

# Square Pegs and Round Holes: Moving Beyond *Bivens* in National Security Cases

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*Since its inception, the Supreme Court has largely orphaned the Bivens doctrine, a child of its own jurisprudence. In doing so, the Court has repeatedly invoked dicta from the Bivens case warning that unspecified “special factors counseling hesitation” could preclude judicial recognition of future constitutional remedies. Picking up on this thread, lower courts have notably limited the justiciability of Bivens claims in cases challenging counterterrorism-related government conduct. This so-called “national security exception” to the Bivens doctrine has created a substantial hurdle to individual justice and government transparency.*

*This Note therefore proposes the creation of an Article I administrative court with jurisdiction over post-deprivation constitutional claims in national security cases. Part II traces the evolution of the Bivens doctrine and the national security exception; Part III discusses how the lack of a viable judicial remedy has created a critical accountability gap; and Part IV describes the proposed structure and responsibilities of this new tribunal.*

“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”

– Chief Justice John Marshall<sup>1</sup>

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1. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

## I. INTRODUCTION

On September 30 and October 14, 2011, the United States government, through the use of covert drone strikes, killed American citizens Anwar al-Aulaqi,<sup>2</sup> Abdulrahman al-Aulaqi, and Samir Khan (collectively, “the victims”).<sup>3</sup> Anwar and Samir were purported members of al-Qa’ida in the Arabian Peninsula (AQAP).<sup>4</sup> However, none of the victims were charged with a crime<sup>5</sup> prior to their targeted killing,<sup>6</sup> and Abdulrahman al-Aulaqi — Anwar’s son — was only sixteen years old at the time of his death.<sup>7</sup> He had no reported ties to terrorism and was reportedly a collateral casualty of a strike aimed at someone else.<sup>8</sup>

On July 18, 2012, the victims’ estates sued the Government, asserting, *inter alia*, Fourth and Fifth Amendment *Bivens*<sup>9</sup> claims

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2. His name is also frequently transliterated from Arabic as Anwar al-Awlaki. This Note uses al-Aulaqi throughout.

3. Mark Mazzetti et al., *C.I.A. Strike Kills U.S.-Born Militant In A Car In Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1; Peter Finn & Greg Miller, *Family Condemns Death of Awlaki's Son*, WASH. POST, Oct. 18, 2011, at A1.

4. *Id.*; Defs.’ Mot. to Dismiss, *Al-Aulaqi v. Panetta* at 2–3, No. 12-CV-1192 (RMC) (D.D.C. July 18, 2012), ECF No. 24. Anwar was also a Specially Designated Global Terrorist. Exec. Order No. 13,224, 31 C.F.R. 594, 75 Fed. Reg. 43,233.

5. The U.S. District Court for the District of Colorado issued a felony arrest warrant for passport fraud in October 2002 naming Anwar al-Aulaqi, but federal prosecutors later rescinded that warrant. Joseph Rhee & Mark Schone, *How Anwar Awlaki Got Away*, ABC NEWS (Nov. 30, 2009), <http://abcnews.go.com/Blotter/FtHoodInvestigation/anwar-awlaki/story?id=9200720>.

6. “Targeted killing” in this context means “the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.” Nils Melzer, *TARGETED KILLING IN INTERNATIONAL LAW* 5 (2008).

7. Finn & Miller, *supra* note 3.

8. Tom Junod, *Obama’s Administration Killed a 16-Year-Old American and Didn’t Say Anything About It. This Is Justice?*, ESQUIRE POLITICS BLOG (Jul. 9, 2012, 7:47 AM), <http://www.esquire.com/blogs/politics/abdulrahman-al-awlaki-death-10470891#ixzz2GTqnMgrf>. When questioned about the Government’s justification for killing Abdulrahman, former White House Press Secretary Robert Gibbs said, “I would suggest that you should have a far more responsible father if they are truly concerned about the well being of their children. I don’t think becoming an al Qaeda jihadist terrorist is the best way to go about doing your business.” Conor Friedersdorf, *How Team Obama Justifies the Killing of a 16-Year-Old American*, THE ATLANTIC <http://www.theatlantic.com/politics/archive/2012/10/how-team-obama-justifies-the-killing-of-a-16-year-old-american/264028/#> (last visited Oct. 24, 2012, 7:02 AM).

9. As explained in Part II(A), *infra*, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 390 (1971), affirmed that, under certain conditions, the Constitution itself can create a cause of action to seek damages from federal officers for violations of constitutional rights.

(“*Aulaqi II*”).<sup>10</sup> This followed an unsuccessful 2010 suit to enjoin the Government from terminating Anwar after his placement on a so-called federal “kill list” became public knowledge (“*Aulaqi I*”).<sup>11</sup> In *Aulaqi I*, the court found that the plaintiff, Anwar’s father, lacked standing to assert constitutional claims as a “next friend.”<sup>12</sup> Although the *Aulaqi II* plaintiffs are unlikely to face a similar jurisdictional hurdle,<sup>13</sup> it is probable that the court will dismiss this suit because of what Professor Stephen Vladeck calls the “national security exception” to the *Bivens* doctrine.<sup>14</sup>

Since the *Bivens* decision, the Supreme Court has largely orphaned the doctrine, a child of its own jurisprudence.<sup>15</sup> In the past few decades, the Court refused to recognize First Amendment suits brought by federal employees,<sup>16</sup> Due Process claims for Social Security benefits,<sup>17</sup> and lawsuits naming federal agencies, rather than individual officials.<sup>18</sup> In doing so, the Court has re-

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10. Complaint, *Al-Aulaqi v. Panetta*, No. 12-CV-1192, ECF No. 3, available at <https://www.aclu.org/national-security/al-aulaqi-v-panetta-complaint>. See also ACLU, *Al-Aulaqi v. Panetta: Lawsuit Challenging Targeted Killings*, <https://www.aclu.org/national-security/al-aulaqi-v-panetta> (last viewed Sept. 29, 2013) (providing background information about the lawsuit).

11. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

12. *Id.* at 19–20.

13. See Benjamin Wittes, *The Aulaqi-Khan Suit: Some Initial Thoughts*, LAWFARE: HARD NAT’L SEC. CHOICES (July 18, 2012, 2:29 PM), <http://www.lawfareblog.com/2012/07/the-aulaqi-khan-suit-some-initial-thoughts/> (“[T]his lawsuit does not suffer from the prohibitive standing problem that plagued . . . earlier efforts to block prospectively the targeting of Anwar Al-Aulaqi. That case suffered from the basic jurisdictional problem that its plaintiff was not Anwar Al-Aulaqi. . . . [T]here is no question that immediate family members who allege that their kin were wrongfully killed have standing to bring suit.”); but see *Defs.’ Mot. to Dismiss*, *supra* note 4, at 4–5 (arguing that plaintiffs lack capacity to sue on the victims’ behalf because they have failed “to demonstrate they have complied with [local] law’s requirements to act as [the victims’] personal representatives” pursuant to Federal Rule of Civil Procedure 17(b)).

14. Stephen I. Vladeck, *Rights Without Remedies: The Newfound National Security Exception to Bivens*, A.B.A. NAT’L SEC. L. REP. 1 (2006), available at [http://www.americanbar.org/content/dam/aba/migrated/natsecurity/nslr/2006/NSL\\_Report\\_2006\\_07.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/natsecurity/nslr/2006/NSL_Report_2006_07.authcheckdam.pdf).

15. See, e.g., George D. Brown, “Counter-Counter-Terrorism via Lawsuit” — *The Bivens Impasse*, 82 S. Cal. L. Rev. 841, 845 (2009) (“[F]rom the outset, the *Bivens* doctrine has contained an equally important, diametrically opposed strand: a high degree of judicial discretion coupled with deference to Congress — both its expertise in the particular subject matter of the suit and its role in making the basic remedial decision of whether damages are available for constitutional violations. Over the last two decades, the latter strand has prevailed. The Supreme Court has rejected the last seven attempts to fashion a *Bivens* action in new contexts.”).

16. *Bush v. Lucas*, 462 U.S. 367, 390 (1983).

17. *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988).

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

peatedly invoked *dicta* from *Bivens*, warning that unspecified “special factors counseling hesitation” could preclude judicial recognition of future constitutional remedies.<sup>19</sup>

Picking up on this thread, lower courts have notably limited the justiciability of *Bivens* claims in national security cases (*i.e.* “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”).<sup>20</sup> As Vladeck notes, since the September 11, 2001 terrorist attacks, no court has granted damages to plaintiffs alleging violations of their individual rights as a result of U.S. counterterrorism policies.<sup>21</sup> In dismissing such suits, courts have relied on the “special factors” analysis, finding that traditional judicial deference to the Government in national security matters forecloses court-created constitutional remedies.<sup>22</sup> This trend stands in stark contrast to *habeas corpus* jurisprudence. The Supreme Court, most recently in *Boumediene v. Bush*,<sup>23</sup> has vigorously defended judicial review of challenges to allegedly unlawful Government detention brought by enemy combatants.<sup>24</sup> In other words, had the Government captured and incarcerated the victims, they could have contested their confinement. Nevertheless, their estates may

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

20. Stephen I. Vladeck, *National Security and Bivens After Iqbal*, 14 LEWIS & CLARK L. REV. 255, 257 (2010).

21. Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1296 (2012).

22. *See, e.g.,* *Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir. 2012) *cert. denied*, 132 S. Ct. 2751 (U.S. 2012) (“Special factors do counsel judicial hesitation in implying causes of action for enemy combatants held in military detention. . . . [T]he grant of affirmative powers to Congress and the Executive in the first two Articles of our founding document suggest some measure of caution on the part of the Third Branch.”).

23. 553 U.S. 723 (2008).

24. *Id.* at 798 (“We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.”). It is worth noting that *Boumediene* may have marked the high tide of robust Court review of such *habeas* actions. Since *Boumediene*, the Court has repeatedly denied *certiorari* to appeals from lower court decisions dismissing *habeas* petitions brought by enemy combatants. Lyle Denniston, *Court Bypasses All New Detainee Cases*, SCOTUSBLOG (June 11, 2012, 11:39 AM), <http://www.scotusblog.com/2012/06/court-bypasses-all-new-detainee-cases/>.

have no recourse to challenge the victims' targeted killing because of current legal lacunae.<sup>25</sup>

This Note argues that the national security exception is unacceptable. As the epigraph from Chief Justice Marshall demonstrates, a core aspiration of our constitutional democracy is to afford individuals remedies for legally cognizable injuries. Unfortunately, *Bivens* is not up to the task. Aside from the limitations imposed by the "special factors" carve-out, other justiciability constraints and affirmative defenses have undermined *Bivens*' efficacy. These include the qualified immunity, state secrets, and political question doctrines, as well as deep-seated judicial deference to the Government in the national security arena.<sup>26</sup> This array of doctrinal and institutional hurdles has not only created an insurmountable barrier for individual plaintiffs, but it has also fostered a serious transparency problem.<sup>27</sup> Professor George Brown has observed that "the default accountability mechanism for questioning government [national security] conduct is the array of civil suits against federal officials by self-proclaimed victims of the war, cases which might be referred to as reverse war on terror suits."<sup>28</sup> Without a viable judicial cause of action, the political process and internal executive branch review provide the sole checks on the Government's targeted killing program.

