

# CONGRESSIONAL WILL AND THE ROLE OF THE EXECUTIVE IN *BIVENS* ACTIONS: WHAT IS SPECIAL ABOUT SPECIAL FACTORS

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## I. INTRODUCTION

Say a government actor violates a person’s constitutional right. In an odd federalist twist, what recourse the person has depends on which government level the violator acted for. If the government actor was cloaked in the mantle of state authority, the victim can sue under the Civil Rights Act of 1871.<sup>1</sup> If, in contrast, the violator acted on behalf of the federal government, the victim has no explicit statutory cause of action. She may, however, be able to sue the government actor directly under the U.S. Constitution on the theory articulated in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>2</sup> Both § 1983 and *Bivens* impose monetary liability on errant government agents who violate individuals’ constitutional rights.<sup>3</sup> But, as a judge-made remedy, *Bivens* has been

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1. 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 . . . .”); see *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (concluding that § 1983’s use of the phrase “under color of” does not limit the statute to acts undertaken in the authorized, legally correct pursuit of state law, but encompasses acts cloaked with state power undertaken by “those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it”), *overruled by Monell v. Dep’t of Soc. Servs. of N.Y.C.*, 436 U.S. 658 (1978).

2. 403 U.S. 388 (1971). James Pfander reveals the provenance of the case’s unusual name, noting that the government attorneys’ “suggest[ion] that the agents were ‘unknown’ at the time of filing but were later identified and served with process, and thus ‘named’” does not explain why the complaint itself, written *pro se*, “referred to ‘Unknown Named’ agents.” James E. Pfander, *The Story of Bivens v. Six Unknown-Named Agents of the Federal Bureau of Narcotics*, in *FEDERAL COURTS STORIES* 275, 281-82 (Vicki C. Jackson & Judith Resnik eds., 2010) [hereinafter Pfander, *The Story of Bivens*]. Pfander presents a “more plausible” explanation, confirmed by Webster Bivens himself: “from the plaintiff’s perspective, the agents simply had ‘unknown names.’” *Id.* at 282.

3. Section 1983 provides remedies for violations of any federal right, not just those guaranteed by the federal Constitution. Somewhat analogously, the Federal Tort Claims Act (FTCA) of 1946, 28 U.S.C. § 1346(b)(1) (2006), provides a remedy against the United States (not the individual actor) “for injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under

subject both to skeptical scrutiny by commentators<sup>4</sup> and to somewhat ad hoc development by the Supreme Court, which has allowed a case-by-case determination of whether “special factors” preclude constitutional damages.<sup>5</sup>

These “special factors” have become a central concept in *Bivens* jurisprudence, yet no court has ever defined the term. This does not mean, however, that “special factors” has no definition; by developing the special factors inquiry over time and through case law, courts have delimited the concept’s contours quite clearly; they just have not explicitly articulated what the concept is. This Article provides that articulation. By illuminating the rationale of Supreme Court special factors jurisprudence and canvassing circuit court cases to see how this rationale has been applied, I derive the definition of special factors from existing case law.

This is possible because, as I show, special factors jurisprudence has not been as *ad hoc* as it seems at first glance. Building on Supreme Court precedent, federal courts of appeals have developed a coherent approach widely shared among the circuits. Identifying that approach and explaining its underlying rationale, as I do here, gives courts an explicit, workable model for applying the special factors analysis in *Bivens* cases. We need such a model because without it, outlier cases can fail to recognize that special factors is a term of art rather than a simple descriptive phrase—a bounded legal analysis, not an appeal to judges’ sensibilities. Such misrecognition has led to occasional incongruous opinions whose special factors analysis comports neither with the accepted way of conducting the inquiry, nor with its underlying rationale.

#### *A. The Contours and Rationale of the Special Factors Analysis*

This Article shows that the special factors analysis has evolved into an inquiry as to whether Congress has indicated that it wishes to reserve decisionmaking about remediation in some area for itself.<sup>6</sup> If Congress has

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circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”

4. See, e.g., James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 121 (2009) (arguing that courts should change their approach to evaluating a *Bivens* claim).

5. See *Wilkie v. Robbins*, 551 U.S. 537, 550-51 (2007).

6. I am, of course, not the first to connect *Bivens* remedies to congressional will. But because I focus on explaining the development and rationale of special factors, I can provide a more thorough analysis of the case law that has shaped the doctrine and expressed its underlying reasoning. Most scholarship that makes this connection instead presupposes the relationship and makes reform proposals on that basis. See, e.g., Betsy J. Grey, *Preemption of Bivens Claims: How Clearly Must Congress Speak?*, 70 WASH. U. L. Q. 1087, 1122-23 (1992) (proposing a clear statement requirement for congressional preclusion of constitutional damages remedies); Kristina A. Kiiik, Comment, *Quantum of Competence: Balancing Bivens During the War on Terror*, 62 SMU L. REV. 1945, 1963-64 (2009) (proposing that courts treat legislative action as more of a special factor than executive action).

indicated that it has already provided all the remedies it thinks are due, or that it prefers that no remedies at all be provided, courts find that special factors preclude recognizing a constitutional damages remedy.<sup>7</sup> If Congress has not so indicated, courts feel confident recognizing a remedy directly under the Constitution.<sup>8</sup> As this description suggests, the special factors analysis maintains the balance of powers between two specific branches of the federal government: the judicial and the legislative.

It may be helpful to think of this process as analogous to federal preemption analysis: while preemption analysis primarily maintains the balance of powers between Congress and the states, special factors analysis maintains the balance of powers between Congress and the federal judiciary.<sup>9</sup> The analogy is not perfect because the vertical concerns of federalism do not map perfectly onto the horizontal concerns of the separation of powers. However, it can be a helpful shorthand because special factors analysis employs techniques drawn from preemption analysis.

In its early version, the special factors analysis looked for explicit congressional preclusion of *Bivens* remedies, requiring something like explicit preemption.<sup>10</sup> Subsequently, it incorporated a version of field preemption,<sup>11</sup> where thorough occupation of a legal area by Congress indicated that there was no room for judge-made remedies. Finally, the special factors analysis has broadened in scope to include something resembling implicit preemption<sup>12</sup>: if the statutory language indicated that Congress wished to reserve the creation of remedies for itself, courts refrained from recognizing constitutional damages remedies. As this description suggests, throughout its development, the special factors analysis has focused on whether congressional legislation precluded constitutional damages remedies against federal actors.

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7. See *Schweiker v. Chilicky*, 487 U.S. 412, 420-21 (1988).

8. See *Carlson v. Green*, 446 U.S. 14, 18-19 (1980).

9. Preemption analysis often addresses the relative authority of executive agencies and the states, but executive agency rules preempt state law only to the extent that Congress delegates that preemptive power to the Executive. See, e.g., *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374-75 (2000) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 n.2 (1952))). The power of preemption, in other words, usually lies with Congress even when others exercise that power for Congress.

