Quantum of Competence: Balancing Bivens during the War on Terror

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INTRODUCTION

New Yorkers shoveled snow in Manhattan because a man sneezed in China. Generations of high-school students struggled to take the derivative of \( f(x) = (x^3 + 2x)x^3 \) because Newton’s apple fell from a tree. And a judge held in dissent that an al Qaeda terrorist suspect could pursue non-statutory damages against the U.S. Attorney General because John Marshall failed to deliver William Marbury his justice of the peace commission before midnight.\(^2\)

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2. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 138 (1803); see also Akhil Reed Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi.
Chaos theory explains how small, initial changes in complex systems cause unexpected results. It explains how the flap of a butterfly's wings in Brazil sets off a tornado in Texas—or how a descending piece of fruit caused me great anxiety in applied calculus. And it may even explain how the key principle underlying *Marbury v. Madison*—ubi jus, ibi remedium—evolved from ancient legal maxim, to foundation for the judicial creation of a damages remedy, to twenty-first century terrorist tactic.

The Supreme Court in *Marbury* held that even in the absence of a private right of action, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Or in other words, where there is a right, there is a remedy. Chief Justice Marshall may have anticipated that the Court would one day apply this principle to create remedies for violations of constitutional rights committed by federal officers. A right without a remedy, indeed, is really no right at all. But it is doubtful that even Marshall could have predicted how an extension of ubi jus, ibi remedium in American jurisprudence would prove advantageous to our adversaries: by clever use of the Constitution's own weight and strength, al Qaeda operatives have beseeched the judiciary to create remedies for their inj
ries, and, consequentially, have brought the Global War on Terror home.\textsuperscript{15} To be sure, inviting enemies into federal courts is a prospect the judiciary has found “intolerable” for decades.\textsuperscript{17} In the World War II-era case \textit{Johnson v. Eisentrager}, the Supreme Court denied constitutional habeas corpus rights to German nationals detained in Allied-occupied territory partly to bar future vexatious claims.\textsuperscript{18} “Litigation,” Justice Jackson noted in \textit{Eisentrager}, is a “weapon in unrestrained enemy hands.”\textsuperscript{19} But because “[i]t is during our most challenging and uncertain moments . . . that we must preserve our commitment at home to the principles for which we fight abroad,”\textsuperscript{20} reconciling the judiciary’s reluctance to litigate national security matters with its duty to safeguard essential liberties has taken on paramount importance.\textsuperscript{21} As the \textit{Marbury} Court observed centuries ago, “[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a

\textsuperscript{15} Following the September 11th attacks, President George W. Bush addressed a joint session of Congress and stated that “[o]ur war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.” President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 Pub. Papers 1140, 1141 (Sept. 20, 2001). The Bush Administration used the phrases “global war on terrorism,” “war on global terrorism,” “war on terrorism,” “war on terror,” and “battle against international terrorism” to capture the scope of the terrorist threat it perceived and the operations that would be required to confront it. JEFFREY RECORD, BOUNDING THE GLOBAL WAR ON TERRORISM 1 (2003), available at http://www.globalsecurity.org/military/library/report/2003/record_bounding.pdf. In a rhetorical departure from its predecessor’s nomenclature, the Obama Administration adopted the term “Overseas Contingency Operation” to describe largely the same activities. See DEPT. OF DEFENSE, FY 2010 BUDGET REQUEST SUMMARY JUSTIFICATION: OVERSEAS CONTINGENCY OPERATIONS (2009) (“The FY 2010 Overseas Contingency Operations budget request funds U.S. military operations in Afghanistan, Iraq, Pakistan, and around the globe through September 2010.”); Scott Wilson & Al Kamen, “Global War On Terror” Is Given New Name, Bush’s Phrase Is Out, Pentagon Says, WASH. POST, Mar. 25, 2009, at A4. Throughout this Commentary I use the phrase “war on terror” as short-hand convenience to describe what is more accurately the “global struggle against modern transnational terrorist networks.” Robert D. Sloane, Prologue to a Voluntarist War Convention, 106 Mich. L. Rev. 443, 446 (2007).

\textsuperscript{16} President Bush often garnered support for the war on terror by reminding the American people that fighting terrorists in Afghanistan, Iraq, Pakistan, and beyond is preferable to fighting them at home. See, e.g., George W. Bush, President of the United States, Address at the Ohio State Highway Patrol Academy: President Discusses PATRIOT Act (June 9, 2005), available at http://www.georgebush-whitehouse.archives.gov/news/releases/2005/06/20050609-2.html; see also Johnson v. Eisentrager, 339 U.S. 763, 779 (1950) (“It would be difficult to devise more effective fettering of a field commander than to . . . divert his efforts and attention from the military offensive abroad to the legal defensive at home.”).


\textsuperscript{18} Eisentrager, 339 U.S. at 779. The Court in \textit{Eisentrager} ultimately held that U.S. courts had no jurisdiction over German nationals held at Landsberg prison. Id. at 781.

\textsuperscript{19} Id. at 779.


\textsuperscript{21} Id. at 539 (noting that courts must “pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns”).
vested legal right."22

But in a domain often inhospitable to reason, balancing security on one hand and liberty on the other23 is no easy task.24 The Supreme Court has implemented emotionally detached methods to weigh these competing, but equally important, interests in cases involving the procedural due process rights for a U.S. citizen captured abroad as an alleged enemy combatant25 and the extent to which the writ of habeas corpus runs to non-U.S. citizens detained at Guantánamo Bay, Cuba.26 Yet when courts must determine whether violations of constitutional rights committed by federal officers in the course of the war on terror are actionable pursuant to Bivens v. Six Unknown Federal Narcotics Agents,27—that is, whether the judiciary should step in and create a damages remedy where one does not exist28—there is no comparable method to balance national security concerns against the judicial recognition of an implied cause of action.

True, the creation of a damages remedy is quintessentially a legislative function.29 And the judiciary's unwillingness to fashion a Bivens remedy where a coordinate branch of government is "in a far better position than a court" to decide whether a remedy should be provided30 is well-understood.31 The Supreme Court has observed numerous times that national security determinations fall within the decision-making power of the political branches,32 and thus where the adjudication of a claim would intrude and interfere with these decisions, the judicial creation of a non-statutory damages remedy would be improper.33

But while the Court in Hamdi v. Rumsfeld34 and Boumediene v. Bush35 managed to afford some protection against constitutional rights viola-

23. See Hamdi, 542 U.S. at 578 (Scalia, J., dissenting).
27. 403 U.S. 388 (1971).
28. Id. at 389.
29. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.").
31. See infra Part I.B-C.
32. See Hamdi v. Rumsfeld, 542 U.S. 507, 583 (2004) (Thomas, J., dissenting) (noting that "the Court . . . has correctly recognized the primacy of the political branches in the foreign-affairs and national-security contexts"); Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (finding that there exists a "heightened deference to the judgments of the political branches with respect to matters of national security"); see also Schneider v. Kissinger, 412 F.3d 190, 194 (D.C. Cir. 2005) ("Absent precedent, there could still be no doubt that decision-making in the fields of foreign policy and national security is textually committed to the political branches of government."). I explore this division of power in greater detail infra Part II.
33. See, e.g., Arar v. Ashcroft, 532 F.3d 157, 181 (2d Cir. 2008).
tions, even for terrorist suspects, lower courts have refused systematically to recognize a cause of action for rights violations committed during the war on terror. Professor Stephen I. Vladeck suggests that when courts consider "amorphous" national security concerns as "special factors" counseling against a Bivens remedy, they "lend a judicial sanction to even the most shocking government conduct in the name of national defense." His assessment warrants reflection: research shows that this emerging "national security exception to Bivens" has prevented courts on at least two occasions from even considering the merits of alleged violations of substantive due process under the Fifth Amendment. Or in other words, contrary to the dictates of Marbury, injuries arising from unlawful detention or extraordinary rendition have gone without a remedy.

