
ARTICLES

ARE DAMAGES DIFFERENT?: *BIVENS* AND NATIONAL SECURITY

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ABSTRACT

Litigation challenging the national security actions of the federal government has taken a seemingly paradoxical form in recent years. Prospective coercive remedies like injunctions and habeas corpus (a type of injunction) are traditionally understood to involve much greater intrusions by the judiciary into government functioning than retrospective money damages awards. Yet, federal courts have developed and strictly applied doctrines barring Bivens damages actions against federal officials because of an asserted need to preserve the prerogatives of the political branches in national security and foreign affairs. At the same time, the courts have been increasingly assertive in cases involving coercive remedies, especially habeas, that have dramatically impacted post-9/11 national security policies. Additionally, federal courts, particularly the Supreme Court, are increasingly willing to rule against the executive in cases concerning justiciability and judicial power.

To date, the limitations on Bivens have been subject to nearly

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universal criticism. In contrast, this Article sympathetically explores why the courts have taken this apparently paradoxical approach to litigation concerning alleged official wrongdoing in the national security and foreign affairs contexts. Two long-term trends, not unique to national security and foreign affairs cases, help explain why damages are disfavored. First, the increasing role that judicial supremacy plays in the Court's self-conception means that law declaring in published opinions is often seen as an adequate substitute for individualized dispute resolution and redress. Second, and related, Congress's and the Court's preferred legal method for holding the executive accountable to the law has shifted from tort suits tried to juries to coercive remedies deployed by judges.

There are also reasons for disfavoring damages that are largely unique to national security and foreign relations contexts. If suits seeking damages were routinely available in these kinds of cases, there would likely be unique discovery burdens and complications; a greatly expanded pool of potential plaintiffs and hence many more suits filed than at present; less ability for the executive to moot disruptive litigation; and, in this expanded number of lawsuits, difficult and consequential decisions about whether to extend robust constitutional protections developed for domestic, peacetime contexts to the very different worlds of military, intelligence, and other security activities. Though the empirical basis for this judgment is disputed, the Court is convinced that damages suits cause "overdeterrence"; and it seems particularly concerned about this in foreign affairs and national security contexts where the executive's flexibility, vigor, and decisiveness are thought most desirable. In addition, the Court might be reluctant to allow Bivens suits in national security and foreign affairs cases because there is an increasing array of other mechanisms, including many nonjudicial ones, to ensure executive compliance with the law, making the costs of Bivens suits perhaps seem unjustifiably high. Taken together, these factors help explain why the Court's modern assertiveness is expressed primarily in suits seeking coercive rather than money damages remedies.

The bar on Bivens in national security and foreign affairs contexts has real costs, as it sacrifices redress and compensation for wronged individuals, and, arguably, deterrence of executive lawbreaking. This Article concludes by suggesting that an administrative compensation scheme could allow wronged individuals to receive some redress while avoiding many of the complications of a Bivens suit.

I. INTRODUCTION

In recent years, federal courts have repeatedly dismissed suits seeking money damages against government officials allegedly responsible for the most controversial aspects of the United States' post-9/11 conflicts and counterterrorism policies. The dismissed cases were brought against senior federal officials such as the Secretary of Defense, Attorney General, FBI director, and Chairman of the Joint Chiefs of Staff for their alleged involvement in extraordinary rendition leading to torture in Syria, military detention of alleged terrorists without judicial review in the United States and at Guantanamo Bay, and interrogation abuses in the United States, at Guantanamo, in Iraq (at Abu Ghraib prison and elsewhere) and Afghanistan (at Bagram and Kandahar detention facilities and elsewhere).¹

Five of the federal circuit courts have held in these cases that it is inappropriate to authorize a *Bivens*² damages remedy against federal officials in suits involving sensitive national security or foreign relations issues, even when the plaintiff had no other effective remedy for the allegedly unconstitutional conduct of the U.S. government. In other words, the courts imposed a broad and perhaps categorical bar on seeking money damages against federal officials in suits challenging the constitutionality of significant national security or foreign relations activities.

These five circuit courts emphasized a number of different considerations, including separation of powers, namely that the Constitution allocates nearly plenary control over most aspects of the military, war-fighting, foreign affairs, diplomacy, and intelligence matters

1. *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc) (suit against the Secretary of Defense alleging that he approved or tolerated policies and practices that led to the torture by the U.S. military of two U.S. citizen security contractors working in Iraq during the postwar insurgency); *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012) (suit against the Secretary of Defense alleging that he approved the plaintiff's unjustified detention as a security threat and mistreatment in military custody in Iraq during the postwar insurgency); *Mirmehdi v. United States*, 689 F.3d 975 (9th Cir. 2012) (suit by Iranian nationals alleging that U.S. FBI and immigration agents lied about their ties to the terrorist group MEK to obtain their predeportation detention); *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012) (suit against the Secretary of Defense and other national security officials brought by a U.S. citizen, Jose Padilla, and his mother, challenging his designation and detention in the U.S. as an enemy combatant, and mistreatment suffered in custody); *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) (suit against the Secretary of Defense and senior Army officers by Afghan and Iraqi nationals challenging their mistreatment at U.S. military prisons in those countries during wartime); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc) (suit brought by a dual citizen of Syria and Canada against the Attorney General, the FBI director, and other officials concerning his extraordinary rendition from the U.S. to Syria where he was allegedly tortured); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) (suit against the Secretary of Defense and other national security officials, challenging the military detention and alleged mistreatment of foreign nationals at Guantanamo Bay).

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

to Congress and the President;³ comparative lack of judicial competence to assess legal and policy issues in these fields;⁴ caution about courts declaring constitutional rules that will limit or overrule the policy judgments of the executive and Congress in the complex and rapidly changing environment of national security or interfere with relations with foreign countries;⁵ concern that officials would be overdeterred by the threat of individual damages liability and thus fail to take aggressive, decisive actions necessary to keep the country safe;⁶ concerns about judicial manageability and improper disclosure of sensitive or classified information;⁷ and caution when a suit challenges how civilian or military commanders supervise and deploy the military establishment, especially in a war zone.⁸

The courts had to decide whether to allow damages suits in these cases because, in instances of alleged wrongdoing by federal officials, there has never been a statutory equivalent to 42 U.S.C. § 1983, which authorizes money damages suits against state and local officials for their constitutional torts.⁹ As a result, the Supreme Court was asked, and in the 1971 *Bivens* case, agreed, to recognize a judicially implied cause of action and money damages remedy against federal officials under the Constitution itself, in a case against federal narcotics officers who allegedly violated the Fourth Amendment.¹⁰ How far this right to sue should extend has become very

3. *Doe*, 683 F.3d at 394, 395; *Lebron*, 670 F.3d at 548–50; *Arar*, 585 F.3d at 575, 578.

4. *Vance*, 701 F.3d at 199–200; *Doe*, 683 F.3d at 395; *Lebron*, 670 F.3d at 548, 549; *Arar*, 585 F.3d at 575, 578.

5. *Doe*, 683 F.3d at 395–96; *Mirmehdi*, 689 F.3d at 982; *Arar*, 585 F.3d at 580–81; *Rasul*, 563 F.3d at 532 n.5. *See also* *Arar v. Ashcroft*, 532 F.3d 157, 181–82 (2d Cir. 2008), *aff'd* 585 F.3d 559 (2d Cir. 2010) (en banc).

6. *Doe*, 683 F.3d at 395, 396; *Ali*, 649 F.3d at 773; *Arar*, 585 F.3d at 578–79.

7. *Doe*, 683 F.3d at 395; *Mirmehdi*, 689 F.3d at 983; *Arar*, 585 F.3d at 576, 578. *See also* *Arar*, 532 F.3d at 181, *aff'd* 585 F.3d 559 (2d Cir. 2010) (en banc); *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008).

8. *Vance*, 701 F.3d at 199–200; *Doe*, 683 F.3d at 395.

9. 42 U.S.C. § 1983 (2012).

10. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394–97 (1971). *Bivens* both recognized a “cause of action” to sue directly under the Fourth Amendment and also held that the Constitution and the general federal question jurisdiction statute gave the judiciary authority to supply money damages as a “remedy.” *Id.* at 389, 396, 397. *See also* *Davis v. Passman*, 442 U.S. 228, 233–34 (1979) (explaining that *Bivens* involves two analytically distinct questions—about a cause of action and a remedy). But the Court generally does not distinguish between these concepts, and in fact, uses them interchangeably, often within the same opinion. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (describing *Bivens* as concerning both “an implied private action for damages” and “implied damages remedy”); *Bush v. Lucas*, 462 U.S. 367, 367, 374 (1983) (describing *Bivens* as both “a private cause of action for damages” and “a nonstatutory damages remedy”). Because the Court uses the terms interchangeably, because the *Bivens* cause of action is defined by the remedy sought, and because it would be unwieldy to say both “remedy” and “cause of action,” whenever I refer to *Bivens*, I

controversial.

Many commentators have decried the refusal by the courts of appeals in the post-9/11 cases to allow a *Bivens* damages remedy as being unfaithful to Supreme Court doctrine, tantamount to judicial abdication of the checking and balancing function, a dangerous failure to deter unconstitutional conduct by the executive, an unfair refusal to compensate some plaintiffs who were indisputably injured, and a departure from a presumed norm of allowing courts to choose an appropriate remedy to right every unconstitutional wrong.¹¹ Steve Vladeck, for example, has strongly criticized what he calls a “national security exception to *Bivens*” adopted by the courts of appeals,¹² as have other critics in legal academia, the media and at advocacy groups.¹³

I share some of the concerns expressed by the critics of these *Bivens*

too will use the terms interchangeably. I beg the forgiveness of any federal courts purists who might find this troublingly imprecise.

11. See, e.g., Editorial, *A National Disgrace*, N.Y. TIMES (Nov. 11, 2009), <http://www.nytimes.com/2009/11/11/opinion/11wed1.html> (calling the Second Circuit’s decision in *Arar*, “insensitive to the violation of [Arar’s] rights and the courts’ duty to hold government accountable for breaches of the law,” and claiming that “[t]he ruling distorts precedent and the Constitutional separation of powers to deny justice to Mr. Arar and give officials a pass for egregious misconduct”).

12. Stephen I. Vladeck, *Rights Without Remedies: The Newfound National Security Exception to Bivens*, 28 A.B.A. NAT’L SEC. L. REP. 1, 1, 4–5 (2006). See also Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1330 (2012) [hereinafter Vladeck, *Canon*]; Stephen I. Vladeck, *National Security and Bivens After Iqbal*, 14 LEWIS & CLARK L. REV. 255, 258–59 (2010) [hereinafter Vladeck, *After Iqbal*] (arguing that post-9/11 decisions are “inconsistent with the animating principles behind *Bivens*” and that “the Court completely missed the opportunity to clarify why national security concerns might actually counsel in favor of liability, rather than against it”); Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 511 (2013) (arguing that the courts of appeals “improperly combine[d] two problematic features” when determining whether to allow a *Bivens* action, and that the courts’ “conceptualization of the *Bivens* question as ‘*Bivens* or nothing’ is decidedly at odds with the way the Supreme Court understood the *Bivens* question in *Bivens* itself”).

13. See, e.g., Anya Bernstein, *Congressional Will and the Role of the Executive in Bivens Actions: What is Special About Special Factors?*, 45 IND. L. REV. 719, 720 (2012) (describing courts’ misrecognition of the special factors analysis in *Bivens* cases as having led to “incongruous opinions”); Gwynne L. Skinner, *Roadblocks to Remedies: Recently Developed Barriers to Relief for Aliens Injured by U.S. Officials, Contrary to the Founders’ Intent*, 47 U. RICH. L. REV. 555, 622–26 (2013) (noting the modern departure from the founders’ original intent regarding remedies available for foreign citizens, and arguing that the original intent is still relevant today); Jonathan Hafetz, *Torture, and Impunity in US Courts*, ALJAZEERA.COM, <http://www.aljazeera.com/indepth/opinion/2012/01/20121307159326319.html> (last modified Jan. 30, 2012) (characterizing the Fourth Circuit’s decision in *Lebron v. Rumsfeld* as “troubling” because, among other things, it “threatens core freedoms protected by the constitution”); Ben Wizner, *A Question for America About Torture*, ACLU BLOG OF RIGHTS (Apr. 23, 2012), <http://www.aclu.org/blog/human-rights-national-security/question-america-about-torture> (arguing that the victims of torture have been denied their day in court).

decisions.¹⁴ But the academic debate, to date, has been almost uniformly critical of the limitations on *Bivens*,¹⁵ and thus has failed to illuminate some important questions about the role of remedies in litigation against government officials in the national security area. Almost no effort has been made to sympathetically explain, much less defend, the bar on *Bivens* in national security and foreign affairs cases.

The refusal to allow the *Bivens* damages remedy in post-9/11 national security cases is both more and less exceptional than critics to date have recognized. Nearly thirty years ago, the Supreme Court rejected the claim that the U.S. Attorney General should have absolute immunity from a *Bivens* suit for actions taken in what the executive asserted was a national security matter.¹⁶ But since then, *Bivens* has been so heavily disfavored by the Supreme Court in nearly every context, as have money damages remedies more generally, that today, there is almost de facto immunity from suit because a cause of action for *Bivens* is rarely available. Thus, the results in the recent national security *Bivens* cases are less exceptional than some suggest because by now, it no longer seems accurate to say that there is a specific “national security exception” to *Bivens*. In a wide range of putative *Bivens* suits involving both ordinary domestic and military subjects, the Justices of the Supreme Court have limited *Bivens* to the very few claims and contexts their predecessors approved in an initial burst of enthusiasm over thirty years ago—primarily those involving domestic law enforcement and prison administration.¹⁷

But the refusal to allow *Bivens* damages remedies in these national security cases is exceptional in another sense: the Supreme Court has arguably never been more assertive in adjudicating national security and

14. See Andrew Kent, *Just Don't Ask for Money: Why Won't Courts Ever Award Damages to the Victims of Drone Strikes?*, SLATE (July 23, 2012), www.slate.com/articles/news_and_politics/jurisprudence/2012/07/anwar_al_awlaki_suit_courts_should_award_damages_in_national_security_cases.html (arguing that it should be easier for plaintiffs to seek compensation for wrongs done by government officials than to get an injunction).

15. For one of the few examples of academic discussion of the *Bivens* national security cases that is not entirely critical of the courts of appeals' decisions, see Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195, 218–20 (2010).

16. *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985).

17. See *infra* Part II. The Court has approved only two types of *Bivens* claims in addition to the Fourth Amendment claim in *Bivens* itself: claims under the equal protection component of the Due Process Clause of the Fifth Amendment alleging gender-based employment discrimination by a member of Congress, *Davis v. Passman*, 442 U.S. 228, 228–29 (1979), and inmates' claims under the Eighth Amendment's ban on cruel and unusual punishment against federal prison officials, *Carlson v. Green*, 446 U.S. 14, 18–23 (1980). See also *Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc) (describing the two contexts in which the Court extended *Bivens* claims).

foreign relations issues than it has in recent years. The last decade saw the executive lose (or have its legal arguments offered as *amicus curiae* rejected) time after time in Supreme Court cases concerning questions of judicial power and justiciability in foreign relations and national security contexts.¹⁸ In the most high profile of these cases, the ones concerning the post-9/11 war on terror, the Court emphatically asserted its authority and rejected or ignored the notion that deference to the executive was appropriate because of the national security or foreign affairs dimensions of

18. See, e.g., *Republic of Arg. v. NML Capital Ltd.*, 134 S. Ct. 2250, 2258 (2014) (rejecting the executive's argument as *amicus curiae* that considerations of international comity counseled against court-facilitated discovery of a sovereign's assets); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1424–25 (2012) (rejecting the executive's argument that challenge to its refusal on Article II grounds to comply with a congressional statute regarding U.S. passports and the status of Jerusalem was a nonjusticiable political question); *Bond v. United States*, 131 S. Ct. 2355, 2360 (2011) (rejecting the executive's argument that the plaintiff lacked standing to raise a federalism challenge to a treaty); *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008) (holding unconstitutional a congressional statute stripping jurisdiction over habeas petitions of persons detained by the executive at Guantanamo Bay as alleged enemy combatants); *Medellín v. Texas*, 552 U.S. 491, 497–99 (2008) (holding that the President lacked authority to order state courts to reconsider criminal convictions that, according to a decision of the International Court of Justice, violated defendants' treaty-based rights); *Hamdan v. Rumsfeld*, 548 US 557, 566–67 (2006) (holding that the executive's military commission violated statutes and international law); *Rasul v. Bush*, 542 U.S. 466, 470, 483–85 (2004) (rejecting the executive's argument that habeas statute did not reach persons detained as enemy combatants at Guantanamo Bay); *Zadvydas v. Davis*, 533 U.S. 678, 687–88, 699–700 (2001) (holding that the court had jurisdiction over habeas petitions challenging postremoval period detention and that an indefinite detention under immigration statutes of an alien deemed removable but who lacked a country willing to accept him was unconstitutional); *INS v. St. Cyr*, 533 U.S. 289, 300–05, 314 (2001) (rejecting the executive's arguments and construing a statute to allow judicial review via habeas of an alien subject to deportation because a withdrawal of habeas jurisdiction would raise serious constitutional questions under the Suspension Clause).

Other important cases about judicial power or justiciability in foreign affairs and national security contexts can be counted as partial losses for the executive. See, e.g., *Munaf v. Geren* 553 U.S. 674, 685–88, 705 (2008) (rejecting the executive's argument that the federal courts had no jurisdiction over the habeas petition from a detainee in Iraq, but vacating injunction entered by the lower court against the executive); *Hamdi v. Rumsfeld*, 542 U.S. 507, 516–17, 526–27 (2004) (agreeing with the executive that it had authority to detain a U.S. citizen as enemy combatant, but rejecting the executive's view that only extremely minimal procedural due process was warranted).

As Ingrid Wuerth has emphasized, the Court has recently declined to give deference to the executive's interpretation of statutes and statutory presumptions in several important cases involving foreign relations issues. See Ingrid Wuerth, *The Bond Case, Statutory Interpretation, and the Executive Branch*, LAWFARE (June 8, 2014), <http://www.lawfareblog.com/2014/06/the-bond-case-statutory-interpretation-and-the-executive-branch/> (citing *Bond v. United States*, 134 S. Ct. 2077 (2014); *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013); *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010)).

The executive branch also won some victories in foreign relations and national security cases raising issues of judicial power or justiciability. See, e.g., *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 1142–43 (2013) (finding that challengers to the executive's foreign intelligence wiretapping program lacked standing); *Samantar v. Yousuf*, 130 S. Ct. 2278, 2284–85 (2010) (affirming the executive's authority to determine immunity from suit of foreign heads of state).

the disputes.¹⁹ In these war on terror cases, as well as in other national security or foreign relations contexts, the Supreme Court has repeatedly ruled against the executive and, in so doing, approved judicial review of the executive's national security actions, in suits where plaintiffs sought prospective, injunctive-type remedies against the government.²⁰ Remedies of that type are typically thought to involve much more judicial intrusion into executive functioning than would a retrospective award of money damages,²¹ and in some instances, injunctive-type remedies were implied by the courts from a jurisdictional statute or said to be required by the Constitution itself, rather than being expressly created by Congress,²² making the questions of separation of powers and judicial authority even more acute. In addition, the war on terror decisions in *Rasul*, *Hamdi*, *Hamdan*, and *Boumediene* were intended by the Court to have, and did in fact have, enormously significant practical effects—restructuring the worldwide interrogation, detention, and military commission policies of the executive branch.²³ Many critics who think the judiciary has not done enough to remedy the perceived excesses in the war on terror are missing the larger picture of unprecedented judicial assertiveness and effectiveness.²⁴

19. See George D. Brown, "Counter-Counter-Terrorism Via Lawsuit"—the Bivens Impasse, 82 S. CAL. L. REV. 841, 898 (2009) (stating that in the war on terror habeas cases, "the Court's normal deference to the political branches . . . disappeared"); Martin S. Flaherty, *Judicial Foreign Relations Authority After 9/11*, 56 N.Y. L. SCH. L. REV. 119, 122 (2011) ("[I]n every major case arising out of 9/11, the Court has rejected the position staked out by the executive branch, even when supported by Congress. At critical points, moreover, each of these rejections involved the Court reclaiming its primacy in legal interpretation . . .").

20. *Boumediene*, 553 U.S. at 732 (habeas); *Munaf*, 553 U.S. at 680 (habeas); *Hamdan*, 548 U.S. at 567 (habeas); *Rasul*, 542 U.S. at 470 (habeas); *Hamdi*, 542 U.S. at 509 (habeas); *Webster v. Doe*, 486 U.S. 592, 594 (1988) (injunction); *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 299 (1972) (mandamus); *Aptheker v. Secretary of State*, 378 U.S. 500, 501–05 (1964) (injunction and declaratory judgment); *Greene v. McElroy*, 360 U.S. 474, 508 (1959) (declaratory judgment); *Kent v. Dulles*, 357 U.S. 116, 129–30 (1958) (declaratory judgment); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 589 (1952) (injunction and declaratory judgment); *Duncan v. Kahanamoku*, 327 U.S. 304, 307 (1946) (habeas).

The Court has vacated or disapproved of injunctions granted by lower courts in national security cases where the Court believed the requirements for equitable relief had not been met. *E.g.*, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32–33 (2008); *Munaf*, 553 U.S. at 705.

Lower federal courts have also sometimes treated requests for injunctions in the national security or foreign affairs area with caution. *See, e.g.*, *Kiyemba v. Obama*, 561 F.3d 509, 511, 516 (D.C. Cir. 2009); *Ramirez de Arellano v. Weinberger*, 724 F.2d 143, 147 (D.C. Cir. 1983) (Scalia, J.).

21. Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1329 (2001).

22. John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 38–42 (2013).

23. See *infra* Part IV.B.

24. For example, many assert that *Boumediene* has been "guttled" by the D.C. Circuit because no

But quite plainly, the federal courts do not forcefully confront the executive in national security and foreign affairs cases at all times or in all contexts. The courts frequently say that judicial review is least appropriate in these areas,²⁵ and the courts' actual behavior often evidences real caution.²⁶ By all appearances, the courts think carefully about which cases to decide on the merits and how to resolve them. A very important question, then, is why courts choose to intervene in the national security and foreign affairs areas in some types of cases but not others. Views about different remedies may help explain.

Why now—when the Supreme Court has approved the use of intrusive, often judicially created, injunctive-type remedies to review, restrain, and restructure the executive's and Congress's conduct of national security and foreign affairs,²⁷ and when the Court more generally seems committed as never before to a strong version of judicial supremacy in both domestic and foreign affairs contexts²⁸—have the appellate courts, with the

habeas petitioners have won on the merits there and been granted release. But, as Benjamin Wittes explains: “[T]he Guantanamo litigation remains very consequential, despite the government’s winning streak at the D.C. Circuit. A lot of detainees have been freed because of court orders the government did not appeal. More still have been freed in anticipation of habeas litigation the government did not feel confident defending. In more cases still, the government had to consider very seriously whether its evidence would or would not stand up in court, and thus had to think long and hard about the merits of detentions.” Benjamin Wittes, *Thoughts on the Cert Denials*, LAWFARE (June 12, 2012), <http://www.lawfareblog.com/2012/06/thoughts-on-the-cert-denials/>.

