

2012

## The New National Security Canon

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### Recommended Citation

Vladeck, Stephen I. "The New National Security Canon." American University Law Review 61, no.5 (2012): 1295-1330.

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# The New National Security Canon

## ESSAYS

### THE NEW NATIONAL SECURITY CANON

STEPHEN I. VLADECK\*

*Why have victims of post-September 11 governmental misconduct met with virtually no success thus far in pursuing damages claims arising out of the government's alleged abuses? One explanation is that these cases are nothing more than one piece of a larger puzzle in which fewer and fewer civil plaintiffs have been able to recover in any suit alleging official misconduct. After all, it is a familiar trope that the Supreme Court has shown increasing skepticism in recent years toward civil plaintiffs in damages suits against government officers. Complicating matters, because reasonable minds continue to disagree about the legality of the surveillance, detention, and treatment of terrorism suspects (and a host of other controversial measures) since September 11, different perspectives on the underlying legal questions will necessarily color our view of whether the absence of relief in these cases is a new—or troubling—development.*

*In this Essay, I aim to provide a deeper answer to this question by looking carefully at the evolution of four different general doctrines in federal courts jurisprudence that have figured prominently in national security civil suits over the past decade: the availability of Bivens remedies; federal common law defenses to state-law suits against government contractors; qualified immunity; and the political question doctrine. To determine whether the lack of recovery in post-September 11 civil litigation differs in kind or merely degree from that which is true more generally, I contrast the state of these doctrines in non-national security cases with how the same law has been applied in suits with national security over- or under-tones. As I conclude, closer inspection*

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*reveals fairly compelling evidence for the emergence of a new “national security canon,” a body of rules unique to national security cases that, at least thus far, all cut against allowing relief in suits that might otherwise be able to proceed to judgment. Absent a change in direction, this trend will have two sets of consequences: First, national security policy will, in most cases, increasingly come to be an area over which the political branches exercise near-plenary control (thereby perpetuating, whether correctly or not, the argument that courts lack the institutional competence to resolve such claims). Second, as such, we may well come to understand the emergence of the national security canon over the past decade as another example of the “normalization of the exception”—the accommodation into existing law of practices and policies typically embraced only by virtue of their exigency and fleeting duration. As the national security canon becomes more deeply ingrained, so too the likelihood that it will expand into contexts other than those in which it has thus far been recognized.*

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#### INTRODUCTION

As of May 2012, not a single damages judgment has been awarded in any of the dozens of lawsuits arising out of post-September 11 U.S. counterterrorism policies alleging violations of plaintiffs’ individual rights.<sup>1</sup> For some, this result simply testifies to the thoughtfulness and care with which the government has conducted the “war on terrorism”; it follows that there is no need for damages if no rights

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1. Obviously, this figure does not take into account suits in which settlements were reached—a set that is certainly not empty. Nor does it include pending cases where the current posture supports recovery for the plaintiff. Rather, the question is simply whether any court has awarded damages in a challenge to a post-September 11 counterterrorism or other national security initiative. So far, the answer has been no. *See Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1159 (2009) (describing how no torture cases against the United States have moved past summary judgment).

have actually been violated.<sup>2</sup> For others, this outcome is a function less of the *legality* of the government's conduct than the *novelty* of the measures adopted after September 11—and the corresponding idea that, whether or not the government crossed the line, the law was not “clearly established” such that individual officers should be held liable for whatever transgressions may have occurred.<sup>3</sup> Still, others take a more cynical view, seeing in this body of jurisprudence a systematic effort to create a form of functional impunity—a creation of new doctrinal barriers to relief that deny recovery even where extant precedent would otherwise appear to have supported it.<sup>4</sup>

Assessing who has the better of this argument is a difficult endeavor. For starters, it is now a familiar trope that the Supreme Court has shown increasing hostility toward civil plaintiffs in most damages suits against government officers—and not just those implicating national security policies.<sup>5</sup> Whatever fealty the Warren and early Burger Courts may have demonstrated toward suits challenging official action, it can hardly be gainsaid that the Rehnquist and Roberts Courts have systematically made it more difficult for civil plaintiffs to obtain damages in cases arising out of governmental misconduct.<sup>6</sup> In that vein, the absence of meritorious damages claims arising out of counterterrorism initiatives may merely be part of a larger pattern in which fewer and fewer civil plaintiffs

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2. See, e.g., *Rasul v. Myers*, 512 F.3d 644, 663–67 (D.C. Cir.) (rejecting a *Bivens* claim for damages brought by a former Guantanamo detainee after finding that he had qualified immunity), *vacated*, 555 U.S. 1083 (2008), *reinstated on remand*, 563 F.3d 527 (D.C. Cir.), *cert. denied*, 130 S. Ct. 1013 (2009).

3. See, e.g., *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083–84 (2011) (concluding that in order for a government officer to be liable in damages actions, his conduct must have violated “clearly established” law of which a reasonable officer in his position knew or should have known).

4. See, e.g., Elizabeth A. Wilson, “Damages or Nothing”: *The Post-Boumediene Constitution and Compensation for Human Rights Violations After 9/11*, 41 SETON HALL L. REV. 1491, 1492–93 (2011) (describing how the outcomes of many post-Boumediene cases have been determined solely by the impact of immigration law and not with reference to actual culpability).

5. See Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1106–07 (2006) (asserting that the current Court has a particular disdain for litigation and has “tightened the conditions under which successful litigants can recover damages or attorney's fees” in suits against the government); see also Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 356–62 (identifying a similar pattern); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 224 (2003) (arguing that the Rehnquist Court was unwilling to create remedies without explicit congressional permission).

6. See Gary S. Gildin, *The Supreme Court's Legislative Agenda to Free Government From Accountability for Constitutional Deprivations*, 114 PENN ST. L. REV. 1333, 1384 (2010) (reviewing the Roberts Court's § 1983 jurisprudence and concluding that the current Court is likely to be hostile to litigants seeking liberalized remedies for victims of governmental wrongdoing).

have been able to recover in *any* suit alleging official misconduct.<sup>7</sup>

In addition, there is no consensus as to the underlying legality—or lack thereof—of much of the challenged governmental conduct in national security cases.<sup>8</sup> So long as reasonable minds continue to disagree about the legality of the surveillance, detention, and treatment of terrorism suspects (and a host of other controversial measures) since September 11, it can hardly be surprising that different perspectives on the underlying legal questions will necessarily color our view of whether the absence of relief in these cases is a new—or troubling—development.<sup>9</sup>

Whereas most of this debate has been couched in terms of generalizations, I aim in this Essay to illuminate the conversation with specifics—to look carefully at the evolution of four different general doctrines in federal courts jurisprudence that have figured prominently in national security civil suits over the past decade: the availability of *Bivens* remedies; federal common law defenses to state-law suits against government contractors; qualified immunity; and the political question doctrine.<sup>10</sup> To determine whether the lack of

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7. Indeed, such reasoning extends to the Court's aggressive reinvigoration of state sovereign immunity, its reluctance to recognize implied statutory causes of action, its narrowing of the scope of federal rights that can be enforced via 42 U.S.C. § 1983, and so on. See Resnik, *supra* note 5, at 224 (arguing that the current Court has been unwilling to grant damages to civil plaintiffs in actions against the government absent an explicit congressional mandate).

8. To take just one example, there appears to still be disagreement about whether the torture of detainees at Abu Ghraib and elsewhere was in fact illegal. See, e.g., Arthur S. Brisbane, *The Other Torture Debate*, N.Y. TIMES, May 15, 2011, at WK8 (illustrating that many believed the interrogation methods used post-September 11 at Abu Ghraib and elsewhere did not amount to torture).

9. For a thoughtful take on the role of "hindsight bias" in these cases, see generally Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195 (2010), discussing "hindsight bias" in the context of encouraging officials' innovation through flexible approaches to damages claims.

10. This list will strike some as arbitrary. After all, one could easily also include the availability of Article III standing in suits challenging national security policies, see, e.g., *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 121–22 (2d Cir. 2011) (holding that petitioner does have Article III standing to challenge the constitutionality of the 2008 amendments to the Foreign Intelligence Surveillance Act of 1978), *petition for cert. filed*, No. 11-1025 (U.S. Feb. 17, 2012), pleading requirements under Rule 8 of the Federal Rules of Civil Procedure, see *Ashcroft v. Iqbal*, 556 U.S. 662, 665 (2009) (considering whether the Respondent's complaint failed to plead sufficient facts to state claim as required under Rule 8), or the state secrets privilege, see, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc) (holding that the state secrets doctrine required the plaintiffs' challenge to the defendant's role in their extraordinary rendition be dismissed), *cert. denied*, 131 S. Ct. 2442 (2011). With regard to the first two, however, I do not believe there are clear examples of contemporary cases adopting "new" rules in national security cases. And with regard to the state secrets privilege, leaving aside the general oversaturation of quality scholarship the topic has already received, two full-length articles, in particular, have considered in detail whether post-September 11 developments have

recovery in post-September 11 civil litigation differs in kind or merely degree from that which is true more generally, I contrast the state of these doctrines in non-national security cases with how the same law has been applied in suits with national security over- or under-tones.<sup>11</sup>

To that end, Part I situates the analysis by providing a capsule summary of the state of the canon with respect to each of these doctrines on September 10, 2001. In Part II, I turn to the key doctrinal developments since September 11 in each field. As Part II will establish, careful study of the relevant jurisprudence yields three significant, but not necessarily consistent, conclusions: *First*, in each of these four areas, there *have* been cases in which courts have recognized newfound “national security”-based reasons to foreclose recovery by plaintiffs. *Second*, some of the most profound obstacles to recovery have been articulated on more general terms, such that their application is not necessarily confined to challenges to counterterrorism policies. *Third*, virtually all of the national security-specific rules have been articulated by *lower* courts, with little more than tacit endorsement by the Supreme Court. In contrast, the Court has played a more direct role in identifying some of the more cross-cutting obstacles to recovery. Thus, although the emergence of a new national security canon has primarily been a project of the lower courts, the Supreme Court’s more general constriction of civil remedies against government officers may well have emboldened, however indirectly, particularly aggressive doctrinal innovation at the circuit level. At the same time, the Court has steadfastly refused to address virtually any of the national security-specific doctrinal developments, however presented.<sup>12</sup>

Finally, in the Conclusion, I turn to the normative implications of the trends identified in Part II. Although I suspect readers will react

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been qualitatively different. Compare Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 87 (2010) (focusing attention on federal court cases between 2001 and 2009), with Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1249 (2007) (using a survey of the origin and evolution of the state secrets doctrine to suggest that the Bush Administration did not differ qualitatively in its use of the privilege).

