special factors counseling hesitation. It also tended to conflate the two original exceptions by treating the available remedies—or Congress's ability to create a remedy—as a special factor.¹⁰⁰ The Court examined both the remedial issue and the underlying government activity—sometimes referred to as “the context”¹⁰¹—to see if the nature of that activity counseled against judicial intrusion.

Chappell is a good example. The Court began with a general statement of the *Bivens* rule, as well as of the exception imposed when special factors are present.¹⁰² It found such a factor in the “peculiar and special relationship of the soldier to his superiors.”¹⁰³ The Court also stated that “[b]efore a *Bivens* remedy may be fashioned, therefore, a court must take into account any ‘special factors counselling hesitation.’”¹⁰⁴ Clearly related to this inquiry were both the existence of possible remedies—“a comprehensive internal system of justice”¹⁰⁵—and Congress's general authority over the military, conferred in several articles of the Constitution.¹⁰⁶ The Court went beyond these considerations to adumbrate the notions of lack of judicial competence and the undesirability of judicial “intrusion” into military affairs.¹⁰⁷ The specific holding of *Chappell* was

99. See *Schweiker*, 487 U.S. at 442 (Brennan, J., dissenting).

100. See Bades, *supra* note 15, at 297 (“The *Bush* decision conflated the two exceptions, so that the existence of a statute was itself a factor counseling hesitation.”); Nichol, *supra* note 41, at 1125 (describing the Court as having merged the two exceptions).

101. E.g., *Schweiker*, 487 U.S. at 426.

102. *Chappell v. Wallace*, 462 U.S. 296, 298 (1983).

103. *Id.* at 300 (quoting *United States v. Brown*, 348 U.S. 110, 112 (1954)).

104. *Id.* at 298 (quoting *Bush v. Lucas*, 462 U.S. 367, 377 (1983)).

105. *Id.* at 302. The Court also noted the role of the Board for the Correction of Naval Records. *Id.* at 303.

106. *Id.* at 301.

107. *Id.* at 305 (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181,

that, “[t]aken together, the unique disciplinary structure of the Military Establishment and Congress’s activity in the field constitute ‘special factors’ which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers.”¹⁰⁸

One can find similar reasoning in *Bush*, which cited both the context in the sense of subject matter, described as “federal personnel policy,”¹⁰⁹ and the complex scheme of rights and remedies available to civil servants, which the Court described as “comprehensive” and “elaborate.”¹¹⁰ The concurring opinion by Justices Marshall and Blackmun also illustrated the conflation point by agreeing that there were special factors, but that a different case would be presented if there was no “comprehensive scheme that was specifically designed to provide full compensation to civil service employees who are discharged or disciplined in violation of their First Amendment rights.”¹¹¹

Schweiker focused on remedies.¹¹² The Court emphasized the fact that Congress had created extensive remedies in “the design of a massive and complex welfare benefits program.”¹¹³ These remedies would not extend to the plaintiff’s constitutional claims. The Court, however, introduced a form of “silence of Congress” approach, finding in the remedial scheme an indication “that congressional inaction has not been inadvertent.”¹¹⁴ Thus, special factors might include what Congress has done, what it has not done, its authority over the area,¹¹⁵ or the context in which *Bivens* relief was sought.

Clearly, the notion of special factors counseling hesitation had assumed a dominant role by the end of the 1980s. An important additional

187 (1962)).

108. *Id.* at 304.

109. *Bush*, 462 U.S. at 380–81.

110. *Id.* at 388.

111. *Id.* at 390 (Marshall, J., concurring).

112. The Court does, however, rely in part on the military decisions. *See Schweiker v. Chilicky*, 487 U.S. 412, 421–22 (1988).

113. *Id.* at 429.

114. *Id.* at 423.

115. As Justice Brennan pointed out in *United States v. Stanley*: “If a *Bivens* action were precluded any time Congress possessed a constitutional grant of authority to act in a given area, there would be no *Bivens*.” *United States v. Stanley*, 483 U.S. 669, 707 (1987) (Brennan, J., dissenting). The Court responded to Justice Brennan’s point by denying “that all matters within congressional power are exempt from *Bivens*” and particularly emphasizing “the number of Clauses” devoted to military affairs. *Id.* at 682 (majority opinion). It is not clear, however, that this distinction will hold up; rather, the authorization to deal with a subject could lead to a form of competence that in turn leads to a special factor.

question remained: Could the context, in the sense of subject matter, ever be enough by itself to constitute a special factor?¹¹⁶ The language of the exception suggests it could, as do the possible echoes of the political question doctrine. In *Stanley*, the Court suggested an affirmative answer. At one point, the majority stated that neither the adequacy nor even the existence of a remedy was relevant to the analysis.¹¹⁷ “The ‘special factor’ that ‘counsels hesitation’ is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.”¹¹⁸ Taken literally, this analysis could open up a large number of contexts in which *Bivens* actions are inappropriate—the damages equivalent of political questions.¹¹⁹ Of course, it may be that context is never considered in isolation since Congress is always potentially available to address remedial issues related to any subject within federal power.

For the purposes of this Article, the subject matter of *Stanley* makes the issue particularly timely. Of all the *Bivens* cases, *Stanley* is factually closest to the type of situation likely to arise in war on terror litigation.¹²⁰ Indeed, Justice Brennan twice referred to the government’s arguments as invoking “national security.”¹²¹ Overall, the 1980s decisions seriously undermined the *Marbury*-rights model of *Bivens*. Later cases built on these decisions, not on *Bivens*.

D. THE “NONEXTENSION” CASES—FEDERAL AGENCIES AND PRIVATE CONTRACTORS

The notion of context is admittedly ambiguous.¹²² For example, the Court did not deny a *Bivens* remedy because of the constitutional claim asserted. The denials rested on an increased importance of the two

116. See *Schweiker*, 487 U.S. at 426–27 (rejecting the notion of context as enough by itself to deny a *Bivens* claim). *But see infra* text accompanying notes 117–19.

117. See *Stanley*, 483 U.S. at 683.

118. *Id.* (alterations omitted).

119. It is significant that the Court in *Chappell* discussed *Gilligan v. Morgan*, 413 U.S. 1 (1973), in which judicial supervision of a state’s National Guard was rejected as a political question. See *Chappell v. Wallace*, 462 U.S. 296, 301–02 (1983).

120. *Stanley* alleged that he had been administered LSD without his knowledge as part of a military study. See *Stanley*, 483 U.S. at 671–72. Justice O’Connor, citing the Nuremberg Military Tribunals, stated in her dissent that such experimentation “simply cannot be considered a part of the military mission.” *Id.* at 709–10 (O’Connor, J., dissenting).

121. *Id.* at 689, 695 (Brennan, J., dissenting). Justice Brennan also referred to the Nuremberg proceedings. See *id.* at 687.

122. See *supra* note 98 and accompanying text.

exceptions—joined together under a generalized rubric of special factors counseling hesitation.¹²³ Two subsequent cases continued this trend and represent a form of “context” broadly defined. They rest largely on the nature of the defendants sued, and represent applications of what the Court called the “logic of *Bivens*.”¹²⁴

In *FDIC v. Meyer*, the plaintiff sued a federal agency, in part under *Bivens*, on a Fifth Amendment due process claim for loss of employment.¹²⁵ A unanimous Court rejected the suit, characterizing it as an attempt to “expand the category of defendants against whom *Bivens*-type actions may be brought.”¹²⁶ Justice Thomas’s opinion analyzed the attempt as contrary to the logic of *Bivens* for two reasons. First, the plaintiff was attempting to circumvent the invocation of qualified immunity by individual defendants; yet the Court recognized that such immunity was a key element of *Bivens*, contemplated in the original decision,¹²⁷ because it delineates the line between conduct that should be deterred and conduct that is constitutionally acceptable, or at least was acceptable when engaged in.¹²⁸ Deterrence is an essential aspect of *Bivens*. “Under [the plaintiff’s proposal] the deterrent effects of the *Bivens* remedy would be lost.”¹²⁹ Thus, Justice Thomas could portray himself as defending *Bivens* while denying its availability. However, his second reason for denial is in the spirit of the 1980s cases. He identified a special factor counseling hesitation. In this case it was the “potentially enormous financial burden for the Federal Government” that direct actions against agencies could bring about.¹³⁰ In this respect, *Meyer* takes us back to the original special factors analysis of *Bivens* itself, which cited “federal fiscal policy” as such a factor.¹³¹ However, *Meyer* takes a broad view of federal fiscal policy, including within it judicial actions that open the door to large liabilities.

123. As noted, the statement of the first exception was sometimes shortened to omit reference to Congress, suggesting a form of independent judicial discretion along the lines of the political question doctrine. However, the Court also relied heavily on Congress’s authority and role.

124. *FDIC v. Meyer*, 510 U.S. 471, 473 (1994).

125. *See id.* at 473–74 (discussing the federal policy of terminating the employment of a failed institution’s senior management).

126. *Id.* at 484.

127. *Id.* at 484 (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971)).

128. *See generally* *Saucier v. Katz*, 533 U.S. 194 (2001), *overruled by* *Pearson v. Callahan*, 129 S. Ct. 808 (2009) (outlining general rules of immunity). The Court revised the *Saucier* approach to determining immunity in *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

129. *Meyer*, 510 U.S. at 485.

130. *Id.* at 486.

131. *Bivens*, 403 U.S. at 396 (citing *United States v. Standard Oil Co.*, 332 U.S. 301, 311 (1947)). Fiscal policy concerns were not present in *Bivens* itself. *See id.*

Justice Thomas saw this as a decision for Congress to make, but one could surely argue that under the spirit of *Bivens*, it was also one for the Court to make, at least in the first instance. After all, Congress could change the rule.

Here we see the prudential dimension of the prudential-deferential model at work. Prudence suggests hesitation before imposing a large liability on the government. Such a step could have extensive and damaging consequences, not all of which are apparent in a particular case before a court. A *Marbury*-rights advocate would contend that these concerns are irrelevant; the court must enforce the Constitution at the behest of an aggrieved citizen. The advocate of the competing model, however, invokes deference at this point. There is another body—Congress—with greater expertise in the underlying subject matter (defined as federal fiscal policy and possible governmental liabilities) and equal, if not greater, capacity to fashion constitutional remedies. For proponents of this model, the weakness of the original *Bivens* decision (and the generative force of the special factors exception) lies in the fact that Congress has not spoken.

The line between the two models was sharply drawn in *Correction Services Corp. v. Malesko*,¹³² a suit by a former federal prisoner against the corporation running the facility in which he was held.¹³³ Although a *Bivens* action of this type would resemble *Carlson v. Green*¹³⁴ in some respects, the Supreme Court in a 5-4 decision refused to allow it. The majority relied heavily on *Meyer* and the 1980s cases, stating, “Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants.”¹³⁵ The Court discussed issues of deterrence and alternative remedies¹³⁶ but seemed equally concerned with maintaining a limited role for *Bivens*. It referred to “caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for three decades.”¹³⁷ The dissenters saw the case as a threat to *Bivens* itself.¹³⁸ Justice Stevens described the doctrine as “a well-

132. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

133. *See id.* at 63–65. The facts appear to represent an example of the increasingly important policies of outsourcing and/or privatizing governmental functions.

134. *Carlson v. Green*, 446 U.S. 14 (1980).

135. *Malesko*, 534 U.S. at 68.

136. *See id.* at 70–73.

137. *Id.* at 74.

138. *See id.* at 82 (Stevens, J., dissenting) (stating that “the driving force behind the Court’s decision is a disagreement with the holding in *Bivens* itself”).

recognized part of our law for over 30 years.”¹³⁹ He even attempted to use the majority’s deference to Congress against it, arguing that “Congress has effectively ratified the *Bivens* remedy.”¹⁴⁰ For the majority, however, the remedy was treated as almost discredited.

E. *WILKIE V. ROBBINS*

*Wilkie v. Robbins*¹⁴¹ presented a complicated and somewhat novel set of facts. A landowner claimed that the Bureau of Land Management engaged in a long-term campaign of harassment against him (a “death by a thousand cuts”¹⁴²) in order to force him to grant the Bureau an easement that it had allowed to expire.¹⁴³ He contended that a *Bivens* action should lie, on the theory that the government’s harassing conduct constituted an attempt to “take” the easement in violation of the Fifth Amendment.¹⁴⁴ By a 7-2 margin, the Court held that *Bivens* relief was not available.

I wish to focus initially on Justice Souter’s treatment of the *Bivens* methodology: it shows how far the Court has moved from its original mode of analysis. He noted the affirmative decisions on relief in *Bivens*, *Davis*, and *Carlson*, but described the Court’s general approach in the following key passage:

[W]e have also held that any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified.¹⁴⁵

He discussed, and transposed, the two exceptions as the steps that would guide the remedial inquiry. A court first asks whether the fact of existing, alternative processes for protecting the asserted interest “amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.”¹⁴⁶ But even if the answer is no,

139. *Id.* at 83.

140. *Id.*

141. *Wilkie v. Robbins*, 551 U.S. 537 (2007).

142. *Id.* at 555.

143. *See id.* at 541–49 (describing the facts of the case). Justice Ginsburg criticized the majority for giving a “restrained account” of the allegations. *Id.* at 570 (Ginsburg, J., concurring in part, dissenting in part).

144. The Fifth Amendment provides in part, “[N]or shall private property be taken for public use without just compensation.” U.S. CONST. amend. V, cl. 4.

145. *Wilkie*, 551 U.S. at 550.

146. *Id.*

“a *Bivens* remedy is a subject of judgment: ‘the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.’”¹⁴⁷

Taken in its entirety, this description of the *Bivens* process is remarkable. The *Marbury*-based presumption of judicial relief for injuries is gone, as Justice Ginsburg pointed out in her dissent.¹⁴⁸ The remedy itself seems somewhat denigrated, repeatedly described as “freestanding”¹⁴⁹ and generally unavailable. Most significant is the emphasis on judicial judgment, indicating a wide range of discretion in determining whether or not special factors are present. The opinion clearly seemed to contemplate a form of balancing. It described the step-two analysis as one of “weighing reasons for and against the creation of a new cause of action.”¹⁵⁰ Deference to Congress also made an appearance at the end of the Court’s analysis. Congress, the majority stated, should be the source of any new remedy for the conduct complained of.¹⁵¹ “‘Congress is in a far better position than a court to evaluate the impact of a new species of litigation’ against those who act on the public’s behalf.”¹⁵² Thus, the main role for judicial discretion would appear to be denying *Bivens* remedies in any doubtful or even close case.

As for the facts of the case, the majority found *Wilkie* to be on the doubtful side. It came close to denying *Bivens* relief based on the original second factor. The plaintiff had a variety of remedies for the government’s acts of harassment, including defending himself in a dubious criminal case it brought against him.¹⁵³ When it came to the Court’s step two, an examination of the “competing arguments”¹⁵⁴ identified the plaintiff’s interest as that of not being subjected to the continuous course of government action present in the case. But “[o]n the other side of the ledger”¹⁵⁵ was the government’s interest in being able to act zealously without the threat of nebulous lawsuits. “This, then, [was] a case for *Bivens*

147. *Id.* (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

148. *See id.* at 574, 585 (Ginsburg, J., concurring in part, dissenting in part). Justice Ginsburg quoted the famous *Marbury* passage about “the very essence of civil liberty” and stated that *Bivens* “drew upon that venerable principle.” *Id.* at 574.

149. *E.g., id.* at 550 (majority opinion).

150. *Id.* at 554 (emphasis added). *See also* Tribe, *supra* note 15, at 70–71.

151. *Wilkie*, 551 U.S. at 562.

152. *Id.* (quoting *Bush*, 462 U.S. at 389).

153. *See id.* at 551–52. The Court stated that the plaintiff had “an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints.” *Id.* at 553.

154. *Id.* at 554.