Professor Vladeck offers three concerns he has with the national secur-

36. See supra notes 25-26 and accompanying text.
37. See infra note 41.
39. See Vladeck, supra note 38, at 5.
40. See id. at 4, 5.
41. See Arar, 532 F.3d at 192; In re Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85, 94 (D.D.C. 2007). In a related case, the Fourth Circuit dismissed a German citizen's complaint on the government's invocation of state-secrets privilege prior to ascertaining whether he could state a Fifth Amendment Bivens action. See El-Masri v. United States, 479 F.3d 296, 300, 313 (4th Cir. 2007). But see Padilla v. Yoo, 633 F. Supp. 2d 1005, 1025 (N.D. Cal. 2009). After this Comment went into production, a California district court, relying extensively on Arar v. Ashcroft, found no special factors counseling hesitation in a Bivens action involving the allegedly unconstitutional treatment of an American citizen residing in the United States as an enemy combatant. Id. at 1025-30. The court held that José Padilla sufficiently alleged constitutional claims against a senior government official, John Yoo, in part because the Authorization for the Use of Military Force (AUMF), id. at 1026-27, the discretion afforded to coordinate branches of government in times of war, id. at 1027-28, the effect the case would have on national security, id. at 1028, and the effect it would have on foreign affairs and foreign relations, id. at 1029-30, did not preclude a Bivens action, id. at 1030. This special-factors analysis is, on balance, more accurate than not. The court erroneously declined to consider the AUMF, a joint-congressional resolution, as a special factor, see id. at 1026-27; infra note 230, but correctly rejected John Yoo's assertions that the AUMF's delegation of authority to the president and arguments that essentially amounted to an invocation of the state-secrets privilege should counsel against Padilla's Bivens action, see Padilla, 633 F. Supp. 2d at 1027-28; infra note 231. Unfortunately, space and publication constraints do not permit a more comprehensive examination of Padilla v. Yoo, and thus where possible, I devote some attention to it in the margins.
42. The government's extraordinary rendition policy is a supposed clandestine CIA program whereby suspected terrorists are sent to foreign countries for interrogation and detention otherwise not permitted in the United States. See Arar, 532 F.3d at 192; El-Masri 479 F.3d at 300. This program, however, is not a part of official government policy. See Arar v. Ashcroft, 414 F. Supp. 2d 250, 256 (E.D.N.Y. 2006).
43. Lesson Eighteen in the al Qaeda training manual, entitled "Prisons and Detention Centers," instructs al Qaeda operatives to "insist on proving that torture was inflicted on them by State Security [investigators] before the judge." Military Studies in the Jihad [Holy War] Against the Tyrants, supra note 9, at 137. In light of this strategy, this Comment will continue to refer to these injuries as "alleged" or "suspect". The issues I focus on relate to getting to the merits of the case, not the merits themselves.
ity exception to Bivens. First, Congress has not provided a remedial mechanism for injuries incurred as a result of unlawful detention or extraordinary rendition. The Supreme Court has never suggested that congressional inaction forecloses Bivens relief, and, according to Professor Vladeck, the recognition of a Bivens action is a particularly appropriate check on unconstitutional governmental action. Second, the national security exception defers disproportionately to executive branch determinations, and the Executive has no discretion to violate the Constitution, even in times of war. And third, although not the original intent of Bivens, the exception “eviscerate[s]” its role as a deterrent for unconstitutional actions by federal officers.

The issues raised in Professor Vladeck’s commentary suggest that lower courts are abdicating their responsibility to vindicate constitutional rights when they consider Bivens actions implicating the war on terror. Given that recent Supreme Court pronouncements have managed to balance safety and liberty even in times of national challenge, this news is troubling. But what is equally disturbing is the appearance that the “faithful guardians of the Constitution” have succumbed to the siren song of security: by withholding a remedy for a “violation of a vested legal right” “in the name of national defense,” the judiciary has adopted a “blunderbuss” approach to denying the enforcement of the very constitutional rights “for which we fight abroad.” Because the United States is a “government of laws, and not of men,” adhering to a sweeping exception to remedial relief for constitutional rights violations simply can-

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44. See Vladeck, supra note 38 (relying entirely on Arar, 414 F. Supp. 2d at 250).
45. Id. at 5.
46. Id.
47. Id. The Constitution contains no explicit provision for its own suspension during times of emergency. The only clause that refers to the suspension of individual rights is the Suspension Clause, which provides, “The Privilege of the Writ of Habeas Corpus shall not be suspended unless, when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. Const. art. I, § 9, cl. 2 (emphasis added).
48. The Supreme Court in Correctional Services Corp. v. Malesko noted that, “[t]he purpose of Bivens is to deter individual federal officers from committing constitutional violations.” 534 U.S. 61, 70 (2001). Bivens itself, however, was not mainly concerned with deterrence. See infra Part I.C.
49. See Vladeck, supra note 38, at 5.
51. The Federalist No. 78 (Alexander Hamilton).
52. See, e.g., Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164-65 (1963) (“The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit government action.”).
54. See Vladeck, supra note 38, at 5.
57. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
not be the rule. What courts are lacking is a way to separate out and distinguish amorphous national security concerns in a Bivens analysis. What is missing is a way to balance Bivens during the war on terror.

This Comment attempts to provide such a method. It deconstructs the Bivens national security exception and introduces a balancing mechanism that I call the Bivens national security exception continuum.58 Since Congress is the political branch entrusted with the institutional competence to create private rights of action and prescribe remedies,59 by measuring amorphous national security matters by congressional participation in the decision-making process, the continuum offers a more balanced way to conduct a Bivens analysis for injuries arising from the war on terror and, in some cases, leaves open the possibility for judicially manufactured relief.60

In brief, Bivens prescribed a framework for the judicial recognition of an implied cause of action against the backdrop of congressional deference to the creation of a damages remedy. The continuum approach I propose, therefore, is a function of the Legislature's participation in the national security decision-making process. It shows that the greater the congressional involvement in a national security matter, the more likely it should be considered a special factor counseling against Bivens relief. In contrast, because the Executive lacks the institutional competence to create private rights of actions and prescribe remedies, the closer a national security matter is to a purely executive function, the less likely it should be considered a special factor, and a Bivens action may be allowed to move forward. The continuum approach does three things. First, it returns courts to the original intent of Bivens as an inquiry into whether Congress is in a better position than the judiciary to create a damages remedy. Second, it capitalizes on the newfound interest-based balancing approach the Court has adopted when considering Bivens actions following the September 11th attacks. And third, by addressing Professor Vladeck's three concerns, it brings courts back to their primary duty—to vindicate constitutional rights.

The analysis proceeds as follows. Part I examines the origins of the national security exception. It describes Bivens relief and the procedures courts have implemented to determine whether to create a damages remedy. This part pays particular attention to the special factors that have counseled against the recognition of an implied cause of action in matters involving the coordinate branches of government. Next, Part II uses the special-factors analysis in Arar v. Ashcroft61 as a tool to separate out and distinguish amorphous national security concerns by quantum of compe-
This part shows the erroneous progression from congressional-centric to executive-centric special factors courts have considered under a *Bivens* analysis. Part III introduces the *Bivens* national security exception continuum. It explains how courts should only consider national security concerns as special factors when congressional action dominates the matter. This approach harmonizes the original intent of *Bivens* as a function of separation of powers principles with the more modern, policy-driven approach courts have been implementing under the special-factors doctrine. Finally, I conclude by highlighting why the analysis is both useful and normatively sound in cases that implicate the war on terror and beyond.

I. ORIGIN OF THE NATIONAL SECURITY EXCEPTION

The national security exception to *Bivens*, while self-evident, is perhaps misnamed. When courts consider national security concerns in a *Bivens* analysis, they do so according to the special-factors doctrine. As such, the national security exception is less of an exception to *Bivens* relief and more of a special factor counseling—albeit absolutely—against the creation of new federal remedies. But what exactly is a “special factor”? How did Justice Brennan's dicta at the end of his opinion in *Bivens* take on such great significance in the way courts approach whether to create a non-statutory damages remedy? How have subsequent *Bivens* actions interpreted this cryptic, cautionary note, and in what ways have they shaped the special-factors doctrine? And why have judicial attitudes toward special factors progressed from a simple examination of congressional action to a more intensive scrutiny of policy ramifications? This part seeks to answer those questions by reviewing the origins of the judicial recognition of an implied cause of action under *Bivens*, examining the history of how courts have identified special factors prior to the September 11th attacks, and distilling what special factors have meant ever since.

