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# THE DEMISE OF MERITS-BASED ADJUDICATION IN POST-9/11 NATIONAL SECURITY LITIGATION

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## ABSTRACT

In times like these, when the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite alarm, it is the duty of a court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. The worst of precedents may be established from the best of motives. We ought to be upon our guard lest our zeal for the public interest lead us to overstep the bounds of the law and the constitution. . . . The constitution was made for times of commotion. In the calm of peace and prosperity there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude.<sup>1</sup>

*Courts faced with civil suits seeking remedies against a bevy of alleged abuses in the conduct of post-9/11 U.S. counterterrorism policies have generally refused to provide relief—and usually not because of a determination that the underlying government conduct was lawful, but rather because of obstacles that, in the courts’ view, barred them from even reaching the merits of the plaintiffs’ claims. As a result, not only have few victims of post-9/11 government abuses received any judicial redress, but remarkably little new law has actually been generated in these cases—either in majority opinions or in separate opinions, which have been few and far between in these cases.*

*The dearth of precedent has had the effect of both (1) leaving some of the most important statutory and constitutional questions about the permissible scope of U.S. counterterrorism policies unanswered; and (2) failing to provide a*

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

*meaningful deterrent against the future recurrence of some of the most troubling abuses of the past decade and a half. More fundamentally, the paucity of merits-based judicial review has also increased the perception—if not the reality—that courts are not as competent to handle lawsuits implicating national security affairs and that, as such, disputes over U.S. counterterrorism policy ought to be left to resolution by the political branches.*

*This Article seeks both to document this phenomenon and to push back against it. After summarizing the dozen different obstacles that courts have relied upon in declining to reach the merits of challenges to post-9/11 counterterrorism policies, the Article steps back and offers a more theoretical reflection on the appropriate contours of judicial remedies for counterterrorism abuses, considering a series of choices that should help illuminate what a “blue sky” remedial regime might look like. Finally, in light of those considerations, this Article offers suggestions for modest reforms that might help inch us toward such a normatively optimal regime—and provides an assessment of their relative strengths and weaknesses.*

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## I. INTRODUCTION

One of the most troubling structural features of contemporary U.S. counterterrorism policies has been the near-total absence of meaningful judicial review—with remarkably few rulings on the lawfulness of either the government’s key programs or the many alleged abuses arising out of their implementation.<sup>2</sup> With a handful of narrowly circumscribed exceptions, courts faced with civil suits seeking remedies against allegedly unlawful government surveillance, detention, interrogation, rendition, and watch-listing, among myriad other initiatives, have refused to provide relief—and usually not because of a determination that the underlying government conduct was lawful, but rather because of obstacles that, in the courts’ views, barred them from even reaching the merits of the plaintiffs’ claims.<sup>3</sup>

As a result, not only have few victims of post-9/11 government abuses received any judicial redress, but remarkably little new law has actually been generated in these cases—either in majority opinions or in separate

2. *See infra* Part II.

3. *See, e.g.,* *Lebron v. Rumsfeld*, 670 F.3d 540, 549 (4th Cir. 2012); *infra* Part II.

opinions, which have been notably few and far between in these cases.<sup>4</sup> The dearth of precedent has had the effect of both (1) leaving some of the most important statutory and constitutional questions about the permissible scope of U.S. counterterrorism policies unanswered and (2) failing to provide a meaningful deterrent against the future recurrence of some of the most troubling abuses of the past decade and a half.

More fundamentally, the paucity of merits-based judicial review<sup>5</sup> has also increased the perception—if not the reality—that courts are not competent to handle lawsuits implicating national security affairs, and that, as such, disputes over U.S. counterterrorism policy ought to be left to resolution by the political branches. As one federal appellate court explained in 2012 in dismissing a damages suit brought by a U.S. citizen held in military detention for nearly four years, “[J]udicial review of military decisions would stray from the traditional subjects of judicial competence.”<sup>6</sup> Thus, as Judge J. Harvie Wilkinson III explained, “[T]he Constitution delegates authority over military affairs to Congress and to the President as Commander in Chief. It contemplates no comparable role for the judiciary.”<sup>7</sup> And yet, for obvious reasons, the political branches are ill-suited to protect individual rights against claims of national security, all the more so when the putative victims belong to under- (or un-)represented minority groups.

This Article seeks both to document this phenomenon and to push back against it. Part II begins by walking through the dozen different obstacles that courts have relied upon in declining to reach the merits of challenges to post-9/11 counterterrorism policies, before briefly noting the few cases that have been resolved on the merits—and offering some reflections on the key features that may have made those cases different. To that end, Part II looks separately at structural limits on civil litigation (such as standing, the political question doctrine, mootness, and jurisdiction-stripping); procedural obstacles to civil litigation (such as the absence of a cause of action, heightened pleading standards, and abstention doctrines); and defenses to civil litigation (including sovereign immunity, official immunity, the state secrets privilege, and the newly minted doctrine of “battlefield preemption”).

Critically, as Part II concludes, although some of these doctrines are

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4. See *infra* Parts II.A–C.

5. See *infra* Part II.D.

6. *Lebron*, 670 F.3d at 548.

7. *Id.*

trans-substantive, and thus, are barriers to merits-based adjudication in all civil litigation against the government, many of them either uniquely apply to, or have been uniquely stretched to encompass, challenges to national security policies. Thus, the phenomenon identified in Part II is much more than just the application of a more general trend against merits-based civil adjudication to the specific subset of national security suits; rather, it is the very real creation of what I have elsewhere described as “the new national security canon.”<sup>8</sup>

Whereas Part II is meant to describe the current state of play, Part III will step back and offer a more theoretical reflection on the appropriate contours of judicial remedies for counterterrorism abuses, considering a series of choices that should help illuminate what a “blue sky” remedial regime might look like. To that end, Part III asks—and attempts to answer—five fundamental questions about the optimal shape of civil remedies in the national security sphere:

- What kind of relief should optimal national security civil remedies provide?
- Against which defendants should such relief be available?
- Should such relief be judge-made or expressly provided by statute?
- Should such relief be accompanied by special procedural or evidentiary rules, or both, or made available in special forums?
- Do we need new substantive law in order to have effective civil remedies?

Finally, in light of the answers Part III articulates to these questions, Part IV will offer suggestions for modest reforms that might help inch us toward such a normatively optimal regime—and will provide an assessment of their relative strengths and weaknesses. As D.C. Circuit Chief Judge William Cranch wrote early in the Republic, “Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude.”<sup>9</sup> To restore this understanding of the judicial role, Part IV identifies a number of potential elements to a hypothetical reform agenda, including modest statutory changes, improved judicial education,

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8. See generally Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295 (2012) [hereinafter Vladeck, *National Security Canon*].

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

and an increased focus in future judicial nominations on the unique remedial powers and responsibilities of the federal courts—especially in national security litigation.

## II. OBSTACLES TO POST-9/11 U.S. COUNTERTERRORISM LITIGATION

Even by conservative estimates, there have been hundreds of civil lawsuits brought over the past 14-plus years challenging some aspect of post-9/11 national security or counterterrorism policies.<sup>10</sup> In avoiding resolution of many—if not most—of these suits on the merits, federal courts have relied upon at least a dozen different non-substantive obstacles to relief.<sup>11</sup> Before highlighting some of the rare examples of merits-based post-9/11 civil

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10. See, e.g., Marguerite Rigoglioso, *Civil Liberties and Law in the Era of Surveillance*, STAN. LAW. (Nov. 13, 2014), <http://law.stanford.edu/stanford-lawyer/articles/civil-liberties-and-law-in-the-era-of-surveillance/> (discussing various concerns with counterterrorism policies and legal issues associated with those policies, and summarizing and discussing responses to those policies, including lawsuits); cf. Mathieu Deflem & Shannon McDonough, *The Fear of Counterterrorism: Surveillance and Civil Liberties Since 9/11*, 52 GLOBAL SOC'Y 70, 75–76 (2015) (analyzing claims against the FBI for alleged civil liberties violations).

11. One recurring *substantive* obstacle to relief in these cases has been the extent to which the Constitution does not protect non-citizens lacking substantial voluntary connections to the United States—including most non-citizens outside the territorial United States. Although the Supreme Court in *Boumediene v. Bush*, 553 U.S. 723, 763–64 (2008), seemed to eschew bright-line categorical tests for assessing the extraterritorial scope of constitutional protections, courts in *Boumediene*'s aftermath have generally hewed to the Court's earlier rulings in *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and have thereby rejected the applicability of such protections—or, at the very least, any claim that their application to non-citizens outside the territorial United States was “clearly established” at the time of the alleged constitutional violation. For a particularly telling case in point, see *Hernandez v. United States*, 785 F.3d 117, 120–21 (5th Cir. 2015) (en banc) (per curiam), *petition for cert. filed*, No. 15-118 (U.S. July 23, 2015).

For better or worse, however, judicial rulings rejecting claims for relief on the ground that the relevant constitutional protection simply does not apply are quintessential “merits” rulings since they are tantamount to a conclusion that the Constitution was not in fact violated by the defendant's conduct. Thus, they are beyond the scope of this Article—which is, as explained above, focused on obstacles to courts even *reaching* the merits in post-9/11 civil litigation. This caveat also explains why this Article says very little about post-9/11 decisions that narrowly construe exemptions to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b) (2012), *amended by* FOIA Improvement Act of 2016, Pub. L. 114-185, § 2, 130 Stat. 538, 538–44 (June 30, 2016) (to be codified at 5 U.S.C. § 101 note), since such decisions are necessarily (if problematically) rejecting the plaintiffs' FOIA claims on their merits.

adjudication, this Part introduces the 12 obstacles courts have relied upon most often, grouping them into three rough categories: structural limits on civil litigation, procedural obstacles to civil litigation, and defenses to civil litigation.

### *A. Structural Limits on Civil Litigation*

Structural limits on civil litigation are constraints on the underlying power of the federal courts—their subject-matter jurisdiction—over the dispute. Although some of these limits are nevertheless judge-made in the sense that their origins can be traced to judicial decisions rather than specific constitutional or statutory text, they all at least derive from constitutional or statutory constraints on judicial power and the settled understanding that “[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”<sup>12</sup> As a result, most structural limits on the federal courts tend to be trans-substantive—and not limited to the specific substantive context (e.g., national security) in which they arise. And yet, as demonstrated below, courts have been especially eager to embrace these limits in post-9/11 national security litigation, oftentimes unnecessarily, if not inappropriately, so.

#### *1. Article III Standing*<sup>13</sup>

“Standing is the determination of whether a specific person is the proper party to bring a matter to the court for adjudication.”<sup>14</sup> Derived from the “case-or-controversy requirement” that the Supreme Court has read into Article III, Section One of the Constitution,<sup>15</sup> the core question that “Article

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12. See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

13. Much of the discussion in this Part derives from Stephen I. Vladeck, *Standing and Secret Surveillance*, 10 ISJLP 551 (2014) [hereinafter Vladeck, *Standing and Secret Surveillance*].

14. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 2.5.1, at 59 (4th ed. 2011).

15. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (discussing derivation of case-or-controversy requirement and requirements of standing); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (“Although we have acknowledged before that ‘the concept of ‘Art. III standing’ has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it,’ certain basic principles have been distilled from our decisions.” (citation omitted)); *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892) (“[Suit] is legitimate only in the last resort, and as a

III standing” investigates is “whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”<sup>16</sup> To that end, the Supreme Court has articulated three requirements plaintiffs must meet to demonstrate Article III standing: “The plaintiff must have [1] suffered or be imminently threatened with a concrete and particularized ‘injury in fact’ that [2] is fairly traceable to the challenged action of the defendant and [3] likely to be redressed by a favorable judicial decision.”<sup>17</sup>

It is familiar sledding that the Supreme Court over the past three decades has increasingly raised the bar plaintiffs must surmount to establish Article III standing, especially in cases seeking to enforce statutory rights without common law analogues (e.g., most environmental litigation).<sup>18</sup> But whereas the Court’s hostility to standing has generally been trans-substantive, it has had an especial impact on challenges to secret government programs.

Thus, in *Clapper v. Amnesty International, USA*,<sup>19</sup> a 5–4 majority rejected the standing of a coalition of attorneys and human rights, labor, legal, and media organizations to challenge section 702 of the Foreign Intelligence Surveillance Act (FISA).<sup>20</sup>

Section 702—the central innovation of the FISA Amendments Act of 2008 (FAA)—provided new statutory authorization for mass electronic surveillance targeting communications of non-U.S. persons reasonably believed to be outside the United States. And although Congress

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necessity in the determination of real, earnest and vital, controversy between individuals.”).

16. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

17. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (citing *Lujan*, 504 U.S. at 560).

18. *See, e.g., Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 107 (1998) (“But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation’s laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.” (citations omitted)); *Lujan*, 504 U.S. at 577–78 (“‘Individual rights,’ . . . do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public.” (citation omitted)); *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (“[B]roadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.”).

19. *Clapper v. Amnesty Int’l USA (Clapper II)*, 133 S. Ct. 1138 (2013).

20. *Id.* at 1142–43, 1145 (citing 50 U.S.C. § 1881a (2012)).

expressly barred the use of section 702 to intentionally target communications by U.S. persons, the plaintiffs in *Clapper* alleged that the surveillance authorized by section 702 made it far more likely that such communications would nevertheless be intercepted.<sup>21</sup> Given that section 702 requires no showing of individualized suspicion before such communications are obtained, the plaintiffs argued that it would therefore be unconstitutional.