11. In that regard, this Essay builds off a shorter, earlier piece I wrote focusing specifically on the proliferation of amorphous “national security” concerns in *Bivens* litigation. See Stephen I. Vladeck, *National Security and Bivens After Iqbal*, 14 LEWIS & CLARK L. REV. 255, 257–58 (2010) (suggesting that *Bivens* remedies can, and should, play a meaningful role in national security cases because *Bivens* likely provides the sole means of redress for constitutional violations).

12. See, e.g., Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122 (2011) (examining the Supreme Court’s docket in post-September 11 terrorism cases—and reflecting on the consequences of the Court’s passive-aggressive behavior).

differently to the emergence of the new national security canon that Part II identifies, I anticipate two specific effects going forward: *First*, absent a change in direction, national security policy will, in most cases, increasingly come to be an area over which the political branches exercise near-plenary control (thereby perpetuating, whether correctly or not, the argument that courts lack the institutional competence to resolve such claims). *Second*, as such, we may well come to understand the emergence of the national security canon over the past decade as another example of the “normalization of the exception”—the accommodation into existing law of practices and policies typically embraced only by virtue of their exigency and fleeting duration.<sup>13</sup>

## I. THE FEDERAL COURTS CANON ON SEPTEMBER 10, 2001

### A. *Bivens Remedies*

The doctrinal evolution of *Bivens* remedies has been well- and often-traced.<sup>14</sup> *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* was a 1971 decision in which the Supreme Court for the first time recognized that, in certain circumstances, the Constitution itself provides a cause of action for damages for constitutional violations by federal officers.<sup>15</sup> Thus, in *Bivens*, the Court recognized a damages claim arising out of an alleged Fourth Amendment violation, holding that such remedies should be available unless: (1) Congress had displaced them with a comprehensive alternative;<sup>16</sup> or (2) “special factors counseling hesitation” militated against relief.<sup>17</sup> In that regard, *Bivens* filled a critical remedial gap, since no federal statute provided a general cause of action for obtaining damages for constitutional violations by federal—as opposed to state—officers.<sup>18</sup>

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13. See, e.g., OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 236 (2006) (arguing that the normalization phenomenon can cause the state to accept controversial emergency powers); cf. Harold D. Lasswell, *The Garrison State*, 46 AM. J. SOC. 455, 457–58 (1941) (suggesting that such normalization is inevitable in the modern industrial state).

14. For one of the most comprehensive (and recent) examples, see James E. Pfander, *The Story of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, in *FEDERAL COURTS STORIES* 275, 295–96 (Vicki C. Jackson & Judith Resnik eds., 2010), observing that the Court’s “unsteady” path in *Bivens* litigation has created substantial uncertainty about what *Bivens* litigants must prove to prevail.

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

16. *Id.* at 397.

17. *Id.* at 396–97.

18. At the time, the FTCA did not authorize suits arising out of intentional torts or claims not recognized as torts in the law of the state in which they accrued. See generally James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and*

Indeed, notwithstanding intervening amendments to the Federal Tort Claims Act (FTCA),<sup>19</sup> there remains no such statute today.<sup>20</sup>

Although *Bivens* was somewhat controversial, the Court's first two follow-up decisions only expanded its scope.<sup>21</sup> Thus, in *Davis v. Passman*,<sup>22</sup> the Court extended *Bivens* to encompass a claim for sex-based discrimination in violation of the equal protection principles enmeshed within the Fifth Amendment's Due Process Clause.<sup>23</sup> And in *Carlson v. Green*,<sup>24</sup> the Court allowed a *Bivens* claim to proceed against a prison warden based on the claim that the warden had denied an inmate access to timely medical care in violation of the Eighth Amendment's ban on cruel and unusual punishments.<sup>25</sup> Although the government argued in *Green* that the FTCA displaced *Bivens* in that case,<sup>26</sup> Justice Brennan explained that Congress can only oust *Bivens* if it "provided an alternative remedy which it *explicitly* declared to be a substitute for recovery directly under the Constitution and viewed as equally effective,"<sup>27</sup> which Congress had not so declared in the case of the FTCA.<sup>28</sup>

In retrospect, *Green* was the high-water mark for *Bivens* remedies. In the 32 years since, the Court has not only declined to recognize any *other* constitutional provisions that can be enforced via *Bivens*, but it has shown an unwillingness to apply the three pro-*Bivens* decisions

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*Constitutional Adjudication*, 98 GEO. L.J. 117, 121 (2009) (providing an overview of the history of legislative developments in the wake of *Bivens*).

19. In 1974, Congress amended the intentional tort exception to the FTCA to create liability for certain intentional torts for law enforcement officers. See Pub. L. No. 93-253, 88 Stat. 50 (1974) (codified as amended at 28 U.S.C. § 2680(h) (2006)). And in 1988, Congress in the Westfall Act created a comprehensive scheme for substituting the federal government in virtually all state-law tort suits against federal officers arising out of the scope of their employment. See Federal Employees Liability Reform and Tort Compensation (Westfall) Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, 4564 (codified at 28 U.S.C. § 2679(b) (2006)). As Jim Pfander and David Baltmanis have argued, these statutes, the legislative history of both of which positively discussed *Bivens*, could be seen as providing at least congressional acquiescence in the Supreme Court's decision. Pfander & Baltmanis, *supra* note 18, at 131-34.

20. But see Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1233-36 (1994) (arguing that states should adopt "converse-1983" statutes, which would create a state-law cause of action for violations of federal constitutional rights by federal officers).

21. See Pfander, *supra* note 14, at 295-96 (recounting the Court's initial expansion of *Bivens* to encompass damages for Equal Protection Clause and Eighth Amendment violations).

22. 442 U.S. 228 (1979).

23. *Id.* at 230-31.

24. 446 U.S. 14 (1980).

25. *Id.* at 16-18.

26. *Id.* at 17-18.

27. *Id.* at 18-19.

28. *Id.* at 19-20 (emphasis added).

to even the most minutely different facts.<sup>29</sup>

The retrenchment took place simultaneously along two axes—the two exceptions Justice Brennan identified in *Bivens* itself. Thus, in a series of cases beginning in the 1980s, the Court held that various federal statutory schemes displaced *Bivens* relief, even though none of those schemes satisfied the requirement from *Green* that Congress have “*explicitly* declared [the relevant scheme] to be a substitute for recovery directly under the Constitution and viewed as equally effective.”<sup>30</sup> Thus, *Bush v. Lucas*<sup>31</sup> refused to recognize a First Amendment retaliation claim arising out of the civil service, based on the existence of an internal administrative process under the Civil Service Reform Act in which the plaintiff’s constitutional claims were “fully cognizable.”<sup>32</sup> And the Court in *Schweiker v. Chilicky*<sup>33</sup> rejected *Bivens* relief in a claim alleging a due process violation in the processing of federal Social Security benefits, deferring to the complex scheme of administrative and judicial remedies provided by the Social Security Act.<sup>34</sup> Whether or not Congress in these cases had *intended* to displace *Bivens*, the decisions at least rested on the (however dubious) premise that Congress had indeed so provided. Moreover, “[t]o the extent that the logic of *Bivens* turned on the possibility that it was ‘damages or nothing,’ that concern was not as strongly implicated in cases where federal law did not force that choice.”<sup>35</sup>

The far more significant retrenchment of *Bivens*, though, took place through the other exception Justice Brennan identified—the existence of “special factors counseling hesitation” before courts should recognize a self-executing constitutional damages remedy.<sup>36</sup> At first, the Court’s “special factors” jurisprudence focused on claims

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29. See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (explaining the Court’s consistent refusal to extend *Bivens* liability to new contexts or new categories of defendants); *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (declining to extend *Bivens* remedies to First Amendment violations in the context of federal employment because of the existence of alternative federal remedies).

30. *Green*, 446 U.S. at 19–20 (emphasis added).

31. 462 U.S. 367 (1983).

32. *Id.* at 385–86.

33. 487 U.S. 412 (1988).

34. *Id.* at 419–20.

35. Vladeck, *supra* note 11, at 264.

36. In *Bivens* itself, Justice Brennan gave only two examples: *United States v. Standard Oil Co.*, 332 U.S. 301, 316 (1947), in which the U.S. government was the plaintiff (and therefore could have created the liability it sought to enforce), and *Wheeldin v. Wheeler*, 373 U.S. 647, 648 (1963), in which an employee of Congress was sued for allegedly exceeding his delegated authority—hardly a constitutional claim. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396–97 (1971).

arising out of the military. Thus, in *Chappell v. Wallace*,<sup>37</sup> handed down the same day as *Bush v. Lucas*, the Court focused on the unique nature of the military's internal system of discipline as a "special factor" counseling against the recognition of a *Bivens* claim by enlisted personnel against their superior officers alleging racial discrimination (notwithstanding the application of *Bivens* to equal protection claims in *Davis v. Passman*).<sup>38</sup> Four years later, the Court in *United States v. Stanley*<sup>39</sup> concluded that there were "special factors" weighing against a *Bivens* remedy for an action brought by a serviceman claiming that he was secretly subjected to LSD as part of an Army experiment:

The "special facto[r]" that "counsel[s] hesitation" is . . . the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate . . . . We hold that no *Bivens* remedy is available for injuries that "arise out of or are in the course of activity incident to service."<sup>40</sup>

As I have suggested before, both *Chappell* and *Stanley* "concerned the hyper-specific issue of civil lawsuits arising out of military service, an area in which the courts had a record of according substantial deference to the political branches that pre-dated *Bivens* by decades."<sup>41</sup> Thus, as with *Bush* and *Schweiker*, these early decisions could be seen as relatively narrow carve-outs to an otherwise vibrant doctrine.

But the Court's next two *Bivens* decisions sent quite the opposite message. In *FDIC v. Meyer*,<sup>42</sup> the Court declined to recognize a *Bivens* remedy based on a due process claim against the Federal Savings and Loan Insurance Corporation, holding that "special factors" generally counseled against *Bivens* remedies against federal agencies.<sup>43</sup> As Justice Thomas explained, "[i]f we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government."<sup>44</sup> Similarly, in *Correctional Services Corp. v. Malesko*,<sup>45</sup> decided just two months after the September 11 attacks, the Court

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37. 462 U.S. 296 (1983).

38. *Id.* at 304.

39. 483 U.S. 669 (1987).

40. *Id.* at 683–84 (alterations in original) (quoting *Bivens*, 403 U.S. at 396; *Feres v. United States*, 340 U.S. 135, 146 (1950)).