10. See *Pennsylvania v. Nelson*, 350 U.S. 497, 505 (1956) (explicit preemption occurs when federal law and state law directly conflict).

11. *Id.* at 504 (field preemption occurs when “federal statutes ‘touch a field in which the federal interest is so dominant that the federal system (must) be assumed to preclude enforcement of state laws on the same subject’” (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

12. *Id.* at 502 (implicit preemption is when the “federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it” (quoting *Rice*, 331 U.S. at 230)).

Through the special factors analysis, *Bivens* has come to allow relief in the limited set of situations for which Congress has neither legislated remedies nor expressed a preference regarding their existence.<sup>13</sup> *Bivens* fills the gap when Congress has not indicated how a particular situation ought to be handled. By inquiring into congressional will, the special factors analysis keeps courts sensitive to whether there is a gap to be filled. In this way, *Bivens* remedies allow courts to vindicate constitutional guarantees of individual rights while coordinating their authority with the legislative branch. The meaning of the term “special factors” has changed substantially since its first, somewhat offhand, use in *Bivens*. But throughout those changes, the term has consistently concerned the distribution of authority between the judiciary and the legislature.

This approach is not only grounded in precedent, it fits the logic of judge-made remedies. By allowing a damages action for a constitutional violation, *Bivens* attempts to act out *Marbury*'s conviction that a right ought to come with a remedy.<sup>14</sup> But, as the *Bivens* opinion intuited, it also threatens the separation of powers between the judiciary and the legislature, as courts assume the power to create causes of action and provide remedies—a power normally exercised by Congress.<sup>15</sup> Through the special factors analysis, courts ensure that their vindication of constitutional rights does not infringe on Congress's authority.

Of course, the judiciary and the legislature are not the only branches that have a hand in crafting remedies. The modern executive branch, with its administrative remedial schemes and its prominent role in the process of legislation, also plays a part. However, as the *Bivens* case discussed throughout this Article indicates, the Executive's role in remedy-creation is still subordinate to that of Congress. Administrative remedial schemes must be authorized through a delegation of congressional power to the Executive and are subject to legislative strictures and specifications. Although the President often plays a significant role in the crafting of legislation and must sign a bill into law, it is still Congress that debates and passes it.<sup>16</sup> Responding to these realities, case law regarding constitutional damages consistently looks to congressional will to ensure that judge-made remedies do not disturb the balance of authority between the judiciary and the legislature.

### B. *Why This Analysis Now*

Special factors analysis developed into its present form gradually, over many cases and courts. This is why, in contrast with much of the scholarship on *Bivens*, I look not just to the Supreme Court but also to the circuit courts to

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13. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395-96 (1971).

14. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.” (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*23)).

15. *Bivens*, 403 U.S. at 395-97.

16. See U.S. CONST. art. I, § 7, cl. 1-2.

understand the meaning of “special factors.” The Supreme Court has sporadically indicated what direction it has wished special factors analysis to take, but much of the doctrine has been developed, refined, and cohered by the federal circuit courts.

This is not to say that the courts of appeal have failed to follow Supreme Court precedent, or even that appellate case law is in tension with that of the Supreme Court. On the contrary, *Bivens*’s special factors jurisprudence instantiates a common phenomenon in doctrinal development: The Supreme Court sketches broad parameters for approaching an issue, and the appellate courts follow that lead to fill in the details. This Article illuminates this doctrinal history at both court levels and explains what the special factors analysis has come to mean—something courts need to understand to determine whether to recognize a constitutional damages remedy in each particular case.

As I have noted, in most cases, the appellate courts have implicitly or unconsciously recognized the thrust of the special factors analysis and applied it appropriately. Why, then, is the explicit discussion I present here necessary? Without an explicit understanding of the doctrine’s development and rationale, courts may fail to understand that special factors analysis focuses specifically on the separation of judicial from *legislative* authority, not from that of the executive. This distinction becomes especially important as the courts see increasing numbers of lawsuits challenging harms incurred through national security projects. The legal context of such lawsuits often fits squarely within the traditional *Bivens* domain, but there are important differences. First, these cases implicate national security policy; second, they often inspire publicity. These non-legal aspects of some contemporary *Bivens* cases can make the legal issues seem new, as well.

Because of the political prominence of the Executive in these cases, courts that do not understand the rationale of the special factors analysis sometimes invert the inquiry, focusing on the balance of judicial and *executive*, rather than legislative, powers. By tradition, the executive branch is considered to have special authority in the area of national security.<sup>17</sup> But this competence does not give the executive branch the authority to legislate or preclude remedies for those whose rights are violated in the course of such projects. That authority belongs primarily to Congress, which remains the proper focus of special factors analysis even in cases involving national security projects. By explaining the doctrine’s rationale and detailing how it has developed, I give courts facing *Bivens* claims a principled and precedent-based model for performing the special factors analysis.

This Article differs from much of the scholarship on constitutional damages precisely because my aim is to give courts a useful tool for dealing with *Bivens* claims now, rather than to reform *Bivens* jurisprudence. My analysis derives

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17. See, e.g., *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 926-27 (D.C. Cir. 2003) (“It is equally well-established that the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview.” (internal citations omitted)).

from my survey of case law. I do not claim that this is the way *Bivens* ought to work. On the contrary, constitutional damages are ripe for reform, and a number of scholars have proposed vehicles for improvement. James Pfander and David Baltmanis, for instance, have suggested eliminating the special factors analysis altogether and, instead, advocate treating *Bivens* cases like those arising under § 1983.<sup>18</sup> Pfander and Baltmanis point out that, while Congress has not legislated a *Bivens* remedy, it has entrenched constitutional damages in American law by passing legislation that presupposed the availability of a *Bivens* remedy.<sup>19</sup> They suggest matching the statutory preclusion of *Bivens* remedies to the Supreme Court's "relatively narrow view of the implied displacement of § 1983 claims."<sup>20</sup> Others have proposed letting *Bivens* suits run against the federal government itself, rather than only against federal actors in their individual capacities.<sup>21</sup>

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18. Pfander & Baltmanis, *supra* note 4, at 121 (explaining that under their proposal, "the 'special factors' that the Court has taken into account in deciding whether to allow an action would no longer operate as a threshold barrier to litigation"). Not everyone finds the parallel convincing: George D. Brown has argued that § 1983, concerned as it is with the relations between states and the federal government, is not an appropriate analogue to *Bivens*'s exclusive focus on federal government issues; additionally, *Bivens*'s basis in the federal Constitution weakens the contention that Congress always has superior authority in crafting remedies. See George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the Bivens Dissenters Prevailed?*, 64 IND. L.J. 263, 266 (1989). As I discuss, though, courts have not followed this lead.

