

NATIONAL SECURITY AND *BIVENS* AFTER *IQBAL*

by
Stephen I. Vladeck*

Given the significance of the Supreme Court's holding vis-à-vis pleading standards in Ashcroft v. Iqbal, it is entirely understandable that most commentators have largely neglected the majority's other holding in the same case—its rejection of superior responsibility as a viable basis for liability under the Bivens doctrine.

This Essay suggests to the contrary that Iqbal deserves to be seen as an important part of a series of judicial decisions arising out of the government's conduct after September 11th in which courts have further narrowed the scope of the Bivens remedy in cases implicating undifferentiated national security considerations, usually (albeit not in Iqbal itself) concluding that such concerns are a "special factor counseling hesitation" in inferring a Bivens remedy. Iqbal thus provides an important opportunity to reflect on these less prominent lower court decisions, for it demonstrates both why such a formulation is inconsistent with the animating principles behind Bivens and how the Court completely missed the opportunity to clarify why national security concerns might actually counsel in favor of liability, rather than against it.

As this Essay argues, in "national security" cases in which there is a greater likelihood that other remedies (both legal and political) will generally be unavailable and that government officers, for all of the right reasons (and some of the wrong ones), will push the proverbial envelope, other doctrines, including qualified immunity, the state secrets privilege, and governmental indemnification, will generally shield those officers who acted reasonably and/or within the scope of their employment, in addition to that governmental conduct which must remain secret. But it is precisely in cases in which these mechanisms do not forestall liability that a Bivens remedy is so important, for Bivens will invariably provide the sole means of obtaining any form of redress after the fact for conceded violations of clearly established constitutional rights.

| | | |
|-----|--|-----|
| I. | INTRODUCTION | 256 |
| II. | <i>BIVENS: ORIGINS AND EVOLUTION</i> | 260 |
| | A. Bivens..... | 261 |
| | B. <i>Thirty Years of Bivens: Expansion and Retrenchment</i> | 263 |

* Professor of Law, American University Washington College of Law. My thanks to John Parry for inviting to me to participate in the symposium for which this Essay was prepared, and to Maureen Roach for exemplary research assistance.

| | | |
|------|--|------------|
| 256 | LEWIS & CLARK LAW REVIEW | [Vol. 14:1 |
| | C. Wilkie and the Expansion of “Special Factors” | 266 |
| | D. Iqbal..... | 267 |
| III. | BIVENS CLAIMS IN POST-SEPTEMBER 11TH DAMAGES LITIGATION..... | 268 |
| | A. Arar..... | 269 |
| | B. Rasul | 272 |
| | C. <i>In re</i> Iraq & Afghanistan Detainee Litigation..... | 275 |
| IV. | BIVENS AS A NATIONAL SECURITY REMEDY OF LAST RESORT..... | 275 |
| V. | CONCLUSION..... | 277 |

I. INTRODUCTION

Within the ever-growing body of scholarship criticizing the Supreme Court’s May 2009 decision in *Ashcroft v. Iqbal*,¹ most of the attention has been directed to the Court’s discussion of the proper pleading standards under Rule 8 of the Federal Rules of Civil Procedure.² Specifically, the bulk of the critiques³ have centered on Part IV of Justice Kennedy’s opinion for the Court.⁴ There, he adopted as a general rule the higher “plausibility” standard for demurrers to complaints (in contrast to the “no set of facts” reading derived from *Conley v. Gibson*⁵) that the Court had identified two years earlier in the more specific context of complex antitrust litigation.⁶ Indeed, whatever one’s view of the merits of *Iqbal*, it is difficult to dispute that it stands as the Court’s most significant decision on federal pleading standards in decades, and one that, if left intact,⁷ may fundamentally alter the landscape of federal civil practice.⁸

Given the potentially universal impact of *Iqbal*’s reading of Rule 8, it is entirely understandable (and to be expected) that most commentators

¹ 129 S. Ct. 1937 (2009).

² See, e.g., Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1467799>; Rakesh N. Kilaru, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1434254>; Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1442786>.

³ The contributions to this Symposium are further proof of this focus. See Symposium, *Pondering Iqbal*, 14 LEWIS AND CLARK L. REV. 1 (2010).

⁴ *Iqbal*, 129 S. Ct. at 1949–54.

⁵ 355 U.S. 41, 46–47 (1957).

⁶ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966–67 (2007).

⁷ As of this writing, legislation has been introduced in Congress that would overrule *Iqbal*’s reading of the relevant federal pleading standards. See Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009) (“[A] Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).”).

⁸ See, e.g., Herman Schwartz, *The Supreme Court Slams the Door*, THE NATION, Sept. 30, 2009, <http://www.thenation.com/doc/20091012/schwartz>.

have largely neglected the majority's other holding in the same case—its rejection, in Part III, of superior responsibility as a viable basis for liability under the *Bivens*⁹ doctrine.¹⁰ And even among those who have paid at least some attention to the *Iqbal* Court's discussion of *Bivens*, the consensus view has been that *Iqbal* is an unremarkable addition to a long line of Supreme Court decisions over the past quarter-century in which the Court has effectively limited *Bivens* to its facts—just another nail in a coffin long-since sealed.¹¹ From that perspective, *Iqbal* is a small part of a much larger problem, the only real solution to which (other than a massive doctrinal shift)¹² appears to be the creation of a statutory cause of action that would provide a rough equivalent to § 1983 relief¹³ for claims against federal officers.¹⁴

In this Essay, I offer a different view. Specifically, I examine the particular role *Bivens* can—and should—play in “national security” cases, by which I loosely mean suits in which the challenged governmental conduct arose in the context of a response to a national security crisis, rather than in the more traditional context of everyday law enforcement.¹⁵ What makes national security cases unique, I suggest, is the greater likelihood that other remedies (both legal *and* political) will generally be unavailable and the equally significant likelihood that government officers, for all of the right reasons (and some of the wrong ones), will push the proverbial envelope. In such cases, other doctrines,

⁹ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (recognizing that a cause of action for damages can be directly inferred from certain constitutional provisions, including the Fourth Amendment). For the story behind *Bivens*, see James E. Pfander, *The Story of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, in *FEDERAL COURTS STORIES* 275, 275–99 (Vicki C. Jackson & Judith Resnik eds., 2010). See also Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. (forthcoming 2010), available at <http://www.ssrn.com/abstract=1475356> (summarizing the evolution of the doctrine and the dispute over the success rate of *Bivens* claims).

¹⁰ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1947–48 (2009).

¹¹ See, e.g., Reinert, *supra* note 9; James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 119 (2009). See also *infra* note 21 (citing cases).

¹² For an intriguing proposed doctrinal reconceptualization of *Bivens*, see Pfander & Baltmanis, *supra* note 11, at 141–50.

¹³ 42 U.S.C. § 1983 (2006) (providing a private cause of action against state officers for violations of federal rights).

¹⁴ See, e.g., *Wilkie v. Robbins*, 127 S. Ct. 2588, 2618 (2007) (Ginsburg, J., concurring in part and dissenting in part).

¹⁵ I recognize that this is a difficult line to describe. As will become apparent, though, the central argument of this Essay is that poorly articulated “national security” concerns should not specifically qualify as a “special factor counseling hesitation” in the analysis of whether to infer a *Bivens* remedy. So qualified, the limitation for which I am arguing is actually relatively concrete. For other attempts to articulate the class of cases here at issue, see George D. Brown, “Counter-Counter-Terrorism via Lawsuit”—*The Bivens Impasse*, 82 S. CAL. L. REV. 841 (2009); Kristina A. Kiik, Comment, *Quantum of Competence: Balancing Bivens During the War on Terror*, 62 SMU L. REV. 1945 (2009).

including qualified immunity, the state secrets privilege, and governmental indemnification, will generally shield those officers who acted reasonably and/or within the scope of their employment, in addition to that governmental conduct which must remain secret. But it is precisely in cases in which these mechanisms do *not* forestall liability that a *Bivens* remedy is so important, for *Bivens* will invariably provide the sole means of obtaining any form of redress after the fact for conceded violations of clearly established constitutional rights.