In rejecting the plaintiffs' standing to pursue such claims, Justice Alito's opinion for the *Clapper* Court seized upon the secret nature of the alleged governmental surveillance that the plaintiffs sought to challenge. Because such secrecy prevented the plaintiffs from showing that the government's interception of their communications was "certainly impending," they could not establish the injury-in-fact required by the Court's prior interpretations of Article III's case-or-controversy requirement.<sup>22</sup>

Justice Stephen Breyer's dissent, however, highlighted two separate problems with this approach: First, "the surveillance alleged by the plaintiffs 'is as likely to take place as are most future events that commonsense inference and ordinary knowledge of human nature tell us will happen.'"<sup>23</sup> Second, and more significantly, Breyer argued, the majority departed from the Court's prior standing precedents in adopting the "certainly impending" standard.<sup>24</sup>

In his words, "certainty is not, and never has been, the touchstone of standing. The future is inherently uncertain." Instead, "what the Constitution requires is something more akin to 'reasonable probability' or 'high probability.' The use of some such standard is all that is necessary here to ensure the actual concrete injury that the Constitution demands."<sup>25</sup>

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21. These allegations were largely vindicated by Edward Snowden's subsequent disclosures of the PRISM and "upstream" collection programs under section 702. See *Amnesty Int'l USA v. Clapper* (*Clapper I*), 638 F.3d 118, 121–22 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1138 (2013); Glenn Greenwald & Ewen MacAskill, *NSA Prism Program Taps in to User Data of Apple, Google and Others*, *GUARDIAN* (June 7, 2013), <https://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data>.

22. Vladeck, *Standing and Secret Surveillance*, *supra* note 13, at 551–52 (footnotes omitted) (citing *Clapper II*, 133 S. Ct. at 1148–49; *Clapper I*, 638 F.3d at 121).

23. *Id.* at 565–66 (citing *Clapper II*, 133 S. Ct. at 1155, 1160 (Breyer, J., dissenting)).

24. *Clapper II*, 133 S. Ct. at 1160.

25. Vladeck, *Standing and Secret Surveillance*, *supra* note 13, at 566 (citing *Clapper*

In other words, *Clapper*, a quintessential national security case, narrowed Article III standing doctrine a substantial step beyond its previous floor by grafting the “certainly impending” standard onto the injury-in-fact requirement.<sup>26</sup>

To be sure, many victims of government abuses in the conduct of post-9/11 national security and counterterrorism policies will have no difficulty demonstrating that the injury they allege is “certainly impending” (since, in most cases, it will have already happened). But *Clapper* has been good for far more than one train already; the Second Circuit relied upon it to dismiss an effort to challenge the expansive and ambiguous military detention provisions of the Fiscal Year 2012 National Defense Authorization Act,<sup>27</sup> and the D.C. Circuit relied upon it to dismiss a challenge to the government’s bulk phone records program—even though, unlike the surveillance at issue in *Clapper*, there was a far more compelling argument that the plaintiffs in that case had been directly affected.<sup>28</sup> Thus, going forward, *Clapper* could make it exceedingly difficult for any civil plaintiff to challenge either (1) a secret government program or (2) future government action to which they will not necessarily be subjected.<sup>29</sup>

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*II*, 133 S. Ct. at 1160, 1165). “[F]ederal courts frequently entertain actions for injunctions and for declaratory relief aimed at preventing future activities that are reasonably likely or highly likely, but not absolutely certain, to take place. And that degree of certainty is all that is needed to support standing here.” *Clapper II*, 133 S. Ct. at 1160.

26. See *Clapper II*, 133 S. Ct. at 1160, 1165.

27. See *Hedges v. Obama*, 724 F.3d 170, 201, 204–05 (2d Cir. 2013) (vacating permanent injunction).

28. See *Obama v. Klayman*, 800 F.3d 559, 561–62 (D.C. Cir. 2015) (per curiam) (vacating preliminary injunction); *id.* at 563–64 (Brown, J., separate opinion). Despite vacating the preliminary injunction, the court in *Obama v. Klayman* distinguished *Clapper v. Amnesty International USA (Clapper II)*: “[W]here the *Clapper* plaintiffs relied on speculation and conjecture to press their claim, here, plaintiffs offer an inference derived from known facts.” *Id.* at 563–64. Moreover, the D.C. Circuit in *Klayman* appeared to problematically conflate the standard for a preliminary injunction with standing analysis, suggesting that plaintiffs must meet an even higher bar for standing when pursuing preliminary relief. See Steve Vladeck, *Better Never Than Late? The D.C. Circuit’s Problematic Standing Holding in Klayman*, JUST SECURITY (Aug. 28, 2015), <https://www.justsecurity.org/25665/late-d-c-circuits-problematic-standing-holding-klayman/>.

29. For an equivocal counterexample, see *Schuchardt v. President of the United States*, No. 15-3491, 2016 WL 5799656 *passim* (3d Cir. Oct. 5, 2016) (reversing a district court’s denial of standing to challenge section 702 based upon the plausible facts as alleged in the plaintiff’s complaint, but holding open the possibility that jurisdictional discovery would support dismissal).

As significantly, *Clapper* may foreclose the prospect of resolving the constitutional challenges to section 702 in any forum other than a motion to suppress in a criminal case—a context (1) that turns entirely on voluntary decisions by the government to introduce evidence “derived from” section 702 (and thereby force the constitutional question) and (2) in which judges to date have been especially skittish at the prospect of resolving such grave constitutional questions on such case-specific facts.<sup>30</sup> Decisions like *Clapper* thereby not only make it difficult for future plaintiffs to challenge other secret government programs, but they also make it harder for any court to resolve the underlying merits of the constitutional questions raised by the FISA Amendments Act in any context.

## 2. The Political Question Doctrine<sup>31</sup>

Related to, but distinct from, standing is the “political question doctrine,” which “refers to subject matter that the [Supreme] Court deems to be inappropriate for judicial review.”<sup>32</sup> Although it has its origins in *Marbury v. Madison*,<sup>33</sup> in contemporary terms, the political question doctrine is shorthand for two primary but distinct objections to judicial review—either because the Constitution commits resolution of the dispute to other branches of the government or because the claims lack “judicially manageable standards.”<sup>34</sup> And yet, despite the amount of attention the doctrine receives and its prominence in the lower courts, “[t]he political

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30. See, e.g., *United States v. Muhtorov*, No. 12-cr-00033-JLK, slip op. at 1–5 (D. Colo. Nov. 19, 2015). For criticism, see Steve Vladeck, *Section 702, the Fourth Amendment, and Article III: The Muhtorov (Non-)Decision*, JUST SECURITY (Nov. 20, 2015), <https://www.justsecurity.org/27784/section-702-fourth-amendment-article-iii-muhtorov-non-decision/>.

31. Much of the discussion in this Part derives from Stephen I. Vladeck, *War and Justiciability*, 49 SUFFOLK U. L. REV. 47 (2016) [hereinafter Vladeck, *War and Justiciability*].

32. CHEMERINSKY, *supra* note 14, § 2.8.1, at 130.

33. *Marbury v. Madison*, 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.”).

34. 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 (El-Shifa II)*, 607 F.3d 836, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring in the judgment) (noting that, over the past 50 years, the Court has exclusively relied on these two *Baker* factors in applying the political question doctrine).

question doctrine has occupied a more limited place in the Supreme Court's jurisprudence than is sometimes assumed," as D.C. Circuit Judge Brett Kavanaugh recently explained.<sup>35</sup> Indeed, only twice in the past half-century has the Court relied upon the existence of a "textually demonstrable commitment" to another branch to dismiss a case on political question grounds,<sup>36</sup> and the cases involving the absence of "judicially manageable standards" have generally fallen within the same subject-matter: challenges to "partisan" gerrymandering.<sup>37</sup>

Notwithstanding the Supreme Court's repeated admonitions concerning the narrowness of the political question doctrine,<sup>38</sup> lower courts have applied the doctrine to a steadily increasing array of post-9/11 challenges to counterterrorism policies, especially those involving the military or private military contractors.<sup>39</sup>

For example, in *Wu Tien Li-Shou v. United States*, the U.S. Court of Appeals for the Fourth Circuit threw out a tort suit arising out of the U.S. Navy's allegedly wrongful killing of an innocent Taiwanese fisherman and its intentional destruction of his boat during a counter-piracy operation in the Gulf of Aden. The court concluded that the case presented a non-justiciable political question "[b]ecause allowing this action to proceed would thrust courts into the middle of a sensitive multinational counter-piracy operation and force courts to second-guess the conduct of a military engagement."

Five months later in *Shimari v. CACI Premier Technology, Inc.*, a federal district court also relied upon the political question doctrine in

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35. *El-Shifa II*, 607 F.3d at 856.

36. See *Nixon v. United States*, 506 U.S. 224, 228–29, 238 (1993) (concluding that exclusive power to adjudicate the merits of impeachment proceedings against federal judges is textually committed to the Senate by virtue of Article I, Section Three, Clause Six); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (explaining that supervision over the weaponry, training, and standing orders of the National Guard are responsibilities vested exclusively in the Executive and Legislative Branches).

37. See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 415–16 (2006) (Kennedy, J., 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, 271–73, 281 (2004) (plurality opinion) (dismissing a gerrymandering challenge to Pennsylvania's legislative districts due to a lack of judicially manageable standards).

38. See, e.g., *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012).

39. See, e.g., *Wu Tien Li-Shou v. United States*, 777 F.3d 175, 178 (4th Cir. 2015), *cert. denied*, 136 S. Ct. 139 (2015).

dismissing state-law and Alien Tort Statute claims against private military contractors arising out of the torture of detainees at the Abu Ghraib prison. As Judge Lee concluded in *Shimari*, the “Defendant was under the ‘plenary’ and ‘direct’ control of the military and . . . national defense interests are so ‘closely intertwined’ with the military decisions governing Defendant’s conduct, such that a decision on the merits would require this Court to question actual, sensitive judgments made by the military.”

In separate decisions, two different courts of appeals also relied upon the political question doctrine to dismiss a range of constitutional and statutory claims arising out of the military’s allegedly wrongful destruction of a Sudanese pharmaceutical plant in 1998. In the first case, the Federal Circuit held that President Clinton’s determination that the plant was “enemy property” was itself unreviewable, so the court could not reach the merits of the plaintiff’s takings claim. In the second case, the D.C. Circuit (sitting en banc) threw out the plaintiff’s tort claims because “[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>40</sup>

To be sure, there have been rulings to the contrary—cases in which courts have allowed challenges to actions by private military contractors (or the military itself) to go forward, notwithstanding invocations of the political question doctrine.<sup>41</sup> But especially where the claim arises out of U.S. or private military operations overseas, the political question doctrine has been a rather significant obstacle to adjudication of such claims on the merits, despite both (1) the Supreme Court’s emphasis that the doctrine is a narrow exception to ordinary presumptions in favor of judicial review and (2) the weaknesses of the arguments for invoking the doctrine in these contexts,

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40. Vladeck, *War and Justiciability*, *supra* note 31, at 50–51 (alterations in original) (first quoting *Wu Tien Li-Shou*, 777 F.3d at 179, 185–86; then quoting *Al Shimari v. CACI Premier Tech., Inc.*, 119 F. Supp. 3d 434, 437–38, 453 (E.D. Va. 2015); then citing *El-Shifa II*, 607 F.3d at 837–40, 842–44 (majority opinion); and then quoting *El-Shifa Pharm. Indus. Co. v. United States (El-Shifa I)*, 378 F.3d 1346, 1349–50, 1365 (Fed. Cir. 2004).

41. See, e.g., *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 69–70, 71 n.21 (D.D.C. 2014) (distinguishing *El-Shifa II* as a case brought by “[f]oreign aliens suing for deprivation of a foreign property interest,” whereas *Al-Aulaqi v. Panetta* involved “U.S. citizens suing for deprivation of their lives”).

specifically.<sup>42</sup>

### 3. *Mootness*

Another feature of the case-or-controversy requirement is the doctrine of “mootness,” which is often described (perhaps a bit misleadingly) as “the doctrine of standing set in a time frame,”<sup>43</sup> i.e., the view that the “[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).”<sup>44</sup> Mootness has provided a significant obstacle to post-9/11 civil litigation in two distinct contexts: (1) habeas petitions in which the petitioner has been released and (2) challenges to expiring (or repealed) surveillance authorities.

In the habeas context, the D.C. Circuit has held that the release of a Guantánamo detainee moots any pending petition for a writ of habeas corpus, since release is the precise relief habeas contemplates—and, at least for Guantánamo detainees, any “collateral consequences” of their prior military detention are too speculative to provide a continuing basis for judicial review.<sup>45</sup> And, famously, in the case of U.S. citizen “enemy combatant” José Padilla, the Supreme Court denied certiorari after Padilla was transferred from military to civilian custody, with Justice Anthony Kennedy writing for himself, Chief Justice John Roberts, and Justice John Paul Stevens to explain that, whether or not Padilla’s habeas petition was formally “moot,”

there are strong prudential considerations disfavoring the exercise of the Court’s certiorari power. Even if the Court were to rule in Padilla’s favor, his present custody status would be unaffected. Padilla is

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42. See, e.g., Steve Vladeck, *Military Contractor Liability Returns to the Supreme Court*, LAWFARE (June 11, 2014, 7:00 AM), <https://www.lawfareblog.com/military-contractor-liability-returns-supreme-court> (“The notion that the Constitution’s text commits to the Executive Branch any and all decisions regarding military conduct is not only lacking for any textual support, but is utterly belied by the long litany of cases in which courts can and do review military conduct, including, e.g., military captures and detention.”).