A. *Bivens v. Six Unknown Federal Narcotics Agents*

The Supreme Court in *Bivens* created a non-statutory damages remedy for violations of the Fourth Amendment by agents of the Federal Bureau of Narcotics. Webster Bivens claimed that six federal officers entered his home without a warrant, "manacled" him in front of his family, and arrested him for alleged narcotics violations all without probable cause. The search caused Bivens great "humiliation, embarrassment,

63. But see *Padilla*, 633 F. Supp. 2d at 1025.
64. *Bivens*, 403 U.S. at 396.
65. *Infra* Part I.A.
66. *Infra* Part I.B.
67. *Infra* Part I.C.
69. *Id.* at 389.
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and mental suffering."\textsuperscript{70} As a result of what he claimed was unlawful conduct, Bivens sought money damages from each of the officers.\textsuperscript{71} The district court dismissed the action for, among other things, failure to state a claim upon which relief could be granted,\textsuperscript{72} and the Second Circuit Court of Appeals affirmed.\textsuperscript{73} The Supreme Court reversed and remanded, however, and relying largely on \textit{Marbury v. Madison}, held that Bivens's "complaint state[d] a cause of action under the Fourth Amendment, [and he] is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment."\textsuperscript{74}

Although the U.S. Constitution vests Congress with legislative power,\textsuperscript{75} \textit{Bivens} held that, in appropriate circumstances, the Constitution itself provides an implied cause of action for its own violation by federal officers.\textsuperscript{76} Following the Civil War, Congress enacted the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983, which created a damages remedy for constitutional rights violations committed by state officials.\textsuperscript{77} Victims of constitutional misconduct by federal officials, however, had no such statutory remedy. The \textit{Bivens} Court thus sought to protect individuals from constitutional rights violations suffered at the hands of federal officials the same way § 1983 protects against injuries by state officers.\textsuperscript{78} \textit{Bivens} therefore stands for the proposition that an injured plaintiff may invoke the jurisdiction of the federal courts to vindicate a violated constitutional right against the offending federal official.\textsuperscript{79}

This landmark case had the potential to open the "floodgates" of constitutional tort litigation.\textsuperscript{80} The Supreme Court in fact readily demonstrated its power and authority by granting itself the ability to judicially manufacture a damages remedy. But extensions of \textit{Bivens} relief have been rare. The Court observed some time ago that its "decisions have

\begin{itemize}
\item \textsuperscript{70} \textit{Id.} at 389-90.
\item \textsuperscript{71} \textit{Id.} at 390.
\item \textsuperscript{73} \textit{Bivens v. Six Unknown Fed. Narcotics Agents}, 409 F.2d 718, 719 (2d Cir. 1969).
\item \textsuperscript{74} \textit{Bivens}, 403 U.S. at 397; see also \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 163 (1803).
\item \textsuperscript{75} U.S. Const. art. 1, § 1.
\item \textsuperscript{76} \textit{Bivens}, 403 U.S. at 401-02 (Harlan, J., concurring).
\item \textsuperscript{77} 42 U.S.C. § 1983 (2006) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 . . . .").
\item \textsuperscript{78} Wilkie v. Robbins, 551 U.S. 537, 585 (2007) (Ginsburg, J., concurring in part and dissenting in part) ("Thirty-six years ago, the Court created the \textit{Bivens} remedy. In doing so, it assured that federal officials would be subject to the same constraints as state officials in dealing with the fundamental rights of the people who dwell in this land.").
\item \textsuperscript{79} \textit{See Butz v. Economou}, 438 U.S. 478, 486 (1978) ("\textit{Bivens} established that compensable injury to a constitutionally protected interest could be vindicated by a suit for damages invoking the general federal-question jurisdiction of the federal courts. . . .").
\item \textsuperscript{80} \textit{See}, e.g., \textit{Wilkie}, 551 U.S. at 569 (Ginsburg, J., concurring in part and dissenting in part).
\end{itemize}
responded cautiously to suggestions that Bivens remedies be extended into new contexts.\textsuperscript{81} Over the last forty years, the Court has extended Bivens relief into only two new contexts, and the most recent extension was nearly thirty years ago. 

Over a decade after Bivens, the Supreme Court in Davis v. Passman recognized an implied cause of action for violations of the Fifth Amendment’s Due Process Clause for a victim of sexual discrimination.\textsuperscript{82} Shirley Davis served as a deputy administrative assistant to then-Louisiana Congressman Otto E. Passman.\textsuperscript{83} Passman terminated Davis’s employment because it “was essential that the understudy to my Administrative Assistant be a man.”\textsuperscript{84} Seeing no available relief in equity or under state law,\textsuperscript{85} the Court carefully recognized Davis’s Bivens action and reversed the Fifth Circuit Court of Appeals’s opinion.\textsuperscript{86} Justice Brennan, who had authored Bivens, noted in Davis that it was irrelevant that Congress had not provided a remedial mechanism because “the question of who may enforce a statutory right is fundamentally different from the question of who may enforce a right that is protected by the Constitution.”\textsuperscript{87} According to Brennan, the Court could enforce the Fifth Amendment, since it is a constitutional right, regardless of whether Congress had enacted a statutory remedy.\textsuperscript{88}

Just one year later in Carlson v. Green, the Court extended Bivens to violations of the Eighth Amendment’s Cruel and Unusual Punishment Clause.\textsuperscript{89} The mother of a deceased prisoner brought suit against federal prison officials, alleging that her son’s untreated ailments ultimately led to his death.\textsuperscript{90} It was again Justice Brennan who acted on behalf of the Court, this time affirming both the district court’s and the Seventh Circuit Court of Appeals’s assessments that a Bivens action was available.\textsuperscript{91} According to the Court, the Federal Tort Claims Act (FTCA) did not protect constitutional rights sufficiently under these circumstances, there was no indication from Congress that the FTCA should be the exclusive remedy for this type of action, and, therefore, Bivens relief was an appropriate exercise of judicial power.\textsuperscript{92}

But Carlson was the second and last time the Supreme Court extended Bivens. Justice Powell, who dissented in Davis\textsuperscript{93} but concurred in judg-

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  \item \textsuperscript{81} Schweiker v. Chilicky, 487 U.S. 412, 421 (1988) (refusing to recognize Bivens relief for wrongful termination of Social Security benefits).
  \item \textsuperscript{82} Davis v. Passman, 442 U.S. 228, 243-44 (1979).
  \item \textsuperscript{83} \textit{Id.} at 230.
  \item \textsuperscript{84} \textit{Id.} at 230 & n.3.
  \item \textsuperscript{85} The Court noted that Congress had failed to create a damages remedy for the violation of Davis’s right. \textit{Id.} at 232-33.
  \item \textsuperscript{86} Davis v. Passman, 571 F.2d 793, 796 (5th Cir. 1978).
  \item \textsuperscript{87} \textit{Davis}, 442 U.S. at 240-41.
  \item \textsuperscript{88} \textit{Id.} at 242.
  \item \textsuperscript{89} Carlson v. Green, 446 U.S. 14, 24 (1980); see also U.S. Const. amend. VIII.
  \item \textsuperscript{90} Carlson, 446 U.S. at 16.
  \item \textsuperscript{91} \textit{Id.} at 24.
  \item \textsuperscript{92} \textit{Id.} at 23; see also Federal Tort Claims Act, 26 U.S.C. § 1346(b) (2006).
  \item \textsuperscript{93} Davis, 442 U.S. at 251-55 (Powell, J., dissenting).
\end{itemize}
ment in *Carlson*,94 wrote separately, cautioning against a further extension of *Bivens*.95 His analysis in *Carlson* stressed that "a court must entertain a *Bivens* suit unless the action is `defeated' in one of two specified ways;"96 either Congress "explicitly declared its remedies to be a substitute for recovery directly under the Constitution and viewed [it] as equally effective"97 or "if `special factors' [that] counsel `hesitation'"98 are present.99

Later *Bivens* progeny clarified the structure of this fact-sensitive, two-step inquiry.100 First, a court will examine whether an alternative damages remedy exists or there is an explicit congressional prohibition against one.101 Either would bar the judicial recognition of an implied cause of action. Second, a court must consider "special factors" that would "counsel hesitation" and foreclose the availability of a remedy.102 These special-factor considerations do not concern "the merits of the particular remedy [being] sought," but rather involve "the question of who should decide whether such a remedy should be provided."103

As previously noted, the phrase "special factors" comes from Justice Brennan's concluding remarks of his *Bivens* majority opinion.104 He conceded that there may be certain "special factors" under which an otherwise valid *Bivens* claim might be nonjusticiable.105 Although he did not define these special factors, Justice Brennan cited two "pre-*Bivens*" actions where the Court declined to recognize an implied cause of action.106 First, in *United States v. Standard Oil Co.*, the Court refused to infer a damages remedy because Congress was in a better position than the judiciary to open up the "federal purse."107 And second, in *United States v. Gilman*, the Court likewise refrained from recognizing an implied cause of action because the claim involved complex policy questions committed to the executive and legislative branches of government.108 The synthesis of these two holdings foreshadowed the core of the original special-factors doctrine: only Congress should decide whether to create a damages

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95. *Id.* at 26-27.
96. *Id.* at 26.
97. *Id.* at 26-27 (Powell, J., concurring in judgment) (internal citations omitted).
98. *Id.* at 27 (internal citations omitted).
99. It was also Justice Powell who wrote, "The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse." *Goldwater v. Carter*, 444 U.S. 996, 996 (1979) (Powell, J., concurring).
101. *Id.*
102. *Id.*
105. *Id.* at 396-97.
106. *Id.* at 396.
107. *Id.* (citing *United States v. Standard Oil*, 332 U.S. 301, 311 (1947)).
108. *Id.* (citing *United States v. Gilman*, 347 U.S. 507, 509 (1954)).
remedy when the claim implicates political branch matters. Subsequent Bivens actions gave greater definition to the special-factors doctrine, and the remainder of this part examines what courts have considered as special factors in matters involving the coordinate branches of government.