Moreover, it makes good sense as a matter of policy to create a regime in which the appropriate legal mechanism for national security abuses is retrospective relief; responsible conduct in the heat of the moment will go unpunished, and precedents will be set suggesting that some lines cannot be crossed even in the worst of times—at least not without legal consequences. Either way, the reviewing court will have the benefit of hindsight, better enabling it “calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude.”¹⁶ In short, to whatever extent *Bivens* has at its core principles reflected the need to foster deterrence and the avoidance of governmental impunity, those principles resonate only that much more forcefully during—and especially *after*—national security crises. And while some may respond to this argument by suggesting that it should be left to Congress to provide appropriate remedies,¹⁷ the bottom line is that Congress will have even less incentive to provide for the victims of wrongful governmental conduct in the context of national security investigations than in the context of everyday law enforcement. Thus, so long as *Bivens* remains on the books, it seems uniquely suited to provide a remedy in those cases in which no other legal or political remedy is feasible.

Viewed in light of this articulation, *Iqbal* emerges as one of a series of judicial decisions arising out of the government’s conduct after September 11th that goes in the *other* direction, where courts have further narrowed the scope of the *Bivens* remedy in cases implicating undifferentiated national security considerations, concluding that such concerns are a “special factor counseling hesitation” in inferring a *Bivens* remedy.¹⁸ To be fair, the *Iqbal* Court’s cursory rejection of “supervisory liability” as a viable basis for a *Bivens* claim was not cast in national security terms,¹⁹ and there is no reason to think the Court would not have reached the same conclusion in a case arising out of less sensational facts. But *Iqbal* provides an important opportunity to reflect on less prominent

¹⁶ United States v. Bollman, 24 F. Cas. 1189, 1192 (C.C.D.C. 1807) (No. 14,622).

¹⁷ See, e.g., Brown, *supra* note 15, at 910–11.

¹⁸ See, e.g., Rasul v. Myers, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (per curiam); Arar v. Ashcroft, 532 F.3d 157, 181 (2d Cir. 2008), *superseded by* 585 F.3d 559 (2d Cir. 2009) (en banc), *petition for cert. filed* No. 09-923 (U.S. Feb. 1, 2010); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 103, 105 (D.D.C. 2007); see also El Badrawi v. Dep’t of Homeland Sec., 579 F. Supp. 2d 249, 262–64 (D. Conn. 2008).

¹⁹ See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948 (2009).

lower court decisions that have made this connection even more explicitly, for *Iqbal* demonstrates both why such a formulation is inconsistent with the animating principles behind *Bivens*, and how the Court completely missed the opportunity to clarify why national security concerns might actually counsel in favor of liability, rather than against it.

To unpack this argument, I begin in Part II with *Bivens* and the Court's subsequent treatment of the doctrine in cases leading up to *Iqbal*. As is by now familiar,²⁰ after a few modest expansions of *Bivens* into other contexts,²¹ the unbroken pattern of the Court's decisions since the early 1980s has been to limit *Bivens* dramatically, even in cases where no other obvious legal remedy seemed available.²² And yet, as Part II concludes, a majority of the Court has quite clearly declined to overrule *Bivens*,²³ leaving intact the notion that there is *some* class of cases in which such a self-executing constitutionally grounded cause of action remains available.

In Part III, I turn to a discussion of the various *Bivens* suits arising out of the Bush Administration's response to September 11th. In several of these cases, the courts have relied on amorphous allusions to "national security" (among other factors) in declining to infer a *Bivens* remedy. Nowhere is this approach better captured than in Judge Brown's opinion concurring in the D.C. Circuit's dismissal of *Rasul v. Myers*, a lawsuit brought by individuals formerly detained as "enemy combatants" at Guantánamo Bay alleging that they were wrongfully detained and even tortured while in U.S. custody.²⁴ As Judge Brown wrote,

Treatment of detainees is inexorably linked to our effort to prevail in the terrorists' war against us, including our ability to work with foreign governments in capturing and detaining known and potential terrorists. Judicial involvement in this delicate area could undermine these military and diplomatic efforts and lead to embarrassment of our government abroad.²⁵

²⁰ For a general overview with useful additional citations, see RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 733–36 (6th ed. 2009).

²¹ See, e.g., *Carlson v. Green*, 446 U.S. 14, 17–18 (1980) (recognizing a *Bivens* remedy for a claim that governmental conduct violated the Cruel and Unusual Punishment Clause of the Eighth Amendment); *Davis v. Passman*, 442 U.S. 228, 229–30 (1979) (recognizing a *Bivens* remedy for a claim that governmental conduct violated the equal protection component of the Fifth Amendment's Due Process Clause).

²² See, e.g., *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *United States v. Stanley*, 483 U.S. 669 (1987); *Bush v. Lucas*, 462 U.S. 367 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983).

²³ See *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

²⁴ See *Rasul v. Myers*, 512 F.3d 644, 649 (D.C. Cir.), *vacated*, 129 S. Ct. 763 (2008) (mem.).

²⁵ *Id.* at 673 (Brown, J., concurring) (internal quotation marks omitted). After the Supreme Court vacated and remanded the panel's decision in light of *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the D.C. Circuit majority expressly incorporated Judge

What is particularly telling about these decisions is the extent to which it was the unavailability of *Bivens*, rather than the potential immunity of the defendants or the classified nature of the relevant evidence, that proved crucial to the disposition. In other words, and unlike most of the other damages lawsuits arising out of the government's post-September 11th counterterrorism policies, the court's unwillingness to infer a judicial remedy for violations of the plaintiffs' constitutional rights was the central holding barring relief.

Finally, in Part IV, I make the case that, contrary to these decisions, *Bivens* remedies are particularly appropriate in national security litigation, both because *other* defenses will preclude legal relief in appropriate cases and because the political process is less likely to provide its own remedies. Focusing on the district court's recent decision in *Padilla v. Yoo* that rejected the government's argument against inferring a *Bivens* remedy as an example,²⁶ Part IV concludes that, whatever the ultimate merits of such lawsuits, they—and not *Iqbal*—represent the right way forward for conceptualizing the availability of *Bivens*-based remedies in national security cases.

II. *BIVENS*: ORIGINS AND EVOLUTION

As is familiar history, the Court in *Bivens* did not invent from whole cloth the proposition that federal officers could be held personally liable in damages for violations of individuals' constitutional rights.²⁷ Well into the twentieth century, for example, plaintiffs could (and routinely did) bring common law claims for damages (often under trespass) against federal officers in state courts.²⁸ But as the Supreme Court began to take a more expansive view of the scope of particular constitutional protections (and their application against the states), it also began to express increasing skepticism that the common law could furnish an adequate remedy, particularly since its scope often varied substantially depending upon the state in which the underlying tort took place.²⁹ The enactment of the Federal Tort Claims Act in 1946 may have alleviated some of these concerns, but its limited substantive scope left open the very real possibility that certain "constitutional" torts might go un-

Brown's rejection of *Bivens*. See *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (per curiam); see also *id.* at 533 (Brown, J., concurring).

²⁶ 633 F. Supp. 2d 1005, 1030 (N.D. Cal. 2009).