155. *Id.* at 555.

step two, for weighing reasons for and against the creation of a new cause of action, the way common law judges have always done.”¹⁵⁶ The majority was particularly troubled by the problem of creating “a workable cause of action.”¹⁵⁷ After all, the government frequently has to drive a hard bargain, and those who deal with zealous agents will often complain.¹⁵⁸ Granting this plaintiff the possibility of a *Bivens* action could lead to an “enormous swath of potential litigation.”¹⁵⁹ Justice Ginsburg not only dissented on the specifics of the case, but also expressed deep concern about the future of *Bivens*, which she saw as essential to protect “bedrock constitutional rights.”¹⁶⁰ To the extent that *Bivens* does play that role, *Wilkie* is certainly part of the narrowing trend that began in the 1980s, building on the original exceptions, and tilting strongly toward the prudential-deferential model rather than the *Marbury*-rights model.¹⁶¹ The invocations of a balancing methodology suggest a possible third approach.

Wilkie is certainly not the last word, however. The war on terror is already generating a wide range of litigation, some of it based on *Bivens*.¹⁶² The Supreme Court has already decided one of these cases, although not on *Bivens* grounds.¹⁶³ Thus, it seems appropriate to take doctrinal stock of where *Bivens* stands today as we enter this potentially decisive era. Will the remedy take on a renewed importance, assuming what Justice Ginsburg views as its rightful place in American constitutionalism?¹⁶⁴ Or will the Court continue to deny *Bivens* remedies, further relegating the doctrine to the margins? Can the Court find a middle ground?

F. MCCARTHY—AN ANOMALY?

I have omitted from this chronologically based list of developments

156. *Id.* at 554.

157. *See, e.g., id.* at 555. There is a clear resemblance between this consideration and one of the political question factors stated in *Baker v. Carr*: “a lack of judicially discoverable and manageable standards.” *Baker v. Carr*, 369 U.S. 186, 217 (1962).

158. *See Wilkie*, 551 U.S. at 561–62.

159. *Id.* at 561.

160. *Id.* at 585 (Ginsburg, J., concurring in part, dissenting in part).

161. *See supra* Part II.C. For an excellent critique of *Wilkie*, see Pfander & Baltmanis, *supra* note 15 (manuscript at 20–24). They make the point that *Wilkie*’s facts could place the case within the category of retaliation claims—brought under *Bivens*—that the Court had recognized in other contexts.

162. *E.g., Arar v. Ashcroft*, 532 F.3d 157 (2d Cir.), *reh’g en banc granted* (Aug. 12, 2008).

163. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The Court decided the case largely on the basis of an analysis of pleading requirements, particularly where an immunity defense is asserted.

164. *See Wilkie*, 551 U.S. at 585 (Ginsburg, J., concurring in part, dissenting in part). Justice Ginsburg drew the basic analogy between *Bivens* and § 1983. She would leave it to Congress “to codify and further define the *Bivens* remedy.” *Id.*

the 1992 decision in *McCarthy v. Madigan*.¹⁶⁵ It is not clear whether *McCarthy* is an anomaly or a revitalization of *Bivens* that “provided optimism that the Court had changed its tune and would extend *Bivens* in the future.”¹⁶⁶ *McCarthy* was a *Carlson*-like suit by a federal prisoner in which the lower courts had denied *Bivens* relief because the plaintiff had failed to exhaust available administrative remedies promulgated by the Federal Bureau of Prisons. The Supreme Court reversed, largely on the basis of established exhaustion principles. Applications of these principles led to the conclusion that “petitioner McCarthy need not have exhausted his constitutional claim for money damages.”¹⁶⁷ The Court then turned to *Bivens*, focusing on special factors. Echoing the conflation cases, the *McCarthy* Court found that the fact that there was no “elaborate and comprehensive remedial scheme”¹⁶⁸ eliminated one version of the special factors exception. The Court, however, also engaged in a balancing inquiry, suggesting that this inquiry might be a component of special factors analysis.¹⁶⁹ As was the case with the general exhaustion analysis, balancing led to the conclusion that the plaintiff did not need to exhaust available remedies.¹⁷⁰ *McCarthy* is certainly an application of *Bivens*, and thus a tacit reaffirmation of the doctrine. However, it does not seem accurately labeled an “extension,” and it is hardly a ringing reaffirmation in the face of cases like *Schweiker* and *Bush*, which it cites.¹⁷¹

165. *McCarthy v. Madigan*, 503 U.S. 140 (1992), *superseded by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, sec. 803(d), § 7(a), 110 Stat. 1321-66, 1321-71 (1996).

166. Heather J. Hanna & Alan G. Harding, *Ubi Jus Ibi Remedium—For the Violation of Every Right, There Must Be a Remedy: The Supreme Court’s Refusal to Use the Bivens Remedy in Wilkie v. Robbins*, 8 WYO. L. REV. 193, 210 (2008). The authors added that “[t]his turned out to be a hope against hopes.” *Id.*

167. *McCarthy*, 503 U.S. at 149.

168. *Id.* at 152.

169. *See id.* at 152–56. The Court discussed the need to balance the individual’s interest in obtaining judicial relief against institutional interests favoring exhaustion.

170. *See id.* at 152 (invoking “an evaluation of the individual and institutional interests at stake in this case”).

171. The best explanation is that the Court saw the case as posing essentially an exhaustion problem given the fact that a *Bivens* remedy in such a situation was clearly established by *Carlson*. *McCarthy* is an example of cases where the Court took *Bivens* as an existing doctrine and focused on other issues in a *Bivens* case. *See, e.g.*, *Hartman v. Moore*, 547 U.S. 250 (2006) (involving a retaliation claim); *Groh v. Ramirez*, 540 U.S. 551 (2004) (applying Fourth Amendment doctrine in a *Bivens* claim). Certainly, immunity doctrine has grown up in the context of *Bivens* actions as a given. *See, e.g.*, *Butz v. Economou*, 438 U.S. 478, 496–503 (1978). In the exhaustion context, 42 U.S.C. § 1997e(a) (2006), as amended in 1996, which imposes exhaustion requirements on *Bivens* claims based on prison conditions, appears to have overruled *McCarthy*.

G. SOME DOCTRINAL LESSONS: THE PROBLEM OF LACK OF LEGISLATIVE AUTHORIZATION, THE § 1983 PARALLEL, AND THE CONSTITUTIONAL COMMON LAW

In the last seven cases specifically posing the question of expanding the availability of *Bivens* relief, the Court has refused to make the remedy available.¹⁷² “Special factors” have been the major analytical vehicle for this shift. Three doctrinal points are in order. The first is that the key to this negative approach is the lack of congressional authorization—the issue that divided the original *Bivens* Court. At times, the Court comes close to viewing the lack of authorization as itself a special factor counseling hesitation.¹⁷³ Short of this position—which would, in effect, adopt that of the original *Bivens* dissenters—the Court seems to view itself as standing on weaker ground than would be the case if Congress had told it to proceed. The Court presents itself as reluctant to create a “freestanding” constitutional remedy.¹⁷⁴ This perception of weaker ground helps to explain the prudential-deferential model. The Court lacks the self-assurance about proceeding that would follow from adoption of the *Marbury*-rights model, based as it is on that iconic case.

Two caveats are in order. First, the Court continues to speak of its common law role, suggesting broad judicial power and discretion.¹⁷⁵ This bold language, however, is considerably diminished by the fact that since the 1980s this discretion has always been exercised in a negative way. A second caveat is that some members of the Court adhere to the original *Bivens* framework and its *Marbury*-based presumption of the availability of relief. But these views are expressed in dissent.¹⁷⁶ When one searches for a pattern in the totality of cases, the strong conclusion is that the contradictory thrusts that were present in *Bivens* remain, but that the resolution is different from in the 1970s. The special factors exception has largely swallowed the rule.¹⁷⁷ Thus, the war on terror *Bivens* litigation will take place in a generally negative context, precedentially and doctrinally.

172. Perhaps one should say seven of the last eight, in light of *McCarthy*.

173. In *Malesko*, the Court cited its earlier statement in *Schweiker* that “[t]he absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001) (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 421–22 (1988)).

174. See, e.g., *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

175. See, e.g., *id.* at 554. See also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, at 398–411 (1971) (Harlan, J., concurring) (suggesting that judicial discretion should be used to imply a remedy).

176. See, e.g., *Wilkie*, 551 U.S. at 574 (Ginsburg, J., concurring in part, dissenting in part).

177. See generally *Brown*, *supra* note 39.

Focusing on the importance of the lack of congressional authorization leads to a second important doctrinal point: the uncoupling of *Bivens* from § 1983. This uncoupling is particularly important in the war on terror context because the defendants will almost always be federal, rather than state, officials. *Bivens* is often viewed as what Justice Ginsburg called the federal “analog to § 1983.”¹⁷⁸ Indeed, a central issue in the original case was whether the fact that Congress had created § 1983 for constitutional violations by state and local officials precluded the courts from creating a similar remedy applicable to federal officials.¹⁷⁹ The decision might be seen as creating an identical constitutional remedy. The more accurate description, however, is that of Justice Stevens: “It is true that we have never expressly held that the contours of *Bivens* and § 1983 are identical. The Court, however, has recognized sound jurisprudential reasons for parallelism, as different standards for claims against state and federal actors ‘would be incongruous and confusing.’”¹⁸⁰

In an important forthcoming article, James Pfander and David Baltmanis argue for similar treatment of constitutional claims against officials at all levels of government.¹⁸¹ They note that both the underlying substantive law and the rules of immunity are the same.¹⁸² They stress the importance of assurance to individuals “that their rights will not vary depending on whether the allegedly unconstitutional conduct at issue was undertaken by state or federal government actors.”¹⁸³ In particular, they view the Court’s insistence on similar immunity rules in the two contexts as resting on the goal of striking a similar “balance between official accountability and immunity” in each situation.¹⁸⁴ For Pfander and Baltmanis, the same balancing should be struck “in the definition of the right to sue.”¹⁸⁵

178. *Wilkie*, 551 U.S. at 585 (Ginsburg, J., concurring in part, dissenting in part).

179. *See Bivens*, 403 U.S. at 427–28 (Black, J., dissenting). Section 1983 also provides liability for statutory violations.

180. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 82 (2001) (Stevens, J., dissenting) (quoting *Butz v. Economou*, 438 U.S. 478, 499 (1978) (internal quotation marks omitted)).

181. *See Pfander & Baltmanis, supra* note 15.

182. *Id.* (manuscript at 43–45).

183. *Id.* (manuscript at 44).

184. *Id.* (manuscript at 45).

185. *Id.* (manuscript at 46). This analysis leads to a presumption of the availability of *Bivens* and the recommendation that “special factors” be abandoned. *See id.* (manuscript at 28). In addition to these strong policy arguments for similarity between the two remedies, Pfander and Baltmanis argue that *Bivens* does enjoy something close to the same congressional foundation as § 1983. They contend that Congress’s adoption of rights against the government in amendments to the FTCA and the Westfall Act (providing for substitution of the government for individual official defendants in most tort cases) show an intent to preserve the *Bivens* remedy. *See id.* (manuscript at 32–38). Specifically, Congress intended

Despite the force of these arguments, however, the retrenchment and subsequent cases make even the notion of “parallelism” seem uncertain. Section 1983 is part of a group of Reconstruction statutes with a highly relevant history. While interpreting it—in the development of “the law of section 1983”—the Court has been mindful of the fact that the Fourteenth Amendment brought about a revolution in American federalism, placing the states in a partially subordinate role.¹⁸⁶ *Bivens* actions present issues not of federalism but of separation of powers. The defendants before the federal courts are officials of a coequal branch. Congress can alter the *Bivens* action in ways that state legislatures could not alter § 1983. As discussed below, *Bivens* actions might be viewed as presenting political questions.¹⁸⁷ That doctrine does not apply to federalism issues.¹⁸⁸ A Court bent on reducing constitutional remedies could certainly find ways of cutting back the scope of § 1983, but it could not abolish it. *Bivens*, on the other hand, has no life of its own.

A third doctrinal point requires discussion: the status of *Bivens* as “constitutional common law.” In a seminal article, Henry Monaghan identified “a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress.”¹⁸⁹ He viewed *Bivens* as an example of this law.¹⁹⁰ Monaghan’s thesis has been criticized,

any new remedies against the government to supplement rather than displace *Bivens*. See *id.* (manuscript at 31). The authors’ argument sheds important new light on the *Bivens* debate. It is perhaps weakened, however, by its lack of direct textual support, see *id.* (manuscript at 38–39) (noting that the language of the Westfall Act does not expressly create a cause of action), and the possibility that any ratification of *Bivens* remedies included judicial power not to grant them, see *id.* (manuscript at 39). Consider the textual issue. It is arguable that if the Constitution is self-executing, § 1983 is unnecessary—the Court could have developed state and local analogues to *Bivens*. Yet the statutory basis for actions against state and local defendants for deprivation of federal rights may be seen as placing them on a surer footing given the federalism concerns that such suits raise. A judicially created cause of action raises separation of powers concerns without the clear statutory foundation of an analogue to § 1983. But see *id.* (manuscript at 38) (discussing congressional “recognition” of *Bivens* actions).

186. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453–55 (1976). Eleventh Amendment jurisprudence is a classic example of the problems that arise from the states’ uncertain role. A recurring question is whether Congress can pass a statute permitting suits against states in federal court. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

187. See *infra* Part IV.A.3.

188. See *Baker v. Carr*, 369 U.S. 186, 210 (1962) (stating that the political question nonjusticiability doctrine is “primarily a function of the separation of powers”).

189. Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975).

190. See *id.* at 23–24.

particularly with respect to *Bivens*.¹⁹¹ However, overt reference and recourse to common law processes have long been present in *Bivens* cases.¹⁹² *Wilkie* is the most recent example. Its approach, building on the earlier cases, suggests a wide-ranging judicial discretion that permits a court to consider any relevant factor—what Justice Harlan in *Bivens* termed “a range of policy considerations . . . at least as broad as the range of those a legislature would consider.”¹⁹³ Moreover, the Court has made it clear that Congress can alter *Bivens* results.

III. WAR ON TERROR *BIVENS* SUITS—A GROWING PHENOMENON

As might be expected, the war on terror has already generated a number of *Bivens* suits.¹⁹⁴ Many are moving through the court system; the first grant of certiorari by the Supreme Court occurred in June 2008.¹⁹⁵ This section of the Article covers three areas: the types of fact patterns likely to be found in the cases, the serious hurdles that a *Bivens* action faces, and the initial manner in which the lower courts are handling the cases. There is a lot at stake. These suits put the courts in the position not just of judging individual acts, but also of judging the war on terror itself.

A. THE TYPES OF SUIT

Many suits will be generated by the detention and interrogation of suspects. Obviously, that activity is at the heart of the government’s antiterrorism efforts, whether carried out by law enforcement officials,

191. See *Bandes*, *supra* note 15, at 325. *Bandes* views the recent *Bivens* cases as a “rejection” of its promise and states that “what the Court has done in the name of separation of powers is to turn away from judicial review and to allow the political branches to abuse their power unchecked.” *Id.*

192. See, e.g., *Bush v. Lucas*, 462 U.S. 367, 378 (1983).

193. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring).

194. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009); *Arar v. Ashcroft*, 532 F.3d 157 (2nd Cir.), *reh’g en banc granted* (Aug. 12, 2008); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Padilla v. Yoo*, No. C 08-00035 JSW, 2009 WL 1651273 (N.D. Cal. June 18, 2009); *Mayfield v. United States*, 504 F. Supp. 2d 1023 (D. Or. 2007); *Khorrani v. Rolince*, 493 F. Supp. 2d 1061 (N.D. Ill. 2007); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007); *Ajaj v. United States*, 479 F. Supp. 2d 501 (D.S.C. 2007); *Al-Kidd v. Gonzales*, No. CV:05-093-S-EJL, 2006 WL 5429570 (D. Idaho Sept. 27, 2006); *Kurzberg v. Ashcroft*, No. 04 CV 3950(JG), 2006 WL 2738991 (E.D.N.Y. Sept. 25, 2006); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006); *Lonegan v. Hasty*, 436 F. Supp. 2d 419 (E.D.N.Y. 2006); *Hatfill v. Ashcroft*, 404 F. Supp. 2d 104 (D.D.C. 2005).