In response, some have proposed the creation of a specialized Article III "national security court" to handle *Aulaqi*-like claims,<sup>29</sup>

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25. See Samuel S. Adelsberg, Short Essay, *Bouncing the Executive's Blank Check: Judicial Review and the Targeting of Citizens*, 6 HARV. L. & POL'Y REV. 437, 437 (2012) ("The U.S. government has afforded more judicial protection to those whom it seeks to wiretap than to those whom it seeks to kill — at least in the case of Anwar al-Awlaki."). Put another way, as the district court asked in *Aulaqi I*: "How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?" *Al-Aulaqi*, 727 F. Supp. 2d at 8.

26. See George D. Brown, *Accountability, Liability, and the War on Terror-Constitutional Tort Suits As Truth and Reconciliation Vehicles*, 63 FLA. L. REV. 193, 246 (2011) (noting that "the notion of national security deference is deeply ingrained in our constitutional tradition").

27. *Id.* at 201–02.

28. *Id.* at 193.

29. See, e.g. Kevin E. Lunday & Harvey Rishikof, *Due Process Is A Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT'L L.J. 87 (2008); Jack L. Goldsmith & Neal Katyal, *The Terrorists' Court*, N.Y. TIMES, (July 11, 2007), <http://www.nytimes.com/2007/07/11/opinion/11katyal.html>; Stuart Taylor, Jr., *The Case for a National Security Court*, THE ATLANTIC (Feb. 27, 2007),

and others have advocated for pre-deprivation administrative procedures to provide due process prior to drone strikes.<sup>30</sup> Both of these proposals are inadequate. In addition to the constraints identified above, Article III courts are ill-equipped to handle classified national security information.<sup>31</sup> National security “hawks” are right to worry that litigating these cases in a public forum could expose sensitive information, as existing evidentiary protections, such as the Classified Information Procedures Act (“CIPA”),<sup>32</sup> do not sufficiently protect intelligence sources and methods.<sup>33</sup> Further, an *ex ante* process, while necessary, is also insufficient because it prevents plaintiffs from contesting unlawful actions. Only a post-deprivation remedy would fulfill the goals of individual justice and accountability by allowing litigants to seek redress for constitutional violations and compelling the Government to defend its legal rationale for its challenged conduct.

This Note therefore proposes the creation of an Article I court with jurisdiction over post-deprivation constitutional claims in national security cases.<sup>34</sup> In building this argument, Part II traces the evolution of the *Bivens* doctrine and the national security exception; Part III discusses how the lack of a viable judicial remedy has created an accountability gap; and Part IV describes the proposed structure and responsibilities of this new tribunal.

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<http://www.theatlantic.com/magazine/archive/2007/02/the-case-for-a-national-security-court/305717/>.

30. See Adelsberg, *supra* note 25, at 445 (proposing the creation of a Citizen Targeting Review Court); Carla Crandall, *Ready . . . Fire . . . Aim! A Case for Applying American Due Process Principles Before Engaging in Drone Strikes*, 24 FLA. J. INT'L L. 55, 56, 86 (2012) (proposing the creation of a pre-strike review tribunal).

31. Lunday & Rishkoff, *supra* note 29, at 118.

32. Classified Information Procedures Act, codified at 18 U.S.C. 3 §§ 1–16 (2012).

33. Afsheen John Radsan, *Remodeling the Classified Information Procedures Act (Cipa)*, 32 CARDOZO L. REV. 437, 442–43 (2010) (arguing that CIPA is archaic and that the “Bush Administration, in part to avoid problems under CIPA, turned away from the federal courts and dealt with high-level cases through alternative means”).

34. This Note does not address the legality of targeted killing under domestic or international law. For scholarship on this topic, compare, e.g., Mark V. Vlasic, *Assassination & Targeted Killing—A Historical and Post-Bin Laden Legal Analysis*, 43 GEO. J. INT'L L. 259 (2012); Mike Dreyfuss, Note, *My Fellow Americans, We Are Going to Kill You: The Legality of Targeting and Killing U.S. Citizens Abroad*, 65 VAND. L. REV. 249 (2012), with John Yoo, *Assassination or Targeted Killings After 9/11*, 56 N.Y.L. SCH. L. REV. 57, 58 (2012).

## II. THE LEGAL LANDSCAPE

### A. *BIVENS* AND ITS IMMEDIATE PROGENY

In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*,<sup>35</sup> Webster Bivens sought damages from individual federal law enforcement agents, alleging that his arrest and search by the agents violated his Fourth Amendment rights.<sup>36</sup> At the time, no cause of action existed to sue Government officials for constitutional violations; 42 U.S.C. § 1983,<sup>37</sup> which created such an avenue for complaints naming state and local actors, has no federal statutory analogue.<sup>38</sup> Though the Supreme Court had acknowledged in *Bell v. Hood*<sup>39</sup> that damages may be an appropriate remedy for federal infringement of the Fourth Amendment, no court recognized such a cause of action prior to *Bivens*.<sup>40</sup> Accordingly, the trial court dismissed Bivens' complaint, and the Second Circuit affirmed.<sup>41</sup>

In its argument before the Supreme Court, the Government contended that, absent a Congressional statute creating a federal right of action, Bivens could only seek redress through a common law suit for trespass in state court.<sup>42</sup> The Court rejected this view in a groundbreaking decision and held that individuals subjected to an illegal search by Government officials could sue for damages directly under the Fourth Amendment.<sup>43</sup> In so doing, the Court noted that the Government sought to

treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. . . . An agent acting — albeit unconstitutionally — in the name of

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35. 403 U.S. 388 (1971).

36. *Id.* at 389–90.

37. 42 U.S.C. § 1983 (2012).

38. Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 818–19 (2010).

39. 327 U.S. 678, 684–85 (1946).

40. Reinert, *supra* note 38, at 820.

41. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 390 (1971).

42. MICHAEL L. WELLS & THOMAS A. EATON, CONSTITUTIONAL REMEDIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 24 (2002).

43. *Bivens*, 403 U.S. at 397.

the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.<sup>44</sup>

Further, the Court emphasized that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”<sup>45</sup> Therefore, “[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. . . . [W]here legal rights have been invaded, . . . federal courts may use any available remedy to make good the wrong done.”<sup>46</sup>

Nonetheless, the Court recognized in *dicta* that “special factors counseling hesitation in the absence of affirmative action by Congress” may constrain judicial recognition of constitutional remedies in other contexts,<sup>47</sup> as could an “explicit congressional declaration that persons injured by a federal officer’s violation of the [Constitution] may not recover money damages from the agents, but must instead be remitted to another remedy . . . .”<sup>48</sup> These indeterminate admonitions soon became part of the legal lexicon, with future decisions adopting a two-prong test to determine the justiciability of *Bivens* claims: first, courts should ensure that there are no “special factors” militating against judicial intervention and second, courts should ascertain whether Congress had supplanted a general constitutional cause of action with a tailored statutory remedy or an explicit statement that no remedy existed.<sup>49</sup>

Though *Bivens* was limited to the Fourth Amendment, it nevertheless seemed to provide a font for new, constitutionally based causes of action.<sup>50</sup> In the first few ensuing years, the Court recognized claims based on the Due Process Clause of the Fifth Amendment<sup>51</sup> and the Cruel and Unusual Punishment Clause of

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44. *Id.* at 391–92.

45. *Id.* at 397 (quoting *Marbury v. Madison*, 5 U.S. 137, 163 (1803)).

46. *Id.* at 395–96 (citations omitted) (internal quotation marks omitted).

47. *Id.* at 396.

48. *Id.* at 397.

49. Vladeck, *supra* note 20, at 261–62.

50. *Id.* at 262.

51. *Davis v. Passman*, 442 U.S. 228, 248–49 (1979).



the Eighth Amendment.<sup>52</sup> In *Davis v. Passman*, the Court emphasized that the judiciary is “the primary means through which [important constitutional] rights may be enforced,”<sup>53</sup> and in *Carlson v. Green*, it stated that the “victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.”<sup>54</sup> Brown calls this period the “Heyday of the *Marbury*-Rights Model,” an era marked by a “relatively straightforward view of constitutional torts [that] buil[t] on the judiciary’s classic role as interpreter and enforcer of the Constitution, the presence of a plaintiff with a constitutional claim, and the presence of a court with jurisdiction to hear it.”<sup>55</sup> Under this approach, a court would reach the merits of *Bivens* suits because doing so was an important function of its Article III responsibilities.<sup>56</sup>

## B. RETREAT

Beginning in the 1980s, however, the *Marbury* modality gave way to a continuing period of retrenchment — what Brown calls a “prudential-deferential” era — in which courts have repeatedly dismissed *Bivens* actions.<sup>57</sup> In doing so, they have invoked the “special factors counseling hesitation” as a bar to justiciability, relying on “some combination of [the Government’s] expertise in the area of the suit’s subject matter, particularly if Congress has acted, and its presumed expertise in providing for enforcement of federal law . . . leading to the conclusion that the judiciary should not participate in the determination.”<sup>58</sup> Accordingly, *Chappell v. Wallace*<sup>59</sup> held that military personnel could not sue superior officers for racial discrimination, and *United States v. Stanley*<sup>60</sup> dismissed a *Bivens* claim by a serviceman alleging that he was secretly subjected to lysergic acid diethylamide (LSD) as part of a

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52. *Carlson v. Green*, 446 U.S. 14, 25 (1980).

53. *Davis*, 442 U.S. at 241.

54. *Carlson*, 446 U.S. at 18.

55. Brown, *supra* note 15, at 853–54, 855.

56. *Id.* at 854.

57. *Id.*

58. *Id.*

59. 462 U.S. 296, 305 (1983).