²⁷ See Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 399 (1987).

²⁸ See Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1, 65 (1968) (noting both the evolution and inadequacies of common law trespass actions as remedies for constitutional violations).

²⁹ See, e.g., *Wolf v. Colorado*, 338 U.S. 25, 42–44 (1949) (Murphy, J., dissenting). Murphy was, famously, arguing that the Court should adopt the exclusionary rule, which it would do twelve years later (overruling *Wolf*) in *Mapp v. Ohio*, 367 U.S. 643, 654, 657 (1961).

remedied. Thus, although the Supreme Court had reserved the question whether the Constitution might itself furnish a cause of action for damages against federal officers in certain cases,³⁰ its recognition in *Bell v. Hood* that the federal courts would have jurisdiction over such claims seemed to suggest that such an argument was at least substantial, if not meritorious.³¹

A. Bivens

A quarter-century later, the Court answered that question in the affirmative, holding in *Bivens* that an individual who was wrongly subjected to an illegal search *could* sue for damages directly under the Fourth Amendment.³² Central to the Court's conclusion was the fact that, since the plaintiff was "innocent,"³³ he could not avail himself of the (by-then) more traditional remedy provided by the exclusionary rule. As Justice Brennan wrote for the majority in *Bivens*, "[t]hat damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition."³⁴ Moreover,

The present case involves no special factors counseling hesitation in the absence of affirmative action by Congress. . . . [And] we cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.³⁵

Answering that question in the affirmative, Brennan's opinion thus articulated what would become the two relevant inquiries for subsequent *Bivens*-like claims: courts should assure themselves that there were no "special factors counseling hesitation,"³⁶ and courts should inquire

³⁰ See *Bell v. Hood*, 327 U.S. 678, 684–85 (1946).

³¹ See, e.g., *id.* at 685.

³² *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

³³ On the "innocence" narrative in *Bivens*, see Pfander, *supra* note 9, at 290–95.

³⁴ *Bivens*, 403 U.S. at 395.

³⁵ *Id.* at 396–97.

³⁶ Brennan's examples of cases in which special factors existed were *United States v. Standard Oil Co.*, 332 U.S. 301, 316 (1947), where the United States itself was the party plaintiff (and therefore could have created the liability it sought to enforce), and *Wheeldin v. Wheeler*, 373 U.S. 647, 648 (1963), in which a congressional employee was sued for allegedly exceeding the authority delegated to him by Congress—hardly a constitutional claim.

whether Congress had displaced a self-executing constitutional remedy by providing a more specific statutory cause of action.³⁷

Concurring in the judgment, Justice Harlan relied on the acceptance in the Court's jurisprudence of two related propositions: that the Constitution itself furnished the cause of action in cases seeking injunctive relief;³⁸ and that the federal courts had the power to infer damages remedies from the common law and from federal statutes.³⁹ It would not follow from those two lines of precedent, Harlan reasoned, to exclude a judge-made constitutionally grounded cause of action for damages. Moreover, a constitutional remedy for damages in cases like *Bivens*' made practical sense, for "it is apparent that some form of damages is the only possible remedy for someone in *Bivens*' alleged position. . . . For people in *Bivens*' shoes, it is damages or nothing."⁴⁰ As Harlan concluded,

[I]t would be at least anomalous to conclude that the federal judiciary—while competent to choose among the range of traditional judicial remedies to implement statutory and common-law policies, and even to generate substantive rules governing primary behavior in furtherance of broadly formulated policies articulated by statute or Constitution—is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will.⁴¹

Thus, and notwithstanding separate dissents from Chief Justice Burger⁴² and Justices Black⁴³ and Blackmun,⁴⁴ *Bivens* seemed to precipitate the judicial recognition of a host of new constitutionally grounded damages actions—in parallel to the growing number of claims enforceable against state officers in lawsuits under § 1983.⁴⁵

³⁷ Indeed, some have argued that Congress affirmatively ratified *Bivens*'s holding, first in the 1974 amendments to the Federal Tort Claims Act, and more prominently with the 1988 enactment of the Westfall Act. See Pfander & Baltmanis, *supra* note 11, at 131–34; see also Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified as amended at 28 U.S.C. § 2680(h) (2006)); Federal Employees Liability Reform and Tort Compensation (Westfall) Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (codified at 28 U.S.C. § 2679(b) (2006)).

³⁸ See *Bivens*, 403 U.S. at 404–06 (Harlan, J., concurring in the judgment).

³⁹ See *id.* at 402–04 & n.4.

⁴⁰ *Id.* at 409–10.

⁴¹ *Id.* at 403–04 (citations omitted).

⁴² *Id.* at 411–27 (Burger, C.J., dissenting).

⁴³ *Id.* at 427–30 (Black, J., dissenting).

⁴⁴ *Id.* at 430 (Blackmun, J., dissenting).

⁴⁵ Ten years before *Bivens*, the Court had significantly expanded the scope of § 1983, holding in *Monroe v. Pape* that § 1983 could be invoked regardless of whether state law provided an adequate remedy for the violation of the plaintiff's federal right. See 365 U.S. 167, 183 (1961).

B. *Thirty Years of Bivens: Expansion and Retrenchment*

As Jim Pfander has noted, “[i]n the early years, . . . the Court took a fairly matter-of-fact approach to the expansion of *Bivens* litigation.”⁴⁶ Thus, in *Davis v. Passman*, the Court recognized the existence of a *Bivens* remedy for an equal protection claim based upon the Due Process Clause of the Fifth Amendment.⁴⁷ And in *Carlson v. Green*, the Court recognized a *Bivens* remedy based upon the Cruel and Unusual Punishment Clause of the Eighth Amendment, sustaining a claim brought by parents of an inmate who had died after allegedly being denied medical treatment by his prison guards.⁴⁸ Moreover, *Green* suggested, however implicitly, that courts should presume that a *Bivens* remedy was available absent some clear conviction to the contrary. As Justice Brennan wrote:

[V]ictims of a constitutional violation by a federal agent have a right to recover damages . . . despite the absence of any statute conferring such a right . . . [unless] defendants demonstrate “special factors counselling [sic] hesitation in the absence of affirmative action by Congress” . . . [or] show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.⁴⁹

And yet, as much as both cases expanded *Bivens* into new contexts, one can also see in their language the means by which *Bivens* would subsequently be limited, for *Green* thereby codified the existence of Brennan’s “special factors” as a reason *not* to infer a *Bivens* remedy.⁵⁰ Thus, although Justice Powell (joined by Justice Stewart) concurred in the judgment in *Green* on narrower grounds, the continuing changes in the Court’s membership opened the door for inroads against *Bivens*’ expansion.

Even still, the first cases in which the Court declined to infer a *Bivens* remedy invariably involved a plausible claim that alternative federal remedies rendered *Bivens* relief unnecessary. Thus, in *Bush v. Lucas*, the Court refused to recognize a First Amendment retaliation claim in the civil service context, in light of the existence of an internal process administered by the Civil Service Commission in which the plaintiff’s constitutional claims were “fully cognizable.”⁵¹ To similar effect, in *Schweiker v. Chilicky*, the Court rejected a claim for *Bivens* relief based upon a violation of the Due Process Clause in the processing of applications for federal Social Security benefits, relying on the carefully crafted scheme of administrative and judicial remedies provided by the Social Security Act.⁵²

⁴⁶ Pfander, *supra* note 9, at 295–96.

⁴⁷ 442 U.S. 228, 248–49 (1979).

⁴⁸ 446 U.S. 14, 16–18 (1980).

⁴⁹ *Id.* at 18–19 (quoting *Bivens*, 403 U.S. at 396).