43. U.S. Parole Comm’n v. Geraghty, 445 U.S. 388, 397 (1980) (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)).

44. *Id.*

45. See *Gul v. Obama*, 652 F.3d 12, 17–18 (D.C. Cir. 2011) (finding that it cannot be “presume[d] a former detainee faces collateral consequences sufficient to keep his petition from becoming moot upon his release”).

scheduled to be tried on criminal charges. Any consideration of what rights he might be able to assert if he were returned to military custody would be hypothetical, and to no effect, at this stage of the proceedings.<sup>46</sup>

But whether the release of a detainee moots his habeas petition (the Supreme Court has long recognized an exception to mootness for cases in which the defendant “voluntarily ceases” the complained-of conduct),<sup>47</sup> Padilla was not released; he was only transferred.<sup>48</sup> Thus, the *Padilla v. Hanft* Court relied on “prudential” mootness to deny certiorari, even though it clearly had the jurisdictional power to hear his case.<sup>49</sup>

As a result, as Justice Ruth Bader Ginsburg pointed out in her dissent from the denial of certiorari, the practical effect of such unnecessary abstention was to leave vital unanswered questions about the scope of the government’s authority to subject U.S. citizen terrorism suspects to military detention apprehended within the United States.<sup>50</sup> Indeed, the statutory and constitutional questions that the Court was set to answer in *Padilla* remain unresolved to this day.

In a similar vein, consider the Second Circuit’s October 2015 decision in *ACLU v. Clapper*, a challenge to the legality of the NSA’s bulk collection of telephone metadata.<sup>51</sup> In a prior decision, the Court of Appeals had held that the program had not been authorized by Congress and was therefore unlawful.<sup>52</sup> Congress subsequently authorized the continuation of that program for a six-month “transitional” period, which, by providing the statutory authorization that the Second Circuit had previously held to be

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46. *Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in the denial of certiorari).

47. *See id.* at 1064–65 (Ginsburg, J., dissenting from denial of certiorari) (“A party’s voluntary cessation does not make a case less capable of repetition or less evasive of review.” (citing *Spencer v. Kemna*, 523 U.S. 1, 17 (1998))).

48. *Id.* at 1063 (Kennedy, J., concurring in the denial of certiorari) (“The President ordered that Padilla be released from military custody and transferred to the control of the Attorney General to face criminal charges.”).

49. *See id.* (“Whatever the ultimate merits of the parties’ mootness arguments, there are strong prudential considerations disfavoring the exercise of the Court’s certiorari power.”).

50. *See id.* at 1064 (Ginsburg, J., dissenting from the denial of certiorari).

51. *ACLU v. Clapper*, 804 F.3d 617, 618–19 (2d Cir. 2015) [hereinafter *ACLU v. Clapper II*].

52. *ACLU v. Clapper*, 785 F.3d 787, 820–21 (2d Cir. 2015) [hereinafter *ACLU v. Clapper I*].

lacking, raised the constitutional question the Second Circuit had ducked in its previous ruling—i.e., whether the phone records program, properly authorized, violated the Fourth Amendment.<sup>53</sup> Rather than answer that question, though, the Second Circuit punted, holding that, although the appeal was not moot, the temporary nature of the transitional program (and the prospect of future mootness) militated against even reaching the constitutional question presented, let alone providing the injunctive relief the plaintiffs sought.<sup>54</sup>

There is little that courts can do when a case becomes formally—and, thus, constitutionally—moot. But in both *Padilla* and *ACLU v. Clapper* (and arguably in *Gul v. Obama* as well), the cases were not constitutionally moot; any mootness was prudential, at most. Nevertheless, courts relied upon mootness-like considerations to avoid reaching the merits and, in the process, not only left unsettled significant constitutional questions about government counterterrorism policies that remain open today,<sup>55</sup> but also, in the habeas cases, specifically, left unanswered whether the petitioners were rightly—or wrongly—detained.

#### 4. Jurisdiction-Stripping

Standing, the political question doctrine, and mootness are all judge-made doctrines of justiciability.<sup>56</sup> But an equally significant structural constraint on the power of the federal courts is Congress's broad control over their subject-matter jurisdiction, as manifested in statutes like section 7(a) of the Military Commissions Act of 2006, codified at 28 U.S.C. § 2241(e):

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53. See *ACLU v. Clapper II*, 804 F.3d at 625.

54. *Id.* at 626–27 (“We agree with the government that we ought not meddle with Congress’s considered decision regarding the transition away from bulk telephone metadata collection, and also find that addressing these issues at this time would not be a prudent use of judicial authority. We need not, and should not, decide such momentous constitutional issues based on a request for such narrow and temporary relief.” (footnote omitted)); accord *Smith v. Obama*, 816 F.3d 1239, 1240–41 (9th Cir. 2016) (dismissing as moot a challenge to the ongoing collection of bulk telephone metadata).

55. See Steve Vladeck, *Section 215 and “Fruitless” (?!?) Constitutional Adjudication*, JUST SECURITY (Oct. 29, 2015), <https://www.justsecurity.org/27177/section-215-fruitless-constitutional-adjudication/>.

56. See generally R. L. Brilmayer, *Judicial Review, Justiciability and the Limits of the Common Law Method*, 57 B.U. L. REV. 807 (1977) (discussing the history of—and the Supreme Court’s traditional approach to—justiciability).

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 . . . , no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.<sup>57</sup>

Of course, the Supreme Court in *Boumediene v. Bush* partially invalidated § 2241(e)(1) as applied to challenges to executive detention made by the non-citizens detained at Guantánamo Bay, Cuba.<sup>58</sup> And the D.C. Circuit subsequently held that *Boumediene* abnegated § 2241(e)(1) in its entirety—effectively restoring the habeas jurisdiction of the federal courts to its pre-2005 status quo.<sup>59</sup>

But § 2241(e)(2) remains intact and has been expressly upheld by the D.C. Circuit as applied to damages suits by former Guantánamo detainees (like the petitioners in *Gul*), because “such remedies are not constitutionally required,”<sup>60</sup> even if the cursory analysis left more than a little to be desired.<sup>61</sup> Indeed, even where former detainees who had prevailed in their habeas cases sought monetary relief for their (judicially decreed) unlawful detention, the D.C. Circuit held that § 2241(e)(2) foreclosed its jurisdiction.<sup>62</sup> Some judges have even gone so far as to suggest that § 2241(e)(2) prevents

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57. 28 U.S.C. § 2241(e) (2012), *partially invalidated* by *Boumediene v. Bush*, 553 U.S. 723 (2008).

58. *Boumediene*, 553 U.S. at 732–33.

59. See *Aamer v. Obama*, 742 F.3d 1023, 1031 (D.C. Cir. 2014); see also Steve Vladeck, *Global (Statutory) Habeas After Aamer*, LAWFARE (June 25, 2014, 4:00 PM), <https://www.lawfareblog.com/global-statutory-habeas-after-aamer>.

60. *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319 (D.C. Cir. 2012).

61. See Steve Vladeck, *The Subtle (New) Constitutional Holding in Al-Zahrani*, LAWFARE (Feb. 21, 2012, 2:47 PM), <https://www.lawfareblog.com/subtle-new-constitutional-holding-al-zahrani>.

62. See *Al Janko v. Gates*, 741 F.3d 136, 137, 146–47 (D.C. Cir. 2014), *cert. denied*, 135 S.Ct. 1530 (2015).

the D.C. Circuit from issuing writs of mandamus to lower courts in all Guantánamo-related cases<sup>63</sup>—although the D.C. Circuit has, correctly, since disagreed in *In re Al-Nashiri (Al-Nashiri I)*.<sup>64</sup>

To be sure, even at its broadest, § 2241(e)(2) only applies to suits by non-citizens seeking to challenge their “detention, transfer, treatment, trial, or conditions of confinement” while in U.S. custody—and so its compass is quite narrow, especially after *Al-Nashiri I*.<sup>65</sup> But it nevertheless has three significant consequences: First, it puts pressure on detainees to shoehorn all of their claims into habeas petitions—since the court’s jurisdiction turns entirely on whether or not the matter at hand is cognizable via habeas.<sup>66</sup> Second, taken together with the *Gul* decision discussed above (which held that habeas petitions by Guantánamo detainees become moot upon their release),<sup>67</sup> it effectively forecloses any remedy for former Guantánamo detainees, even if their detention, or their treatment while detained, was clearly unlawful. Third, and more generally, it appears to invite additional efforts by Congress in the future affirmatively to foreclose access to the courts in non-habeas national security-related cases.

### B. Procedural Obstacles to Civil Litigation

Unlike the structural obstacles identified in Part II.A, procedural obstacles to civil litigation do not implicate the Court’s power to decide the case, but rather turn on the factual or legal sufficiency of the plaintiff’s claim for relief, or other non-substantive impediments to courts reaching the

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63. See *In re Al-Nashiri*, No. 14-1203, slip op. at 3 (D.C. Cir. Nov. 12, 2014) (Kavanaugh, J., dissenting), <https://www.justsecurity.org/wp-content/uploads/2014/11/Order-Granting-Stay-12-November-2014-1.pdf>; *ACLU v. United States*, No. 13-003, slip op. at 2–5 (Ct. Mil. Comm’n Rev. Mar. 27, 2013) (Silliman, J., concurring), [http://www.mc.mil/Portals/0/pdfs/ACLU13-003/13-003%20ACLU%20Writ%20\(Ordering%20Dismissal\)%20\(J.%20Silliman%20Concur\)%20\(Mar%2027%202013\).pdf](http://www.mc.mil/Portals/0/pdfs/ACLU13-003/13-003%20ACLU%20Writ%20(Ordering%20Dismissal)%20(J.%20Silliman%20Concur)%20(Mar%2027%202013).pdf); *Miami Herald v. United States*, No. 13-002, slip op. at 3–5 (Ct. Mil. Comm’n Rev. Mar. 27, 2013) (Silliman, J., concurring), [http://www.mc.mil/Portals/0/pdfs/Media13-002/13-002%20Media%20Writ%20\(Ordering%20Dismissal\)%20\(J.%20Silliman%20Concur\)%20\(Mar%2027%202013\).pdf](http://www.mc.mil/Portals/0/pdfs/Media13-002/13-002%20Media%20Writ%20(Ordering%20Dismissal)%20(J.%20Silliman%20Concur)%20(Mar%2027%202013).pdf).

64. See *In re Al-Nashiri (Al-Nashiri I)*, 791 F.3d 71, 75–78 (D.C. Cir. 2015).

65. See, e.g., *id.*; *Belbacha v. Bush*, 520 F.3d 452, 454–58 (D.C. Cir. 2008).

66. See, e.g., *Salahi v. Obama*, No. 05-0569 (RLC), 2015 WL 9216557, at \*1–3 (D.D.C. Dec. 17, 2015) (dismissing a challenge to the timing of a detainee’s periodic review board because it was not cognizable via habeas, and so the court lacked jurisdiction to entertain it).

67. See *supra* text accompanying note 45.

merits of that claim.

1. *Causes of Action*<sup>68</sup>

Since 1871, federal law has provided a statutory cause of action—an express authorization for a judicial remedy—for violations of all federal rights by anyone acting “under color of” state law (i.e., any de jure or de facto officer of a state government).<sup>69</sup> Remarkably, though, federal law provides no similar general cause of action for violations of federal rights by federal officers.<sup>70</sup> Instead, litigants seeking civil remedies arising out of unlawful action by federal government officers must identify a specific statutory cause of action authorizing such a suit.<sup>71</sup> And because no statute authorizes such suits for constitutional violations, litigants seeking damages arising from prior unconstitutional federal government conduct are today<sup>72</sup> left to the judge-made remedy the Supreme Court inferred directly from the Constitution in its 1971 *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* ruling.<sup>73</sup>

It is no secret that the Supreme Court, ever since 1980, has expressed increasing skepticism of *Bivens*.<sup>74</sup> Whether reflecting specific separation of powers concerns or a more general judicial distaste for the making of federal common law, the Court has declined to recognize any new *Bivens* remedy since *Carlson v. Green*<sup>75</sup> and has repeatedly expanded the scope of the two exceptions to *Bivens* that Justice William Brennan articulated in his 1971

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68. Much of the discussion in this Part derives from Vladeck, *National Security Canon*, *supra* note 8.

69. See 42 U.S.C. § 1983 (2012).

70. See Vladeck, *National Security Canon*, *supra* note 8, at 1300–01.

71. See *id.* at 1300–04.

72. At the Founding, and until 1988, litigants could (and often did) avail themselves of state law remedies to vindicate constitutional rights against federal officers. See Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 514, 531 (2013). As I and others have explained elsewhere, however, the Westfall Act, enacted in 1988, has been (mis)interpreted to cut-off such state law relief, leaving judge-made remedies under *Bivens* the exclusive mechanism for obtaining damages for most constitutional violations by federal officers. See *id.* at 514; see also James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 121–23 (2009).

73. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395–97 (1971).

74. See Vladeck, *National Security Canon*, *supra* note 8, at 1302–04.

75. *Carlson v. Green*, 446 U.S. 14, 16–18 (1980).

majority opinion: (1) cases in which Congress has provided an alternative to *Bivens* and (2) cases presenting “special factors counseling hesitation.”<sup>76</sup> What’s more, at least two Justices—Scalia and Thomas—argued that “*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action,” notwithstanding the significant differences between implied statutory and implied constitutional remedies.

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At the same time, the number of cases in which the Court has specifically declined to recognize a *Bivens* claim since 1980 is fairly modest—it can be counted on two hands, and nearly all of them fall into identifiable (if not defensible) categories, including (1) cases in which statutes provided alternative means of redress;<sup>78</sup> (2) cases brought by service members arising out of their military service;<sup>79</sup> (3) suits against defendants other than federal government officers (e.g., federal agencies, private corporations, or private contractors);<sup>80</sup> and (4) suits advancing novel constitutional claims.<sup>81</sup> Over the same time period, no Justices other than Scalia and Thomas have objected to the “core” of *Bivens*,<sup>82</sup> and a handful of decisions have reached other issues in *Bivens* cases without expressing skepticism about the availability of a cause of action.<sup>83</sup> In other words, there is a case to be made that the Supreme Court’s perceived hostility to *Bivens* is not nearly as comprehensive and categorical as is widely portrayed, especially in suits at *Bivens*’s “core,” i.e., suits against individual federal officers who were directly responsible for violations of clearly established constitutional rights.