41. Vladeck, *supra* note 11, at 264.

42. 510 U.S. 471 (1994).

43. *See id.* at 485–86 (specifying that the damages remedies applied under *Bivens* would inappropriately affect federal fiscal policy if awarded against federal agencies).

44. *Id.* at 486.

45. 534 U.S. 61 (2001).

refused to extend *Bivens* to a suit against the private operators of a federal halfway house, even though the underlying claim closely mirrored that which the Court had approved in *Green*.<sup>46</sup> Without specifically explaining why “special factors” counseled hesitation, Chief Justice Rehnquist held that *Bivens* relief should only be recognized “to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer’s unconstitutional conduct.”<sup>47</sup>

Indeed, although it was decided shortly after September 11, *Malesko* helps drive home the state of *Bivens* jurisprudence at the outset of the war on terrorism: The Court had shown increasing skepticism toward recognizing “new” *Bivens* claims primarily by relying on the idea of “special factors”; but at the same time, the Court had *never* rejected *Bivens* relief when such a claim was the only means by which the plaintiff could vindicate a constitutional claim against a federal officer.<sup>48</sup> Despite the objections of Justices Scalia and Thomas to the entire *Bivens* enterprise,<sup>49</sup> the Court had quite carefully left open the possibility that, in a case where the choice was truly between “*Bivens* or nothing,”<sup>50</sup> the Justices might choose the former.

### B. Contractor Preemption

Unlike *Bivens*, where significant pre-September 11 case law helped to illuminate the trend in the Supreme Court’s approach, only one

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46. *Id.* at 63.

47. *Id.* at 70.

48. *See, e.g.*, *Carlson v. Green*, 446 U.S. 14, 19–20 (1980) (permitting *Bivens* remedies for persons injured by federal officers’ Eighth Amendment violations given the absence of alternative remedies); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 409–10 (1971) (Harlan, J., concurring in the judgment) (“For people in *Bivens*’ shoes, it is damages or nothing.”). *See generally* Carlos Manuel Vázquez & Stephen I. Vladeck, *State Law and the Nature of the Bivens Question*, 161 U. PA. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=2038641>.

49. *See Malesko*, 534 U.S. at 75 (Scalia, J., concurring) (“*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action . . . . As the Court points out, we have abandoned that power to invent ‘implications’ in the statutory field. There is even greater reason to abandon it in the constitutional field, since an ‘implication’ imagined in the Constitution can presumably not even be repudiated by Congress.”). For a critique of Justice Scalia’s analogy to the Court’s implied statutory remedy jurisprudence, see Stephen I. Vladeck, *Bivens Remedies and the Myth of the “Headly Days,”* 8 U. ST. THOMAS L.J. 514 (2012).

50. *See Pfander & Baltmanis, supra* note 18, at 123 (contending that when *Bivens* claims are denied, most plaintiffs are unable to pursue state-law theories).

decision by the Supreme Court prior to 2001 specifically spoke to the question of “contractor preemption,” i.e., cases in which the federal government’s interests justified judicial recognition of a federal common law rule barring state-law claims against government contractors.<sup>51</sup> That (controversial) case was the Court’s 1988 decision in *Boyle v. United Technologies Corp.*<sup>52</sup>

*Boyle* arose out of the crash of a military helicopter.<sup>53</sup> The heirs of one of the decedents brought a state-law wrongful death action against the contractor responsible for designing the helicopter, alleging that a design flaw in the escape hatch prevented the decedent (who had survived the initial crash into the Atlantic Ocean) from escaping before he drowned.<sup>54</sup>

Writing for a 5-4 Court, Justice Scalia held that such a state-law claim was “displaced” by federal common law.<sup>55</sup> At the outset, he emphasized case law holding that “obligations to and rights of the United States under its contracts are governed exclusively by federal law,”<sup>56</sup> as is “the civil liability of federal officials for actions taken in the course of their duty.”<sup>57</sup> Although *Boyle* involved a government contractor and not a federal employee, the Court still noted that in both instances the government’s interest in having the work completed remains constant.<sup>58</sup> Thus, Justice Scalia explained that imposing liability on government contractors would be adverse to the interests of the United States because government contractors would respond by either: (1) raising procurement prices or (2) declining to follow design specifications.<sup>59</sup>

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51. To be sure, there are other contexts in which federal interests have been held to justify the displacement via federal common law of state-law remedies, including cases in which the relevant considerations sounded in foreign policy. See, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 397 (2003) (holding that a California statute requiring disclosure of certain World War II insurance policy information was preempted by foreign policy considerations). But *Boyle* and its progeny bespeak a unique form of preemption, as articulated below. See *infra* notes 53–65 and accompanying text.

52. 487 U.S. 500 (1988).

53. *Id.* at 502.

54. See *id.* at 502–04 (summarizing the case’s background).

55. Indeed, the Court consciously appeared to distinguish in *Boyle* between “displacement” and “preemption” of state law. The latter occurs when positive federal law ousts state law by virtue of the Supremacy Clause; the former occurs when federal common law is the culprit. See, e.g., *id.* at 507–08 n.3 (noting explicitly that the Court is referring to the displacement of state law and not preemption); cf. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2534–35 (2011) (referring to the statutory “displacement” of federal common law).

56. *Boyle*, 487 U.S. at 504.

57. *Id.* at 505.

58. *Id.*

59. *Id.* at 507.

That federal interests were triggered, though, was not the end of the inquiry. Instead, Justice Scalia then explained that such interests justify the displacement of state law only when “a ‘significant conflict’ exists between an identifiable ‘federal policy or interest and the [operation] of state law,’ or the application of state law would ‘frustrate specific objectives’ of federal legislation.”<sup>60</sup> As he concluded, “[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates ‘in a field which the States have traditionally occupied.’ . . . But conflict there must be.”<sup>61</sup>

Turning to the case at hand, Justice Scalia found the existence of precisely such a conflict, since the government contract imposed on the contractor a duty to install the escape hatch pursuant to the government’s specifications while the plaintiff claimed the contractor had a conflicting duty to deviate from those specifications by including other escape hatch mechanisms.<sup>62</sup> In other words, in an area of such strong federal concern, state-law claims should not be allowed to go forward when they present such a square conflict with existing (and presumptively valid) federal policy choices.<sup>63</sup> This was especially so, Justice Scalia reasoned, because of the FTCA, which specifically exempts from suit claims arising out of a government officer’s performance of a “discretionary function.”<sup>64</sup> Because “[w]e think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision,” it was that much clearer that the strong federal interest not only counseled against state-law claims, but against *any* liability whatsoever.<sup>65</sup>

The Supreme Court has not reconsidered (or extended) *Boyle* since it was decided. At least before September 11, however, lower courts had primarily understood *Boyle* as nothing more than an extension of the FTCA’s “discretionary function” exception to a particular type of state-law tort suits against contractors, whether because it was a “derivative immunity” or a form of “federal common law preemption.” In 2000, for example, the Fifth Circuit cited *Boyle* for the proposition that “[g]overnment contractor immunity is derived from the government’s immunity from suit where the performance of

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60. *Id.* (alteration in original) (citations omitted).

61. *Id.* at 507–08 (citations omitted).

62. *Id.* at 509.

63. *See id.* at 509–10.

64. *Id.* at 500–01.

65. *Id.* at 511.

a discretionary function is at issue.”<sup>66</sup> And in an earlier case, the Seventh Circuit described *Boyle* as holding that, “under certain circumstances, government contractors are shielded from state tort liability [only] for products manufactured for the Armed Forces of the United States.”<sup>67</sup>

Indeed, pre-September 11 cases relying on *Boyle* invariably involved relatively minor variations on the underlying theme: plaintiffs seeking to use state law to recover against contractors for claims that would have been barred under the discretionary function exception if brought directly against the responsible government officers. Virtually all of these suits arose in the products liability context.<sup>68</sup>

### C. *The Political Question Doctrine*

Whereas *Bivens* and *Boyle* both go to the availability *vel non* of a cause of action arising out of governmental (or government contractor) misconduct, there are also a number of defenses in suits challenging official action,<sup>69</sup> including the political question doctrine. Although it has its origins in *Marbury v. Madison*,<sup>70</sup> in contemporary terms, the political question doctrine is shorthand for the recognition that there are some disputes ill-suited for judicial resolution, either because the Constitution commits their resolution to other branches or because the claims lack “judicially manageable standards.”<sup>71</sup> Despite the amount of attention the doctrine receives and its prominence in the lower courts, “[t]he political question doctrine has occupied a more limited place in the Supreme Court’s jurisprudence than is sometimes assumed,” as Judge Kavanaugh of

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66. *Kerstetter v. Pac. Scientific Co.*, 210 F.3d 431, 435 (5th Cir. 2000).

67. *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 997 (7th Cir. 1996).

68. Chief Justice Rehnquist explained *Boyle* as standing for the proposition that, “[w]here the government has directed a contractor to do the very thing that is the subject of the claim, we have recognized this as a special circumstance where the contractor may assert a defense.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001).

69. As noted above, I do not consider the state secrets privilege in this Essay. *Supra* note 10 (noting the parameters of this Essay as well as providing helpful citations to more complete discussions of the state secrets privilege before and after September 11).

70. 5 U.S. (1 Cranch) 137, 170–71 (1803) (“Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.”).

71. These are two of the six factors articulated in *Baker v. Carr*, 369 U.S. 186, 217 (1962). Over time, they have come to be seen as the two dominant considerations. *See, e.g., El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring in the judgment) (noting that, over the past fifty years, the Court has exclusively relied on these two *Baker* factors in applying the political question doctrine), *cert. denied*, 131 S. Ct. 997 (2011).

the United States Court of Appeals for the District of Columbia Circuit recently explained.<sup>72</sup> Indeed, only twice in the past half-century has the Court relied on the existence of a “textually demonstrable commitment” to another branch to dismiss a case on political question grounds,<sup>73</sup> and the cases involving the absence of “judicially manageable standards” have all fallen within the same subject-matter: challenges to “partisan” gerrymandering.<sup>74</sup>

Thus, in *Nixon v. United States*,<sup>75</sup> decided in 1993, the Court threw out a suit by former federal judge Walter Nixon seeking to contest the means by which he was removed from office.<sup>76</sup> After being impeached by the House of Representatives, Nixon was tried before a special Senate committee, which was empowered to “receive evidence and take testimony” before reporting back to the full body, which then proceeded to reach a verdict pursuant to the constitutionally prescribed procedure.<sup>77</sup> Nixon claimed that the proceedings before the committee were inconsistent with the constitutional requirement that he be tried by the Senate because the full Senate was barred from participating in the evidentiary hearings.<sup>78</sup> For a unanimous Court (although some Justices offered different rationales),<sup>79</sup> Chief Justice Rehnquist held Nixon’s claims to be barred by the political question doctrine.<sup>80</sup> According to Rehnquist, the text of the Constitution (which invests the Senate with the “sole” power to “try”

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72. *El-Shifa*, 607 F.3d at 856 (Kavanaugh, J., concurring in the judgment).