⁵⁰ *See id.* at 18.

⁵¹ 462 U.S. 367, 385–86 (1983).

⁵² 487 U.S. 412, 424–29 (1988).

Such decisions seemed at least superficially consistent with both Brennan's majority opinion in *Bivens* and Harlan's concurrence.⁵³ To the extent that the logic of *Bivens* turned on the possibility that it was "damages or nothing," that concern was not as strongly implicated in cases where federal law did not force that choice. Rather, the more controversial developments came in the context of Justice Brennan's "special factors counseling hesitation" in *Bivens*,⁵⁴ and the identification of such factors in cases decided at roughly the same time. In *Chappell v. Wallace*, decided the same day as *Bush v. Lucas*, the Court identified the military's internal system of discipline—and the need to avoid undue judicial interference therewith—as a "special factor" counseling against the recognition of a *Bivens* claim for racial discrimination by enlisted personnel against their superior officers,⁵⁵ even though the Court had already recognized the availability of *Bivens* in the context of a sex-discrimination equal protection claim in *Davis v. Passman*.⁵⁶

Similarly, in *United States v. Stanley*, the Court held that "special factors" warranted against inferring a *Bivens* remedy for an action brought by a serviceman claiming that he was secretly subjected to LSD as part of an Army experiment.⁵⁷ As Justice Scalia explained for the Court,

The "special facto[r]" that "counsel[s] hesitation" is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate. . . . We hold that no *Bivens* remedy is available for injuries that "arise out of or are in the course of activity incident to service."⁵⁸

And yet, although *Chappell* and *Stanley* were both much-maligned,⁵⁹ it bears emphasizing that they both concerned the hyper-specific issue of civil lawsuits arising out of military service, an area in which the courts had a record of according substantial deference to the political branches that pre-dated *Bivens* by decades. Thus, although the results in both cases

⁵³ Of course, there were fairly strong arguments in both cases that the alternative remedies were *not* adequate. See, e.g., *Schweiker*, 487 U.S. at 430–49 (Brennan, J., dissenting); FALLON ET AL., *supra* note 20, at 736.

⁵⁴ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

⁵⁵ *Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

⁵⁶ 442 U.S. 228, 248 (1979).

⁵⁷ 483 U.S. 669, 683–84 (1987).

⁵⁸ *Id.* (alterations in original) (quoting *Bivens*, 403 U.S. at 396; *Feres v. United States*, 340 U.S. 135, 146 (1950)).

⁵⁹ In a case decided later in the same Term as *Stanley*, Justice Marshall attributed the result to the Court's "conviction . . . that members of the Armed Forces may be subjected virtually without limit to the vagaries of military control." *Solorio v. United States*, 483 U.S. 435, 467 (1987) (Marshall, J., dissenting).

seem difficult to reconcile with *Bivens*⁶⁰ they still might plausibly have implicated the “special factors” that Brennan had in mind.⁶¹

Finally, the Court in the same period also expressed skepticism at recognizing the availability of *Bivens* remedies against any defendant other than a federal government officer. Thus, in *FDIC v. Meyer*, the Court declined to entertain a due process claim against the Federal Savings and Loan Insurance Corporation,⁶² reasoning that

If we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government. . . . [B]ut decisions involving “federal fiscal policy” are not ours to make. We leave it to Congress to weigh the implications of such a significant expansion of Government liability.⁶³

And in *Correctional Services Corp. v. Malesko*, the Court refused to allow a *Bivens* claim against a privately operated prison for federal inmates,⁶⁴ even though it had already recognized an Eighth Amendment cause of action in *Carlson v. Green*,⁶⁵ and even though there was no guarantee that the defendant would be liable under state common law.⁶⁶

Thus, three decades after its inception, *Bivens* itself appeared intact at least on its own facts, but its successful extension into any new contexts seemed decidedly unlikely. After early expansions of the doctrine, the Court had not recognized a new class of *Bivens* claims since 1980, and had shown ever-increasing deference to alternative remedial schemes provided by Congress—even where Congress may not have intended to oust *Bivens*. At the same time, the Court also began to expand upon the idea of “special factors counseling hesitation,” even though the two cases in which those factors precluded relief against individual federal officers both arose in the unique context of challenges to intra-military relations. Indeed, perhaps the most significant development during this time period came in the related but distinct context of *statutory* remedies, where the Supreme Court emphatically repudiated its authority to infer causes of action from federal *statutes*, culminating with the Court’s decisions in *Alexander v. Sandoval* in 2001,⁶⁷ and *Gonzaga University v. Doe*

⁶⁰ See, e.g., *Stanley*, 483 U.S. at 708–10 (O’Connor, J., concurring in part and dissenting in part); *id.* at 686–708 (Brennan, J., concurring in part and dissenting in part).

⁶¹ Indeed, the majority in *Stanley* relied heavily on the Court’s 1950 decision in *Feres v. United States*, which read into the Federal Tort Claims Act a bar on recovery for injuries incident to military service. 340 U.S. at 146.

⁶² 510 U.S. 471 (1994).

⁶³ *Id.* at 486 (internal quotation marks omitted).

⁶⁴ 534 U.S. 61, 71–74 (2001).

⁶⁵ 446 U.S. 14, 16–18 (1980).

⁶⁶ See *Malesko*, 534 U.S. at 79–80 (Stevens, J., dissenting).

⁶⁷ 532 U.S. 275 (2001). Justice Scalia made explicit the connection between the two bodies of case law in *Malesko*, suggesting that “*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action.” *Malesko*, 534 U.S. at 75 (Scalia, J., concurring). As Scalia continued, “we have abandoned that

in 2002.⁶⁸ The merits of these decisions aside, this holistic scaling back of the judicial role in the creation and/or protection of individual remedies prompted several prominent scholars of the federal courts to identify “hostility to litigation” as one of the preeminent themes of the Rehnquist Court.⁶⁹

C. *Wilkie and the Expansion of “Special Factors”*

The high-water mark of the Court’s retrenchment from *Bivens*, though, came at the end of its 2006 Term in *Wilkie v. Robbins*, in which the Court rejected a *Bivens* claim under the Takings Clause of the Fifth Amendment that arose out of an allegedly systematic pattern of harassment and retaliation by officials at the U.S. Bureau of Land Management.⁷⁰ *Wilkie* was unique as compared to the prior cases in which the Court had declined to infer a *Bivens* remedy, for there was no argument whatsoever that Congress had provided an alternative remedial scheme. Instead, the majority relied upon the extent to which each of Robbins’s individual complaints against individual officers arising out of individual episodes *probably* could be vindicated through separate administrative or judicial processes at the state and federal levels.⁷¹ The Court then identified as a “special factor counseling hesitation” the “difficulty” inherent in finding a new *Bivens* remedy to redress Robbins’s injuries collectively, because “a general provision for tortlike liability when Government employees are unduly zealous in pressing a governmental interest affecting property would invite an onslaught of *Bivens* actions.”⁷²

In dissent, Justice Ginsburg (joined by Justice Stevens) criticized the majority for finding “a special factor counseling hesitation quite unlike any we have recognized before.”⁷³ Moreover, she explained, the Court’s fears about opening the potential floodgates through an unwarranted

power to invent ‘implications’ in the statutory field. There is even greater reason to abandon it in the constitutional field, since an ‘implication’ imagined in the Constitution can presumably not even be repudiated by Congress.” *Id.* (citation omitted); *see also id.* at 67 n.3 (majority opinion) (“[W]e have retreated from our previous willingness to imply a cause of action where Congress has not provided one. Just last Term it was noted that we ‘abandoned’ the view of *Borak* decades ago, and have repeatedly declined to ‘revert’ to ‘the understanding of private causes of action that held sway 40 years ago.’” (citations omitted) (quoting *Sandoval*, 532 U.S. at 287)).