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76. Vladeck, *National Security Canon*, *supra* note 8, at 1300–02; *see also Bivens*, 403 U.S. at 396.

77. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

78. *See, e.g., Bush v. Lucas*, 462 U.S. 367, 389–90 (1983).

79. *See, e.g., United States v. Stanley*, 483 U.S. 669 (1987). In *United States v. Stanley*, the Court drew a direct line from the Federal Tort Claims Act (FTCA), in which the *Feres* doctrine bars suits by service members “incident to” their service, to *Bivens* claims by service members. *Id.* at 680–84.

80. *See, e.g., Minneci v. Pollard*, 132 S. Ct. 617, 620–21 (2012) (employees of private prison); *Malesko*, 534 U.S. at 63 (majority opinion) (private corporation); *FDIC v. Meyer*, 510 U.S. 471, 473 (1994) (federal agency).

81. *See, e.g., Wilkie v. Robbins*, 551 U.S. 537, 541 (2007) (bringing *Bivens* and Racketeer Influenced and Corrupt Organizations Act (RICO) claims against government employees for harassment and intimidation).

82. *See, e.g., Malesko*, 534 U.S. at 75 (Scalia, J., concurring).

83. *See, e.g., Hartman v. Moore*, 547 U.S. 250, 252, 259 (2006) (addressing “causation” within a retaliatory prosecution *Bivens* action).

As with the political question doctrine, though, lower courts in national security cases have gone much further.<sup>84</sup> Thus, in a growing litany of decisions, four different courts of appeals have refused to recognize *Bivens* claims in suits alleging constitutional counterterrorism abuses by relying on debatable (if not indefensible) invocations of the “special factors” exception to *Bivens*—invocations with little or no relationship to those upon which the Supreme Court has relied.<sup>85</sup>

Thus, for example, courts have invoked merits-based considerations (e.g., whether the defendants might have immunity; whether state secrets might bar further litigation; and so on) or entirely undifferentiated concerns about judicial interference with national security policies to refuse to recognize *Bivens* claims.<sup>86</sup> As significantly, these decisions have converted what used to be a choice between *Bivens* and state tort law remedies into a choice between *Bivens* and “nothing” and have ended up holding that the appropriate answer is nothing.<sup>87</sup>

At first, though, these decisions came almost entirely in suits brought by non-citizens, usually based upon alleged constitutional violations outside the United States.<sup>88</sup> Thus, while decisions like the en banc Second Circuit’s ruling in *Arar v. Ashcroft*<sup>89</sup> and the D.C. Circuit’s holding in *Rasul v. Myers*<sup>90</sup> were controversial, they could at least be distinguished as not encompassing claims brought by U.S. citizens to vindicate clearly established constitutional rights. But four subsequent decisions have all but slammed the door on *Bivens* remedies in all national security cases: the Fourth Circuit’s decision in *Lebron v. Rumsfeld* (another José Padilla case);<sup>91</sup> the en banc Seventh Circuit’s holding in *Vance v. Rumsfeld*;<sup>92</sup> and the D.C. Circuit’s decisions in

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84. See *Meshal v. Higgenbotham*, 804 F.3d 417, 426–27 (D.C. Cir. 2015), *cert. docketed*, No. 15-1461 (U.S. June 6, 2016); *Vance v. Rumsfeld*, 701 F.3d 193, 197–98 (7th Cir. 2012) (en banc); *Doe v. Rumsfeld*, 683 F.3d 390, 394–96 (D.C. Cir. 2012); *Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir. 2012).

85. See cases cited *supra* note 84.

86. See, e.g., *Doe*, 683 F.3d at 394–96 (refusing to extend “a *Bivens* remedy in a case involving the military, national security, [and] intelligence”); see also cases cited *supra* note 84.

87. See cases cited *supra* note 84.

88. See, e.g., *Arar v. Ashcroft*, 585 F.3d 559, 563, 565 (2d Cir. 2009) (in banc).

89. See *id.* at 581–82.

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

91. *Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir. 2012).

92. *Vance v. Rumsfeld*, 701 F.3d 193, 198 (7th Cir. 2012) (en banc) (“Whatever presumption in favor of a *Bivens*-like remedy [that] may once have existed has long since

*Doe v. Rumsfeld*<sup>93</sup> and *Meshal v. Higenbotham*.<sup>94</sup>

In all four of these cases, the courts relied upon the special factors prong to hold that no *Bivens* claim should be available to U.S. citizens challenging their treatment at the hands of U.S. captors, even though each of the citizens sought to vindicate clearly established constitutional rights—and even though, in *Meshal*, the captors were ordinary law enforcement (and not military) officers.<sup>95</sup> As Judge Nina Pillard explained in her dissent in *Meshal*, the result is to foreclose any remedy—“whether under state or federal law, constitutional, administrative, or otherwise”—for “a United States citizen who was arbitrarily detained, tortured, and threatened with disappearance by United States law enforcement agents in Africa.”<sup>96</sup> Whether or not these rulings are faithful to the Supreme Court’s guidance (or would be upheld on appeal, or both), they interpose a substantial barrier to any recovery of damages arising out of constitutional violations in the conduct of U.S. counterterrorism and national security policies. Without a cause of action, even the most egregious constitutional violations by the federal government cannot be remedied through judicial review, so long as they have concluded (and are not therefore subject to injunctive relief).

*Bivens* is not the only doctrine where courts have narrowed available causes of action in national security and counterterrorism cases. Another significant example concerns suits under the Alien Tort Statute (ATS), an antiquated provision of the Judiciary Act of 1789 that confers jurisdiction upon the federal courts over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>97</sup> Although the Supreme Court in 2004 held that the ATS allows plaintiffs to bring suit for violations of certain well-settled norms of international law, including international human rights law,<sup>98</sup> the Court

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been abrogated.”).

93. *Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012).

94. *Meshal v. Higenbotham*, 804 F.3d 417, 426–27 (D.C. Cir. 2015) (“The weight of authority against expanding *Bivens*, combined with our recognition that tort remedies in cases involving matters of national security and foreign policy are generally left to the political branches, counsels serious hesitation before recognizing a common law remedy in these circumstances.” (footnote omitted)), *cert. docketed*, No. 15-1461 (U.S. June 6, 2016).

95. *Id.* at 423; *e.g.*, *Vance*, 701 F.3d at 202–05; *Doe*, 683 F.3d at 394–96; *Lebron*, 670 F.3d at 548.

96. *Meshal*, 804 F.3d at 432–33 (Pillard, J., dissenting).

97. 28 U.S.C. § 1350 (2012).

98. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 724, 732 (2004).

subsequently ruled in 2013 that the “presumption against extraterritoriality” applies to the ATS—such that it cannot be used to bring suits for claims that fail to “touch and concern the territory of the United States.”<sup>99</sup>

To date, lower courts are divided on the scope of the “touch and concern” standard. In the Abu Ghraib litigation, the Fourth Circuit held that alleged human rights violations by U.S. military personnel (and contractors) at a U.S. military prison in U.S.-occupied territory in Iraq did sufficiently touch and concern U.S. territory for the ATS to apply,<sup>100</sup> but other courts have reached different conclusions in suits against other U.S. actors.<sup>101</sup> Thus, human rights violations by U.S. officials or corporations overseas may also be without a judicial remedy because of the absence of a cause of action, depending upon the extent to which those violations touch and concern U.S. territory.

## 2. Heightened Pleading Standards

Even where litigants have identified a viable cause of action, another procedural obstacle that has emerged in recent years is the heightened pleading standard the Supreme Court articulated in one of its few decisions in a post-9/11 civil suit: *Ashcroft v. Iqbal*.<sup>102</sup>

*Iqbal* arose out of the federal government’s post-9/11 roundup of hundreds of immigrants believed to be of Arab or Muslim descent, 184 of whom—including the *Iqbal* plaintiffs—were designated as “high interest,” and held in especially restrictive conditions of confinement.<sup>103</sup> The plaintiffs

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99. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013). In contrast to the extraterritorial scope of substantive constitutional rights, *Kiobel v. Royal Dutch Petroleum Co.* creates a new procedural obstacle by imposing a territorial constraint on statutory causes of action that do not expressly apply overseas. See *id.* Indeed, in *Meshal v. Higgenbotham*, Judge Kavanaugh suggested that such reasoning should also circumscribe non-statutory causes of action (like *Bivens*), even though it derives from a canon of statutory interpretation. See 804 F.3d at 430–31 (Kavanaugh, J., concurring).

100. See *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 520 (4th Cir. 2014).

101. See, e.g., *Doe v. Drummond Co.*, 782 F.3d 576, 582–83 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1168 (2016); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 195–96 (2d Cir. 2014). The Supreme Court recently declined to take a case seeking, among other things, to resolve the circuit split over post-*Kiobel* application of the “touch and concern” test. See *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1027–28 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 798 (2016).

102. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

103. *Id.* at 667, 669.

brought suit against 34 named federal officials and 19 “John Doe” federal corrections officers, including claims against then-Attorney General John Ashcroft and then-FBI Director Robert Mueller III, alleging that their treatment violated numerous constitutional provisions.<sup>104</sup> Writing for a 5–4 Court, Justice Kennedy held that the plaintiffs’ claims against Ashcroft and Mueller, specifically, failed to plead sufficient facts to state a claim for purposeful and unlawful discrimination, based on the Court’s earlier decision in *Bell Atlantic Corp. v. Twombly*.<sup>105</sup>

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”<sup>106</sup>

As for the *Iqbal* plaintiffs’ suit, “the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September 11 detainees as ‘of high interest’ because of their race, religion, or national origin. This the complaint fails to do.”<sup>107</sup>

The *Iqbal* decision has had a dramatic impact on all civil litigation in the United States. But its impact in cases challenging national security or counterterrorism policies is especially significant, since it may be particularly difficult for plaintiffs to surmount the “plausibility” bar where much of the relevant information remains classified or otherwise out of public view.<sup>108</sup>

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104. *Id.* at 668–69.

105. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

106. *Iqbal*, 556 U.S. at 678 (citations omitted) (quoting *Twombly*, 550 U.S. at 556–57, 570).

107. *Id.* at 682.

108. For example, a district court threw out a challenge to the New York Police Department’s alleged targeting of Muslim neighborhoods in New Jersey on the ground that the plaintiffs had not “alleged facts from which it can be plausibly inferred that they were targeted solely because of their religion. The more likely explanation for the surveillance was a desire to locate budding terrorist conspiracies.” *Hassan v. City of New York*, No. 2:12-3401 (WJM), 2014 WL 654604, at \*7 (D.N.J. Feb. 20, 2014), *rev’d*, 804 F.3d 277 (3d Cir. 2015).

### 3. The “Immediate Custodian” Doctrine

A third procedural obstacle courts have relied upon to avoid the merits of post-9/11 civil suits is the “immediate custodian” doctrine—a rule that traces back to the Supreme Court’s 1885 decision in *Wales v. Whitney*,<sup>109</sup> and which requires habeas petitioners to name as the respondent “the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official.”<sup>110</sup>

Thus, the first time the *Padilla* case reached the Supreme Court (after the Second Circuit had held that his detention as an “enemy combatant” was unlawful),<sup>111</sup> the Justices ducked the merits, holding only that Padilla had named the wrong respondent in his habeas petition—and that the U.S. District Court for the Southern District of New York, where Padilla had initially filed for habeas relief, lacked personal jurisdiction over the right respondent: the commander of the South Carolina Navy brig where Padilla was detained.<sup>112</sup> The Seventh Circuit relied upon similar reasoning to dismiss a habeas petition filed by Ali Saleh Kahlah al-Marri—the one non-citizen arrested within the United States to be held as an “enemy combatant”—after he was transferred to the same brig.<sup>113</sup>

In both cases, application of the “immediate custodian” rule served only to prevent the federal courts from reaching the merits of the petitioners’ claims temporarily, since both detainees were free to (and did) re-file their habeas petitions in the U.S. District Court for the District of South Carolina.<sup>114</sup> But in both cases, the government eventually mooted those new claims by transferring the detainees to civilian criminal custody on the eve of Supreme Court review, thereby avoiding the very merits determinations that courts would have been forced to make but for the initial application of the immediate custodian rule.<sup>115</sup> Combined with the mootness concerns

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109. *Wales v. Whitney*, 114 U.S. 564, 574 (1885).

110. *Rumsfeld v. Padilla (Padilla II)*, 542 U.S. 426, 435 (2004).

111. *See Padilla v. Rumsfeld (Padilla I)*, 352 F.3d 695, 698 (2d Cir. 2003), *rev’d on other grounds*, 542 U.S. 426 (2004).

112. *See Padilla II*, 542 U.S. at 442.

113. *See al-Marri v. Rumsfeld*, 360 F.3d 707, 708, 712 (7th Cir. 2004).

114. *Padilla v. Hanft*, 389 F. Supp. 2d 678, 679–80 (D.S.C.), *rev’d*, 423 F.3d 386 (4th Cir. 2005); *al-Marri v. Hanft*, 378 F. Supp. 2d 673, 673–74 (D.S.C. 2005).