73. See *Nixon v. United States*, 506 U.S. 224, 228–29 (1993) (concluding that exclusive power to adjudicate the merits of impeachment proceedings against federal judges is textually committed to the Senate by virtue of Art. I, § 3, cl. 6); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (explaining that surveillance over the weaponry, training, and standing orders of the National Guard are responsibilities vested exclusively in the executive and legislative branches).

74. See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006) (plurality opinion) (lamenting that drawing congressional lines is an unwelcome task for the judiciary because of the difficulties in drawing a “fair and rational” map); *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion) (dismissing a gerrymandering challenge to Pennsylvania’s legislative districts due to a lack of judicially manageable standards).

75. 506 U.S. 224 (1993).

76. *Id.* at 228.

77. *Id.* at 226–28.

78. *Id.* at 228.

79. Justices White and Souter each wrote separate opinions concurring only in the judgment. See *id.* at 239–40 (White, J., concurring in the judgment) (reasoning that the Court did have jurisdiction to ensure that the Senate “tried” impeached officials, but that the Senate had met that standard in the instant case); *id.* at 252–54 (Souter, J., concurring in the judgment) (agreeing that judicial interference in Senate impeachment trials would lead to impermissible consequences, but suggesting that review might nevertheless be available in cases of egregious misconduct by the Senate).

80. *Id.* at 237–38 (majority opinion).

cases of impeachment)<sup>81</sup> categorically precluded judicial second-guessing of the means by which such a trial was conducted.<sup>82</sup>

As for cases raising a lack of judicially manageable standards, a good (albeit post-September 11) example is the Court's 2004 decision in *Vieth v. Jubelirer*.<sup>83</sup> There, voters challenged the constitutionality of Pennsylvania's redistricting plan following the 2000 census, arguing that, because of the Pennsylvania legislature's partisan gerrymandering, the new district maps violated the "one person, one vote" rule<sup>84</sup> of *Reynolds v. Sims*.<sup>85</sup> In 1986, the Supreme Court had concluded in *Davis v. Bandemer*<sup>86</sup> that the Equal Protection Clause of the Fourteenth Amendment empowered federal judges to circumscribe partisan gerrymandering.<sup>87</sup> Writing for a four-Justice plurality in *Vieth*, however, Justice Scalia emphasized the extent to which no remotely manageable standard had emerged in the eighteen intervening years that could draw the line between "good politics and bad politics."<sup>88</sup> Put more bluntly, no one had been able to articulate a sufficiently clear set of standards to explain whether—and to what extent—district lines drawn for one political party's partisan advantage would violate Article I, Article IV, or the Equal Protection Clause.

The political significance of the decision aside, the critical point about *Vieth* for present purposes is the extent to which that prong of the political question doctrine has only surfaced in contemporary disputes along similar lines. In ascertaining the scope of the political question doctrine in national security cases *after* September 11, it is the first of the *Baker v. Carr*<sup>89</sup> factors, and not the second, that will prove critical.

#### D. Qualified Immunity

Finally, perhaps the most commonly invoked defense in suits challenging official action is officer immunity. Although some

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81. See U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.")

82. See *Nixon*, 506 U.S. at 234–35.

83. 541 U.S. 267 (2004).

84. See *id.* at 290 (rejecting plaintiffs' argument that the "one person, one vote" rule provided judicially manageable standards with which to resolve the dispute).

85. 377 U.S. 533 (1964).

86. 478 U.S. 109 (1986).

87. *Id.* at 143.

88. *Vieth*, 541 U.S. at 299 (plurality opinion).

89. 369 U.S. 186 (1962).

officers are entitled to “absolute immunity” when acting in particular capacities,<sup>90</sup> the doctrine of far more relevance here is “qualified immunity,” which provides that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>91</sup> In enunciating the current standard in *Harlow v. Fitzgerald*<sup>92</sup> in 1982, the Court famously disclaimed reliance upon subjective considerations (such as malice or bad faith), opting instead for an objective inquiry that could be resolved in most cases on the pleadings, or at worst, at summary judgment.<sup>93</sup>

The qualified immunity test itself has undergone only modest revisions since *Harlow*. In *Anderson v. Creighton*,<sup>94</sup> for example, the Court clarified that:

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.<sup>95</sup>

Thus, most of the doctrinal innovation with regard to qualified immunity has centered not on whether the *right of the plaintiff* in question was “clearly established,” but whether the unlawfulness of the *officer’s conduct* was “apparent.”<sup>96</sup> A subtle distinction in theory, it has proved rather significant in practice.<sup>97</sup>

Separate from the standard to apply in qualified immunity cases is the means by which qualified immunity claims are resolved.

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90. See, e.g., *Rehberg v. Paulk*, 132 S. Ct. 1497, 1501–05 (2012) (summarizing the origins and scope of absolute immunity to § 1983 suits).

91. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

92. 457 U.S. 800 (1982).

93. Thus, qualified immunity “is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). To that end, the denial of a qualified immunity defense is subject to immediate interlocutory appeal under the collateral order doctrine. *Id.* at 524–30.

94. 483 U.S. 635 (1987).

95. *Id.* at 640.

96. See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (“This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.” (citation omitted) (internal quotation marks omitted)).

97. See, e.g., *Henry v. Purnell*, 652 F.3d 524, 534–35 (4th Cir.) (en banc) (rejecting officer’s argument that he was entitled to qualified immunity because it was not clearly established that shooting a fleeing nonthreatening misdemeanant would be unlawful under the circumstances), *cert. denied*, 132 S. Ct. 781 (2011).

Typically, a qualified immunity defense presents two analytically distinct questions: (1) whether the officer's conduct was unlawful (the "legality" question); and (2) whether the unlawfulness should have been apparent in light of clearly established law (the "liability" question). Although an officer cannot be liable unless his conduct was also unlawful, the same is not true in reverse. As such, courts might be tempted to assume, without deciding, that the conduct was unlawful in cases in which the law was not yet clearly established, since the defendant prevails regardless of the legality of his conduct.<sup>98</sup> Such an approach, however, would potentially thwart the development of forward-looking law, since courts would not be "establishing" any legal rules going forward.<sup>99</sup>

To ward against that possibility, the Supreme Court in June 2001 mandated a particular "order-of-battle" in qualified immunity cases, holding in *Saucier v. Katz*<sup>100</sup> that lower courts should answer the legality question first in *all* cases, including those in which the defendant will nevertheless prevail on liability.<sup>101</sup> As Justice Kennedy explained for the majority:

This is the process for the law's elaboration from case to case . . . .  
The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.<sup>102</sup>

Thus, qualified immunity on the eve of September 11 had two salient characteristics. First, under *Anderson*, the central question was whether the unlawfulness of the defendant's conduct (and not the plaintiff's underlying right) was apparent in light of "clearly established" law. Second, under the so-called "*Saucier* sequence," even in cases in which that standard could not be met, courts still had a duty to answer the legality question—and to thereby articulate forward-looking principles of constitutional law to govern future cases, even if they were ultimately irrelevant to the disposition of the case *sub judice*.

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98. See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (recounting that the District Court granted summary judgment on a qualified immunity theory by assuming, without deciding, that a substantive due process violation had taken place, but then holding that the law was not established with sufficient clarity to justify § 1983 liability).

99. See *id.* (stating that an immunity determination alone would not create any standards for future cases).

100. 533 U.S. 194 (2001).

101. *Id.* at 206.

102. *Id.* at 201.

## II. THE FEDERAL COURTS CANON AFTER SEPTEMBER 11, 2001

It seems silly to ask whether the terrorist attacks of September 11 and the government's various responses thereto have had an impact on the federal courts. Quite obviously, much has changed over the past eleven years.<sup>103</sup> But there is a critical difference in this context between correlation and causation. Thus, in this Part, I revisit the four doctrinal areas surveyed in Part I, and examine some of the critical developments in each since September 11. As this Part will demonstrate, some of the innovations of the past decade seem to have very little to do with national security concerns, whereas others are entirely a creature of such concerns.

### A. *Bivens Remedies*

The Supreme Court has handed down two significant *Bivens* decisions since September 11.<sup>104</sup> In the first, *Wilkie v. Robbins*,<sup>105</sup> the Court rejected a *Bivens* claim arising out of a series of run-ins between a ranch owner and U.S. Bureau of Land Management officials over an easement, which led to charges of harassment and retaliation.<sup>106</sup> The Court's analysis identified "a special factor counseling hesitation quite unlike any we have recognized before."<sup>107</sup> The Court harped on the "difficulty" that would result from finding a new *Bivens* remedy to redress Robbins's individual and distinct injuries collectively, because "a general provision for tort-like liability when Government employees are unduly zealous in pressing a governmental interest affecting property would invite an onslaught of *Bivens* actions."<sup>108</sup> Although the special factor identified in *Wilkie* was new, the Court again seized on the likelihood that each of Robbins's individual claims likely had an adequate remedy under federal or state law.<sup>109</sup>

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103. Indeed, this Essay has all but ignored the remarkable body of habeas corpus jurisprudence precipitated by the detention of terrorism suspects since 2001. See generally Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941 (2011) (book review) (surveying the impact of historical understandings of the Suspension Clause on contemporary litigation).

104. *Bivens* has also been at issue in two additional cases. In *Hartman v. Moore*, 547 U.S. 250 (2006), the Court addressed the elements a plaintiff must plead in order to make out a retaliatory prosecution *Bivens* claim without addressing the availability of a *Bivens* remedy in any more detail. *Id.* at 251. And in *Hui v. Castaneda*, 130 S. Ct. 1845 (2010), the Court held that the Public Health Service Act, 42 U.S.C. § 233(a), provides a statutory alternative to *Bivens* claims against Public Health Service employees arising out of their official duties. 130 S. Ct. at 1853. Neither decision broke new ground in *Bivens* jurisprudence.

105. 551 U.S. 537 (2007).

106. *Id.* at 561–62.

107. *Id.* at 577 (Ginsburg, J., concurring in part and dissenting in part).

108. *Id.* at 562 (majority opinion).