195. *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (June 16, 2008) (No. 07-1015). The case was decided on May 18, 2009. *Iqbal*, 129 S. Ct. 1937.

intelligence agents, the military, or personnel from other federal agencies. Arrests, conditions of detention, allegations of torture, and claims of religious and racial discrimination will all arise. A good example are the claims set forth in the complaint in *Elmaghraby v. Ashcroft*, a case arising out of confinement in a highly restrictive “administrative maximum” unit.¹⁹⁶ The complaint alleged numerous potential constitutional violations including beatings, interference with access to counsel, denial of adequate medical care, unreasonable strip and body-cavity searches, harsh confinement because of religious beliefs, and harsh confinement because of race.¹⁹⁷ The plaintiffs based their claims, in part, on the First, Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution.¹⁹⁸

Such suits challenging conditions of detention and methods of confinement are frequent.¹⁹⁹ There are two aspects of these cases that deserve additional mention. They frequently include as defendants high-ranking federal officials on the ground that these officials authorized or directed the challenged practices. For example, the defendants in *Elmaghraby* ranged from the Attorney General of the United States to “John Doe” corrections officers. The Supreme Court’s first treatment of a war on terror *Bivens* case came in *Ashcroft v. Iqbal*, the successor to *Elmaghraby*.²⁰⁰ One of the questions presented was “[w]hether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.”²⁰¹ The majority’s resolution of the case cast doubt on theories of supervisory liability under *Bivens*.²⁰²

The notion of high-level liability is taken further in the well-publicized suit brought by Jose Padilla against former Justice Department official John Yoo. The complaint alleged “conscience-shocking interrogation techniques and conditions of confinement . . . intended to destroy Mr. Padilla’s ordinary emotional and cognitive functioning in order

196. *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *2 (E.D.N.Y. Sept. 27, 2005), *aff’d in part, rev’d in part*, *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev’d sub nom. Ashcroft v. Iqbal*, 128 S. Ct. 1937 (2009). *Elmaghraby* ultimately became the *Iqbal* case.

197. *See id.* at *2–*7.

198. *See id.* at *7–*9.

199. *See Seamon, supra* note 7, at 715 (“[T]he victims of . . . torture have begun to sue.”).

200. *Iqbal*, 129 S. Ct. 1937.

201. *Id.* at 1956 (Souter, J. dissenting) (quoting the petition for writ of certiorari).

202. *See id.* at 1955 (stating that the majority opinion “does away with supervisory liability under *Bivens*”).

to extract from him potentially self-incriminating information.”²⁰³ Yoo, however, was not a superior officer in the chain of command of those who allegedly mistreated Padilla. He was Deputy Assistant Attorney General in the Justice Department’s Office of Legal Counsel. The suit alleges that the conduct was the product of several legal memoranda authorizing it, written by Yoo.²⁰⁴

A second important aspect of the detention and interrogation suits is that they can put the courts in the position of judging policies such as “extraordinary rendition.” This controversial program involves sending terrorism suspects to countries that permit harsher interrogation techniques than the United States. The best known case is that of Maher Arar, who brought a *Bivens* suit seeking damages for extraordinary rendition, which put the courts in the middle of one of the most hotly debated issues of the entire war on terror.²⁰⁵

Bivens suits can arise in other contexts as well. For example, various forms of surveillance are likely to be a fruitful source of litigation. In a widely publicized suit in which the American Civil Liberties Union was the lead plaintiff, a federal district court enjoined the National Security Agency’s Terrorist Surveillance Program.²⁰⁶ The Court of Appeals for the Sixth Circuit reversed and dismissed the case on standing grounds.²⁰⁷ A different form of surveillance claim was presented in *Tabbaa v. Chertoff*, in which plaintiffs challenged a border search that occurred after they returned from an Islamic conference in Canada.²⁰⁸ Although the Fourth

203. Complaint ¶ 21, *Padilla v. Yoo*, 2009 WL 1651273 (N.D. Cal. June 18, 2009) (No. C 08-00035 JSW). See also John Schwartz, *Judge Weighs Dismissing Case Involving Torture Memorandums*, N.Y. TIMES, Mar. 7, 2009, at A13 (discussing the *Padilla* lawsuit).

204. Complaint, *supra* note 203, ¶¶ 16, 20. These memoranda have become quite controversial, particularly the joint Bybee-Yoo Memorandum, referred to as the “Torture Memorandum.” See WAYNE MCCORMACK, *LEGAL RESPONSES TO TERRORISM* 551–55 (2d ed. 2008). Yoo has criticized the suit in the following terms: “The lawsuit by Padilla and his Yale Law School lawyers is an effort to open another front against U.S. anti-terrorism policies. If he succeeds, it won’t be long before opponents of the war on terror use the courtroom to reverse the wartime measures needed to defeat those responsible for killing 3,000 Americans on 9/11.” John Yoo, *Terrorist Torture Travesty*, WALL ST. J., Jan. 19, 2008, at A13.

205. See *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir.), *reh’g en banc granted* (Aug. 12, 2008). For a critical discussion of the Arar incident, see Jules Lobel, *The Preventive Paradigm and the Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407, 1429–32 (2007). See generally *Rendition to Torture: The Case of Maher Arar: Joint Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight and the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on Foreign Affairs*, 110th Cong. (2007) [hereinafter *Joint Hearing*] (considering the practice of extraordinary rendition).

206. *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *rev’d*, 493 F.3d 644 (6th Cir. 2007).

207. *ACLU*, 493 F.3d 644.

208. *Tabbaa v. Chertoff*, 509 F.3d 89, 93–96 (2d Cir. 2007).

Amendment played a prominent role in the plaintiffs' claims in both cases, neither suit requested damages.²⁰⁹ These are, however, the kinds of government activities which can lead to a *Bivens* action.²¹⁰

Bivens is indeed at the center of counter-counter-terrorism litigation. The underlying policies of the war on terror and the zeal of those who prosecute it inevitably lead to potential violations of constitutional rights. Those who oppose the war on terror, as well as those who view their rights as having been infringed (and their lawyers), have seized on *Bivens* as a key to fighting back. Peter Margulies describes damages suits against federal officers as part of a range of initiatives that drive campaigns of what he calls "crossover advocacy."²¹¹ David Zaring has stated that "in these high-profile cases, winning the lawsuit is less precisely the point than is practicing increasingly personal politics while calling attention to a policy and a plight,"²¹² and that "[t]hese suits are more symbolic than likely to succeed, in that they rely not on the verdict, but on the ability to make a claim against a policy-maker."²¹³ As Zaring admits, some, perhaps many, of the plaintiffs will have suffered real injuries of the sort at which *Bivens* was aimed.²¹⁴ The distinction is not easy to draw and may lead to downgrading the importance of serious lawsuits that are not publicity stunts.²¹⁵ There is still, as noted, a lot at stake. *Bivens* suits could derail the war on terror, or at least seriously impede it. Therefore, it is not surprising that the government and individual officials have available a range of defenses to stop the suits short of the merits.

B. DEFENSES—OTHER THAN SPECIAL FACTORS

In this section, I will examine briefly two possible defenses to a war on terror *Bivens* action, other than the special factors exception. Before considering that defense, it is important to realize that it is by no means the only one available. If one has reservations about these suits and is tempted to regard the special factors analysis as an important threshold limit, it may be relevant that there are other potential avenues of limiting them. It may

209. See *id.* at 92; *ACLU*, 493 F.3d at 650–51.

210. See *In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007) (refusing to dismiss a *Bivens* action alleging surveillance in violation of the Fourth Amendment).

211. See Peter Margulies, *The Detainees' Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 *BUFF. L. REV.* 347, 348–49 (2009).

212. Zaring, *supra* note 22, at 332.

213. *Id.* at 335.

214. See *id.* at 340.

215. It must be noted, however, that Padilla sought only one dollar in damages against Yoo. Complaint, *supra* note 203, ¶ 109b.

not be necessary to push the prudential-deferential model to the point that *Bivens* really does lose all force in war on terror contexts.

The two most prominent defenses are the state secrets privilege²¹⁶ and the qualified immunity defense. Both defenses can be viewed as protecting the effectiveness of government programs, whether by shielding an official from the burdens of litigation or by keeping secret information regarding that program. In *El-Masri v. United States*, the Fourth Circuit stated the essence of the privilege as follows: “Under the state secrets doctrine, the United States may prevent disclosure of information in a judicial proceeding if ‘there is a reasonable danger’ that such disclosure ‘will expose military matters which, in the interest of national security, should not be divulged.’”²¹⁷

If the privilege is successfully invoked, it is sometimes possible for the litigation to continue, but if an attempt to proceed would threaten disclosure of protected matters, the suit must be dismissed.²¹⁸ In *El-Masri*, the court dismissed on state secrets grounds the plaintiff’s *Bivens* challenge to his extraordinary rendition, even though the general existence of the program was a matter of public knowledge.²¹⁹ State secrets dismissals are a real risk for plaintiffs in war on terror suits, including *Bivens* actions.²²⁰ At the moment, the privilege is under serious attack, with critics suggesting various ways of limiting it, including giving Congress a role in pending litigation.²²¹

The immunity defense is well known, both in suits brought under § 1983 and those involving federal officials.²²² Most *Bivens* defendants can

216. See, e.g., Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007) (surveying state secrets decisions and considering alternatives); Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM. L. REV. 1931 (2007) (considering how receptive the judiciary should be to the executive’s claim of the state secrets privilege in light of the separation of powers).

217. *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007) (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)).

218. See *id.* at 306.

219. See *id.* at 308–11.

220. See *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007) (finding that the plaintiff in a *Bivens* suit could not establish standing because the sealed document necessary to demonstrate its standing was covered by the state secrets privilege). Further proceedings on remand in this complicated litigation are reported at *In re National Security Agency Telecommunications Records Litigation*, 564 F. Supp. 2d 1109 (N.D. Cal. 2009).

221. See, e.g., Chesney, *supra* note 216, at 1312.

222. See, e.g., *Butz v. Economou*, 438 U.S. 478 (1978) (establishing qualified immunity as the standard of immunity generally available to federal officers). See also *United States v. Stanley*, 483 U.S. 669, 690–706 (1987) (Brennan, J., dissenting) (finding that the majority’s special factors inquiry had supplanted the standard immunity inquiry).

claim qualified immunity. The federal courts' approach has been to first determine whether the defendant violated a constitutional right. If so, the court considers whether the right was clearly established at the time of the alleged violation and "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."²²³ The Supreme Court recently revisited the issue of the test for qualified immunity.²²⁴ It is not clear what effect its decision might have on war on terror *Bivens* actions. Many of these cases will involve rights that were clearly established at the time of the government action and will survive preliminary motions to dismiss on immunity grounds.²²⁵ On the other hand, some rights may not have been apparent to a reasonable official. The immunity defense will prevent some suits from being brought. In *Iqbal*, however, the Second Circuit rejected the defendants' argument that the post-September 11 context created extraordinary circumstances that could alter a right's status as clearly established.²²⁶ The Supreme Court's decision in *Iqbal* did not decide this issue but did express the view that those circumstances were relevant to the state of mind of officials accused of discrimination when they were dealing with suspected terrorists.²²⁷

Thus, the narrow approach to *Bivens* does not stand alone. Other doctrines are available to keep counter-counter-terrorism litigation in check. Furthermore, there is an analytical kinship between the special factors exception, the immunity defense, and the state secrets privilege. Immunity protects the official from the burden of litigation and also furthers the government's interest in having zealous officials. The state secrets privilege operates to shield government programs from judicial oversight generated by lawsuits. Immunity, if upheld, stops litigation at an early stage. Successful invocation of the privilege can sometimes halt litigation as well. The prudential-deferential model furthers similar interests and leads to dismissal before the merits. Does the application of this approach to *Bivens* suits in a "strong" manner amount to overkill? One's answer probably depends on how one views counter-counter-terrorism suits in the first place. Their compensation function can be accomplished by other means. The core issue is the desirable extent of judicial oversight of

223. *Saucier v. Katz*, 533 U.S. 194, 202 (2001), *overruled by* *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

224. *See Pearson*, 129 S. Ct. 808.

225. John Yoo himself has questioned whether immunity doctrine will be of much help to *Bivens* defendants. *See Yoo, supra* note 204.

226. *See Iqbal v. Hasty*, 490 F.3d 143, 159 (2d Cir. 2007), *rev'd sub nom. Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

227. *See Iqbal*, 129 S. Ct. at 1951–52.

executive actions in the war on terror. In its present form, *Bivens* points toward a very narrow role.

C. THE WAR ON TERROR AS A SPECIAL FACTOR

In this section, I consider several lower court opinions on special factors analysis as a prelude to a general treatment of the issue in Part IV. The most in-depth discussions are found in the district court and court of appeals opinions in *Arar v. Ashcroft*.²²⁸ The plaintiff, a dual citizen of Syria and Canada, was initially detained by federal agents at John F. Kennedy Airport in New York. After approximately two weeks he was “rendered” to Syria, where he was confined for ten months.²²⁹ He alleged coercive and involuntary interrogation in New York, and torture and other cruelty in Syria. His action against a range of federal officials was based in part on *Bivens*, claiming deprivation of due process rights. The district court expressed uncertainty as to “whether substantive due process would erect a *per se* bar to coercive investigations, including torture, for the purpose of preventing a terrorist attack.”²³⁰ For purposes of the *Bivens* inquiry, however, it assumed an affirmative answer.²³¹ The court also concluded that cases such as *Rasul v. Bush*,²³² and the fact that the conduct either occurred or was initiated on U.S. soil, might vest Arar with “some substantive protection”²³³ despite arguments for dismissing on foreign territory or nationality grounds. This led it to the special factors exception to *Bivens*. The opinion is a classic example of the prudential-deferential model.

The district court treated the special factors analysis as a separation of powers issue: “the question of who should decide whether . . . a remedy should be provided.”²³⁴ In terms that evoke the political question doctrine,²³⁵ it repeated its view that “the foreign policy and national-security concerns raised here are properly left to the political branches of

228. *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008), *aff’d* 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *reh’g en banc granted* (Aug. 12, 2008). Although the en banc decision may change the result, the district court and court of appeals panel decisions present a full discussion of the issues on both sides.

229. *See Arar*, 414 F. Supp. at 252–57. There is extensive literature on extraordinary rendition. *See, e.g.*, WITTES, *supra* note 22, at 25–28.

230. *Arar*, 414 F. Supp. 2d at 274.

231. *See id.* at 275.

232. *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that federal courts’ statutory jurisdiction to hear habeas cases extends to Guantanamo Bay).

233. *Arar*, 414 F. Supp. 2d at 279.

234. *Id.* (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983)).

235. The court treated the *Bivens* and political question doctrines as separate. *See id.* at 283 n.14.

government.”²³⁶ It raised the possibility of embarrassment of the government through “multifarious pronouncements” by different branches.²³⁷ It stressed that judicial involvement might present a lack of expertise problem and called for “explicit legislation.”²³⁸ Thus, the court dismissed the counts based on extraordinary rendition.²³⁹

On appeal, the Court of Appeals for the Second Circuit affirmed the district court by a 2-1 margin.²⁴⁰ The split is a classic example of the difference between the two models discussed here. The majority utilized the prudential-deferential model. It expressed reluctance to “probe deeply into the inner workings of the national security apparatus of at least three foreign countries, as well as that of the United States.”²⁴¹ The majority went so far as to state that the government’s invocation of the state secrets privilege was itself a special factor counseling hesitation.²⁴² It also expressed concern about diminishing the federal government’s ability “to speak with one voice” to foreign governments²⁴³ and concluded that Congress should be the branch to decide “the availability of a damages remedy in circumstances where the adjudication of the claim at issue would necessarily intrude on the implementation of national security policies and interfere with our country’s relations with foreign powers.”²⁴⁴ Thus, the prudential-deferential model showed the broad reach of its logic. The court deferred to Congress with respect to the remedial decision because adjudication could have harmful effects within a particular context: the war on terror.