19. Pfander & Baltmanis, *supra* note 4, at 132-33 ("[N]ew remedies under the FTCA were designed to supplement, not displace, the *Bivens* action.").

20. *Id.* at 143. Pfander and Baltmanis specifically propose the § 1983 preclusion standards enunciated in *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246, 250-60 (2009), which held that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2006), did not displace a § 1983 action challenging a school's inadequate response to allegations that a child was being sexually harassed. Pfander & Baltmanis, *supra* note 4, at 143. *Fitzgerald* concluded that the "remedial schemes [were] parallel rather than inconsistent" because Congress had not expressed a "legislative intent to displace § 1983 claims[;] . . . had not put in place detailed or more restrictive remedies that would suggest the inapplicability of constitutional tort litigation[;]" had tailored Title IX to a different "substantive scope of coverage" than that of the Equal Protection clause; and had limited Title IX remedies to the "responsible governmental entities" rather than to "individual officers." *Id.*

21. See Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability under Bivens*, 88 GEO. L.J. 65, 65-68 (1999). Pillard claims that, insofar as the government indemnifies officials sued in their individual capacities under *Bivens*, the individual liability requirement of *Bivens* "undercut[s] *Bivens*'s remedial efficacy" by allowing a range of defenses that often defeat otherwise meritorious cases and creating an "illusion of an opportunity to obtain damages" that allows Congress and the courts to avoid dealing with the very real problem of bad conduct by federal actors. *Id.* at 67-68. James Pfander has suggested that federal government indemnification for officials sued under *Bivens* is not automatic: "[l]egal representation" for personal capacity suits "requires a written request from the agency head and a finding that representation will further the interests of the federal government." James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*,

Undoubtedly, other ways still remain to make constitutional damages actions more predictable, sensible, and congruent with other areas of law. However, lower courts do not have the luxury of making such changes themselves: Reforms like these can be instituted only by the Supreme Court or by Congress. For now, lower courts must employ the special factors analysis, and this Article explicitly delineates what this analysis entails.

### C. *Why Bivens Is Important*

The idea of permitting remedies against government actors who violate individuals' rights did not start with *Bivens* but had been around for centuries. Either the government itself or the officers acting in its name were amenable to suit in England beginning in the thirteenth century; by the eighteenth and nineteenth centuries, English "reports . . . abound[ed] with cases against inferior officers."<sup>22</sup> In the United States, by the time *Bivens* was decided, such remedies usually took the form of injunctions granted under the theory of *Ex Parte Young*.<sup>23</sup> Based on the long-term availability of injunctions in such cases, Justice Harlan's concurrence in *Bivens* noted that its result was hardly radical.<sup>24</sup> Since federal courts already granted injunctions in such situations, judge-made

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111 COLUM. L. REV. 1601, 1609 n.36 (2011) [hereinafter Pfander, *Resolving the Qualified Immunity Dilemma*]. Still, the actual frequency of such designations, and of indemnification, remains unclear; most commentators assume that federal employees are routinely indemnified. A number of other works have proposed government, rather than individual, liability under *Bivens*. See, e.g., PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 100 (1983) ("[I]f enterprise liability for official misconduct is substantially expanded, society can enjoy significant and unambiguous gains."); William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and its Employees for Torts and Constitutional Torts*, 9 ADMIN. L. REV. AM. U. 1105, 1110 (1996) ("Congress should amend the FTCA [to extend] respondeat superior and exclusive liability of the United States to *Bivens* claims.").

22. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 15 (1963) (collecting cases). Jaffe argues that suing the government was easier in England than in the early Republic because the doctrine of sovereign immunity did not prevent suits against the King.

[M]any claims affecting the Crown could be pursued in the regular courts if they did not take the form of a suit against the Crown. And when it was necessary to sue the Crown *eo nomine* consent apparently was given as of course. . . . By a magnificent irony, this body of doctrine and practice, at least in form so favorable to the subject, lost one-half of its efficacy when translated into our state and federal systems. Because the King had been abolished, the courts concluded that where in the past the procedure had been by petition of right there was now no one authorize to consent to suit!

*Id.* at 1-2.

23. 209 U.S. 123 (1908).

24. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring).

remedies for federal employees' constitutional violations were nothing new.<sup>25</sup> In recognizing a damages remedy, he reasoned, the Court did not create a new judicial power so much as apply an existing power to a class of people whose injury could not be addressed through an injunction.<sup>26</sup>

In fact, Jerry Mashaw has demonstrated that the *Bivens* remedy was even less novel than this reasoning implies.<sup>27</sup> In late eighteenth and early nineteenth century America, people whose rights were violated by federal employees had "broad opportunities for common law damage actions" against them.<sup>28</sup> Such opportunities came not through special judicial dispensation but simply as a matter of common law tort: "private citizens objecting to official action by an agent of the United States had ample legal weapons at their disposal."<sup>29</sup> Legislators and ordinary American residents shared the presumption that damages actions were available in such situations—and not just available but necessary to keep the government in check. "Americans valued common law actions and criminal prosecutions, subject to trial by jury, as protections against the depredations of federal officials."<sup>30</sup> Indeed, because federal agents were subject to suit in their individual capacities, and because their only affirmative defense was that "they had acted entirely properly pursuant to the laws of the United States,"<sup>31</sup> working as a "federal administrative agent may have been legally quite treacherous."<sup>32</sup> Damages remedies against federal employees were once the norm.

Such private remedies remained available throughout most of the nineteenth century: While "immunity had been somewhat precariously established for cabinet level officials"<sup>33</sup> in the postbellum period, "lower level officers were protected only by a reasonableness defense in a few instances provided by statute. And other suits involving private rights, but indirectly challenging prior official determinations, followed the forms of private actions that hardly acknowledged their public law implications."<sup>34</sup> At the time the U.S. Constitution was written, a common law cause of action was simply presumed to exist, and for at least a century after the Constitution was framed, individuals could sue public officials who had violated their constitutional rights for damages.

The growth of the administrative state forced courts to balance the importance of smooth and continued government functioning against traditional

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25. *Id.* One could point also to suppression of evidence and invalidation of a statute.

26. *Id.*

27. See generally Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 *YALE L.J.* 1256 (2006).

28. *Id.* at 1341.

29. *Id.* at 1328.

30. *Id.* at 1322.

31. *Id.* at 1331.

32. *Id.* at 1325.

33. Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 *YALE L.J.* 1362, 1379 (2010) [hereinafter Mashaw, *Federal Administration*].