109. See *id.* (asserting that legislation would be better suited to remedy

Finally, just this Term, the Court in *Minneeci v. Pollard*<sup>110</sup> appeared to come full-circle on *Bivens*, rejecting a claim against an individual employee working for a private contractor operating a federal prison on the ground that adequate remedies were almost certainly available under state law.<sup>111</sup> Although the claim closely mirrored that which the Court had approved in *Green*, the Court held that “Pollard’s Eighth Amendment claim focuses upon a kind of conduct that typically falls within the scope of traditional state tort law. And in the case of a privately employed defendant, state tort law provides an ‘alternative, existing process’ capable of protecting the constitutional interests at stake.”<sup>112</sup>

In both *Wilkie* and *Pollard*, then, the Court continued the trend of declining to recognize “new” *Bivens* claims, albeit on fairly narrow terms in each instance. *Wilkie* recognized a “new” “special factor” in the form of the potential floodgates of recognizing a zealousness-based property-rights *Bivens* claim;<sup>113</sup> *Pollard* suggested that adequate state-law remedies may by themselves be sufficient to displace *Bivens*,<sup>114</sup> at least where the defendant is a private contractor operating under color of state law, rather than a government officer.

In contrast to the Supreme Court’s cautious skepticism, three different circuit courts have recognized a new obstacle to *Bivens* claims in national security cases—a “special factor” based on the sensitivity of the government’s national security policies. Properly understood, such a “special factor” both (1) unduly incorporates other doctrinal concerns into cause-of-action analysis and (2) would therefore bar any and all recovery to the relevant plaintiffs, going a critical step beyond anything the Supreme Court has ever sanctioned.

The first decision to reach this result was the D.C. Circuit’s holding in *Rasul v. Myers*<sup>115</sup> (*Rasul II*). *Rasul II* was a damages suit brought by non-citizens formerly detained as “enemy combatants” at Guantánamo Bay, Cuba, alleging a series of violations of their statutory, constitutional, and treaty-based rights in their detention

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government overreach than judicially created factors).

110. 132 S. Ct. 617 (2012).

111. See *id.* at 623–24 (stating that state tort law can be effective in preventing constitutional violations).

112. *Id.* at 623. As Carlos Vázquez and I argue in a forthcoming article, *Pollard* may thereby refocus *Bivens* analysis on the relationship between federal and state remedies—as opposed to the recognition of one to the exclusion of the other. See Vázquez & Vladeck, *supra* note 48.

113. See *Wilkie*, 551 U.S. at 561 (contemplating the danger of a “‘too much’ standard”).

114. See *Pollard*, 132 S. Ct. at 621.

115. 563 F.3d 527 (D.C. Cir.) (per curiam), *cert. denied*, 130 S. Ct. 1013 (2009).

and treatment while in custody.<sup>116</sup> Initially, the D.C. Circuit rejected the plaintiffs' claims on qualified immunity grounds, holding that because the detainees had no legally cognizable rights, it necessarily followed that the defendants' alleged misconduct could not have been unlawful.<sup>117</sup> After the Supreme Court held in *Boumediene v. Bush*<sup>118</sup> that the Constitution's Suspension Clause "has full effect" at Guantánamo,<sup>119</sup> the Court "GVR'd"<sup>120</sup> *Rasul* for reconsideration in light of that holding.<sup>121</sup> On remand, the Court of Appeals reaffirmed its qualified immunity holding,<sup>122</sup> but added a footnote identifying an alternative, equally fatal bar to recovery—one borrowed from Judge Janice Rogers Brown's concurrence in the original panel opinion<sup>123</sup>: "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."<sup>124</sup> Perhaps because of that cryptic footnote, the Supreme Court denied certiorari the second time around.<sup>125</sup>

Just over six months after the D.C. Circuit's decision in *Rasul II*, the en banc Second Circuit reached a similarly themed result in *Arar v.*

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116. See *id.* at 528. The lead plaintiff in *Rasul II* was also the lead plaintiff in *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that the federal courts have statutory jurisdiction over habeas petitions brought by non-citizens detained at Guantánamo).

117. See *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir.), *vacated*, 555 U.S. 1083 (2008). For a more general overview of the D.C. Circuit's jurisprudence vis-à-vis Guantánamo—and where *Rasul* fits in, see Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451 (2011).

118. 553 U.S. 723 (2008).

119. *Id.* at 771.

120. A "GVR" order is a summary order from the Supreme Court granting certiorari, vacating the decision below, and remanding for reconsideration in light of an intervening development—usually a new decision by the Court on a related issue. See generally *Lawrence v. Chater*, 516 U.S. 163, 165–66 (1996) (describing GVRs and deciding that issuing such orders is within the Court's discretionary certiorari jurisdiction).

121. See 555 U.S. 1083, 1083 (2008).

122. See *Rasul II*, 563 F.3d 527, 529–30 (D.C. Cir.) (per curiam), *cert. denied*, 130 S. Ct. 1013 (2009).

123. *Rasul v. Myers*, 512 F.3d 644, 672–73 (D.C. Cir.) (Brown, J., concurring), *vacated*, 555 U.S. 1083 (2008).

124. *Rasul II*, 563 F.3d at 532 n.5. Specifically, the footnote relied on the D.C. Circuit's 1985 decision in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985). There, then-Judge Scalia had declined to recognize a *Bivens* claim arising out of the Iran-Contra affair, arguing 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." *Id.* at 209. Even *Sanchez-Espinoza*, though, turned on the fact that the allegedly unconstitutional conduct took place on foreign soil, and not, as in *Rasul*, on the grounds of a U.S. military base over which no other country was sovereign. *Id.* at 206–07.

125. *Rasul v. Myers*, 130 S. Ct. 1013, 1013 (2009).

*Ashcroft*.<sup>126</sup> Arar, a dual Canadian-Syrian citizen, was arrested by U.S. authorities at JFK International Airport in September 2002 because he was (apparently wrongfully) suspected of involvement with al Qaeda.<sup>127</sup> Arar was subsequently detained (and allegedly abused) for thirteen days before he was subjected to “extraordinary rendition” to Syria, where he remained in custody for just under one year.<sup>128</sup> Arar subsequently brought a damages suit against the U.S. officers responsible for his initial detention, his treatment while in U.S. custody, and his subsequent transfer to Syria.<sup>129</sup>

In affirming the district court’s dismissal of Arar’s suit, the en banc Second Circuit held that his *Bivens* claims were unavailing because a special factor counseled hesitation—to wit, “rendition.”<sup>130</sup> As Chief Judge Jacobs wrote for a 7-4 en banc majority, “in the context of extraordinary rendition, [a *Bivens*] action would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation, and that fact counsels hesitation.”<sup>131</sup> Noting that “[h]esitation’ is ‘counseled’ whenever thoughtful discretion would pause even to consider,”<sup>132</sup> the Court of Appeals concluded that damages suits seeking remedies against officials who were implementing extraordinary rendition policies would impermissibly entrench the courts in deciding the validity of these important national security policy questions.<sup>133</sup> Suggesting in addition that the classified nature of much of the evidence was also a reason to hesitate,<sup>134</sup> the Court of Appeals declined to recognize a *Bivens* claim.<sup>135</sup>

Unlike *Rasul II*, the *Arar* decision provoked a series of dissents. Judge Sack, in particular, wrote to emphasize the extent to which “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>136</sup> Judge Calabresi agreed, noting that the court already had appropriate methods for protecting secrets.<sup>137</sup>

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126. 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

127. *Id.* at 563.

128. *Id.* at 565–66.

129. *See id.* at 567 (detailing the complaint that Arar filed against federal officials for harms resulting from his detention and removal to Syria).

130. *Id.* at 563.

131. *Id.* at 574.

132. *Id.*

133. *Id.* at 575.

134. *Id.* at 576.

135. *Id.* at 580.

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

137. *See id.* at 635 (Calabresi, J., dissenting) (agreeing with Judge Sack’s observation that the denial of a *Bivens* remedy on national security grounds is

Thus, he suggested that rejecting *Bivens* suits merely “because state secrets might be revealed is a bit like denying a criminal trial for fear that a juror might be intimidated: it allows a risk, that the law is already at great pains to eliminate, to negate entirely substantial rights and procedures.”<sup>138</sup> Notwithstanding the force of the double-counting concern, or the more general point that incorporating case-specific concerns about defenses into analysis of the general availability of a cause of action dangerously conflates longstanding bodies of precedent,<sup>139</sup> the Supreme Court denied certiorari, with no dissents.<sup>140</sup>

Whereas *Rasul II* and *Arar* both involved non-citizen plaintiffs whose constitutional rights were unclear, at best, the third case in the trilogy is quite the opposite. In *Lebron v. Rumsfeld*,<sup>141</sup> the Fourth Circuit upheld the dismissal of a *Bivens* suit on behalf of Jose Padilla, a U.S. citizen challenging the legality of his long-term extracriminal detention within the United States as an “enemy combatant” and his treatment therein.<sup>142</sup> Writing for a unanimous panel, Judge Wilkinson emphasized the “special factors” that, in the court’s view, counseled hesitation:

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. Litigation of the sort proposed thus risks impingement on explicit constitutional assignments of responsibility to the coordinate branches of our government.<sup>143</sup>

In so holding, Judge Wilkinson 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

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“double counting of the government’s interest in preserving state secrets”).

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

139. *See, e.g.,* Vladeck, *supra* note 11, at 275–77 (discussing use of various government defenses to articulate a special factor counseling hesitation).

140. 130 S. Ct. 3409 (2010). Presumably, because she was on the Second Circuit throughout most of the en banc proceedings, Justice Sotomayor did not participate. *See id.* (noting that Justice Sotomayor did not take part in considering the petition for certiorari).

141. 670 F.3d 540 (4th Cir. 2012).

142. *Id.* at 548.

143. *Id.*

asked to review “military affairs,” including the alleged abuse of citizens by the military within the territorial United States.<sup>144</sup> 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.

Moreover, to whatever extent the courts have identified other novel special factors in cases less-directly implicating national security and foreign affairs over the past decade, one can immediately identify two material differences. First, in the national security context, the “special factors” analysis seizes on the general inappropriateness of *any* judicial interference with governmental action in the relevant arena.<sup>145</sup> Second, and related, the *Bivens* decisions in the national security cases are therefore unlike *Wilkie*, *Pollard*, and other lower-court holdings; in *Rasul II*, *Arar*, and *Lebron*, it really was “*Bivens* or nothing.”<sup>146</sup> Each time, the Court of Appeals chose the latter.<sup>147</sup>

#### B. Contractor Preemption

Whereas the cases discussed above go to the difficulty in identifying a cause of action against federal officers for post-September 11 civil liberties abuses, the same difficulty presumably should not have hampered attempts to hold government contractors liable in cases in which they allegedly violated plaintiffs’ rights while acting under color of federal law. Indeed, as *Pollard* held in rejecting a *Bivens* claim, it is the more normal course to use state—rather than

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144. *Id.* at 548–50.