60. 483 U.S. 669, 686 (1987).

military experiment. In both cases, the Court explained that maintaining military discipline was a “special factor” that precluded judicial intervention.<sup>61</sup>

In another case, the Court denied relief to a federal employee who claimed that his supervisors violated his First Amendment rights when they fired him following public statements he made criticizing his agency.<sup>62</sup> The Court noted that the employee had access to a comprehensive administrative remedial system created by Congress to protect civil servants from retaliatory terminations.<sup>63</sup> Similarly, *Schweiker v. Chilicky*<sup>64</sup> rejected a *Bivens* action for social security disability benefits by recipients claiming a due process violation. The Court found that the recipients had adequate remedies within “the design of a massive and complex welfare benefits program.”<sup>65</sup> In sum, special factors analysis played a pivotal role in curtailing *Bivens*’ expansion, and the Court’s focus on the *sui generis* character of the military “suggests . . . possible echoes of the political question doctrine.”<sup>66</sup>

This cabining continues to the present day.<sup>67</sup> In *Wilkie v. Robbins*,<sup>68</sup> a property owner brought a *Bivens* claim based on the Takings Clause of the Fifth Amendment, arguing that the Bureau of Land Management had attempted to force him to grant the Bureau an easement. In dismissing his suit, the Court held that

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61. *Chappell*, 462 U.S. at 304 (“The special nature of military life . . . would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command.”); *Stanley*, 483 U.S. at 683 (“The ‘special facto[r]’ that ‘counsel[s] hesitation’ is . . . that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.”).

62. *Bush v. Lucas*, 462 U.S. 367, 390 (1983).

63. *WELLS & EATON*, *supra* note 42, at 25–26.

64. 487 U.S. 412, 428–29 (1988).

65. *Id.* at 429.

66. *Brown*, *supra* note 15, at 860–61. *Brown* argues that “[t]hese decisions also cast doubt on the *Marbury*-rights presumption of the availability of such a remedy.” *Id.* at 859.

67. *See, e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 486 (1994) (refusing to consider a due process claim against the Federal Savings and Loan Insurance Corporation because recognizing “a direct action for damages against federal agencies . . . would [create] a potentially enormous financial burden for the Federal Government”); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (dismissing a *Bivens* suit against a privately operated prison for federal inmates and noting that “[s]ince *Carlson* [the Court has] consistently refused to extend *Bivens* liability to any new context or new category of defendants”); *Minneci v. Pollard*, 132 S. Ct. 617, 623 (2012) (dismissing an Eighth Amendment claim against employees of a privately-run federal prison because “state tort law provides an alternative, existing process capable of protecting the constitutional interests at stake”).

68. 551 U.S. 537 (2007).

any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified. . . . Congress is in a far better position than a court to evaluate the impact of a new species of litigation against those who act on the public's behalf.<sup>69</sup>

The Court thus made clear that the creation of a *Bivens* remedy is a judicial prerogative that should be used as a means of last resort.

In light of these cases, Brown argues that “[t]he *Marbury*-based presumption of judicial relief for injuries is gone . . . The remedy itself seems somewhat denigrated, repeatedly described as ‘freestanding’ and generally unavailable. Most significant is the emphasis on judicial judgment, indicating a wide range of discretion in determining whether or not special factors are present.”<sup>70</sup> Vladeck similarly notes that “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.”<sup>71</sup> District and appellate courts have seized upon special factors analysis as a way to exempt such claims from judicial review.<sup>72</sup> Taken together, this recent pattern has created a significant justiciability hurdle for the *Aulaqi II* plaintiffs and other parties bringing national security-related *Bivens* actions.<sup>73</sup>

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69. *Id.* at 550, 562 (internal quotation marks omitted).

70. Brown, *supra* note 15, at 865 (footnotes omitted); *see also* Reinert, *supra* note 38, at 824 (“The Supreme Court’s refusal to extend *Bivens* liability to new constitutional claims or new defendants since 1980 is a fair indication that the cause of action occupies a disputed position in our jurisprudence. This becomes even more evident when one considers the depth of judicial skepticism about the merit of such actions in the areas in which the remedy is recognized.”).

71. Vladeck, *supra* note 20, at 265.

72. *Id.* at 269 (“[Following] the terrorist attacks of September 11th . . . poorly defined ‘national security’ concerns began to surface as their own ‘special factor counseling hesitation’ when inferring a *Bivens* remedy.”); *see also* Brown, *supra* note 15, at 883 (“The war on terror presents several obvious candidates for special factors analysis. Every such case will involve national security, an area in which the Court has expressed hesitation to involve the judiciary.”).

73. Vladeck, *supra* note 20, at 275 (“It is all but impossible . . . to imagine how a post-September 11th detainee could ever state a viable *Bivens* claim.”).

## C. THE NATIONAL SECURITY EXCEPTION

Vladeck argues that there is a “national security exception” to *Bivens* suits under which lower courts have found claims non-justiciable due to a variety of special factors, including traditional judicial deference to the Government’s military and foreign policy prerogatives.<sup>74</sup> Although the Supreme Court has never explicitly endorsed such an exemption, it noted in *Ashcroft v. Iqbal* that “[b]ecause implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability ‘to any new context or new category of defendants.’”<sup>75</sup> In *Iqbal*, a Pakistani national asserted First and Fifth Amendment *Bivens* claims against government officials following his arrest and detention, which he alleged were based on his race, religion, or national origin.<sup>76</sup> While the Court focused primarily on pleading deficiencies in the respondent’s complaint,<sup>77</sup> it also held that “[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*.”<sup>78</sup>

Federal district and appellate courts are responsible for fleshing out the contours of the national security exception.<sup>79</sup> For example, in *Sanchez-Espinoza v. Reagan*,<sup>80</sup> the D.C. Circuit considered, *inter alia*, Fourth and Fifth Amendment *Bivens* claims against the Reagan Administration for its support of the Nicaraguan Contras. In dismissing the suit, the court held that “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.”<sup>81</sup> Citing *Sanchez-Espinoza*, the D.C. Circuit has taken a particularly harsh line against national security *Bivens* cases. In *Rasul v. Myers (Rasul II)*,<sup>82</sup> several British nationals brought Fifth and Eighth Amendment claims against the

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74. Vladeck, *supra* note 14, at 4.

75. *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (citing *Malesko*, 543 U.S. at 68).

76. *Id.* at 666.

77. Vladeck, *supra* note 20, at 256.

78. *Iqbal*, 556 U.S. at 676.

79. See Vladeck, *supra* note 20, at 256 (“[V]irtually all of the national security-specific rules have been articulated by lower courts, with little more than tacit endorsement by the Supreme Court.”).

80. 770 F. 2d. 202, 205 (D.C. Cir. 1985).

81. *Id.* at 209.

82. 563 F.3d 527, 528 (D.C. Cir. 2009) (per curiam).

Government for their detention and purported mistreatment at the Guantanamo Bay Naval Base. The court found that the defendants were entitled to qualified immunity and dismissed the suit.<sup>83</sup> In a footnote, it added that “federal courts cannot fashion a *Bivens* action when ‘special factors’ counsel against doing so. . . . The danger of obstructing U.S. national security policy is one such factor. . . . We see no basis for distinguishing this case from *Sanchez-Espinoza*.”<sup>84</sup>

Most recently, in *Ali v. Rumsfeld*,<sup>85</sup> several Afghan and Iraqi citizens asserted *Bivens* claims against several U.S. civilian and military defense officials arising out of the plaintiffs’ detention by U.S. armed forces. Drawing on *Rasul II* and *Sanchez-Espinoza*, the D.C. Circuit held that “allowing a *Bivens* action to be brought against American military officials engaged in war would disrupt and hinder the ability of our armed forces to act decisively and without hesitation in defense of our liberty and national interests.”<sup>86</sup> Accordingly, “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.”<sup>87</sup> The D.C. Circuit’s special factors jurisprudence reflects *Wallace* and *Stanley*’s reluctance to meddle in internal military affairs, and the court has extended those cases by routinely dismissing *Bivens* claims brought by foreign nationals that implicate the Government’s foreign policy or security interests. Although the court has not articulated a categorical exception for such cases, its emphatic warning that recognizing a cause of action would endanger national security leaves no room for similarly situated plaintiffs to bring future claims.

In line with the D.C. Circuit, the Second Circuit found *en banc* that special factors prevented the court from granting relief to a foreign national for his alleged rendition to Syria undertaken by

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83. *Id.* at 532, 533.

84. *Id.* at 553 n.5 (citations omitted). *See also* *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) *cert. denied*, 129 S. Ct. 2825 (2009) (refusing to recognize a *Bivens* claim suit against several Government officials for disclosing the plaintiff’s status as a covert intelligence operative because doing so would “inevitably require judicial intrusion into matters of national security and sensitive intelligence information” that “may undermine ongoing covert operations”).

85. 649 F.3d 762, 764 (D.C. Cir. 2011).

86. *Id.* at 773 (internal quotation marks omitted).

87. *Id.* at 774 (internal quotation marks omitted).

the federal government.<sup>88</sup> In *Arar v. Ashcroft*, the plaintiff alleged that federal agents unlawfully detained and transferred him to Syria.<sup>89</sup> Arar also asserted that American and Syrian officials tortured him.<sup>90</sup> In an opinion authored by Chief Judge Jacobs, the court dismissed the case after concluding that reviewing Arar's claims "would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation."<sup>91</sup>

Notably, the Second Circuit drew on Supreme Court and appellate jurisprudence to provide a detailed exposition of special factors analysis. It held:

"Special factors" is an embracing category, not easily defined; but it is limited in terms to factors that provoke "hesitation." While special factors should be substantial enough to justify the absence of a damages remedy for a wrong, no account is taken of countervailing factors that might counsel alacrity or activism, and none has ever been cited by the Supreme Court as a reason for affording a *Bivens* remedy where it would not otherwise exist.

*The only relevant threshold — that a factor "counsels hesitation" — is remarkably low.* It is at the opposite end of the continuum from the unflagging duty to exercise jurisdiction. Hesitation is a pause, not a full stop, or an abstention; and to counsel is not to require. "Hesitation" is "counseled" whenever thoughtful discretion would pause even to consider.<sup>92</sup>

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88. *Arar v. Ashcroft*, 585 F.3d 559, 565 (2d Cir. 2009) (en banc).

89. *Id.* at 563.

90. *Id.* See also Vladeck, *supra* note 20, at 269 ("[T]he 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.").

91. *Id.* at 574. The court was also concerned that allowing the case to proceed would incentivize "graymail," i.e. a "lawsuit[] brought to induce the government to settle a case (or prevent its filing) out of fear that any effort to litigate the action would reveal classified information . . ." *Id.* at 578–79 (internal quotation marks and brackets omitted). It placed the burden of crafting an appropriate remedy squarely on Congress, noting that legislative branch possesses the requisite "competence, expertise, and responsibility." *Id.* at 581.

92. *Id.* at 574 (emphasis added).