34. *Id.* (internal quotation marks omitted).



remedies in tort and spurred the development of official immunities.<sup>35</sup> This act of reframing around the necessity of effective governmental operations, rather than individual right, obstructed the existing common law remedies for constitutional violations.<sup>36</sup> *Bivens*, then, did not invent a new remedy so much as it reinstated an old one in a new version. As people's practical ability to sue errant federal actors diminished, the Court reintroduced a remedy that had been universally available when the Constitution was written.<sup>37</sup>

*Bivens* thus reinstated a previously available remedy, and it has come to "play[] a central role in our system of constitutional remedies."<sup>38</sup> As recent work by Alexander Reinert suggests, while commentators seem convinced that *Bivens* actions are futile and the Supreme Court appears hostile toward them, *Bivens* actions continue to be viable at lower court levels and secure approximately the same success rate as other kinds of civil rights cases.<sup>39</sup>

There are also other reasons to think that our system of government requires some version of constitutional damages. Justice Harlan's concurrence in *Bivens* famously noted that injunctions have no remedial effect for violations that are not ongoing or likely to be repeated, he stated, "For people in *Bivens*' shoes, it is damages or nothing."<sup>40</sup> The question becomes whether we prefer nothing over damages. That question leads squarely to what we think constitutes a right and what it entails—an issue the full exploration of which falls far beyond the scope of this Article. I will note, however, that if we think of a right as something that is real only insofar as it exists in the world—that is, to the extent as it has effects felt by individuals<sup>41</sup>—then a right fairly requires a remedy.<sup>42</sup> As Daryl Levinson

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35. See Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 138-39 (2012).

36. *Id.* at 149-62.

37. *Id.* at 192.

38. Pfander & Baltmanis, *supra* note 4, at 117.

39. Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 842 (2010) ("The data suggest that if *Bivens* claims survive [the sua sponte dismissal of frivolous claims], their rate of success is somewhere in between the previously reported success rates for prisoner civil rights litigation and nonprisoner civil rights litigation."); see also *id.* at 833-36, 843-46 (describing the study's methodology for determining what constituted a *Bivens* case and what qualified as success). Reinert examined filings in New York (Eastern and Southern Districts), Texas (Southern District), Pennsylvania (Eastern District), and Illinois (Northern District) from 2001 to 2003. *Id.* at 832.

40. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). There may of course be other ways of ensuring that the guarantees of the Bill of Rights are enforced. One can imagine a comprehensive administrative system devoted to preserving individual constitutional rights and remediating breaches by government employees. Such an approach might even lead to more consistent remedies for individuals and lower violation rates among federal actors. So requiring some remedial options does not necessarily mean requiring damages actions. Still, in our adversarial, individualist system of rights enforcement, damages actions are the natural choice.

41. American pragmatism was perhaps the philosophical tradition that most clearly

has argued, if a right is defined by its existence in the world, then it not only requires, but is, in fact, *defined by* its remedy: “Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.”<sup>43</sup> The basic idea is not new in American law—it appeared in *Marbury v. Madison*,<sup>44</sup> which itself quoted Blackstone for the proposition that “‘it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded.’”<sup>45</sup>

Alternatively, one can choose to see rights as pure ideas with no necessary worldly existence: noumenal, extrasensory forms. But insofar as rights in a democracy are seen to inhere in individuals and to be guaranteed by the government, this view creates a dilemma. If rights are only abstractions to which governments profess allegiance and not facts on the ground subject to enforcement and remediation, it becomes difficult to distinguish a right from a public relations strategy. And it becomes difficult for a government to credibly claim to guarantee a right whose breach gives rise to no remedies.<sup>46</sup> As Justice Harlan noted in *Bivens*, constitutional rights represent “social policies . . . aimed predominantly at restraining the Government as an instrument of the popular

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enunciated a definition of reality as that which has effects in the world, but realists of many stripes would subscribe to this general approach. See, e.g., Charles Sanders Peirce, *The Essentials of Pragmatism*, in *PHILOSOPHICAL WRITINGS OF PEIRCE* 251, 252 (Justus Buchler ed., 1955) (“[I]f one can define accurately all the conceivable experimental phenomena which the affirmation or denial of a concept could imply, one will have therein a complete definition of the concept, and *there is absolutely nothing more in it.*”); LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 7 (A.J. Ayer ed., D.F. Pears & B.F. McGuinness trans., 1922) (“The world is all that is the case.”). Perhaps the best known American theorist of rights and remedies, Wesley Newcomb Hohfeld, also saw rights as defined by their effects in the world: He defined a right as something that creates a duty in another. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 36-38 (Walter Wheeler Cook ed., 1923).

42. One can imagine a system in which a right’s effect in the world implicated an internal administrative law more than an individual adversarial process. See, e.g., Mashaw, *Federal Administration*, *supra* note 33, at 1470. Our own system, however, is more focused on external enforcement by individuals.

43. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *COLUM. L. REV.* 857, 858 (1999); see also *id.* at 874 (“Rights are often shaped by the nature of the remedy that will follow if the right is violated. The definition of most or all rights incorporates ‘remedial’ prophylactic rules. And, perhaps most obviously, the cash value of any right is a function of the remedial consequences attached to its violation.”).

44. 5 U.S. (1 Cranch.) 137 (1803).

45. *Id.* at 163 (quoting 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*23).

46. See, e.g., David S. Law & Mila Versteeg, *Sham Constitutions* 6-7 (Nov. 1, 2001) (unpublished manuscript) (on file with author) (“[E]valuating the extent to which countries actually uphold the rights found in their constitutions” by investigating “the gap between what rights are guaranteed on paper and what rights are respected in practice,” and concluding that those with the largest gap between promise and worldly effect have “sham constitutions.”).

will,”<sup>47</sup> and it would be “at least anomalous” if the very entity restrained were also the only one allowed to create remedies for its own lack of restraint.<sup>48</sup> For Justice Harlan, the *Bivens* remedy rested on the premise that foxes are not the only acceptable guards for henhouses.<sup>49</sup>

While *Bivens* actions are not the only way constitutional guarantees can be vindicated, they fit both the history of constitutional rights vindication in America and the individualist approach to rights enforcement that our adversarial system fosters. And they fulfill a primary criterion for recognizing a right: providing a remedy for its violation.<sup>50</sup>

#### D. Article Outline

In what follows, I first trace the development of special factors analysis in the Supreme Court, from its origin as vague, off-hand dictum, to its culmination into a standard inquiry about congressional will. Part II presents, in some detail, how *Bivens* itself introduced the special factors, and then progresses through the Supreme Court’s several stages of subsequent special factors analyses. Moving on to the federal courts of appeal, Part III shows that the common understanding of *Bivens*’s central problem as one of the separation of judicial from legislative powers has led to a fairly standard, though never fully articulated, approach. Almost uniformly, circuit courts treat the special factors analysis as an inquiry into whether Congress has indicated that it wishes to preclude *Bivens* remedies.