⁶⁸ 536 U.S. 273 (2002).

⁶⁹ *See* Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 343 (2003); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 224 (2003); 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, 1114 (2006).

⁷⁰ 127 S. Ct. 2588, 2598–2604 (2007).

⁷¹ *See id.* at 2599.

⁷² *Id.* at 2604.

⁷³ *Id.* at 2613 (Ginsburg, J., concurring in part and dissenting in part).

recognition of a *Bivens* claim like that sought by Robbins seemed difficult to reconcile with the absence of a significant number of comparable claims under § 1983.⁷⁴ In the end, though, *Wilkie* seems to make clear that, if *Bivens* is not strictly limited to its facts,⁷⁵ it is a far higher hurdle than it was at inception. Contrary to the presumption in favor of finding a *Bivens* claim articulated in *Green*, *Wilkie* drives home the conclusion that the presumption today is *against* inferring any new categories of *Bivens* claims, absent the most compelling reasons to do so.

D. Iqbal

Against this tide of authority, the Court's treatment of *Bivens* in *Ashcroft v. Iqbal*⁷⁶ is hardly surprising. The plaintiff was a Muslim native of Pakistan arrested after September 11th as part of an immigration roundup of hundreds of non-citizens meeting certain characteristics in and around New York City. Although he ultimately pled guilty to identity fraud-related charges and was removed to Pakistan, Iqbal brought a host of charges arising out of the mistreatment he allegedly encountered while in pre-trial detention, naming thirty-four federal officials (including Attorney General Ashcroft and FBI Director Mueller) and nineteen "John Doe" federal corrections officers as defendants.⁷⁷ After the district court denied the defendants' motion to dismiss on the ground of qualified immunity, the defendants took an interlocutory appeal to the Second Circuit. While that appeal was pending, the Supreme Court decided *Twombly*,⁷⁸ thereby raising the additional question of whether the heightened standard identified therein applied to Iqbal's case—and, if so, whether his allegations were adequate to survive a motion to dismiss.⁷⁹

The Second Circuit concluded that *Twombly* did not require application of a heightened standard, and, on the merits, affirmed the district court as to some of Iqbal's claims and reversed on others, ordering a remand for carefully coordinated discovery.⁸⁰ Concurring, Judge Cabranes worried about subjecting senior officials to civil litigation for such types of national security-related claims:

[T]hese officials . . . may be required to comply with inherently onerous discovery requests probing, *inter alia*, their possible knowledge of actions taken by subordinates at the Federal Bureau of Investigation and the Federal Bureau of Prisons at a time when

⁷⁴ *Id.* at 2615–16.

⁷⁵ Justice Thomas, joined by Justice Scalia, argued that it should be so limited. *See id.* at 2608 (Thomas, J., concurring).

⁷⁶ 129 S. Ct. 1937 (2009).

⁷⁷ First Amended Complaint and Jury Demand, *Elmaghraby v. Ashcroft*, No. 04 CV 01809 (JG) (JA), 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005).

⁷⁸ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

⁷⁹ *See generally* *Iqbal v. Hasty*, 490 F.3d 143, 147–49 (2d Cir. 2007) (summarizing the background), *rev'd sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

⁸⁰ *See Iqbal*, 490 F.3d at 160–77.

Ashcroft and Mueller were trying to cope with a national and international security emergency unprecedented in the history of the American Republic.⁸¹

Perhaps mindful of Judge Cabranes' national security-centered concerns, the Supreme Court reversed, holding, in the process, that *Twombly's* heightened pleading standard applied to all civil litigation.⁸² The Court also concluded that the kind of "supervisory liability" *Iqbal* claimed as the basis for suing Ashcroft and Mueller—i.e., their "knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees"—was not available in a *Bivens* action.⁸³ As Justice Kennedy explained,

Respondent's conception of "supervisory liability" is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term "supervisory liability" is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.⁸⁴

At first blush, such a holding seems rather modest, especially when contrasted with the breadth of the *Iqbal* Court's clarification of pleading standards in the latter part of its opinion. But given that (1) the petitioners had *conceded* that officers could be subject to *Bivens* liability as supervisors on grounds other than respondeat superior; and (2) the subsequent discussion of pleading standards rendered such a conclusion superfluous, the Court's doubly unnecessary discussion of *Bivens* seems to be cover for a much larger point, either about *Bivens* in general, or about its specific application to cases such as *Iqbal*.⁸⁵

III. *BIVENS* CLAIMS IN POST-SEPTEMBER 11TH DAMAGES LITIGATION

As others have documented, the hostility shown by the Supreme Court to *Bivens* claims during the 1980s and 1990s clearly affected the

⁸¹ *Id.* at 179 (Cabranes, J., concurring).

⁸² *Iqbal*, 129 S. Ct. at 1953.

⁸³ *Id.* at 1949.

⁸⁴ *Id.*

⁸⁵ For a careful analysis of how *Iqbal's* elimination of supervisory liability affects claims against senior government officers in the context of another counterterrorism case, see *al-Kidd v. Ashcroft*, 580 F.3d 949, 975–77 & n.25 (9th Cir. 2009).

disposition of *Bivens* lawsuits by the lower courts during the same time period.⁸⁶ With limited exceptions, though, it was not until a handful of cases, like *Iqbal*, arising out of the government's aggressive response to the terrorist attacks of September 11th that poorly defined "national security" concerns began to surface as their own "special factor counseling hesitation" when inferring a *Bivens* remedy.

A. Arar

At least chronologically, the first of these decisions came in the civil suit brought by Maher Arar, a dual Canadian and Syrian citizen who was (apparently wrongfully) suspected of involvement with al Qaeda. While transferring flights at JFK International Airport on September 26, 2002, Arar was arrested by U.S. authorities and detained (and allegedly tortured) for thirteen days. He was then apparently subjected to the U.S. government's extraordinary rendition program and transferred to Syria, where he remained in custody for just under one year.⁸⁷

Arar filed suit in the U.S. District Court for the Eastern District of New York against various U.S. officials, including then-Attorney General John Ashcroft, pursuant to the Torture Victim Protection Act of 1991 (TVPA)⁸⁸ and the Fifth Amendment. As to the latter, the complaint alleged that the defendants violated Arar's Fifth Amendment rights to substantive due process by subjecting him to torture and coercive interrogation in Syria; subjecting him to arbitrary and indefinite detention without trial in Syria; subjecting him to arbitrary detention and coercive and involuntary custodial interrogation in the United States; and interfering with his ability to obtain counsel or petition the courts for redress.⁸⁹

Although the government argued that Arar could not invoke the Due Process Clause as a non-citizen who never legally entered the United States, the district court assumed (without deciding) that he *was* protected by the Fifth Amendment with regard to his claims arising from his transfer to (and torture in) Syria,⁹⁰ but declined to infer a *Bivens* remedy anyway. As Judge Trager wrote, "whether the policy be seeking to undermine or overthrow foreign governments, or rendition, judges should not, in the absence of explicit direction by Congress, hold officials

⁸⁶ See, e.g., Reinert, *supra* note 9.

⁸⁷ For a summary of the facts as alleged in Arar's complaint, see *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 252–57 (E.D.N.Y. 2006), *aff'd*, 532 F.3d 157 (2d Cir. 2008), *superseded by* 585 F.3d 559 (2d Cir. 2009) (en banc), *petition for cert. filed* No. 09-923 (U.S. Feb. 1, 2010). See also *Arar*, 532 F.3d at 194–201 (Sack, J., concurring in part and dissenting in part) (summarizing the case's background).