25. *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (suggesting that the courts generally give “heightened deference to the judgments of the political branches with respect to matters of national security”); *Regan v. Wald*, 468 U.S. 222, 242 (1984) (“Matters relating ‘to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.’” (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952))).

26. See, e.g., *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1664 (2013) (applying the presumption against extraterritorial application to limit the reach of the Alien Tort Statute because of “the danger of unwarranted judicial interference in the conduct of foreign policy”).

27. Although, as many critics have noted, the Court’s post-9/11 cases have not actually resulted in the court-ordered release of any detainees, the response to the Court rulings by Congress and the executive have caused many detainees to be released, and many aspects of the government’s national security policies to be dramatically restructured in rights-protective ways. See *supra* notes 23–24 and accompanying text.

28. A number of commentators have noted an increasing posture of judicial supremacy at the Supreme Court, with both a vertical dimension, in which the Court “seeks to ensure and expand its hierarchical superiority in our judicial system” by giving it “the final say when any other court, state or federal, rules on the constitutionality of government conduct,” Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 669 (2012), and a horizontal dimension, namely that the Court “alone among the three branches has been allocated the power to provide the full substantive meaning of all constitutional provisions,” Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240–41 (2002).

blessing of the Supreme Court,²⁹ been unwilling to allow *Bivens* suits for money damages in the national security area?

Thus, this Article asks, are damages different, and if so, why? Answering these questions turns out to be a complicated endeavor, raising fundamental questions about the ways in which the judiciary has participated over the course of our history in restraining the activities of the other branches of government within bounds of the law.

Several possible explanations for the courts' remedial preferences are insufficient—not wrong, but insufficient. The decisions rejecting *Bivens* in national security and foreign affairs cases might be examples of the phenomenon that occurs during threats and emergencies, in which the federal courts fail to protect individual rights and defer too much to the government.³⁰ They might evidence what a number of commentators see as a larger trend of the courts' increasing "hostility to litigation,"³¹ including to civil rights and civil liberties litigation against government.³² They might simply be part of a general trend of the courts disfavoring damages remedies or being reluctant to authorize remedies not approved by Congress. They might show that the courts see a greater need for judicial intervention when the alleged constitutional violation is ongoing or threatened as opposed to completed, as it must be for standing to exist in injunctive and habeas cases. They might result from the fact that plaintiffs who qualify for injunctive or habeas relief will generally be perceived by the judiciary to be legally "innocent," while damages plaintiffs could well be "guilty," and therefore, less sympathetic.³³ The courts may implicitly

29. The Court has denied certiorari in every post-9/11 national security case where a *Bivens* remedy was rejected. See *Mirmehdi v. United States*, 133 S. Ct. 2336 (2013); *Vance v. Rumsfeld*, 133 S. Ct. 2796 (2013); *Lebron v. Rumsfeld*, 132 S. Ct. 2751 (2012); *Arar v. Ashcroft*, 130 S. Ct. 3409 (2010); *Wilson v. Libby*, 129 S. Ct. 2825 (2009). *Doe v. Rumsfeld* has not reached a final judgment. There does not appear to have been a certiorari petition filed in *Ali v. Rumsfeld*. Originally, the Court vacated the decision in *Rasul v. Myers* in light of *Boumediene v. Bush*, see *Rasul v. Myers*, 555 U.S. 1083, 1083 (2008), but when the D.C. Circuit affirmed the dismissal of *Bivens* claims on remand, the Supreme Court denied certiorari, see *Rasul v. Myers*, 558 U.S. 1091, 1901 (2009).

30. See Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 4–6 (2005) (surveying the literature and concluding that "the belief that the Court acts to suppress rights and liberties under conditions of threat is so widely accepted in post-September 11 America, and has been so widely accepted since the World War I period, that most observers no longer debate whether the Court, in fact, behaves in this way").

31. Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1107–08 (2006).

32. See David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1200 ("Over the past three decades, the Supreme Court (and in recent years, the Congress) has restricted civil rights remedies through a series of complex and controversial measures.").

33. Thanks to Jonathan Hafetz for the observations in this and the prior sentence.

agree with John Jeffries's thesis that doctrines minimizing officials' damages liability—he was focused primarily on qualified immunity—spur the desirable development of constitutional law by lowering the cost of ruling against the government.³⁴ Or the *Bivens* decisions might be explained by the fact that, by virtue of their backgrounds and method of their selection, federal judges are very likely to have views on important legal and policy matters that are “acceptable to a majority, or indeed a supermajority, of the officeholders in the political branches.”³⁵

While many or perhaps all of these factors likely play a role, they cannot fully account for the courts' behavior in the *Bivens* cases. As noted, the Supreme Court has not been deferential in the post-9/11 habeas cases, and has ruled against the executive repeatedly and assertively in national security and foreign relations litigation in recent years, generally in cases seeking injunctive-type remedies,³⁶ and at times in favor of claimants who hardly qualified for judicial sympathy, for instance, because of admitted involvement with al Qaeda,³⁷ or because they were convicted felons.³⁸

34. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999).

35. Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 1023–24 (2004) (making this argument in the area of race discrimination). Thanks to Alexander Reinert for this observation.

36. See *supra* notes 18–20 and accompanying text.

37. *Hamdan v. Rumsfeld*, 548 US 557, 569 (2006).

38. *Zadvydas v. Davis*, 533 U.S. 678, 684 (2001); *INS v. St. Cyr*, 533 U.S. 289, 293 (2001). I recognize that many observers, including a number of my colleagues who read earlier drafts of this Article, would dispute the claim that the Court has intervened forcefully in national security cases in recent years. Because this claim is important to my argument, I want to explain why I think that description is justified based on *Hamdan* and *Boumediene*. As David Cole has noted, *Boumediene* did three things that put the Court in unprecedented conflict with Congress and the President:

First, for the first time in its history, the Supreme Court declared unconstitutional a law enacted by Congress and signed by the president on an issue of military policy in a time of armed conflict. . . . Second, and also for the first time, the Court extended constitutional protections to noncitizens outside U.S. territory during wartime. . . . Third, the Court declared unconstitutional a law restricting federal court jurisdiction. . . . Only on two prior occasions has the Court actually declared a jurisdiction-stripping law unconstitutional, and on both occasions it found reasons for doing so that were independent of the pure question of jurisdiction.

David D. Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2008 CATO SUP. CT. REV. 47, 47–49 (citations omitted). The Court in both cases suggested that military detention of alleged enemy fighters held outside the sovereign territory of the United States was essentially per se lawless if Article III courts did not bless it, see *infra* notes 171–72 and accompanying text, even though the Court's case law and historical practice of the U.S. government had never required that. See generally Andrew Kent, *Boumediene, Munaf, and the Supreme Court's Misreading of the Insular Cases*, 97 IOWA L. REV. 101 (2011) [hereinafter Kent, *Insular Cases*]; Andrew Kent, *Judicial Review for Enemy Fighters: The Court's Fateful Turn in Ex parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. 150 (2013) [hereinafter Kent, *Enemy Fighters*]. Also in *Hamdan*, the Court failed to defer to the President's exercise of statutorily delegated rulemaking authority or his plausible interpretation of a law-of-war treaty, without discussing case law that would seem to have required, or at least recommended deference in both cases. Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The*

Moreover, federal courts routinely issue injunctions against federal officials without worrying that they have implied their right to do so from a mere grant by Congress of federal subject matter jurisdiction.³⁹ As explored below, the recent rejection of *Bivens* has deep historical roots in the growth of the administrative state overseen by judges wielding injunctive-type remedies and the concomitant decline of the traditional tort suit as the mechanism for restraining federal official misconduct.⁴⁰ But there is no categorical bar on damages suits against wayward officials in ordinary, domestic cases. The lower courts' refusal, consistent with the Supreme Court's doctrines and preferences, to allow *Bivens* in the national security and foreign affairs area is much more pronounced and acute than the general historical trend toward injunctive-type remedies. There is something different about damages generally and even more so in the national security and foreign affairs area.

To begin this project of answering whether and how damages are different from other remedies, we must broaden the scope of the analysis. The post-9/11 *Bivens* cases cannot be understood by reference to *Bivens* doctrine or the law of remedies alone. An important premise of this Article is that Richard Fallon's "doctrinal equilibration thesis," concerning how the courts restrain governmental misconduct, is descriptively correct.⁴¹ Fallon's thesis is that the courts self-consciously seek to obtain the outcomes they view as consistent with the best understanding of legal materials like the Constitution and policy goals by adjusting the many different levers available, seeking, in his words, "an acceptable overall alignment of doctrines" involving remedies, substantive constitutional rights, justiciability, causes of action, pleading and proof standards, and immunity.⁴² These are all best understood as "flexible and potentially adjustable components of a package of rights and enforcement mechanisms that should be viewed, and assessed for desirability, as a whole."⁴³

Limitations on *Bivens* cannot be assessed either descriptively or

Functional Case for Foreign Affairs Deference to the Executive Branch, 23 CONST. COMMENT. 179, 194–99 (2006).

39. Preis, *supra* note 22, at 39–40, 53.

40. See *infra* Part II.B–C.

41. The term "equilibration" does not imply the existence of a normatively attractive equilibrium. See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 637 n.11 (2006).

42. *Id.* at 637.

43. Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 480 (2011). As Fallon acknowledges, other scholars have made similar or related points about the Court's equilibration of different doctrines. *Id.* at 482 n.13.

normatively without understanding the whole package of doctrines and practices that interact with each other in complex ways to achieve the courts' goal of keeping other branches of government within the bounds of the law. And anyone advocating that courts broadly allow *Bivens* suits in national security and foreign relations cases—as many commentators do⁴⁴—must account not only for the current equilibration, but also for how the courts would likely change related doctrines to accommodate the policy goals and preserve the institutional relationships that the limitations on *Bivens* presently serve.

This Article attempts to understand the doctrinal equilibration that the courts have developed in the national security litigation context, of which the limitation on *Bivens* is a part. The Supreme Court's view of the nature of its judicial role has shifted dramatically over time, and there have been accompanying shifts in its preference for different types of remedies in litigation against the government. Inverting its traditional practices, the Court now prefers other remedies instead of money damages for enforcement of constitutional and other law against the government in all contexts, not just national security. The modern Court's preferred remedy is not actually a traditional remedy at all—it is the Court's ability to announce rules and doctrines of constitutional and subconstitutional law in its published opinions and be confident that the executive branch will treat the opinions as legally binding in all relevant contexts. The Court has thus shifted away from its traditional role as resolver of individual disputes and provider of individual redress toward a role as the preeminent law declarer and standard setter.⁴⁵

Viewing law declaration as a system-wide injunctive-type remedy shows how money damages suits can also be vehicles for courts to control government functioning prospectively and system-wide. As a result, the distinction between injunctions and damages is not as great as it may first appear. But still, the Supreme Court is particularly loath to allow a damages remedy against federal officials in national security and foreign relations cases, and courts of appeals have followed its lead.⁴⁶

One reason for the Court's view of damages remedies is clear—it has repeatedly stated in many contexts that it believes that damages liability for officials causes “overdeterrence”—the failure of officials to vigorously and efficiently perform socially beneficial functions because of their fear of

44. See *supra* notes 11–13 and accompanying text.

45. See *infra* Parts IV–V.

46. See *supra* notes 1–2 and accompanying text.

personal damages liability. The Court has also expressed concerns about the unique burdens of discovery, especially on senior policymakers, imposed by *Bivens* suits as opposed to other types of litigation against the government. These concerns seem likely to be particularly pronounced in the national security and foreign affairs areas.⁴⁷

Other reasons the courts might disfavor damages can be discerned, but they are not explicitly stated by the judiciary. Guessing at unstated motives is difficult and perhaps unwise. The Supreme Court, as the saying goes, is a “they,” not an “it.”⁴⁸ This is even more true when we broaden the focus to the entire federal judiciary. The individuals who compose the Court and the judiciary as a whole change frequently and hence, ideological and legal views of judges change. In addition, many internal and external factors might influence the way individual judges vote and write such that offering conjectures and making generalizations about their motivations could be imprudently speculative. So I will offer some thoughts about potential reasons that might defend or justify the Court’s disapproval of money damages suits in the national security and foreign affairs areas, with the explicit caveat that I am not claiming to know or predict the inner thoughts and motivations of the various judges involved.

There are several such reasons. A much greater pool of potential plaintiffs can bring a suit seeking money damages compared to an injunction or habeas, particularly in the national security and foreign relations areas. As a result, allowing *Bivens* suits will vastly increase the potential for constitutional litigation against the government, raising docket concerns as well as increasing the potential for interbranch conflict and judicial involvement in sensitive areas often thought to be the domain of the President and Congress.⁴⁹

Damages suits pose unique risks of interbranch conflict for another reason: *Bivens* litigation is outside the control of the executive branch.⁵⁰ When only defensive suits or claims seeking injunctions, habeas corpus, or exclusionary rule remedies are allowed, the government can control whether these claims proceed by deciding whether to initiate or discontinue the legal proceedings or government action that gave rise to the suits or claims.⁵¹ *Bivens* suits cannot be headed off in this manner, because private

47. See *infra* Part VI.A–B.

48. Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 375–77, 376 n.94 (2010).

49. See *infra* Part VI.D.2.

50. See *supra* note 18 and accompanying text.

51. See *infra* note 151 and accompanying text.

individuals can choose whether to sue, and they can sue for tort damages whether or not they are still detained or still subject to other government coercion, such as a criminal prosecution.

This expanded volume of litigation outside the control of the executive that allows *Bivens* in national security and foreign relations contexts would require the courts to frequently make difficult judgments about how and whether to transplant detailed rights-protective norms of constitutional law developed in domestic, peacetime contexts into the much different world of extraterritorial national security and foreign relations activities. The Supreme Court and courts of appeals seem cautious in the face of this prospect.⁵²

And finally, the courts seem likely to be aware that, especially in the national security area, there have developed in the last decade an extraordinary range of mechanisms for maintaining the rule of law within the executive branch—everything from independent inspectors general within executive agencies to an aggressive investigative press receiving an ever-growing number of leaks from current and former officials, to the Freedom of Information Act (“FOIA”)⁵³ litigation and public shaming of lawbreaking officials at which nonprofit organizations have become adept. With all of these other accountability mechanisms working more vigorously than ever before, and more vigorously in this area than in many other areas of government operations, a *Bivens* damages remedy might seem to be unnecessary and undesirable, especially given the costs of such lawsuits.⁵⁴

This Article proceeds in five major parts. Part II outlines the rise and decline of *Bivens* at the Supreme Court, and discusses the Court’s views about national security litigation against government officials. Part III defends the courts of appeals which have barred *Bivens* in post-9/11 national security and foreign affairs cases from the chorus of critics who charge that the circuit courts have misapplied Supreme Court doctrine. Part III also preemptively answers a potential response to this project: that *Bivens* is so toothless in every context that there is nothing interesting happening in national security and foreign relations cases.

Part IV begins the project of contextualizing the Court’s remedies doctrines by outlining the Court’s preferred role as a law declaring institution interested in securing the rule of law system-wide, rather than as

52. See *infra* Part VI.E.

53. Freedom of Information Act, 5 U.S.C. § 552 (2012).

54. See *infra* Part VI.C.

an individual dispute solver and redress provider.

Part V turns back to earlier periods of American history to provide additional context for the modern Court's preference for constitutional litigation employing injunctions and law declaration to restrain the government instead of the traditional mechanism that prevailed in the eighteenth, nineteenth and early twentieth centuries—the common law tort suit. Part VI discusses several potential reasons why damages cases are especially disfavored in national security and foreign relations cases.

The Conclusion, Part VII, notes one significant cost of barring *Bivens*—some severely mistreated, innocent individuals are denied any remedy at all—and briefly suggests that an administrative compensation scheme to give innocent victims some redress is worth considering.

II. THE RISE AND DECLINE OF *BIVENS* AT THE SUPREME COURT

To assess the role of the federal courts in post-9/11 national security litigation, it is necessary to understand the nature and trajectory over time of the *Bivens* remedy. As this part demonstrates, the *Bivens* remedy today is strongly “disfavored,”⁵⁵ and the Supreme Court probably views it as available in only three circumstances: Fourth Amendment claims against law enforcement personnel, employment discrimination claims against federal employers under the equal protection component of the Due Process Clause, and Eighth Amendment claims against federal prison officials. In addition, the Court has implied several times that it will be exceedingly reluctant to extend *Bivens* into national security and foreign affairs contexts.

A. THE *BIVENS* DECISION AND EARLY EXPANSION

In 1971, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Supreme Court recognized an implied right under the Fourth Amendment to sue federal officials for money damages.⁵⁶ Webster Bivens alleged that federal narcotics agents broke into his house without probable cause and mistreated him in violation of the Fourth Amendment.⁵⁷ For this one-time event, an injunction was not available. The government did not pursue a prosecution, so the exclusionary rule provided no relief. As Justice Harlan said in concurrence, “[f]or people in

55. *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009).

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

57. *Id.* at 389–90.

Bivens' shoes, it is damages or nothing."⁵⁸

The U.S. government argued that Mr. Bivens could sue for damages, but only under state tort law, which it viewed as the traditional remedy for misconduct by a federal official.⁵⁹ The Court rejected state tort law as the exclusive avenue of relief. Over the course of the twentieth century, the Fourth Amendment had come to protect broader interests than those recognized under state tort law, and state law may be “inconsistent or even hostile” to federal rights, posing problems of federal supremacy.⁶⁰ Moreover, since the Court had implied a right to sue federal officials for injunctive relief under the Constitution and the federal question jurisdictional statute,⁶¹ and also implied rights to sue under some federal statutes, it would not be unprecedented or unusual to imply a money damages remedy here, especially since “[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”⁶²

The Court added two potential caveats which might be present in other cases and that would counsel against finding an implied damages remedy for constitutional torts: there might be, but was not in Mr. Bivens' case, “another remedy, equally effective” provided by Congress, and there might be, but were not here, “special factors counseling hesitation” about whether the Court should infer a remedy “in the absence of affirmative action by Congress.”⁶³ Deference to Congress was hence part of the *Bivens* doctrine from the outset.

Within the decade, the Court extended *Bivens* to allow suits against federal officials under two additional constitutional provisions—the equal protection component of the Due Process Clause of the Fifth Amendment in a gender-based employment discrimination suit against a Congressman,⁶⁴ and the Eighth Amendment's ban on cruel and unusual punishment in an inmate's case against federal prison officials.⁶⁵ At the time, it seemed likely that the Court would keep expanding *Bivens* until it

58. *Id.* at 410 (Harlan, J., concurring).

59. *Id.* at 390–91 (majority opinion).

60. *Id.* at 391–95. *See also id.* at 408–09 (Harlan, J., concurring).

61. *See Schneider v. Smith*, 390 U.S. 17, 21–22 (1968); *Phila. Co. v. Stimson*, 223 U.S. 605, 619–20 (1912) (“[I]n case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process.”).

62. *Bivens*, 403 U.S. at 395–96. *See also id.* at 405 (Harlan, J., concurring).

63. *Id.* at 396–97 (majority opinion).

64. *Davis v. Passman*, 442 U.S. 228, 228–29 (1979).

65. *Carlson v. Green*, 446 U.S. 14, 18–23 (1980).

became the substantial equivalent of 42 U.S.C. § 1983.⁶⁶

B. THE MECHANICS OF SUING IN TORT FOR FEDERAL OFFICIAL MISCONDUCT

Because of sovereign immunity, federal officials are sued under *Bivens* in their so-called personal, rather than official, capacities.⁶⁷ In theory, persons injured by actions of a federal official could also seek compensation by suing the agent's employer, the United States government, for damages, but the sovereign immunity of the federal government blocks this route.⁶⁸ The Federal Tort Claims Act ("FTCA"), originally enacted in 1946 and frequently amended since,⁶⁹ effects a partial waiver of sovereign immunity by allowing suits directly against the federal government instead of officers (who might be judgment proof), and making the United States liable for injuries caused by the negligent or wrongful act or omission of any federal employee acting within the scope of his or her employment, in accordance with the law of the state where the act or omission occurred.⁷⁰ Under the Westfall Act of 1988,⁷¹ the FTCA is the exclusive remedy for torts committed by federal officials within the scope of their employment, except for suits brought for violations of the Constitution.⁷² In other words, state law tort claims against individual official defendants are now generally barred.

The Supreme Court takes the prospect of individual liability in damages for officials very seriously and has crafted immunity doctrines to soften the blow. The Court's rulings provide the President of the United States and certain classes of officials defined functionally—prosecutors doing prosecutorial work, legislators legislating, judges doing judicial work, and certain persons performing "quasi-judicial" functions—with

66. Alexander A. Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 822 (2010) (showing that initially, it was widely assumed among lower courts and commentators that *Bivens* remedies would be available for all constitutional rights).

67. *Cf. Scheuer v. Rhodes*, 416 U.S. 232, 238, 247–48 (1974) (holding that sovereign immunity does not bar a suit for damages against an official in his or her personal capacity).

68. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 841–42 (6th ed. 2009).

69. Federal Tort Claims Act, Act of Aug. 2, 1946, ch. 753, 60 Stat. 812, 842–47; Act of June 25, 1948, ch. 646, 62 Stat. 869, 982–85 (codified as amended in scattered sections of 28 U.S.C. (2012)).

70. 28 U.S.C. § 1346(b). But the FTCA did not waive sovereign immunity for suits alleging violations of the Constitution. *FDIC v. Meyer*, 510 U.S. 471, 477–78 (1994).

71. Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended at 28 U.S.C. § 2621 et seq.).

72. 28 U.S.C. § 2679(b).

absolute immunity from money damages suits, generally for the reason that such suits would likely be frequent, frequently meritless, and uniquely capable of disrupting job performance.⁷³ All other government officials are entitled only to a “qualified immunity” from money damages suits.⁷⁴ Under the qualified immunity doctrine, officials are liable only when they violate “clearly established” federal rights, that is, when “[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.’”⁷⁵

Because qualified immunity is not just a defense to liability, but also “a limited ‘entitlement not to stand trial or face the other burdens of litigation,’”⁷⁶ the Court’s doctrine encourages speedy resolution of immunity questions by judges.⁷⁷ The policy reasons for the Court’s active protection of federal officials through a robust immunity doctrine, including fear of dampening the zeal with which officials perform their jobs because of fear of personal liability, are discussed below in Part VI.A.