115. *See al-Marri v. Spagone*, 555 U.S. 1220, 1220 (2009) (mem.); *Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in the denial of certiorari) (“After Padilla sought certiorari in this Court, the Government obtained an indictment charging him with various crimes. The President ordered that Padilla be released from military

discussed above, the immediate custodian rule allowed the courts to avoid the merits of Padilla's and al-Marri's military detentions—and allowed the government to continue those detentions for several additional years, until the specter of Supreme Court merits review incentivized their transfer to civilian criminal custody.<sup>116</sup>

#### 4. Councilman *Abstention*

Finally, in the specific context of the Guantánamo military commissions, civilian courts have also avoided the merits of habeas petitions challenging the legality of the commissions through the doctrine of “*Councilman* abstention”: civilian courts will decline to resolve pre-trial challenges to military trials that are best left, in the first instance, to the military judicial system.<sup>117</sup> Although the district court, the D.C. Circuit, and the Supreme Court refused to abstain under *Schlesinger v. Councilman* in *Hamdan v. Rumsfeld*,<sup>118</sup> four other district courts have relied upon *Councilman* to decline to entertain pre-trial challenges to the commissions Congress created in response to *Hamdan* under the Military Commissions Act of 2006 (MCA),<sup>119</sup> an approach the D.C. Circuit recently affirmed.<sup>120</sup> Each of these courts held that Congress's involvement and express authorization of military trials in such cases justified abstention in favor of

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custody and transferred to the control of the Attorney General to face criminal charges. . . . Whatever the ultimate merits of the parties' mootness arguments, there are strong prudential considerations disfavoring the exercise of the Court's certiorari power.”).

116. See generally Stephen I. Vladeck, *Terrorism Prosecutions and the Problem of Constitutional “Cross-Ruffing,”* 36 CARDOZO L. REV. 709 (2014) (discussing the potential mischief that could result from the government's ability to transfer detainees back and forth between civilian criminal justice and military detention regimes).

117. See, e.g., *Schlesinger v. Councilman*, 420 U.S. 738, 759–61 (1975).

118. *Hamdan v. Rumsfeld*, 548 U.S. 557, 612–13 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109–366, § 7(b), 120 Stat. 2600, 2636 (2006) (plurality opinion) (ultimately holding that the military commissions created by President Bush after 9/11 were unlawful).

119. See *Al-Nashiri v. Obama*, 76 F. Supp. 3d 218, 222 (D.D.C. 2014), *aff'd sub nom. In re Al-Nashiri (Al-Nashiri II)*, Nos. 15-1023, 15-5020, 2016 WL 4525274 (D.C. Cir. Aug. 30, 2016); *Khadr v. Obama*, 724 F. Supp. 2d 61, 70 (D.D.C. 2010); *Khadr v. Bush*, 587 F. Supp. 2d 225, 230–31 (D.D.C. 2008); *Hamdan v. Gates*, 565 F. Supp. 2d 130, 136 (D.D.C. 2008). See generally Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10 U.S.C., 18 U.S.C., 28 U.S.C., and 42 U.S.C.).

120. *Al-Nashiri II*, 2016 WL 4525274.

the commissions.<sup>121</sup> Thus, even though the D.C. Circuit finally has been able to answer at least some of the many constitutional questions raised by the MCA on direct appeal from the commissions,<sup>122</sup> those decisions took years longer than they would have but for *Councilman*. And, thanks to an unduly expansive reading of *Councilman*,<sup>123</sup> some of the most fundamental questions about the commissions remain unanswered today.<sup>124</sup>

### C. Defenses to Civil Litigation

A third category of obstacles to merits-based adjudication of challenges to national security and counterterrorism policies is substantive defenses, such as immunity and preemption. Although it is common to describe these defenses as “merits-based,” in this context, it is a bit of a misnomer, as a ruling for the defendant based upon one of these defenses is not tantamount to a holding that the defendant acted lawfully. To the contrary, each of these defenses goes to whether the defendant may be insulated from recovery even if the rights the plaintiff invoked were violated.<sup>125</sup>

#### 1. Sovereign Immunity

Although the sovereign immunity of state governments is a fraught topic of contemporary constitutional law, the federal government’s sovereign immunity is seldom at issue, thanks to a series of statutes through

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121. See cases cited *supra* note 119.

122. See, e.g., *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (en banc) (holding that it violates the Ex Post Facto Clause for military commissions to try the offenses of material support and solicitation when committed prior to the Military Commission Act’s enactment).

123. For criticism of how *Schlesinger v. Councilman* has been applied in this context, see Steve Vladeck, *Abstention and the “Other” D.C. Circuit Military Commission Appeal*, JUST SECURITY (Nov. 30, 2015), <https://www.justsecurity.org/28005/abstention-other-d-c-circuit-military-commission-appeal/>.

124. Just to take one example, the *Al-Nashiri* litigation raises fundamental questions about the temporal jurisdiction of the military commissions (and whether they can try pre-9/11 offenses) and the constitutional composition of the intermediate Court of Military Commission Review (and whether military judges serving on it are “principal officers” for purposes of the Appointments Clause). *Al-Nashiri v. Obama*, 76 F. Supp. 3d at 222; *Al-Nashiri I*, 791 F.3d 71, 85 (D.C. Cir. 2015).

125. See George D. Brown, *Accountability, Liability, and the War on Terror—Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 FLA. L. REV. 193, 217–18 (2011) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 744–45 (1982)); Vladeck, *National Security Canon*, *supra* note 8, at 1297 (citation omitted).

which it has generally been waived by Congress.<sup>126</sup> Thus, litigants may usually proceed directly against the federal government (as opposed to proceeding against an officer thereof) so long as a statute—such as the Federal Tort Claims Act (FTCA), for example—provides a cause of action for such a suit.<sup>127</sup>

Perhaps surprisingly, one statute that provides such a cause of action is the Foreign Intelligence Surveillance Act (FISA), which authorizes suits for damages and other relief by “[a]n aggrieved person, other than a foreign power or an agent of a foreign power, . . . who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of [another provision of FISA].”<sup>128</sup> Usually, it will be difficult for aggrieved persons to invoke FISA’s cause of action since violations of it will typically remain a secret. But in *Al-Haramain Islamic Foundation v. Obama*,<sup>129</sup> the Ninth Circuit identified another obstacle: FISA’s civil liability provision does not actually waive the sovereign immunity of the United States.<sup>130</sup> As Judge McKeown explained, “A ‘person’ who may have committed the violation is defined as ‘any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power.’ Glaringly missing from the definition is the ‘United States.’”<sup>131</sup> Thus, even though it would be all but impossible for a plaintiff to identify the specific government employee who violated FISA, the Ninth Circuit read FISA narrowly to preclude suits against the federal government directly.<sup>132</sup>

Reading FISA’s civil liability provision as not waiving the federal government’s sovereign immunity is an awfully small tree in the larger forest surveyed in this Article. But in addition to making it more difficult for victims of FISA violations to obtain civil redress, the Ninth Circuit’s decision also suggests that other statutes creating express causes of action (and thereby ameliorating several of the obstacles identified above) will be read narrowly to avoid waiving the federal government’s sovereign immunity

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126. See, e.g., 28 U.S.C. § 2674 (2012).

127. See *id.*

128. 50 U.S.C. § 1810 (2012).

129. *Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845 (9th Cir. 2012).

130. *Id.* at 848.

131. *Id.* at 851 (citation omitted).

132. See *id.* at 849, 851.

absent express indicia to the contrary.<sup>133</sup> As with many of the other obstacles surveyed in this Article, that phenomenon may not be unique to national security or counterterrorism litigation, but it has an especially pervasive effect in those areas.

## 2. Official Immunity<sup>134</sup>

Even assuming a cause of action exists and there are no other obstacles or defenses in bringing civil suits arising out of counterterrorism or other national security policies, in order to recover damages, “a plaintiff must still demonstrate not just that his rights were violated,” but that the officer-defendant is not entitled to immunity.<sup>135</sup> In most cases, the relevant official immunity doctrine is “qualified” immunity, which forecloses liability unless unlawfulness of the defendant’s conduct should have been apparent to a reasonable officer in the defendant’s position in light of clearly established law.<sup>136</sup> Indeed, in *Ashcroft v. al-Kidd*,<sup>137</sup> the one damages suit challenging post-9/11 counterterrorism policies in which the Supreme Court has gone past these obstacles, qualified immunity was the ultimate ground for denying review.<sup>138</sup>

To be sure, “[i]n 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.”<sup>139</sup> Yet, there are two developments in qualified immunity jurisprudence that are worth mentioning insofar as they pose especial challenges to efforts to establish forward-looking precedents in national security litigation. “First, in a case having nothing to do with national security, the Supreme Court in *Pearson v. Callahan* unanimously disposed

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133. *See id.* at 855.

134. Much of the discussion in this Part derives from Vladeck, *National Security Canon*, *supra* note 8.

135. *Id.* at 1325–26.

136. *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).

137. *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011).

138. *See id.* at 741–43 (discussing Ashcroft’s qualified immunity from a potential Fourth Amendment violation).

139. Vladeck, *National Security Canon*, *supra* note 8, at 1326.

of the *Saucier v. Katz* sequence.”<sup>140</sup> *Saucier* had mandated just eight years earlier that courts should be required to resolve qualified immunity defenses by answering the underlying merits question—whether the plaintiff’s rights were violated—even in cases in which the relevant law was not “clearly established”; thus, the plaintiff would not have been entitled to damages.<sup>141</sup> Under *Saucier*, then, courts would definitively establish forward-looking principles of constitutional law even in cases in which the defendant prevailed.<sup>142</sup>

As Justice Alito wrote for the [*Pearson*] 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.

Although the Court still stressed that the *Saucier* sequence “is often beneficial,” 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 decisions have been few and far between since *Pearson*.

As a result, because qualified immunity will preclude recovery in 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

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140. *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)).

141. *Pearson*, 555 U.S. at 232 (“Qualified immunity is applicable unless the official’s conduct violated a clearly established constitutional right.”); *see also* *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

142. *See Pearson*, 555 U.S. at 232 (emphasizing the first inquiry is whether the plaintiff’s constitutional rights were violated, and then whether such rights were “clearly established”).

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 [(and had held the conduct unlawful)], then the law would have been clearly established at  $T_2$  such that the plaintiff should now be able to recover at  $T_3$ .”

A good example of this problem in practice is José 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. 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 like 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.

Of course, this problem is hardly confined to national security cases. As the *Padilla* litigation demonstrates, however, what 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 [on the merits] in those contexts. 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.

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. 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.

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 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 [and there is no suggestion to that effect], it would be hard to see how they could be consistent with the broader understanding of immunity doctrine.<sup>143</sup>

### 3. *The State Secrets Privilege*

One of the more controversial obstacles to post-9/11 civil litigation challenging counterterrorism or national security policies has been the "state secrets privilege." In reality, the state secrets privilege is two different doctrines: "One completely bars adjudication of claims premised on state secrets (the '*Totten* bar'); the other is an evidentiary privilege ('the *Reynolds*

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143. Vladeck, *National Security Canon*, *supra* note 8, at 1327–29 (footnotes omitted) (first quoting *Pearson*, 555 U.S. at 232–36; then citing *Padilla v. Yoo*, 678 F.3d 748, 752, 763–69 (9th Cir. 2012); and then quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 746–47 (2011) (Kennedy, J., concurring)).

privilege’) that excludes privileged evidence from the case and may result in dismissal of the claims.”<sup>144</sup> The *Totten* bar applies “‘where the very subject matter of the action’ is ‘a matter of state secret’” and mandates dismissal because it is “so obvious that the action should never prevail over the privilege.”<sup>145</sup> The *Reynolds* privilege is more qualified:

Unlike the *Totten* bar, a valid claim of privilege under *Reynolds* does not automatically require dismissal of the case. In some instances, however, the assertion of privilege will require dismissal because it will become apparent during the *Reynolds* analysis that the case cannot proceed without privileged evidence, or that litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.<sup>146</sup>

Both the *Totten* bar and the *Reynolds* privilege have figured prominently in post-9/11 civil litigation, especially suits challenging “extraordinary rendition,” the practice pursuant to which the United States allegedly transferred detainees to third-party countries for the purpose of having those countries torture and otherwise coercively interrogate them.<sup>147</sup> An exemplar case is the en banc Ninth Circuit’s decision in *Mohamed v. Jeppesen Dataplan, Inc.*, a suit against a Boeing subsidiary for its alleged role in providing logistical support (including flight services) to the rendition program.<sup>148</sup>

Writing for a 6–5 majority of the en banc panel, Judge Raymond Fisher explained that, even though it was not clear that the “very subject matter” of the suit was itself a secret (given various public disclosures about the extraordinary rendition program—and Jeppesen Dataplan’s role therein),<sup>149</sup> and even though the plaintiffs probably could make out a prima facie case without divulging the state secrets at issue, the *Reynolds* privilege nevertheless required dismissal:

[F]urther litigation presents an unacceptable risk of disclosure of state secrets no matter what legal or factual theories Jeppesen would choose to advance during a defense. Whether or not Jeppesen provided

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144. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077 (9th Cir. 2010) (en banc) (footnote omitted).

145. *Id.* at 1077–78 (quoting *United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953)).

146. *Id.* at 1079.

147. *See, e.g., id.* at 1073, 1083–84.

148. *Id.* at 1075.

149. *Id.* at 1084–85.

logistical support in connection with the extraordinary rendition and interrogation programs, there is precious little Jeppesen could say about its relevant conduct and knowledge without revealing information about how the United States government does or does not conduct covert operations. Our conclusion holds no matter what protective procedures the district court might employ. Adversarial litigation, including pretrial discovery of documents and witnesses and the presentation of documents and testimony at trial, is inherently complex and unpredictable. Although district courts are well equipped to wall off isolated secrets from disclosure, the challenge is exponentially greater in exceptional cases like this one, where the relevant secrets are difficult or impossible to isolate and even efforts to define a boundary between privileged and unprivileged evidence would risk disclosure by implication. In these rare circumstances, the risk of disclosure that further proceedings would create cannot be averted through the use of devices such as protective orders or restrictions on testimony.<sup>150</sup>

What is especially telling about *Mohamed* is that it is one of the more *nuanced* discussions and applications of the state secrets privilege in a post-9/11 civil case. There are virtually no examples of courts *rejecting* assertions of the state secrets privilege in such suits, and the government has benefited from this privilege in suits between purely private parties where there is not a public indication of the government's role in the underlying facts.<sup>151</sup> Thus, where the state secrets privilege applies,<sup>152</sup> it has come to form an imposing—and often insurmountable—obstacle to civil litigation where much of the subject matter (or, at least, potential evidence) remains classified.<sup>153</sup>

#### 4. “Battlefield Preemption”

Finally, perhaps the most specific defense arising out of U.S. counterterrorism and national security operations that courts have recognized in post-9/11 civil litigation has been the concept of “battlefield

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150. *Id.* at 1087–89.