Part IV turns to outliers. One kind of outlier applies special factors analysis like everybody else, by looking for indications of legislative preclusion, but mistakenly finds congressional intent where none could have been implied. That kind of outlier stays within the parameters of the accepted doctrine and follows the special factor rationale, but it comes to unreasonable conclusions. The second kind of outlier deviates more seriously from the mainstream by failing to recognize that special factors analysis inquires into *legislative* will. The second kind of outlier turns *Bivens*’s separation of powers concern on its head by focusing instead on the Executive. *Arar v. Ashcroft*,<sup>51</sup> a Second Circuit case, exemplifies this mistake, and I examine it in detail to demonstrate how it deviates from the Supreme Court’s established form of special factors analysis and

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47. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring). One could point also to evidence suppression and statute invalidation.

48. *Id.* at 403. In this passage, Justice Harlan lumped together the executive and the legislative branches as the popular government restrained by constitutional guarantees. Later *Bivens* jurisprudence made this distinction more clearly.

49. *Bivens* remedies are usually applied against executive officers, while it is Congress that creates the remedies. Justice Harlan’s concurrence read the Constitution as restraining the will of both political branches. *Id.*

50. See Thomas R. Phillips, *The Constitutional Rights to a Remedy*, 78 N.Y.U.L. REV. 1309, 1310-14 (2003).

51. 585 F.3d 559 (2d Cir. 2009) (rehearing en banc).

misconstrues its underlying separation of powers concern. I also show that what the *Arar* court thought were *Bivens* special factors are, in fact, separate concerns that come with legal doctrines of their own, and I discuss how those concerns would have looked if the court had used the appropriate legal frameworks. Finally, the conclusion synthesizes the elements of special factors analysis generally shared among the circuit courts and reviews some of the stakes of getting it right.

As the Supreme Court has moved away from recognizing implied rights of action generally, it has also expressed ambivalence about the wisdom and the extent of *Bivens*. At least two sitting justices have strongly implied that *Bivens* was a mistake.<sup>52</sup> But the Supreme Court—those two Justices included—has also reserved for itself “the prerogative of overruling its own decisions,” cautioning others against treating its own moods and apparent preferences as law.<sup>53</sup> In this vein, it has instructed lower courts to “follow [a] case which directly controls” even when that case “appears to rest on reasons rejected in some other line of decisions.”<sup>54</sup> *Bivens* actions remain viable; this Article gives lower courts a principled way to assess them.

## II. SPECIAL FACTORS ANALYSIS AT THE SUPREME COURT

### A. *Special Factors in Bivens*

*Bivens* famously held that a “violation of [the Fourth Amendment guarantee against unreasonable searches and seizures] by a federal agent acting under color of his authority gives rise to a cause of action for damages” against the individual agent.<sup>55</sup> Webster Bivens was allowed to sue for damages, in their personal capacities,<sup>56</sup> the federal agents who had entered his home without a warrant and

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52. See, e.g., *Wilkie v. Robbins*, 551 U.S. 537, 568 (2007) (Thomas, J., concurring) (“*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action.” (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring))). As my brief historical discussion indicates, of course, the *Bivens* decision came in the wake of the Court’s exercise of its common-law powers to expand official immunities.

53. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

54. *Id.*; see also *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

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

56. As Reinert explains:

Personal capacity claims are brought against government officials individually, almost always for damages. In theory, defendants who are found liable in their personal capacity are responsible for paying damages out of their own pockets, although the federal government, like most states and municipalities, usually indemnifies employees for the damages awarded in constitutional tort actions. . . . Official capacity claims, by contrast, are brought nominally against government officials, but typically seek injunctive relief against a government entity that would otherwise be immune from suit in federal court.

arrested him.<sup>57</sup> Rejecting the defendants' contention that Bivens should sue for tort in state court, the Court held that a federal right should be vindicated in federal court.<sup>58</sup> In a seeming afterthought, the *Bivens* opinion added that "[t]he present case involves no special factors counselling hesitation in the absence of affirmative action by Congress,"<sup>59</sup> that is, in the absence of a congressionally created remedy.

*Bivens* did not elaborate on what it meant by special factors; it just gave a couple of examples.<sup>60</sup> Later cases would develop the idea more fully. Looking closely at this original presentation of special factors helps us see both how much the analysis has changed since *Bivens* was decided, and how its animating concerns have remained similar.

In the first example, *United States v. Standard Oil Co. of California*,<sup>61</sup> the Court had refused to create a new cause of action to allow the government to sue a corporation whose employee had injured a soldier.<sup>62</sup> Rejecting a tort law analogy, the Court concluded that the case primarily raised issues of the "federal fiscal policy" of expenditures on injured soldiers.<sup>63</sup> Tort-inflicted costs were hardly new, the Court reasoned, yet Congress, "the custodian of the national purse,"<sup>64</sup> which knew how to "take steps to prevent interference with federal

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Reinert, *supra* note 39, at 811 n.2 (citations omitted).

57. Pfander notes that although the Court assumed Bivens's innocence, it is not clear that police lacked probable cause for the arrest, and it is likely that the warrantless entry and arrest were lawful under New York law at the time. Pfander, *The Story of Bivens*, *supra* note 2, at 290, 292-93. The larger point, of course, remains undisturbed: The Court was deciding only whether Bivens had a cause of action against allegedly unconstitutional treatment, not whether the officers had in fact acted unconstitutionally, nor whether New York law countenanced unconstitutional action.

58. Specifically, the Court explained that, were Bivens to sue in state court, the Fourth Amendment would not preserve an affirmative right; but, it would only "limit the extent to which the agents could defend . . . their actions [as] a valid exercise of federal power," leaving them to "stand before the state law merely as private individuals" if they could be "shown to have violated" it. *Bivens*, 403 U.S. at 390-91. But officers are not, the Court emphasized, merely private individuals: The power of the federal officer to enter a private home and enact an arrest differs from the authority of a private individual, and a person's ability to resist trespass by a private individuals differs from his ability to resist trespass by a federal agent—resistance that may itself be criminal. *Id.* at 391-95. Moreover, the Court stated, since the rights guaranteed by the Fourth Amendment are federal and do not depend on the provisions of state law, it made no sense to rely on state law to remedy their violation. *Id.* at 392-93. Finally, regarding its recognition of a remedy for Bivens, the Court noted that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 395.

59. *Id.* at 396. The standard spelling of "counseling" has apparently changed since 1971, and it appears spelled both with one "l" and with two in the case law.

60. *Id.*

61. 332 U.S. 301 (1947).

62. *Id.* at 314.