The expansive scope of the majority's definition is remarkable and, taken to its logical conclusion, would create an insuperable barrier for plaintiffs challenging any conduct that a court deems sensitive. Accordingly, Chief Judge Jacobs' opinion evoked several strident dissents. Judge Sack argued that his colleagues were "mistaken to preclude *Bivens* relief solely in light of a citation or compilation of one or more purported examples of such 'special factors'"<sup>93</sup> and 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."<sup>94</sup> Judge Calabresi agreed<sup>95</sup> and asserted, "[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."<sup>96</sup> The majority was therefore "utterly wrong" to find no cause of action when a court could account for the Government's national security interests through judicious application of the state secrets doctrine and other protective measures.<sup>97</sup>

The majority and dissenting opinions in *Arar* reveal how the idealist-prudential divide identified by Brown has shifted closer to doctrinal absolutism. Judge Calabresi's pragmatic opinion highlights the importance of judicial review and propounds an even-handed approach to resolving legitimate security concerns. In contrast, Chief Judge Jacobs abjures balancing and adopts a hardline, pro-dismissal approach to any difficult case that would give a reasonable court pause. As with *Ali* and *Rasul II*, a national security plaintiff would be hard-pressed to find any opening in *Arar* to advance his claim.<sup>98</sup>

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93. *Id.* at 600 (Sack, J., dissenting).

94. *Id.* at 583 (Sack, J., dissenting).

95. *Id.* at 637 (Calabresi, J., dissenting) ("This maladaptation of a *Bivens* analysis . . . is motivated by a belief that the majority's holding is necessary to protect our nation's security. But, as I have already said, that worthy concern both can be and should be protected by already existing ordinary law and not by reaching out and potentially warping the Constitution.").

96. *Id.* at 638 (Calabresi, J., dissenting) (footnotes omitted).

97. *Id.* at 639.

98. *But see* *Turkmen v. Ashcroft*, 915 F. Supp. 2d 314 (E.D.N.Y. 2013). There, Muslim plaintiffs brought a *Bivens* suit alleging, inter alia, harsh conditions of confinement and violations of their religious rights. The court rejected the defendants' argument that

### 1. *National Security Bivens Suits Brought by American Citizens*

Lower courts have also used special factors analysis to exempt from review the *Bivens* claims of American citizens. In *Lebron v. Rumsfeld*,<sup>99</sup> José Padilla, a U.S. citizen, sought damages for his long-term military detention as an “enemy combatant.” A unanimous Fourth Circuit panel upheld the district court’s dismissal of his *Bivens* suit, concluding that

[s]pecial factors do counsel judicial hesitation in implying causes of action for enemy combatants held in military detention. First, the Constitution delegates authority over military affairs to Congress and to the President as Commander in Chief. It contemplates no comparable role for the judiciary. Second, judicial review of military decisions would stray from the traditional subjects of judicial competence.<sup>100</sup>

*Doe v. Rumsfeld*<sup>101</sup> rejected a complaint by an American military contractor who claimed that former Secretary of Defense Donald Rumsfeld approved his unlawful military detention during the Iraq War. The court noted that the “Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence. . . . The strength of the special factors of military and national security is underlined by precedent beyond the *Bivens* cases, and indeed before the creation of *Bivens* remedies.”<sup>102</sup>

Similarly, in *Vance v. Rumsfeld*,<sup>103</sup> an *en banc* Seventh Circuit dismissed a *Bivens* claim brought by private military contractors

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“national security concerns implicated by the September 11 attacks” counseled hesitation in implying a *Bivens* remedy, *id.* at 353–54, and noted that the *Arar* majority “acknowledged that *Bivens* claims are already available for the harsh conditions of confinement.” *Id.* at 337 n.10. Finally, the court recognized that the Supreme Court’s treatment of free exercise rights “in *Iqbal* indeed suggests the ‘unsettling possibility’ that individuals have no right ‘to pursue a damages claim for intentional, religiously-based mistreatment’” but nevertheless allowed this case to proceed. *Id.* at 354.

99. 670 F.3d 540 (4th Cir. 2012) *cert. denied*, 132 S. Ct. 2751 (2012).

100. *Id.* at 548.

101. 683 F.3d 390, 391 (D.C. Cir. 2012).

102. *Id.* at 394–95 (citations omitted).

103. 701 F.3d 193, 193 (7th Cir. 2012) (*en banc*), *petition for cert. filed*, Feb. 5, 2013.



alleging that the U.S. military unlawfully detained them.<sup>104</sup> In an opinion written by Chief Judge Easterbrook, the court held that “[w]hatever presumption in favor of a *Bivens*-like remedy may once have existed has long since been abrogated.”<sup>105</sup> The court further found that the “plaintiffs’ citizenship is [not] dispositive one way or the other. Wallace and Stanley also were U.S. citizens. The Supreme Court has never suggested that citizenship matters to a claim under *Bivens*.”<sup>106</sup> In dissent, Judge Hamilton argued that “[b]efore this *en banc* decision and the Fourth Circuit’s recent decision in *Lebron* . . . there should have been no doubt that a civilian U.S. citizen prisoner tortured by a federal official, even a military officer, could sue for damages under *Bivens*.”<sup>107</sup> Rather, applying the same standards to foreign and U.S. nationals would bring “the law’s treatment of U.S. citizens . . . down to the floor that we are now tolerating for the most dangerous foreign terrorists.”<sup>108</sup>

In sum, following *Bivens*, Supreme Court jurisprudence has severely limited the availability of constitutional remedies for government misconduct. District and appellate courts have extrapolated from the special factors *dicta* in *Bivens* to bar claims — including those brought by American citizens — based on national security-related conduct. Several circuits have noted that the Government’s expertise and authority in this arena weigh heavily against judicial intervention and that it is incumbent on Congress to fashion an appropriate remedy. Under *Arar*, *Ali*, *Lebron*, and *Vance*’s logic, it is difficult to imagine a court ever

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104. *Id.* at 196 (The plaintiffs were purportedly denied access to counsel and experienced “threats of violence and actual violence, sleep deprivation and alteration, extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, denial of needed medical care, yelling, prolonged solitary confinement, [and] *incommunicado* detention.”).

105. *Id.* at 198.

106. *Id.* at 203 (citing *Doe*, 683 F.3d at 396) (The court also said that it “would be offensive to our allies, and it should be offensive to our own principles of equal treatment, to declare that this nation systematically favors U.S. citizens over Canadians, British, Iraqis, and our other allies when redressing injuries caused by our military or intelligence operations.”).

107. *Id.* at 212, 215 (Hamilton, J. dissenting). Judge Hamilton also distinguished *Wallace* and *Stanley*, arguing that the special factors language in those cases “cannot reasonably be read to have extended a blanket exemption to all U.S. military personnel for *Bivens* liability to civilians.” *Id.* at 216.

108. *Id.* at 222.

reaching the merits of a national security-related *Bivens* action.<sup>109</sup>

### III. THE UNACCOUNTABLE GOVERNMENT

The national security exception to *Bivens* has created a substantial hurdle to both individual justice and Government transparency. Self-executing constitutional remedies are an essential gap-filler for victims of Government malfeasance. As Justice Harlan observed in his concurring opinion in *Bivens*, “For people in *Bivens*’ shoes, it is damages or nothing.”<sup>110</sup> In other words, without this fallback, the *Aulaqi II* and similarly situated plaintiffs have no legal recourse to challenge violations of fundamental rights. This strikes at the heart of *Marbury*’s aphorism that “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded.”<sup>111</sup> Rights and remedies are inextricably linked, and to deny the latter is to vitiate the former.<sup>112</sup> By foreclosing *Bivens* actions to victims of government action, the courts have potentially deprived American citizens of constitutional protections and crafted an expansive exemption for national security-related suits.<sup>113</sup>

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109. See Vladeck, *supra* note 21, at 1316–17 (2012) (“[*Lebron*] provided perhaps the most detailed analytical underpinnings to the reasoning first deployed in *Rasul II* and *Arar*: the amorphous special factor identified in the two earlier cases is, in fact, a series of considerations generally reflecting the constitutional and practical difficulties courts face whenever they are asked to review ‘military affairs,’ including the alleged abuse of citizens by the military within the territorial United States. If this is a ‘special factor’ counseling hesitation against inferring a *Bivens* remedy, one is hard-pressed to imagine any challenge to the conduct of national security policy, whether here or overseas, that could survive such a test.”) (footnote omitted).

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

111. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

112. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857 (1999) (“The right/remedy distinction in constitutional law serves to maintain the illusion that rights are defined by courts through a mystical process of identifying ‘pure’ constitutional values without regard to the sorts of functional, fact-specific policy concerns that are relegated to the remedial sphere. . . . No less than in contract and property law — where from Holmes to Calabresi and Melamed we have recognized that rights and remedies are functionally interrelated — rights and remedies in constitutional law are interdependent and inextricably intertwined.”).

113. Some may argue that the availability of equitable relief is sufficient to deter Government misconduct and secure individual rights. However, Anya Bernstein observes that “our system of government requires some version of constitutional damages. Justice Harlan’s concurrence in *Bivens* famously noted that injunctions have no remedial effect for violations . . . The question becomes whether we prefer nothing over damages.” Anya

A. INSUFFICIENCY OF STATUTORY ALTERNATIVES TO *BIVENS*

Unfortunately, existing statutory alternatives to *Bivens* offer little aid. Some plaintiffs have invoked the Religious Freedom Restoration Act (“RFRA”)<sup>114</sup> and the Federal Tort Claims Act (“FTCA”)<sup>115</sup> in national security litigation. The former allows individuals to sue the Government and “obtain appropriate relief” if it substantially burdens the free exercise of their religion.<sup>116</sup> The latter imputes liability to the Government for torts committed by federal officials in the course of their official duties. Although neither requires a plaintiff to assert a violation of a constitutional right,<sup>117</sup> their utility in the national security context is hampered in three respects.

First, as to RFRA, not all plaintiffs in national security cases will be able to plausibly contend that the Government inhibited their religious practice.<sup>118</sup> While RFRA might apply to torture and detention claims in which the Government prevented some sort of religious observance (*e.g.* daily prayer),<sup>119</sup> it is difficult to see how the *Aulaqi II* plaintiffs or others could argue that targeted killing entails a RFRA violation. Second, RFRA explicitly excludes Government conduct that “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>120</sup> Exigent national security requirements are likely to satisfy this test, and given established judicial deference, it is improbable that a court will probe the Government’s proffered rationale.

Similarly, the FTCA contains several exceptions that can preclude relief for national security plaintiffs, including an exemption for activities that took place in a foreign country and those that involve the exercise of a discretionary function by a Government official.<sup>121</sup> Finally, like *Bivens*, RFRA and FTCA claims are subject to additional justiciability constraints in the form of the

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Bernstein, *Congressional Will and the Role of the Executive in Bivens Actions: What Is Special About Special Factors?*, 45 IND. L. REV. 719, 727 (2012) (footnote omitted).

114. 42 U.S.C. § 2000bb-1 (2012).