⁸⁸ 28 U.S.C. § 1350 (2006).

⁸⁹ *Arar*, 414 F. Supp. 2d at 257–58.

⁹⁰ *Id.* at 274–75.

who carry out such policies liable for damages even if such conduct violates our treaty obligations or customary international law.”⁹¹

Arar appealed the district court’s decision to the Second Circuit, a divided panel of which affirmed.⁹² Although the majority concluded that the judicial review provided by the Immigration and Nationality Act largely precluded Arar’s claims,⁹³ it held in the alternative that “special factors” would counsel hesitation even if the Immigration and Nationality Act did not. As Judge Cabranes explained,

At its core, this suit arises from the Executive Branch’s alleged determination that (a) Arar was affiliated with Al Qaeda, and therefore a threat to national security, and (b) his removal to Syria was appropriate in light of U.S. diplomatic and national security interests. There can be no doubt that for Arar’s claims to proceed, he must probe deeply into the inner workings of the national security apparatus of at least three foreign countries, as well as that of the United States, in order to determine the basis for his alleged designation as an Al Qaeda affiliate and his removal to Syria via Jordan despite his request to be removed to Canada.⁹⁴

Indeed, as the court elaborated, “the government’s assertion of the state-secrets privilege in this litigation constitutes a further special factor counseling us to hesitate before creating a new cause of action or recognizing one in a domain so clearly inhospitable to the fact-finding procedures and methods of adjudication employed by the federal courts.”⁹⁵

Concurring in part and dissenting in part, Judge Sack took particular exception to the majority’s invocation of the state-secrets privilege as itself justifying the preclusion of a *Bivens* remedy. As he wrote,

⁹¹ *Id.* at 283. Curiously, Judge Trager invoked as additional justification for declining to infer a *Bivens* remedy: the unlikely availability of a qualified immunity defense. *See id.* at 282 (“[T]he qualified immunity defense . . . is not a sufficient protection for officials operating in the national-security and foreign policy contexts. This is because the ability to define the line between appropriate and inappropriate conduct, in those areas, is not, as stated earlier, one in which judges possess any special competence. Moreover, it is an area in which the law has not been developed or specifically spelled out in legislation.”). If anything, such an argument has the relevant considerations entirely backward, since a government officer will have qualified immunity unless his conduct “violate[d] *clearly established* statutory or constitutional rights of which a reasonable person would have known.” *Id.* at 286 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added)). For a shorter (contemporaneous) critique of Judge Trager’s decision, see Stephen I. Vladeck, *Rights Without Remedies: The Newfound National Security Exception to Bivens*, ABA NAT’L SEC. L. REP., July 2006, at 1.

⁹² *Arar*, 532 F.3d at 162.

⁹³ *See id.* at 180 (“[T]he review procedures set forth by the INA provide ‘a convincing reason’ for us to resist recognizing a *Bivens* cause of action for Arar’s claims arising from his alleged detention and torture in Syria.” (citation omitted) (quoting *Wilkie v. Robbins*, 127 S. Ct. 2588, 2598 (2007))).

⁹⁴ *Id.* at 181.

⁹⁵ *Id.* at 183.

Any legitimate interest that the United States has in shielding national security policy and foreign policy from intrusion by federal courts . . . would be protected by the proper invocation of the state-secrets privilege. . . .

. . . .

. . . Moreover, the state-secrets privilege is a narrow device that must be specifically invoked by the United States and established by it on a case-by-case basis. That seems far preferable to the majority's blunderbuss solution—to withhold categorically the availability of a *Bivens* cause of action in all such cases—and the concomitant additional license it gives federal officials to violate constitutional rights with virtual impunity. Rather than counseling against applying *Bivens*, the availability to the defendants of the state-secrets privilege counsels permitting a *Bivens* action to go forward by ensuring that such proceedings will not endanger the kinds of interests that properly concern the majority.⁹⁶

Because Judge Sack thereby believed that Arar had stated a viable claim, he proceeded to analyze whether the defendants were entitled to qualified immunity—concluding that they were not.⁹⁷

Somewhat surprisingly, six weeks after the Second Circuit's decision was handed down, the court sua sponte ordered rehearing en banc. Nonetheless, the en banc court reached the same result as the panel, with Chief Judge Jacobs explaining for a seven to four majority that the key to the case was the conclusion that “rendition” was, in general, a “special factor” cutting against a *Bivens* remedy. In his words, “in the context of extraordinary rendition, [a *Bivens*] action would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation, and that fact counsels hesitation.”⁹⁸ Thus, “‘extraordinary rendition’ is a context new to *Bivens* claims . . . [and] in the context of extraordinary rendition, hesitation is warranted by special factors.”⁹⁹

The majority opinion provoked four strongly-worded dissents, including one from Judge Sack, who rehashed much of his panel dissent, especially the idea that “heeding ‘special factors’ relating to secrecy and security is a form of double counting inasmuch as those interests are fully protected by the state-secrets privilege.”¹⁰⁰ Judge Calabresi picked up on

⁹⁶ *Id.* at 212–13 (Sack, J., concurring in part and dissenting in part) (citations omitted); see also *id.* at 213–14 (“The alleged intentional acts which resulted in Arar’s eventual torture and inhumane captivity were taken by federal officials while the officials and Arar were within United States borders, and while Arar was in the custody of those federal officials. He therefore presents this Court with a classic, or at the very least viable, *Bivens* claim—a request for damages incurred as a result of violations of his Fifth Amendment substantive due process rights by federal officials while they detained him.” (footnote omitted)).

⁹⁷ *Id.* at 214–15.

⁹⁸ *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) (en banc), *petition for cert. filed* No. 09-923 (U.S. Feb. 1, 2010).

⁹⁹ *Id.* at 563.

¹⁰⁰ *Id.* at 583 (Sack, J., concurring in part and dissenting in part).

the “double-counting” idea in his own emphatic dissent, adding the charge that the majority was unnecessarily reaching out to decide a constitutional question—that the “national security” concerns identified in the majority opinion may well have provided a barrier to Arar prevailing on the merits, but in a manner that was not nearly as constitutionally categorical as the en banc court’s repudiation of rendition-based *Bivens* claims. As he explained,

We *already* possess a well-established method for protecting secrets, one that is more than adequate to meet the majority’s concern. Denying a *Bivens* remedy because state secrets might be revealed is a bit like denying a criminal trial for fear that a juror might be intimidated: it allows a risk, that the law is already at great pains to eliminate, to negate entirely substantial rights and procedures.¹⁰¹

Relying on such national security concerns in denying a *Bivens* remedy was not only “double counting,” Judge Calabresi continued, but was in fact a serious threat to the role courts should play in striking a balance between protecting national security and providing remedies to innocent victims of governmental abuses. Thus,

[R]egardless of whether the Constitution itself requires that there be such redress, the object must be to create and use judicial structures that *facilitate* the giving of compensation, at least to innocent victims, while protecting from disclosure those facts that cannot be revealed without endangering national security. That might well occur here through the application of a sophisticated state secrets doctrine. It does not occur when, at the outset, Arar’s claims—though assumed true and constitutionally significant—are treated as lacking any remedy. And this is just what today’s unfortunate holding does. It hampers an admission of error, if error occurred; it decides constitutional questions that should be avoided; it is, I submit, on all counts, utterly wrong.¹⁰²

B. Rasul

The next significant *Bivens* claim related to the government’s post-September 11th conduct arose out of the detention (and alleged mistreatment) of certain non-citizen “enemy combatants” at Guantanamo Bay, Cuba. Shafiq Rasul—the lead named plaintiff in the 2004 Supreme Court case holding that the habeas statute conferred jurisdiction over the detainees’ claims¹⁰³—and three others brought suit

¹⁰¹ *Id.* at 635 (Calabresi, J., concurring in part and dissenting in part) (footnote omitted); *see also id.* at 637 (“These, then, are the majority’s determinative ‘special factors’: a mix of risks that are amply addressed by the state secrets doctrine and policy concerns that inhere in all *Bivens* actions and in innumerable every-day tort actions as well.”).