145. *See, e.g., id.* at 549 (“Further supporting judicial deference is the Constitution’s parallel commitment of command responsibility in national security and military affairs to the President as Commander in Chief.”).

146. *See id.* at 552–55 (refusing to consider a *Bivens* claim where interests of other branches of government would be adversely affected); *Arar v. Ashcroft*, 585 F.3d 559, 580–81 (2d Cir. 2009) (en banc) (rejecting a *Bivens* claim where the court determined that the merits of the counterterrorism policy at issue should be left to Congress), *cert. denied*, 130 S. Ct. 3409 (2010); *Rasul II*, 563 F.3d 527, 532 n.5 (D.C. Cir.) (per curiam) (denying a *Bivens* claim because no liability should be available), *cert. denied*, 130 S. Ct. 1013 (2009).

147. The one exception to this pattern thus far was the Seventh Circuit’s decision in *Vance v. Rumsfeld*, 653 F.3d 591 (7th Cir. 2011), *reh’g en banc granted*, Nos. 10-1687, 10-2442, 2011 U.S. App. LEXIS 22083 (7th Cir. Oct. 28, 2011), in which the Court of Appeals held that a *Bivens* remedy was available—and that qualified immunity did not bar—a claim by U.S. citizens arising out of their allegedly unlawful detention and mistreatment by U.S. agents while they were working for a private Iraqi security firm. *Id.* at 594. The Seventh Circuit has since granted the government’s petition for rehearing en banc, and heard argument on February 8, 2012. SEVENTH CIRCUIT COURT OF APPEALS, <http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=10-1687&submit=showdkt&yr=10&num=1687> (last visited May 3, 2012).

federal—law to measure the liability of private contractors.<sup>148</sup>

Nevertheless, when victims of torture at Abu Ghraib brought a civil suit against the defense contractors allegedly responsible for at least some of the abuse, a divided panel of the D.C. Circuit held in *Saleh v. Titan Corp.*<sup>149</sup> that the plaintiffs' state-law claims were barred under a *Boyle*-like theory, even though the lawsuit did not implicate a "discretionary function."<sup>150</sup> Invoking, instead, the distinct "combatant activities" exception to the FTCA,<sup>151</sup> Judge Silberman, writing for the panel majority, explained that "the [*Boyle*] court looked to the FTCA exceptions to the waiver of sovereign immunity [more generally] to determine that the conflict was significant and to measure the boundaries of the conflict."<sup>152</sup>

Thus, the Court of Appeals could look to the combatant activities exception to identify the requisite "conflict" between state tort suits and federal policy.<sup>153</sup> Relying on a Ninth Circuit decision that held that "the combatant activities exception was designed 'to recognize that during wartime encounters[,] no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action,'"<sup>154</sup> the D.C. Circuit held that the same should be true for private military contractors.<sup>155</sup> "[I]t is the imposition *per se* of the state or foreign tort law that conflicts with the FTCA's policy of eliminating tort concepts from the battlefield,"<sup>156</sup> Judge Silberman explained. Thus, the D.C. Circuit articulated the principle of "battlefield preemption," i.e., that "the federal government occupies the field when it comes to warfare, and its interest in combat is always 'precisely contrary' to the imposition of a non-federal tort duty."<sup>157</sup>

Judge Garland sharply dissented, identifying two central flaws in the majority's analysis. First, as he explained:

*Boyle* has never been applied to protect a contractor from liability resulting from the contractor's violation of federal law and policy. And there is no dispute that the conduct alleged, if true, violated both. Hence, these cases are not "within the area where the policy

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148. *Minneci v. Pollard*, 132 S. Ct. 617 (2012).

149. 580 F.3d 1 (D.C. Cir. 2009), *cert. denied*, 131 S. Ct. 3055 (2011).

150. *Id.* at 6.

151. See 28 U.S.C. § 2680(j) (2006) (exempting from liability "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war").

152. *Saleh*, 580 F.3d at 6.

153. *Id.* at 6 & n.3.

154. See *id.* at 7 (alteration in original) (quoting *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992)).

155. *Id.* at 7–8.

156. *Id.* at 7.

157. *Id.* (citing *Boyle v. United Techs. Corp.*, 487 U.S. 500, 500 (1988)).

of the ‘discretionary function’ would be frustrated,” and they present no “significant conflict” with federal interests. Preemption is therefore not justified under *Boyle*.<sup>158</sup>

Second, and as significantly, *Boyle*’s analysis centered both textually and analytically on the FTCA’s discretionary function exception—and not on the general idea that preemption could be derived from any or all of the FTCA’s statutory exceptions.<sup>159</sup> Otherwise, as Judge Garland suggested, “there is no reason to stop there. The FTCA’s exceptions are not limited to discretionary functions and combatant activities . . . . Once we depart from the limiting principle of *Boyle*, it is hard to tell where to draw the line.”<sup>160</sup> Nevertheless, despite the unusual (and strident) dissent from Judge Garland, along with a surprisingly equivocal amicus brief from the U.S. government respecting certiorari,<sup>161</sup> the Supreme Court denied certiorari in *Saleh*.<sup>162</sup>

Perhaps emboldened by the denial of certiorari in *Saleh*, the Fourth Circuit subsequently relied heavily on the D.C. Circuit’s analysis in throwing out another pair of state-law tort suits also arising out of Abu Ghraib. Thus, after holding in *Al-Quraishi v. L-3 Services, Inc.*<sup>163</sup> that rejection of a *Boyle*-like defense was subject to an immediate interlocutory appeal under the collateral order doctrine,<sup>164</sup> a divided panel of the Court of Appeals followed *Saleh* in *Al Shimari v. CACI International, Inc.*<sup>165</sup> After extensively recounting the D.C. Circuit’s analysis, Judge Niemeyer held that “[t]he uniquely federal interest in conducting and controlling the conduct of war, including intelligence-gathering activities within military prisons, thus is simply incompatible with state tort liability in that context.”<sup>166</sup> As if the point were not sufficiently clear, Judge Niemeyer concluded with the

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158. *Id.* at 23 (Garland, J., dissenting) (footnote omitted) (citations omitted).

159. *See id.* One might also object that the FTCA exception is not for *all* military activities, but rather for “combatant” activities. So construed, it may not even be clear that, had the same claims been brought under the FTCA against U.S. servicemembers, the exception would have barred relief.

160. *Id.*

161. In a brief invited by the Supreme Court, the Obama Administration took fairly substantial issue with much of the D.C. Circuit’s analysis, but nevertheless recommended that certiorari be denied given the narrowness of the claims and the lack of a circuit split. *See* Brief for the United States as Amicus Curiae, *Saleh v. Titan Corp.*, 131 S. Ct. 3055 (2011) (No. 09-1313), 2011 WL 2134985, at \*11–13.

162. 131 S. Ct. at 3055.

163. 657 F.3d 201 (4th Cir. 2011), *vacated sub nom.* *Al Shimari v. CACI Int’l, Inc.*, No. 10-1891, 2012 WL 1656773 (4th Cir. May 11, 2012) (en banc).

164. *Id.* at 205.

165. 658 F.3d 413 (4th Cir. 2011), *vacated*, No. 10-1891, 2012 WL 1656773 (4th Cir. May 11, 2012) (en banc).

166. *Id.* at 419–20.

observation that “[w]hat we hold is that conduct carried out during war and the effects of that conduct are, for the most part, not properly the subject of judicial evaluation,”<sup>167</sup> and then penned a separate concurrence suggesting that, even if *Saleh* was wrongly decided, the political question doctrine would bar recovery.<sup>168</sup>

Judge King, who dissented from the recognition of interlocutory appellate jurisdiction in *Al-Quraishi*, dissented on the merits in *Al Shimari*, largely reprising Judge Garland’s dissent from *Saleh*.<sup>169</sup> The plaintiffs then sought rehearing en banc, this time with the support of the Obama Administration.<sup>170</sup> And on May 11, 2012, the en banc Fourth Circuit held by an 11–3 vote that the Court of Appeals in fact *lacked* interlocutory appellate jurisdiction over the two district court decisions denying the contractors’ motions to dismiss, remanding to allow the district court to proceed to discovery and summary judgment on the merits.<sup>171</sup> At the same time, the Court of Appeals expressed no view on the merits (including the *Boyle* preemption question)<sup>172</sup>—and several of the judges in the majority hinted in concurring opinions that they were sympathetic to the contractors’ defenses.<sup>173</sup>

What is telling about both *Saleh* and the (now vacated) panel decision in *Al Shimari* is how dramatically they differ from other applications of *Boyle* in the circuit courts, even after September 11. As with the pre-September 11 jurisprudence surveyed above, other post-September 11 cases have stuck to the “narrow” understanding of *Boyle*—as only applying in cases implicating the “discretionary function” exception at most, and even then, only comfortably in cases arising out of products liability.<sup>174</sup> Thus, whereas the *Bivens* jurisprudence reveals the recognition of a new kind of “special factor” against a backdrop in which more and more special factors have been

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167. *Id.* at 420.

168. *See id.* at 420–25 (Niemeyer, J., concurring separately).

169. *Id.* at 427–36 (King, J., dissenting).

170. *See* Brief for the United States as Amicus Curiae, *Al Shimari v. CACI Int’l, Inc.*, Nos. 09-1335, 10-1891, 10-1921 (4th Cir. May 11, 2012) (en banc), 2012 WL 123570.

171. *Al Shimari v. CACI Int’l, Inc.*, No. 10-1891, 2012 WL 1656773, at \*13 (4th Cir. May 11, 2012) (en banc).

172. *See, e.g., id.* at \*10 n.14.

173. *See id.* at \*13 (Duncan, J., concurring). *But see id.* at \*14 (Wynn, J., concurring) (emphasizing that the jurisdictional dismissal intimated no opinion whatsoever on the merits).

174. *See, e.g., In re Katrina Canal Breaches Litig.*, 620 F.3d 455, 460–61 (5th Cir. 2010) (looking only at whether *Boyle*’s three conditions are met in the product liability context).

identified,<sup>175</sup> the *Boyle* jurisprudence reflects a categorical and fundamental expansion of a previously circumscribed doctrinal rule, grounded in, but hardly confined to, amorphous national security considerations.