C. RETRENCHMENT OF *BIVENS*

After *Davis v. Passman* in 1979 and *Carlson v. Green* in 1980,⁷⁸ the Court stopped the expansion of *Bivens*, and instead, in a long series of cases, has refused to extend *Bivens* to any new contexts, new constitutional provisions, or new types of defendants, based on the two caveats in *Bivens*: that a *Bivens* remedy should be withheld if Congress has created an effective alternate remedial scheme, or if there are other “special factors counseling hesitation” by the judiciary.⁷⁹ Since 1980, the Court has refused to extend *Bivens* at least eight times, and in those and other cases, has counseled hesitation and expressed doubts about the *Bivens* enterprise.⁸⁰ In

73. FALLON ET AL., *supra* note 68, at 998–1002.

74. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

75. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080, 2083 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *Harlow*, 457 U.S. at 818.

76. *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

77. *See e.g., Mitchell*, 472 U.S. at 526–27.

78. *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980).

79. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396–97 (1971). Although *Davis* had recognized a *Bivens* remedy for due process violations concerning sex-based employment discrimination, the Court has several times made clear that “a *Bivens* action alleging a violation of the Due Process Clause of the Fifth Amendment may be appropriate in some circumstances, but not in others.” *FDIC v. Meyer*, 510 U.S. 471, 484 n.9 (1994).

80. *Minnecci v. Pollard*, 132 S. Ct. 617, 623–26 (2012) (refusing to allow a *Bivens* remedy under the Eighth Amendment against employees of a private prison contracting with the federal government); *Hui v. Castaneda*, 130 S. Ct. 1845, 1848 (2010) (holding that Congress had precluded *Bivens* claims against individual Public Health Service employees and instead required that such suits be brought

a 2001 decision declining to extend *Bivens*, the Court stated that *Bivens* was available only “in limited circumstances,” that *Bivens* was not available “simply for want of any other means for challenging a constitutional deprivation in federal court,” and that “[s]ince *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants.”⁸¹ In 2007, the Court noted that a *Bivens* remedy “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.”⁸² And in 2009 in *Ashcroft v. Iqbal*, which arose out of the federal investigation of the 9/11 attacks, the Court stated that the *Bivens* remedy, like all judicially-implied causes of action, is “disfavored.”⁸³

To date, William Brennan is the only Justice to ever have authored a majority opinion squarely holding that a previously unrecognized *Bivens* remedy is available.⁸⁴ In recent *decades*, Justices at the center and left of the ideological spectrum have expressed caution or even skepticism about *Bivens*,⁸⁵ while Justices Clarence Thomas and Antonin Scalia have written

under the FTCA); *Wilkie v. Robbins*, 551 U.S. 537, 550, 561–62 (2007) (refusing to allow a *Bivens* claim by a property owner who alleged that U.S. Bureau of Land Management officials had retaliated against him in violation of the First Amendment when he refused the government’s demand for an easement); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68–69 (2001) (refusing to allow *Bivens* claim against a government contractor); *FDIC v. Meyer*, 510 U.S. 471, 484–86 (1994) (holding that *Bivens* was not available for a claim by a former bank employee against a federal banking agency alleging he lost his job due to agency action that violated the Due Process Clause); *Schweiker v. Chilicky*, 487 U.S. 412, 414, 425 (1988) (holding that *Bivens* was not available for claims that Social Security disability benefits had been denied in violation of the Fifth Amendment, because an elaborate administrative scheme provided a meaningful alternative remedy and signaled Congress’s exclusive control of the area); *United States v. Stanley*, 483 U.S. 669, 681–84 (1987) (refusing to allow a former Army servicemember to use *Bivens*—presumably by invoking the substantive due process component of the Fifth Amendment—to sue the military and civilian personnel who secretly gave him LSD in a disturbing medical experiment); *Chappell v. Wallace*, 462 U.S. 296, 298–304 (1983) (refusing to allow *Bivens* to be used by Navy-enlisted men to sue superior officers for race discrimination under the Due Process Clause because there were “special factors counseling hesitation” in creating a damages remedy not authorized by Congress); *Bush v. Lucas*, 462 U.S. 367, 368 (1983) (refusing to allow a First Amendment suit by a NASA engineer against his supervisors because the federal employment relationship was “governed by comprehensive procedural and substantive provisions” created by Congress, which gave “meaningful remedies against the United States”).

81. *Malesko*, 534 U.S. at 67, 68, 69.

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

83. *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009).

84. Justice Brennan was the author of *Bivens*, *Davis*, and *Carlson*. The only other Justices to have ever joined a majority opinion squarely holding that a previously unrecognized *Bivens* remedy is available are Justices William Douglas, Thurgood Marshall, Byron White, Harry Blackmun, John Paul Stevens, and Potter Stewart.

85. Justice David Souter, in an opinion joined by Justices Stephen Breyer and Ruth Bader Ginsburg, suggested that a *Bivens* remedy is “a novel rule that a proponent has a burden to justify

separately to indicate their hostility to *Bivens*, calling it “a relic of the heady days in which this Court assumed common-law powers to create causes of action,” and suggesting that the remedy be forever limited to the specific claims and contexts where it was previously recognized in *Bivens*, *Davis*, and *Carlson*.⁸⁶

The fact that damages under *Bivens* would be the only possible way to remedy a wrong is relevant, but is not itself enough to cause the Court to extend *Bivens*.⁸⁷ Though the Court has never denied a *Bivens* remedy in a case where the plaintiff had no other means to obtain some partial redress, or at least make a complaint,⁸⁸ it has denied *Bivens* remedies in cases where the plaintiff had no other means of judicial redress.⁸⁹

Given this parade of decisions and the broad language, which points to limiting and disapproving *Bivens*, it is no wonder that some commentators have questioned whether *Bivens* is on the path to extinction.⁹⁰ But there

affirmatively on policy grounds in every context in which it might arguably be recognized.” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 177 (1996) (Souter, J., dissenting). Moreover, Justice Anthony Kennedy wrote *Iqbal*, Justice Breyer wrote *Minneci* (an opinion joined by Justices Kennedy, Sonia Sotomayor, Elena Kagan and others), Justice Sotomayor wrote for a unanimous Court in *Hui*, Justice Souter wrote *Wilkie* (an opinion joined by Justices Kennedy, Breyer and others), Justice Stevens wrote *Bush* (an opinion joined by Justice Brennan, among others), and Justice Sandra Day O’Connor wrote *Schweiker*, showing that it is not just the Justices on the far right who have voiced or agreed with reasons for not extending *Bivens*. Justice Clarence Thomas’s opinion in *Meyer* was unanimous. Justice Hugo Black dissented in *Bivens* itself.

86. *Malesko*, 534 U.S. at 75 (Scalia, J., concurring, joined by Thomas, J.). See also *Minneci v. Pollard*, 132 S. Ct. 617, 626 (2012) (Scalia, J., concurring, joined by Thomas, J.); *Wilkie*, 551 U.S. at 568 (Thomas, J., concurring, joined by Scalia, J.). Although these Justices have been more outspoken on the issue than others, it seems overwhelmingly likely that their view—that *Bivens* should not be extended—commands majority support on the Court today. It is hard to imagine that Chief Justice John Roberts and Justice Samuel Alito do not share broadly similar views about *Bivens* with Justices Scalia and Thomas.

87. See *Wilkie*, 551 U.S. at 550 (stating that a *Bivens* remedy “is not an automatic entitlement no matter what other means there may be to vindicate a protected interest”); *FDIC v. Meyer*, 510 U.S. 471, 473, 479 (1994) (denying a *Bivens* suit in a case where the U.S. agency defendant had sovereign immunity); *United States v. Stanley*, 483 U.S. 669, 683 (1987) (finding it “irrelevant . . . whether the laws currently on the books afford Stanley, or any other particular serviceman, an ‘adequate’ federal remedy for his injuries”).

88. See Vladeck, *Canon*, *supra* note 12, at 1304.

89. This occurred in *Chappell*, *Stanley*, *Bush*, and *Chilicky*. See, e.g., *Stanley*, 483 U.S. at 683.

90. See, e.g., 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.”).

Simply describing the myriad cases in which the Court has held that a *Bivens* remedy will not be allowed does not give an adequate picture of the Court’s reluctance to extend *Bivens*. In a number of cases which it resolved on other grounds, the Court noted that it was assuming without deciding that a *Bivens* remedy was proper, rather than holding that it was. E.g., *Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014) (First Amendment viewpoint discrimination claim); *Reichle v. Howards*, 132 S. Ct. 2088, 2093 n.4 (2012) (First Amendment retaliatory arrest claim); *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)

does not appear to be support on the Court, even from Justices Thomas or Scalia, for overruling *Bivens* entirely.⁹¹ Thousands of *Bivens* suits are still filed every year, primarily against federal law enforcement officials under the Fourth Amendment, or federal prison officials under the Eighth Amendment.⁹²

D. *BIVENS* IN NATIONAL SECURITY AND FOREIGN RELATIONS CONTEXTS

The Supreme Court has strongly hinted that it will be especially reluctant to extend *Bivens* into the national security and foreign affairs areas, in large part because the Court views Congress and the executive as having constitutionally based predominance there, and believes that judicial scrutiny would be excessively costly. It seemed clearly relevant to the Court in *Iqbal* that the defendants in the putative *Bivens* suit were the Attorney General of the United States and the FBI director, both of whom were charged with violating the Constitution during the law enforcement operations in the immediate aftermath of the 9/11 attacks.⁹³ *Chappell v.*

(First Amendment free exercise claim); *Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982) (First Amendment employment retaliation claim); *Harlow v. Fitzgerald*, 457 U.S. 800, 820 n.36 (1982) (same); *Butz v. Economou*, 438 U.S. 478, 486 n.8 (1978) (First Amendment and Due Process claims based on retaliation); *Doe v. McMillan*, 412 U.S. 306, 309, 325 (1973) (invasion of privacy claim). It would have been easy for the Court to recognize *Bivens* remedies in some or all of these cases had it desired to. In one recent case, the Court appeared to hold that *Bivens* extended to a specific First Amendment claim—that a non-prosecutor government official, acting in retaliation of the plaintiff's First Amendment protected speech, successfully induced a prosecutor to initiate criminal charges for which there was no probable cause. *Hartman v. Moore*, 547 U.S. 250, 256 (2006). But later the Court twice stated that it has never approved a *Bivens* First Amendment claim. *Reichle*, 132 S. Ct. at 2093 n.4; *Iqbal*, 556 U.S. at 675.

91. The Justices seem content to refuse to extend *Bivens* to any new substantive claims or categories of defendants. The Court has frequently decided cases involving Fourth Amendment *Bivens* claims without calling into doubt whether such a claim is allowed. *See, e.g.*, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (holding that a government official is entitled to qualified immunity against a *Bivens* action alleging a Fourth Amendment violation); *Groh v. Ramirez*, 540 U.S. 551, 563–65 (2004) (holding that qualified immunity does not apply to a government official who knowingly violated the Fourth Amendment in a *Bivens* action); *Anderson v. Creighton*, 483 U.S. 635, 636–37 (1987) (deciding the question of whether a federal law enforcement officer who violated the Fourth Amendment may be held personally liable). In *Iqbal*, the Court impliedly approved the plaintiff's *Bivens* claims under the Fifth Amendment's equal protection component, based on *Davis v. Passman*. *Iqbal*, 556 U.S. at 675. *Carlson's* holding that federal prison officials can be sued for Eighth Amendment violations, *Carlson v. Green*, 446 U.S. 14, 18–20 (1980), also seems safe, at least for now. *See Minneci*, 132 S. Ct. at 622–24 (noting the availability of such a suit); *Farmer v. Brennan*, 511 U.S. 825, 830–32 (1994) (allowing such a suit).

92. William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1151 & n.297 (1996). Lower federal courts have approved *Bivens* remedies for a wider range of constitutional rights. *See, e.g.*, *Milhouse v. Carlson*, 652 F.2d 371, 374 (3d Cir. 1981) (“[A] federal cause of action for damages may be implied directly from the [F]irst [A]mendment.”).

93. *Iqbal*, 556 U.S. at 666, 675–77.

Wallace and *United States v. Stanley* refused to allow *Bivens* suits against military officials on separation of powers grounds.⁹⁴

And there are additional cases which did not involve actual holdings about extending *Bivens* but that contained important dicta speaking against recognizing *Bivens* remedies on behalf of foreign citizens challenging extraterritorial national security activities of the U.S. government. In *Christopher v. Harbury*, a suit against CIA, State Department, and National Security Council (“NSC”) officials concerning alleged U.S.-authored misconduct in Guatemala’s civil war, the Court implied that it would exercise caution on separation of powers grounds about interfering with foreign affairs functions of the executive before finding available a *Bivens* cause of action.⁹⁵

In *United States v. Verdugo-Urquidez*, a criminal case involving a Fourth Amendment exclusionary rule issue about a search of a Mexican citizen’s residence in Mexico by the Drug Enforcement Administration in cooperation with Mexican law enforcement, the Court cited the potential for *Bivens* suits as a reason to not recognize extraterritorial constitutional rights for noncitizens:

Not only are history and case law against respondent, but . . . the result of accepting his claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries. The rule adopted by the Court of Appeals would apply not only to law enforcement operations abroad, but also to other foreign policy operations which might result in “searches or seizures.” . . . Application of the Fourth Amendment to those

94. *Chappell v. Wallace*, 462 U.S. 296, 300–02 (1983) (finding that the Constitution gave Congress “plenary” control over the system of military discipline; that Congress had “established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure”; and that the need for strict and unhesitating obedience and discipline in the military counseled strongly against allowing the civilian judiciary to intrude on behalf of enlisted men against their officers); *United States v. Stanley*, 483 U.S. 669, 681–83 (1987) (stating that allowing this *Bivens* suit would “call into question military discipline and decisionmaking [and] . . . require judicial inquiry into, and hence intrusion upon, military matters” that had not been invited by Congress, the branch of government that the Constitution expressly empowered to make “Rules” regarding the military).

95. *See Christopher v. Harbury*, 536 U.S. 403, 406–08, 417 (2002) (“The particular facts of this case underscore the need for care on the part of . . . the [C]ourt in determining[] the claim for relief underlying the access-to-courts plea. The action alleged on the part of all the Government defendants (the State Department and NSC defendants sued for denial of access and the CIA defendants who would have been timely sued on the underlying claim but for the denial) was apparently taken in the conduct of foreign relations by the National Government. Thus, if there is to be judicial enquiry, it will raise concerns for the separation of powers in trenching on matters committed to the other branches. ‘[F]oreign policy [is] the province and responsibility of the Executive.’ ‘[T]he very nature of executive decisions as to foreign policy is political, not judicial.’” (citations omitted)).

circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest. Were respondent to prevail, aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters.⁹⁶

Chief Justice William Rehnquist suggested that a judicial opinion holding that the Fourth Amendment applied to the extraterritorial law enforcement seizures would “apply not only to law enforcement operations abroad, but *also to other foreign policy operations*” abroad in which, the Chief suggested, application of Fourth Amendment strictures could be very damaging to U.S. national security interests.⁹⁷ In other words, executive officials will feel bound to conform their future conduct in all relevant areas according to the rules and doctrines announced in the Supreme Court’s (and maybe the courts of appeals’) constitutional opinions, but constitutional rules issued for one setting might not be appropriate for all areas of government activity. In particular, it seems quite likely that constitutional law declared in domestic or non-national security related contexts (like “law enforcement operations”⁹⁸) could be poor fits for military and other national security operations overseas. This suggestion is interesting because in constitutional tort litigation in ordinary domestic cases, the Court frequently suggests that it is highly desirable that the reasoning and doctrines of its judicial opinions have widespread prospective, conduct-altering effect on government officials in relevantly similar contexts.⁹⁹

Echoing (or actually prefiguring) many of the Court’s concerns in *Harbury* and *Verdugo-Urquidez* is a frequently cited decision by then-Judge Scalia of the D.C. Circuit, *Sanchez-Espinoza v. Reagan*.¹⁰⁰

96. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 262–63, 273–74 (1990) (citing *Bivens*).

97. *Id.* at 273–74 (emphasis added).

98. *Id.* at 273.

99. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (discussing the value of “promot[ing] the development of constitutional precedent” by issuing rulings on the constitutionality of official conduct in damages suits); *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (same); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (same).

Similarly, scholars writing about constitutional litigation in the domestic context frequently assert or assume that it is an obvious good for the Supreme Court or lower courts to issue opinions setting out doctrine that the other branches of government must follow in all applicable circumstances. *See, e.g.*, Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 *FORDHAM L. REV.* 1913, 1918, 1923, 1922 (2007); James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 *COLUM. L. REV.* 1601, 1602–08 (2011).

100. The putative *Bivens* suit was brought by residents of Nicaragua and other plaintiffs against President Reagan, the CIA director, Secretary of State, Secretary of Defense, and other senior officials challenging U.S. actions in Nicaragua. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 205–08 (D.C. Cir.

III. PRELIMINARY OBJECTIONS: IS THERE ANYTHING WORTH TALKING ABOUT?

Before developing positive accounts of why the courts now prefer injunctive-type remedies over damages and how a bar on *Bivens* suits in national security and foreign relations contexts functions as part of system-wide doctrinal equilibration, this part will consider two types of objections to the project of this Article. First, this part will address the arguments of a number of commentators that the courts of appeals have simply misapplied Supreme Court *Bivens* doctrine, or that the national security concerns are ill-defined or otherwise inappropriate considerations for the courts. If the courts of appeals are merely erring rather than, as I see it, acting in a way consistent with Supreme Court doctrines and attitudes, this Article's project would be much less interesting. But, I conclude that the critics' arguments miss the mark. To be clear, I am not endorsing the holding of any particular case that, on a given set of facts, specific national security concerns should bar a *Bivens* remedy. My point is more general—it was not doctrinal error for the lower courts to weigh concerns of this type in making their *Bivens* decisions.

A second potential objection to this project is the view that *Bivens* suits against national security officials are so unlikely to succeed for a variety of reasons that they represent more of a minor nuisance than an important topic of study. In brief, the claim is that various pro-defendant litigation doctrines, such as qualified immunity and the practice of the federal government of routinely defending and indemnifying its sued employees, render *Bivens* suits irrelevant. I conclude that, while there is an element of truth to this, the reality is more complicated.

A. DID THE COURTS OF APPEALS SIMPLY MISAPPLY SUPREME COURT DOCTRINE?

A number of academics and commentators have criticized the courts of appeals for relying on what they view as vague, overly broad or otherwise ill-defined national security considerations to deny a *Bivens*

1985). Judge Scalia wrote that “[w]e have no doubt that . . . considerations of institutional competence preclude judicial creation of damage remedies here. . . . [and] the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad.” *Id.* at 208–09. Judge Scalia further noted that there is a possibility of “‘embarrassment of our government abroad’ through ‘multifarious pronouncements by various departments on one question,’” *id.* at 209 (quoting *Baker v. Carr*, 369 U.S. 186, 226, 217 (1962)), and the possibility that “foreign citizens[] [are] using the courts in situations such as this to obstruct the foreign policy of our government.” *Id.*

remedy.¹⁰¹ Others suggest that the refusal to allow a *Bivens* remedy in these cases undermines the rule of law and allows the executive branch to be immunized for gross misconduct—the implication being that the national security considerations invoked by the courts are either improper or insubstantial compared to competing values.¹⁰² In addition, some commentators have argued that the Supreme Court’s *Bivens* decisions hold that the “special factors” inquiry is concerned solely with legislative-judicial separation of powers on the question of authority to determine a remedy.¹⁰³ As a result, the scholars conclude that it is a misapplication of Supreme Court doctrine for the circuit courts to allow other concerns, such as executive-judicial or legislative-judicial concerns about national security and foreign relations competence and authority to be counted as special factors.¹⁰⁴

101. See, e.g., Brief for Distinguished Professors of Constitutional and Federal Courts Law as Amici Curiae in Support of Plaintiffs-Appellees at 6, *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012) (No. 09-16478) [hereinafter Distinguished Brief] (criticizing *Arar* as “wrongly decided” and stating that it relied only on “*ipse dixit*” regarding the national security considerations); Vladeck, *After Iqbal*, *supra* note 12, at 259, 269, 275 (stating that the circuit courts relied on “amorphous,” “poorly defined,” and “vague and generalized national security concerns”); Jonathan Hafetz, *The Next Supreme Court National Security Detention Case?*, BALKINIZATION (Aug. 26, 2011), <http://balkin.blogspot.com/2011/08/next-supreme-court-national-security.html> (arguing that the rationales for a presumption against *Bivens* in national security cases are troubling because they are overly expansive).

102. See, e.g., Replacement Brief for Amici Curiae Law Professors in Support of Maher Arar at 4, *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2010) (en banc) (No. 06-4216-cv) (arguing to the en banc court that the panel’s presumption against *Bivens* in national security cases was based on “loose reasoning” that “[a]t best . . . creates a legal ‘no man’s land’ . . . [and] [a]t worst . . . precludes future damages claims that merely touch upon anti-terrorism efforts”); *id.* at 3 (“[T]he factors cited by the panel majority as foreclosing a *Bivens* action on separation of powers grounds would be insufficient to find the case non-justiciable under a traditional political question inquiry.”); Hafetz, *supra* note 13 (arguing that the Fourth Circuit’s *Lebron* decision barring *Bivens* in national security cases was “a significant setback for the rule of law,” “undermines the principle that government officials should be held accountable for their illegal conduct,” and makes courts “instruments of impunity” for torture).

103. See, e.g., Bernstein, *supra* note 13, at 720–21 (stating that the special factors inquiry looks only at “whether Congress has indicated that it wishes to reserve decisionmaking about remediation in some area for itself”). A number of scholars, including Erwin Chemerinsky, Paul Carrington, David Golove, William Van Alstyne, Michael Tigar, Kermit Roosevelt III, and Steve Vladeck, agree. See Distinguished Brief, *supra* note 101, at 23 (stating that “the separation of powers concern[] underlying the ‘special factors’ standard” in the Supreme Court’s case law is “deference to the law-making powers of the legislature”); Brief of Constitutional Law and Federal Courts Professors as Amici Curiae in Support of Plaintiffs-Appellants at 3, *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012) (No. 11-6480) (stating that the Supreme Court’s case law establishes that special factors analysis “involves separation-of-powers concerns over interference with the *legislative*, rather than *executive*, prerogative” and that “[f]ear of undue judicial interference with the executive branch has *not* been part of the Court’s ‘special factors’ analysis in applying *Bivens*”).