¹⁰² *Id.* at 638–39 (footnote omitted).

¹⁰³ *See Rasul v. Bush*, 542 U.S. 466, 472–73 (2004). Ironically, Rasul was released to the United Kingdom in March 2004—one month before argument, and three months before the Court decided the case bearing his name.

under the TVPA,¹⁰⁴ the Geneva Conventions,¹⁰⁵ the Religious Freedom Restoration Act,¹⁰⁶ and the Fifth and Eighth Amendments (under *Davis* and *Green*).

As relevant here, the D.C. district court dismissed the plaintiffs' Fifth and Eighth Amendment claims without reaching the *Bivens* issue, relying instead on qualified immunity grounds. Specifically, the court concluded that even if the detainees were protected by the Constitution, it was not clearly established that their detention and treatment were in violation thereof.¹⁰⁷ Instead, "the plaintiffs' attenuated connections with the United States coupled with the dispute over whether Guantanamo is within the territorial jurisdiction of the Judiciary would lead a reasonable person to believe that the plaintiffs would not be afforded any constitutional protections even under a 'generous and ascending scale of rights.'"¹⁰⁸

On appeal, the D.C. Circuit affirmed, albeit on somewhat different grounds.¹⁰⁹ Relying on its (since-overruled) decision in *Boumediene v. Bush*, which held that the Guantanamo detainees were not entitled to any constitutional protections,¹¹⁰ the majority concluded that, in effect, there was no set of facts on which the plaintiffs could state a viable claim.¹¹¹ And in the alternative, the court agreed with the district court that the defendants were entitled to qualified immunity, since "[a]n examination of the law at the time the plaintiffs were detained reveals that even before *Boumediene*, courts did not bestow constitutional rights on aliens located outside sovereign United States territory."¹¹²

Judge Brown wrote separately to emphasize that even if the plaintiffs' constitutional claims had merit, special factors counseled against inferring a *Bivens* remedy—indeed, she suggested that the court should not have even reached the qualified immunity issue.¹¹³ To that end, she invoked then-Judge Scalia's opinion for the D.C. Circuit in *Sanchez-Espinoza v. Reagan*,¹¹⁴ which had concluded that,

"[T]he 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

¹⁰⁴ 28 U.S.C. § 1350 (2006).

¹⁰⁵ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

¹⁰⁶ Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb to bb-4.

¹⁰⁷ *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 41–44 (D.D.C. 2006), *aff'd sub nom. Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008), *vacated*, 129 S. Ct. 763 (2008) (mem.), *aff'd in part, rev'd in part*, 563 F.3d 527 (D.C. Cir. 2009).

¹⁰⁸ *Id.* at 43 (footnote omitted) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)).

¹⁰⁹ *Rasul*, 512 F.3d 644.

¹¹⁰ 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 128 S. Ct. 2229 (2008).

¹¹¹ *Rasul*, 512 F.3d at 663–65.

¹¹² *Id.* at 666.

¹¹³ *Id.* at 672 & n.1 (Brown, J., concurring).

¹¹⁴ 770 F.2d 202 (D.C. Cir. 1985).

causing injury abroad. . . . Whether or not the present litigation is motivated by considerations of geopolitics rather than personal harm, we think that as a general matter the danger of foreign citizens' using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist."¹¹⁵

Because "[t]reatment of detainees is inexorably linked to our effort to prevail in the terrorists' war against us, including our ability to work with foreign governments in capturing and detaining known and potential terrorists,"¹¹⁶ Judge Brown concluded that "all of the special factors we identified in *Sanchez-Espinoza* apply to this case and plaintiffs cannot bring their claims under *Bivens*."¹¹⁷

Five months later, the Supreme Court decided *Boumediene*, holding that the Guantanamo detainees *do* possess at least some constitutional rights (specifically, in *Boumediene*, the habeas corpus right protected by the Suspension Clause).¹¹⁸ In light of that holding, the Court shortly thereafter granted Rasul's petition for certiorari, vacated the D.C. Circuit's decision, and remanded for reconsideration in light of *Boumediene*.¹¹⁹ On remand, the D.C. Circuit nevertheless reinstated its original judgment,¹²⁰ relying heavily on its conclusion that the defendants still were entitled to qualified immunity.¹²¹ In the alternative, though, the majority in a footnote expressly adopted Judge Brown's earlier analysis of the availability of a *Bivens* remedy, concluding that, even if their analysis of qualified immunity was incorrect, "special factors" counseled hesitation, and so a *Bivens* remedy was not available in any event.¹²² This time around, the Supreme Court denied certiorari,¹²³ leaving the D.C. Circuit's opinion intact.

¹¹⁵ *Rasul*, 512 F.3d at 673 (alteration in original) (quoting *Sanchez-Espinoza*, 770 F.2d at 209).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). For more on *Boumediene* and its implications, see Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107 (2009).

¹¹⁹ *Rasul v. Myers*, 129 S. Ct. 763 (2008) (mem.).

¹²⁰ *Rasul v. Myers*, 563 F.3d 527, 528 (D.C. Cir. 2009) (per curiam).

¹²¹ The Supreme Court's intervening decision in *Pearson v. Callahan*, 129 S. Ct. 808 (2009), made the court's task even easier, for it eliminated the requirement that courts decide as a threshold matter in qualified immunity cases whether the plaintiffs' claim stated a violation of a constitutional right. After *Pearson*, the court could assume that issue without deciding it, relying instead on the conclusion that any such right was not "clearly established" at the time of the government officers' alleged misconduct. See *Rasul*, 563 F.3d at 529–30.

¹²² *Rasul*, 563 F.3d at 532 n.5 ("We see no basis for distinguishing this case from *Sanchez-Espinoza*. Plaintiffs' *Bivens* claims are therefore foreclosed on this alternative basis, which is also unaffected by the Supreme Court's *Boumediene* decision." (citation omitted)).

¹²³ *Rasul v. Myers*, No. 09-227, 2009 WL 2588226, at *1 (U.S. Dec. 14, 2009).

C. *In re* Iraq & Afghanistan Detainee Litigation

Perhaps the strongest argument against inferring a *Bivens* remedy in a lawsuit arising out of the detention of suspected terrorists came in a case brought by nine Iraqi and Afghani citizens challenging their allegedly unlawful detention and treatment at various military prisons in Iraq and Afghanistan, including Abu Ghraib.¹²⁴ Although the plaintiffs' allegations were disturbing, the district court declined to infer a *Bivens* remedy, since

There is no getting around the fact that authorizing monetary damages remedies against military officials engaged in an active war would invite enemies to use our own federal courts to obstruct the Armed Forces' ability to act decisively and without hesitation in defense of our liberty and national interests¹²⁵

Moreover, as Judge Hogan concluded:

Military, executive, and congressional officials might arrive at a different conclusion from the judiciary about where on the spectrum a particular interrogation technique falls and whether it was, or is, properly used to obtain information about our enemies while conducting a war. . . . The hazard of such multifarious pronouncements . . . warrant leaving to Congress the determination whether a damages remedy¹²⁶ should be available under the circumstances presented here.