115. 28 U.S.C. §§ 1346(b), 2671–2680 (2012).

116. 42 U.S.C. § 2000bb-1(e).

117. Brown, *supra* note 26, at 210–11.

118. *Id.* at 213.

119. *Id.* at 210.

120. 42 U.S.C. § 2000bb-1(b).

121. Brown, *supra* note 26, at 215 (footnotes omitted).

qualified immunity, state secrets, and political question doctrines.

### 1. *Qualified Immunity*

Qualified immunity precludes individual Government officials from liability unless the plaintiff shows “(1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.”<sup>122</sup> In other words, “[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.”<sup>123</sup>

For instance, in *Padilla v. Yoo*,<sup>124</sup> the Ninth Circuit considered a qualified immunity defense to RFRA and *Bivens* claims raised by José Padilla (the same Padilla of *Lebron*). Padilla asserted that John Yoo, a former Government attorney, intentionally circumvented domestic and international law in advising the Government that it could indefinitely detain Padilla, an American citizen, by designating him as an enemy combatant.<sup>125</sup> The trial court rejected Yoo’s motion to dismiss, finding that there was no alternative remedy for Padilla’s alleged constitutional injuries and that “special factors [do not] counsel hesitation where there is no authority evidencing a remedial scheme for designation or treatment of an American citizen residing in America as an enemy combatant.”<sup>126</sup> In addition, the trial court concluded that RFRA “allows for individual capacity suits for money damages against federal officers.”<sup>127</sup> Finally, it rejected Yoo’s qualified immunity defense, holding that Padilla’s *Bivens* and RFRA claims were predicated on clearly established law, including substantive Fifth and Eighth Amendment constitutional rights, and that the complaint set forth sufficient facts to establish a causal link between Yoo’s conduct and the injuries alleged.<sup>128</sup>

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122. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011).

123. *Id.* at 2085.

124. 678 F.3d 748 (9th Cir. 2012).

125. *Id.* at 753–54.

126. *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1025 (N.D. Cal. 2009), *rev’d*, 678 F.3d 748 (9th Cir. 2012).

127. *Id.* at 1039 (internal quotations omitted).

128. *Id.* at 1032–39.

The Ninth Circuit reversed, however, noting that the Supreme Court's decision in *Ashcroft v. al-Kidd*<sup>129</sup> established that courts must look to the clearly established law that existed *at the time* of the purported injury.<sup>130</sup> The court found that

the Supreme Court had not at the time of Yoo's tenure [with the Government], declared that American citizens detained as enemy combatants had to be treated at least as well, or afforded at least the same constitutional and statutory protections, as convicted prisoners. On the contrary, the Supreme Court had suggested in *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3 (1942), the most germane precedent in existence at the time of Yoo's tenure . . . that a citizen detained as an unlawful combatant could be afforded *lesser* rights than ordinary prisoners or individuals in ordinary criminal proceedings.<sup>131</sup>

The Supreme Court did announce subsequent to Padilla's arrest in *Hamdi v. Rumsfeld*<sup>132</sup> that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."<sup>133</sup> Nonetheless, the Ninth Circuit noted that even if this principle applied to Padilla's claims, the degree "to which citizens detained as enemy combatants must be afforded the constitutional protections granted other detainees remains unsettled. . . . '[T]he full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting.' The same is true of Padilla's RFRA claim."<sup>134</sup> As a consequence, the court granted Yoo qualified immunity and dismissed Padilla's complaint.<sup>135</sup>

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129. 131 S. Ct. 2074 (2011).

130. *Yoo*, 678 F.3d at 758.

131. *Id.* at 759–60 (emphasis in original).

132. 542 U.S. 507 (2004).

133. *Id.* at 533.

134. *Yoo*, 678 F.3d at 762 (quoting *Hamdi*, 542 U.S. at 535) (internal citations omitted).

135. *Id.* at 769.

## 2. *State Secrets Privilege*

The state secrets privilege allows the federal government to “withhold information in litigation when the public disclosure of the material would cause damage to the United States’ national security.”<sup>136</sup> Robert Chesney notes that the “state secrets privilege has played a significant role in the Justice Department’s response to civil litigation arising out of post-9/11 counterterrorism policies,”<sup>137</sup> and Brown notes that “[a]ssertions of the state secrets privilege can limit the plaintiff’s suit or block the suit altogether.”<sup>138</sup> For example, in *El-Masri v. United States*,<sup>139</sup> a foreign national accused the Central Intelligence Agency (“CIA”) of kidnapping and torturing him. The Fourth Circuit noted that “[u]nder the state secrets doctrine, the United States may prevent the disclosure of information in a judicial proceeding if there is a reasonable danger that such disclosure will expose military matters which, in the interest of national security, should not be divulged.”<sup>140</sup> It dismissed the suit because, to establish a prima facie case, the plaintiff would need to produce “evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations,” thereby exposing sensitive state secrets.<sup>141</sup>

The Government has regularly raised the state secrets privilege in national security cases — regardless of the underlying cause of action<sup>142</sup> — including in *Aulaqi I.*<sup>143</sup> Brown notes that with regard to the state secrets doctrine, the “scales are heavily weighted in the government’s favor. Exclusion of a single piece of evidence can force dismissal of a suit. It may make it impossible

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136. Lindsay Windsor, *Is the State Secrets Privilege in the Constitution? The Basis of the State Secrets Privilege in Inherent Executive Powers & Why Court-Implemented Safeguards Are Constitutional and Prudent*, 43 GEO. J. INT’L L. 897, 901 (2012).

137. Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1250 (2007).

138. Brown, *supra* note 26, at 196.

139. 479 F.3d 296 (4th Cir. 2007).

140. *Id.* at 302 (internal quotation marks omitted).

141. *Id.* at 309.

142. See Brown, *supra* note 26, at 227 (“Building on the concept of ‘military,’ both the Bush and Obama administrations have invoked the privilege in suits involving such war on terror matters as extraordinary rendition.”).

143. Michael Epstein, *The Curious Case of Anwar al-Aulaqi: Is Targeting A Terrorist for Execution by Drone Strike A Due Process Violation When the Terrorist Is A United States Citizen?*, 19 MICH. ST. J. INT’L L. 723, 727–28 (2011).

for the plaintiff to prove his claim, negate the defendant's ability to mount a defense, or negate the plaintiff's ability to demonstrate standing . . . ."<sup>144</sup> As with qualified immunity, the state secrets doctrine undermines RFRA and the FTCA's viability as an alternative basis to *Bivens* claims.

### 3. Political Question Doctrine

Another impediment to individual justice through RFRA and FTCA is the political question doctrine. This defense is "shorthand for the recognition that there are some disputes ill-suited for judicial resolution, either because [*inter alia*] the Constitution commits their resolution to other branches or because the claims lack 'judicially manageable standards.'"<sup>145</sup> In *El-Shifa Pharm. Indus. Co. v. United States*,<sup>146</sup> the D.C. Circuit sitting *en banc* dismissed an FTCA claim brought by owners of a Sudanese pharmaceutical plant who sued the United States for defamation and to recover damages for the destruction of the plant. The court held that the "political question doctrine bars [] review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion."<sup>147</sup> The court therefore found that "if the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target, and the plaintiffs ask us to do just that."<sup>148</sup>

The Government also invoked the political question doctrine in *Aulaqi I*, a *Bivens* suit.<sup>149</sup> In that case, the court relied on *El-Shifa* to find that

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144. Brown, *supra* note 26, at 228 (footnotes omitted).

145. Vladeck, *supra* note 21, at 1307.

146. 607 F.3d 836 (D.C. Cir. 2010) (*en banc*), *cert. denied*, 131 S.Ct. 997 (U.S. 2011).

147. *Id.* at 842.

148. *Id.* at 844. Some have argued, however, that the Supreme Court's recent decision in *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), has cast doubt on *El-Shifa*'s restrictive application of the political question doctrine. See, e.g., Steve Vladeck, *What's Really Wrong With the Targeted Killing White Paper*, LAWFARE: HARD NAT'L SEC. CHOICES (Feb. 5, 2013, 6:44 PM), <http://www.lawfareblog.com/2013/02/whats-really-wrong-with-the-targeted-killing-white-paper/> (noting that the Supreme Court "went out of its way [in *Zivotofsky*] to remind everyone (especially the D.C. Circuit) of just how limited the political question doctrine really should be").

149. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 46 (D.D.C. 2010).

[j]udicial resolution of the “particular questions” posed by plaintiff in this case would require this Court to decide: (1) the precise nature and extent of Anwar Al-Aulaqi’s affiliation with AQAP; (2) whether AQAP and al Qaeda are so closely linked that the defendants’ targeted killing of Anwar Al-Aulaqi in Yemen would come within the United States’ current armed conflict with al Qaeda; (3) whether (assuming plaintiff’s proffered legal standard applies) Anwar Al-Aulaqi’s alleged terrorist activity renders him a “concrete, specific, and imminent threat to life or physical safety”; and (4) whether there are “means short of lethal force” that the United States could “reasonably” employ to address any threat that Anwar Al-Aulaqi poses to U.S. national security interests.<sup>150</sup>

The court determined that there were “no judicially manageable standards which courts can endeavor to assess the President’s interpretation of military intelligence and his resulting decision — based on that intelligence — whether to use military force against a terrorist target overseas.”<sup>151</sup> The court further held that “there is inadequate reason to conclude that Anwar Al-Aulaqi’s U.S. citizenship — standing alone — renders the political question doctrine inapplicable to plaintiff’s claims.”<sup>152</sup> It therefore dismissed the case.<sup>153</sup>

In sum, even if a national security plaintiff has the requisite factual basis to bring a RFRA or an FTCA claim, such claims are unlikely to provide viable alternatives to *Bivens* because of their own statutory carve-outs and the qualified immunity, state secrets, and political question doctrines. As a result, the national security exception to *Bivens* has left the *Aulaqi II* plaintiffs and those similarly situated without a remedy for constitutional violations.

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150. *Id.* (citations omitted).

151. *Id.* at 47 (citing *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1367 n.6 (Fed. Cir. 2004)).

152. *Id.* at 49.

153. *Id.* at 54.