### C. *The Political Question Doctrine*

As Judge Niemeyer's concurrence in the original panel decision in *Al Shimari* suggested,<sup>176</sup> the political question doctrine has also become an increasingly prominent defense in post-September 11 national security cases. And yet, because the political question doctrine has always fared better in the lower courts than in the Supreme Court,<sup>177</sup> it is more difficult to ascertain whether, in this context, the uptick in political question cases can be ascribed to unique national security considerations, or rather as part of a more general pattern.

Consider in this regard the litigation in *El-Shifa Pharmaceutical Industries Co. v. United States*.<sup>178</sup> After the U.S. government destroyed a Sudanese pharmaceutical plant in 1998, the government claimed in various statements that it had neutralized a potential chemical weapons facility.<sup>179</sup> The owner of the plant, who maintained his innocence, brought two separate suits: a takings claim arising out of the destruction of his property, and an FTCA claim premised on the allegedly defamatory nature of the government's public statements.<sup>180</sup> In 2004, the Federal Circuit dismissed the takings claim, relying on the political question doctrine.<sup>181</sup> Because the "enemy property" doctrine would bar recovery if the plant was in fact a chemical weapons factory,<sup>182</sup> the Court of Appeals reasoned that "the

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175. See *supra* Part II.A (exploring the Court's skepticism toward new *Bivens* remedies as demonstrated by its recognition of new "special factors").

176. See *Al Shimari*, 658 F.3d at 420–25 (Niemeyer, J., concurring separately) (applying the *Baker* factors to the conduct of military contractors in Iraq).

177. Compare *Boumediene v. Bush*, 553 U.S. 723, 744 (rejecting the government's argument that questions of sovereignty are subject to the political question doctrine), with *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842–43 (D.C. Cir. 2010) (en banc) (dismissing suit on political question doctrine grounds because "[a] plaintiff may not . . . clear the political question bar simply by 'recasting foreign policy and national security questions in tort terms'" (quoting *Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005))), *cert. denied*, 131 S. Ct. 997 (2011), and *Schroder v. Bush*, 263 F.3d 1169, 1173 (10th Cir. 2001) (affirming application of political question doctrine to dismiss farmers' suit requesting that the government maintain certain favorable market conditions).

178. 607 F.3d 836 (D.C. Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 997 (2011).

179. *Id.* at 838.

180. *Id.* at 839–40.

181. *Id.* at 839.

182. *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1355–56 (Fed. Cir. 2004); see also Stephen I. Vladeck, *Enemy Aliens, Enemy Property, and Access to the Courts*,

Constitution, in its text and by its structure, commits to the President the power to make extraterritorial enemy property designations such as the one made regarding the appellants' Plant.<sup>183</sup> In other words, the Constitution committed to the President the unreviewable right to be wrong in targeting overseas enemy property. The Supreme Court denied certiorari.<sup>184</sup>

As for the defamation claim, the en banc D.C. Circuit took a somewhat more nuanced approach in 2010, but nevertheless rejected it under the political question doctrine.<sup>185</sup> As Judge Griffith explained in writing for the en banc majority, "[t]he political question doctrine bars our 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>186</sup> Thus,

[t]he case at hand involves the decision to launch a military strike abroad . . . . The law-of-nations claim asks the court to decide whether the United States' attack on the plant was "mistaken and not justified." The defamation claim similarly requires us to determine the factual validity of the government's stated reasons for the strike. 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>187</sup>

Like the Federal Circuit, then, the D.C. Circuit concluded that the Constitution contains a textually demonstrable commitment of such decision-making power to the political branches. And as in the Federal Circuit case, the Supreme Court denied certiorari.<sup>188</sup>

But whether such analysis is convincing in the context of U.S. military operations overseas, lower courts have also relied on the political question doctrine to bar claims against contractors. For example, the same day as the panel decided *Al-Quraishi* and *Al Shimari*, the Fourth Circuit relied on the political question doctrine to throw out a U.S. servicemember's claim that he was injured due to the negligence of a government contractor.<sup>189</sup> Writing for a

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11 LEWIS & CLARK L. REV. 933 (2007) (providing background on the "enemy property" doctrine and its application in *El-Shifa*).

183. *El-Shifa*, 378 F.3d at 1367.

184. 545 U.S. 1139, 1139 (2005).

185. *See El-Shifa*, 607 F.3d at 838.

186. *Id.* at 842.

187. *Id.* at 844.

188. 131 S. Ct. 997 (2011).

189. *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 403 (4th Cir.

unanimous panel (at least as to the judgment) in *Taylor v. Kellogg Brown & Root Services, Inc.*,<sup>190</sup> Judge King held that such a claim could not go forward because “an analysis of [the defendant’s] contributory negligence defense would ‘invariably require the Court to decide whether . . . the Marines made a reasonable decision’ in seeking to install the wiring box to add another electric generator at the Tank Ramp”—without which the plaintiff would not have been injured by the contractor.<sup>191</sup> That is to say, the political question doctrine barred adjudication of claims against contractors, at least where the contractor was operating under the military’s control<sup>192</sup> and where “national defense interests were closely intertwined with the military’s decisions governing [the contractor’s] conduct.”<sup>193</sup>

In so holding, the Fourth Circuit relied heavily on an earlier decision by the Eleventh Circuit rejecting an analogous claim against a government contractor by the wife of a servicemember who was seriously injured in an accident in Iraq caused by an employee.<sup>194</sup> As the Court of Appeals explained in *Carmichael v. Kellogg, Brown & Root Services, Inc.*<sup>195</sup>:

Because the circumstances under which the accident took place were so thoroughly pervaded by military judgments and decisions, it would be impossible to make any determination regarding [the defendants’] negligence without bringing those essential military judgments and decisions under searching judicial scrutiny. Yet it is precisely this kind of scrutiny that the political question doctrine forbids.<sup>196</sup>

To be fair, the decisions in both *Taylor* and *Carmichael* went out of their way carefully to explain why the specific claims at issue *would* necessarily bring “military judgments and decisions under searching judicial scrutiny.”<sup>197</sup> Indeed, the Fifth Circuit reversed and remanded the dismissal of analogous cases on the ground that it was *not* clear whether that would inevitably be true.<sup>198</sup> Thus, these political question cases turn on remarkably narrow terms—claims against government contractors arising out of foreign military operations

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2011).

190. *Id.*

191. *Id.* at 411–12.

192. *See id.* at 411 (assessing the extent to which the government contractor was under the military’s control).

193. *Id.*

194. *Id.* at 410.

195. 572 F.3d 1271 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3499 (2010).

196. *Id.* at 1282–83.

197. *Id.* at 1283.

198. *Lane v. Halliburton*, 529 F.3d 548, 565 (5th Cir. 2008).

that necessarily implicate particular military decisions.

At the same time, it is difficult to identify a Supreme Court decision endorsing the underlying principle that the political question doctrine categorically precludes judicial second-guessing of sensitive military judgments and decisions, either directly or insofar as they affect the conduct of military contractors. To the contrary, legion are decisions emphasizing that *not* all cases involving the military are barred by the political question doctrine. Therefore, even if the reasoning of these political question decisions is specific and their application limited, they still reflect a fundamental misconception of the underlying principles.<sup>199</sup> Perhaps *El-Shifa* came closest to a convincing explanation—that the concern is with judicial interference with the *actual* conduct of military operations overseas.<sup>200</sup> But if that is the review that the political question doctrine forbids, the *Taylor* and *Carmichael* courts appear to have skipped a few steps by failing to explain in detail how specific combat decisions would necessarily be called into question simply by allowing civil litigation to go forward.

Finally, it is worth emphasizing that similar carelessness concerning the political question doctrine can be found in non-national security decisions by post-September 11 circuit courts, as well. In *Zivotofsky v. Secretary of State*,<sup>201</sup> a divided panel of the D.C. Circuit threw out a lawsuit in which U.S. citizen parents sought to enforce their statutory right to have the passport of their child born in Jerusalem read “Jerusalem, Israel.” Because the statute conflicts with executive branch policy, which does not recognize Jerusalem as the capital of Israel, the State Department refused to comply.<sup>202</sup> The parents promptly sued, only to have their claims thrown out. Writing for the panel majority in the D.C. Circuit, Judge Griffith held that the parents’ claims were foreclosed by the political question doctrine because the President’s “recognition” power was exclusive, and therefore unreviewable.<sup>203</sup> Concurring in the judgment, Judge Edwards agreed that the President’s recognition power was exclusive,

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199. See, e.g., *id.* at 562 (determining that the political question doctrine did not bar suit against a government contractor, despite its military affiliations, because the plaintiffs pled a plausible set of facts regarding fraud and misrepresentation that would not require the court to question the Army’s role).

200. See *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (en banc) (articulating concerns about the judicial branch second-guessing the strategic decision to deploy troops), *cert. denied*, 131 S. Ct. 997 (2011).

201. 571 F.3d 1227 (D.C. Cir. 2009), *vacated*, 132 S. Ct. 1421 (2012).

202. See *id.* at 1228–30 (explaining why the political question doctrine extended to the Executive’s power to recognize foreign governments).

203. *Id.* at 1231–32.

but concluded that, as a result, the statute in question was necessarily unconstitutional—not that the courts lacked the power to say so.<sup>204</sup>

On certiorari, the Supreme Court agreed with Judge Edwards, ruling 8-1 that the political question doctrine did *not* bar the Zivotofsky's claim.<sup>205</sup> As Chief Justice Roberts explained for the majority, “determining the constitutionality of § 214(d) involves deciding whether the statute impermissibly intrudes upon Presidential powers under the Constitution. . . . Either way [that question is answered], the political question doctrine is not implicated.”<sup>206</sup> In an important and incisive concurrence, Justice Sotomayor agreed, elaborating that “it is not whether the evidence upon which litigants rely is common to judicial consideration that determines whether a case lacks judicially discoverable and manageable standards. Rather, it is whether that evidence in fact provides a court a basis to adjudicate meaningfully the issue with which it is presented. The answer will almost always be yes . . . .”<sup>207</sup>

Other examples of lower courts overzealously applying the political question doctrine after September 11 abound. But because they run the gamut,<sup>208</sup> it is difficult to draw conclusions from them other than that, as was true before September 11, the lower courts seem far more positively disposed toward the political question doctrine than the Supreme Court. To that end, one might dismiss the newfound uses of the doctrine in national security cases as further examples of the deeper underlying trend. Yet, the increasingly uncritical view that claims implicating almost any military judgments thereby trigger the political question doctrine may suggest that, as with the *Bivens* and contractor preemption cases noted above, these decisions constitute a new, though modest, departure from extant precedent.