B. SPECIAL FACTORS IN THE 1980s

The Supreme Court has been particularly hesitant about allowing Bivens claims to move forward if the action implicates separation of powers principles. This reluctance presumably stems from Justice Harlan’s concurring opinion in Bivens where he noted that “the question of judicial power to grant Bivens damages is . . . whether the power to authorize damages as a judicial remedy for the vindication of a federal constitutional right is placed by the Constitution itself exclusively in Congress’ hands.”

Or in other words, whether the judicial creation of a damages remedy is an ultra vires exercise of power turns on the Constitution’s explicit grant of that power to another branch of government. Justice Harlan’s concurrence deserves attention since it created a majority for the Bivens Court.

The separation of powers doctrine allocates power horizontally among the three branches of government—the legislative, the executive, and the judicial. Although studied most frequently in terms of executive encroachment on the Legislature or legislative encroachment on the Executive, separation of powers principles also bar the judiciary from adjudicating matters solely within the purview of the political branches. The doctrine is nowhere mentioned in the Constitution itself, but as Justice Brandeis put it in his dissent in Myers v. United States:

The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Because the separation of powers doctrine operates as “a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other,” its role in a Bivens analysis is particularly

110. See id.
111. See Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 587 (1952) (holding that President Truman’s Article II powers did not permit him to take possession of private property during the Korean War).
114. Buckley v. Valeo, 424 U.S. 1, 122 (1976). “This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it.” Id. at 123.
Bivens relief is improper when a coequal coordinate branch of government, namely Congress, is in a better position than the courts to create a damages remedy. Past considerations of Bivens involving the three branches of government show how separation of powers principles figured into the Court's refusal to recognize an implied cause of action in the 1980s.

For example, the Supreme Court in Bush v. Lucas held that a First Amendment Bivens remedy did not exist in situations "arising out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States." Decided five years after Carlson, this was the first time that the Court declined to extend Bivens into a new scenario. Bush, a disgruntled NASA aerospace engineer, stated to the media that his job was "a travesty and worthless." Both television and print sources broadcasted these statements, and as a result of the negative publicity, Bush's superiors demoted him. Seeing no alternative remedial mechanism, Bush sought Bivens damages for compensation.

The Bush Court cautiously approached its consideration of an extension of Bivens. Justice Stevens writing for the entire Court noted that "our power to grant relief that is not expressly authorized by statute... is to be exercised in the light of relevant policy determinations made by the Congress." The Court in its special-factor analysis determined that it indeed was preferable for Congress, rather than the judiciary, to evaluate the impact of damages suits for alleged violations of a federal employee's First Amendment rights. The Court did not identify merely one special factor, but instead indicated that "a good deal of history" counseled against the recognition of a new implied cause of action. And the Court went on to explain the purpose of the special-factors doctrine in separation of powers language: the doctrine does "not concern the merits of the particular remedy that was sought. Rather, [special factors] relate[ ] to the question of who should decide whether such a remedy should be provided." Special factors, therefore, are inquiries into how non-judicial determinations are made and whether "there are reasons for allowing

115. See generally id.
117. Id. at 368.
118. Id. at 389-90.
119. Id. at 369.
120. Id. at 369-70.
121. Id. at 372-73.
122. Id. at 373.
123. Id. at 389.
126. Id. at 380.
Congress to prescribe the scope of relief that is made available"\(^{127}\) in those situations.

In the Supreme Court's second unequivocal denial of *Bivens* relief, a unanimous Court in *Chappell v. Wallace* refused to create a damages remedy for constitutional rights violations committed by military officers.\(^{128}\) Minority enlisted naval personnel claimed that their commanding officers "failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity" because of their "race, color or previous condition of servitude."\(^{129}\) The Court identified in its special-factors analysis that a "special status" exists for the military.\(^{130}\) Because Congress enjoys "plenary control"\(^{131}\) over military discipline, this separation of powers assessment precluded the judiciary from permitting members of the armed forces to bring suits against superior officers for damages.\(^{132}\)

And third, in *United States v. Stanley*, the Court held that a *Bivens* remedy was unavailable to a former army serviceman who "violently beat his wife and children" because federal agents had administered a hallucinogen narcotic to him without his knowledge.\(^{133}\) The special factors present here likewise drew directly from separation of powers principles: "uninvited intrusion into military affairs by the judiciary [was] inappropriate."\(^{134}\) Similar to the special-factors analysis in *Bush*,\(^{135}\) the *Stanley* Court identified several factors which counseled against the judicial recognition of an implied cause of action: the military's position in society, its separate system of discipline and justice, and an explicit constitutional grant of power to Congress to govern the armed forces.\(^{136}\) The Court then reaffirmed the reasoning behind *Chappell* that these special factors established Congress's primacy in this field.\(^{137}\) According to the *Stanley* Court, because Congress had not authorized judicial intervention into military discipline, the Legislature retained sole authority over these matters and, thus *Bivens* relief was inappropriate.\(^{138}\)

What the early *Bivens* progeny tells us is that courts placed a premium on the "bedrock principles of separation of powers [that] foreclosed judicial imposition of a new substantive liability."\(^{139}\) In *Bush*, the Court noted that *Bivens* inquiries must focus on which branch of government should decide whether a remedy should be provided.\(^{140}\) In *Chappell*, the Court

\(^{127}\) *Bush*, 462 U.S. at 380.
\(^{129}\) *Id.* at 297.
\(^{130}\) *Id.* at 303-04.
\(^{131}\) *Id.* at 301.
\(^{132}\) *Id.* at 300.
\(^{134}\) *Id.* at 683.
\(^{135}\) *Supra* note 124 and accompanying text.
\(^{136}\) *Stanley*, 483 U.S. at 682-83.
\(^{137}\) *Id.* at 683.
\(^{138}\) *Id.* at 679-80.
\(^{140}\) *Supra* note 126 and accompanying text.
applied this understanding and refused to recognize an implied cause of action where Congress enjoyed "plenary control." And in Stanley, the Court again denied Bivens relief because, among other things, the Constitution had granted Congress the ability to govern the armed forces: as in Chappell, the Legislature retained authority over military matters and therefore, as in Bush, Congress was in a better position to determine whether a damages remedy should exist.

But while the Court in the 1980s focused its "special factors counseling hesitation" analysis upon Congress's participation in the creation of damages remedies, more recent Bivens actions have treated "special factors" as any concern the Court might find important to the creation of a cause of action. Or to borrow a phrase from Professor Laurence H. Tribe, twenty-first century Bivens jurisprudence suggests that there is no longer a "specialness" in a "special factors" inquiry. To understand what Professor Tribe's assessment means, this Comment will now examine how the Court's Bivens analysis moved away from an examination of congressional action pursuant to separation of powers principles and moved toward the consideration of policy ramifications instead.

C. SPECIAL FACTORS AFTER SEPTEMBER 11TH

The Supreme Court's approach to the special-factors doctrine underwent a paradigm shift after the September 11th attacks. The second step of the contemporary Bivens analysis is now more concerned with balancing competing interests than with adhering to separation of powers principles. This new way of framing the special-factors examination suggests that as congressional inaction becomes more pronounced, courts should more actively engage in a policy-driven approach to the creation of a damages remedy rather than recognizing an implied cause of action exclusively to provide relief. Because there is no statutory means of redress for injuries arising from unlawful detention or extraordinary rendition during the war on terror—and because the idea of enacting such legislation is perhaps politically unpalatable—looking at the way courts have contributed to the special-factors doctrine since the September 11th attacks provides unique insight into how the national security exception to Bivens became the dominant rule.