## B. RECONCILING *MARBURY* AND NATIONAL SECURITY CASES

Before proceeding, it is worth noting that *Marbury's* holding was limited to a claim “involving a violation of a non-constitutional right to a judicial commission. And as a statement about the availability of a remedy for a violation of one’s constitutional rights, Marshall’s dictum is more of an aspiration than a hard and fast rule.”<sup>154</sup> Professor Richard Fallon observes that the “Supreme Court has failed to speak unequivocally about questions of entitlement to judicial review.”<sup>155</sup> Although

[c]laims of entitlement to judicial review, whether statutory or non-statutory, often presuppose the existence of rights to remedies . . . doctrines barring individual remediation in some cases [*e.g.* the qualified immunity, sovereign immunity, and political question doctrines] suggest that *Marbury's* promise of a remedy for every rights violation is better viewed as a flexible normative principle than as an unbending rule of constitutional law.<sup>156</sup>

It is reasonable to ask why justiciability limits on constitutional claims raised in national security cases are any more troubling than, say, the dismissal of a routine *Bivens* claim involving an illegal search and seizure by a federal officer who enjoys qualified immunity. Put another way, if our legal and political systems have long accepted doctrinal barriers to lawsuits alleging Government misconduct and violations of fundamental rights, why should national security cases receive special solicitude?

First, there is no greater injury than the wrongful deprivation of life.<sup>157</sup> Government-sanctioned targeted killing is fundamentally different from an unlawful search and seizure. Second, “the *Marbury* dictum reflects just one of two principles supporting remedies for constitutional violations. Another principle, whose

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154. RICHARD H. FALLON, JR. ET. AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 309 (6th ed. 2009).

155. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 *COLUM. L. REV.* 309, 333 (1993).

156. *Id.* at 337–38 (footnotes omitted).

157. See Toren G. Evers-Mushovic & Michael Hughes, *Rules for When There Are No Rules: Examining the Legality of Putting American Terrorists in the Crosshairs Abroad*, 18 *NEW ENG. J. INT'L & COMP. L.* 157, 172 (2012) (“The deprivation of life is more severe than detention . . .”).

focus is more structural, demands a system of constitutional remedies adequate to keep government generally within the bounds of law.”<sup>158</sup> *Ex post* review of constitutional violations is important not only as an opportunity for individual remediation — an interest that may sometimes give way to competing concerns<sup>159</sup> — but also as an incentive for federal compliance with the law by compelling the Government to account for its actions in a public forum. This principle is especially necessary with respect to national security-related transactions, where the Government’s legal and policy rationale for potentially unlawful conduct is usually classified.<sup>160</sup> In broadly exempting national security *Bivens* claims from judicial review, courts not only undermine the constitutional rights of American citizens, but they also create a substantial impediment to public scrutiny of controversial counterterrorism policies.

### C. GOVERNMENT TRANSPARENCY

Kathleen Clark notes that accountability is essential to ensuring that “the federal government’s executive branch complies with the law and the mechanisms that monitor such compliance.”<sup>161</sup> She argues that the process of accountability has four stages: 1) disclosure, where the Government provides an “account-receiver” with information relating to its challenged conduct; 2) justification, where the Government defends the legality of its conduct; 3) evaluation, where the account-receiver evaluates the Government’s explanation of its conduct; and 4) rectification, where, if warranted, the account-receiver receives a remedy for the Government’s conduct.<sup>162</sup> Both Clark<sup>163</sup> and Brown<sup>164</sup> acknowledge that civil lawsuits can be a critical accountability mechanism, especially in the opaque national security arena.

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158. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991).

159. *Id.* at 1779.

160. See Kathleen Clark, *The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program*, 2010 B.Y.U. L. REV. 357, 389 (2010) (discussing “the degree to which the Bush Administration’s claims of national security secrecy undermined” accountability mechanisms).

161. *Id.* at 361.

162. *Id.* at 361–62 (footnotes omitted).

163. *Id.* at 362.

164. Brown, *supra* note 26, at 202–03.

Through the discovery process, suits can reveal the Government's policy rationale and legal justifications for its challenged conduct, force the Government to defend its decisions in a public forum, and, if merited, provide a plaintiff with some form of relief.<sup>165</sup> Lesley Wexler argues that *Aulaqi I* is a particularly illuminating case model in that it shows both the benefits and the limits of national security *Bivens* claims.<sup>166</sup> She asserts that “[w]hile the [plaintiffs] lost big on paper, they may have achieved some gains in instigating other checks on executive authority” by spurring public and academic debate.<sup>167</sup> Nonetheless, Wexler concedes that “few politicians on either side of the aisle have seriously questioned the legality of the decision, with even [President] Obama’s political rivals lauding the outcome. If restraint and overt transparency were the measures by which one ought to judge the success of [*Aulaqi I*], it [ ] appears to be a failure.”<sup>168</sup> Further, the lawsuit did not force the Government to reveal its legal justification for targeting Aulaqi.<sup>169</sup>

Accordingly, although even unsuccessful national security lawsuits can foment public scrutiny and Congressional over-

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165. *Id.* at 204.

166. Lesley Wexler, *Litigating the Long War on Terror: The Role of al-Aulaqi v. Obama*, 9 LOY. U. CHI. INT’L L. REV. 159, 162 (2011).

167. *Id.* at 167.

168. *Id.* at 170–71.

169. *See id.* at 172 (“[I]n the wake of al-Aulaqi’s death, the public learned that the Justice Department’s Office of Legal Counsel issued a classified memorandum detailing its understanding of the legality of al-Aulaqi’s strike. . . . [but] the administration has not officially declassified and released the memo . . .”). On February 4, 2013, news media obtained a copy of an internal white paper providing legal guidance on whether the Government could “use lethal force in a foreign country outside the area of active hostilities against a U.S. citizen who is a senior operational leader of al-Qa’ida or an associated force of al-Qa’ida — that is, an al-Qa’ida leader actively engaged in planning operations to kill Americans.” DEP’T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE, at 1, available at [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf). The paper did not specifically authorize lethal force against the victims, but it did note that there is no appropriate forum to the constitutionality of targeted killing because “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention[.]” *Id.* at 10. Although the white paper specifically addressed *ex ante* judicial review of lethal operations against U.S. enemy combatants, its conclusion that court intervention would be inappropriate in this context conceivably applies to post-deprivation litigation, as well. The Government also reportedly provided Congress with “a long, detailed 2010 memo from the Justice Department’s Office of Legal Counsel justifying the killing of Anwar al-Awlaki.” Michael D. Shear & Scott Shane, *Congress to Get Classified Memo On Drone Strike*, N.Y. TIMES, Feb. 7, 2013, at A1.

sight,<sup>170</sup> the Government will not be required to account for its actions if such claims are regularly dismissed before discovery begins. In particular, Chesney argues that “concerns for democratic accountability are especially acute when the [state secrets] privilege is asserted in the face of allegations of unconstitutional government conduct.”<sup>171</sup> Without a forum in which a plaintiff can effectively prosecute his claims, accountability is an illusory goal, vitiating *Marbury*’s vision of structural checks on unconstitutional conduct by the Government.

#### IV. AN ARTICLE I NATIONAL SECURITY COURT

To close this lacuna, Congress should establish an Article I National Security Tribunal (“NST”) to hear constitutional claims brought by American citizens.<sup>172</sup> The NST would close the rights/remedies gap generated by the national security exception to the *Bivens* doctrine and compel the Government to account for its actions.<sup>173</sup> An appropriately balanced legislative scheme could furnish safeguards for both individual rights and classified information by using specialized evidentiary procedures that would protect sensitive intelligence.<sup>174</sup> Hearings before the NST would be adversarial, providing a forum in which individual plaintiffs could seek relief for violations of their constitutional rights before neutral arbiters and compel the Government to account for its conduct. Through the NST, the Government could also alleviate concerns regarding its counterterrorism policies without compromising its ability to combat exigent security threats. Finally, as Benjamin McKelvey notes, “a legislative solution [to the justiciability gap] would provide the branches of government and the

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170. Wexler, *supra* note 166, at 174.

171. Chesney, *supra* note 137, at 1252–53.

172. The Constitution grants Congress the authority “[t]o constitute Tribunals inferior to the supreme Court.” U.S. Const. art. I, § 8, cl. 9.

173. See Lunday & Rishikof, *supra* note 29, at 111 (arguing that the creation of an Article III national security to review the preventive detention, treatment, and trial of terrorists would “provide a strategic departure from the current course that has diminished the United States’ standing on rule of law in the fight against terrorism”).

174. See Benjamin McKelvey, Note, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 VAND. J. TRANSNAT’L L. 1353, 1378 (2011) (arguing that the creation of an Article III *ex ante* national security court along the lines of the Foreign Intelligence Surveillance Court (FISC) would “alleviate fears over the abuse of targeted killing without interfering with executive duties and authority”).

American public with a clear articulation of the law of targeted killing.”<sup>175</sup>

Section A proposes the NST’s structure and rules of procedure, Section B discusses potential alternatives to an Article I court and their relative disadvantages, and Section C addresses possible criticisms of this proposal.

## A. STRUCTURE AND PROCEDURE

### 1. *Jurisdiction*

The NST would have jurisdiction over certain constitutional claims brought by American citizens that arise out of the Government’s national security conduct, including the targeted killing of U.S. nationals. The NST’s governing statute would also provide that the United States of America is the named defendant and waives sovereign immunity to all lawsuits brought before the tribunal. This would eliminate the qualified immunity affirmative defense, as no individual federal official would be party to NST lawsuits.

The NST’s statute would confer the following authority:

- (1) The National Security Tribunal will have exclusive subject matter jurisdiction over claims:
  - a. Brought by American citizens residing either within or outside the territory of the United States;
  - b. Arising under:
    - i. The Fourth Amendment,
    - ii. The Due Process Clause of the Fifth Amendment, or
    - iii. The Cruel and Unusual Punishment Clause of the Eighth Amendment; and
  - c. That implicate Government conduct pertaining to counterterrorism or military activities.

It is worth noting that the NST would be without precedent: never before has Congress created an Article I court with the sole purpose of hearing constitutional claims. To be clear, Article III courts would retain concurrent jurisdiction over all cases brought

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175. *Id.*

before the tribunal, and for that reason, the NST would have the authority to hear only those constitutional causes of action recognized by the Supreme Court. This scheme merely provides an alternative vehicle for litigating *Bivens* claims arising out of national security-related disputes. Further, there is nothing unlawful about granting Article I courts jurisdiction over constitutional causes of action. Such purview is consistent with Congress's authority to create adjudicatory bodies that hear cases involving "public rights," which include constitutional claims brought against the Government.<sup>176</sup>

## 2. Composition

The NST would be composed of three sub-parts — a governing Board of Commissioners, a Judiciary, and an Office of Plaintiff Counsel — and function as an independent federal agency. Like the bipartisan Federal Election Commission,<sup>177</sup> the Board would be comprised of five Commissioners appointed by the President with the advice and consent of the Senate. Two of the Commissioners would be registered Democrats, two would be registered Republicans, and the final Commissioner would be a registered independent. When submitting Board nominations to the Senate, the President must certify that a nominee has substantive expertise in national security matters.<sup>178</sup> The Commissioners would serve for five-year terms and be removable by the President only

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176. See *Crowell v. Benson*, 285 U.S. 22, 50 (1932) ("Congress, in exercising the powers confided to it, may establish legislative courts (as distinguished from constitutional courts in which the judicial power conferred by the Constitution can be deposited) which are to form part of the government of territories or of the District of Columbia, or to serve as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.") (internal quotation marks omitted); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 247–48 (1985) ("[N]ineteenth century decisions established that 'public rights' — largely claims by private individuals against the government for such matters as pensions and land patents, claims to which the government could entirely refuse consent to suit — might, if Congress so chose, be left entirely to final administrative determination.") (footnote omitted).