63. *Id.*

64. *Id.*

funds,” had not devised a cause of action for that situation.<sup>65</sup> Creating a cause of action would improperly supplant congressional authority with an executive “fiscal and regulatory polic[y].”<sup>66</sup> *Standard Oil* rebuffed the Executive’s request that the Court step outside its normal role as “arbiter[] between citizen[]” parties, each equally powerless to create a cause of action.<sup>67</sup> The Court reasoned that since the federal government could, itself, create the cause of action it requested, it was inappropriate for the Court to do so.<sup>68</sup> *Bivens* approvingly referred to *Standard Oil*’s refusal to intervene in “federal fiscal policy”<sup>69</sup> and its conclusion that “the United States [was] the party plaintiff to the suit. And the United States has the power at any time to create the liability.”<sup>70</sup> *Bivens* also cited, but did not discuss, *United States v. Gilman*,<sup>71</sup> where the Court declined to extend common-law respondeat superior indemnification to the Federal Tort Claims Act (FTCA) when the federal government sued its own employee for indemnification.<sup>72</sup> The *Gilman* Court focused on Congress’s expertise in the area, stating “[t]he relations between the United States and its employees have presented a myriad of problems with which the Congress over the years has dealt.”<sup>73</sup>

*Bivens* did not explain what constituted special factors in these cases. However, the cases suggest that the Court declined to do for the other branches what they ought to do for themselves—deferring to congressional authority over the federal purse and deferring to congressional expertise in the area of federal employment.

*Bivens*’s second example of a situation involving special factors was *Wheeldin v. Wheeler*,<sup>74</sup> in which the recipient of a House Un-American Activities Committee subpoena sued a committee investigator for improperly using his subpoena power.<sup>75</sup> The Court held that the allegations did not constitute a

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65. *Id.* at 315-16.

66. *Id.* at 314-15.

67. *Id.* at 316.

68. *Id.* at 316-17. Although *Standard Oil* started out distinguishing the legislative from the executive branch, this later passage lumped them together. At the same time, *Standard Oil* also assumed that courts *could* themselves create remedies, especially in “the constitutional area.” *Id.* at 313.

69. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971) (quoting *Standard Oil*, 332 U.S. at 311).

70. *Id.* (alteration in original) (quoting *Standard Oil*, 332 U.S. at 316).

71. 347 U.S. 507 (1954).

72. *Id.* at 509-13.

73. *Id.* at 509.

74. 373 U.S. 647 (1963).

75. *Id.* at 648. Alleging a violation of his Fourth Amendment rights, the recipient claimed that the investigator was not authorized by the committee to subpoena him specifically, but had instead filled in, without receiving properly delegated authority to do so, a blank subpoena signed by the committee chairman, and that the statute authorizing the House Un-American Activities Committee to subpoena witnesses was itself unconstitutional. *Id.* at 648-49. He further alleged that the receipt of the subpoena, which was delivered to his workplace, caused him to lose his job and

constitutional claim because “there was neither a search nor a seizure of him. He was neither arrested nor detained . . . . In short, the facts alleged do not establish a violation of the Fourth Amendment.”<sup>76</sup> As with any inquiry into whether a plaintiff has stated “a claim upon which” the relief demanded “can be granted,”<sup>77</sup> this example merely required that the remedy fit the right: Constitutional damages require a constitutional violation.<sup>78</sup> Later cases in the *Bivens* line adopt this requirement, not as a special factor, but as a simple element of the claim.<sup>79</sup>

Finally, *Bivens* noted that congressional action might obviate a constitutional damages remedy.<sup>80</sup> Rejecting the argument that a judge-made remedy was appropriate only if “*necessary* to enforce” a constitutional right,<sup>81</sup> the Court reasoned that the question was “merely whether petitioner . . . is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.”<sup>82</sup> Presuming this normal availability, the Court furthermore found “no explicit congressional declaration” that people in Mr. *Bivens*’s situation “may not recover money damages . . . but must instead be remitted to another remedy, equally effective in the view of Congress.”<sup>83</sup> In *Bivens*, overcoming the presumption that constitutional damages were available required an “explicit congressional declaration” both making such a remedy unavailable and requiring the petitioner to pursue “another remedy [that was] equally effective in the view of Congress.”<sup>84</sup> If Congress barred a damages remedy and directed harmed individuals to some other relief that it viewed as an equivalent to damages, the Court should pause and consider that fact before deciding whether to grant a damages remedy.<sup>85</sup>

While *Bivens* did not label this third situation as a special factor, its concerns are congruent with those of the first. Together, the two provide the enduring rationale behind special factors analysis: a deference to congressional authority and expertise over the federal budget, federal employees, and the creation of remedies.

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to be stigmatized, leading to economic and emotional damages. *Id.* at 648.

76. *Id.* at 649-50.

77. FED. R. CIV. P. 12(b)(6).

78. *See* *Carey v. Phipus*, 435 U.S. 247, 254 (1978).

79. *See, e.g.,* *Davis v. Passman*, 442 U.S. 228, 248 (1979) (“Moreover, a plaintiff seeking a damages remedy under the Constitution must first demonstrate that his constitutional rights have been violated. We do not hold that every tort by a federal official may be redressed in damages.”).

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

81. *Id.* at 397 (emphasis added).

82. *Id.*

83. *Id.*

84. *Id.*

85. As discussed below, the term “counselling hesitation” has come to mean something more like “prohibiting” a damages remedy. *Id.* at 396. This later meaning, however, which is the product of decades of case law, is hard to read back into *Bivens* itself—“counsel,” after all, does not usually mean command, and “hesitation” does not usually mean cessation.

### B. Explicit Preclusion (1979-1983)

In the decade following *Bivens*, the Court explained that there were “two situations” in which a *Bivens* claim “may be defeated”: when “defendants demonstrate ‘special factors counselling hesitation,’”<sup>86</sup> and when they “show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.”<sup>87</sup> At this stage, the special factor label primarily applied to the

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86. *Carlson v. Green*, 446 U.S. 14, 18 (1980) (quoting *Bivens*, 403 U.S. at 396).