In November 2001, for example, the Supreme Court in Correctional Services Corp. v. Malesko refused to recognize an implied cause of action

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141. Supra note 132 and accompanying text.
142. Supra note 123 and accompanying text.
145. See Wilkie, 551 U.S. at 554.
146. Tribe, supra note 144, at 70.
147. See Vladeck, supra note 38, at 5 (noting that "Congress, as the instrument of popular sentiment, is the least likely to look out for the rights of those swept up in the proverbial dragnet.").
for Eighth Amendment violations against a private corporation acting in concert with the Federal Bureau of Prisons.\textsuperscript{148} Correctional Services Corporation (CSC) operated a halfway house in New York where John E. Malesko, who had been convicted of securities fraud, was sentenced to reside for one-and-a-half years.\textsuperscript{149} According to the complaint, a CSC employee forbade Malesko, who had a known history of heart disease, from using an elevator to get to his living quarters.\textsuperscript{150} As a result of this prohibition, Malesko suffered a heart-attack and injured his ear while climbing the stairs to his fifth floor residence.\textsuperscript{151} Three years later, he filed suit against the CSC employee and several other unnamed employees seeking compensatory and punitive damages.\textsuperscript{152} The district court construed the action as a \textit{Bivens} claim and dismissed it in its entirety.\textsuperscript{153} The Second Circuit Court of Appeals affirmed in part, reversed in part, and controversially reasoned that there are times when even private companies should be subject to \textit{Bivens} relief.\textsuperscript{154}

The Supreme Court, however, declined to extend \textit{Bivens} and held that private entities are not subject to a \textit{Bivens} action.\textsuperscript{155} Chief Justice Rehnquist noted that there existed an alternative remedial mechanism for Malesko to pursue monetary damages, and thus an extension of \textit{Bivens} would be an inappropriate exercise of judicial power.\textsuperscript{156} But curiously, the Court went further to hold that "[t]he purpose of \textit{Bivens} is to deter individual federal officers from committing constitutional violations."\textsuperscript{157} This language in \textit{Malesko} is puzzling, especially when viewed alongside Justice Harlan's fifth-vote concurrence in \textit{Bivens}. In concurring with the judgment, Justice Harlan observed that:

\begin{quote}
[C]ompensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct. Damages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result.\textsuperscript{158}
\end{quote}

Therefore, instead of showing judicial restraint, as Chief Justice Rehnquist claimed when he refused to recognize an implied cause of action, by casting \textit{Bivens} as a deterrent, the \textit{Malesko} Court actually injected itself into policy considerations reserved for the political branches. To put it another way, contrary to the original intent of \textit{Bivens}, the \textit{Malesko} Court moored itself to the idea that a special-factors analysis includes inquiries

\begin{itemize}
\item \textsuperscript{148} \textit{Malesko}, 534 U.S. at 63.
\item \textsuperscript{149} \textit{Id.} at 63-64.
\item \textsuperscript{150} \textit{Id.} at 64.
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} \textit{Id.} at 64-65.
\item \textsuperscript{153} \textit{Id.}
\item \textsuperscript{154} \textit{Id.} at 65.
\item \textsuperscript{155} \textit{Id.} at 66 & n.2.
\item \textsuperscript{156} \textit{Id.} at 71-73.
\item \textsuperscript{157} \textit{Id.} at 70.
\end{itemize}
into whether the judicial creation of a damages remedy might serve as a deterrent against unconstitutional conduct by federal officers. But that has never been the test.

In June 2007, the Court in Wilkie v. Robbins declined to recognize an implied cause of action for trespass and other land-use violations under the Fourth and Fifth Amendments. But it also broadened the scope of Bivens's “step two” even further. At issue in Wilkie was whether landowners had, inter alia, a private action for damages under Bivens against Bureau of Land Management federal officers accused of harassment and intimidation. In step one of his Bivens analysis, Justice Souter found that an alternative damages remedy existed for the landowners. This recognition in and of itself was sufficient to defeat a Bivens action; the Malesko Court indeed terminated the analysis at that point. But when Justice Souter turned to an unnecessary Bivens “step two”—the special-factors doctrine—he declined to focus his analysis on congressional participation and instead held that the Court must weigh “reasons for and against the creation of a new cause of action, the way common law judges have always done.” The Wilkie Court went on to balance the competing interests of the landowners and the government officials and concluded that, “[t]he point here is not to deny that Government employees sometimes overreach, for of course they do, and they may have done so here if all the allegations are true. The point is the reasonable fear that a general Bivens cure would be worse than the disease.” Finally, in far-reaching language suggesting that there are even times when the violation of a right does not warrant a remedy, Justice Souter noted that “any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation.”

The Malesko and Wilkie Courts’ departure from Bivens’s 1980s progeny cannot be overstated. In balancing policy considerations, the Court adopted a newly “open-ended special factors methodology,” both “unmanageable” and “inconsistent with a reasonable concept of separation of powers.” Professor Tribe also makes the insightful point that this methodology “has been exercised to the detriment of Fifth Amendment rights peculiarly in need of the protection that only a Bivens remedy could have ensured.” This perhaps explains how violations of substan-

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160. Id. at 541. Also at issue was whether the landowners had a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (2006). Wilkie, 553 U.S. at 541. The Court also declined to recognize relief under RICO. Id.
161. Id. at 553.
162. See Malesko, 534 U.S. at 74.
163. Wilkie, 551 U.S. at 553.
164. Id. at 561.
165. Id. at 562 (emphasis added).
166. See Tribe, supra note 144, at 70.
167. Id. at 70-71 (citing Gene R. Nichol, Bivens, Chilicky, and Constitutional Damages Claims, 75 VA. L. REV. 1117, 1151 (1989)).
168. Id. at 71.
tive due process under the Fifth Amendment arising from unlawful de-
tention and extraordinary rendition have gone without a remedy. If this is
the case—and in this author's opinion, it is—then Professor Tribe's strong
analysis throws into sharp relief how the judiciary's reluctance to recog-
nize a cause of action for rights violations committed during the war on
terror is wholly divorced from Justice Harlan's separation of powers
based *Bivens* concurrence. This hesitation comes from a newly minted
post-September 11th interest-based approach instead.169

What does all this mean for a terrorist suspect pursuing relief under
*Bivens*? To put it succinctly, even if an al Qaeda operative can show that
federal officers have violated some type of constitutional right—a rather
significant assumption by itself170—the alleged terrorist will still have to
prove that no "special factors" counsel against an extension of *Bivens*
under the particular circumstances of the case. But conducting this *Bivens*
analysis can be daunting and uncomfortable for judges in the absence of a
coherent special-factors doctrine. As the Supreme Court distanced itself
from the separation of powers principles evident in the 1980s and moved
to a more interest-based approach in the twenty-first century, these "un-
manageable" and "inconsistent" messages imply that special-factors in-
quiries are no longer limited to questions as to whether a court *can* create
a damages remedy. They now include whether a court *should*.

At first blush, this transition from a positive to a normative assessment
invites judicial interference into the political sphere. Indeed, the holdings
in *Malesko* and *Wilkie* say not what the law is, but rather what the law
should be.171 But upon closer examination, this new approach does just
the opposite: it invites political interference into the judicial sphere.172
Part II next examines how this twenty-first century interest-based ap-
proach to the creation of non-statutory damages remedies manifested in
the ill-defined national security exception to *Bivens*. It traces the excep-
tion's expansion and explains how, by favoring policy considerations over
separation of powers principles, courts unwittingly have given complete
executive deference to the creation of a damages remedy—in defiance of
nearly forty-years of *Bivens* jurisprudence.

II. MEASURING BY QUANTUM OF COMPETENCE

This part uses the application of the national security exception in *Arar
v. Ashcroft* as a tool to analyze amorphous national security concerns
within the *Bivens* national security exception. The Second Circuit in *Arar*
held that violations of substantive due process under the Fifth Amend-

169. Drawing on other aspects of Justice Harlan's concurrence, I explore infra Part
III.A how this post-September 11th approach may not be entirely inconsistent with separa-
tion of powers principles.
170. This is especially true if the alleged injuries occurred outside the Constitution's
171. *See supra* notes 166-69 and accompanying text.
Quantum of Competence

The primary reason the Arar court denied Bivens relief was that the results of its special-factors analysis revealed that its creation of a dam-

175. Id. at 255.
176. Id. at 257.
177. Arar, 532 F.3d at 181-83.
178. Id. The court also noted that "this action involves the intersection of removal decisions and national security" and treated this observation as a special factor. Id. at 183. The court went on to explain, however, that this type of relationship would "implicate our relations with foreign powers." Id.
179. Id. at 181.
181. Id. at 182-83.
ages remedy would intrude and interfere with foreign policy. The legislative branch dominates the conduct of foreign policy—the implementation of general principles by which a government is guided in its management of or relations with another country—and legislators are in the best position to determine whether a damages remedy should exist. Or to capture it in the context of this Comment, Congress exhibits the highest degree of institutional competence to fashion remedial relief, and therefore, when the Legislature exercises greater control over a national security decision, courts should treat these matters as special factors.