177. Federal Election Campaign Act, 2 U.S.C.A. § 437c(a)(1) (West 2012) ("The [Federal Election] Commission is composed of . . . 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.").

178. This also tracks a statutory requirement that Federal Election Commission members "shall be chosen on the basis of their experience, integrity, impartiality, and good judgment. . ." *Id.* at § 437c(a)(3).

for cause, insulating them from political pressure. Aside from supervising the daily operations of the NST, the Board would hear appeals from Judiciary decisions and appoint members of the Judiciary and the Chief NST Plaintiff Counsel.

The Judiciary sub-part would comprise administrative judges who would preside over claims brought before the NST. Their appointment must be approved by at least three Commissioners who would be required to certify that each judge is a national security expert. Provided that they met the requisite standards, all judges would receive Top Secret security clearances with access to Sensitive Compartmented Information. They would enjoy lifetime appointments subject to removal at will by a majority of the Board.<sup>179</sup> All cases brought before the NST would be conducted via bench trial, as the Seventh Amendment right to a jury trial does not attach to civil cases implicating public rights.<sup>180</sup>

Lastly, the Office of Plaintiff Counsel would represent plaintiffs with cases before the NST. The Chief NST Plaintiff Counsel, appointed for a five-year term and removable at will by a majority of the Board, would run this office. His staff would consist of an “expert bar of federal and military defense” attorneys with TS/SCI security clearances.<sup>181</sup> Thus, experienced counsel with access to essential classified information would provide representation to national security plaintiffs. Although each party would be responsible for bearing its litigation expenses, successful plaintiffs would be eligible to recoup attorneys’ fees in accordance with the provisions of 42 U.S.C. Section 1988,<sup>182</sup> which Congress could amend to cover NST cases. Though plaintiffs would lose the benefit of *pro bono* representation that many who bring *Bivens* claims currently enjoy, those with meritorious cases would

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179. This arrangement would avoid the dual for-cause removal scheme found unconstitutional by the Supreme Court in *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010).

180. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 34 (1989) (“[T]he Seventh Amendment does not prohibit Congress from assigning resolution of a statutory claim that is legal in nature to a non-Article III tribunal that does not use a jury as a factfinder so long as the claim asserts a ‘public right,’ . . .”).

181. Adelsberg, *supra* note 25, at 447.

182. The statute provides that in any action to enforce a provision of, *inter alia*, 42 U.S.C. § 1983 or RFRA, a court, “in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs” awarded. 42 U.S.C.A. § 1988(b) (West 2012).

be able to recover much of their litigation costs. This scheme would deter frivolous suits brought at the Government's expense.

### 3. *Standard of Proof, Admissibility of Evidence, and Judicial Review*

The burden of proof would lie with the plaintiff, and he would have to provide "clear and convincing" evidence<sup>183</sup> that the Government's actions were unconstitutional. In other words, the challenged conduct would be presumptively legal. This heightened standard would account for the Government's national security interests by subjecting the plaintiff's claims to greater scrutiny than the preponderance of evidence standard ordinarily applied in civil cases. A more stringent standard of proof would also protect against hindsight bias because the plaintiff must show that the constitutional error was readily apparent in the challenged conduct.<sup>184</sup>

There is a legitimate concern that NST trials might lead to the disclosure of sensitive intelligence and that the Federal Rules of Evidence and Civil Procedure, which ordinarily govern civil cases in federal courts, are ill-suited to national security matters and place an undue burden on the Government.<sup>185</sup> Information col-

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183. Richard Husseini, Comment, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence As the Burden of Proof*, 57 U. CHI. L. REV. 1387, 1406 (1990) ("There are three basic evidentiary standards available: preponderance of the evidence, clear and convincing evidence, and evidence beyond a reasonable doubt. These three standards constitute a continuum, with the least restrictive standard — preponderance — applied to civil cases because society has a minimal concern with the outcome of such private suits, and the most restrictive standard — beyond a reasonable doubt — applied to criminal determinations of guilt because the interests of the defendant are of such magnitude that historically and without any explicitly constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. Clear and convincing evidence is an intermediate standard appropriate when the interest at stake are deemed to be more substantial than mere loss of money.") (internal quotation marks, footnotes, brackets, and ellipses omitted).

184. See Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195, 231 (2010) ("If categorical deference is problematic because it fails to address presentism, categorical interventionism is problematic because it does not acknowledge hindsight bias.").

185. See Marc D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 DENV. U. L. REV. 961, 1009–10 (2009) ("Of particular concern to the government in an executive-detention habeas action may be national security, including the potential revelation of intelligence and intelligence-gathering methods and the burden of producing battlefield evidence. As one district court judge recently observed, the 'discovery process alone risks aiding our enemies by affording them a mechanism to obtain what information they could about military affairs and disrupt command missions



lected through classified sources and in combat zones does not usually comport with ordinary law enforcement standards, rendering much of that evidence inadmissible during a routine civil trial.<sup>186</sup> Rather than subject such information to a blanket state secrets exemption, the NST would employ specialized evidentiary procedures derived from the *habeas* proceedings afforded to unlawful enemy combatants.

As the Supreme Court made clear in *Hamdi*, the “exigencies” surrounding *habeas* claims brought by these individuals “may demand that . . . enemy-combatant proceedings [ ] be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding.”<sup>187</sup> The same logic applies to national security *Bivens* claims, which implicate similar policy concerns. The NST’s procedures would therefore be governed by the Military Commission Rules of Evidence (“MCRE”),<sup>188</sup> which were promulgated pursuant to the Military Commissions Acts of 2006<sup>189</sup> and 2009<sup>190</sup> in response to Supreme Court *habeas* jurisprudence. These rules strike an adequate balance between providing plaintiffs with access to essential information and protecting sensitive intelligence. For instance, the MCRE state that “[c]lassified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security.”<sup>191</sup> The MCRE also provide for *in camera* review<sup>192</sup> and protective orders<sup>193</sup> and allow for the introduction of hearsay.<sup>194</sup> Such procedures would therefore allow cases like *Aulaqi II* to proceed without threatening the release of sensitive intelligence.

Finally, all appeals from NST decisions would be submitted to the Board of Commissioners, which would hear appeals *en banc*.

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by wresting officials from the battlefield to answer compelled deposition and other discovery inquiries.”) (footnote omitted).

186. *Id.*

187. *Hamdi*, 542 U.S. at 533–34.

188. Mil. Comm’n R. Evid., available at [http://www.defense.gov/pubs/pdfs/Part%20III%20-%20MCREs%20\(FINAL\).pdf](http://www.defense.gov/pubs/pdfs/Part%20III%20-%20MCREs%20(FINAL).pdf).

189. Codified at 10 U.S.C. §§ 948–49 (2012), as amended.

190. Pub. L. No. 111-84, §§ 1801–07, 123 Stat. 2190, 2574–2614 (2009).

191. Mil. Comm’n R. Evid. 505(a).

192. *Id.* at 505(b)(1)(3).

193. *Id.* at 505(e)(1).

194. *Id.* at 601.

The Board would review the trial judge's factual findings for clear error and conclusions of law *de novo*. Plaintiffs seeking Article III review of Board decisions must first exhaust their remedies before the NST and may then petition the Supreme Court for *certiorari*.<sup>195</sup> The Supreme Court would review only final decisions rendered by the Board, would review legal conclusions and "constitutional facts" (*i.e.* "the factual determinations on which the constitutional right depends")<sup>196</sup> *de novo*, and would review all other factual determinations for clear error. Limiting the scope of review would ensure that sensitive information is kept out of Article III courts and that NST national security experts would resolve non-constitutional factual issues.

## B. CONSIDERATION OF ALTERNATIVES

### 1. Codifying Bivens

Some have proposed that Congress simply pass legislation eliminating the national security exception to the *Bivens* doctrine.<sup>197</sup> However, as noted, even without the special factors

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195. It is worth noting that Article III courts have proven willing to review constitutional claims brought before Article I administrative agencies even when that agency's organic statute expressly precludes judicial review. *See, e.g., Johnson v. Robison*, 415 U.S. 361, 366–67 (1974) (holding that even though statute precluded judicial review of decisions on claims for benefits or payments submitted to the Administrator of Veterans Affairs, that statute did not expressly apply to extrinsic constitutional claims, and such claims were therefore reviewable by Article III courts). Here, however, judicial review is expressly *permitted* provided that plaintiffs first exhaust their NST remedies. Even if Article III courts choose not to give legal effect to this requirement and allow plaintiffs to file suit prior to NST exhaustion, such a holding would be of dubious value. National security plaintiffs would still encounter the same problems — *e.g.*, special factors and political questions — that have forestalled prior *Bivens* actions in Article III courts.

196. Judah A. Shechter, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 COLUM. L. REV. 1483, 1483 (1988). *See also* Monaghan, *supra* note 176, 253–54 ("In *Crowell v. Benson*, a divided Court both confirmed and generalized the constitutional fact doctrine in strong terms. While conceding that ordinary facts could be established in the administrative process, the Court held that constitutional facts must be found by the courts. Thus, an employer challenging a federal administrative compensation order was entitled to an independent judicial determination of whether the injury occurred on navigable waters, as well as of the existence of the employer-employee relationship. These conditions were considered indispensable to the application of the statute 'not only because the Congress has so provided explicitly . . . but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.'") (footnote omitted).

197. *See, e.g.* Michael B. Hedrick, Note, *New Life for A Good Idea: Revitalizing Efforts to Replace the Bivens Action with A Statutory Waiver of the Sovereign Immunity of the*

carve-out, national security cases have still run up against the qualified immunity, state secrets, and/or political question doctrines. Further, aside from the inherent procedural and evidentiary problems that would ensue, Article III judges are, by and large, not national security experts. One of the NST's strengths is that both plaintiff counsel and the arbitrator would have relevant expertise. In sum, Congressional action to disaggregate special factors analysis from national security cases would be an ineffective stop-gap measure: a more comprehensive solution is needed.