151. *See, e.g.,* Restis v. Am. Coal. Against Nuclear Iran, No. 13 Civ. 5032(ER), 2015 WL 1344479, at \*8 (S.D.N.Y. Mar. 23, 2015).

152. One court has held that the private remedy provided by the Foreign Intelligence Surveillance Act preempts the state secrets privilege, suggesting that Congress may displace the privilege through appropriate legislation. *See In re NSA Telecomms. Records Litig.*, 564 F. Supp. 2d 1109, 1119 (N.D. Cal. 2008).

153. *See* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1268 (2007).

preemption,”<sup>154</sup> which has been relied upon to dismiss a series of tort suits against private military contractors involving state law.<sup>155</sup> At its core, the idea of battlefield preemption has its roots in a quixotic 1988 Supreme Court decision, *Boyle v. United Technologies Corp.*<sup>156</sup>

*Boyle* arose out of the crash of a military helicopter. 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.

Writing for a 5-4 Court, Justice Scalia held that such a state-law claim was “displaced” by federal common law. 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,” as is “the civil liability of federal officials for actions taken in the course of their duty.” 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. 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.

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’

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154. *Saleh v. Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009) (“Thus, the instant case presents us with a more general conflict preemption, to coin a term, ‘battle-field preemption’: 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.” (citation omitted)).

155. *See, e.g., Al Shimari v. CACI Int’l, Inc.*, 658 F.3d 413, 417 (4th Cir. 2011), *vacated*, 679 F.3d 205 (4th Cir. 2012) (en banc); *Al-Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201, 203 (4th Cir. 2011), *vacated sub nom. Al Shimari v. CACI Int’l, Inc.*, 679 F.3d 205; *Saleh*, 580 F.3d at 10 (“During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted.”); *Koohi v. United States*, 976 F.2d 1328, 1336–37 (9th Cir. 1992); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1494–95 (C.D. Cal. 1993).

156. *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988); *see cases cited supra* note 155.

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." 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."

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. 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. 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." 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 interests not only counseled against state-law claims, but against any liability whatsoever.

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." . . .

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>157</sup>

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157. Vladeck, *National Security Canon*, *supra* note 8, at 1305–07. "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

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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.*, that the plaintiffs' state-law claims were barred under a *Boyle*-like theory, even though the lawsuit did not implicate a "discretionary function." Invoking, instead, the distinct "combatant activities" exception to the FTCA, 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."

Thus, the Court of Appeals could look to the combatant activities exception to identify the requisite "conflict" between state tort suits and federal policy. 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,'" the D.C. Circuit held that the same should be true for private military contractors. "[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," 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."

[Then] 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 of the 'discretionary function' would be frustrated," and they present no "significant conflict" with federal interests. Preemption is therefore not justified under *Boyle*.

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recognized this as a special circumstance where the contractor may assert a defense.'" *Id.* at 1307 n.68 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001) (majority opinion)).

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. 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.” Nevertheless, despite the unusual (and strident) dissent from Judge Garland, along with a surprisingly equivocal amicus brief from the U.S. government respecting certiorari, the Supreme Court denied certiorari in *Saleh*.

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.* that rejection of a *Boyle*-like defense was subject to an immediate interlocutory appeal under the collateral order doctrine, a divided panel of the Court of Appeals followed *Saleh* in *Al Shimari v. CACI International, Inc.* 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.” As if the point were not sufficiently clear, Judge Niemeyer concluded with the 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,” and then penned a separate concurrence suggesting that, even if *Saleh* was wrongly decided, the political question doctrine would bar recovery.

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*. The plaintiffs then sought rehearing en banc, this time with the support of the Obama Administration. 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. At the same time, the Court of Appeals expressed no view on the merits (including the *Boyle* preemption question)—and several of the judges in the majority hinted in concurring opinions that they were

sympathetic to the contractors' defenses.<sup>158</sup>

"What is telling about both *Saleh* and the (now vacated) panel decision in *Al Shimari* is how dramatically they differ [not just] from other applications of *Boyle* in the circuit courts," but from the purported judicial "restraint" that characterizes so many of the other obstacles summarized above.<sup>159</sup> In these cases, federal judges are affirmatively displacing state tort law despite the absence of any positive federal law on point (and, in some circumstances, over the objections of the federal government) in order to insulate defendants from liability. It may well be that, all things being equal, state law ought to play very little role in creating liability for the actions of private military contractors overseas. But the notion that the federal courts (and not the political branches) have the ability to say so is radically at odds with many of the justifications for the other limits on judicial review.

#### D. Merits Decisions

Lest the above survey leave readers with the wrong impression, there are examples of civil post-9/11 counterterrorism litigation in which courts have unabashedly reached and resolved the merits of the plaintiffs' claims without regard to how they ruled on the merits. Some of these cases, like Abdullah Al-Kidd's civil claims against lower level FBI agents,<sup>160</sup> or the damages claim brought on behalf of Anwar al-Awlaki after he was killed in a drone strike,<sup>161</sup> were rare results in which courts resolved the cases (rightly or wrongly) on the merits; others, like the *Hassan v. City of New York*<sup>162</sup> and *Turkmen v. Hasty* litigation,<sup>163</sup> remain ongoing—and so the verdict remains both literally and figuratively incomplete. But for present purposes, what is

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158. *Id.* at 1318–20 (footnotes omitted) (first citing *Boyle*, 487 U.S. at 502–05, 507–11, 512; then citing and quoting *Saleh*, 580 F.3d at 1, 5–7; then citing *id.* at 23 (Garland, J., dissenting); then citing *Al-Quraishi*, 657 F.3d at 204–05; then citing *Al Shimari v. CACI Int'l, Inc.*, 658 F.3d at 417–20; then citing *id.* at 420–25 (Niemeyer, J., separate opinion); then citing *id.* at 427–36 (King, J., dissenting); then citing *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d at 208, 212, 219 n.14, 224).

159. *Id.* at 1320.

160. *Al-Kidd v. Gonzales*, No. 1:05-cv-00093-EJL-MHL, 2012 WL 4470860, at \*1–2 (D. Idaho June 26, 2012), *adopted by* No. 1:05-CV-093-EJL-MHW, 2012 WL 4470782, at \*1–2 (D. Idaho Sept. 27, 2012).

161. *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 58–59, 68–80 (D.D.C. 2014) (granting defendants' motion to dismiss).

162. *Hassan v. City of New York*, 804 F.3d 277, 309 (3d Cir. 2015).

163. *Turkmen v. Hasty*, 789 F.3d 218, 264–65 (2d Cir. 2015), *reh'g en banc denied*, 808 F.3d 197 (2d Cir. 2015).

more interesting are the types of litigation that have proven successful, which help us assess whether there are any obvious explanations for why the merits have been so easy to reach in those contexts but not others.

By far, the seminal example of substantive post-9/11 civil litigation has been the Guantánamo habeas litigation—and the dozens of habeas petitions filed by non-citizens held in military detention at Guantánamo.<sup>164</sup> Although any number of criticisms can be (and have been) leveled at the procedural, evidentiary, and substantive rules that the D.C. Circuit has handed down in these cases,<sup>165</sup> the larger point for present purposes is that such rules have been articulated at all—and with dramatic results. Even accounting for appellate reversals, 30 of the 61 petitioners who filed for habeas relief after and in light of *Boumediene* received it—and that does not account for the dozens of detainees whom the government likely chose to transfer or otherwise release based solely on the specter of such review.<sup>166</sup> From the government's perspective, the litigation has produced immensely useful decisional jurisprudence that, in turn, has formed the basis for proposed statutory reforms, constitutional arguments, and (we can only assume) myriad policy decisions.<sup>167</sup> Most significantly, at least for current detainees, none of the structural limits, procedural obstacles, or defenses identified above have prevented courts from reaching the merits.<sup>168</sup>

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164. See, e.g., *Kiyemba v. Obama*, 555 F.3d 1022, 1023 (D.C. Cir. 2009), *vacated*, 559 U.S. 131 (2010) (per curiam); see also Tony West, Assistant Attorney Gen., Address to the ABA Standing Committee on Law and National Security (Feb. 18, 2011) (“Currently, there are about 140 active habeas cases involved GTMO detainees who are challenging the legal basis for their detentions.”), in *Assistant Attorney General Tony West Speaks at the ABA Standing Committee on Law and National Security Breakfast*, U.S. DOJ, <https://www.justice.gov/opa/speech/assistant-attorney-general-tony-west-speaks-aba-standing-committee-law-and-national> (last updated Sept. 17, 2014).

165. See generally Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451 (2011) [hereinafter Vladeck, *D.C. Circuit After Boumediene*] (discussing criticisms and analyzing the D.C. Circuit's post-*Boumediene* jurisprudence).

166. *Guantanamo Habeas Decision Scorecard*, CTR. FOR CONSTITUTIONAL RIGHTS (Dec. 21, 2009), <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/guantanamo-bay-habeas-decision-scorecard>.

167. See *Al-Nashiri v. MacDonald*, No. 11-5907 RJB, 2012 WL 1642306, at \*2 (W.D. Wash. May 10, 2012) (discussing Congress's responses to “Supreme Court's concerns regarding the detainees at Guantánamo”), *aff'd*, 741 F.3d 1002 (9th Cir. 2013); Vladeck, *D.C. Circuit After Boumediene*, *supra* note 165, at 1484 (citing Editorial, *A Right Without a Remedy*, N.Y. TIMES (Feb. 28, 2011), [http://www.nytimes.com/2011/03/01/opinion/01tue1.html?\\_r=0](http://www.nytimes.com/2011/03/01/opinion/01tue1.html?_r=0)).

168. See, e.g., *Mousovi v. Obama*, No. 05-1124 (RMC), 2016 WL 3771240, at \*5–6 (D.D.C. July 11, 2016), *appeal docketed*, No. 16-5225 (D.C. Cir. July 29, 2016).

A second category of civil post-9/11 counterterrorism litigation that has also produced at least some merits rulings is litigation under the Freedom of Information Act (FOIA).<sup>169</sup> Among other things, FOIA suits have not only led to the production of a veritable bevy of significant government documents (including one of the principal Department of Justice Office of Legal Counsel memos on the legality of the targeted killing of Anwar al-Awlaki)<sup>170</sup> but have also provoked statutory reforms in those cases in which Congress has objected to disclosures that courts have otherwise deemed FOIA to require.<sup>171</sup> Again, the point is not that plaintiffs are winning in all, or even most, of these cases (to be clear, they are not).<sup>172</sup> Rather, the point is that, as in the Guantánamo habeas litigation, courts are resolving these cases on their merits—which, in this context, means on the applicability of the relevant FOIA exemptions invoked by the government.<sup>173</sup>

Finally, a third remarkable (if delayed) example has been litigation challenging government watch lists, especially the “No Fly List,” which has culminated in a series of district court decisions identifying serious due process concerns with the redress procedures the government has provided for individuals who believe they were wrongly placed on the list, along with decisions denying government motions to dismiss based on various of the obstacles described above.<sup>174</sup> At least where litigants remain on the No Fly

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169. FOIA, 5 U.S.C. § 552 (2012), *amended by* FOIA Improvement Act of 2016, Pub. L. 114-185, § 2, 130 Stat. 538, 538 (June 30, 2016) (to be codified at 5 U.S.C. § 101 note).

170. *N.Y. Times Co. v. U.S. DOJ*, 756 F.3d 100, 103–04 (2d Cir.), *amended by* 758 F.3d 436 (2d Cir.), *supplemented by* 762 F.3d 233 (2d Cir. 2014).

171. Thus, for example, Congress passed the Protected National Security Documents Act (PNSDA) of 2009, Pub. L. No. 111-83, § 565, 123 Stat. 2142, 2184–85 (codified at 5 U.S.C. § 552 note), in response to the Second Circuit’s interpretation of FOIA’s exemption 7(F) in *ACLU v. Department of Defense*, 543 F.3d 59, 63–64 (2d Cir. 2008), *vacated*, 558 U.S. 1042 (2009) (mem.). The PNSDA does not overrule the Second Circuit’s reading of exemption 7(F), but rather provides a new exception to FOIA for particular detainee photographs like those at issue in the *ACLU* case. *See* PNSDA of 2009 § 565, 123 Stat. at 2184–85 (providing FOIA exemption where record “would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States”).

172. *See* Michael Roffe, *Post-9/11 Info Access*, FIRST AMEND. CTR. (Oct. 1, 2004), <http://www.firstamendmentcenter.org/post-911-info-access>.

173. *See, e.g.,* *Ctr. for Constitutional Rights v. Dep’t of Def.*, 968 F. Supp. 2d 623, 636–37 (S.D.N.Y. 2013), *aff’d sub nom. Ctr. for Constitutional Rights v. CIA*, 765 F.3d 161 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015).

174. *See, e.g.,* *Mohamed v. Holder*, No. 1:11-cv-50 (AJT/MSN), 2015 WL 4394958, at \*11–12 (E.D. Va. July 16, 2015); *Latif v. Holder*, No. 3:10-cv-00750-BR, 2015 WL 1883890, at \*1–2 (D. Or. Apr. 24, 2015); *Ibrahim v. Dep’t of Homeland Sec.*, 62 F. Supp.