The dissenting opinion by Judge Sack is an equally classic example of the *Marbury*-rights model. It emphasized that “there is a long history of

236. *Id.* at 280. The court also noted the argument that government policy toward aliens is closely related to other fields, such as foreign affairs and exercise of the war power. *See id.* at 282.

237. *Id.* at 282.

238. *Id.* at 283. The court stated that “the task of balancing individual rights against national-security concerns is one that courts should not undertake without the guidance or the authority of the coordinate branches, in whom the Constitution imposes responsibility for our foreign affairs and national security.” *Id.*

239. *See id.* at 283–85. The court permitted the plaintiff to amend his complaint concerning the detention and interrogation within the United States. *See id.*

240. *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008), *aff’g* 414 F. Supp. 2d 250, *reh’g en banc granted* (Aug. 12, 2008).

241. *Id.* at 181.

242. *See id.* at 183.

243. *Id.* at 182.

244. *Id.* at 181. Seamon cites the district court opinion in *Arar* as support for the following proposition: “The Court might be particularly reluctant to recognize a *Bivens* claim when doing so would require judicial review of the executive branch’s conduct of foreign affairs and military strategy, as may be true of torture claims arising from the war on terrorism.” Seamon, *supra* note 7, at 778.

judicial review of Executive and Legislative decisions related to the conduct of foreign relations and national security.”²⁴⁵ In support of this proposition, Judge Sack drew on the Supreme Court’s decision in *Hamdi v. Rumsfeld*.²⁴⁶ The Second Circuit has heard *Arar* en banc. One can anticipate a split decision, as well as a substantial likelihood of Supreme Court review.²⁴⁷

The same arguments appear in other cases. One circuit court judge initially found special factors in a detention case. Judge Brown of the District of Columbia Circuit described “the method of detaining and interrogating alleged enemy combatants during a war [as] a matter with grave national security implications.”²⁴⁸ After remand from the Supreme Court on other grounds, a panel of the circuit court adopted Judge Brown’s special factors position as an alternative holding.²⁴⁹ One district court has found that the Federal Privacy Act provides a comprehensive remedy that constitutes a special factor counseling hesitation.²⁵⁰ Naturally, the government officials argue special factors vigorously in defending *Bivens* cases.²⁵¹

Not all courts have been as receptive to the special factors defense, as illustrated by the district court opinion in *Elmaghraby v. Ashcroft*.²⁵² As discussed previously, this case raised a wide range of issues based on

245. *Arar*, 532 F.3d at 213 (Sack, J., concurring in part, dissenting in part). The dissent also discussed the question of when it is proper to treat a *Bivens* complaint as seeking to extend that remedy to a new context. *Id.* at 208.

246. *See id.* at 213 (“Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.” (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004))).

247. The NEW YORK TIMES has urged reversal. *See Tortured Justice*, N.Y. TIMES, Dec. 8, 2008, at A28.

248. *Rasul v. Myers*, 512 F.3d 644, 673 (D.C. Cir.) (Brown, J., concurring), *vacated*, 129 S. Ct. 763 (2008) (mem.). *See also In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007) (finding “special factors” and refusing to allow a *Bivens* right of action).

249. *See Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (per curiam).

250. *Hatfill v. Ashcroft*, 404 F. Supp. 2d 104, 117 (D.D.C. 2005). The government recently settled *Hatfill*’s case. *See* Scott Shane & Eric Lichtblau, *Scientist Is Paid Millions by U.S. in Anthrax Suit*, N.Y. TIMES, June 28, 2008, at A1.

251. *See, e.g.*, Defendant John Yoo’s Motion to Dismiss at 12–24, *Padilla v. Yoo*, 2009 WL 1651273 (N.D. Cal. June 18, 2009) (No. C 08-00035 JSW).

252. *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005), *aff’d in part, rev’d in part*, *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev’d sub nom.* *Ashcroft v. Iqbal*, 128 S. Ct. 1937 (2009). Also, in *Kar v. Rumsfeld*, 580 F. Supp. 2d 80 (D.D.C. 2008), the district court noted the defense but did not reach it. Robert Chesney states that it is “worth noting that the opinion rejects out of hand the government’s suggestion that a *Bivens* remedy would be inappropriate.” Posting of Robert Chesney to nationalsecuritylaw@lists.wfu.edu (Sept. 30, 2008) (on file with author).

detention and interrogation of a terrorist suspect shortly after September 11, 2001. The government argued that the extraordinary context of the September 11 attacks constituted a special factor. The court recognized the “unique and complex law enforcement and security challenges” posed by terrorism threats, but it insisted that constitutional protections must remain in effect.²⁵³ Like Judge Sack in *Arar*, it drew on Justice O’Connor’s opinion in *Hamdi v. Rumsfeld* in which she emphasized the particular importance of the judiciary’s *Marbury*-based, rights-protective role during the war on terror.²⁵⁴

A similar rejection of special factors arguments can be found in the district court decision largely denying the defendant’s motion to dismiss in *Padilla v. Yoo*.²⁵⁵ Jose Padilla, an American citizen, brought a *Bivens* action against former Justice Department official John Yoo, claiming in part that Yoo’s legal advice had laid the groundwork for unconstitutional interrogation tactics used against Padilla after his designation as an enemy combatant.²⁵⁶ In moving to dismiss the complaint, Yoo relied heavily on the special factors defense. The court first rejected any notion of special factors based on an alternative remedy.²⁵⁷ It distinguished many of the Supreme Court cases discussed above on the ground that the “special factors” in those cases were the alternative remedies available.²⁵⁸ The court then turned to the possibility of context-based special factors, considering such potential issues as military considerations, national security, and foreign relations concerns.²⁵⁹

The court rejected all of these possible grounds for a special factors dismissal. In doing so, it engaged in a highly fact-specific analysis. For example, any military concerns disappeared because Padilla’s “detention was not a necessary removal from the battlefield.”²⁶⁰ As for foreign affairs considerations, the court distinguished *Arar* on the ground that it involved a foreign national and interactions with foreign governments.²⁶¹ It noted

253. See *Elmaghraby*, 2005 WL 2375202, at *14.

254. See *id.* (“[I]t is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested.” (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004))).

255. *Padilla*, 2009 WL 1651273.

256. See *id.* at *2–*7.

257. See *id.* at *10 (finding that other than a *Bivens* suit, “Padilla has no other means of redress for the alleged injuries he sustained as a result of his detention and interrogation”).

258. See *id.* at *12–*14 (distinguishing *Bush* and *Schweiker*).

259. See *id.* at *15–*19.

260. *Id.* at *17.

261. See *id.* at *18–*19. “The treatment of an American citizen on American soil does not raise the same specter of issues relating to foreign relations.” *Id.* at *19.

courts' concerns about "intrusion" into these areas²⁶² but saw no general problem with intrusion into the conduct of the war or terror, at least where a citizen's individual liberties were at stake.²⁶³

IV. SPECIAL FACTORS AND THE WAR ON TERROR *BIVENS* ACTIONS—A PROPOSED ANALYSIS

A. THE PRUDENTIAL-DEFERENTIAL MODEL AND WAR ON TERROR *BIVENS* ACTIONS

1. The General Problem of Shared Competence

The Supreme Court's *Bivens* precedents do not deal with this new context. The lower court cases are helpful but not dispositive. One way to look at the issue is to view *Bivens* as having changed substantially over four decades. The Court has moved from a presumption in favor of a constitutional damages remedy (with two specific exceptions) to a presumption against. *Bivens* has even been portrayed by a lower court as "disfavored."²⁶⁴ At the time, this portrayal by the district court might have seemed an overstatement. In *Iqbal*, however, the Supreme Court itself offered the following assessment on the state of *Bivens*: "Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'"²⁶⁵ Perhaps the most accurate assessment is the *Wilkie v. Robbins* Court's statement that the remedy "is not an automatic entitlement."²⁶⁶ Why is it so hard to make an accurate assessment of *Bivens*? The answer is not that the Court has completely reversed its position on the whole subject of constitutional remedies.²⁶⁷ The Court made it clear from the beginning that Congress has the upper hand in deciding whether to provide such remedies. This is apparent in the second exception, which refers explicitly to a

262. *See id.* at *16, *19.

263. *See id.* at *17, *19.

264. *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 94 (D.D.C. 2007).

265. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)). *Cf. Neb. Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005) (citing a "presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees").

266. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

267. *But see Malesko*, 534 U.S. at 75 (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition.>").

congressionally created alternative.²⁶⁸ Equally important is *Bivens*'s citation in the context of the first exception (special factors) of *United States v. Standard Oil* and *United States v. Gilman*.²⁶⁹ Those nonconstitutional cases emphasized not only Congress's expertise in matters of fiscal policy, but also its role in devising remedies to carry out that policy. "[E]xercise of judicial power to establish the new liability . . . would be intruding within a field properly within Congress's control and as to a matter concerning which it has seen fit to take no action."²⁷⁰

In stating the first exception, the Court referred to "special factors counselling hesitation *in the absence of affirmative action by Congress*."²⁷¹ This language points out the ever-present potential of Congress bringing to bear its expertise—both its substantive expertise with respect to a given subject matter *and* its expertise on how to remedy constitutional violations in the context of that subject matter. The courts do not lose their own expertise, but we are more in the land of constitutional common law than of *Marbury*-compelled remedies.²⁷² Thus, the post-1980s shift can be viewed as the result of a growing awareness of the separation of powers dimension of the problem of constitutional torts by federal officials, an issue not present in the context of § 1983.

A further illustration of the general problem of shared competence is the fact that the 1980s cases from *Chappell* to *Schweiker* often conflated the exceptions.²⁷³ As noted earlier, they lumped under the heading of special factors both the subject matter and the remedies that Congress had provided to deal with it. *Bush v. Lucas* went so far as to say, in the context of a constitutional claim, that "the ultimate question on the merits in this case may appropriately be characterized as one of 'federal personnel policy.'"²⁷⁴ Yet the Court also discussed extensively the range of congressionally provided remedies available to the plaintiff.²⁷⁵

268. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

269. *Id.* at 396 (citing *United States v. Standard Oil*, 332 U.S. 301 (1947); *United States v. Gilman*, 347 U.S. 507 (1954)).

270. *Standard Oil*, 332 U.S. at 316.

271. *Bivens*, 403 U.S. at 396 (emphasis added).

272. Justice Brennan may have had in mind a relatively narrow role for the first exception, but he let the doctrinal genie out of the bottle.

273. See, e.g., Bades, *supra* note 15, at 297.

274. *Bush v. Lucas*, 462 U.S. 367, 380–81 (1983).

275. See *id.* at 385–88. Indeed, congressional *inaction* in the face of existing remedies might become dispositive. See *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (suggesting "judicial deference to indications that congressional inaction has not been inadvertent").

It is undeniable that the *Bivens* doctrine *seems* to have undergone a shift in the 1980s cases toward the prudential-deferential approach, but the ingredients of that approach were always present in the doctrine, particularly in the Court's emphasis on who is to decide,²⁷⁶ with the ultimate answer being Congress. Moreover, the element of judicial policymaking and discretion seems at least as open as it was in Justice Harlan's *Bivens* concurrence.²⁷⁷ The question is whether that discretion invariably tilts toward a negative outcome and, if so, why. One answer might be the reliance of *Bivens* on statutory implied rights of action, an area in which the Court has apparently cut back.²⁷⁸ However, the Court had begun to uncouple the two as early as *Davis v. Passman*.²⁷⁹ It is also clear that focus on the subject matter diverts focus from the rights asserter and the rights asserted. Thus, the prudential-deferential approach points toward a negation of judicial power, while the *Marbury*-rights approach points the other way. The order in which the cases arose may also have played a role in the shift. The first three *Bivens* cases—*Bivens*, *Davis*, and *Carlson*—presented the Court with relatively isolated examples of misuse of power. Later cases such as *Bush* and *Stanley* represented more of an attack on the structure of programs or on underlying governmental policies. Reluctance to engage in this inquiry led to the gradual ascendancy of the prudential-deferential model during what turned out to be the formative period of *Bivens*. If this approach remains prevalent, the war on terror cases may well continue the judicial refusal to “extend” *Bivens* to new contexts.

2. The War on Terror as a Special Factor Counseling Hesitation

a. Policy

The war on terror presents several obvious candidates for special factors analysis. Every such case will involve national security, an area in which the Court has expressed hesitation to involve the judiciary.²⁸⁰ In a recent *Bivens* case finding special factors present, the District Court for the District of Columbia stated that “[i]t is established beyond peradventure that military affairs, foreign relations, and national security are

276. See *Bush*, 462 U.S. at 380.

277. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 402–11 (1971) (Harlan, J., concurring).

278. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67 n.3 (2001) (noting a retreat “from our previous willingness to imply a cause of action where Congress has not provided one”); *id.* at 75 (Scalia, J., concurring) (noting the significance of the cutback on implied statutory rights of action).

279. *Davis v. Passman*, 442 U.S. 228, 240–42 (1979).

280. See *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988).

constitutionally committed to the political branches of our government.”²⁸¹ The quote emphasizes that the prudential approach is not just a matter of judicial reluctance to intervene in certain areas. It is based on a preference for the political branches as the locus of decisionmaking in matters of national security.²⁸²

The reference to “military affairs” brings up a second point: courts are unwilling to oversee the conduct of wartime operations.²⁸³ Courts are concerned not only about the Constitution’s commitment of the “war power” to the political branches as shown by numerous provisions.²⁸⁴ They are also concerned with the practical effects of direct interference such as disrupting operations by deposing combatants and otherwise involving them in a trial.²⁸⁵ Of course, the elasticity of the concept of a war on terror²⁸⁶ may counsel hesitation in finding special factors counseling hesitation.²⁸⁷ Interrogations within the United States are considerably removed from the foreign military operations that generated the original hands-off approach.

A third reason for finding special factors present in the war on terror context is the possibility of a significant foreign affairs dimension. Courts often emphasize the importance of deference to the political branches in the foreign affairs context.²⁸⁸ Like national security, one might argue that any war on terror case involves foreign affairs. The United States is working with many countries to deal with the global problem of terrorism. If a court inquires into the facts of a specific case, it is likely to find foreign affairs lurking below, if not close to, the surface. In *Arar*, for example, the rendition of a Canadian-Syrian citizen involved relations with both countries. The district court noted that the Canadian officials could be

281. *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 107 (D.D.C. 2007).

282. Recall *Bush*’s emphasis on the question of who should decide.

283. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (“[W]e accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war.”).

284. *E.g.*, U.S. CONST. art. I, § 8, cl. 11 (power to declare war); U.S. CONST. art. I, § 8, cl. 12 (power to raise and support armies); U.S. CONST. art. I, § 8, cl. 13 (power to provide and maintain a navy); U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States . . .”).

285. *See In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d at 105.

286. *See The Terrorists Who Didn’t Bark*, BOSTON GLOBE, Apr. 9, 2008, at A14. *See also Hamdi*, 542 U.S. at 521 (recognizing that the war on terror may require rethinking traditional assumptions about war).

287. There is a risk that law enforcement officials will attempt to shield misconduct during criminal investigations by invoking the war on terror. For example, crimes such as credit card fraud by illegal aliens might be presented as related to terror, thus justifying more intrusive investigative tactics.

288. *See, e.g.*, *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

embarrassed if, despite their denials, the suit showed they were working with American authorities.²⁸⁹ An Arab country such as Syria might also be embarrassed, for different reasons, by revelation of cooperation with the United States.²⁹⁰ The court concluded generally that “this case raises crucial national-security and foreign policy considerations, implicating ‘the complicated multilateral negotiations concerning efforts to halt international terrorism.’”²⁹¹ In sum, the national security, military, foreign affairs triad of traditional reasons for judicial hesitation argue strongly for such hesitation here.²⁹² This view also rests on a rejection of the “law enforcement” model of terrorism as the only valid means of analysis. The intelligence and military models are equally relevant.²⁹³ Obviously, the concepts overlap. Perhaps terrorism and efforts to combat it should be regarded as *sui generis*.