## 2. *Pre-Deprivation Process Only*

Samuel Adelsberg has proposed the creation of a Citizen Target Review Court ("CTRC") to govern pre-deprivation review of American citizens designated for targeted killing.<sup>198</sup> His proposal is important and timely, and Congress could synthesize the CRTC and the NST to provide both *ex ante* and *ex post* review. Adelsberg contends, however, that

[a]ny post-deprivation process, such as a *Bivens*-style action, for a targeted attack would also be problematic. Government officials charged with carrying out these attacks might be hesitant to do so if there were a threat of prosecution. Moreover, post-deprivation process for a target would be effectively meaningless in the wake of a successful attack.<sup>199</sup>

Adelsberg's account is deficient in several respects. First, "prosecution" refers to the pursuit of imposing criminal liability; the NST, however, would only hear civil cases. Second, because the United States would be the named defendant, NST cases would not expose individual officials to adverse judgments. Third, as discussed, a post-deprivation process, while obviously incapable of actually reversing an injury, is still indispensable to

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*United States for Constitutional Tort Suits*, 71 GEO. WASH. L. REV. 1055, 1056 (2003) ("Congress should revive past efforts to amend the [FTCA] to create a statutory cause of action against the United States for violations of constitutional rights by federal agents in order to alleviate recognized problems with the *Bivens* action and potential exacerbation of these problems.") (footnotes omitted).

198. Adelsberg, *supra* note 25, at 445.

199. *Id.* at 444.

ensuring individual justice for and transparent review of Government malfeasance. In addition, the CRTC by itself is not likely to prevent injuries resulting from exigent national security concerns that lead to swift but potentially wrong-headed action in the heat of battle. Finally, although Adelsberg provides for an Emergency Targeting Mechanism (ETM) to expedite *ex ante* review in exigent scenarios,<sup>200</sup> his proposal lacks any procedure that would hold the Government accountable for mistakes made when it employs the ETM. He cautions that this “exception [should] not swallow the rule and . . . [should] be used in very specific and circumscribed situations.”<sup>201</sup> But without *ex post* liability, the ETM’s meager requirements are unlikely to dissuade the Government from a potentially unlawful course of action.

During February 2013 confirmation hearings on John Brennan’s nomination to the Director of Central Intelligence post, Senator Dianne Feinstein (D-CA) indicated interest in creating an *ex ante* targeting review body based on the Foreign Intelligence Surveillance Act (“FISA”) court.<sup>202</sup> This proposal subsequently gained traction with other legislators<sup>203</sup> and commentators.<sup>204</sup> Although it is worth consideration, a FISA-type court alone is insufficient. First, FISA proceedings take place *ex parte* and in closed courtrooms.<sup>205</sup> Assuming that a targeting review

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200. *Id.* at 452 (“The Attorney General can only authorize [a targeted killing] operation if he or she (1) reasonably determines that an emergency situation exists with respect to the individual being targeted; (2) reasonably determines that the factual basis for the issuance of an order exists, in that the target would have been approved through the GTP; (3) informs a CTRC judge at the time of such authorization that the decision has been made to target this U.S. citizen; and (4) reports back to the CTRC judge within seven days with the justification for the operation.”).

201. *Id.* at 451–52.

202. Scott Shane, *A Court to Vet Kill Lists*, N.Y. TIMES, Feb. 9, 2013, at A1.

203. *Id.*

204. See, e.g. Robert Chesney, *A FISC for Drone Strikes? A Few Points to Consider . . .*, LAWFARE: HARD NAT’L SEC. CHOICES (Feb. 7, 2013, 9:11 PM), <http://www.lawfareblog.com/2013/02/a-fisc-for-drone-strikes-a-few-points-to-consider/> (providing preliminary guidance on a FISC analogue for targeted killing); see also, McKelvey, *supra* note 174, at 1379–80 (proposing the creation of a FISC targeted killing analogue prior to Brennan confirmation hearings). In May 2013, President Obama announced in a major national security address that his administration had adopted new, classified procedures to provide greater oversight for targeting decisions. He also indicated that he would consider *ex ante* review by an independent court. White House, Office of the Press Secretary, *Remarks of President Barack Obama* (May 23, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama>.

205. Note, *Shifting the FISA Paradigm: Protecting Civil Liberties by Eliminating Ex Ante Judicial Approval*, 121 HARV. L. REV. 2200, 2206 (2008) (“One of the most striking

court follows the same model, American citizens of the Government's "kill list" would have no opportunity to see and challenge the Government's evidence against them.<sup>206</sup> This is inconsistent with individual justice and Government transparency. Second, the FISA court has often been criticized for "rubber stamping" Government surveillance requests.<sup>207</sup> Given traditional judicial deference to the Government in national security matters, it is certainly arguable that an *ex ante* targeting review court would also be seen as a Potemkin tribunal. Finally, as noted, accountability requires rectification (*i.e.* recompense for wrongdoing), and only an *ex post* process can achieve that goal.

### C. POTENTIAL CRITICISM

#### 1. Feasibility

As a threshold matter, some may argue that it is inconceivable that Congress would create a court like the NST. The Executive Branch has long enjoyed preeminence in the national security arena not only due to judicial deference, but also because of "congressional acquiescence."<sup>208</sup> Further, until the Brennan confirmation hearings, congressional inquiries into the targeted killing program, including the drone strikes against the victims, were tepid at best.<sup>209</sup> As a result, the NST may be no more than an academic exercise. Nevertheless, *Marbury's* aspirational goal of providing judicial review for legally cognizable wrongs, coupled with *Bivens'* admonition that Government actors are capable of

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elements of the FISA system is the total absence of adversariality. Because the collection of intelligence in this context requires by its very nature that the surveilled party not receive notice in advance, the *ex ante* approval system is almost by definition also *ex parte*.").

206. *Id.*

207. *Id.* at 2210 ("[C]harging a panel of federal judges with insufficient background information on specific cases, and little intelligence experience, with approving foreign intelligence surveillance applications has resulted in an essentially rubber stamp process where applications are practically never denied.") (citing Bob Barr, *A Tyrant's Toolbox: Technology and Privacy in America*, 26 J. LEGIS. 71, 78 (2000)).

208. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1297 (1988).

209. Michael A. Cohen, *The Imperial Presidency: Drone Power and Congressional Oversight*, WORLD POLITICS REVIEW, <http://www.worldpoliticsreview.com/articles/12194/the-imperial-presidency-drone-power-and-congressional-oversight> (last visited July 24, 2012).

inflicting great harm when constitutional rights are implicated, necessitates some action to resolve the national security exception to constitutional causes of action.

Further, congressional consideration of an *ex ante* court, as well as increasing public criticism of the Government's targeted killing program, indicate that the Government's relative impunity in this area is waning. There is also evidence that support for establishing an *ex post* process is gaining some momentum.<sup>210</sup> Thus, whether through a pre-deprivation FISA court analogue or post-deprivation review, the Government may soon face greater scrutiny of its targeted killing program.

## 2. National Security "Hawks"

National security hawks may argue that the NST subverts the President's constitutional commander-in-chief prerogatives to "direct military operations under the laws of war or the statutory authority to direct special activities such as covert actions."<sup>211</sup> However, the President's war-making powers are not unfettered: they are still subject to constitutional limitations.<sup>212</sup> Some may also claim that the NST would "dilute the normal practice of war with law-enforcement methods."<sup>213</sup> According to John Yoo,

[t]hose . . . in the Bush administration who worked on the response to 9/11 understood that the country was involved

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210. See Steve Vladeck, *Why a "Drone Court" Won't Work — But (Nominal) Damages Might. . .*, LAWFARE: HARD NAT'L SEC. CHOICES, <http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/> (last visited Feb. 10, 2013).

211. Lunday & Rishikof, *supra* note 29, at 114.

212. See *id.* at 114–15. ("The involvement of an Article III court in review of actions traditionally reserved almost entirely to the discretion of the executive raises concerns about interference with the President's constitutional commander-in-chief and foreign relations powers to direct military operations under the laws of war or the statutory authority to direct special activities such as covert actions. However, the executive's authority is not plenary. Article I of the Constitution provides Congress with the power to make rules for capture on land and sea. Additionally, Congress is granted authority by statute to conduct general oversight of certain special activities.") (footnotes omitted).

213. John Yoo, *The Real Problem With Obama's Drone Memo*, WALL ST. J., Feb. 7, 2013, available at <http://online.wsj.com/article/SB10001424127887323951904578288380180346300.html>; see also John Yoo & Robert Delahunty, *Obama's Legal Netherworld*, FOREIGN POLICY, Feb. 8, 2013, [http://www.foreignpolicy.com/articles/2013/02/08/obamas\\_legal\\_netherworld\\_justice\\_department\\_memo](http://www.foreignpolicy.com/articles/2013/02/08/obamas_legal_netherworld_justice_department_memo) ("The white paper's assumption that U.S. citizens who are enemy combatants are constitutionally entitled to due process even while engaged in, or available for, hostilities is both gratuitous and in error.")

in a new kind of war, one that demanded the covert use of force abroad, detention of terrorists at Guantanamo Bay without criminal trials, tough interrogations, and broad electronic surveillance. . . . U.S. citizenship doesn't create a legal force field around Americans who treasonously join the enemy. . . . [and] including terrorists among those afforded constitutional protections . . . risks stretching those protections a mile wide and an inch deep — weakening them for all Americans.<sup>214</sup>

Yoo and those who share his views would likely argue that the NST 1) improperly accords constitutional protections to undeserving enemy combatants; and 2) subverts the rights of all Americans by providing a modified form of judicial review for those with claims before the NST.

First, Yoo is wrong to suggest that joining the enemy strips a U.S. citizen of his constitutional rights; *Hamdi* clearly held otherwise.<sup>215</sup> Second, although *Hamdi* affirmed that a “citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker,” it also held that “the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”<sup>216</sup> In other words, the Court confirmed that American enemy combatants had a constitutional due process right to *habeas* review, but it circumscribed that right to compensate for the Government’s competing national security concerns. Thus, Yoo is wrong to suggest that “joining the enemy” vitiates constitutional protections and that modifying those protections to account for Government interests undermines every American’s rights. Accordingly, the NST’s authority to review national security-related constitutional claims brought by American citizens would be based on sound jurisprudence.

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214. Yoo, *supra* note 213.

215. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (“We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”).

216. *Id.* at 533.

## V. CONCLUSION

In sum, the national security exception to the *Bivens* doctrine has rendered cases like *Aulaqi II* toothless in securing individual justice and government accountability. Statutory alternatives to *Bivens* are unavailing because of their own exemptions and the qualified immunity, political question, and state secrets doctrines. This has created a troubling accountability gap and an impediment to individual justice, both of which belie our nation's commitment to the rule of law. Congress should therefore create an administrative Article I court to hear claims brought by American citizens alleging that the Government violated their constitutional protections in national security-related conduct. This National Security Tribunal would close a significant legal lacuna that has undermined America's commitment to transparent government and fundamental rights.