Judge Hogan's opinion thus epitomizes both the generalized critique of *Bivens* (as judicial arrogation of the legislative function) and the specific reluctance to infer *Bivens* remedies in national security cases, especially where non-citizens are concerned. It is all but impossible, given the language of opinions like Judge Hogan's and Judge Brown's, to imagine how a post-September 11th detainee could *ever* state a viable *Bivens* claim. Instead, the run of jurists seem to assume, like Judge Hogan, that individuals in these plaintiffs' position can repair only to Congress to seek redress.

IV. BIVENS AS A NATIONAL SECURITY REMEDY OF LAST RESORT

The cases recounted in Part III demonstrate the extent to which vague and generalized national security concerns have repeatedly served as a "special factor counseling hesitation" in fashioning *Bivens* remedies for governmental misconduct in post-September 11th terrorism cases. But all of these cases neglect the extent to which *other* mechanisms adequately protect the national security concerns that such lawsuits implicate, even while the same decisions relied at least in part on the existence of such devices (e.g., the state-secrets privilege in *Arar*; qualified

¹²⁴ *In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85 (D.D.C. 2007).

¹²⁵ *Id.* at 105.

¹²⁶ *Id.* at 107.

immunity in *Rasul*). Thus, my own view is that Judge Sack had it exactly right in his partial panel dissent in *Arar*, i.e., that “[r]ather than counseling against applying *Bivens*, the availability to the defendants of the state-secrets privilege counsels permitting a *Bivens* action to go forward by ensuring that such proceedings will not endanger the kinds of interests that properly concern the majority.”¹²⁷

Put another way, the existence of defenses and other mechanisms to vindicate the government’s claimed need to avoid inappropriate judicial interference with national security and foreign policy is the opposite of a special factor counseling hesitation. If anything, it is a special factor counseling *in favor* of a remedy, since the courts can have faith that these other doctrines will provide the sorting mechanism that *Bivens* was never meant to—and to bar relief on the merits in cases in which the government’s concerns are justified.¹²⁸

Moreover, the courts that have relied on these amorphous national security concerns have also adopted one of the classical critiques of *Bivens* by suggesting that it is up to Congress (and not the courts) to provide remedies. But in so holding, these cases overlook the very real extent to which the victims of most of the government’s more egregious post-September 11th abuses have no real political constituency—most are non-citizens, most reside outside the territorial United States, and so on. And even if there was *some* political support for these former detainees, legislative remedies would be the last measure of redress that they would be able to obtain, given the very skewed politics that would necessarily result from an attempt to provide statutory damages to one-time terrorism suspects.¹²⁹

Separate from Judge Sack’s partial dissent in *Arar*, a more recent district court opinion seems more attuned to this understanding of *Bivens*. Specifically, *Padilla v. Yoo* is a civil suit brought by a U.S. citizen, formerly detained as an “enemy combatant,” against the former Justice Department lawyer who, he alleges, was responsible for his mistreatment while in military custody.¹³⁰ In denying Yoo’s motion to dismiss, the

¹²⁷ *Arar v. Ashcroft*, 532 F.3d 157, 213 (2d Cir. 2008) (Sack, J., concurring in part and dissenting in part), *superseded by* 585 F.3d 559 (2d Cir. 2009) (en banc), *petition for cert. filed* No. 09-923 (U.S. Feb. 1, 2010).

¹²⁸ *Cf. Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (“[Qualified immunity] will not allow the Attorney General to carry out his national security functions wholly free from concern for his personal liability; he may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point . . .”).

¹²⁹ *See, e.g., id.* at 522 (“National security tasks . . . are carried out in secret; open conflict and overt winners and losers are rare. Under such circumstances, it is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation. Whereas the mere threat of litigation may significantly affect the fearless and independent performance of duty by actors in the judicial process, it is unlikely to have a similar effect on the Attorney General’s performance of his national security tasks.” (footnote omitted)).

¹³⁰ 633 F. Supp. 2d 1005, 1012 (N.D. Cal. 2009).

district court conducted an extensive analysis of whether to infer a *Bivens* remedy, distinguishing the cases discussed above on the grounds that the plaintiff was a U.S. citizen detained within the territorial United States:

The treatment of an American citizen on American soil does not raise the same specter of issues relating to foreign relations. The Court is not persuaded by the decisions not to find a *Bivens* remedy in instances in which foreign nationals are allegedly subjected to unconstitutional treatment abroad. The courts' concerns about the creation of remedies for foreign nationals and the courts' intrusion into the affairs of foreign governments finds no application in the particular circumstances raised by the case of allegations of unconstitutional treatment of an American citizen on American soil.¹³¹

In the process, the *Padilla* court also rejected Yoo's argument that "national security" was itself a special factor counseling hesitation, observing that "Yoo's argument amounts to an assertion of the state secrets privilege. Should a privilege surface on behalf of the government, the Court can and will address those concerns in due time in the management of this case."¹³²

In focusing so heavily on *Padilla*'s citizenship and place of detention, it is hard to see the *Padilla* opinion as taking on the broader issue of whether "national security" concerns should ever furnish a "special factor counseling hesitation" in inferring a *Bivens* remedy. But the underlying logic in *Padilla* reveals the same thinking as that advanced by the dissenters in *Arar*—that other doctrines (including qualified immunity) will do the relevant work in protecting national security, and that the existence of a *Bivens* claim should turn more squarely on the existence vel non of adequate alternative remedies. Put another way, the *Padilla* opinion helps to identify the central flaw in the reasoning of the other cases, all of which deny a *Bivens* remedy because of a fear that the plaintiff might *win*. For "special factors" to mean anything that is intellectually coherent, they should exist without respect to the ultimate outcome of the lawsuit.

V. CONCLUSION

With all of these developments in tow, *Iqbal* emerges as a missed opportunity—a case in which the Court could have set things straight as to the circumstances in which "national security" concerns present "special factors counseling hesitation"—even while holding that the plaintiff's allegations were insufficiently specific to survive a motion to dismiss.¹³³ A more careful review of these other cases, though, suggests

¹³¹ *Id.* at 1030.

¹³² *Id.* at 1028.

¹³³ The only case thus far on the Supreme Court's docket for the 2009 Term in which a *Bivens* issue is squarely raised does not appear to provide an opportunity to revisit this issue; the question presented in *Hui v. Castaneda*, No. 08-1529 (scheduled

that the “special factors” analysis has gone somewhat off the rails after September 11th, expanding to serve as a catch-all bar on civil damages in lawsuits arising out of counterterrorism operations. There may well still be cases where there *are* such special factors; the above Essay has merely attempted to suggest both why national security cases do not comfortably fit, and why, in marked contrast, the specific doctrines that can preclude recovery in such lawsuits only helps to clear the underbrush that would otherwise get in the way of finding a *Bivens* remedy. So long as *Bivens* stays on the books, national security cases may well present the most—rather than the least—compelling situations for its use.

for hearing Mar. 2, 2010), is whether the Federal Tort Claims Act is the exclusive remedy for claims arising from medical care and related functions provided by Public Health Service personnel, thereby barring *Bivens* actions. *See Castaneda v. United States*, 546 F.3d 682 (9th Cir. 2008), *cert. granted sub nom. Migliaccio v. Castaneda*, 130 S. Ct. 49, *cert. dismissed in part*, 130 S. Ct. 487 (2009) (dismissing certain petitioners/defendants). Whatever the answer to that question, the Court’s denial of certiorari in *Rasul* suggests that the Second and D.C. Circuits may have had the last word, at least for now, on the issue addressed herein.