Bivens actions raise an additional question: Should those who are defending the country be subject to damages suits when they make mistakes, even of constitutional magnitude? They may be carrying out official policy. Immunity doctrines may not shield them. There is, of course, the possibility that because of indemnification and representation practices the supposedly individual defendant is really the government. The Court’s doctrine has proceeded on the opposite assumption, emphasizing deterrence of individual, rogue behavior.²⁹⁴ There is at least a theoretical risk that *Bivens* actions will deter the guardians from doing their jobs. Detainee advocate Peter Margulies has argued against “sweeping civil and criminal liability for Bush administration officials” on the ground that “such measures could chill future officials confronting crises.”²⁹⁵ If the war on terror is a context in which zealous pursuit of the objective is desirable, and one views the *Bivens* action as a fiction in which the government is already the real defendant,²⁹⁶ the essential question may be whether such suits should be available to challenge policy apart from any individual

289. See *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 281 (E.D.N.Y. 2006), *aff’d*, 532 F.3d 157 (2d Cir.), *reh’g en banc granted* (Aug. 12, 2008).

290. See *id.*

291. *Id.* (citing *Doherty v. Meese*, 808 F.2d 938, 943 (2d Cir. 1986)).

292. The close relationship between the policies underlying the special factors exception and the political question doctrine is clearly visible.

293. See, e.g., GUIORA, *supra* note 25, at 27–28 (discussing three models for shaping counterterrorism policy).

294. See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69–71 (2001).

295. Peter Margulies, *Peter Margulies Responds*, 30 A.B.A. NAT’L SECURITY L. REP., Nov./Dec. 2008, at 7, 7.

296. See generally Pillard, *supra* note 22 (contending that the real defendant in interest in *Bivens* actions is the government).

effects. When the individual defendants include the policymakers themselves, the two functions of the *Bivens* action merge.

Should courts utilize the prudential-deferential model to block counter-counter-terrorism via litigation? I do not dispute the importance of individual compensation. However, compensation can be provided through entity liability.²⁹⁷ I advocate a strong use of the model, despite the fact that it sacrifices judicial review of controversial executive action. This approach will not please those who favor a strong judicial role in the war on terror context; however, policymaking via tort suits seems singularly inappropriate in this sensitive area of national security. Congressional oversight of possible executive misconduct is preferable, and has taken place,²⁹⁸ especially since a Democratic Congress is in the position of investigating a Republican administration. Indeed, the national political dialogue is extensively focused on proposals to engage in broad inquiries into the antiterror efforts of the Bush Administration.²⁹⁹ Still, when Congress and the executive are in accord on how to wage the “war,” that fact may make the issue look more like a political question than the subject matter of a lawsuit in which officials happen to be the defendants. The existence of a national effort against terrorism may well be a special factor counseling hesitation, and the prudential-deferential model forces courts to focus on the effects of their actions on that effort.

b. Precedents

To what extent do the Court’s *Bivens* precedents shed light on the question of whether the war on terror will be treated as a special factor counseling hesitation given the fact that none of them deals with the matter directly? On a general level, they can be seen as demonstrating a move away from the *Marbury*-rights model and toward special factors analysis and the prudential-deferential model. This suggests that that model is likely to prevail in counter-counter-terrorism litigation. However, the key question concerns the Court’s refusal to extend *Bivens* to new “contexts”: What characteristics of those new contexts made them special factors? To a considerable extent, it was the subject matter, such as military affairs, in which the Court saw Congress as possessing special expertise.³⁰⁰ Statutory

297. See *infra* text accompanying notes 413–34 (discussing alternative schemes for providing compensation from the government).

298. See, e.g., *Joint Hearing, supra* note 205; *Restoring the Rule of Law: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. (2005); Mark Mazzetti, *Senate Panel to Pursue Investigation of C.I.A.*, N.Y. TIMES, Feb. 27, 2009, at A14.

299. See, e.g., Mazzetti, *supra* note 298.

300. See Tribe, *supra* note 15, at 66.

developments were also relevant. For example, the existence of some remedy played a role,³⁰¹ although congressional action in the general field may have been enough.³⁰²

Congress has enacted a broad array of statutes to deal with terrorism, both before and after September 11, 2001. The Foreign Intelligence Surveillance Act (“FISA”) was passed in 1978.³⁰³ Obviously, September 11 produced a number of statutory responses.³⁰⁴ This extensive framework includes attention to remedial issues. For example, Congress has provided a civil action under FISA for improper electronic intercepts.³⁰⁵ One district court has suggested that the fact that Congress has addressed “detainee treatment without creating a private cause of action for detainees injured by military officials”³⁰⁶ is relevant to the denial of a *Bivens* action. One could argue that counter-counter-terrorism suits trigger the second *Bivens* exception, but the important point of the conflation phenomenon is that the two exceptions are read together, grouped under the special factors counseling hesitation rubric.

Thus, it becomes important to consider how to define the field that the Court found unsuitable for judicial intervention. In *Bush*, it was federal employment policy.³⁰⁷ In *Chappell* and *Stanley*, it was the internal

301. See, e.g., *Chappell v. Wallace*, 462 U.S. 296, 302 (1983) (emphasizing a comprehensive statutory system of military justice which “provides for the review and remedy of complaints and grievances such as those presented by respondents”). It does not appear that *Stanley* had a nonjudicial remedy, at least not an arguably adequate one.

302. See *United States v. Stanley*, 483 U.S. 669, 683–84 (1987). The emphasis on the fact that Congress has acted in the field raises the question of how much, if at all, Congress must have addressed remedial issues.

303. Foreign Intelligence Surveillance Act of 1978 § 101, 50 U.S.C. § 1801 (2006).

304. E.g., Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739; Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001). See generally MCCORMACK, *supra* note 204, at 237–39 (discussing the USA PATRIOT Act).

305. See 50 U.S.C. § 1810. On the other hand, in dealing with torture, Congress has stated that nothing in the statute shall be “construed as creating any substantive or procedural right enforceable by law by any party in any civil proceeding.” 18 U.S.C. § 2340B (2006). Coupled with the statutes discussed in the next footnote, it is certainly possible to argue that Congress has focused on the particular remedial issues raised by the war on terror.

306. *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 107 n.23 (D.D.C. 2007). Both the Military Commissions Act and the Detainee Treatment Act contain language which appears to forbid actions by certain detainees “relating to any aspect of the detention.” See, e.g., Detainee Treatment Act, sec. 1005(e)(1), § 2241(e)(2), 119 Stat. at 2742; *Boumediene v. Bush*, 476 F.3d 981, 986 n.1 (D.C. Cir. 2007), *rev’d on other grounds*, 128 S. Ct. 2229 (2008) (“[The Military Commissions Act] eliminates jurisdiction over non-habeas claims by aliens detained as enemy combatants.”).

307. See *Bush v. Lucas*, 462 U.S. 367, 381–88 (1983) (discussing the development of civil service remedies). The Court noted “the comprehensive nature of the remedies currently available.” *Id.* at 388.

operations of the military.³⁰⁸ *Stanley* comes the closest, with its caution against “judicial inquiry into, and hence intrusion upon, military matters.”³⁰⁹ It is clear, however, that the Court was referring to the *internal* operations of the military, not to military activity generally, although this subject is addressed in other decisions.³¹⁰ The cases involve more discrete and contained subjects than the war on terror. Yet as long as one views one dimension of the prudential approach as Congress’s possession of a special competence over a range of areas, it is perhaps not a stretch to treat the war on terror as a single, albeit multifaceted, subject and to say that Congress has a special competence (and constitutional charge, along with the executive) to deal with its component parts, including remedial issues. This argument is a point for treating the war on terror as a special factor counseling hesitation in fashioning a *Bivens* remedy. Still, it is the executive branch, more than Congress, that has taken a forceful role in policymaking, often relying on theories of inherent executive power. Thus, extensive use of the special factors analysis (the prudential-deferential model) is open to the criticism that deference to Congress has subtly morphed into deference to the executive.

Lower court cases are of some help in understanding the special factors problem, but the current cases contain judicial views on both sides of the issue.³¹¹ There is also some relevant pre-September 11 precedent. The most frequently cited case is *Sanchez-Espinoza v. Reagan*, a District of Columbia decision authored by then-Judge Scalia.³¹² *Reagan* was, in part, a *Bivens* action against high-level federal officials based on their support of the Nicaraguan “Contras.”³¹³ The court, writing after *Bush* and *Chappell*, viewed the case as a classic special factors problem. The large number of competing policy considerations called for a legislative solution of the remedial issue. Scalia wrote, “We have no doubt that these considerations of institutional competence preclude judicial creation of damage remedies here.”³¹⁴ He also extrapolated “the special needs of foreign affairs” from *Chappell*’s concern for the special needs of the armed forces.³¹⁵

308. See, e.g., *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (noting the special relationship between soldiers and superior officers).

309. *United States v. Stanley*, 483 U.S. 669, 682 (1987).

310. See *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981) (dealing with the refusal to register females under the Military Selective Services Act and recognizing the professional military judgment involved in “decisions as to the composition, equipping, training, and control of a military force”).

311. See *supra* Part III.C.

312. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

313. See *id.* at 205–06 (discussing allegations that U.S. support led to harm of innocent civilians).

314. *Id.* at 208.

315. See *id.* at 208–09.

I will quote at length from the opinion, in part because it could be a precursor of things to come:

The foreign affairs implications of suits such as this cannot be ignored—their ability to produce what the Supreme Court has called in another context “embarrassment of our government abroad” through “multifarious pronouncements by various departments on one question.” Whether or not the present litigation is motivated by considerations of geopolitics rather than personal harm, we think that as a general matter the danger of foreign citizens’ using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist.³¹⁶

One can find other lower court opinions citing national security in the special factors analysis.³¹⁷ A recurring theme is that of deference to the political branches, not just on the specific question of remedy.³¹⁸ The echoes of the political question doctrine are obvious. That is my second reason for quoting Judge Scalia at length; he makes specific the link between special factors and political questions with his citation to *Baker v. Carr*.³¹⁹

3. The War on Terror as a Political Question—Reinforcing the Special Factors Conclusion

As discussed earlier,³²⁰ considerations similar to those underlying the political question doctrine played a role in the development of the prudential-deferential version of *Bivens*. Not surprisingly, the analytical similarities of the two approaches have surfaced in lower court war on terror *Bivens* cases, despite the expressed view that the two doctrines are different.³²¹ Issues of national security, foreign affairs, and military

316. *Id.* at 209 (citation omitted).

317. *See, e.g.,* *Beattie v. Boeing Co.*, 43 F.3d 559, 564–67 (10th Cir. 1994) (finding that the national security implications of security clearance decisions constituted a special factor); *Wilson v. Libby*, 498 F. Supp. 2d 74, 93–96 (D.D.C. 2007) (finding that the national security implications of the disclosure of CIA status constituted a special factor).

318. *See, e.g., Beattie*, 43 F.3d at 565 (noting the judiciary’s lack of expertise and that security clearance decisions are entrusted to executive discretion); *Libby*, 498 F. Supp. 2d at 93–94 (noting the need for executive discretion).

319. *Reagan*, 770 F.2d at 209 (referring to “multifarious pronouncements by various departments on one question”).

320. *See supra* text accompanying notes 116–19.

321. *See, e.g.,* *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 283 n.14 (E.D.N.Y. 2006), *aff’d*, 532 F.3d 157 (2d Cir.), *reh’g en banc granted* (Aug. 12, 2008). At the end of its special factors analysis, the district court stated, “Having determined that no *Bivens* remedy is available here, there is no need to discuss the political-question doctrine.” *Id.*

operations can be seen both as presenting political questions and as special factors counseling hesitation.

It is helpful to recall the special factors analysis in *Arar*. The Second Circuit stated that the Canadian plaintiff's challenge to his rendition to Syria required probing "deeply into the inner workings of the national security apparatus of at least three foreign countries, as well as that of the United States."³²² To the extent that such a suit proceeds, "the ability of the federal government to speak with one voice to its overseas counterparts is diminished, and the coherence and vitality of U.S. foreign policy called into question."³²³ The latter quote is a clear invocation of *Baker v. Carr*'s sixth factor, "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."³²⁴ The district court in *Arar* quoted *Baker* on the same point, noting that then-Judge Scalia had brought it into play in *Sanchez-Espinoza*.³²⁵

In the context of terrorism-related litigation, there is a particular District of Columbia Circuit case that merits discussion at this point. *Schneider v. Kissinger* was a damages action based on U.S. involvement in the assassination of a Chilean general as part of its attempt to destabilize the Allende regime.³²⁶ The circuit court's rejection of this suit represents a "strong" version of the political question doctrine. Judge Sentelle's opinion begins with *Marbury*'s recognition of a class of political acts³²⁷ and traces its evolution as a "limitation of the jurisdiction of the courts particularly applicable to foreign relations."³²⁸ The opinion emphasizes the textual commitment of foreign relations and national security to the political branches.³²⁹ It also emphasizes the limited competence and role of the judiciary in such matters.³³⁰ Indeed, this seems the most significant part of the analysis. The court contrasts the broad commitments of these matters to

322. *Arar*, 532 F.3d at 181.

323. *Id.* at 182.

324. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

325. *See Arar*, 414 F. Supp. 2d at 281–82.

326. *See Schneider v. Kissinger*, 412 F.3d 190, 191–92 (D.C. Cir. 2005) (discussing the facts of the case). The case appears to have been based on common law tort theories rather than a *Bivens* theory. *See id.* at 196–97 (discussing the role of tort standards).

327. *See id.* at 193.

328. *Id.* (citing *Oetjen v. Cent. Leather Corp.*, 246 U.S. 297, 302–03 (1918)).

329. *See id.* at 194–96.

330. *See id.* at 195–97. This is a recurring theme in national security litigation. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 579 (2004) (Thomas, J., dissenting) (stating that courts "lack the expertise and capacity to second-guess" the decision of the president, acting with congressional approval, to detain an enemy combatant).

the political branches by Articles I and II of the Constitution³³¹ with the almost total absence of any such commitment to the judiciary in Article III,³³² which “provides no authority for policymaking in the realm of foreign relations or provision of national security. It cannot then be denied that decision-making in the areas of foreign policy and national security is textually committed to the political branches.”³³³

The opinion is replete with minimization of the role of the courts. All they do, according to the opinion, is resolve cases and controversies; “recasting foreign policy and national security questions in tort terms does not provide standards for making or reviewing foreign policy judgments.”³³⁴ The logic of *Schneider v. Kissinger*, however, shows what happens when one starts down this road. It resembles the argument that an Article I commitment of a subject matter to Congress gives Congress a special, unreviewable competence in that area. If Article III courts, having no foreign affairs, military, or national security power, can only adjudicate cases and controversies, what happens when a duly presented case presents an issue in the field? Would there be an automatic abdication? As Robert Pushaw points out, “[I]f a textually demonstrable constitutional commitment of the issue to a coordinate political department raised a political question, then federal courts could never decide any claims against Congress or the President because the text of Articles I and II commits to them all legislative and executive powers.”³³⁵

Thus, the entire war on terror could become a political question shielded from judicial review. That possibility may be particularly strong in matters that can be labeled military or foreign policy. As Pushaw reminds us, the “sobering example” of *Korematsu* looms over any such analysis.³³⁶

331. See *Schneider*, 412 F.3d at 194–95.

332. See *id.* at 195.

333. *Id.*

334. *Id.* at 197.

335. Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis*, 80 N.C. L. REV. 1165, 1176 (2002) (internal quotation marks omitted) (footnote omitted). The close relationship between the political question doctrine and *Bivens*’s special factors analysis is demonstrated by the fact that Justice Brennan made a similar argument in his *United States v. Stanley* dissent: “If a *Bivens* action were precluded any time Congress possessed a constitutional grant of authority to act in a given area, there would be no *Bivens*.” *United States v. Stanley*, 483 U.S. 669, 707 (1987) (Brennan, J., dissenting). The political question doctrine is sharply criticized from a variety of perspectives. In addition to Pushaw’s excellent article, see Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333 (2006). With regard to *Baker*, Tyler states that “its prudential factors are even more problematic than its initial focus on constitutional text.” *Id.* at 368.