#### D. *Qualified Immunity*

I have saved the most voluminous body of law for last. Even assuming the existence of a cause of action and the lack of categorical defenses to recovery in civil suits arising out of

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204. See *id.* at 1233–45 (Edwards, J., concurring) (establishing that the political question doctrine was inapplicable given the “commonplace” issues of statutory construction).

205. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

206. *Id.* at 1428.

207. *Id.* at 1435 (Sotomayor, J., concurring in part and concurring in the judgment).

208. See, e.g., *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938 (5th Cir.) (dismissing a class action brought by gasoline retailers alleging that national oil production companies were engaged in a price-fixing conspiracy on ground that claims were barred by political question doctrine), *cert. denied*, 132 S. Ct. 366 (2011).

counterterrorism or other national security policies, a plaintiff must still demonstrate not just that his rights were violated, but that the unlawfulness of the defendant's conduct should have been apparent in light of clearly established law.<sup>209</sup> As noted above, this was the D.C. Circuit's basis for rejecting liability in *Rasul I*,<sup>210</sup> and one of its two bases for doing so in *Rasul II*.<sup>211</sup> In *Ashcroft v. al-Kidd*,<sup>212</sup> the one damages suit challenging post-September 11 counterterrorism policies in which the Supreme Court has reached the merits, qualified immunity was the ultimate ground for denying review.<sup>213</sup> In light of the novelty of the threat the country has faced and the policies the government has undertaken to face that threat, it can hardly be surprising that a defense that forecloses liability in cases where the law was unsettled has played a particularly central role in post-September 11 litigation.

Still, two developments in qualified immunity jurisprudence bear mention. First, in a case having nothing to do with national security, the Supreme Court in *Pearson v. Callahan*<sup>214</sup> unanimously disposed of the *Saucier* sequence in light of practical, procedural, and substantive concerns raised by lower court judges.<sup>215</sup> As Justice Alito wrote for the Court:

[W]hile the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.<sup>216</sup>

Although the Court still stressed that the *Saucier* sequence "is often beneficial,"<sup>217</sup> such reasoning presupposes that lower courts will waste their time reaching holdings that are (1) constitutionally grounded and (2) no longer necessary to the result. Not surprisingly, such opinions have been few and far between since *Pearson*.

As a result, because qualified immunity will preclude recovery in

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209. See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (explaining that it is not enough that an action has previously been held to be unlawful; rather, the unlawfulness must be apparent).

210. See *supra* note 117 and accompanying text.

211. See *supra* notes 115–116 and accompanying text.

212. 131 S. Ct. 2074 (2011).

213. See *id.* at 2083–85 (discussing Ashcroft's qualified immunity from a potential Fourth Amendment violation).

214. 555 U.S. 223 (2009).

215. *Id.* at 234–35.

216. *Id.* at 236.

217. *Id.*

cases raising novel challenges to governmental counterterrorism policies (whether because the policy is novel or because the plaintiff's legal claim is), the practical effect of *Pearson* is that such novelty will seldom be disturbed. For example, suppose a plaintiff challenged a novel governmental policy as applied to him at  $T_0$ . At  $T_1$ , the relevant court decides that the defendant is entitled to qualified immunity because the unlawfulness of his conduct was not apparent in light of clearly established law. Under *Saucier*, that holding would come alongside judicial articulation of the relevant law going forward (including perhaps a holding that the policy is unlawful). Under *Pearson* it likely will not. If a different plaintiff is now subjected to the same treatment at  $T_2$ , qualified immunity will *again* bar recovery at  $T_3$ . In contrast, if the court at  $T_1$  had articulated a forward-looking rule as *Saucier* required, then the law *would* have been clearly established at  $T_2$  such that the plaintiff should now be able to recover at  $T_3$ .<sup>218</sup>

A good example of this problem in practice is Jose Padilla's *Bivens* suit against John Yoo, alleging that the opinions Yoo wrote while serving in the Justice Department's Office of Legal Counsel directly contributed to Padilla's mistreatment while in military custody. In May 2012, the Ninth Circuit dismissed Padilla's suit based on its conclusion that Yoo was entitled to qualified immunity.<sup>219</sup> In particular, the Ninth Circuit so held because (1) it was not clearly established from 2001 to 2003 that "cruel, inhuman, or degrading treatment" (CIDT) shocks the conscience; and (2) it was similarly not clearly established during the same time period whether the specific mistreatment Padilla alleged was torture (which *did* clearly shock the conscience) or CIDT. And yet, despite its detailed analysis of the state of the law from 2001 to 2003, and its apparent recognition of how close a case Padilla's was, the panel pretermitted its analysis after holding that the relevant law was not clearly established between 2001 and 2003, expressly invoking *Pearson* as justifying its decision to set no precedent going forward about the state of the law today.<sup>220</sup>

Of course, this problem is hardly confined to national security cases.<sup>221</sup> As the *Padilla* litigation demonstrates, however, what

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218. For more on this problem, see Stephen I. Vladeck, *AEDPA, Saucier, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595 (2009) (articulating how *Saucier* could be utilized in post-conviction habeas corpus cases).

219. *Padilla v. Yoo*, No. 09-16478, 2012 WL 1526156 (9th Cir. May 2, 2012).

220. *Id.* at \*15 n.16 ("We have discretion to decide which of the two prongs of qualified immunity analysis to address first. Here, we consider only the second prong." (citation omitted)).

221. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 432 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (stating he "would end the failed

separates national security litigation in this context is the absence of other opportunities for the articulation of forward-looking constitutional principles. Whereas ordinary First, Fourth, Fifth, and Eighth Amendment claims can arise in a number of contexts other than suits for retrospective relief (e.g., in suits for prospective relief or as defenses to criminal prosecutions), there are a vanishingly small set of challenges to national security policies that will be justiciable in those contexts.<sup>222</sup> Thus, the general rule articulated in *Pearson* will wreak particular havoc in the national security context, potentially freezing (or, at a minimum, substantially slowing) the development of constitutional law with regard to the surveillance, detention, and treatment of terrorism suspects.<sup>223</sup>

The second development is less about the order of battle than the substance of qualified immunity analysis. Although courts have historically applied qualified immunity with relative evenhandedness to government officers at all levels of service, a provocative concurrence by Justice Kennedy in the *al-Kidd* case suggests that this might perhaps be incorrect in national security litigation.<sup>224</sup> As he there explained:

A national officeholder intent on retaining qualified immunity need not abide by the most stringent standard adopted anywhere in the United States . . . [or] guess at when a relatively small set of appellate precedents have established a binding legal rule. If national officeholders were subject to personal liability whenever they confronted disagreement among appellate courts, those officers would be deterred from full use of their legal authority. The consequences of that deterrence must counsel caution by the Judicial Branch, particularly in the area of national security . . . . [N]ationwide security operations should not have to grind to a halt even when an appellate court finds those operations unconstitutional. The doctrine of qualified immunity does not so constrain national officeholders entrusted with urgent responsibilities.<sup>225</sup>

To be sure, Justice Kennedy was writing only for himself in this passage. Still, if this is more than just a fleeting observation, it might suggest that unique national security concerns do play (and perhaps

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*Saucier* experiment now" in a high school freedom of speech case).

222. See, e.g., *Al Shimari v. CACI Int'l, Inc.*, 658 F.3d 413, 419 (4th Cir. 2011) (suggesting that the very purposes of tort law conflict with the pursuit of warfare), *vacated*, No. 10-1891, 2012 WL 1656773 (4th Cir. May 11, 2012) (en banc).

223. See Vladeck, *supra* note 11, at 275–78.

224. See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2086–87 (2011) (Kennedy, J., concurring).

225. *Id.* at 2087 (citations omitted).

have been playing) a role in judicial assessment of qualified immunity. At a minimum, Justice Kennedy's concurrence suggests that at least some jurists are far more willing to find no liability in national security cases than they would in non-national security cases raising comparable constitutional claims. Unless such holdings were based on the conclusion that the substantive law was different in the national security context, it would be hard to see how they could be consistent with the broader understanding of immunity doctrine.

CONCLUSION: TAKING STOCK OF THE NEW NATIONAL SECURITY  
CANON

Whatever its full contours, the above analysis has hopefully been persuasive as to the existence of a new national security canon—a body of jurisprudence in which distinct (and sometimes poorly articulated) national security concerns have prompted courts to disfavor relief, even when either: (1) relief should otherwise have been available; or (2) other settled (and topically neutral) doctrines would likely have foreclosed relief in any event. Thus, where federal officer defendants are concerned, courts have relied heavily on the absence of *Bivens* remedies, with qualified immunity as an available fallback. And where the defendants are private contractors operating under color of federal law, the *Bivens* cases have focused on the availability of state-law remedies, whereas the state-law tort cases have focused on the unique federal interest justifying preemption. Ultimately, given the heads-we-win, tails-you-lose quality to this body of decision-making, it is difficult to rebut the conclusion that, at least at the circuit level, more is going on than just faithful application of existing precedent. The question then becomes what to make of this development.

In the short-term, this jurisprudential pattern suggests that victims of governmental overreaching in the conduct of national security policy will primarily have to turn to the political branches for redress, since retrospective judicial remedies will likely be unavailing. Such a development might put only that much more pressure on the growing body of scholarship suggesting that, especially during national security crises, meaningful checks and balances can be found internally within the Executive Branch. As significantly, such case law might eventually force the Supreme Court to reassert its role in these cases in a manner that gives these newfound doctrinal accommodations a far narrower compass than they might otherwise enjoy. Indeed, given that most of the case law identified in Part II arises out of a minority of jurisdictions (the Second, Fourth,

Eleventh, and D.C. Circuits), one response might be that these circuits are merely outliers whose extreme views have distorted the state of play.

But if what in fact has taken place over the last decade is a testament to a longer-term pattern, one that neither the political branches nor the Supreme Court disrupt in the near future, then we must confront a more alarming possibility: that as these “national security”-based exceptions increasingly become the rule in contemporary civil litigation against government officers—whether with regard to new “special factors” under *Bivens*, new bases for contractor preemption under *Boyle*, proliferation of the political question doctrine, or even more expansive reliance upon the qualified immunity defense—the line between the unique national security justifications giving rise to these cases and ordinary civil litigation will increasingly blur. Thus, wherever one comes down on the virtues and vices of this new national security canon, perhaps the most important point to take away is the need to carefully cabin its scope. Otherwise, exceptions articulated in the guise of such unique fact patterns could serve more generally to prevent civil liability for government misconduct and to thereby dilute the effectiveness of judicial review as a deterrent for any and all unlawful government action—not just those actions undertaken in ostensibly in defense of the nation.