104. See, e.g., Bernstein, *supra* note 13, at 723 (suggesting that courts barring *Bivens* in national security cases “do not understand the rationale of the special factors analysis” because of executive-judicial issues); Hafetz, *supra* note 101 (“The defendants’ arguments about the need to protect sensitive information and avoid interference with military decisionmaking rest on a fundamental misconception

1. What Are “Special Factors”?

To evaluate these arguments, we must first understand what type of inquiry the Court is performing when it decides whether “special factors” are present that counsel against extending *Bivens* to a new claim or context. According to the Court, this is a prudential “judgment” by the court acting in a “common law” capacity to decide whether it is appropriate and desirable to allow a specific type of judicial remedy even though Congress has not authorized it.¹⁰⁵ As Justice Souter wrote, joined by Justices Breyer and Ginsburg, a *Bivens* remedy is “a novel rule that a proponent has a burden to justify affirmatively on policy grounds in every context in which it might arguably be recognized.”¹⁰⁶ This inquiry is heavily focused on the propriety of judicial caution before authorizing a remedy Congress has not chosen.¹⁰⁷

But, contrary to the suggestion of some scholars,¹⁰⁸ the Court’s *Bivens* doctrine makes considerations other than Congress’s choice of particular remedies relevant. In *Stanley*, for example, the Court noted that the “special factors” analysis in that case was “essentially a policy judgment” about “how harmful and inappropriate judicial intrusion upon” executive functioning—in that case “military discipline” and the military chain of command—“is thought to be.”¹⁰⁹ Though they do not contain holdings about *Bivens*, three cases give a flavor of the Court’s approach. In *Harbury* and *Verdugo-Urquidez*, the Court was concerned about judicial interference with the executive’s extraterritorial actions in foreign affairs and national security, as was then-Judge Scalia in *Sanchez-Espinoza*.¹¹⁰ In addition,

of *Bivens*: the Supreme Court intended ‘special factors’ to protect *legislative*, not executive, prerogatives.”).

105. *Minneci v. Pollard*, 132 S. Ct. 617, 621 (2010) (“[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.’” (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007))); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring) (describing the question presented in *Bivens* as “whether compensatory relief is ‘necessary’ or ‘appropriate’ to the vindication of the interest asserted,” and stating that the Court would evaluate a “range of policy considerations” in the same fashion as a legislature); *Arar*, 585 F.3d at 621 (analyzing the Court’s special factors case law and deciding it “must be regarded as a prudential limitation”).

106. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 117 (1996) (Souter, J., dissenting, joined by Ginsburg and Breyer, J.J.).

107. *See, e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 486 (1994) (declining to extend *Bivens* remedy into new context and showing deference to Congress); *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (same); *Bush v. Lucas*, 462 U.S. 367, 389–90 (1983) (same).

108. *See supra* notes 103–04 and accompanying text.

109. *United States v. Stanley*, 483 U.S. 669, 681 (1987).

110. *See supra* notes 95–100 and accompanying text.

Iqbal is suffused with concerns about judicial interference with high-level national security officials.¹¹¹ Moreover, in *Butz v. Economou*, a case about alleged misconduct by a federal administrative agency and its officials against a regulated entity, the Court said that, when Congress has not legislated about remedies in a particular context, deciding whether to extend *Bivens* into that context involves a judicial assessment of “whether the courts are qualified to handle the types of questions raised by the plaintiff’s claim.”¹¹² *Wilkie* made clear that general concerns about administrability and inviting too many legal claims against the executive branch enter into the special factors analysis.¹¹³ Thus, the Court’s case law refutes the scholars’ claim that special factors pertain only to Congress’s views about choices between different remedies.

In non-*Bivens* contexts, when the Supreme Court reasons about what kinds of remedies are appropriate, it takes account of a wide range of interests, such as the interests of the federal executive branch and the public’s interest in safety and security. Take, for example, the exclusionary rule, the primary way that the Fourth Amendment is enforced. As with *Bivens*, the exclusionary rule is a judicially created remedy, and the Court views the question whether and when to apply it as a policy-laden “prudential” decision.¹¹⁴ A wide range of governmental and societal interests are factored into the Court’s determination of when to apply this remedy.¹¹⁵ The Court also considers administrability concerns and incentives of litigants.¹¹⁶ Similarly, in exercising its equitable discretion to decide whether to approve an injunction, the Court evaluates a wide range of factors. In a recent case, where it was asked to approve an injunction issued in aid of habeas jurisdiction over a security detainee held in Iraq by U.S. military forces during the insurgency period, the Court counseled caution about intruding into military matters on a foreign battlefield and

111. See *infra* note 220 and accompanying text.

112. *Butz v. Economou*, 438 U.S. 478, 480, 503 (1978).

113. See *Wilkie v. Robbins*, 551 U.S. 537, 561 (2007) (noting that allowing a *Bivens* claim of the type pressed by the plaintiff “would invite claims in every sphere of legitimate governmental action affecting property interests”). Cf. *FDIC v. Meyer*, 510 U.S. 471, 485 (1994) (citing as a special factor the “potentially enormous financial burden” that agency liability under *Bivens* would create).

114. *Pa. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998).

115. See, e.g., *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011) (invoking concerns about “set[ting] the criminal loose in the community without punishment”); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (holding the exclusionary rule unavailable because “[t]he costs of applying the exclusionary rule in the context of civil deportation hearings are high”).

116. For example, the Court cited the fact that imposing exclusion as the remedy “for a knock-and-announce violation would generate a constant flood of alleged failures to observe the rule,” leading to “extensive” and fact-intensive litigation, as a reason not to allow the remedy. *Hudson v. Michigan*, 547 U.S. 586, 594–95 (2006).

denied relief.¹¹⁷ Since these kinds of interests can be part of the Court's prudential policy balancing when it decides whether to allow other discretionary remedies—injunctions and the exclusionary rule, which is quasi-injunctive in its effects—it seems reasonable that they would be available for the same kind of remedial balancing of equities that the Court's case law requires in the *Bivens* context.

Carlos Vázquez and Steve Vladeck have recently argued that, under their view of the Court's doctrine, the special factors that would counsel against extending *Bivens* “must be factors that favor leaving the question of damages to other existing remedial regimes, including state law. Factors that would favor leaving the plaintiff with no cause of action at all would bear instead on the question of defenses, such as official immunity.”¹¹⁸ The separation of powers and national security-related reasons justifying the courts of appeals' refusals to extend *Bivens* were inapposite under the Supreme Court's case law, Vázquez and Vladeck conclude, because they were reasons to preclude any judicial remedy under doctrines of “immunity, privilege, or preemption,” not reasons to prefer an alternate remedial regime such as state tort law over *Bivens*.¹¹⁹

I read the Supreme Court's *Bivens* case law differently. In my view, the Court in both *Chappell* and *Stanley* assumed that the plaintiffs had no viable cause of action under state or federal law, and no effective remedy from any alternate federal system.¹²⁰ Thus, the Court's *Bivens* doctrine has long tolerated denying *Bivens* even when there is no other effective remedy, and as a result, “special factors” cannot only consist of reasons to prefer one remedy over another. In addition, as shown above, the Court has expressly taken many other interests into account as “special factors.”¹²¹

To make their policy-laden judgment about the propriety of a judicially-created damages remedy for federal official misconduct in a particular context, the courts of appeals hearing the post-9/11 national security cases relied on a number of considerations, detailed in Part I,

117. *Munaf v. Geren*, 553 U.S. 674, 679–80, 700 (2008).

118. Vázquez & Vladeck, *supra* note 12, at 543.

119. *Id.* at 523.

120. See *infra* notes 241–44 and accompanying text for discussion of alternate federal remedial avenues in *Chappell* and *Stanley*. In *Chappell*, the Court did not indicate that a state law provided a viable remedy. In *Stanley*, the majority opinion, Justice O'Connor's concurrence, and Justice Brennan's dissent all assumed that Stanley lacked a state law remedy. *E.g.*, *United States v. Stanley*, 483 U.S. 669, 706–07 (1987) (Brennan, J., dissenting) (discussing possible alternate remedies for the respondent and not mentioning state tort suits). Thus in both cases, in the absence of *Bivens*, the plaintiffs had “no cause of action at all,” and their federal remedies were either nonexistent or very far from being “appealing.”

121. See *supra* notes 108–13 and accompanying text.

sounding in separation of powers, comparative institutional competence, and special deference in military, diplomatic, and intelligence contexts.¹²² The courts of appeals did not pull these out of thin air. A number of these concerns were referenced by the Supreme Court in discussing *Bivens* in *Harbury*, *Verdugo-Urquidez*, *Iqbal*, *Chappell*, and *Stanley*.¹²³ And every single one of these concerns cited by the circuit courts had previously been used by the Supreme Court to help it resolve a wide variety of issues involving substantive law, procedural contexts, types of legal questions, and requested remedies very different from the *Bivens* question raised in the post-9/11 cases.¹²⁴

Because the Supreme Court has found these considerations important in so many other areas, it is somewhat difficult to maintain that they are all too ill-defined or otherwise inappropriate to apply to the prudential policy decision of whether to extend *Bivens*, or that a court of appeals that

122. See *supra* notes 3–8 and accompanying text.

123. See *supra* notes 94–96 and accompanying text.

124. The comparative institutional competence and authority of the President and Congress compared to the judiciary in foreign affairs and national security has been invoked in dozens of Supreme Court decisions across a wide variety of topics, in which the Court has expressed caution about fettering the political branches' actions in the national security and foreign relations areas. See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010); *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005); *Haig v. Agee*, 453 U.S. 280, 292 (1981). The reluctance of the judiciary to interfere with the executive's ability to speak with "single voice[]" about foreign relations matters is part of the political question doctrine, *Baker v. Carr*, 369 U.S. 186, 211 (1962), and frequently mentioned in other procedural contexts, e.g., *Munaf v. Geren* 553 U.S. 674, 702–03 (2008); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431–33 (1964). Caution about allowing judicial review to disclose national security secrets held by the executive, or more general considerations about the executive's superior ability to obtain and keep secrets, have been mentioned by the Court in numerous contexts. See, e.g., *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1910 (2011) (state-secrets privilege); *United States v. Nixon*, 418 U.S. 683, 707 (1974) (executive privilege). Concern about executive officials being "overdeterred" from taking vigorous and effective action in the public interest because of fear of personal liability is the keystone of the Court's official immunity doctrine and, as discussed above, is thought to be particularly problematic for senior policymakers responding to national security crises. See *infra* notes 217–21 and accompanying text. The Court has expressed concerns about extending judicial review into active war zones overseas, e.g., *Boumediene v. Bush*, 553 U.S. 723, 770, 793 (2008); *Munaf*, 553 U.S. at 700; *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950), and about allowing the judiciary to be used by noncitizens located abroad to challenge the U.S. government and undermine its prestige and legitimacy, see e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273–74 (1990) (quoted in text accompanying *supra* note 96); *Eisentrager*, 339 U.S. at 789.

The Court has suggested that certain structural constitutional doctrines restricting congressional or executive power are relaxed or even absent in the foreign affairs and national security areas. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012) (principle of enumeration as limitation does not apply to Congress's power over immigration); *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (allowing statutes "closely related" but not on point to count as congressional delegations of foreign relations power). Even individual constitutional rights can be diminished or even eliminated in some contexts due to concerns about security. See *infra* note 274 and accompanying text.

declines to extend *Bivens* in national security cases misapplied Supreme Court doctrine in considering them.

Again, I emphasize that I am not endorsing the way these factors were applied in any given *Bivens* case, but I am making the much more modest claim that, despite an avalanche of criticism, the courts of appeals did not misunderstand or misapply Supreme Court doctrine.

B. DO *BIVENS* SUITS MATTER?

When discussing early versions of this project, some of the reactions I heard were polarized around the relevance of *Bivens*. One view was that *Bivens* suits are so well known to be bark rather than bite that there is not much to talk about. First, these readers pointed out, the rules and practices of litigation in this area greatly favor government defendants; qualified immunity, heightened pleading under *Iqbal*, interlocutory appeals, the courts' presumption against extending *Bivens*, the political question doctrine, the state secrets privilege, and underlying judicial reticence in the national security area are some of the obvious ones. Second, it was said, the result of these factors is that *Bivens* suits almost never succeed.¹²⁵ Third, even while they are ongoing, *Bivens* suits matter little to officials because the Department of Justice defends them, and the U.S. government will indemnify them.¹²⁶

Another very different reaction I heard, including from people who had served in the executive branch, conceded the general thrust of the above points, but still asserted that officials are in fact concerned about the prospect or actuality of *Bivens* suits against them, and that this might well shape the incentives or behavior of those officials.

Although it is impossible to conclusively document the inner thoughts of the many human beings who make up the executive branch, in my view, the second reaction is more accurate. *Bivens* suits undoubtedly face many obstacles to success, but Alexander Reinert has shown that far more succeed than previously assumed—in fact, they appear to be about as successful as other types of challenges to alleged government misconduct.¹²⁷ Jack Goldsmith recently conducted wide-ranging interviews

125. See Reinert, *supra* note 66, at 826–28 (documenting the widespread view that almost no *Bivens* suits succeed).

126. It is widely asserted or assumed by scholars that, when sued under *Bivens*, nearly all officials are defended and indemnified by their government employers so that they do not incur an actual risk of monetary liability. See, e.g., JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 68–69 (2d ed. 2007).

127. Reinert, *supra* note 66, at 813.

with national security officials, and heard that the prospect of personal damages liability is concerning.¹²⁸ While almost all federal employees will get government-paid defense counsel when sued for official conduct,¹²⁹ it is not guaranteed by law that employees will be indemnified for judgments or settlements against them—and even if they are indemnified, they likely will not know that until after judgment.¹³⁰ It seems likely that word of this travels through the grapevine of the executive branch. In addition, many federal officials obtain personal liability insurance policies.¹³¹ Unless they are dramatically misinformed or excessively risk averse, this suggests that *Bivens* suits are reasonably thought to be a danger to their pocketbooks.

It seems likely that the highest officials—the Attorney General or CIA director, for example—are somewhat differently situated than lower level officials. The highest officials can be sued hundreds of times and it seems exceedingly unlikely that the government would not defend and indemnify them. But there are good reasons to believe that *Bivens* matters a good deal to all save those at the very top.

128. JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 234–35, 238–39 (2012).

129. 28 U.S.C. § 517 (2012) authorizes Department of Justice attorneys to defend claims against federal employees in accordance with guidelines found at 28 C.F.R. §§ 50.15, .16 (2013)

130. Many, but probably not all, federal employees who might be sued under *Bivens* arising out of national security activities may be indemnified for any damages assessed against them, but have no legal right to require indemnification. Regulations or publicly available directives covering all employees of the Department of Justice (which includes the FBI), the State Department, the Department of Homeland Security, and the Treasury Department provide that each agency “may,” at the discretion of the agency head or a designee, indemnify for any judgment or pay any negotiated settlement if the defendant employee’s conduct was within the scope of his or her employment and the indemnification or payment is in the interest of the agency. 28 C.F.R. § 50.15(c)(1), (2) (2013) (Department of Justice); 31 C.F.R. § 3.30(a), (b) (2013) (Department of Treasury); 22 C.F.R. § 21.1(a), (b) (2013) (Department of State); Management Directive Regarding Indemnification of Employees Acting in Official Capacity, MD # 0415 (Sept. 26, 2005), available at https://www.dhs.gov/xlibrary/assets/foia/mgmt_directive_0415_indemnification_employees_acting_official_capacity.pdf (Department of Homeland Security). Generally, similar rules seem to apply to certain Department of Defense employees. *E.g.*, 32 C.F.R. § 516.32(a) (2013) (Department of the Army). The Central Intelligence Agency’s regulations and directives are classified, but it appears that there is legal authority for indemnifying them from personal capacity tort judgments. See Dep’t of Justice, Office of Public Affairs, *Department of Justice Releases Four Office of Legal Counsel Opinions*, JUSTICE.GOV (Apr. 16, 2009), <http://www.justice.gov/opa/pr/2009/April/09-ag-356.html>. In practice, federal officials have a tiny chance of ultimately paying a judgment out of pocket. Reinert, *supra* note 66, at 846 (examining large dataset from several judicial districts and finding that “there is no indication that successful *Bivens* claims result in individual officers paying out personal funds to satisfy judgments or settlements”).

131. Paul Michael Brown, *Personal Liability Tort Litigation Against Federal Employees: A Primer*, 8 U. ST. THOMAS L.J. 329, 331 (2011). Certain employees are entitled to partial rebates of these premium payments, *id.*, which might suggest that Congress views the insurance as important to official job functions.

IV. THE TRIUMPH OF LAW DECLARATION OVER INDIVIDUAL REMEDIATION

This part begins the work of explaining why the modern Court is so hostile to *Bivens* at a time when it has never been more active in authorizing intrusive injunctive-type remedies in constitutional litigation and in ruling against the executive in national security and foreign affairs disputes concerning judicial power and authority.

The starting point is an analysis of the goals, the role in the legal system, and the preferred mode of operation of the Supreme Court. The modern Court has come to view its role in securing government compliance with the law to be primarily about declaring law that will prospectively bind government actors system-wide, rather than providing individual redress. It then shows how the Court appears to use its law declaring powers to provide what it sees as adequate checks and balances on the executive branch in the national security area, largely obviating any need for a remedy for each affected individual.

This does not fully answer the question of why the Court seems to prefer to do most of its law declaration work in the national security area via injunctive-type suits rather than damages actions. That is the burden of Parts V and VI.

A. *UBI JUS IBI REMEDIUM?*

Numerous individuals, some of whom seem indisputably to have been grievously wronged by post-9/11 national security actions, have been denied any compensation or redress because of the lack of *Bivens* or other compensatory remedies.¹³² Contrary to the ancient maxim *ubi jus ibi remedium* (for every right there must be a remedy), individuals in these cases have been left without a remedy even when the violation of core rights protecting life, limb, and property seems clear. The notion that a rights violation requires a civil remedy lies at the foundation of the common law of torts,¹³³ was reiterated by Blackstone,¹³⁴ assumed by the authors of *The Federalist*,¹³⁵ and proclaimed by the Supreme Court in

132. For example, there is essentially no dispute that Mr. Arar, *see supra* note 11, was wholly innocent.

133. See Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 16 (1998).

134. 3 WILLIAM BLACKSTONE, COMMENTARIES *23 (“[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.”).

135. THE FEDERALIST NOS. 15, 70 (Alexander Hamilton).

many decisions, including *Marbury v. Madison* and *Bivens* itself.¹³⁶ It is widely considered a foundational principle of our constitutional order premised on limited government and the rule of law that wrongs by government officials can be redressed through the legal system.

The circuit court decisions denying a *Bivens* remedy because of national security and foreign affairs considerations reflect an implicit view that *ubi jus ibi remedium* is not a firm constitutional command, but at best an aspiration which can be honored in the breach. Academic commentary tends to strongly favor the contrary view—that the Constitution mandates individual effective remedies.¹³⁷ Critics of the appellate level *Bivens* decisions have suggested that they may violate the Constitution by failing to provide an adequate remedy for unconstitutional conduct of federal officials.¹³⁸

What type and amount of remedies the Constitution requires for violations of constitutional rights is an extraordinarily complex and controversial subject. Although there are many broad statements in Court decisions about when rights require individualized remedies,¹³⁹ and there are some Court holdings that interpret the Constitution as requiring a specific remedy in a specific circumstance,¹⁴⁰ the Supreme Court does not have any clear doctrine about how the issue should be understood and

136. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147, 163 (1803); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971). *See also* *United States v. Loughrey*, 172 U.S. 206, 232 (1898) (“The maxim *ubi jus, ibi remedium* lies at the very foundation of all systems of law, and . . . I cannot believe that the common law departs from it.”); *Florida v. Georgia*, 58 U.S. (17 How.) 478, 493 (1854) (“[I]f this case is decided adversely to their rights, they are without remedy, and there is no form of proceeding in which they could have that decision revised in this court or anywhere else. Justice, therefore, requires that they should be heard before their rights are concluded.”); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 624 (1838) (“[A] monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist.”).

137. *See, e.g.*, Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1553–54 (1972); Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1121 (1989). *See also* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 262 n.16 (2000) (stating that “the weight of academic opinion . . . favors strict liability for all constitutional violations” and citing examples).

138. *See, e.g.*, James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 138 (2009); Vázquez & Vladeck, *supra* note 12, at 573–75.

139. *See supra* note 136 and accompanying text.

140. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 793–95 (2008) (holding that, unless Congress acts to suspend habeas corpus during a rebellion or invasion, the Constitution requires that habeas or a meaningful substitute be available in certain circumstances); *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 315–16 (1987) (holding that the Takings Clause requires the government to compensate a taking).

resolved generally. The view that individual remedies are always required is profoundly at odds with centuries of Supreme Court doctrine, under which government wrongs have gone effectively unremedied because of doctrines of sovereign immunity, official immunity, standing, ripeness, mootness, the political question doctrine, exhaustion of remedies, abstention, congressional control of federal court jurisdiction, and the like.¹⁴¹ Moreover, as Anthony Bellia has shown, even in English common law, the supposed source of the rule, *ubi jus ibi remedium* was generally a mere “platitude.”¹⁴²

Departing from the views of the many academics who support remediation of every constitutional wrong, Richard Fallon and Daniel Meltzer suggest that individual remediation is not always required, but that the Constitution does require “a system of constitutional remedies adequate to keep government generally within the bounds of law.”¹⁴³ This view better accounts for all the doctrines which limit full remediation and strikes me as an accurate descriptive account of how the Supreme Court sees constitutional remedies and the judiciary’s role providing them, including in the national security area. As Fallon and Meltzer suggest, the Court appears to evaluate the utility of different potential remedies not individually—not by asking whether an allegedly wronged individual will need it for effective individual redress—but as part of a larger package of doctrines and remedies that can be used to satisfy its systemic goal of maintaining the rule of law while accommodating other interests.¹⁴⁴

B. JUDICIAL LAW DECLARATION AS A SYSTEM-WIDE REMEDY

Fallon and Meltzer’s articulation of the Court’s views about remedies tracks another important distinction drawn by scholars of the Court, especially in constitutional litigation. It is often said that there are two models of the function of the Supreme Court and lower federal courts: the case or dispute resolution model, in which a court’s function is to protect private rights and provide individual redress, and the law declaration

141. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1781–86 (1991) (describing cases involving some of these doctrines as ones “in which no effective redress could be obtained for rights violations committed by the government and its officers,” and noting that “the number of such cases has expanded under doctrines that are now well entrenched”).

142. Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 784, 786 (2004).

143. Fallon & Meltzer, *supra* note 141, at 1778–79.

144. *Id.*

model, in which the court's function is to say what the law is.¹⁴⁵ Both models trace their lineage to *Marbury v. Madison*, which in defending judicial review, famously declared that the court's "duty" is to "say what the law is," while emphasizing that this power is properly exercised only in service of the court's "duty" to provide a remedy for violations of an individual's private right.¹⁴⁶

But contrary to *Marbury*, in recent decades, the law declaration role has been largely decoupled from individual dispute resolution and redress. The Court no longer, if it ever did, believes that individually effective remedies are constitutionally required in every case of government misconduct. Instead, the Court seeks to ensure its systemic goal of maintaining the rule of law within the other branches.