336. See Pushaw, *supra* note 335, at 1199 n.219.

The aspect of the political question doctrine that seems to be driving this analysis is the prudential aspect. The nonprudential notion of a textually demonstrable commitment of the matters at issue to the political branches is met by an equally strong textual commitment of cases and controversies to Article III courts, at least cases that common law courts traditionally hear. The Constitution provides judicially discernable and manageable standards. Perhaps issues of national security call for a prudential exercise of judicial discretion to stay out because of factors like the need for the nation to speak with one voice, but they raise the perplexing question of how to reconcile the existence of judicial power with refusals to exercise it. When jurisdiction is refused under one of the abstention doctrines, for example, there is presumably another tribunal available to hear the matter. However, when a case is dismissed without an alternate forum, a serious problem of rights without remedies arises under the political question and other nonjusticiability doctrines.

The same problem can arise in war on terror *Bivens* actions, at least if the prudential-deferential model prevails. Focus on the subject matter diverts focus from the rights asserter, the rights asserted, and the fact that those rights are asserted in a traditional judicial proceeding. In the *Bivens* context, a nice example is furnished by *Bush v. Lucas*, one of the key early cases in the shift away from the *Marbury*-rights model. The Court conceded that “this case concerns a claim that a constitutional right has been violated,” but it stated that “the ultimate question on the merits in this case may appropriately be characterized as one of ‘federal personnel policy.’”³³⁷ Both considerations—whether a question is “political” and whether “special factors” counsel hesitation—push the analysis toward separation of powers issues. The Court naturally looks at the prerogatives of the other branches. A high degree of deference often results—one which manifests itself not in an approach to the merits,³³⁸ but in a decision not to hear the case at all. The prudential-deferential approach, with its close resemblance to the political question doctrine, represents another example of a justiciability analysis.

Thus, this approach to *Bivens* could lead to rejecting most war on terror claims on special factors grounds. I say “most” because there will be

337. *Bush v. Lucas*, 462 U.S. 367, 380–81 (1983). Thus, a purported individual claim was recast as an attack on policy. Yet this duality will always be present in *Bivens* actions.

338. See Pushaw, *supra* note 335, at 1199. Pushaw’s general argument is to adopt a strong presumption of judicial review, but with “extraordinary deference to the elected branches” in areas such as military and foreign affairs. *Id.* This is one answer to the challenge of finding a middle ground, although it tilts strongly in the government’s favor.

cases at the margin that seem to involve mainly law enforcement issues without a close connection to the war on terror. This result is problematic, however, not in cases at the margin, but in cases at the center of the war on terror, where the constitutional claims are also at the center of individual rights protected by the Bill of Rights. Let us assume a case in which citizenship and place of injury are not relevant, and either the right is well established or the claim of right is highly plausible. In “heartland” *Bivens* actions arising out of the war on terror, will the *Marbury*-rights version of the doctrine make a comeback?

B. THE *MARBURY*-RIGHTS MODEL AND WAR ON TERROR *BIVENS* ACTIONS

1. Is the *Marbury*-Rights Model Dead?

The *Marbury*-rights model is not dead. Four Justices invoked it in the *Malesko* dissent.³³⁹ Even Justices Scalia and Thomas have stated they would apply “*Bivens* and its progeny [if] limited ‘to the precise circumstances that they involved.’”³⁴⁰ One needs to ask, however, why this model has fallen so far out of favor as to lead to a general perception that *Bivens* is of little force.³⁴¹ As suggested earlier, a partial reason is that the 1980s cases that established the ascendancy of the prudential-deferential model were generally strong candidates for a negative response to the *Bivens* question. They usually presented either an extensive remedial framework, as in *Schweiker*, or a subject matter with which the courts felt unfamiliar, such as internal military affairs in *Chappell* and perhaps *Stanley*. *Bush* may represent an example of both. While I and others have criticized these cases for insufficient emphasis on their constitutional dimensions,³⁴² they show the power of the subject matter focus and the diversion from individual rights produced by special factors counseling hesitation.

339. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Stevens, J., dissenting). Justice Stevens was joined by Justices Souter, Ginsburg, and Breyer. The recent upsurge of interest among academics may play a role in the reconsideration and possible rebirth of this model. In particular, the article by Pfander and Baltmanis makes a strong case for a presumption in favor of a *Bivens* action. See Pfander & Baltmanis, *supra* note 15 (manuscript at 8) (“[T]he federal courts should presume that a well-pleaded complaint, alleging an unconstitutional invasion of interests in life, liberty, and property, gives rise to an action for damages under *Bivens*.”).

340. *Wilkie v. Robbins*, 551 U.S. 537, 568 (2007) (Thomas, J., concurring) (quoting *Malesko*, 534 U.S. at 75).

341. See *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 94 (D.D.C. 2007) (“[I]t would be fair to say that recognizing such a claim is clearly disfavored.”).

342. See Bandes, *supra* note 15; Brown, *supra* note 39. My present view is largely one of acceptance of these cases, particularly given their ramifications for the war on terror.

The three most recent cases were also somewhat weak candidates for the constitutional damages remedy. *Meyer* ran into the problem that “the logic of *Bivens*”³⁴³ supports a claim against individual employees, not the employing agency. The Court emphasized the importance of deterring individual officers³⁴⁴ and expressed concern about imposing “a potentially enormous financial burden for the Federal Government.”³⁴⁵ *Malesko* was a closer case. However, in denying a *Bivens* remedy against the private prison employer, the majority built on *Meyer* in finding a direct analogy to its attempt to hold the agency liable³⁴⁶ and again emphasized deterrence of individual employees.³⁴⁷ By the time the Court got to *Wilkie*, the notion of *Bivens* as a narrow doctrine—or at least as one that the Court continually refused to “extend”—had become something of a self-fulfilling prophecy. In that case, the underlying claim raised what the Court called “a serious difficulty of devising a workable cause of action.”³⁴⁸ The opinion combined the latest statement of the prudential-deferential approach with the introduction of a balancing approach and an inconclusive attempt at applying it.³⁴⁹ After noting the difficulties involved, the Court basically punted the issue to Congress, which it described as “‘in a far better position than a court to evaluate the impact of a new species of litigation’ against those who act on the public’s behalf.”³⁵⁰

In examining whether war on terror actions might be different enough to revive the *Marbury*-rights model and survive the special factors analysis, this Article will consider briefly what might be called “*Bivens* law” generally. This is not the only source of relevant doctrine, however. Since September 11, the Supreme Court has decided several important non-*Bivens* war on terror cases. These cases have resulted in important victories for plaintiffs, as well as reaffirmations of the judicial role in protecting individual rights in times of national emergency.³⁵¹

Drawing first on *Bivens* law, it is important to note that to designate the entire war on terror as a special factor is perhaps a stretch beyond

343. *FDIC v. Meyer*, 510 U.S. 471, 485 (1994).

344. *See id.*

345. *Id.* at 486. This reasoning supports the contention that the decision to impose entity liability should come from Congress.

346. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001). In comparing *Malesko* with *Meyer*, the majority went so far as to say, “This case is, in every meaningful sense, the same.” *Id.*

347. *See id.* at 69–71.

348. *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007).

349. Tribe describes the Court’s balancing as “unconvincing.” *See Tribe, supra* note 15, at 71.

350. *Wilkie*, 551 U.S. at 562 (quoting *Bush v. Lucas*, 462 U.S. 367, 389 (1983)).

351. *See infra* Part IV.B.2.

previously recognized contexts given that those contexts are both narrower and more specific. One might break the concept down into component parts such as “foreign affairs.” Even here, however, the courts are reluctant to paint with a broad brush that blocks off entire areas. The Supreme Court stated in *Baker v. Carr* that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”³⁵²

Dissenting from the Second Circuit’s *Arar* decision, Judge Sack cautioned against a “blunderbuss” approach to war on terror *Bivens* actions “and the concomitant additional license it gives federal officials to violate constitutional rights with virtual impunity.”³⁵³ The point is reinforced when one considers that many of the actions will present “heartland”³⁵⁴ *Bivens* claims, such as searches like that in the original case or interrogation techniques that shock the conscience.³⁵⁵ Unless *Bivens* is overruled, some suits seem viable even under current law. Certainly, any such cases will severely test the strength of the war on terror as a special factor. Moreover, the *Marbury*-rights model may be on the verge of a comeback. The Supreme Court has recently, in a series of cases, reinforced the judiciary’s rights-protecting role, even in the face of action by the political branches.

2. Support for the *Marbury*-Rights Model from the Supreme Court’s War on Terror Cases

Beginning in 2004, the Supreme Court decided a series of challenges to government confinement, classification, and trial of terrorism suspects.³⁵⁶ The Court regarded the cases as of the highest importance. The following quote from Justice Stevens is typical: “At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people’s rulers and their successors is the

352. *Baker v. Carr*, 369 U.S. 186, 211 (1962). It should be noted that the district court’s initial decision in *Padilla v. Yoo* shows that a highly case-specific inquiry can conclude that any such concerns are absent from a particular set of facts, even though that set of facts is closely related to the broader war on terror.

353. *Arar v. Ashcroft*, 532 F.3d 157, 212–13 (2d Cir.) (Sack, J., concurring in part, dissenting in part), *reh’g en banc granted* (Aug. 12, 2008).

354. *See* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 78 (2001) (Stevens, J., dissenting) (contending that the Eighth Amendment claim “falls in the heartland of substantive *Bivens* claims”).

355. *E.g.*, *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *15–17 (E.D.N.Y. Sept. 27, 2005) (discussing conditions of confinement claims), *aff’d in part, rev’d in part*, *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev’d sub nom. Ashcroft v. Iqbal*, 128 S. Ct. 1937 (2009).

356. *See* *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

character of the constraints imposed on the Executive by the rule of law.”³⁵⁷ Although the government won some victories,³⁵⁸ the Court, whether by forced statutory construction or outright constitutional pronouncements, dealt it a series of setbacks. The cases called for a relatively wide-ranging procedure in habeas corpus proceedings,³⁵⁹ extended habeas corpus to Guantanamo Bay,³⁶⁰ struck down the original military commissions,³⁶¹ and mandated the availability of habeas for certain detainees despite statutory language to the contrary.³⁶²

The Court was well aware of the tension between liberty and security,³⁶³ and of the need to respect the expertise of the political branches in matters of national security.³⁶⁴ Still, it came down squarely on the *Marbury* side of these issues, insisting on a substantial role for the judiciary. Benjamin Wittes, in writing of the pre-*Boumediene* decisions, discerns a

chasm between the practical impact of the Supreme Court’s decisions in this area so far and the potential implications of those decisions in the future—perhaps the near future—to justify more extensive judicial supervision of war making. Taken on their own, the Court’s pronouncements to date have been something less than dramatic. At the same time, they contain doctrinal seeds of a far more aggressive judicial posture³⁶⁵

357. *Padilla*, 542 U.S. at 465 (2004) (Stevens, J., dissenting).

358. *E.g.*, *id.* at 450–51 (ordering dismissal of the habeas corpus petition as filed in the wrong district). In *Hamdi*, five Justices agreed that the president has some authority to detain individuals in the plaintiff’s position, *Hamdi*, 542 U.S. at 517; *id.* at 579 (Thomas, J., dissenting), and a plurality stated that “an appropriately authorized and properly constituted military tribunal” might be able to provide the necessary process, *id.* at 538 (plurality opinion).

359. *See Hamdi*, 542 U.S. 507.

360. *See Rasul*, 542 U.S. 466.

361. *See Hamdan*, 548 U.S. 557.

362. *See Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

363. *See id.* at 2276–77. The Court recognized the tension between the need for executive authority when national security is threatened and “fidelity to freedom’s first principles.” *Id.* at 2277. Perhaps the best summation of the views of a majority of the Justices is the following: “The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.” *Id.*

364. *See id.* at 2276–77. The Court stated that proper deference must be accorded to the political branches. Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.

Id. (citation omitted).

365. WITTES, *supra* note 22, at 104. According to Wittes, “[w]hat the Supreme Court has done is carve itself a seat at the table.” *Id.* at 15.

Boumediene marked a further step in this direction, both as a matter of rhetoric and of result. Citing *Marbury*, *Boumediene* cautioned against “a regime in which [Congress and the President], not this Court, say ‘what the law is.’”³⁶⁶ This view had earlier come across strongly in *Hamdi v. Rumsfeld*, where the Court emphasized that the Constitution “most assuredly envisions a role for all three branches when individual liberties are at stake”³⁶⁷ and stated that “it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.”³⁶⁸

Apart from the general thrust of the cases, there is an equally important, and more specific, dimension to their analysis: the special role of habeas corpus within the constitutional order. The Court’s first war on terror decisions all arose out of petitions for habeas corpus. The various opinions contain countless pages of historical analysis of the “Great Writ,” reaching back into English history.³⁶⁹ Habeas corpus is specifically guaranteed in the Constitution,³⁷⁰ while judicial review is not mentioned, let alone *Bivens* actions. The opinions emphasize the writ’s “centrality”³⁷¹ and that it secures the “chief” freedoms in our system, “freedom from arbitrary and unlawful restraint and . . . personal liberty.”³⁷² The Court emphasizes the role of habeas corpus as “an indispensable mechanism for monitoring the separation of powers.”³⁷³ The judiciary is not just protecting

366. *Boumediene*, 128 S. Ct. at 2259 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). See David D. Cole, *Rights over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2008 CATO SUP. CT. REV. 47 (calling *Boumediene* a groundbreaking decision).

367. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

368. *Id.* at 535. *Hamdi* can be seen as the Court’s first encounter with classic national security arguments in the context of war on terror litigation. The government invoked the “extraordinary constitutional interests at stake” and “[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict.” *Id.* at 527. Indeed, the court below had made the classic argument that the war powers are vested in the political branches by Articles I and II, and that Article III courts do not possess an analogous power. See *id.* at 514–15. The result in *Hamdi* gave something to both sides. The citizen detainee’s right to “basic” process was recognized. See *id.* at 534. At the same time, the decision affirmed the government’s power to detain citizen enemy combatants, limited the process that is due them, and in the plurality opinion, both suggested that the required standards could be met by “an appropriately authorized and properly constituted military tribunal,” *id.* at 538, and applied law-of-war principles to the war on terror, at least for now, see *id.* at 521. Still, the core of the analysis seems best reflected in the plurality’s statement that “we . . . reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances.” *Id.* at 535.

369. See, e.g., *id.* at 554–72 (Scalia, J., dissenting).

370. U.S. CONST. art. I, § 9, cl. 2.

371. *Boumediene*, 128 S. Ct. at 2244.

372. *Id.* at 2277.

373. *Id.* at 2259. *Boumediene*, the only one of the cases to invalidate on constitutional grounds

individual freedoms; it is preventing the political branches from ganging up on unpopular groups, such as suspected terrorists.³⁷⁴

These Supreme Court cases appear to give strong support to application of the *Marbury*-rights model of *Bivens* when the issue resurfaces in war on terror litigation.³⁷⁵ After all, the Court relied on a *Marbury* view of the legal system in that very context. Particularly important is the notion of the judicial branch as a check on the political branches in times when national security is threatened.³⁷⁶ *Bivens* actions can perform this same function, especially when the underlying conduct represents official policy, not the acts of a rogue official.

There are other reasons for finding support for the *Marbury*-rights model. In *Hamdan v. Rumsfeld*, for example, abstention—a classic prudential doctrine—was available, but the Court rejected it.³⁷⁷ Overall, the Court's normal deference to the political branches—a mainstay of the prudential-deferential model—disappeared when the Court apparently concluded that they had subordinated individual rights to national security and attempted to freeze the judiciary out of the process.

action concurred in by both political branches, is replete with such references. *See, e.g., id.* at 2277. "Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law." *Id.* "Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person." *Id.*

374. Although the focus of the cases is on measures taken by the executive branch, it must be emphasized that Congress acted to reinforce what the President had done.