The Constitution textually commits a wide-range of foreign policy decision to Congress. Under the enumerated powers in Article I, Congress may “regulate Commerce with foreign Nations,” “establish an uniform Rule of Naturalization,” “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,” and “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” The Senate Foreign Relations Committee is charged with leading foreign-policy legislation and debate in the Senate, and the U.S. House of Representatives Committee on Foreign Affairs has exclusive jurisdiction over oversight and legislation relating to “national security developments affecting foreign policy.”

Several Supreme Court pronouncements also inform congressional textual control over foreign affairs. Over a century ago, in *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, the Court held that Congress’s control over immigration arises from its foreign policy powers. In *Pfizer Inc. v. India*, the Court declined to address an issue regarding a foreign government’s disparate treatment under the Foreign Sovereign Immunities Act because “that task is properly one for Congress particularly in light of the sensitive political nature and foreign policy implications of the question.” And to echo Chief Justice John Roberts in *Boumediene v. Bush*, the “American people,” who select their representatives to Congress, lost “a bit more control over the conduct of this Nation’s foreign policy to unelected, politically unaccountable judges.”

Congressional action can dominate national security matters implicating foreign policy in a *Bivens* analysis. The D.C. district court in *In re Iraq and Afghanistan Detainees Litigation*, for example, denied non-statutory damages to foreign nationals detained in Iraq partly because it would require “inquiring into the propriety of specific interrogation techniques

182. *Id.* at 181.
183. See BLACK’S LAW DICTIONARY 719, 1276 (9th ed. 2009) (defining “foreign” and “policy”).
186. 130 U.S. 581, 603-04 (1889).
and detention practices employed by the military while prosecuting wars."\(^\text{189}\) Relying on *United States v. Stanley*, the court noted that "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate."\(^\text{190}\) Having already established that the Congress enjoys plenary power over the military, the court properly considered interfering with the implementation of textually committed foreign policy as a special factor under *Bivens*\(^\text{191}\).

**B. Executive Control Over Foreign Affairs—Inherent**

The *Arar* court also identified national security decisions involving foreign relations as special factors under *Bivens*.\(^\text{192}\) The majority panel noted that, "[t]here can be no doubt that litigation of this sort would interfere with the management of our country's relations with foreign powers and affect our government's ability to ensure national security."\(^\text{193}\) But analyzing the quantum of competence in this grey zone can be challenging: foreign relations powers are "not expressly allocated by the Constitution, and the division of authority between Congress and the President in respect of them is not clearly defined."\(^\text{194}\) Because the Executive has the "vast [but not exclusive] share of responsibility for the conduct of our foreign relations,"\(^\text{195}\) courts need to look more searchingly to determine to what extent Congress participates in foreign relations decisions implicating national security.

In 1936, the Supreme Court in *United States v. Curtiss-Wright Export Corp.* held that the president possesses "plenary and exclusive power" to conduct foreign relations and that this inherent power is not dependent upon congressional delegation.\(^\text{196}\) President Franklin D. Roosevelt, acting pursuant to a joint congressional resolution, placed an arms embargo on U.S. shipments to warring South American countries.\(^\text{197}\) The Curtiss-Wright Export Corporation violated the embargo and argued in defense that the congressional resolution was an "invalid delegation of legislative power to the executive."\(^\text{198}\) The Court, however, found it unnecessary even to consider this contention and instead held that the president has "broad discretion" within his inherent powers to conduct foreign relations.\(^\text{199}\)

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190. *Id.* at 106 (quoting *United States v. Stanley*, 483 U.S. 669, 683 (1987)).
191. *Id.* at 107.
193. *Id.*
197. *Id.* at 312-13.
198. *Id.* at 314.
199. *See id.* at 329. One year later the Court in *United States v. Belmont* took judicial notice of President Roosevelt's recognition of the Soviet government, as the "Executive
A shallow reading of Curtiss-Wright suggests that because the president’s power over foreign relations is “plenary,” the Executive has absolute authority in this field. To frame it in the context of this Comment, national security decisions implicating foreign relations would then have a low quantum of competence, should not be considered as special factors, and a Bivens action may be allowed to move forward. At the opposite end of the spectrum, indeed, the Supreme Court in Chappell and Stanley and the district court in In re Iraq and Afghanistan Detainees Litigation refused to extend Bivens relief precisely because Congress enjoys “plenary control” over military discipline.

But Congress’s plenary power vis-à-vis the military and the Executive’s “plenary power” vis-à-vis foreign relations is readily distinguishable: the Constitution itself textually awards the Legislature control over military discipline; the recognition of presidential plenary power in foreign relations is both enhanced and contracted by judicial fiat. To be sure, the Court’s own language in Curtiss-Wright cabins its scope: foreign relations “like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.” Subsequent judicial decisions and the observations of noted scholars demonstrate how this “subordination” to the Constitution accommodated Congress’s role in foreign relations.

After Curtiss-Wright, for example, the Supreme Court and several circuits re-adopted an earlier view, found in Oetjen v. Central Leather Co., that “[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—the political—departments of the government.” The Court in Oetjen held that the political branches’ designations of sovereignty are immune from judicial review, and later decisions applied this observation to articulate the modern political question doctrine, and to hold that the president may comply with an international

had authority to speak as the sole organ of that government.” United States v. Belmont, 301 U.S. 324, 330 (1947).

201. Chappell v. Wallace, 462 U.S. 296, 300-01 (1983). “In drafting the Constitution... [the Framers’] response was an explicit grant of plenary authority to Congress ‘To raise and support Armies; ‘To provide and maintain a Navy; and ‘To make Rules for the Government and Regulation of the land and naval Forces.’” Id. (quoting U.S. Const. art. I, § 8, cls. 12-14).
203. infra notes 206-08.
204. Arar v. Ashcroft, 532 F.3d 154, 183 (2d Cir. 2008) (noting that a foreign relations decisions committed to the political branches counsel against a Bivens remedy); Corrie v. Caterpillar, Inc., 504 F.2d 974, 983 (9th Cir. 2007) (holding that a cause of action against an Israeli bull-dozer company was a nonjusticiable political question).
treaty obligation absent implementing congressional legislation, but only so long as those means "are consistent with the Constitution."\textsuperscript{208} And as Dean Harold Hongju Koh pointed out in his 1990 book, when it comes to the Executive's power in foreign relations implicating national security:

[The Constitution] assigns to the president the predominant role in the process, but affords him only a limited realm of exclusive powers, with regard to diplomatic relations and negotiations and to the recognition of nations and governments. Outside of that realm, governmental decisions regarding foreign affairs must transpire within a sphere of \textit{concurrent authority}, under presidential management, but bounded by the checks provided by congressional consultation and judicial review.\textsuperscript{209}

\textit{Bivens} actions arising out of the Executive's inherent control over foreign affairs highlight the difficulty in ascertaining how much Congress participates in the national security matters implicating foreign relations. For instance, the D.C. Circuit in \textit{Sanchez-Espinoza v. Reagan}, the case upon which the \textit{Arar} court grounded its reasoning that foreign relations concerns operate as special factors, refused to recognize a cause of action for Nicaraguans who brought claims against U.S. government officials for supporting the Contras.\textsuperscript{210} Then-Judge Scalia concluded that "the special needs of foreign affairs must stay our hand in the creation of damage remedies."\textsuperscript{211} The "special needs" as "special factors" included President Ronald Reagan and various cabinet-level officials providing financial and political support to Nicaraguan rebels in contravention of the Boland Amendments, enactments which repeatedly denied the President's request for financial assistance to support the Contras.\textsuperscript{212} By attempting to restrict U.S. support to the Nicaraguan rebels, Congress played a role in the foreign relations decisions implicated in this \textit{Bivens} action; their refusal to appropriate funds precipitated the Executive's back-door support of the Contras. But the extent of Congress's participation here—and consequentially whether the quantum of competence was sufficient to defeat a \textit{Bivens} claim—is perhaps for the reader to decide.

C. Executive Privilege

The gravamen of the special factors examination in \textit{Arar} was a fear that the court's creation of a damages remedy would interfere with the political branches' conduct of foreign policy.\textsuperscript{213} But the court also considered that "the government's assertion of the state-secrets privilege in this litigation constitutes a \textit{further} special factor counseling us to hesitate before

\textsuperscript{211} Id.
\textsuperscript{212} Id. at 205; see also David J. Barron & Martin S. Lederman, \textit{The Commander in Chief at the Lowest Ebb—A Constitutional History}, 121 Harv. L. Rev. 941, 1081 (2008).
\textsuperscript{213} See supra Part II.A.
creating a new cause of action or recognizing one.”214 By erroneously considering an executive privilege as a special factor,215 the Arar court strayed from separation of powers principles, balanced policy interests instead, and unduly invited executive intrusion in the judicial sphere.