The Court does not accomplish systemic rule of law primarily by providing individual redress and dispute resolution, but rather through law declaration. In fact, the most important "remedy" the Court deploys is its ability to declare law and be confident it will be obeyed prospectively by government actors system-wide in all relevant contexts. To be clear, the Court often declares law in this fashion in cases seeking money damages for individual redress,¹⁴⁷ so I am not arguing that that law declaration only occurs in injunctive-type cases or that it has entirely displaced litigation seeking individual redress.

Certain structural features of constitutional law, combined with the role the Court has claimed for itself in our legal system, help explain how law declaration might be thought of as a remedy and as a rough, prospective substitute for retrospective redress and individual dispute resolution. Governments at all levels—and for purposes of this Article, what really matters is the federal government—have essentially acceded to the Supreme Court's demand in *Cooper v. Aaron* that the constitutional doctrines and rules announced by the Court in its decisions be treated as equivalent to the Constitution itself, and therefore, as prospectively binding rules of law applicable to all government actors facing circumstances within the scope of those rules or doctrines.¹⁴⁸ This broad acceptance¹⁴⁹ by

145. FALLON, ET AL., *supra* note 68, at 72–80; Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–71 (1973).

146. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 177 (1803); Monaghan, *supra* note 28, at 667–73.

147. *See, e.g., Camreta v. Greene*, 131 S. Ct. 2020, 2030–33 (2011) (discussing law declaration via § 1983 constitutional tort suits).

148. *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958). *See also* FALLON ET AL., *supra* note 68, at 70 (stating that the view of judicial supremacy announced in *Cooper v. Aaron* is now "conventional wisdom"); Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common*

other branches of government of the Court's vision of supremacy is seen even in the national security area, where we might expect the executive to be more likely to insist on its own independent right to interpret the Constitution and laws unless binding judicial judgments in particular litigated cases required otherwise.¹⁵⁰ There is no other explanation for the executive's recent decisions to moot just before Supreme Court review several individual lawsuits raising significant war on terror legal issues¹⁵¹—the Administration feared not a judgment against it in an individual case, but a Court opinion declaring law that the executive would feel bound to apply across the board going forward. Although the Court still maintains, as a rhetorical matter, that it exists merely to resolve disputes, and that it avoids unnecessary constitutional rulings, it is widely understood that the Court seeks out opportunities to rule on constitutional issues (or other legal issues) precisely in order to announce doctrine that will function as prospectively binding law system-wide.¹⁵²

The Court's widely accepted authority to announce rules and doctrines of law that will prospectively bind government officials across the board can be usefully thought of as a type of remedy—analogue in its effect to a

Law, 89 HARV. L. REV. 1, 2 (1975) (“[T]he Court’s great prestige has fostered the impression that every detailed rule laid down has the same dignity as the constitutional text itself.”); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 728–39 (2005) (showing that the Department of Justice’s Office of Legal Counsel and Solicitor General’s Office generally treat Supreme Court and sometimes even court of appeals judicial doctrines as prospectively binding constitutional law); James F. Spriggs, II, *Explaining Federal Bureaucratic Compliance with Supreme Court Opinions*, 50 POL. RES. Q. 567, 584 (1997) (concluding that the studied federal agencies complied substantially with Supreme Court opinions).

For critiques of the view that government officials are obliged to follow the Supreme Court’s announced doctrines and rules as law, see generally Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123 (1999); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993).

149. Of course, compliance by federal officials with the Court’s doctrines is nowhere near complete. It is not necessary to my argument to answer the difficult question whether executive branch officials truly believe that the Court’s doctrines, rules, and tests constitute supreme binding law in all relevant circumstances covered by them, or rather whether executive officials treat the Court’s law declarations as predictions of how courts will rule in future lawsuits and therefore, worth following for efficiency, legitimacy, or related reasons.

150. See Neal Devins, *Congress, the Supreme Court, and Enemy Combatants: How Lawmakers Buoyed Judicial Supremacy by Placing Limits on Federal Court Jurisdiction*, 91 MINN. L. REV. 1562, 1566, 1574–75, 1579 (2007) (showing that during the Bush administration, both the President and Congress treated the Court’s holdings and doctrines in the post-9/11 cases as authoritative and binding).

151. See *Kiyemba v. Obama*, 131 S. Ct. 1631 (2011) (mem.); *al-Marri v. Spagone*, 555 U.S. 1220 (2009) (mem.); *Padilla v. Hanft*, 547 U.S. 1062 (2006) (mem.).

152. Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 854 (2005); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1093–94, 1100–05 (1987).

legal system-wide declaratory judgment or perhaps even structural injunction.¹⁵³ The power and reach of this system-wide coercive effect depends not only on widespread acceptance of a certain strong kind of judicial supremacy in our law and politics, but also on important structural features of our system of constitutional law. As a result of the way “incorporation” and “reverse-incorporation” of constitutional rights have occurred, the same individual constitutional rights apply in essentially the same ways to government officials at the local, state, and national levels.¹⁵⁴ In certain areas, including criminal procedure, which is highly important in national security, the Court’s interpretations of the Constitution have created such a dense thicket of rules and doctrines that observers equate it to a comprehensive legal code of conduct.¹⁵⁵ The Court’s interpretations of the Constitution therefore have pervasive effects on government conduct of its daily affairs. And constitutional criminal procedure tends to be transsubstantive, meaning that distinctions are not made based on the nature or seriousness of the offense.¹⁵⁶

Thus, a Supreme Court decision arising out of the investigation of a routine minor crime by local police can announce, for example, Fourth Amendment rules that will prospectively bind government officials all the way up to the most senior national policymakers when they are directing responses to the most serious national security threats. The fact that the Court is, and knows that it is, declaring law that will bind all levels of government across many different contexts, often in very precise and detailed ways, can have profound effects on how the Court crafts its constitutional doctrines.

The Court has exercised this system-wide law declaring power to great effect in the national security area post-9/11, not only in constitutional cases, but also when it is declaring the meaning of widely applicable or otherwise significant subconstitutional law. In a four-year

153. This point has been made by a number of scholars. *E.g.*, Karlan, *supra* note 99, at 1923. For a recent example in the national security area, see Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 240.

154. See Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1515–16 (2005).

155. See William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 3 (1996) (“In criminal procedure, just about everything is constitutionalized; non-constitutional law is usually unimportant, and constitutional law has the look of a code designed for comprehensive coverage.”).

156. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2140 (2002) (“[M]ost constitutional limits on policing are transsubstantive—they apply equally to suspected drug dealers and suspected terrorists.”). There are some exceptions to this broad rule. See *infra* note 274 and accompanying text.

span, the Supreme Court issued rulings in four habeas cases¹⁵⁷ that, through the law they declared and the steps the executive and Congress took to comply with it, had the effect, as Aziz Huq describes, of “transforming the institutional structure” of several entire national security programs, including ones which were not parties to the litigation, in ways that were so “dramatic and wide-ranging” that the rulings had effects “somewhat akin to that achieved by . . . structural injunction[s].”¹⁵⁸

For instance, in *Hamdan v. Rumsfeld*, nominally a habeas case brought by a single individual to challenge his military commission trial,¹⁵⁹ the Court’s opinion and the rules of law it declared ended up fundamentally transforming not only the rules for military commissions, but also U.S. military and CIA detention and interrogation methods worldwide.¹⁶⁰ This latter effect occurred when the Court, after rejecting a plausible contrary interpretation relied on by the executive,¹⁶¹ held that Common Article 3 of the 1949 Geneva Conventions (which banned “outrages upon personal dignity, in particular humiliating and degrading treatment” and other abuses)¹⁶², applied to the conflict with al Qaeda and the Taliban.¹⁶³ “Coercive interrogation” was now clearly illegal, as the Court almost certainly knew and intended it would be. This law declaration spurred an enormously significant series of changes by various national security agencies to suspend questionable practices.¹⁶⁴ The military commission system was also reshaped significantly as a result of the Court’s law declaration in *Hamdan*, and here again, the Court rejected a plausible executive branch interpretation of the law.¹⁶⁵

Another case, *Boumediene v. Bush*, a decision on the consolidated habeas cases of a small number of detainees,¹⁶⁶ held that the Constitution required that noncitizens detained at Guantanamo Bay have access to habeas corpus or a substantially similar procedure to challenge their detention as enemy combatants by the U.S. military.¹⁶⁷ While technically

157. *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

158. Huq, *supra* note 153, at 240.

159. *Hamdan*, 548 U.S. at 566–67.

160. Huq, *supra* note 153, at 241.

161. *Hamdan*, 548 U.S. at 630.

162. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

163. *Hamdan*, 548 U.S. at 632.

164. *E.g.*, Huq, *supra* note 153, at 241–42.

165. *Id.* at 241.

166. *Boumediene v. Bush*, 553 U.S. 723, 733–35 (2008).

167. *Id.* at 732–33.

only limited to a few petitioners, a single unique location (Guantanamo Bay) and to a single procedural clause of the Constitution (the Suspension Clause), the ruling was a revolutionary break from past practice and the Court's own precedents holding that noncitizens outside the United States lack individual constitutional rights.¹⁶⁸ The Court's declaration of the law actually had the—in my view, intended¹⁶⁹—effect of signaling to the executive that judicial review applying the Constitution more broadly—including perhaps some of the “code” of criminal procedure rules—might occur in any extraterritorial location where the U.S. government exercised pervasive coercive power, including in war zones.¹⁷⁰

In the oral arguments and decisions concerning these post-9/11 national security cases, the Court and individual Justices frequently asserted that the Court's interventions were required to maintain sufficient judicial power and checks on the political branches in order to ensure that the rule of law prevailed.¹⁷¹ The Court also frequently expressed its related view that the rule of law requires the rule of judges.¹⁷² In other words, the

168. Cole, *supra* note 38, at 47–49. For documentation of the claim that pre-*Boumediene* doctrine and practice rejected constitutional rights for noncitizens outside the sovereign territory of the United States, see Kent, *Insular Cases*, *supra* note 38, at 123–32; Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1853–60 (2010) [hereinafter Kent, *Civil War*]; J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463 *passim* (2007) [hereinafter Kent, *Global Constitution*].

169. Kent, *Enemy Fighters*, *supra* note 38, at 248 (“It was . . . almost certainly an intended effect of *Boumediene*, that the U.S. military in both the Afghanistan and Iraq theaters of war took dramatic steps to change their arrest and detention procedures to account for the possibility of judicial review.”).

170. See *id.* at 246–48 (“There are several reasons to think *Boumediene* . . . points toward a new era of a globally protective Constitution for noncitizens, even including military enemies.”). The D.C. Circuit later held that *Boumediene* did not extend habeas review to noncitizen military detainees in Afghanistan. *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010).

171. See, e.g., *Boumediene*, 553 U.S. at 797–98 (“Security subsists . . . in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives. Our opinion does not undermine the Executive’s powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch.”); *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring in part) (implying that the Constitution’s separation of powers would be undermined if the military could detain and try individuals “without independent review,” in other words, without Article III judicial review); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (“[U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.”).

172. See *Boumediene*, 553 U.S. at 764–65 (suggesting that the lack of judicially-enforced constitutional rights at Guantanamo Bay would allow “the political branches to govern without legal constraint”); *Hamdan*, 548 U.S. at 587 (refusing to abstain from deciding the case because “the various individuals assigned review power” over the military commissions—a panel of military officers, then the Secretary of Defense, then the President of the United States—“clearly lack the structural insulation

Justices seem to be self-aware about the systemic law declaring function I am describing.

V. THE DECLINE OF COMMON LAW TORT LITIGATION AND RISE OF THE ADMINISTRATIVE STATE

This part takes a historical view of the courts' views of damages versus coercive remedies, looking at changes over time that might help explain the current contours of litigation against the federal government. Law declaration and injunctive-type remedies issued by judges are the primary features of this type of litigation today, having replaced jury verdicts and money damages as the primary way that federal officials are kept within the bounds of the law. This inversion helps explain why in the national security and foreign affairs areas today, the courts are so hostile to *Bivens* litigation, but forcefully use law declaration, habeas, and injunctive remedies to police the executive branch. In other words, this division of labor in national security and foreign affairs cases is in keeping with the Court's preferences across the board. The following part, Part VI, will look at unique features of national security and foreign relations litigation that might make courts especially hostile to suits seeking damages. Let me emphasize that this part does not purport to be offering causal claims that would satisfy a historian. It discusses trends and changes over time and suggests that the nature and result of these changes helps contextualize the judiciary's current approach to remedies.

A. *BIVENS* IS MATERIALLY DIFFERENT THAN COMMON LAW TORT SUITS

For anyone familiar with American legal history, it is somewhat jarring to hear that U.S. courts should not allow tort suits for money damages against federal officers involved in national security or foreign relations matters, even when U.S. citizens are the plaintiffs. Historically, these tort suits have been an important way that U.S. citizens protected themselves from federal government excesses during wars and other crises.¹⁷³ For instance, during the Civil War, thousands of tort suits were

from military influence" possessed by a court staffed with "civilian judges"); *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (explaining that because "[e]xecutive imprisonment" without judicial review is "oppressive and lawless," "this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace" (citation omitted)).

173. See, e.g., *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 128–32, 137 (1851) (upholding a jury verdict against a U.S. army officer for trespass against American property located in Mexico during the Mexican War); *Milligan v. Hovey*, 17 F. Cas. 380, 380–83 (C.C.D. Ind. 1871) (No. 9,605) (charging jury in a tort suit by Lambdin Milligan against a U.S. general who arrested him and officers who

filed against Union soldiers and civilian executive officials.¹⁷⁴ And indeed, a number of critics of the judiciary's limitations on *Bivens* in the national security area today have pointed to this history of damages liability against federal officials in national security contexts as a reason that *Bivens* should be presumptively available for national security-related claims.¹⁷⁵

But the modern *Bivens* suits in national security and foreign relations cases are substantially different than the type of common law damages actions that historically were allowed. First, for much of American history there were significant limits on who could access U.S. courts and claim protections of domestic U.S. law, including the Constitution. To generalize a great deal, noncitizens outside the United States were not thought to have individual rights under the Constitution, nor were enemy fighters, no matter where located. And noncitizens who were civilian enemy aliens (nationals of a country at war with the United States) or enemy fighters did not have the right to access U.S. courts during wartime.¹⁷⁶

The history of tort liability for U.S. officials arising out of national security and war contexts thus shows that (1) successful plaintiffs were almost exclusively U.S. citizens and noncitizen civilians who were not alien enemies, and (2) almost all of these tort suits against U.S. officials can be thought of as "home front" issues. There are numerous examples of home front cases. We see U.S.-based civilians (either citizens or noncitizens who peacefully resided here) alleging that they were exempt from militia or army service but nevertheless had been inducted against their will or tried and imprisoned or fined for nonperformance of duty by a military court.¹⁷⁷ We see U.S.-based civilians suing because their property

convicted him in a military commission trial held unconstitutional by the Supreme Court in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)); *Crosby v. Cadwalader*, 6 F. Cas. 876, 876-77 (C.C.E.D. Pa. 1870) (No. 3,419) (charging jury in a tort suit against a U.S. general who detained plaintiff's vessel); *McCall v. McDowell*, 15 F. Cas. 1235, 1236-38, 1247 (C.C.D. Cal. 1867) (No. 8,673) (holding, in a bench trial, a U.S. general liable and awarding damages for false imprisonment of a citizen of California who was arrested by the military for exulting at the death of President Lincoln); *Walker v. Crane*, 29 F. Cas. 13, 20-21 (C.C.D. Vt. 1865) (No. 17,067) (charging jury in a trespass suit against a U.S. army provost marshal for assault and battery and false imprisonment by a citizen of Vermont); *Avery v. Bulkly*, 1 Root 275, 275-76, 1791 WL 242, at **1 (Conn. 1791) (upholding jury verdict against militia commander for assault on civilian during militia exercises); *Smith v. Shaw*, 12 Johns. 257, 265-68 (N.Y. Sup. Ct. 1815) (finding that military officials were trespassers because plaintiff was not legally triable by court-martial during the War of 1812).

174. James G. Randall, *The Indemnity Act of 1863: A Study in the War-Time Immunity of Governmental Officers*, 20 MICH. L. REV. 589, 596-97 (1922).

175. See Margulies, *supra* note 15, at 202-03.

176. For a fuller discussion, see *infra* Part VI.E.

177. E.g., *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 22 (1827); *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 334-35, 337 (1806); *Tyler v. Pomeroy*, 90 Mass. (8 Allen) 480, 482-83 (1864).

was seized by soldiers who needed provisions or believed it belonged to or was destined to be sold to the enemy.¹⁷⁸ We see some U.S.-based civilians who were tried by military tribunals for alleged spying or other wartime misconduct and used tort suits to contest the military's jurisdiction over them.¹⁷⁹ We see some U.S. soldiers trying to use tort suits to challenge certain aspects of military discipline or court martial jurisdiction over them.¹⁸⁰ And the like.

But apart from the home front and rear echelon issues—and especially once the legal issues got fully enmeshed with war—we see very different things in the case law. It was a rule generally followed that “[l]east of all, will the common law undertake to rejudge acts done *flagrante bello* in the face of the enemy.”¹⁸¹ Complying with the laws of war—which historically were very permissive—was a complete defense to a tort suit.¹⁸² Enemy fighters could not sue U.S. officials in tort.¹⁸³ And recall that all enemy aliens, including civilians, were prohibited from accessing U.S. courts for the duration of the conflict.¹⁸⁴ By contrast, modern damages suits have often been brought by persons designated by the executive as enemy fighters, and have frequently challenged activities far removed from the home front.¹⁸⁵

Besides the limitations on the types of plaintiffs and types of allowable claims in these eighteenth and nineteenth century damages

178. *E.g.*, *McKrell v. Metcalfe*, 63 Ky. (2 Duv.) 533, 534, 1866 WL 3483, at **1 (1866); *Wellman v. Wickerman*, 44 Mo. 484, 484–85, 1869 WL 5082, at **1 (1869).

179. *E.g.*, *Milligan v. Hovey*, 17 F. Cas. 380, 380 (C.C.D. Ind. 1871) (No. 9,605); *Smith v. Shaw*, 12 Johns. 257, 257–59 (N.Y. Sup. Ct. 1815); *M’Connell v. Hampton*, 12 Johns. 234, 234 (N.Y. Sup. Ct. 1815).

180. *E.g.*, *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 78 (1857); *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 89 (1849).

181. *Tyler*, 90 Mass. at 484–85 (opinion of Gray, J.).

182. *See, e.g.*, *Terrill v. Rankin*, 65 Ky. (2 Bush) 453, 457, 1867 WL 4038, at * 3 (1867) (“[U]nless the order was authorized by the laws of war, it conferred on the appellee no legal authority, and, consequently, his act was illegal, and he is personally responsible in this action for all the consequences of his own unjustifiable and tortious act.”).

183. *See Johnson v. Jones*, 44 Ill. 142, 151, 1867 WL 5117, at **5 (1867).

184. During this earlier era, there were some kinds of permissible damages suits or claims that did not arise on the U.S. home front. Perhaps the most important example of this occurred when U.S. vessels during wartime seized vessels that allegedly belonged to the enemy or contained enemy cargo, and then brought them before a federal court sitting in its admiralty jurisdiction as a “prize” court, seeking to have the vessel condemned by the court and sold for profit. The courts could and did award damages through a kind of cross-claim if the U.S. officials acted wrongfully by, for example, seizing a vessel that was in fact owned by an American or a neutral noncitizen instead of an enemy. *See, e.g.*, *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178–79 (1804) (explaining that a neutral noncitizen was awarded damages because the U.S. naval commander lacked statutory authorization to seize his vessel).

185. *See cases cited supra* note 1.

actions against federal officials, there was another significant difference between these suits and the modern *Bivens* suits that must be considered relevant to the doctrinal equilibration. The earlier suits against U.S. officials arose under the common law, not, as in modern practice, under federal statutes or the Constitution.¹⁸⁶ If federal law entered the case, it was as a defense asserted by the officials, and the courts would need to determine whether the officials' conduct was authorized by that law. When the Constitution was invoked defensively, officers were deemed to have exceeded their authority and acted illegally if the courts found that they violated the Constitution or that the statute or other authorization for their conduct was unconstitutional.

Although it is difficult to prove this, it appears likely that the vast majority of federal officer suits were resolved without a court ever making a widely-noticed, published ruling on the constitutionality of the official conduct. This is significant, because it means that the judiciary was not announcing constitutional policy that might have to be prospectively followed by the federal government in similar cases going forward. The victim was compensated (or not, according to how the jury or the judge saw the case), but federal policymakers could continue to independently formulate policy. Surely both policymakers and lower level officials would be influenced—appropriately so—by judicial rulings or jury verdicts holding that a given policy or action violated an individual's common law rights, both because of the deterrent effect of a potential damages judgment against them, and also because of the authority of the court's declaration of what the law was. But as both a practical and a legal matter, federal officials were much more free to press forward with a policy declared to violate a common law individual right than they would be if a policy were held to be unconstitutional.

In a *Bivens* case, the substance of the cause of action is the federal Constitution, and hence these cases pervasively involve federal courts pronouncing rules and doctrines of law and whether official policies or practices violate them. This is of course a very good thing in many circumstances. If officials are engaging in conduct that a court would hold violates the Constitution, it is often highly desirable that they be told this, either in a suit directly against them or in a published judicial opinion which states rules applicable to their conduct. But as discussed in Part VI below, when the executive is taking actions in national security and foreign relations contexts, especially when abroad, an active judicial role

186. Compare cases cited *supra* notes 1, 177–80.

pronouncing binding constitutional law might not be seen by relevant actors—the executive, Congress, the federal courts—as a straightforward good.

B. THE DECLINE OF TORT DAMAGES AND RISE OF ALTERNATE REMEDIES AGAINST OFFICIAL MISCONDUCT

Over the last century or so, the common law tort suit for damages has gone from a primary way that federal officers were held accountable to a nullity, while the suit for prospective coercive relief against a government official has gone from playing a limited and humble role (deploying state or common law) to a mighty and pervasive role (deploying federal law) in judicial review. Understanding the comprehensive nature of these inversions over time provides explanatory context for the Court’s apparent view today that an individual damages remedy under *Bivens* is not constitutionally required so long as other remedies, very broadly understood, provide sufficient assurance of the rule of law within the executive.

As noted in the previous section, the common law tort suit for money damages was a primary remedy against official misconduct for decades after the Founding, though suits seeking equitable or otherwise coercive remedies under state law or common law were also used.¹⁸⁷ Federal law came to displace state law governing the substance of the action for a variety of complex reasons. Ideological changes relating to federalism probably played a role. The old view that state governments and state laws were a bulwark or protection against federal oppression was inverted by the experiences of the Civil War, Reconstruction, and the Reconstruction amendments to the Constitution.