87. *Id.* at 18-19 (citing *Bivens*, 403 U.S. at 396). This Article focuses specifically on the development of the special factors analysis, rather than on the development of *Bivens* jurisprudence as a whole. Scholarship dealing with the remedy more broadly tends to present its history as one of a brief initial decade of expansion, during which, in addition to *Bivens*'s initial recognition of constitutional damages for Fourth Amendment violations, the Court recognized remedies for violations of Fifth Amendment due process rights to equal treatment for women and Eighth Amendment rights regarding medical attention while incarcerated. *See id.*; *Davis v. Passman*, 442 U.S. 228, 245-48 (1979). After 1980, however, the Court's tide turned against *Bivens*, and from then on, *Bivens* cases primarily declined to recognize, rather than expand, individuals' remedies against federal employees. In 1983, the Court held unanimously that military personnel had no *Bivens* claim against their superior officers for racial discrimination. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983). Additionally, and again unanimously, the Court held that federal employees had no *Bivens* claim against superiors who violated their First Amendment free speech rights. *Bush v. Lucas*, 462 U.S. 367, 388-89 (1983). In 1988, the Court declined to recognize that people wrongly denied social security disability benefits had a *Bivens* due process claim under the Fifth Amendment. *Schweiker v. Chilicky*, 487 U.S. 412, 425, 428-29 (1988). In 1994, the Court held that only individuals, not agencies, could be sued under *Bivens*. *FDIC v. Meyer*, 510 U.S. 471, 485-86 (1994). And in 2001 it held, analogously, that a private corporation was not liable under *Bivens* suit either. *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). In 2007, the Court declined to recognize *Bivens* actions for violations of the Fifth Amendment's Takings Clause, although it did not unequivocally deny *Bivens* remedies to all takings claims. *Wilkie v. Robbins*, 551 U.S. 537 (2007). And most recently, in *Minneci v. Pollard*, the Court held that employees of a privately ran federal prison were not subject to *Bivens* suits because state law provided alternative remedies. *Minneci v. Pollard*, 132 S. Ct. 617 (2012); *see also* Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens After Minneci*, 90 WASH. U. L. REV. (forthcoming 2013), available at [ssrn.com/abstract=2042175](http://ssrn.com/abstract=2042175).

*Bivens* jurisprudence is often described as initially expanding to include certain constitutional provisions and then ceasing to expand to others. It is not clear, however, why, if a damages remedy is available for violations of some constitutionally guaranteed individual rights, it should not be presumptively available for all. After all, the Constitution does not guarantee some individual rights less vigorously than others. (Instead, it would make more sense to draw the line at the Constitution's structuring and constraint of government action, which does not guarantee individual rights.) This history is perhaps better interpreted as successive determinations about the kinds of *situations*—the kinds of relations between plaintiffs and defendants—that *Bivens* may encompass, rather than about the particular constitutional *provisions* it can vindicate.



question of whether defendants “enjoy[ed] such independent status in our constitutional scheme . . . that judicially created remedies against them might be inappropriate.”<sup>88</sup>

Thus in *Carlson v. Green*, the Court determined that prison guards receive no constitutional protection from suit beyond qualified immunity, which ensures that a lawsuit does not “inhibit their efforts to perform their official duties.”<sup>89</sup> Although in *Davis v. Passman*<sup>90</sup> the defendant’s role as a former Congressman was a “special concern[] counseling hesitation,” the Court determined that his immunity from suit for “actions taken in the course of his official conduct” was sufficiently addressed by qualified immunity and “the protections . . . [of] the Speech or Debate Clause” of the Constitution.<sup>91</sup> Although the defendant’s unusual position in *Davis* counseled hesitation, it did not preclude a remedy.

The Court also continued to assess whether an “explicit congressional declaration” precluded constitutional damages.<sup>92</sup> *Davis*, for instance, reasoned that a plaintiff excluded from explicit statutory remedies must have a constitutional damages remedy.<sup>93</sup> The *Davis* plaintiff was a congressional employee not subject to Title VII protections.<sup>94</sup> The Court determined that there was “no evidence . . . that Congress meant . . . to foreclose alternative remedies . . . . On the contrary, [the statute] leaves undisturbed whatever remedies petitioner might otherwise possess.”<sup>95</sup> Similarly, *Carlson* held that the plaintiff inmate’s ability to sue the government under the FTCA did not preclude his constitutional damages suit against the individuals who injured him.<sup>96</sup> On the contrary, the Court concluded that the Senate Report accompanying the 1974 amendments to the FTCA “made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action.”<sup>97</sup>

During this stage of *Bivens* jurisprudence, in sum, the Court presumed that a constitutional damages remedy was available unless (1) the defendant was so “independent” within the “constitutional scheme” that judicial remedies against

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88. *Carlson v. Green*, 446 U.S. 14, 19 (1980) (holding that an inmate’s ability to bring an action under the FTCA did not preclude a *Bivens* suit for violations of his Eighth Amendment rights and addressing what law governed such an action by an inmate’s estate).

89. *Id.*

90. 442 U.S. 228 (1979).

91. *Id.* at 246.

92. *Id.* at 246-47 (internal citations omitted).

93. *Id.* at 245.

94. See 42 U.S.C. § 2000e-16(a) (2006) (protecting only employees in the competitive civil service).

95. *Davis*, 442 U.S. at 247. As a non-competitive employee (that is, not a regular civil service employee but someone hired and fired by the Congressman), the plaintiff had no statutory or administrative remedy. *Id.* at 247 n.26. And because the defendant Congressman had since left office, the plaintiff could seek no equitable relief either. *Id.* at 231.

96. *Carlson v. Green*, 446 U.S. 14, 20 (1980); see also Pfander & Baltmanis, *supra* note 4, at 132-33.

97. *Carlson*, 446 U.S. at 20; see also Pfander & Baltmanis, *supra* note 4.

him would upset the federal government's balance of powers;<sup>98</sup> or (2) Congress had explicitly provided some other, equally effective, remedy.<sup>99</sup> While either of these factors could preclude a *Bivens* remedy, only the first was explicitly called a special factor. The second still constituted its own inquiry into the extent of "affirmative action by Congress."<sup>100</sup> Later cases, in contrast, began to treat the existence of congressional remedies as a special factor as well.<sup>101</sup>

### C. *Implicit Preclusion (1983-2007)*

Special factors analysis changed dramatically over the following decades. The Court abandoned its interest in a defendant's place in the constitutional scheme and in the power differences between the parties. It focused instead on the separation of powers and relative institutional competence between the legislative and the judicial branches. Instead of requiring an explicit legislative substitute for constitutional damages, the Court began to look for implicit indications of legislative preference. The Court also abandoned the presumption of constitutional damages, turning instead to case-by-case evaluations. Instead of a consideration that counseled hesitation, special factors became an obstacle that commanded cessation.<sup>102</sup>

Two unanimous 1983 decisions started these new trends. One, *Bush v. Lucas*,<sup>103</sup> declined to recognize a *Bivens* remedy for a federal employee, holding that the "elaborate, comprehensive scheme" protecting such employees, within which the plaintiff's claims were "fully cognizable," provided sufficient recourse.<sup>104</sup> In deferring to Congress's special authority over federal employees,

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98. *Carlson*, 446 U.S. at 19.

99. *Id.* at 18-19.

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

101. *See, e.g.*, *Moore v. Glickman*, 113 F.3d 988, 991 (9th Cir. 1997) ("Implied preclusion of a *Bivens* action can be found when defendants can demonstrate the existence of 'special factors counselling hesitation in the absence of affirmative action by Congress.'" (quoting *Schweiker v. Chillicky*, 487 U.S. 412, 421 (1988))).