Although the use of the state-secrets privilege necessarily implicates national security, unlike the congressional textual or the executive inherent control over foreign affairs, it is wholly within the province of the executive branch: the department that controls the matter of the case has unconditional authority over its assertion, there is no congressional oversight over its invocation, and courts have increasingly considered it to be “absolute.”216 The Supreme Court in United States v. Reynolds formally recognized the state-secrets privilege as a narrowly construed common-law evidentiary rule and held that when “the occasion for the privilege is appropriate the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone.”217 The privilege, therefore, derives from a decidedly non-constitutional source, the judicially created inherent executive foreign affairs power. And since Reynolds, it has been the judicial—not the legislative—branch that has broadened this rule to include military secrets, diplomatic relations, and intelligence sources.218

There is little need to discuss the extent of Congress’s participation in the assertion of an executive privilege. There is none. And because the political branches share in national security determinations,219 the anomaly inherent in the state-secrets privilege has not gone unnoticed by the nation’s lawmaking body.220 The proposed State-Secrets Protection Act of 2009 aims at “help[ing] guide the courts to balance the Government’s interests in secrecy with accountability and the rights of citizens to seek

216. United States v. Reynolds, 345 U.S. 1, 7-11 (1953) (collecting cases); Chesney, supra note 38, at 1271.
219. See supra note 32.
judicial redress.” 221 This law would prevent the Executive from asserting the privilege until the court conducts a hearing to determine whether material information must not be disclosed. 222 Senator Ted Kennedy, a co-sponsor of the 2008 version of the bill, expressed concern that repeated invocations of the state-secrets privilege “impair[] the ability of Congress and the judiciary to perform their constitutional duty to check executive power.” 223

Senator Kennedy’s assessment is accurate, and this evaluation, among other things 224 makes the consideration of an executive privilege as a special factor under Bivens particularly inappropriate. The state-secrets privilege is a presidential tool, and when treated as a special factor, the court defers not to a congressional determination, but to an executive determination of whether a cause of action under Bivens should exist. In other words, the Arar court did not give the Executive’s view of a case’s impact on foreign policy “serious weight” when it considered the state-secrets privilege as a special factor. 225 On the contrary, the court, the traditional guardian of individual rights against the political branches, allowed the Executive to override the potential for constitutional remedies based solely on a judicially manufactured, non-statutory executive privilege. By granting the executive branch the unilateral power to block remedies stemming from egregious rights violations committed in the war on terror, the court not only emptied without justification the fundamental and longstanding legal maxim, “where there is a right, there is a remedy,” 226 but also another fundamental and longstanding principle: “[n]o man is allowed to be a judge in his own cause.” 227

This part deconstructed the national security exception to Bivens by measuring national security decisions by their quantum of institutional competence. It distinguished amorphous national security concerns by objectively assessing Congress’s involvement in a national security matter. This part also demonstrated how, by sacrificing separation of powers principles in favor of interest-based policy determinations, the judiciary permitted the gross expansion of political interference in the judicial sphere, much to the detriment of safeguarding essential liberties. The remainder of this Comment will now propose a way to conduct a Bivens analysis during the war on terror that brings courts back to their primary duty—to vindicate constitutional rights.

224. See Kiik, supra note 215, at 817-19.
226. Supra note 6.
227. THE FEDERALIST NO. 10 (James Madison). “With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time. . . .” Id.
III. THE BIVENS NATIONAL SECURITY EXCEPTION CONTINUUM

The purpose of the Bivens national security exception continuum is two-fold: first, it separates out and distinguishes amorphous national security concerns, and second, it balances competing interests during the war on terror. It thereby honors the original intent of Bivens as a function of separations of powers principles and at the same time seize upon the new-found interest-based approach courts have adopted under the special-factors doctrine. And perhaps most importantly, the continuum offers a way to balance within Bivens's unique framework national security concerns with individual rights, even during times of national challenge:

THE BIVENS NATIONAL SECURITY EXCEPTION CONTINUUM

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<td>executive control over foreign affairs</td>
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By now, the way the continuum works should be clear: when courts consider whether violations of constitutional rights committed by federal officers in the course of the war on terror are actionable under Bivens, they must examine any potential special factors counseling hesitation by quantum of competence. If congressional action dominates a national security decision, as is true when the Legislature alone takes action, then there exists a high quantum of competence. It is then more likely that a special factor counseling hesitation exists and Bivens relief should be denied. But when executive action dominates a national security matter, as is true when the government invokes the state-secrets privilege, it is then less likely that a court should consider the matter a special factor under Bivens. The Executive lacks the institutional competence to

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228. Supra Part I.B.
229. Supra Part I.C.
230. Cf. Padilla v. Yoo, 633 F. Supp. 2d 1005, 1026-27 (N.D. Cal. 2009) ("Therefore, the court finds that the congressional determination to vest authority and discretion with the President in the designation of enemy combatants under the AUMF does not constitute a special factor barring judicial review of such designations."). This joint-congressional resolution is just that, a congressional resolution. As I explain throughout this Comment, Congress has the greatest institutional competence to fashion remedial relief, and accordingly, courts should consider congressionally dominated national security decisions as special factors. In passing the AUMF, Congress was not merely the dominant participant in the national security decision—indeed it was the sole actor. See Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). The Padilla court should have considered it a special factor.
231. For the same reasons, the Padilla court properly determined that "the decision to designate, detain, and interrogate Padilla as an enemy combatant . . . made pursuant to the AUMF's explicit grant of authority to the President from Congress" and arguments that essentially amounted to an invocation of the state-secrets privilege were not special factors.
confer or deny a damages remedy. The middle of the continuum represents the foreign affairs powers shared by the Executive and the Legislature within the national security context. Here exists an internal check-and-balances, or as Dean Koh calls it, a “concurrent authority,” which guards against one branch or the other from dominating the decision-making process. Consequentially, ascertaining whether Congress or the Executive exercises greater control requires a bit more scrutiny.232

under Bivens. See Padilla, 633 F. Supp. 2d at 1027-28. First, the AUMF itself and its delegation of power to the president are, as the court accurately distinguished, two very different potential special factors. Id. at 1026-28; supra note 41. As I explained supra note 230, the AUMF alone is purely a legislative function. But its delegation of authority to the president expanded the Executive’s inherent control over foreign affairs, thereby placing this special factor to the right-side of the Bivens national security exception continuum. The closer a national security matter is to a purely executive function, the less likely it should be considered a special factor. Here, the district court’s Bivens analysis was right on point: the executive-centric national security matter rightly did not counsel against the recognition of Padilla’s constitutional claims.

Second, the Padilla court correctly dismissed Yoo’s “contention that the secret nature of his advice, because it may affect national security, constitute[d] a ‘special factor counseling hesitation’ precluding judicial review.” Padilla, 633 F. Supp. 2d at 1028 n.1. The court determined this argument was comparable to an assertion of the state-secrets privilege. Id. at 1028. Because the consideration of the state-secrets privilege as a special factor is “tantamount to complete executive deference to the creation of a damages remedy, which defies nearly forty-years of Bivens jurisprudence,” Kiik, supra note 215, at 818, the court correctly rejected Yoo’s argument that the effect Padilla’s case would have on national security should prevent his Bivens action from moving forward.

232. It is difficult to measure quantum of institutional competence when a Bivens action implicates foreign relations concerns stemming from the Executive’s inherent control over foreign affairs. See supra Part II.B. Padilla v. Yoo is no exception. The fourth and final national security matter the Padilla court considered in its special-factor analysis was the effect the case would have on foreign affairs and foreign relations. Padilla, 633 F. Supp. 2d at 1029-30. Like the Second Circuit in Arar v. Ashcroft, the California district court turned to Sanchez-Espinosa v. Reagan for guidance on what might be considered a special factor. Padilla, 633 F. Supp. 2d at 1029; see also Arar v. Ashcroft, 532 F.3d 157, 182 (2d Cir. 2008). And, as in Arar, the Padilla court quoted then-judge Scalia that “the special needs of foreign affairs must stay our hand in the creation of damages remedies.” Arar, 532 F.3d at 182; Padilla, 633 F. Supp. 2d at 1029 (quoting Sanchez-Espinosa v. Reagan, 770 F.2d 202, 209 (D.C. Cir. 1985)). But in evaluating whether national security concerns about foreign relations should bar the creation of a Bivens remedy, the district court in Padilla and the appellate court in Arar—relying on the same case and on the same quote—reached opposite results; the former was not “persuaded by the decisions not to find a Bivens remedy in instances in which foreign nationals [were] allegedly subjected to unconstitutional treatment abroad,” Padilla, 633 F. Supp. 2d at 1029, while the latter found that “[t]here can be no doubt that litigation of this sort would interfere with the management of our country’s relations with foreign powers and affect our government’s ability to ensure national security,” Arar, 532 F.3d at 182. Padilla distinguished its special-factors analysis from Arar and Sanchez-Espinosa on citizenship and territorial grounds: Bivens action involving foreign nationals and the judicial intrusion into the affairs of foreign governments had no application to the instant case involving an American citizen on American soil. Padilla, 633 F. Supp. 2d at 1030; see also Arar, 532 F.3d at 181-82.