The 1875 enactment of general federal question jurisdiction gave plaintiffs an incentive to affirmatively plead violations of federal law, rather than wait for defendants to raise it as defense of justification.¹⁸⁸ The *Ex parte Young* doctrine developed in the early twentieth century, allowing

187. See James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1871–72 (2010) (summarizing the common law writs that could be used against government officials). During the eighteenth and nineteenth centuries, common law suits against federal officials were an important form of ordinary administrative law. See, e.g., Jerry L. Mashaw, *Administration and “The Democracy”*: *Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1669–70 (2008); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1321–31 (2006).

188. Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 399 (1987).

official State action to be enjoined when it conflicted with the U.S. Constitution, through suits filed nominally against state officials.¹⁸⁹ Federal judges came to incorporate many provisions of the Bill of Rights against the state and local governments through the Due Process Clause of the Fourteenth Amendment, creating an ever denser web of judicially-enforced federal constitutional law which restrained state and local officials when they interfered with property rights.¹⁹⁰ As these new federal constitutional rights expanded, they began to cover more and different interests than the common law did, making the common law seem increasingly inadequate to the job of fully enforcing the Constitution.¹⁹¹

Starting in the mid-twentieth century, the enforcement of these ever-increasing federal constitutional rights was given a huge boost by the Court's invigoration of the damages suit against state and local officials under 42 U.S.C § 1983.¹⁹² State and local abuses thus regularly came before the federal courts for correction under the federal Constitution. Since federal constitutional law directed at state and local officials had become such a prominent part of the docket of the federal courts, it might have seemed increasingly anachronistic in suits about the conduct of the U.S. government and its officials to allow state law to restrain the federal government.

Another factor was the end of the era of general common law. Prior to the Court's landmark decision in 1938 in *Erie Railroad Co. v. Tompkins*,¹⁹³ both state and federal courts applied a general common law to regulate both private actors and government officials.¹⁹⁴ When *Erie* announced that there is no "federal general common law" but only the law of particular sovereigns,¹⁹⁵ this hinted at the federalism and separation of powers strains involved when courts held federal officers accountable under the common

189. See *Ex parte Young*, 209 U.S. 123, 156–57, 167–68 (1908) (holding that an injunction against a state official did not violate state sovereign immunity because the official was not acting on behalf of the state when he sought to enforce an unconstitutional law).

190. See Rosen, *supra* note 154, at 1515.

191. See JEFFRIES ET AL., *supra* note 126, at 68 ("So long as federal constitutional rights were thought of as analogues to common-law concepts, the common-law damages remedies available under state law would have seemed adequate. As the Court began to think of federal rights and remedies as more than common-law concepts, independent federal damage actions seemed appropriate . . .").

192. See *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

193. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

194. See Vázquez & Vladeck, *supra* note 12, at 539–42 (pointing to the *Erie* decision as a reason for the decline of the common law tort suit against federal officials); James E. Pfander, Iqbal, Bivens, and the Role of Judge-Made Law in Constitutional Litigation, 114 PENN. ST. L. REV. 1387, 1415 (2010) (same).

195. *Erie*, 304 U.S. at 78.

law.¹⁹⁶

Over the first several decades of the twentieth century, it began to seem important to have a systematic way to regulate and restrain the greatly increased and professionalized federal workforce produced by the growth of the administrative state.¹⁹⁷ Then in 1946, Congress enacted an important statute to take the place of tort suits as administrative regulation. The Administrative Procedure Act (“APA”) provided for judicial review of many federal agency actions via suits for injunctive and declaratory remedies against federal agencies or federal officers in their official capacity, but did not allow suits for money damages.¹⁹⁸ The growth in size and professionalization also meant that wrongs by federal officials came to seem less as trespasses by wayward individuals, and more like actions of the sovereign. Also in 1946, Congress passed the Federal Tort Claims Act.¹⁹⁹ The FTCA provided a waiver of sovereign immunity, substituting the United States as a defendant in place of federal employees when they were sued for state law torts committed within the scope of their employment.²⁰⁰ The FTCA was a decisive move away from individual liability under state tort law for federal officials.²⁰¹ Congress completed the transition from state tort law to federal law as being the primary regulator

196. As *Erie* is conventionally understood, federalism was implicated because state law was binding and controlling federal officials, in an inversion of the usual presumption of federal supremacy. And separation of powers was implicated because courts were creating and imposing law to restrain executive officials without legislative approval. For a revisionist account of the meaning of *Erie*, see generally Craig Green, *Repressing Erie’s Myth*, 96 CALIF. L. REV. 595 (2008), and Craig Green, *Erie and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661 (2008).

197. See *supra* note 187 and accompanying text.

198. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). See also David Zaring, *Personal Liability as Administrative Law*, 66 WASH. & LEE L. REV. 313, 323 (2009) (attributing the decline in state law tort suits against federal officers in part to the enactment of the APA). It should be noted that APA review is not available for many national security activities, and even where available, the doctrines controlling entitlement to relief are loose enough that courts have substantial flexibility to defer to the government on national security or foreign affairs matters. See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1106–31 (2009).

199. Federal Tort Claims Act, Act of Aug. 2, 1946, ch. 753, 60 Stat. 812, 842–47. See also Act of June 25, 1948, ch. 646, 62 Stat. 869, 982–85 (repealing and reenacting the FTCA as part of comprehensive bill reorganizing the federal judiciary).

200. See *supra* note 70 and accompanying text.

201. The shift away from state law tort suits and toward the APA and FTCA as the primary means of regulating federal official conduct was in keeping with concomitantly developing notions about the function and constitutional status of tort law. It was increasingly common to see tort law not as a private right to choose to redress an individual wrong, but rather as public law, a form of public regulation of official conduct, to be shaped by public values such as efficient deterrence of antisocial conduct and loss-spreading. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 581–83 (2005).

of federal official illegality when, in the 1988 Westfall Act, it made the FTCA the exclusive remedy for nonconstitutional suits against federal officials acting within the scope of their employment.²⁰²

At the same time as it was gradually moving from common law and state law tort to modern day federal administrative law as the primary means of ensuring executive branch accountability to law, the Court also effectuated a related sweeping reversal, which helps explain its currently skeptical view about the importance of money damages suits. In suits against government officials, judicial doctrine used to privilege money damages over coercive remedies like injunctions. As the Court said in *Bivens*, “[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”²⁰³ Generally speaking, throughout the nineteenth century, “[w]here review was by mandamus or injunction, courts were unwilling to review to the extent that the statute provided the administrative officer any discretion.”²⁰⁴ Thus, injunctions and mandamus were available only where positive law (a statute or well-defined common law) precisely specified the duty of the officer.

The availability of equitable relief has always turned on the inadequacy of a legal (generally money damages) remedy.²⁰⁵ There were both constitutional and prudential or institutional reasons for the traditional preference for damages over equitable remedies in suits against the government. The constitutional reason centered around the important role of the civil jury.²⁰⁶ The prudential or institutional reasons are related to the judiciary’s hesitation about getting entangled in directing state or federal

202. See *supra* notes 71–72 and accompanying text.

203. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971).

204. Jerry L. Mashaw, *The American Model of Federal Administrative Law: Remembering the First One Hundred Years*, 78 GEO. WASH. L. REV. 975, 987 (2010).

205. The Judiciary Act of 1789 provided “[t]hat suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law.” Judiciary Act of 1789, ch. 20, sec. 16, 1 Stat. 73, 82. This provision was carried forward in the Revised Statutes section 723, see *Whitehead v. Shattuck*, 138 U.S. 146, 150 (1891) (describing this recodification), and only dropped when the Federal Rules of Civil Procedure were created in 1938. However, the requirement that damages (or other remedies at law) be deemed inadequate before equitable relief be forthcoming has continued to this day in judicial doctrine. See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (requiring, among other things, for a permanent injunction to be granted, “that remedies available at law, such as monetary damages, are inadequate to compensate for that injury”).

206. When courts sit in equity, a jury is not needed unless certain special facts must be found; federal courts should not allow a suit in equity when a suit in law is adequate because that would circumvent the jury, which is constitutionally protected by the Seventh Amendment. *Whitehead*, 138 U.S. at 150–51.

executive officials on how to do their jobs.²⁰⁷

But, together with Congress, the Court gradually came to invert the old remedial hierarchy to favor injunctive-type relief over money damages. The shift of administrative law from being heavily tort or damages based to the modern APA regime of injunctions, mandamus, and declaratory judgments was discussed above.²⁰⁸ The law of government searches and seizures is another area where the Court has shifted its regulation of government officials from damages imposed after jury trials to equitable remedies and judge-only procedures.²⁰⁹ Civil rights litigation under the Constitution is yet another.²¹⁰

The development of official immunity doctrines is also a significant part of this story. During the Founding period and for some time afterwards, government officials had no immunity from a suit, either for damages or other relief.²¹¹ During the nineteenth century, the Court

207. For a modern expression of this hesitation, see *City of L.A. v. Lyons*, 461 U.S. 95, 112 (1983).

208. Under the APA, jury trials are absent and courts reviewing agency actions may issue remedies taking the forms of mandatory and prohibitory injunctions and declaratory relief, but may not award money damages. See 5 U.S.C. §§ 702, 706 (2012).

209. As originally understood, the Fourth Amendment did not require warrants (which, like today, were issued *ex parte* by judicial officers at the request of the constable), and presupposed that the primary enforcement against search and seizure abuses would be by a common law trespass suit tried before a local jury. Warrants did not wholly immunize constables in tort suits. See Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1919–20 (2014). Today, the Court has developed a warrant “requirement,” treats a validly-issued warrant as establishing the legality of the search or seizure for almost all purposes, and enforces the Fourth Amendment primarily with the exclusionary rule, a remedy controlled entirely by judges, not juries. Moreover, common law tort suits against federal officers are barred in many circumstances and, although *Bivens* suits directly under the Fourth Amendment are available (one of the very few areas where the Court has allowed *Bivens* suits), they are subject to qualified immunity and other progovernment defenses and doctrines administered by judges. See *supra* notes 71–72 and accompanying text.

210. See Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1112 (2010) (stating that since *Brown v. Board of Education*, injunctive relief has become “the norm, rather than the exception, in cases seeking to enforce broadly shared rights the value of which would be hard to quantify”); Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931, 936 (2010) (“[T]he Court has articulated a preference, at least rhetorically, for injunctive relief in civil rights cases.”).

The Court’s invigoration of state sovereign immunity from damages suits in recent years is well known. However, unconstitutional actions of the states and federal government can be and are routinely enjoined through the non-statutory *Ex parte Young* doctrine under which an officer is sued and enjoined on the theory that actions which violate the Constitution are not truly authorized government actions, but unauthorized private wrongs. *Ex parte Young*, 209 U.S. 123, 156–57, 167–68 (1908). The *Ex parte Young* doctrine, although developed by the Court in suits against state officials, has long been applied to allow injunctions against the federal government (nominally against federal officers) notwithstanding sovereign immunity. See *supra* note 61 and accompanying text.

211. See David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 14–20 (1972); Woolhandler, *supra* note 188, at 414–21.

developed immunity doctrines that, while there were many complexities and changes over time, can be fairly summarized as providing more protection from prospective and coercive suits than from damages suits.²¹² In the late nineteenth century and into the twentieth, the Court gradually inverted this, so that eventually, official immunity doctrines provided little or no protection to local, state, or federal officials from prospective and coercive relief, while robust immunity rules tightly limited money damages suits, first under the common law and then also under the Constitution.²¹³

These robust immunities (sovereign and individual) from money damages suits have the effect of making injunctive relief more readily available, because of the test that injunctions shall not issue when legal remedies are adequate.²¹⁴ For many decades, courts have also routinely presumed that a violation of constitutional rights is an “irreparable injury” under the test for getting an injunction.²¹⁵ Richard Fallon has concluded that “[t]he Court . . . has treated suits for injunctions against ongoing constitutional violations strikingly different from *Bivens* actions. . . . [T]he post-*Brown* Court, so far as I am aware, has never suggested that injunctions against ongoing constitutional violations are constitutionally problematic in the way it now believes *Bivens* actions to be.”²¹⁶

By the latter part of the twentieth century, federal substantive law had displaced the common law and state law as the primary way that federal official illegality was measured; the suit for money damages against federal officials had been largely eclipsed by APA review and other types of suits for prospective coercive relief; and the locus of decisionmaking shifted away from juries and into the hands of judges. Given these epochal shifts, one can better understand why the modern Supreme Court came to view

212. See Woolhandler, *supra* note 188, at 449–52 & n.280.

213. Compare *id.* at 460–70 (tracing the development of robust official immunity from damages suits) with *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (noting that qualified immunity for officials does not bar “a suit to enjoin future conduct”).

214. See Karlan, *supra* note 21, at 1328–29 (making this point with regard to state sovereign immunity under the Eleventh Amendment); Reinert, *supra* note 210, at 939 (same). Both Reinert and Karlan emphasize, however, that the Court has cut back on the availability of injunctions to enforce civil rights claims in a variety of ways. See, e.g., Reinert, *supra* note 210, at 935.

215. See Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 231 & n.132 (2012).

216. Fallon, *supra* note 210, at 1113. This still seems true today, though there are some recent indications that the Court may be tightening up slightly the availability of injunctive relief, by making the test for issuing an injunction more determinate and rule-like, see Gergen, Golden & Smith, *supra* note 215, at 214, perhaps to facilitate appellate oversight and correction, and by reversing several times and criticizing lower court decisions which in any way presumed that an injunction could be issued, see, e.g., *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757–58, 2761 (2010); *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008).

the *Bivens* remedy as essentially optional rather than constitutionally mandatory—because the Court is now more focused on systemically maintaining the rule of federal law within the executive branch through law declaration and coercive, prospective remedies, rather than through individual remediation and redress.

VI. REASONS FOR CAUTION ABOUT DAMAGES IN NATIONAL SECURITY CASES

Parts IV and V explored large structural changes in the role of the judiciary and its methods of operation over the last hundred-plus years that help explain why the modern Court generally prefers injunctive-type remedies to damages in suits against the government. This part discusses reasons why courts might be particularly cautious about allowing *Bivens* damages suits in cases involving national security and foreign affairs.

The Court believes that damages suits and the concomitant discovery burdens and threats of personal liability are likely to waste officials' time, cause excessive caution in the performance of official duties, and deter good people from entering government service, and there are some reasons to think that these concerns are heightened in national security and foreign affairs cases. The courts might well believe that the executive branch is adequately constrained in the national security area by mechanisms other than damages lawsuits. And allowing *Bivens* suits in the national security and foreign relations areas will greatly increase the size of the pool of potential plaintiffs who can challenge the constitutionality of the executive's conduct, subject the government to litigation and potential law declaration it will be unable to moot by conceding individual relief, and force courts to make difficult determinations about whether and how constitutional rights should apply abroad and outside the ordinary peacetime contexts for which they were developed. These features, many of which are arguably unique to suits seeking damages remedies, help explain why the courts' recent assertiveness is expressed primarily in suits seeking coercive rather than damages remedies. If one is concerned about the judicialization and constitutionalization of foreign relations and national security, for some or all of the reasons raised by the courts of appeals and canvassed in Part III.A, this judicial caution about extending *Bivens* is desirable.

But that is not to say that such caution should necessarily trump competing values, such as vindication of constitutional rights, redress of injuries or deterrence of official law-breaking. This part does not aim to weigh and balance all competing interests but merely offers reasons, some

of them heretofore unexplored, that might support the courts' stance toward *Bivens* in the national security and foreign affairs contexts.

A. "SOCIAL COSTS" OF DAMAGES LIABILITY FOR GOVERNMENT OFFICIALS

The Supreme Court's case law on official immunity expressly highlights a number of consequences it sees as flowing from damages liability. Robust official immunity for individual officials sued personally is justified by the Court because of the "cost[,] not only to the defendant officials, but to society as a whole," of damages suits and the prospect of individual liability.²¹⁷ The cost that appears to most worry the Court is often called "overdeterrence," which occurs when the fear of personal damages liability discourages the vigorous, efficient, and socially beneficial performance of official functions, either because there is some doubt about what the law requires or there is a prospect of meritless but nevertheless costly damages suits.²¹⁸ It is a frequent trope of discussions of national security and foreign affairs that the political branches, in particular the executive, must be able to act quickly, vigorously, and flexibly to meet dangerous and unforeseen or changing circumstances.²¹⁹ In keeping with this precept, *Iqbal* implied that the social cost of overdeterrence might be especially high when "high-level officials" are sued because of their actions in response to "a national and international security emergency,"²²⁰

217. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

218. See FALLON ET AL., *supra* note 68, at 734 (stating that modern official immunity doctrine "is designed primarily to avoid dampening the vigor of officials in the performance of their duties"); PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 16–20 (1983) (describing how overdeterrence could occur in practice); Jeffries, *supra* note 137, at 269 ("Current doctrine rests squarely on the overdeterrence rationale.").

219. See, e.g., *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375–76 (2000); *Haig v. Agee*, 453 U.S. 280, 291–92 (1981); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936).

220. *Ashcroft v. Iqbal*, 556 U.S. 662, 685–86 (2009) ("Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to . . . 'a national and international security emergency unprecedented in the history of the American Republic'" (quoting *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007) (Cabranes, J., concurring))). See also *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2086–87 (2011) (Kennedy, J., concurring) ("When faced with inconsistent legal rules in different jurisdictions, national officeholders should be given some deference for qualified immunity purposes . . ."). Other social costs of official damages liability cited by the Court include the likelihood of frivolous litigation, *Forrester v. White*, 484 U.S. 219, 226–27 (1988); "the expenses of litigation," whether frivolous or meritorious, "the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," *Harlow*, 457 U.S. at 813–14; the burdens of discovery on government officials, e.g., *Iqbal*, 556 U.S. at 685–86; *Crawford-El v. Britton*, 523 U.S. 574, 588, 591, 593 n.14 (1998); the

though the Court has in the past refused to accord cabinet heads absolute immunity in these circumstances.²²¹

The Court recognizes that this immunity has downsides—individuals who are harmed are deprived of compensation, and “the ideal of the rule of law” suffers²²²—but overall, the Court weighs the policy balance to favor very strong official immunity. Indeed, in qualified immunity cases, the Court frequently discourses about the myriad harms of damages actions against individual officers.²²³ When it initially created the *Bivens* remedy, the Court saw it is fulfilling at least two purposes, compensation of a wronged individual and deterrence of government misconduct.²²⁴ In recent decades, as it has cut back on *Bivens*, the Court has said it serves only one purpose—deterrence.²²⁵ But since the modern Court is so concerned with overdeterrence, especially of senior policymakers responding to national security crises, this purpose of *Bivens* is one about which the Court is very suspicious.

It should be noted that the predicted “social costs” of damages liability, like its capacity to overdeter, are based on contested empirical claims.²²⁶ And, as discussed in Part III.B above, there are some reasons to

deterrence of policymakers from giving or receiving candid and wide-ranging advice, see *Harlow*, 457 U.S. at 817 n.28; and the unfairness to officials who are held personally liable for actions they took for the public’s benefit, sometimes under the direction of law or superior orders, and frequently in the face of unclear constitutional standards and challenging factual situations, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 239–40 (1974).

221. See *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985) (rejecting the argument that the U.S. Attorney General should have absolute immunity when performing national security functions). A few years before *Mitchell*, the Court had suggested that presidential “aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy” might need absolute immunity “to protect the unhesitating performance of functions vital to the national interest.” *Harlow*, 457 U.S. at 812.

222. *Forrester*, 484 U.S. at 223. See also *Westfall v. Erwin*, 484 U.S. 292, 295 (1988) (discussing this problem in the context of absolute immunity of federal officials for state law torts).

223. E.g., *Iqbal*, 556 U.S. at 685–86; *Pearson v. Callahan*, 555 U.S. 223, 237 (2009); *Atwater v. City of Lago Vista*, 532 U.S. 318, 351 n.22 (2001); *Crawford-El*, 523 U.S. at 590 & n.12; *Forrester*, 484 U.S. at 226–27; *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Harlow*, 457 U.S. at 813–14.

224. *Carlson v. Green*, 446 U.S. 14, 21 (1980).

225. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (“The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.”); *FDIC v. Meyer*, 510 U.S. 471, 485 (1994) (“It must be remembered that the purpose of *Bivens* is to deter the officer.”).

226. See Fallon, *supra* note 43, at 495–97. A number of recent theoretical and empirical efforts have been made to begin to remedy the problem of lack of solid information about actual governmental practices. See, e.g., Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 *FORDHAM URB. L.J.* 587, 587–96 (2000); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 *U. CHI. L. REV.* 345, 347 (2000); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 *UCLA L.*

suspect that the most senior executive policymakers are unlikely to be bothered by any fear of personal financial liability. They could, of course, still fear discovery of sensitive information about them or their actions, the diversion of their time, and other costs cited by the Court.

B. DISCOVERY BURDENS

The potential release of sensitive and closely-held information through discovery is a concern for the government in almost any civil or criminal lawsuit, but these concerns are dramatically heightened in the national security and foreign relations contexts. At the same time, using court-ordered discovery to force out information the government wants to keep secret is more appealing for ideologically-oriented litigants in national security and foreign relations contexts, because traditional means by which internal government information is released, such as voluntary agency disclosure or FOIA,²²⁷ are much more limited in these contexts.²²⁸

Discovery in *Bivens* cases can be more intrusive and burdensome for government officials than in other types of suits. Only in *Bivens* suits are government officials sued personally. As the Supreme Court has explained, even though qualified immunity rules are designed to screen out meritless suits before imposing the costs of discovery on government officials, “limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity.”²²⁹ If the official is not entitled to have the suit dismissed on qualified immunity grounds, he or she may be deposed and will need to turn over emails and other individual documents to the plaintiffs.²³⁰ *Bivens* liability for senior officials is only available for “the official’s own individual actions” and intentions, not on the basis of respondeat

REV. 1023, 1028 (2010).

227. Freedom of Information Act, 5 U.S.C. § 552 (2012).

228. Litigants with weak *Bivens* claims might be tempted to sue because they assume that the government would often rather settle than produce sensitive information in discovery.

229. Crawford-El v. Britton, 523 U.S. 574, 593 & n.14 (1998).

230. See *id.* at 598 (noting that if the *Bivens* suit is not dismissed on qualified immunity grounds, “the plaintiff ordinarily will be entitled to some discovery”). Dozens of depositions of government officials were taken by the plaintiffs in the *Bivens* litigation about immigration detentions during the investigation of the 9/11 attacks. See United States’ Response to Plaintiffs’ Objections to Chief Magistrate Judge Gold’s Order Entered on December 20, 2007, at 3 & n.3, Elmaghraby v. Ashcroft, 2005 U.S. Dist. LEXIS 21434 (E.D.N.Y. Sept. 27, 2005) (Nos. 04 CV 1809, 02 CV 2307), 2008 WL 8255274, at *2. In a conversation with plaintiffs’ counsel, I was informed that the depositions were of low level officials and that document production did not appear to impinge directly on the senior officials sued.

superior,²³¹ and so plaintiffs must be entitled to discover what exactly each individual defendant thought and did.