List, courts have been able to reach the merits of their due process challenges and, in many cases, rule for the plaintiffs.<sup>175</sup> But even there, once a plaintiff has been removed from the No Fly List, courts have thrown out his or her claim for injunctive or declaratory relief—on the ground that such suits are, at that point, moot.<sup>176</sup> And where plaintiffs have sought damages for prior government misconduct related to the No Fly List, courts have declined to recognize a cause of action under *Bivens*.<sup>177</sup>

What do these cases have in common?

Among other things, they involve claims grounded in express constitutional provisions or statutes creating private causes of action, not seeking damages, and with sophisticated (if often judge-made) procedures to protect, as far as practicable, the government's interest in the secrecy of the information at the heart of the litigation.<sup>178</sup> They also involve plaintiffs who have unquestioned and ongoing injuries and who are seeking relief that courts have provided in contexts far less sensitive than government counterterrorism or national security operations.<sup>179</sup> To date, those factors have proven to be the perfect storm necessary for courts to reach the merits of civil suits challenging post-9/11 counterterrorism or national security policies, or both. These cases may well be fortuitous, or they may provide useful insights into the kinds of reforms that might enable more courts to reach the merits in more of these cases going forward.

### III. RETHINKING CIVIL REMEDIES FOR COUNTERTERRORISM ABUSES

But what should the rules be? Where Part II identified the unique confluence of circumstances that have tended to favor resolution of civil suits challenging post-9/11 counterterrorism, national security policies, or both on the merits, this Part turns away from doctrinal considerations and aims to sketch a more normative blueprint for civil remedies for counterterrorism abuses by asking—and attempting to answer—a series of questions.

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3d 909, 928–31 (N.D. Cal. 2014).

175. See *N.Y. Times Co.*, 756 F.3d at 112–15; *Ibrahim*, 62 F. Supp. 3d at 928–31.

176. See, e.g., *Tarhuni v. Lynch*, 129 F. Supp. 3d 1052, 1062 (D. Or. 2015), *appeal filed*, No. 15-35887 (9th Cir. Nov. 12, 2015).

177. See, e.g., *Tanvir v. Lynch*, 128 F. Supp. 3d 756, 766–67 (S.D.N.Y. 2015).

178. See, e.g., *N.Y. Times Co.*, 756 F.3d at 112–15 (FOIA); *Mousavi v. Obama*, No. 05-1124 (RMC), 2016 WL 3771240, at \*11 (D.D.C. July 11, 2016) (Habeas Corpus), *appeal docketed*, No. 16-5225 (D.C. Cir. July 29, 2016); *Ibrahim*, 62 F. Supp. 3d at 928–31 (No Fly List).

179. See cases cited *supra* note 175.

### A. What Kind of Relief?

For starters, should an optimal remedial regime favor prospective or retrospective relief—injunctions or damages? To be sure, there are compelling reasons why, in appropriate circumstances, both forms of relief might be necessary. Damages lack the coercive power of injunctions and thus will do little to stop ongoing unlawful government conduct. And injunctive relief, as Part II demonstrated, can often be sidestepped through government actions to moot the dispute—whether by ceasing the complained of conduct, releasing the petitioning detainee, removing the plaintiff from the No Fly List, or otherwise.<sup>180</sup>

That said, especially in the national security context, there is something to be said for giving primacy to after-the-fact relief over *ex ante* judicial review. Take targeted killings as an example: it is hardly clear how *ex ante* review, as opposed to *ex post* review, is more desirable for protecting either the government's interests or those of the putative target in these cases.

After all, it seems obvious that *ex ante* review is far more likely to interfere with the President's ability (and responsibility) to act in self-defense to protect the United States from potentially imminent terrorist attacks, as compared to retrospective review. Insofar as [considerations of] imminence or infeasibility of capture may in some cases be inextricably intertwined with the legality of a particular use of lethal force, it necessarily follows that the presence of such conditions cannot typically be adjudicated in advance of using such force. Thus, we would never try to decide whether a law enforcement officer is legally entitled to use lethal force to protect himself or others before he actually does so. The answer, as the Supreme Court has repeatedly stressed, would depend entirely on the actual circumstances, necessarily weighed in hindsight [and]<sup>181</sup>

through judicial review that is removed from the pressures of the moment and with the benefit of the dispassionate distance on which such review must rely.<sup>182</sup> “To similar effect, whether the government used excessive force in

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180. See *supra* Part II.A.3.

181. Stephen I. Vladeck, *Targeted Killing and Judicial Review*, 82 GEO. WASH. L. REV. ARGUENDO 11, 18 (2014) (first citing U.S. DOJ, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE (2011), <http://fas.org/irp/eprint/doj-lethal.pdf>; and then citing *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985)).

182. See, e.g., *Garner*, 471 U.S. at 11–12.

relation to the object of the attack is also something that can only reasonably be assessed post hoc.”<sup>183</sup>

Relatedly, for those concerned about undue judicial interference in ongoing U.S. national security operations, retrospective relief—after the operation has ended or the abuse has been committed—seems far less intrusive than prospective relief. “Leaving aside how much less pressure judges would be under in such cases, it’s also generally true that damages regimes don’t have nearly the same validating effect on government action that ex ante approval” (or, at least, that non-disapproval) does.<sup>184</sup>

Otherwise, one would expect to have seen a dramatic upsurge in lethal actions by law enforcement officers after each judicial decision refusing to impose individual liability arising out of a prior use of deadly force. So far as I know, no such evidence exists.

Of course, damages actions aren’t a perfect solution here. It’s obvious, but should be said anyway, that in a case in which the government does act unlawfully, no amount of damages will likely make the victim (or his heirs) whole. It’s also inevitable that, like much of the Guantánamo litigation, most of these suits would be resolved under extraordinary secrecy, and so there would be far less public accountability for targeted killings than, ideally, we might want.<sup>185</sup>

That said, “the specter of damages, even nominal damages, should have a deterrent effect on future government officers, such that, if a targeted killing operation ever was carried out in a way that violated the relevant legal rules, there would be liability—and, as importantly, precedent”—sufficient to force the next government official to reflect more carefully and to ensure that the government’s actions are lawful.<sup>186</sup> Prospective relief, in contrast, is often as much about forcing the government to stop the complained-of conduct as it is about creating forward-looking precedent.<sup>187</sup>

Finally, it is worth considering what kinds of damages ought to be

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183. *Drones and the War on Terror: When Can the U.S. Target Alleged American Terrorists Overseas?: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 67 (2013) (prepared statement of Stephen I. Vladeck, Professor of Law and Associate Dean for Scholarship, American University Washington College of Law), [http://judiciary.house.gov/\\_files/hearings/printers/113th/113-2\\_79585.pdf](http://judiciary.house.gov/_files/hearings/printers/113th/113-2_79585.pdf).

184. *Id.*

185. *Id.* at 67–68.

186. *Id.* at 68.

187. *Id.* at 64–65.

available. If the principal goal of this enterprise is to create meaningful precedent that constrains future government officers, then perhaps it is unnecessary to provide for punitive damages—and, indeed, for much more than nominal compensatory damages. On the flip side, if the goal is both to deter unlawful government conduct and to punish especially egregious misconduct, perhaps punitive damages should be available, at least in exceptional cases.

### *B. Against Whom?*

Related to, but distinct from, the question of what kind of relief an ideal regime would provide is against whom such relief would run. For doctrinal reasons, as Part II noted, most civil suits challenging government conduct are brought against the relevant government officers, often in their personal (as opposed to official) capacity.<sup>188</sup> The “officer fiction” is a concept that was created by the federal courts in the early part of the twentieth century to avoid the consequences of the Supreme Court’s expanding sovereign immunity jurisprudence and remains a mainstay of civil suits against state and federal government officers today.<sup>189</sup>

But in reality, virtually all of the suits discussed in Part II—and, indeed, virtually all of the civil suits challenging post-9/11 counterterrorism policies—have not been challenging the actions of rogue government officers but have rather been challenging their role in devising (and implementing) policies approved at the highest and most official levels. Given the government’s responsibility for the alleged abuses in most of these cases, along with the extent to which the government is already indemnifying its officers in suits brought directly against those officers,<sup>190</sup> it seems that such suits would be far less controversial (and far less doctrinally fraught) if they could be brought directly against the federal government—while immunizing the individual officers in the process.

Indeed, this is the model Congress has followed for most tort claims against federal officers—through the FTCA and the Westfall Act, which together not only waive the federal government’s sovereign immunity in

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188. See *supra* Part II.B.3.

189. See MARTIN A. SCHWARTZ, FED. JUDICIAL CTR., SECTION 1983 LITIGATION 124 (Kris Markarian ed., 3d ed. 2014), <https://www.casd.uscourts.gov/Attorneys/CJAAAppointments/SiteAssets/docs/FJCSection1983Outline.pdf> (providing background on *Ex parte Young*).

190. See Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Official’s Individual Liability Under Bivens*, 88 GEO. L.J. 65, 76–77 (1999).

many tort cases but also require substitution of the federal government for officer-defendants in any case in which the tort arose within the officer-defendants' "scope of employment."<sup>191</sup> Having the liability run directly against the government would also have the salutary effect of mooted official immunity doctrines, which only apply to government officers and not to governments themselves.<sup>192</sup> Individual officers should still be liable in cases in which they were acting outside the scope of their employment, but courts have broadly construed the scope of a government officer's employment—even to encompass allegations of torture—so long as the officer was not acting *ultra vires*.<sup>193</sup> As frustrating as those decisions are in the context of doctrines that make suits against the government nearly impossible to pursue, as a normative matter, a rebuttable presumption that the claim should run against the government, and not the individual officer, would not only overcome many of the doctrinal hurdles noted above, but also it would put the burden on the government—and not the plaintiff—to demonstrate that a particular abuse was committed without official sanction.

### C. *Provided by Whom?*

As the early *Bivens* cases and the Guantánamo habeas cases discussed in Part II underscore, courts can fashion remedies—and appropriate procedural and evidentiary rules to help flesh out those remedies—without help from Congress. Part II not only underscores the extent to which judges are often reluctant to do so without more explicit legislative sanction, but it also illustrates the range of obstacles courts have identified that, whether or not they can be overcome by judges, can certainly be more easily brushed aside by Congress.

For example, Congress can provide express causes of action,<sup>194</sup> reduce the pleading requirements identified in *Iqbal*,<sup>195</sup> override the "immediate

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191. See 28 U.S.C. § 1346(b) (2012 & Supp. I 2013); 28 U.S.C. § 2679(d) (2012); see also 28 U.S.C. § 2680.

192. See generally Janell M. Byrd, Comment, *Rejecting Absolute Immunity for Federal Officials*, 71 CALIF. L. REV. 1707 (1983) (discussing "the problems presented by absolute immunity, and propos[ing] certain amendments to the FTCA").

193. See, e.g., *Rasul v. Myers*, 512 F.3d 644, 654–61 (D.C. Cir. 2008), *vacated*, 555 U.S. 1083 (2008) (mem.), *reinstated on remand*, 563 F.3d 527, 528 n.1 (D.C. Cir. 2009) (per curiam).

194. See *supra* Part II.B.1.

195. See *supra* Part II.B.2.

custodian” rule,<sup>196</sup> waive the federal government’s sovereign immunity,<sup>197</sup> abrogate the state secrets privilege,<sup>198</sup> and overrule the “battlefield preemption” defense recognized in cases like *Saleh*.<sup>199</sup> Congress also likely has broad authority to create Article III standing where none previously existed insofar as it can define statutory injuries not recognized at common law.<sup>200</sup> This is not to say that judges lack the authority to take many of these steps themselves, but it seems unlikely that most of these obstacles can be overcome simply through judge-made law—especially in the lower federal courts. Changes in the composition of the Supreme Court might produce modest changes in some of these areas, but they will surely pale in comparison to that which Congress could provide by statute.

#### *D. With Special Procedures or in Special Forums?*

A separate question is whether such claims should come with special procedures (especially with regard to protecting the government’s interest in secrecy), be litigated in special forums (such as a “national security court”), or both.

To the former, as it has provided in other contexts, including the Classified Information Procedures Act (CIPA),<sup>201</sup> FISA,<sup>202</sup> and cases before the Alien Terrorist Removal Court (ATRC),<sup>203</sup> Congress could demand that certain proceedings be brought in camera, requiring plaintiffs to be represented by security-cleared private counsel in order to proceed in cases that would have previously been dismissed under the state secrets privilege.<sup>204</sup> Such an accommodation may not be necessary in all (or even

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196. *See supra* Part II.B.3.

197. *See supra* Part II.C.1.

198. *See supra* Part II.C.3.

199. *See supra* Part II.C.4; *see also* *Saleh v. Titan Corp.*, 580 F.3d 1, 6 (D.C. Cir. 2009) (majority opinion) (citing *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 366–67 (1943)).

200. *See supra* Part II.A.1.

201. Classified Information Procedures Act, 18 U.S.C. app. § 6 (2012) (“Any hearing held pursuant to this subsection (or any portion of such hearing specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information.”).

202. 50 U.S.C. § 1861(f) (2012 & Supp. III 2015); 50 U.S.C. § 1881a(k)(2) (2012).

203. 8 U.S.C. § 1534(e)(3) (2012).

204. *See generally* David Cole & Stephen I. Vladeck, *Navigating the Shoals of Secrecy: A Comparative Analysis of the Use of Secret Evidence and ‘Cleared Counsel’ in*

most) cases, but it is worth seriously considering at least in those cases for which, under existing law, the alternative to largely secret civil litigation is no litigation whatsoever.