375. *See Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *14 (E.D.N.Y. Sept. 27, 2005) (citing *Hamdi* for the proposition that national security concerns "do not warrant the elimination of remedies for . . . constitutional violations"), *aff'd in part, rev'd in part*, *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev'd sub nom. Ashcroft v. Iqbal*, 128 S. Ct. 1937 (2009).

376. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004). Writing prior to *Boumediene*, Pushaw cautioned against a possible overreading of the cases expressing this principle. *See generally* Robert J. Pushaw, Jr., *The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005 (2007). "As with the 2004 detention decisions . . . *Hamdan* is a setback for the President, but hardly the devastating blow imagined by many commentators. The Court has not plunged into a brave new world of bold judicial review." *Id.* at 1077. He discusses the Constitution's conferral of the war powers on the political branches and makes the important point that "the Framers and Ratifiers never mentioned what would happen if someone challenged the exercise of war powers not as inconsistent with Articles I or II, but rather as violating his or her individual legal rights." *Id.* at 1023. Looking back over our history, he concludes:

[T]he Justices have inevitably decided cases based not simply upon abstract rules of law, but also upon various political and practical considerations. Operating within these constitutional and pragmatic confines, the Court has tried to articulate and enforce individual rights and liberties to the extent possible, as it did recently in the "enemy combatant" litigation.

Id. at 1081.

377. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 584–90 (2006).

It is true that the prudential-deferential language of lack of judicial competence, judicial interference, and the dangers of courts overseeing the military is present, but it is found mainly in the dissents.³⁷⁸ In *Boumediene*, Justice Scalia accused the Court of “an inflated notion of judicial supremacy.”³⁷⁹ Dissenting in *Rasul v. Bush*, he decried the decision as “forcing the courts to oversee one aspect of the Executive’s conduct of a foreign war.”³⁸⁰ Dissenting in *Hamdan*, Justice Thomas cited with approval President Bush’s finding that “the war on terror ushers in a new paradigm.”³⁸¹ The Court, however, seemed to go out of its way to say that the *Marbury* paradigm has served us well and that *Korematsu*-like departures from it are the evil most to be feared.

For present purposes, the key question is how easy the Court will find the conceptual step from habeas petitions to damages actions to be. As noted, the opinions present the writ as occupying a preferred position. Habeas is aimed at deprivation of *liberty*: what Blackstone, as quoted by Justice Scalia, described as “a more dangerous engine of arbitrary government” than other “gross and notorious [acts] of despotism.”³⁸² While the habeas cases involve liberty, the damages cases will present questions of other rights as well. The Supreme Court cases on the former may shed little light on the latter.³⁸³ The issue did surface in *Rasul*. The end of the majority opinion discussed briefly, and positively, the possibility of nonhabeas actions being brought by noncitizens at Guantanamo.³⁸⁴ In dissent, Justice Scalia stated that *Bivens* actions could be brought as a result of the decision.³⁸⁵

Indeed, the Court has recently suggested that *Boumediene*’s thrust extends beyond habeas corpus. In *Rasul v. Myers*, the D.C. Circuit rejected a *Bivens* suit arising out of conditions at Guantanamo, based in part on its view at that time that nonresident aliens outside the United States did not possess constitutional rights.³⁸⁶ The Supreme Court’s later decision in

378. See, e.g., *Hamdi*, 542 U.S. at 579–88 (Thomas, J., dissenting).

379. *Boumediene v. Bush*, 128 S. Ct. 2229, 2302 (2008) (Scalia, J., dissenting).

380. *Rasul v. Bush*, 542 U.S. 466, 499 (2004) (Scalia, J., dissenting).

381. *Hamdan*, 548 U.S. at 691 n.6 (Thomas, J., dissenting).

382. *Hamdi*, 542 U.S. at 555 (Scalia, J., dissenting) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131–33 (1765)).

383. One can, of course, argue that deprivation of liberty and deprivation of rights are closely intertwined; the courts must be vigilant to protect against both.

384. See *Rasul*, 542 U.S. at 484. The Detainee Treatment Act and the Military Commissions Act might cut off civil actions, although they appear to be limited to persons held as enemy combatants.

385. See *id.* at 500 (Scalia, J., dissenting).

386. See *Rasul v. Myers*, 512 F.3d 644, 663–65 (D.C. Cir.), *vacated*, 129 S. Ct. 763 (2008) (mem.).

Boumediene established that such persons do possess the right to habeas corpus. When *Myers* came before it on certiorari, the Court granted the petition, vacated the judgment, and remanded the case “for further consideration in light of *Boumediene v. Bush*.”³⁸⁷ Still, it is far from clear that the Court will abandon the prudential-deferential model of *Bivens* when the inevitable war on terror cases come before it. After all, it has spent nearly three decades developing that approach. Given its bows in the direction of national security and the dangers of terrorism, the Court might find appealing a compromise legal regime for the war on terror—a new paradigm, so to speak, in which habeas corpus is a constant, but *Bivens* is not.³⁸⁸ Dissenting in *Boumediene*, Justice Scalia stated that “America is at war with radical Islamists” and argued that the decision “will make the war harder on us. It will almost certainly cause more Americans to be killed.”³⁸⁹ A Court anxious to preserve its political capital—the sort of response that prompted Alexander Bickel’s defense of the political question doctrine³⁹⁰—might be reluctant to take the step from habeas to *Bivens*.

3. The *Bivens* Impasse and Balancing as a Way Out

Looking at the state of *Bivens* in 2009, there is some support for the *Marbury*-rights model, but the prudential-deferential model has prevailed for three decades. The result is an impasse, particularly in war on terror cases: the choice of model largely determines whether the suit proceeds. The *Marbury*-rights model inevitably highlights the importance of judicial vindication of individual constitutional rights (as well as the judiciary’s checking function) and triggers a presumption that the plaintiff should be heard. The prudential-deferential model points with equal strength to a hands-off approach to the war on terror. Echoes of the political question doctrine are clear in such concepts as lack of judicial capacity and the need for unhindered action by the political branches to formulate and execute policy to deal with a grave threat to national security.

The courts will inevitably seek a way out of the *Bivens* impasse as war on terror suits force this choice on them with increasing frequency. They are likely to seek a solution that preserves *Bivens* in some form and is able

387. *Rasul*, 129 S. Ct. 763.

388. Wittes states, “I don’t doubt that the judiciary could open the door just a crack and entertain habeas claims but not others.” WITTES, *supra* note 22, at 116. He raises the prospect that the Court “could hold that detention differs so fundamentally from other exertions of governmental power that the Constitution specifically limits the power of Congress to suspend habeas corpus.” *Id.*

389. *Boumediene v. Bush*, 128 S. Ct. 2229, 2294 (2008) (Scalia, J., dissenting)

390. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 183–98 (1962).

to distinguish between suits that “should” proceed and those that should not. This is a tall order. Courts may try to avoid the impasse by looking for answers outside of *Bivens*, in nonmerits doctrines such as immunity and state secrets, or in approaches to the merits such as “standards that resolve every doubt in favor of the validity of the government’s action.”³⁹¹ Since many war on terror actions will be brought under *Bivens*, however, they cannot avoid confronting the impasse.

4. Balancing—An Illusory Compromise

Some form of balancing might emerge as a potentially attractive compromise. On the plaintiff’s side, for example, the extent of alternative remedies diminishes the need for a judicial one to vindicate the underlying interest. Special factors analysis might be recast as a means of making sure the government’s interest in avoiding litigation is considered. Balancing was certainly explicit in *Wilkie*.³⁹² The Court considered the interests on each side and then weighed reasons for and against what it described as “a workable cause of action.”³⁹³

It is far from clear how much doctrinal impact *Wilkie* will have. Laurence Tribe is highly critical of the Court for “depart[ing] from the presumption of *Bivens* relief . . . into the realm of judicial balancing.”³⁹⁴ He views the Court as having moved into an “unhinged and uncabined balancing inquiry”³⁹⁵ that constitutes a “lawless and arbitrary” enterprise.³⁹⁶ Tribe writes from the perspective of a *Marbury*-rights purist, but a return to that model is far from a sure thing, either in general or in the specific context of the war on terror. It is, however, the case that balancing tests are often criticized for not providing “clear guidance about what behavior is permitted.”³⁹⁷

391. Pushaw, *supra* note 335, at 1199 (proposing a standard in the political question context for “military or foreign affairs decisions that allegedly violate individual legal rights”).

392. Perhaps balancing was already implicit in *Bivens* cases prior to *Wilkie*. See Nichol, *supra* note 41, at 1150 (discussing *Schweiker* as a possible balancing case); Tribe, *supra* note 15, at 67 (same). Balancing was explicit in *McCarthy v. Madigan* on the issue of exhaustion where the Court made an “evaluation of the individual and institutional interests at stake in [the] case.” *McCarthy v. Madigan*, 503 U.S. 140, 152 (1992), *superseded by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, sec. 803(d), § 7(a), 110 Stat. 1321-66, 1321-71 (1996).

393. *E.g.*, *Wilkie v. Robbins*, 551 U.S. 537, 555 (2007).

394. Tribe, *supra* note 15, at 76.

395. *Id.* at 70.

396. *Id.* at 71.

397. Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 646 (1988). McFadden’s view is that balancing tests may resolve the particular litigation before the court, but that they fail “to guide future behavior.” *Id.*

Moreover, balancing seems inconsistent with the concept of justiciability. In the context of war on terror *Bivens* suits, the use of special factors analysis is best seen as a doctrine of justiciability. The resemblance to the political question doctrine reinforces this point. For justiciability purposes, the strength of the plaintiff's claim is not determinative of the structural, separation of powers-based question of whether the courts should hear it at all.

If the prudential-deferential model is reaffirmed in the war on terror context, this can be seen as the result of a generalized balancing. The plaintiff's ability to assert rights is something of a constant as long as the claim is sufficient to survive a motion to dismiss.³⁹⁸ However, the government's interest in untrammelled prosecution of the war on terror would outweigh whatever interests the plaintiff might present. No particularized inquiry into how the war on terror would be affected is necessary or desirable. In a Fourth Amendment surveillance case, the Supreme Court described the operation of balancing in the following terms: "[O]ur task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression."³⁹⁹ In *Bivens* cases, the choice of model takes the competing values into account and answers the problem. The balancing has taken place in the choice. It is the fact that one cannot have it both ways that creates the impasse.

Rejection of balancing means rejection of a filtering device that would, in theory, allow some war on terror *Bivens* suits to proceed. But it is difficult to come up with a test that identifies which ones "should" proceed in light of the constants on both sides. Not only is there no balancing, but also under the prudential-deferential model, issues such as immunity and state secrets will not arise. The suit is dismissed at the threshold. It can certainly be argued that these two defenses—treating the privilege as a defense—lead to more nuanced adjudication in which filtering does take place. Moreover, consideration of the state secrets privilege represents a form of balancing in which one of the government's most important

398. In *Iqbal v. Hasty*, the court of appeals stated in a conditions of confinement case that most of the rights that the Plaintiff contends were violated do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination. The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times. *Iqbal v. Hasty*, 490 F.3d 143, 159 (2d Cir. 2007), *rev'd sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

399. *United States v. U.S. Dist. Court*, 407 U.S. 297, 314–15 (1972).

interests in protecting the war on terror is considered. Using *Bivens* as a wholesale dismissal device sweeps too broadly, insulates the executive branch, and prevents adjudication of some of the most important constitutional issues of our time. My response to these arguments is twofold. First, a workable balancing test for special factors analysis seems hard to devise. For example, how would courts measure the importance to the war on terror of particular governmental measures? Any such inquiry, like that in *Padilla v. Yoo*, raises issues of judicial intrusiveness and of close scrutiny of war on terror decisions through highly case-specific analysis. The prudential-deferential model asks whether the defendant's actions are plausibly viewed as part of the government's antiterrorism efforts. If so, a special factor is present. Second, adoption of a balancing test seems to require a presumption of the availability of relief. Rather than a compromise "third way" approach, this seems essentially a thinly disguised adoption of the *Marbury*-rights model.

A final word on balancing is in order given this Article's focus on the war on terror. The concept plays a central role in Judge Richard Posner's recent book *Not a Suicide Pact*.⁴⁰⁰ Posner discusses balancing extensively, although not in the specific context of *Bivens* actions. His central thesis is that courts must permit civil liberties to "vary with the threat level."⁴⁰¹ "In times of danger, the weight of concerns for public safety increases relative to that of liberty concerns, and civil liberties are narrowed."⁴⁰² Posner's analysis specifically calls for balancing and invokes an analytical approach based more on flexible standards than on rules.⁴⁰³ Does Posner's analysis strengthen the case for balancing as a way out of the *Bivens* impasse in the context of the war on terror? In this specific context, his thesis points in the same direction as the prudential-deferential model, with the war on terror viewed as a special factor. As a result, Posnerian balancing would make no difference. On a more general level, it is helpful to see current *Bivens* doctrine as essentially one of justiciability. Posner's view of varying rights seems to be aimed more at merits questions and similar issues. It may, for example, have an important role to play in non-*Bivens* cases, such as determining the validity of governmental surveillance on a motion to suppress evidence in a criminal trial.

400. RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006).

401. *Id.* at 7.

402. *Id.* at 9.

403. *See, e.g., id.* at 31, 35, 39, 41. For a critique of Posner, see Lobel, *supra* note 205, at 1435–38.

Of course, it would be possible to revert to the *Marbury*-rights model (so that the plaintiff presumptively gets heard) and apply Posner's approach to the merits (so that the plaintiff almost always loses).⁴⁰⁴ I am not sure that this is a substantial step beyond the current *Bivens* impasse. Posner's analysis does help us see that at the root of the prudential-deferential model is a form of balancing, even if it will probably be applied as a rule of justiciability in the war on terror. We can see more clearly what is going on, but the impasse is still there. Courts must still choose between the two conflicting models, and the choice of model resolves the case. Just as balancing is not the answer, it may be that the courts are not the place to look for it.

V. THE ROLE OF CONGRESS—ALTERNATIVES TO *BIVENS*

The general arguments for congressional action in war on terror issues certainly apply in the specific context of the *Bivens* impasse. The war on terror will generate a large number of constitutional claims. The notion that the legal system will not even grant a hearing to apparent victims such as Maher Arar is troubling. For many, it runs counter to deeply held notions of justice. Yet a broad range of war on terror *Bivens* suits certainly presents the risk that Wittes invokes: a regime "in which legalisms pervasively hamper governmental pursuit of a goal that nearly all Americans support"⁴⁰⁵—in other words, a regime of counter-counter-terrorism via lawsuit. Absent legislation, the issue will ultimately be decided by the Supreme Court.⁴⁰⁶ Since balancing is not a realistic option, the Court will be forced to confront the impasse and decide which model prevails in war on terror litigation.

Let us proceed from the premise that Congress *should* act. *Can* it act to resolve the *Bivens* impasse? The answer will depend, for some, on which way it tilts. Advocates of a strong judicial role in rights enforcement⁴⁰⁷ will contend that only a legislative endorsement of the *Marbury*-rights model will pass constitutional muster. Yet even the original *Bivens* decision

404. This would be somewhat similar to Pushaw's suggested deferential approach to individual rights cases posing political questions. Deference is not automatic victory for the government, but it does seem to come close.

405. WITTES, *supra* note 22, at 150.

406. In its present posture, *Arar* is a strong candidate. One can expect a sharply divided decision from the en banc Second Circuit.

407. *See generally* Bandes, *supra* note 15 (developing the notion of a self-executing Constitution). The view of Pfander and Baltmanis that Congress has effectively ratified the *Bivens* remedy permits analysis to stop short of the notion of a self-executing Constitution. *See, e.g.*, Pfander & Baltmanis *supra* note 15 (manuscript at 30) ("Congress has now ratified the *Bivens* remedy . . .").

clearly contemplated a superior role for Congress that is inconsistent with the notion of a constitutional command automatically accompanied by judicial enforcement. The second exception indicated the Court would defer to an “explicit congressional declaration that persons injured by a federal officer’s violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.”⁴⁰⁸ The first exception—“special factors counselling hesitation in the absence of affirmative action by Congress”⁴⁰⁹—apparently contemplated the possibility of some supervening congressional role as well. The Court’s development of the first exception, including the conflation of the second with it, is based on notions of legislative superiority. Moreover, the conceptual view of *Bivens* as federal common law⁴¹⁰ reinforces Congress’s ability to act, whether by choosing the *Marbury*-rights model or a different approach.