In a habeas, injunctive, or declaratory case, it is frequently the case that an entire statute, rule or policy is challenged and there may be less need to dig into the individual files or personal recollections of government officials. Perhaps for this reason, and in order to generate publicity and impose costs on officials, ideologically-motivated litigation outfits quite often name very senior policymakers as defendants in *Bivens* suits.²³² The post-9/11 suits have named as defendants the Attorney General, FBI director, CIA director, Chairman of the Joint Chiefs, Secretary of Defense, and others.²³³ The Supreme Court has frequently warned about the “evils” of “[d]iscovery involving public officials,”²³⁴ and not surprisingly appears more concerned about this when very senior officials or national security or foreign relations subject matters are involved.²³⁵ The potentially heightened discovery burden in *Bivens* litigation is thus another reason the Court may be skeptical about extending *Bivens* into the national security and foreign relations contexts. In fact, the Court has frequently cited the burdens of participating in discovery and other aspects of litigation as a reason to grant qualified immunity to government officials.²³⁶ One should note, however, that in practice, lower court judges may make discretionary rulings that serve to protect very senior officials from direct discovery burdens.²³⁷

C. SUBSTITUTABILITY OF “REMEDIES” BROADLY UNDERSTOOD

The Supreme Court has suggested that it has very wide discretion, in choosing how it will act to maintain the rule of law in the executive branch, to take into account the presence of alternate remedial schemes, understood

231. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

232. *See Zaring*, *supra* note 198, at 331–37 (suggesting that many *Bivens* suits against senior policymakers are filed to generate publicity, symbolize the subjugation of high officials to the law, impose personal costs on officials thought to have violated the law, and to obtain court-ordered discovery).

233. *Id.* *See also supra* note 1 and accompanying text.

234. *Crawford-El*, 523 U.S. at 593 n.14.

235. *See, e.g., Iqbal*, 556 U.S. at 685 (noting that the costs of discovery to the government are “only magnified” when the relevant officials are tasked with responding to national security threats like 9/11); *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 & n.28 (1982) (“In suits against a President’s closest aides, discovery of this kind frequently could implicate separation-of-powers concerns.”). *Cf. Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2086–87 (2011) (Kennedy, J., concurring) (explaining why qualified immunity protection is particularly important for national policymakers responding to security emergencies).

236. *See cases cited supra* note 220.

237. *See, e.g., Kyle Eng’g Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979) (“Heads of government agencies are not normally subject to deposition.”).

in a very broad way as encompassing not only alternate judicial remedies. This might be called the substitutability of remedies.

Outside the national security area, the Court has frequently justified restrictions on one type of suit against the government by pointing to the availability of a different type of lawsuit.²³⁸ And when the Court justifies restrictions on certain remedies, it often points not only to alternate judicial remedies, but also to nonjudicial institutions and practices that keep the executive within check. For instance, in *Nixon v. Fitzgerald*, the Court explained its new rule of absolute immunity for the President from civil suits related to official functions would “not leave the Nation without sufficient protection against misconduct” because impeachment, “constant scrutiny by the press,” “[v]igilant oversight by Congress,” and desires for reelection, “prestige” and “historical stature” would provide sufficient “formal and informal checks.”²³⁹ There are numerous other examples where the Court took this broad view of “substitutability of remedies,” disallowing individual damages suits because nonjudicial checks were sufficient to ensure executive accountability to law.²⁴⁰

This seems to occur in national security and foreign affairs contexts as well. *Chappell v. Wallace*, a putative *Bivens* suit by enlisted servicemen against their officers for race discrimination, shows the Court taking a very broad view of the substitutability of remedies. The Court there declined to extend *Bivens*, relying very heavily on the fact that the military justice system provided remedies.²⁴¹ There was no mechanism to seek money

238. See, e.g., *Alden v. Maine*, 527 U.S. 706, 755 (1999) (noting that although states may not be sued by individuals because of sovereign immunity, the federal government may still sue); *City of L.A. v. Lyons*, 461 U.S. 95, 111–13 (1983) (imposing restrictive standing rules to bar suit for injunction but noting availability of damages suit).

Many critics contend that the promise of an alternate remedy is often a hollow one. See, e.g., Rudovsky, *supra* note 32, at 1212–13 (“Alternatives are promised, but they are often denied, unavailable in practice, or riddled with exceptions that seriously undermine their effectiveness.”).

239. *Nixon v. Fitzgerald*, 457 U.S. 731, 757 (1982).

240. In *Hudson v. Michigan*, 547 U.S. 586 (2006), the Court noted that one reason that the exclusionary rule should not be applied to “knock-and-announce” Fourth Amendment violations by the police was that “the increasing professionalism of police forces” helped “deter[] civil-rights violations” like the one at issue. *Id.* at 598. Another example of a broad view of the substitutability of remedies come from the Court’s justifications for prosecutors having absolute immunity from damages suits. See *Imbler v. Pachtman*, 424 U.S. 409, 428–29 (1976) (suggesting that damages suits are not necessary because professional oversight bodies, judicial review within the criminal process, and other mechanisms will ensure that prosecutors follow the law).

241. As described by the Court, that system allowed aggrieved enlisted men to petition their commanding officer, an officer exercising court-martial jurisdiction or, if the dispute involved the accuracy of military records, the Board for the Correction of Naval Records, and ask those persons or entities to investigate and provide what relief they saw fit. Only the Board’s decisions concerning records disputes could be reviewed by any third party or court (judicial review under an arbitrary and

damages or remedies in the nature of an injunction, declaratory judgment, or mandamus. And there was no way to initiate judicial review in the first instance. Yet the Court found this system sufficient enough to obviate any need for *Bivens*, suggesting that system-wide rule of law rather than effective individual redress was its goal.

In *United States v. Stanley*, the LSD military case, the Court declined to allow *Bivens* but noted that Stanley had filed an administrative claim with the Army and an FTCA suit. Both were denied or dismissed, but the Court seemed to think the mere existence of those systems was noteworthy. The Court also noted the possibility that Stanley would get some kind of statutory veteran's benefits, but did not say how likely this was or suggest that this would have provided compensation for the tortious injuries he had allegedly suffered.²⁴² All the Justices agreed that Stanley could not pursue a state law tort claim.²⁴³ Despite the manifest inadequacy of all of these alternate remedies, the Court denied his request to allow a *Bivens* claim.²⁴⁴

The Court's recent decision in *Clapper v. Amnesty International USA* provides another interesting example.²⁴⁵ Plaintiffs who alleged a fear that their communications could be intercepted under a provision of the Foreign Intelligence Surveillance Act ("FISA") were denied standing by the Court.²⁴⁶ An important part of the rationale concerned the Foreign Intelligence Surveillance Court ("FISC"). Congress created this special court, staffed with Article III judges, to review *ex ante* and *ex parte* the executive branch's requests to conduct foreign intelligence surveillance.²⁴⁷ Although proceedings before the FISC are secret, news reports and information gleaned from the few public opinions issued by FISC judges suggest that there is an ongoing and reasonably robust dialogue between FISC judges and executive branch attorneys who specialize in FISA to review the legality of surveillance.²⁴⁸ In *Clapper*, the Supreme Court

capricious administrative law standard). See *Chappell v. Wallace*, 462 U.S. 296, 302–04 (1983). See also *supra* Part II.

242. *United States v. Stanley*, 483 U.S. 669, 672, 675 (1987).

243. *Id.* at 670–71.

244. *Id.* at 686.

245. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013).

246. *Id.* at 1142–43.

247. *Id.* at 1143.

248. Many critics argue that the FISC is a rubber stamp because it has apparently rarely formally denied a government request. My admittedly impressionistic and incomplete sense gathered from talking to people with knowledge of the process and reviewing leaked documents is that Gary Schmitt is correct that one "reason the court has such a high rate of warrant approvals is almost certainly that the layer of government lawyering required to bring a request forward is already extensive, and the evidentiary requirements for a request itself are such that most FISC approvals are easily decided."

implied that it need not find that the plaintiffs had standing to pursue their constitutional litigation against the government because the Article III judges of the FISC were already providing sufficient judicial review to ensure that the executive obeyed the law.²⁴⁹ This is essentially a substitutability of remedies rationale.

It seems plausible that, in the national security area, when considering whether to authorize additional remedies (or find that plaintiffs have standing to invoke already existing remedies), the Court takes a system-wide view of whether the totality of its law declaring actions, plus any remedial and oversight regimes put in place by court order, statute, or executive order, provide sufficient assurance that the rule of law and separation of powers prevail. This very loose view of the substitutability of remedies implicitly presupposes that the Constitution does not require that any particular plaintiff have anything more robust or individualized, like a *Bivens* remedy. As noted above, it is quite controversial and not well understood what remedial baseline or floor the Constitution requires. It seems likely that, in the specialized contexts of national security and foreign relations, especially actions overseas affecting noncitizens or in conflict zones, the constitutional rules about minimally sufficient remedies are even more relaxed than in the domestic sphere of workaday government activities.

A very broad view of the substitutability of remedies—seeing money damages suits as only one among many legal and nonlegal means of constraining the executive branch to obey the law—might be particularly appropriate in the area of national security, given recent developments in law and legal and political culture. In an important 2012 book, Jack Goldsmith describes the profusion of forms of accountability that have increasingly developed within and around the modern executive branch in the national security area in the years since 9/11.²⁵⁰ He calls this an “ecology of transparency”²⁵¹ and provides a rich description of its many components—including framework statutes enacted by Congress which contain oversight mechanisms and criminal prohibitions; criminal trials of

Gary Schmitt, *Don't Save This Court*, WEEKLY STANDARD (Aug. 5, 2013), http://www.weeklystandard.com/articles/don-t-save-court_741008.html. Some recently disclosed documents also suggest that the FISC has been willing to push back against the government. See Charlie Savage & Scott Shane, *Secret Court Rebuked N.S.A. on Surveillance*, N.Y. TIMES (Aug. 21, 2013), <http://www.nytimes.com/2013/08/22/us/2011-ruling-found-an-nsa-program-unconstitutional.html>.

249. *Clapper*, 133 S. Ct. at 1150, 1154.

250. GOLDSMITH, *supra* note 128.

251. *Id.* at 118.

wayward officials who break criminal laws; scrutiny of the legality of policy by empowered and relatively independent lawyers within the executive branch such as general counsels and the Judge Advocate General's Corps; independent inspector generals within agencies reporting to Congress and authorized to ferret out waste and abuse; congressional committee reporting requirements and congressional investigations; internal accountability board review proceedings and ethics investigations; FOIA proceedings; and "public criticism and calumny" brought on by a vigorous investigative press which excels at obtaining leaks about possible illegalities and an active NGO community.²⁵²

As Goldsmith's interviews with current and former executive officials make clear, these mechanisms of accountability "impose various forms of psychological, professional, reputational, financial, and political costs on those held accountable,"²⁵³ and have inhibiting effects on the willingness of executive officials to push the envelope.²⁵⁴ He concludes that, as a result of this ecology of transparency, which has proliferated in the decade since 9/11, the executive branch is reasonably well "fettered" and kept within the bounds of law.²⁵⁵

Though Goldsmith lists "civil trials" as part of his detailed description of post-9/11 accountability, the book barely addresses them,²⁵⁶ and for good reason. As we have seen, *Bivens* suits have played a relatively small role in the national security area because the courts of appeals have not allowed them to go forward.²⁵⁷ Goldsmith's account of the effectiveness of this new ecology of transparency provides interesting context for thinking about the way the courts have equilibrated doctrine in the national security area. On the one hand, it might be said that his account undermines one of the Supreme Court's most potent arguments against monetary liability for federal officials—the fear that it will "overdeter," cause excessive caution that damages the public interest, especially in the national security area where boldness is arguably more necessary.²⁵⁸ It might seem far-fetched to think that a civil tort suit will by itself cause significant overdeterrence for, say, a senior CIA official who is also worried about investigations by the inspector general, DOJ prosecutors, and an internal accountability board;

252. *Id.* at 118–21, 235.

253. *Id.* at 235.

254. *Id.* at 239 ("Everyone in the CIA, and every national security lawyer in the government, knows that the threshold of sin has lowered.").

255. *Id.* at 211, 239.

256. *Id.* at 235.

257. See *supra* notes 1–2 and accompanying text.

258. For discussion of the theory of overdeterrence, see *supra* note 218 and accompanying text.

congressional scrutiny; foreign civil and criminal trials ginned up by NGOs; and public scrutiny in the press or NGO reports. This is especially the case if, as seems likely, the official has personal liability insurance or can request reimbursement of costs and indemnification from his agency, or both.²⁵⁹ It is likely true, as Goldsmith suggests, that all of these accountability mechanisms put together have caused some overdeterrence. But it does not seem credible that civil torts suits would alone tip the balance from appropriate deterrence to overdeterrence.

On the other hand, if the Court does evaluate the need for remedies by looking system-wide at whether the rule of law prevails, this thick new web of accountability mechanisms in the national security area described by Goldsmith might suggest that *Bivens* is largely unnecessary. This latter view would gain traction if *Bivens* litigation were perceived to be uniquely costly.

D. EFFECTS OF THE TRANSREMEDIATION ENFORCEMENT OF RIGHTS

Allowing constitutional claims to be asserted through damages litigation might pose unique concerns in the national security and foreign relations areas. Compared to injunctive-type suits, the executive would have much less ability to control or moot damages litigation; the pool of potential plaintiffs would be much larger; and courts might be forced to change the definitions of constitutional rights in undesirable ways. The Court's approach to litigation against the government—focusing on system-wide rule of law rather than individual redress, intervening occasionally but forcefully in injunctive-type cases while being cognizant of reasons for judicial caution in the areas of national security and foreign affairs—suggests that these factors could be considered reasons to disfavor damages suits.

The Supreme Court's failure to extend *Bivens* to most constitutional rights and contexts is notable in our constitutional system because where state and local officials are involved, almost all substantive constitutional rights can generally be enforced both offensively and defensively, as both a sword and shield, in suits seeking both retrospective relief such as damages and prospective relief such as injunctions. "Offensive" enforcement occurs when an injured private individual chooses to initiate legal proceedings against the (allegedly) responsible government official seeking a remedy. "Defensive" enforcement occurs when the government initiates legal proceedings against a private individual, and the (alleged) rights violation

259. See *supra* notes 129–31 and accompanying text.

with its attached remedy, if there is one, is raised to block or limit the government's legal options. Offensive enforcement can generally seek either prospective or retrospective remedies. For instance, in a § 1983 suit, Congress has authorized plaintiffs to initiate suits seeking both damages from the state and local officials and, if the official misconduct is continuing or threatens to be repeated, injunctions. On the other hand, defensive enforcement generally seeks relief that is injunctive in nature and usually best described as prospective. For instance, when a criminal defendant raises a claim that the police violated his constitutional rights during a search of his house, the remedy is the exclusion of evidence from the upcoming trial—essentially an injunction against the government's future use of the evidence.

To coin an admittedly awkward phrase, we could say that constitutional rights against state and local government officials are generally enforced in a transremedial fashion—both offensively and defensively, and both prospectively and retrospectively—while rights against federal officials are not, because of limitations on *Bivens*.²⁶⁰ Individuals whose rights are injured by federal officials have essentially all the same remedies in defensive litigation as do individuals injured by state and local officials, but the availability of remedies in offensive litigation differs greatly between the federal and state and local contexts due to the *Bivens* doctrine.

The choice of whether the enforcement of substantive constitutional rights against government officials will be transremedial has important consequences along several dimensions. The size of the pool of potential litigants who can invoke a given constitutional right will be vastly different depending on whether the rights enforcement is transremedial. The executive can unilaterally choose to moot injunctive-type suits, giving an individual relief and avoiding law declaration, but cannot unilaterally moot a damages suit. And in a system where rights against officials are generally enforced transremedially, the resulting litigation in multiple remedial contexts has the potential to change the definitions of the substantive rights—and not always in desirable ways. It seems appropriate that the Supreme Court and courts of appeals confronting the question whether to extend *Bivens* consider these consequences—and they almost certainly are doing so already.

260. The focus on suing government officials obviates the need to discuss complex issues about suing sovereigns directly.

1. Executive Control

Government officials have a substantially lesser ability to control or influence whether the litigation will occur in the offensive setting. If constitutional rights can be litigated only defensively, government officials can choose not to initiate the formal legal proceedings that trigger the ability to use the constitutional right defensively. By definition, it is the private individual who chooses whether to initiate offensive constitutional litigation.

The type of remedy matters as well. When an injunction or habeas relief is sought, the executive has the unilateral option to moot the suit by consenting to the requested relief. The executive often trades off individual relief in this way to avoid law declaration that will have systemic, far-reaching effects.²⁶¹ This executive safety valve in suits for prospective relief might give the courts some comfort that the executive branch does not view an impending law declaring judicial opinion as wholly unacceptable. There are still unresolved questions about the executive's right to moot a damages claim by making an offer of judgment for all compensatory relief the plaintiff could possibly be seeking, plus fees and costs.²⁶²

2. The Size of the Plaintiff Pool

In the national security area, the U.S. government engages in relatively little activity that results in defensive assertions of constitutional rights. Certainly, there are some criminal prosecutions for national security crimes, including ones that occurred abroad. But intelligence, military and diplomatic activities—which constitute a very large proportion of this country's overseas national security activities—involve almost no government-initiated legal proceedings which allow constitutional rights to be asserted defensively. Therefore, in the national security area, there will be very few individuals who can assert constitutional claims against the U.S. government and its officials if offensive litigation is not allowed or is limited.

Under current doctrine, offensive litigation seeking injunctions or injunctive-type relief (habeas) is widely, but by no means universally, available for individuals affected by U.S. national security policies. But, as

261. See *supra* note 151 and accompanying text.

262. See *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528–29 (2013) (“While the Courts of Appeals disagree whether an unaccepted offer that fully satisfies plaintiff’s claim is sufficient to render the claim moot, we do not reach this question, or resolve the split” (footnote omitted)).

this Article has discussed, offensive money damages remedies (*Bivens*) have not been provided in most circumstances. Allowing *Bivens* in the national security area will substantially increase the size of the pool of potential plaintiffs—meaning the pool of persons who can raise constitutional claims offensively or defensively, whether or not they initiate civil lawsuits as formal plaintiffs. Rules about Article III standing and matters of timing mean that there is an enormous difference between the size of the pool of potential plaintiffs in offensive versus defensive constitutional litigation, and between suits seeking retrospective versus prospective remedies. There will always be a much larger number of individuals who potentially could raise claims against the government offensively compared to defensively, and a much larger number of individuals who can sue for damages than for injunctive relief.

To simplify somewhat, an individual may seek injunctive relief only for so long as the government harm is occurring. That might be just a few instances. After it is over, the injured party will not have standing to sue for injunctive-type relief unless it can be shown that the government harm is objectively likely to recur.²⁶³ Even if the harm occurs over a longer period of time, and therefore, there is a greater time window during which to sue for injunctive relief, the government misconduct might be of a type which prevents the individual from reaching a lawyer or court.²⁶⁴ Therefore, there will generally be a somewhat narrow time window in which an injured party can be a plaintiff seeking injunctive relief against government misconduct. The time window during which an individual injured by government officials may seek to be a plaintiff in a money damages suit is substantially, often exponentially, larger—probably at least several years under the relevant statute of limitations.²⁶⁵ In addition, it is significantly easier to establish standing to sue for damages than for an injunction.²⁶⁶

263. For cases concerning traditional injunctions, see *City of L.A. v. Lyons*, 461 U.S. 95, 106–07 nn.7 & 8 (1983); *O’Shea v. Littleton*, 414 U.S. 488, 495–97 (1974). The law regarding habeas cases is more complex. In ordinary criminal cases, a released detainee may still pursue a habeas petition—in other words, the petition is not moot—if it can be proved that there are specific ongoing collateral consequences of the challenged criminal conviction. See *Spencer v. Kemna*, 523 U.S. 1, 8–12 (1998). The D.C. Circuit has been very hesitant to extend these rules to law-of-war detainees, like those at Guantanamo. See *Gul v. Obama*, 652 F.3d 12, 16–18 (D.C. Cir. 2011). The Supreme Court has not addressed this issue.

264. This seems even more likely to be true in national security areas than domestically, because the government misconduct might occur abroad, might involve extrajudicial detention, etc. A number of the post-9/11 *Bivens* plaintiffs—for instance Arar, El-Masri, and Padilla—were allegedly detained in manners that prevented them from seeking outside legal assistance.

265. The statute of limitations for *Bivens* and § 1983 claims is borrowed from the forum state’s personal injury statute. See *Wilson v. Garcia*, 471 U.S. 261, 266–67 (1985).

266. See Fallon, *supra* note 43, at 491 (“[P]arties who seek damages for past injuries almost never

As a result of this, in general, but especially in the national security area, the size of the pool of potential plaintiffs will always be substantially larger in offensive compared to defensive litigation, and in litigation seeking damages compared to injunctions.²⁶⁷ This is either a feature or a bug depending on one's views about a variety of issues. In *Harbury*, *Verdugo-Urquidez*, and *Iqbal*, the Court implied that it sees it as a bug in the national security area.²⁶⁸

3. Changing Definitions of Rights When Transremedial Enforcement Exists

Allowing constitutional rights to be enforced offensively as well as defensively and with retrospective as well as prospective remedies can lead courts to change the definition of the rights, and not always in rights-protective ways. The enforcement of some important criminal procedure rights offensively via constitutional tort suits has been shown to have led the courts to reshape and cut back on the substantive right itself.²⁶⁹ An example of this dynamic is the *Miranda* case law.²⁷⁰ In other words,

encounter difficulties in satisfying the demands of standing doctrine.”).

267. It is true that, as a practical matter, the ease of raising constitutional claims and incentives to do so will be greater in defensive compared to offensive litigation, especially in the criminal area—*Gideon* rights mean that all individuals in defensive criminal litigation will have a lawyer, and the prevalence of the exclusionary rule remedy gives significant incentives to raise constitutional claims. See Karlan, *supra* note 99, at 1915–16 & n.8 (discussing the reasons that defensive constitutional litigation is relatively common). Offensive litigation is greatly limited in the domestic sphere by the rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), that § 1983 actions must (with minimal exceptions) be dismissed if a judgment for the plaintiff would necessarily imply the invalidity of the plaintiff's criminal conviction or imprisonment. *Id.* at 486–87. Lower federal courts apply the *Heck* rationale in *Bivens* cases. See, e.g., *Clemente v. Allen*, 120 F.3d 703, 705 (7th Cir.1997) (per curiam). In the national security realm, especially extraterritorially, the U.S. government is much more likely to use tools other than a criminal prosecution, meaning that *Heck* will rarely present a problem.