Space constraints do not permit a more comprehensive analysis of Sanchez-Espinosa, Arar, and Padilla. My limited purpose here instead is to emphasize that when the Executive and the Legislature enjoy “concurrent authority” over national security decisions—decisions, for example, that involve the treatment of foreign nationals vis-à-vis U.S. citizens—the quantum of institutional competence that potential special factor exhibits may not be self-evident. Courts must therefore closely examine whether the executive or legislative branch exercises greater authority over these national security matters when conducting a Bivens analysis.
A. SYNTHESIZING THE SPECIAL-FACTORS DOCTRINE

The theory behind this proposed balancing approach is equally as important as the mechanics. The Bivens national security exception continuum offers a special-factors methodology that permits the judiciary to follow separation of powers principles while concomitantly “weighing reasons for and against the creation of a new cause of action, the way common law judges have always done.”233 Contrary to what Professor Tribe may suggest, the interest-based balancing approach of today and the separations of power principles of yesterday are not mutually exclusive.234 Being able to synthesize both methods provides unified guidance in the absence of a coherent special-factors doctrine.

B. RETURNING TO BIVENS’S ORIGINAL INTENT

The continuum first and foremost harkens back to the separation of powers principles so clearly apparent in Bivens and its early progeny. As the original manifestations of Bivens relief required congressional deference to the creation of a damages remedy, by separating national security concerns by quantum of competence, the continuum redirects the courts’ focus to examining “the question of who should decide whether such a remedy should be provided.”235 In this way, the balancing mechanism addresses Professor Vladeck’s second concern with the national security exception: it eliminates executive deference to the creation of a damages of remedy.236 Because the Executive lacks the institutional competence to manufacture private rights of action and prescribe remedies, executive-centric national security concerns should not be considered as special factors under Bivens. This approach reaffirms that not even the Executive may violate the Constitution during war, that the president may not unilaterally deny the enforcement of a constitutional right, and that no man may be a judge in his own case.

C. CAPITALIZING ON INTEREST-BASED BALANCING

Offering a methodology courts might find regressive rather than progressive will have little positive impact in balancing Bivens during the war on terror. Built within the continuum, therefore, is a policy-based approach courts may be more willing to follow in this time of national challenge. Balancing methods have proved effective in protecting constitutional rights in the past, and thus it is likely that this technique will prove equally successful.

It should be no coincidence that while Justice Harlan’s concurrence in Bivens provided instructions as to how the separation of powers should figure into a Bivens analysis, it also offers insight as to how an interest-

234. Supra notes 163-65 and accompanying text.
236. See Vladeck, supra note 38, at 5.
based balancing methodology may be, at least in part, compatible with the special-factors doctrine. Justice Harlan reasoned in *Bivens* "that the range of policy considerations we may take into account is at least as broad as the range [that] a legislature would consider with respect to an express statutory authorization of a traditional remedy."\(^{237}\) To be clear, after weighing the relevant policies in *Bivens*, he agreed with the majority's conclusion that the government had not advanced any substantial policy consideration against the recognition of a remedy for Fourth Amendment violations.\(^{238}\)

Taking Justice Harlan's reasoning into account, the *Bivens* national security exception continuum approach aptly reconciles his separation of powers principles with his moderate interest-based policy considerations. To illustrate, either the existence of an alternative damages remedy or the purposeful choice not to create one indicates that Congress has controlled the decision-making process. When Congress controls the decision-making process in a national security matter, the potential special factor exhibits high quantum of competence. It therefore follows that purposeful congressional action or inaction should be considered in a *Bivens* analysis. So long as Congress has neither provided a remedy nor explicitly prohibited against one,\(^{239}\) the judiciary may adopt an interest-based policy approach to determine how to weigh that special factor against the recognition of an implied cause of action. In this way, even when congressional inaction—a special factor exhibiting high quantum of competence and thus requiring consideration—is evident, a *Bivens* remedy may still be appropriate.\(^{240}\)

This process assuages Professor Vladeck's first and third concerns that the national security exception "lend[s] a judicial sanction to even the most shocking government conduct in the name of national defense."\(^{241}\) First, congressional inaction to the creation of a damages remedy for unlawful detention and extraordinary rendition has not been inadvertent: Congress has twice issued legislation addressing detainee treatment without creating a private cause of action for those injured by federal officials.\(^{242}\) But Congress also has not explicitly prohibited remedies for these violations either. And the Supreme Court has never suggested that congressional inaction prohibits an extension of *Bivens*;\(^{243}\) indeed, there


\(^{238}\) *Id.* at 407-08.

\(^{239}\) *Supra* notes 100-03 and accompanying text.

\(^{240}\) See *supra* notes 145-47 and accompanying text.

\(^{241}\) See Vladeck, *supra* note 38, at 5.


\(^{243}\) *Cf.* Schweiker v. Chilicky, 487 U.S. 412, 421-22 (1988). "The absence of statutory relief for a constitutional violation, for example, does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Id.*
would be no such thing as a Bivens remedy if that were the rule.\textsuperscript{244} The congressional inaction present under these circumstances indicates that there is a high quantum of competence, this inaction should be considered a special factor, and courts are free to balance it as a concern they may find important to the creation of a damages remedy.

In the same vein, this process alleviates Professor Vladeck's third concern that the national security exception "eviscerate[s]" Bivens's role as a deterrent.\textsuperscript{245} The Court in Malesko indicated that the deterrence factor should figure into a Bivens analysis, and Justice Souter reached this conclusion using an interest-based policy approach.\textsuperscript{246} Purposeful congressional inaction increases the likelihood that federal officers may violate constitutional rights because there is no enforcement mechanism. Because Congress through its inaction has dominated this national security matter, balancing special factors like this with a high quantum of competence allows for the consideration that a Bivens remedy may be proper specifically to deter government officials from endangering the protection of the very constitutional rights "for which we fight abroad."\textsuperscript{247}

CONCLUSION

The purpose of this Comment has been to propose a way to balance Bivens during the war on terror. The national security exception continuum offers a methodology firmly grounded in both traditional and modern incarnations of the special-factors doctrine. But critics may suggest that the foregoing analysis is merely an ambitious academic exercise into the obscure nuances of Bivens relief with little pragmatic value. Suffice to say, any Bivens action lodged by a terrorist suspect would likely involve special factors pertaining to the congressional textual control or the executive inherent control over foreign affairs,\textsuperscript{248} and even under the continuum approach, the judicial creation of a damages remedy would be improper. But such an outcome-orientated criticism is short-sighted. To turn a truism on its head, the ends do not justify the means—the means justify the ends. The process by which courts reach the decision whether to extend Bivens relief is equally as important as the decision itself.

As this Comment went to press, the Second Circuit in Arar v. Ashcroft affirmed en banc the district court's refusal to extend Bivens relief.\textsuperscript{249} This decision "recognized [the judiciary's] limited competence, authority, and jurisdiction to make rules or set parameters to govern the practice called rendition" because courts "can easily locate that competence, expertise, and responsibility elsewhere: in Congress."\textsuperscript{250} Accordingly, the

\textsuperscript{244} See Vladeck, supra note 38, at 5.
\textsuperscript{245} Id.
\textsuperscript{246} Supra notes 155-58 and accompanying text.
\textsuperscript{248} See supra Part II.A-B.
\textsuperscript{249} Arar v. Ashcroft, No. 06-4216, 2009 WL 3522887, at *17 (2d Cir. Nov. 2, 2009) (en banc rehearing).
\textsuperscript{250} Id.
proposed *Bivens* national security exception continuum approach, a function of Congress’s participation in a national security matter, is not only a more balanced way to conduct a *Bivens* analysis for injuries arising from the war on terror, but also a process encouraged by at least one court. In light of this Second Circuit ruling, this Comment’s analysis is more relevant than ever.
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