To the latter, arguments for shifting these cases into specialized “national security courts” have been underwhelming, to say the least.<sup>205</sup> Either the rules that would apply to these cases can be modified, or they cannot be.<sup>206</sup> The former would suggest that shifting these cases into a national security court would be unnecessary; the latter would suggest that national security courts would not actually solve the problems that their proponents have held out to justify them, since the same procedural and evidentiary rules would have to apply there, as well.

#### *E. Do We Need New Substantive Law?*

Finally, if the focus of this enterprise is on how to create more opportunities for judicial review of the merits of U.S. counterterrorism, national security policies, or both, then it should stand to reason that those merits ought to be assessed against existing substantive law—including statutory and constitutional authorities. If anything, focusing on substantive reforms may distract from the extent to which the larger problem is the inability of courts to hand down precedents that could help suggest whether or not particular substantive reforms are even necessary. For example, how the Supreme Court answers the substantive Fourth Amendment question about the application of the third-party doctrine to telephone metadata<sup>207</sup> could have had a lot to say about the legislative deliberations that culminated in the USA FREEDOM Act of 2015.<sup>208</sup>

None of this is to say that substantive reforms are not also important. However, from the perspective of clearing the way for courts to reach the

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*the United States, the United Kingdom, and Canada*, in REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT 161 (Liora Lazarus et al. eds., 2014) (providing a comparative analysis of U.S., U.K., and Canadian “secret evidence procedures” and recommending areas for improvement).

205. See generally Stephen I. Vladeck, *The Case Against National Security Courts*, 45 WILLAMETTE L. REV. 505 (2009).

206. See, e.g., *id.* at 514 (“A national security court, in contrast, would be marked by relaxed evidentiary rules, including the ability to introduce hearsay testimony and perhaps even evidence that is produced by governmental coercion.”).

207. See, e.g., *Klayman v. Obama*, 805 F.3d 1148, 1148–49 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc).

208. USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (to be codified in scattered sections of 50 U.S.C.).

merits of civil suits challenging government counterterrorism, national security policies, or both, the real problem is that the merits are not conclusively known—and, as such, an informed conversation about other potential avenues for substantive reform cannot be had.

#### IV. POTENTIAL AVENUES FOR REFORM—AND THEIR SHORTCOMINGS

In light of the pitfalls identified in Part II and the principles marshalled in Part II, the task then becomes to identify potential avenues for reform—and their shortcomings. Realistically, it might be helpful to break these potential reforms into two categories, one focused on the role of the Judiciary and one focused on Congress.

##### *A. The Role of Judges in National Security Litigation*

As Part II suggests, many of the obstacles to judicial resolution of the merits of civil suits challenging post-9/11 national security and counterterrorism policies is that they are judge-made and likely reflect deeper skepticism of (if not outright hostility to) an aggressive judicial role in supervising such government conduct. Indeed, D.C. Circuit Judge David Sentelle was surely speaking for more than just a majority of a court of appeals panel in 2003 when he noted that “the judiciary is in an extremely poor position to second-guess the executive’s judgment in [the] area of national security.”<sup>209</sup>

Thus, whereas it is easy enough to propose that judge-made doctrines be reformed by judges, such reforms are unlikely to happen absent some kind of change in the mindset of contemporary federal judges when it comes to the significance of meaningful civil remedies against the government. To that end, any focus on judicial reforms ought to have at its core three separate—but related—components.

##### *1. Remedies as a Nomination and Confirmation Issue*

There is no reason why a judicial nominee’s views on the role of federal courts in providing remedies against unlawful government action cannot, and should not, be part of both the background vetting conducted by the Executive Branch and the formal proceedings before the Senate Judiciary Committee. It may not make for good television, but paying more attention to a nominee’s approach to the remedial role of the courts—and not just the

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209. See *Ctr. for Nat’l Sec. Studies v. U.S. DOJ*, 331 F.3d 918, 928 (D.C. Cir. 2003) (citing *Krikorian v. Dep’t of State*, 984 F.2d 461, 464 (D.C. Cir. 1993)).

interpretive methodologies they are likely to champion on the bench—might well have a salutary effect in identifying candidates most likely to push back against some of the judge-made obstacles identified above.

## 2. Judicial Trainings

Both for new and longstanding judges, far greater private training on both the history of judicial review in these contexts (which was far more robust) and the well-documented work of federal judges in other cases implicating sensitive national security considerations (such as criminal terrorism prosecutions) could go a long way toward educating jurists with regard to how they might overcome some of these obstacles. Among other things, such trainings could focus on the voluminous resources the Federal Judicial Center has put together to assist judges handling unique “national security case-management challenges”<sup>210</sup> and could underscore the unavailability of opportunities to generate precedent in other contexts—explaining why these kinds of civil suits are so significant, regardless of how they are resolved on the merits.

## 3. Identification of Especially Problematic Precedents

Finally, for those jurists who are more sympathetic to the problems identified in this Article (especially current and potential future U.S. Supreme Court Justices), it might be particularly useful to identify especially problematic precedents—those prior decisions that might provide the most significant roadblocks to meaningful judicial review in this context. Two obvious candidates in this regard are the circuit-level decisions categorically refusing to recognize *Bivens* remedies in national security cases,<sup>211</sup> and the Supreme Court’s 2009 *Pearson* decision, which allows lower courts to avoid setting any forward-looking precedent in damages suits in which the relevant law was not clearly established at the time of the officer-defendant’s alleged misconduct.<sup>212</sup> Frankly, more robust *Bivens* suits, coupled with precedent-setting decisions on the merits, even where the officer-defendant is not himself liable, would go a very long way toward ameliorating many of the problems motivating this Article.

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210. See, e.g., ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., NATIONAL SECURITY CASE MANAGEMENT: AN ANNOTATED GUIDE 1 (2011), [http://www.fjc.gov/public/pdf.nsf/lookup/TSGuid01.pdf/\\$file/TSGuid01.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/TSGuid01.pdf/$file/TSGuid01.pdf).

211. See *supra* Part II.B.1.

212. See *supra* Part II.C.2.

#### 4. *Shortcomings*

All of this being said, it is difficult to imagine how effective these reforms can be (at least beyond the margins). The federal courts in general are a historically conservative institution, and it is difficult to imagine that better judicial training and a “bad precedent hit list” would have a significant impact. If anything, there would be far more potential for significant impact if the availability of remedies became a meaningful issue in all judicial nominations, but given how fraught that process already is, it is hard to imagine any constituency injecting yet another issue that could so easily be taken out of context by opponents of the nominee (or of the then-current president).

##### *B. The Role of Congress in National Security Litigation*

The elephant in the room is Congress. As Part II noted, many—if not most—of the obstacles identified in Part II could be overcome by statute, and rather easily at that. At the same time, this is the same Congress that not only has refused ever to provide a general cause of action for constitutional violations by federal officers,<sup>213</sup> but also, in recent years, has only been too happy to try to pretermitt not only judicial remedies in national security cases, but judicial review altogether.<sup>214</sup> That said, short of a comprehensive framework statute for judicial remedies against the federal government, there are four specific reforms that might be pursued independently.

##### *1. Broadening Standing by Statute*

The first reform is targeted at decisions like *Clapper*<sup>215</sup>—and at broadening the standing of plaintiffs to challenge secret government programs. As I have argued in some detail elsewhere, Congress actually has far more control over standing than is generally understood—and often creates standing where it did not previously exist simply in how it defines statutory injuries.<sup>216</sup> As Justice Kennedy wrote in his concurring opinion in *Lujan v. Defenders of Wildlife*,<sup>217</sup> “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy

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213. See *supra* Part II.B.1.

214. See *supra* Part II.A.2.

215. *Clapper II*, 133 S. Ct. 1138 (2013).

216. See Vladeck, *Standing and Secret Surveillance*, *supra* note 13, at 554–55.

217. *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992).

where none existed before.”<sup>218</sup> “The key is that ‘Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.’”<sup>219</sup> Thus, after *Clapper*, Congress could authorize suit by any person “who can demonstrate (i) a reasonable basis to believe that their communications will be acquired under [FISA]; and (ii) that they have taken objectively reasonable steps to avoid such surveillance.”<sup>220</sup> Congress could do the same for other challenges to secret government programs, like the claims at issue in *Hedges v. Obama*.<sup>221</sup>

## 2. Creating Express Causes of Action

To similar effect, Congress could also create an express cause of action for violations of federal law by federal officers. That is to say, Congress could codify the ability of individuals whose federal rights have been violated by federal officers to pursue private civil litigation for prospective relief (for ongoing violations) or retrospective relief (for completed violations), much as it has already done for violations of federal rights by state officers,<sup>222</sup> or for specific violations of federal statutes, such as FISA.<sup>223</sup>

## 3. Waiving Immunity Defenses

Whether alongside these reforms or by itself, Congress could also waive the federal government’s sovereign immunity (and override individual officers’ immunity defenses) by enacting a Westfall Act-like statute to cover all suits arising within a government officer’s “scope of employment,” and not just from the specific categories of tort claims already recognized by the Federal Tort Claims Act.<sup>224</sup>

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218. Vladeck, *Standing and Secret Surveillance*, *supra* note 13, at 555–56 (citing *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).

219. *Id.* at 568.

220. *Id.*

221. See *Hedges v. Obama*, 724 F.3d 170, 173–74 (2d Cir. 2013).

222. See 42 U.S.C. § 1983 (2012) (providing that any state officer who “subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”).

223. See 50 U.S.C. § 1810 (2012) (authorizing suits for damages by individuals subjected to unlawful surveillance under FISA).

224. See 28 U.S.C. § 1346(b) (2012 & Supp. I 2013); 28 U.S.C. §§ 2679(d), 2680 (2012). See generally Vázquez & Vladeck, *supra* note 72.

#### 4. Abrogating the State Secrets Privilege

Congress could and should abrogate the state secrets privilege<sup>225</sup>—and, if necessary, replace it with a far more tailored procedure (applicable in a far narrower class of cases) providing for particular proceedings to proceed wholly in camera and, where necessary, with security-cleared counsel representing the relevant parties.

#### 5. Overruling *Iqbal*

In line with some of the other reforms proposed above, Congress could also consider one of the many proposals that have been floated to overrule *Iqbal* and *Twombly*<sup>226</sup>—and to restore the “*Conley v. Gibson*” standard for the factual sufficiency of a complaint under Rule 8 of the Federal Rules of Civil Procedure.<sup>227</sup> Under that approach, so long as the pleaded claim or defense provides fair notice of the nature of the claim or defense and the allegations, if taken to be true, would support a legally sufficient claim or defense, then the claim is factually sufficient under Rule 8.<sup>228</sup>

#### 6. Other Reforms

Of course, these five reforms are not exclusive. Among other things, Congress could revisit the “immediate custodian” rule, the “battlefield preemption” doctrine, 28 U.S.C. § 2241(e)(2)’s jurisdiction-stripping provision, *Councilman* abstention, and virtually all of the other obstacles identified in this Article.<sup>229</sup> Congress could also pursue substantive reforms in some of the areas in which courts have been unduly skeptical of post-9/11 claims for relief, including, for example, under FOIA.<sup>230</sup> But the five reforms noted above are the ones that would apply to the greatest number of cases, and that would be most likely to make a meaningful difference in increasing the frequency of merits-based adjudication in challenges to post-9/11 national security and counterterrorism policies—and, perhaps, in improving judicial accountability for government conduct in this sphere.

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225. See *supra* Part II.C.3.

226. See *supra* Part II.B.2.

227. *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

228. *Id.*

229. See *supra* Part II.

230. See *supra* Part II.D.

### 7. *Shortcomings*

Unfortunately, the shortcoming of each of these reforms is the same—politics. There has never been a meaningful constituency for such an expansion of judicial remedies against the federal government, and there certainly is not one today. Among other things, critics would argue that such measures would (1) open the courthouse doors to terrorists; (2) more generally open the floodgates to vexatious and frivolous civil litigation against the government; (3) consume significant government resources in defending against such suits; and (4) put a strain on the treasury by authorizing far more damages awards than have been available to date. There are, of course, responses to each of these concerns, along with accommodations that can be made to dilute the impact these reforms will have along such lines. But, it is hard to imagine that such responses will matter against the political backlash that these proposals would almost surely provoke. The harder question is whether one or two of these reforms might have a better chance than all of them together (e.g., focusing on standing and an expansion of the Westfall Act). But it is difficult to imagine even modest statutory reforms in the name of increasing the judicial role in these cases progressing in this Congress (or one in the near future).

## V. CONCLUSION

Reasonable minds will surely disagree about how many of the pressing substantive legal questions implicated by contemporary U.S. national security and counterterrorism policy should be answered. Is the government's bulk collection of Americans' phone records constitutional? Can U.S. citizens lawfully be targeted by a drone strike under any (or particular) circumstances? Does the government have the power to freeze the assets of U.S. entities simply because they have done business in the past with specially designated foreign terrorist organizations? Are U.S. citizens who provide support to al Qaeda and its affiliates subject to military detention if they are arrested within the United States?

The purpose of this Article is not to suggest answers to these questions, but rather to underscore the imperative of having these questions answered—by judges—in the first place. It is increasingly clear that the post-9/11 world in which we live is a permanent, and not temporary, feature of our lives. As such, it is equally clear, or at least should be, that the U.S. government will continue to pursue new and expansive approaches to mitigating the threat posed by international terrorism—approaches the legality of which could very well be affected by the some of the questions not being answered today.

Writing 209 years ago, Chief Judge Cranch suggested that “dangerous precedents occur in dangerous times.”<sup>231</sup> But what might be even more dangerous is when no precedents are made in dangerous times, leaving future government officers without clarity on the limits of their authority, leaving victims of government abuses without remedies for even the most egregious violations of their constitutional rights, and leaving courts with the increasing (and incorrect) impression that, in the context of challenges to government national security or counterterrorism policies, the only winning move is not to play.

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