268. See *supra* notes 93, 95–97 and accompanying text.

269. For a theoretical and doctrinal investigation of this phenomenon, see generally Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002 (2010).

270. As a result of concerns about expansive § 1983 and *Bivens* liability, the Court in a 2003 decision held that a *Miranda* violation does not occur at the time of interrogation but only later, if the government seeks to use the interrogation to incriminate the suspect in some way. *Chavez v. Martinez*, 538 U.S. 760, 770–73 (2003) (Thomas, J., joined by Rehnquist, C.J., O'Connor & Scalia, JJ.). See also *United States v. Patane*, 542 U.S. 630, 641–42 (2004) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J.) (reiterating their views from *Chavez*). Two other Justices in *Chavez* agreed that no tort suit alleging a *Miranda* violation should be allowed under the circumstances presented in *Chavez*, but were not prepared to agree with the plurality's view that only use at trial itself would trigger a *Miranda* violation. *Chavez*, 538 U.S. at 777–78 (Souter, J., concurring, joined by Breyer, J.). The lower courts understand the rule to be that a *Miranda* violation only occurs if the fruits of a non-*Miranda* compliant interrogation are used in some way as part of a criminal case or a threat of criminal liability. See, e.g., *Somberger v. City of Knoxville*, 434 F.3d 1006, 1024–25 (7th Cir. 2006). Concerns about the

doctrinal equilibration occurs, as predicted by Fallon and others, whereby greater opportunities to litigate rights and seek relief leads to limitations on the substantive coverage of rights.

The Court already is faced with difficult problems equilibrating rights and remedies, especially in the criminal procedure area, because (1) rights apply in essentially the same way to federal, state, and local officials, (2) procedural rights are typically transsubstantive—they do not vary with the nature or seriousness of the offense or issue, and (3) the availability of § 1983 and *Ex parte Young* requires the Court to take account of different remedial and procedural contexts—defensive and offensive, civil and criminal, damages and injunctions.²⁷¹

It does not seem unreasonable for courts to be somewhat cautious about allowing offensive uses of constitutional rights against the federal government in the national security area, because that would add a whole new array of difficult issues that must become part of the equilibration. If the Court must account for the offensive impact in the national security context of all constitutional rights, it might be tempted—as the doctrinal equilibration thesis predicts²⁷²—to, for example, narrow the substantive contours of rights or increase the protections of qualified immunity for officials. It is widely thought that courts will often strain to uphold national security policies that the executive contends are essential for the safety of the country. If the Court reduced the scope of a right, for instance, because of the desire to avoid declaring illegal an important national security policy or practice, this narrowed right would henceforth apply to all state, local and federal officials, across domestic and national security contexts,

proliferation of constitutional tort suits were cited as reasons for the rule. *See Chavez*, 538 U.S. at 778–79 (Souter, J., concurring). For a rich discussion of whether *Miranda* is solely a trial right, and the implications for coercive interrogation in the war on terror, see generally John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation After Chavez v. Martinez*, 39 GA. L. REV. 733 (2005). The “shocks the conscience” Fifth Amendment substantive due process case law, which could apply to limit coercive interrogations, was left untouched by *Chavez*. *Chavez*, 538 U.S. at 774–75 (Thomas, J., joined by Rehnquist, C.J. and Scalia, J.).

271. A recent article suggests that, because “the same rules apply to officers at all levels of government” when the Court elaborates qualified immunity doctrines and when it defines the elements of a constitutional claim, it makes sense for the same to be true regarding the existence of the cause of action—i.e., *Bivens* should be available for any constitutional claim just like § 1983 is. Pfander & Baltmanis, *supra* note 138, at 139. The authors suggest that “the law of government accountability” would be improved if all government officials were subject to the same constitutional restrictions through the same type of constitutional tort suits. *Id.* at 139–40. But there are plausible grounds to think the opposite—precisely because the same rules apply to officers at all levels of government, the courts are appropriately cautious about allowing robust rights developed in a domestic and local context to be enforced via *Bivens* in novel and often extraterritorial national security situations.

272. *See supra* notes 41–43 and accompanying text.

defensively as well as offensively, in ways that might result in net harm to constitutional interests overall. We might call this the potential for “blow back”—negative consequences redounding in the domestic realm—if *Bivens* is extended to federal national security activities.

One way that blow back concerns could be mitigated is if constitutional rights are tailored by the Court to the context and severity of the offense or issue the government is confronting. This would allow tighter rules for ordinary, domestic law enforcement within the United States, and looser or different rules for serious national security issues, especially those arising overseas (assuming the Constitution applies there at all). Although the Court has generally resisted this and insisted that much of criminal procedure be transsubstantive,²⁷³ there are some areas of doctrine where constitutional rights already are or could easily become narrowed and tailored for national security contexts.²⁷⁴ We are likely to see a lot of narrowing and tailoring if offensive tort suits under *Bivens* are routinely allowed in national security and foreign relations cases.

The courts’ ability to narrow and tailor rights in high-stakes national security or foreign relations contexts does not entirely mitigate concerns about blow back. Constitutional constraints loosened only for serious national security incidents could be extended to other contexts over time, as

273. See *supra* note 156 and accompanying text.

274. For instance, the Fourth Amendment rules regarding electronic (and probably physical) searches apply somewhat differently “with respect to activities of foreign powers or their agents” than it does to “domestic aspects of national security” or ordinary law enforcement investigations. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 321–22 (1972). Congress has created a separate warrant regime for electronic surveillance, 50 U.S.C. §§ 1801–1812 (2006), and physical searches, *id.* §§ 1821–1829, for foreign intelligence purposes in the Foreign Intelligence Surveillance Act. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1885c). The “special needs” case law contains hints that preventive searches or seizures designed to thwart an imminent terrorist attack or other very serious crime would be subject to much looser Fourth Amendment standards. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (“[T]he Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack . . .”).

In *New York v. Quarles*, the Supreme Court permitted a relaxation of *Miranda* rules to allow brief unwarned questioning designed to secure a weapon at a public crime scene; the Justice Department believes that this “public safety” rationale can be applied expansively in serious terrorism cases involving risks of future attacks. *New York v. Quarles*, 467 U.S. 649, 655–56 (1984). For current DOJ interpretations of *Quarles*, see *United States v. Abdulmutallab*, No. 10-20005, 2011 U.S. Dist. LEXIS 105462, at *13–16 (E.D. Mich. Sept. 16, 2011).

Furthermore, in upholding but limiting a form of preventive detention of noncitizens pending removal from the country under the immigration statutes, the Court noted that it was not speaking to the issue of “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.” *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001).

the government argues, for example, that it should be allowed to use these loosened standards in serious domestic crimes like multiple homicides, kidnappings of children, and the like. There are reasons to think that courts might struggle to draw appropriate lines.²⁷⁵

E. DOMAINS OF THE CONSTITUTION AND ACCESS TO COURTS

Expanding and extending constitutional protections to extraterritorial locations and to enemies and potential enemies of the United States will pose serious practical and doctrinal questions for the courts, necessitating new and unpredictable equilibrations of doctrines. It seems appropriate that courts would be cautious about extending *Bivens* in these ways.

Historically, the right to access U.S. courts and to claim protection under U.S. domestic laws, including the Constitution, was limited by citizenship, territorial location, and enemy status. Enemy aliens (citizens or subjects of a nation at war with the United States), were barred from accessing U.S. courts during wartime unless they were resident in America and had refrained from taking hostile actions against the United States. And all aliens who were outside the United States lacked any rights under the U.S. Constitution. Even if present in the United States (say, as prisoners of war), enemy fighters lacked any right to access U.S. courts and any individual rights under the Constitution.²⁷⁶ Thus, there were historically sharp limits to the scope of our constitutional community, and for noncitizens, access to U.S. courts and to U.S. constitutional rights depended on being a civilian (not an enemy fighter) who was present in the United States.

The inability of enemy aliens and enemy fighters to access U.S. courts during war, and the lack of extraterritorial constitutional rights for noncitizens had, quite obviously, enormous implications for the relationship between the U.S. government and the people against whom and among whom many of its national security and foreign relations actions took place. Even though, as discussed in Part V.A above, common law tort suits were generally available to restrain and remedy lawbreaking by U.S. officials, this could not occur for anyone categorically barred from

275. See Christopher Slobogin, *Why Crime Severity Analysis is Not Reasonable*, 97 IOWA L. REV. BULL. 1, 5–10 (2012) (explaining reasons why the courts will not follow the reasonableness analysis based on crime severity).

276. This section draws on several of my previous articles for its account of legal history. See generally Kent, *Enemy Fighters*, *supra* note 38; Kent, *Insular Cases*, *supra* note 38; Kent, *Civil War*, *supra* note 168; Kent, *Global Constitution*, *supra* note 168; Andrew Kent, *Do Boumediene Rights Expire?*, 161 U. PA. L. REV. PENNUMBRA 20 (2012).

the courts. The Constitution has come to impose fairly stringent and very detailed limitations on how the government can search, eavesdrop, seize persons or property, and use violence—the core of many national security activities. And so the lack of constitutional rights for noncitizens abroad meant that, whether or not an injured party might in theory have been able to bring a legal action against the government or its officials, extraterritorial U.S. government activity—including all military intelligence, diplomatic, and law enforcement actions—were not limited by those robust individual constitutional rights.

This is either a feature or a bug depending on one's perspective. Chief Justice Rehnquist's opinion in *Verdugo-Urquidez* treated it as a very important feature which should not be changed. And he indicated that, if constitutional rights were to apply abroad to noncitizens, the fact that a *Bivens* suit would allow them to be used offensively against U.S. officials conducting national security functions was intolerable.²⁷⁷

Applying domestic constitutional norms extraterritorially to national security and foreign affairs activities would have an enormously constraining effect on U.S. policies and actions. The foreign intelligence surveillance and collection framework created by Congress and the executive branch assumes that non-U.S. citizens located outside the United States lack Fourth Amendment rights.²⁷⁸ The executive branch's internal policies for conducting targeted killings pursuant to the post-9/11 Authorization for the Use of Military Force ("AUMF") assume that non-U.S. citizen targets located outside the United States lack both Fourth Amendment and Fifth Amendment Due Process rights.²⁷⁹ Indeed most military activities during armed conflict—from detention to targeting with kinetic force—would run afoul of individual constitutional rights, were they applicable. Cooperation with foreign law enforcement entities would be significantly constrained if action in coordination with or at the behest of the U.S. executive brought with it all of the Fourth, Fifth, and Sixth Amendment apparatus, including various judicial preauthorization requirements. Many aspects of U.S. immigration law—for example, the national origin preferences or ideological exclusion rules—would be unconstitutional if the First Amendment and Fifth Amendment were applicable. Covert actions or military actions that selectively fund or target

277. See *supra* notes 96–99 and accompanying text.

278. See *supra* notes 246–47 and accompanying text.

279. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (allowing the president "to use all necessary and appropriate force" to respond to the attacks of September 11, 2001).

groups based on religion or ideological viewpoint—for instance, the Sunni Awakening during the conflict in Iraq, or support for anti-Communist forces during the Cold War—would probably be unconstitutional if the First Amendment were applicable to extraterritorial actions involving non-U.S. citizens. Many more examples could be given.

Historically, the lack of extraterritorial constitutional rights for noncitizens did not necessarily mean that the U.S. acted lawlessly and wantonly when it performed military, intelligence, law enforcement, or other functions. Important nonconstitutional rules from treaties, customary international law, common law, U.S. statutes, and executive orders, as well as diplomacy and considerations of public image and reciprocity, quite often gave the U.S. government reasons to act with restraint and some measure of concern for individuals. Many of these rules and norms were not judicially enforced—for example, the various law-of-war treaties such as the Hague Conventions and Geneva Conventions that the United States joined. But judicial review and redress for injuries were available in some circumstances for U.S. government action abroad.²⁸⁰ As might be expected, there were strict limits to this tort liability: from cases arising out of the Civil War, we learn that even U.S. citizen civilians in loyal states were not protected by tort from militarily necessary actions on the field of battle or behind the lines,²⁸¹ and so *a fortiori* noncitizens abroad could not have been either.

Thus, when the Supreme Court and other courts have over the years been engaged in doctrinal equilibration in the area of tort liability of U.S. officials, the lack of extraterritorial constitutional rights for noncitizens abroad meant that the judiciary could design doctrines regarding constitutional rights, remedies, immunities, and the like without having to take account of the possibility that the doctrines it developed for the paradigm of domestic peacetime activity would also become applicable to

280. The famous Marshall Court case of *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) shows that when neutrals or U.S. citizens were injured on the high seas by unlawful U.S. naval prize seizures during wartime, admiralty courts had jurisdiction to award monetary compensation paid by the U.S. officials. See *supra* note 184 and accompanying text. Federal officials who lost tort suits of this kind were often indemnified by a private bill passed by Congress. See Pfander & Hunt, *supra* note 187, at 1889–1904.

In another famous case, the Supreme Court upheld a tort damages award against a U.S. military officer for unnecessarily seizing the property of a U.S. citizen from the front lines during the Mexican War. *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 128–32, 137 (1851).

281. See Kent, *Civil War*, *supra* note 168, at 1920 & n.321 (“In the years after the Civil War, the Court held that soldiers and other government officials had no civil liability in tort or otherwise for any wartime acts ‘done in accordance with the usages of civilized warfare under and by military authority.’” (quoting *Freeland v. Williams*, 131 U.S. 405, 416 (1889))); *supra* note 181 and accompanying text.

extraterritorial national security activity.

It is not a stretch to think that if the doctrinal equilibration had to account for extraterritorial rights for noncitizens, even in national security activities, the Court might have defined rights in narrower ways, weakened remedies, expanded immunity, or taken other actions that would have perhaps had net negative effects on our domestic constitutional law—the possible blow back effect discussed above.

Significant doctrinal and attitudinal changes have occurred in recent years that make the possibility of extraterritorial constitutional rights for noncitizens a real possibility. Prior to 9/11, the executive branch and the courts had to deal with hard questions of this type in law enforcement investigations of significant criminal cases.²⁸² Responses to 9/11 by the executive finally provided the impetus for the Supreme Court to move toward extraterritorial constitutional rights for noncitizens. After hinting at it in *Rasul v. Bush* and *Hamdan v. Rumsfeld*,²⁸³ the Court in *Boumediene v. Bush* held an individual rights provision of the Constitution applicable to a noncitizen abroad for the first time ever.²⁸⁴ Several aspects of the Court's decision, which I have previously written about, suggest that *Boumediene*

282. For example, criminal litigation arising out of FBI investigations of al Qaeda terrorism in the 1990s led some lower courts to hold that, at least for U.S. citizens, but perhaps more generally, constitutional rights like the Fourth Amendment and the Fifth Amendment privilege against self-incrimination had some applicability abroad. *See, e.g., United States v. Sadeek Odeh (In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges))*, 552 F.3d 157, 161, 169 (2d Cir. 2008). The *Verdugo-Urquidez* case, discussed above, arose out of the investigation of the murder of a Drug Enforcement Administration agent and a major international narcotics conspiracy. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 262–63 (1990). As part of that litigation, the Supreme Court held that the Fourth Amendment did not apply to the search in Mexico of a Mexican national's home by U.S. law enforcement acting with Mexican counterparts in order to locate evidence for a U.S. criminal trial. *Id.* at 274–75.

283. *See Kent, Global Constitution, supra* note 168, at 476–78 (discussing those opinions).

284. *Boumediene v. Bush*, 553 U.S. 723, 770 (2008) (holding the Suspension Clause applicable at Guantanamo Bay, then noting that “before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution”).

Other Court precedents have raised the possibility of habeas corpus review of U.S. military detention or trial operations in foreign battle zones. In *Ex parte Quirin*, 317 U.S. 1, 24–25 (1942), and *In re Yamashita*, 327 U.S. 1, 9 (1946), the Court held that the Constitution permits noncitizen members of an enemy nation's military who are tried before military commissions on U.S. soil to challenge their convictions through habeas corpus in federal court. *See Kent, Enemy Fighters, supra* note 38, at 166–69, 241. In *Munaf v. Geren*, the Court upheld the jurisdiction and authority of a U.S. district court sitting in habeas to review the detention of American citizens held by the U.S. military in Iraq as security detainees during the insurgency. *Munaf v. Geren*, 553 U.S. 674, 685–88, 705 (2008). The Court's somewhat cryptic discussion of a substantive due process claim did not conclusively rule out the possibility that this could be a constitutional limit on the U.S. government's authority in the area of prisoner transfers. *Id.* at 706–07.

might be the start of applying individual constitutional rights besides habeas to noncitizens in truly extraterritorial locations, unlike Guantanamo Bay which was really quasi-U.S. territory.²⁸⁵ Unless the Court signals a change of course, the possibility of extending the Constitution means that the executive must operate under the shadow of the Constitution when its agents interact with noncitizens abroad. Injecting *Bivens* suits into the mix could increase the amount and complexity of litigation enormously.

This possibility of an extraterritorial Constitution protecting noncitizens abroad, even during the kind of national security operation traditionally thought less suitable for judicialization and constitutionalization—military operations in a foreign war zone—is a significant new input into the doctrinal equilibration regarding whether to extend *Bivens* rights, and one that the courts could properly take into account when deciding whether to extend *Bivens*.

VII. CONCLUSION

It is an unfortunate byproduct of the courts' hesitation to extend the *Bivens* remedy into national security or foreign relations contexts that innocent individuals who have been grievously wronged by federal officials are often left with no means of redress.²⁸⁶ If they cannot reach the courts during the detention or mistreatment—for example because they are held incommunicado outside the United States—neither habeas corpus nor an injunction can help them as a practical matter. Once they are released, those remedies are by law unavailable. If the individual is never criminally prosecuted, the exclusionary rule is not available to vindicate constitutional interests. As Justice Harlan said in *Bivens*, for persons in this situation, “it is damages or nothing.”²⁸⁷

Yet, for the reasons discussed in this Article, the Supreme Court and many courts of appeals have been cautious about providing a money damages remedy under *Bivens* in the national security and foreign relations contexts.²⁸⁸ Might there be any other way to provide some compensation without introducing some of the complications that *Bivens* does?

As this Article has shown, one of the reasons the courts are reluctant to extend *Bivens* into the national security and foreign relations spheres is a

285. See Kent, *Enemy Fighters*, *supra* note 38, at 245–48.

286. See *supra* notes 1 & 132 and accompanying text.

287. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

288. See *supra* notes 3–8 and accompanying text.

concern about the judicialization and constitutionalization of security policy. Of course, many commentators think more judicialization and constitutionalization of the national security and foreign affairs activities of the federal government is highly desirable.²⁸⁹ But notwithstanding *Boumediene*, the Supreme Court and courts of appeals are quite cautious to allow that to occur, especially via constitutional damages suits.

If it were possible to remove the federal constitutional element of the claim for damages against federal officials, the courts' concerns could be eliminated. But repealing the Westfall Act²⁹⁰ and allowing state law tort suits against federal officials is not a full solution to the problems of judicialization and constitutionalization, because federal officials could raise as a defense that their actions were authorized by the Constitution itself, or by a law, regulation or policy that the Constitution allowed the government to promulgate and enforce. Thus, even though the courts would be applying state tort law as the substantive law underpinning the claim, the Constitution directly or indirectly (if the plaintiff challenges the constitutionality of the officer's statutory defense) would be involved in the courts' decision. Congress probably could not validly bar federal officials from raising colorable defenses arising under the Constitution, and therefore, suits against federal officials in their personal capacities will never avoid the problems of constitutionalization by the judiciary.

A more promising avenue would be an administrative compensation system running against the United States itself. Because of the sovereign immunity of the federal government, this can be accomplished only by Congress. To date, Congress has exempted many foreign affairs, national security, and military activities from the various administrative compensation schemes it has created in the Federal Tort Claims Act,²⁹¹ the Military Claims Act,²⁹² the Foreign Claims Act,²⁹³ and the International Agreement Claims Act.²⁹⁴ But it need not be quite so restrictive.

289. See *supra* Part VI.

290. See *supra* notes 71–72 and accompanying text.

291. 28 U.S.C. § 2680 (2012) (barring claims if, for example, they “aris[e] out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war,” “aris[e] in a foreign country,” or are based on intentional torts committed by non-law enforcement personnel).

292. 10 U.S.C. § 2733(a) (2012) (allowing claims only against “civilian” members of the military or for “noncombat activities”).

293. 10 U.S.C. § 2734(b) (2012) (barring claims that “result directly or indirectly from an act of the armed forces of the United States in combat” and requiring, if the claim arose during time of war, that the foreign national claimant be “determined by the [claims] commission or by the local military commander to be friendly to the United States”).

294. 10 U.S.C. §§ 2734a, 2734b (2012) (allowing claims only if pursuant to an international agreement entered into by the executive branch).

It is beyond the scope of this Article to draft a model administrative claims statute.²⁹⁵ But several features seem important to protect the various national security and foreign relations interests. The substantive law governing the claims would be not the U.S. Constitution but rather state or foreign tort law, or perhaps statutory rules of conduct created by Congress. Claimants should probably be required to prove that they are not military enemies of the United States. In the current conflict, that would mean that persons who are members of Al Qaeda, the Taliban or associated forces, or who substantially supported one of those groups, would be barred from pursuing tort damages through the administrative process.²⁹⁶ Discovery should probably be absent or very limited, to discourage fishing expeditions and to protect classified and otherwise sensitive information. But within these (and perhaps other) limits, innocent individuals harmed in their persons or property by national security and foreign relations actions of the U.S. government should be entitled to reasonable compensation.

I will not rest the case for such a compensation scheme on a claim that its presence would deter misconduct by government officials. There are reasons based in economic and organizational theory, and the practical realities of how governments respond to tort lawsuits, to think that the threat of monetary liability against the sovereign is unlikely to significantly deter official misconduct.²⁹⁷ So simple fairness is the best argument. Such a scheme could mitigate some of the harshness of the judiciary's reluctance to extend *Bivens* to national security and foreign relations activities, while avoiding many of the complications that *Bivens* suits would bring.

295. For a fuller discussion, see Brown, *supra* note 19, at 905–10 (suggesting ways besides *Bivens* that individuals wronged by national security policies can be compensated and abuses brought to light).

296. See National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011) (setting out the detention authority of the executive branch in the conflict with Al Qaeda); Uthman v. Obama, 637 F.3d 400, 402 (D.C. Cir. 2011) (construing the detention authority under the September 2001 Authorization for the Use of Military Force).

297. E.g., Emery & Maazel, *supra* note 226, at 587–88, 590; Levinson, *supra* note 226, at 361–87; Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65 *passim* (1999); Schwartz, *supra* note 226, at 1025 & n.5, 1027–28.