At this point, I wish to explore possible legislative approaches. Congress certainly could choose the *Marbury*-rights model, in part based on the view that the Court has moved too far in the opposite direction. Thus, we might see a counterpart to § 1983 for federal officials—a true analogue that could include redress for statutory as well as constitutional violations.⁴¹¹ Such a statute could deal with ancillary matters, such as indemnification and attorney’s fees.⁴¹² The courts would have to grapple with a host of interpretative questions, including the extent to which the new statute incorporated the existing body of § 1983 law, which is quite extensive, and the status of existing *Bivens* precedents. The state secrets privilege—not present in § 1983 suits—would be a problem. However, the principal issue would be one of policy: Does Congress wish to choose the *Marbury*-rights model in the face of the burdens it places on the war on terror? Is there a different, and better, way out of the impasse?

I think there is in the form of entity liability. In the context of torture, Seamon makes the case for entity liability as follows:

[T]he United States should be civilly liable for at least some torture inflicted by people acting under color of federal law. That belief rests on the view . . . that torture typically results from systemic problems; it is

408. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

409. *Id.* at 396.

410. See generally Monaghan, *supra* note 189 (discussing the concept of “constitutional common law subject to amendment, modification, or even reversal by Congress”).

411. See Seamon, *supra* note 7, at 803.

412. See 42 U.S.C. § 1988(b) (2006) (providing for the award of attorney’s fees).

seldom the sole result of “a few bad apples.” It is therefore fair for the system to bear responsibility for the torture. Awards of money judgments in civil actions are an appropriate way to hold the government responsible for torture. They compensate torture victims (to the extent their injuries are compensable). They symbolically represent the United States’ acknowledgement of responsibility, as determined by an independent judiciary. And, the threat of civil liability may encourage the government to adopt measures to prevent torture by its officials.⁴¹³

The same point can be made generally with respect to collateral damage from the war on terror.⁴¹⁴ The drafting of a statute to achieve this goal presents several challenges. I will assume that one of the problems with *Bivens* in its present form is the imposition of individual liability, despite Pillard’s analysis that “[t]he federal government has become the real defendant party in interest in *Bivens* litigation.”⁴¹⁵ Certainly the Court has proceeded on the assumption of individual liability. One approach to an entity liability statute is to build on § 1983. Seamon proposes a statute that would be substantially identical to it and would establish a cause of action against “persons.”⁴¹⁶

Entity liability would come in through an analogy to § 1983’s precept that local governments are liable for customs or policies that cause constitutional violations.⁴¹⁷ This proposal retains individual liability, which can be criticized on the classic grounds of effect on individual zeal and judicial supervision of war on terror policies via tort suits. More to the point, it seems an indirect method of establishing entity liability. A statute that comes out and says what it is doing probably stands a better chance of achieving its goals than one that relies on indirection and judicial adoption of policies established in another context.⁴¹⁸

413. Seamon, *supra* note 7, at 759–60 (footnotes omitted).

414. Thomas Madden and his colleagues made this point in 1983, before liability issues focused on the war on terror:

Most observers believe, and we agree, that to most effectively serve the primary goals of compensation, deterrence, and fairness in dealing with alleged constitutional violations by federal officials, and to afford a solution to the problems perceived to flow from the current system of individual liability, Congress should replace liability of individual officials with governmental liability for constitutional wrongs done in the public’s name.

Thomas J. Madden, Nicholas W. Allard & David H. Remes, *Bedtime for Bivens: Substituting the United States as Defendant in Constitutional Tort Suits*, 20 HARV. J. ON LEGIS. 469, 475 (1983).

415. Pillard, *supra* note 22, at 67. Pillard appears to concede that litigation has some effect on the defendant officials. *Id.* at 97 n.137. Moreover, a new administration could change policies on such matters as indemnification.

416. See Seamon, *supra* note 7, at 759.

417. See *id.* at 760.

418. This should not be taken as a criticism of Seamon’s excellent article, probably the definitive work on the subject. His preference for building on § 1983 is certainly understandable given the

An alternative approach is to build on the existing system of compensation for government wrongs: the FTCA.⁴¹⁹ Writing in the context of the war on terror, one commentator states that “Congress should substitute the United States as the proper defendant in constitutional tort actions. The amendment to the FTCA would expand the statute’s waiver of sovereign immunity to make the United States liable in money damages for constitutional torts committed by its employees.”⁴²⁰ Under current law, the “FTCA’s incorporation of state tort law limits recovery against the government for tort-like violations of individual constitutional rights to situations in which state law recognizes an analogous negligent or intentional tort.”⁴²¹

Amending the FTCA has the advantage of directness, but it brings with it a host of problems, particularly in the context of war on terror *Bivens* suits. For example, as Seamon points out, the Act contains exceptions both for combatant activities and for claims arising in a foreign country.⁴²² Most problematic is the “discretionary function” exception.⁴²³ The general view is that “[a]n FTCA claim will not lie for ‘an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid.’”⁴²⁴ The Supreme Court has stated that it was not the purpose of Congress to test constitutional issues through tort suits.⁴²⁵ Thus,

numerous problems he identifies with using the FTCA, discussed immediately below. Moreover, the concept of combining individual and entity liability is in harmony with the views expressed by the Court in *Carlson*. At this point, it makes sense to keep all legislative options on the table. A recent comment states that:

If courts continue to dismiss torture lawsuits under existing law, Congress could create a cause of action against government officials by amending the [Torture Victims Protection Act] so that it imposes liability for torture committed under domestic U.S. law. Alternatively, to allow suits against the U.S. government, it could amend the FTCA or create a federal analogue to the civil rights statute, [§ 1983]

Developments in the Law—Access to Courts, 122 HARV. L. REV. 1158, 1166–67 (2009).

419. 28 U.S.C. § 1346(b) (2006).

420. Note, *New Life for a Good Idea: Revitalizing Efforts to Replace the Bivens Action with a Statutory Waiver of the Sovereign Immunity of the United States for Constitutional Torts Suits*, 71 GEO. WASH. L. REV. 1055, 1065 (2003).

421. JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 1124 (5th ed. 2003).

422. See Seamon, *supra* note 7, at 732–37. It has been stated that “the morass of FTCA exceptions is likely to swallow most possible torture claims.” *Developments in the Law*, *supra* note 418, at 1160.

423. 28 U.S.C. § 2680(a).

424. PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, *GELLHORN AND BYSE’S ADMINISTRATIVE LAW* 1279 (10th ed. 2003) (quoting 28 U.S.C. § 2680(a)).

425. See *Dalehite v. United States*, 346 U.S. 15, 27–30 (1953). See also Seamon, *supra* note 7, at 749 (discussing the discretionary function exception and raising the possibility that lower-level officials would be liable, but not high-level policymakers).

an approach that builds on the FTCA will encounter a number of problems in the war on terror context, although careful drafting can perhaps resolve some of them. Indeed, building on the existing FTCA structure without taking into account the numerous pitfalls could result in removing individual liability without substituting entity liability. How to preserve the presumed deterrent effect of *Bivens* raises a further issue.⁴²⁶ Finally, it should be noted that the FTCA is a complex statute that has generated a complex body of law. Amending it to deal with the war on terror may have serious unintended consequences in other areas.⁴²⁷

The two approaches to entity liability discussed above are certainly possibilities for Congress to consider if it seeks a way out of the *Bivens* impasse. Either approach, admittedly, leaves unresolved the problem of judicial intrusion on the policies and operational aspects of the war on terror. After all, judgment for the plaintiff would rest on a finding of unconstitutional action by one or more government officials. A partial response is to cap the amount of damages allowable. The plaintiff would get some relief and the government would avoid what the Court called, in denying a *Bivens* action against a federal agency, “a potentially enormous financial burden.”⁴²⁸ Paying for collateral damage would become part of the cost of waging the war on terror.

Let us consider, however, two alternatives. The first is to make hearing *Bivens* claims part of the jurisdiction of any new national security court. There have been a number of proposals for such a court, centered on detention and related issues.⁴²⁹ Such a court, however, might develop a broad range of expertise in matters related to terrorism. For example, Chesney has suggested that suits that would otherwise be dismissed on state secrets privilege grounds could be transferred “to a classified judicial forum for further proceedings.”⁴³⁰ Of course, any such approach still raises

426. See Madden et al., *supra* note 414, at 471 (recommending the “establishment of an independent administrative disciplinary board”).

427. Other issues may arise. Pre-war on terror efforts to substitute the FTCA for *Bivens* founded on the issue of immunity for the government if the individual would be immune. See *id.* at 479–86.

428. *FDIC v. Meyer*, 510 U.S. 471, 486 (1994).

429. See, e.g., Amos N. Guiora, Opening Statement, *Suspected Terrorists: Domestic Terror Courts Are Waiting!*, 156 U. PA. L. REV. PENNUMBRA 357 (2008); Neal Katyal, *A National Security Court: Not Now, Not Yet*, GEO. SEC. L. COMMENT., Oct. 1, 2008, available at <http://www.securitylawbrief.com/commentary/2008/10/a-national-secu.html> (“[T]here are literally hundreds of different models from which to choose . . .”).

430. Chesney, *supra* note 216, at 1313. Indeed, Jack Goldsmith has stated that “[o]thers might want a national security court to examine other areas of law, such as those civil cases in which the ‘state secrets’ privilege is invoked to block litigation.” Jack Goldsmith, *Long-Term Terrorist Detention and Our National Security Court* 15 n.45 (Feb. 9, 2009) (unpublished manuscript, on file with the Brookings

the issue of judicial pronouncements on war on terror policies.

Perhaps courts are not the answer. Both the Association of the Bar of the City of New York and Human Rights Watch have recommended the establishment of a compensation system outside the judicial process.⁴³¹ The Bar Association states that

a system can be devised that would compensate victims of torture and cruel or inhuman treatment, while deterring the initiation of frivolous claims and minimizing evidentiary problems inherent in protecting state secrets. An independent administrative agency to handle such claims could develop an expertise in the handling of such claims; pleading standards and procedures for summary dismissal might be developed to weed out frivolous claims; costs could be imposed for claims that prove to have been filed without a reasonable basis; procedures to address the government's invocation of the state secrets privilege could be adopted . . . and liability could be limited to the United States, thereby excluding damage claims against individual personnel.⁴³²

There are a variety of nonjudicial options for Congress to consider. In addition to the claims commission model, there is considerable interest in the possibility of a congressionally created "Truth and Reconciliation Commission,"⁴³³ which would examine U.S. war on terror policies. Its mandate might include awarding compensation to innocent victims of those policies.⁴³⁴ Thus, there are a number of legislative options. In line with Wittes's view, I look to Congress for a way out of the impasse. Yet one must recognize that Congress may do nothing, leaving matters in the hands of the courts. As the analysis in this Article suggests, there are strong arguments for both models, reflecting the duality of the original *Bivens* decision. Ultimately a case like *Arar* will reach the Supreme Court. One can predict a split decision, but not much more than that. If the Court leaves matters where they are—adhering to the prudential-deferential

Institution), available at http://www.brookings.edu/~media/Files/rc/papers/2009/0209_detention_goldsmith/0209_detention_goldsmith.pdf.

431. See ASS'N OF BAR OF CITY OF N.Y., REAFFIRMING THE U.S. COMMITMENT TO COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS 49 (2008); HUMAN RIGHTS WATCH, FIGHTING TERRORISM FAIRLY AND EFFECTIVELY 22 (2008).

432. ASS'N OF BAR OF CITY OF N.Y., *supra* note 431, at 49.

433. See *Developments in the Law*, *supra* note 418, at 1168 (noting the Truth and Reconciliation Commission in South Africa). After rejecting "sweeping civil and criminal liability for Bush administration officials," Peter Margulies states that "[a] bipartisan truth commission focused on transparency, not blame, would better serve American interests. As in all responses to the Bush administration's excesses, the politics of pay-back should bow to the imperative of problem-solving." Margulies, *supra* note 295, at 7.

434. See *Developments in the Law*, *supra* note 418, at 1168.

model—Congress seems unlikely to act. The contrary result—exposing American officials to counter-counter-terrorism via lawsuit—seems more likely to provoke action. Ironically, the best way to get Congress to provide something other than the *Marbury*-rights model is for the Court to adopt it.

VI. CONCLUSION

There is no ideal solution to the issues raised in this Article. The war on terror will increasingly generate suits by terrorism suspects who seek damages for the governmental conduct to which they have been subjected. Many of these suits will be based on the *Bivens* doctrine, which permits damages actions for constitutional torts committed by federal officials. This Article contends that the *Bivens* doctrine exists in two forms: the *Marbury*-rights model and the prudential-deferential model. The former focuses on the plaintiff and points toward allowing the suit to proceed. The latter focuses on the subject matter and leads to emphasis on protecting the government. It has become a form of justiciability doctrine, closely related to the political question doctrine, and has prevailed since the 1980s.

War on terror *Bivens* plaintiffs face obstacles, but they are not insurmountable. The Supreme Court's recent habeas corpus cases in the context of the war on terror have emphasized a heightened judicial role in protecting individual rights. One cannot say which model the Court will choose. *Bivens* represents an impasse: a difficult, if not impossible, choice between abandoning judicial protection of constitutional rights in order to shield the war on terror and judicial oversight of the war on terror via tort suits in order to protect those rights. The difficulty of the choice also reflects the deep division within our society over how to strike the balance between individual liberty and national security.

This Article contends that in the context of the war on terror judicial application of the prudential-deferential model makes the most sense. Intrusion via tort suits on the difficult policy choices involved presents a high risk, and it is questionable whether “the civil courts may provide a kind of alternate truth commission, through the process of legal discovery.”⁴³⁵ Moreover, the ability to bring a *Bivens* action has never been

435. Schwartz, *supra* note 203. I admit that my optimal solution is at variance with the view of the constitutional order put forward by Fallon and Meltzer in Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991). I favor compensation, but not necessarily from a court. This is at variance with what they refer to as the “*Marbury* principle” of remediation by a court “for all constitutional violations,” an aspirational goal that the system will not always achieve. *Id.* at 1778–79. They view as even more important “an overall system of remedies that is effective in maintaining a regime of lawful government.” *Id.* at 1779. In the

an absolute right, or anything close to it. Still, Congress can and should take the legal system beyond the impasse. Entity liability has the potential of compensating victims while protecting the war on terror from death by lawsuit. It is far from clear that Congress will act. Perhaps the Court will force its hand.⁴³⁶

war on terror context, my approach looks to the possibility of the political branches policing themselves to some extent. Obviously, there would still be lawsuits of many different kinds, both by and against the government (and its officials), which would raise constitutional issues. *Bivens* suits, however, would not be among them. Those who disagree with the views put forth in this Article are likely to view *Bivens* suits as essential *both* for remediation *and* as a constitutional check on the political branches. In the latter capacity, they can be seen as using the courts to provide an important accountability mechanism; apart from plaintiffs' status as wronged individuals, they function as private attorneys general. See Zaring, *supra* note 22, at 366.

436. See Stephen I. Vladeck, *Rights Without Remedies: The Newfound National Security Exception to Bivens*, 28 A.B.A. NAT'L SECURITY L. REP., July 2006, at 1, 5 ("Congress, as the instrument of popular sentiment, is the least likely to look out for the rights of those swept up in the proverbial dragnet, and is the least willing to create remedies for constitutional violations to the news of which we have become too accustomed."). Vladeck is strongly critical of the lower courts' decisions in *Arar*. The same issue of the REPORT contains a defense of *Arar* by Julian Ku. See Julian Ku, *Why Constitutional Rights Litigation Should Not Follow the Flag*, 28 A.B.A. NAT'L SECURITY L. REP., July 2006, at 1.