102. There is another, more legal realist, way to tell this same history. Simply put, after the expansive rights-creation of the Warren years, the Supreme Court limited and constrained constitutional damages just as it limited and constrained other rights created or enhanced in the 1960s and 1970s. Though I focus on a more doctrinally intricate explanation, I also agree with the legal realist version of the history: The two are not mutually contradictory. What I explain in shorthand is that the legal realist approach looks to the result—the contraction, or at least the stopped expansion, of rights. I look to how the Court gets there—drawing on preemption analysis to create a somewhat analogous approach at the federal level, it retained its focus on the separation of judicial and *legislative* powers.

103. 462 U.S. 367 (1983).

104. *Id.* at 385-86. The plaintiff in *Bush v. Lucas* was a NASA employee who had been demoted for publicly criticizing the agency. *Id.* at 369. He first sought administrative remedies available to him under the civil service laws, including a final layer of review, completed several

*Bush* was in line with *Gilman*, one of the cases cited by *Bivens* when it introduced special factors, which refused to intrude on the federal employee relationship.<sup>105</sup> But *Bush* added something new as well: implicit preclusion. Congress, the Court stated, “may . . . indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself.”<sup>106</sup> After *Bush*, courts were responsible for discerning an implicit congressional desire to preclude constitutional damages. Such implicit preclusion would decisively constitute a special factor.

In this same process, the Court abandoned *Bivens*’s concern with power differentials between the parties and focused instead on the relative institutional competence of different branches of government. The Court refused to “augment[ ]” Congress’s “elaborate remedial system . . . constructed step by step, with careful attention to conflicting policy considerations” with a judge-made remedy.<sup>107</sup> Deferring to congressional competence in the federal employee realm, *Bush* also compared the institutional competence of Congress and the Executive.<sup>108</sup> Discussing *Standard Oil*, which was the original example of special factors relied on in *Bivens*, *Bush* explained the Court has “refused to create a damages remedy” because such a remedy would have been “the instrument for . . . establishing the federal fiscal and regulatory policies which the . . . executive . . . thinks should prevail” but which was, in fact, for Congress to determine.<sup>109</sup> *Bush* thus emphasized that the executive branch may have policy preferences, but it is Congress, not the judiciary, that implements them in laws.

The other 1983 decision marked an even more radical change in the special factors analysis. *Chappell v. Wallace*<sup>110</sup> announced for the first time that “a [*Bivens*] remedy will not be available when ‘special factors counselling hesitation’ are present.”<sup>111</sup> This announcement was styled as a description, not a holding.<sup>112</sup> Whether the very existence of special factors precludes a *Bivens* remedy or merely gives rise to a more careful inquiry on the part of courts—as it had in pre-*Chappell* cases—does not yet have a definitive answer. But,

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years after the demotion, in which an agency review board recommended his reinstatement with back pay; NASA followed the recommendation. *Id.* at 371. While this final administrative appeal was pending, *Bush* sued the superiors who had demoted him for violating his First Amendment right to free speech. *Id.*

105. See *supra* note 72 and accompanying text.

106. *Bush*, 462 U.S. at 378.

107. *Id.* at 388.

108. *Id.* at 379.

109. *Id.* (quoting *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 314 (1947)).

110. 462 U.S. 296 (1983).

111. *Id.* at 298 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971)).

112. The *Chappell* opinion asserted that “[t]he Court, in *Bivens* and its progeny, has expressly cautioned” that special factors would have this preclusive effect, *id.*, but as my discussion analysis demonstrates, this was not accurate. In fact, before *Chappell*, *Bivens* and its progeny treated special factors as something that a court should consider, not something that should bring a court up short.

building on *Chappell*'s confident proclamation, courts lean toward preclusion.<sup>113</sup>

*Chappell* also introduced what might be termed a field preclusion approach to special factors. In *Chappell*, military personnel sued their superiors for discrimination on the basis of race.<sup>114</sup> *Chappell* declined to recognize a remedy for military servicepeople against military superiors by analogy to the *Feres* doctrine, which exempts the federal government from suit under the FTCA for harms sustained "incident to [military] service."<sup>115</sup> The *Feres* doctrine has been justified through the requirements of military discipline and its necessity to national security.<sup>116</sup> *Chappell* further emphasized Congress's plenary control over, and wide-ranging regulation of, military affairs, which had effectively occupied the field of remedy creation in the military context.<sup>117</sup> "[T]he unique disciplinary structure of the [m]ilitary [e]stablishment and Congress' activity in the field constitute 'special factors'" making a *Bivens* remedy "inappropriate."<sup>118</sup> The Court thus read congressional intent off of congressional silence on the issue, and interpreted its own authority with reference to the arena occupied by Congress.<sup>119</sup>

The Court did not explicitly acknowledge the changes these cases wrought in the special factors analysis, but treated them as mere explications of an existing approach. Of course, unacknowledged changes to existing doctrine are not unusual. They are, rather, how our precedential system of law-making works. In this case, however, the changes wrought by the 1983 cases may have been so

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113. Compare, e.g., *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) (asserting that all that is required to preclude a *Bivens* suit is a single factor counseling hesitation, and concluding that the "relevant threshold" for preclusion is thus "remarkably low"), with *id.* at 583 (Sack, J., concurring in part and dissenting in part) ("[T]he applicable test is not whether 'special factors' exist, but whether after 'paying particular heed to' them, a *Bivens* remedy should be recognized with respect to at least some allegations in the complaint."). It is especially difficult to reconcile *Chappell*'s characterization of special factors with *Davis*, where a *Bivens* action was approved despite the acknowledged existence of a special factor. *Chappell* did not purport to overrule *Davis*.

114. *Chappell*, 462 U.S. at 297.

115. *Id.* at 299 (alteration in original) (citing *Feres v. United States*, 340 U.S. 135, 138 (1950)).

116. The reasoning of *Chappell* was extended in *United States v. Stanley*, 483 U.S. 669 (1987), which held that *Bivens* was unavailable not only to subordinates suing their military superiors, but in any case that implicated military discipline where the injury occurred incident to military service. *Id.* at 683-84. *Stanley* effectively equated the *Bivens* special factor analysis in cases implicating the military with *Feres*'s 'incident to service' analysis. *Id.* at 678-84.

117. *Chappell*, 462 U.S. at 299.

118. *Id.* at 304.

119. This approach, of course, contrasts sharply with that of *Davis*, in which the Court held that the omission of the injured party from a remedial scheme left her with access to any otherwise existing remedies. *Davis v. Passman*, 442 U.S. 228 (1979); see *supra* note 79 and accompanying text. It also pairs oddly with *Bush*, handed down the same day, which denied a *Bivens* remedy precisely because the injured party was included in the remedial scheme. *Bush v. Lucas*, 462 U.S. 367 (1983); see *supra* note 104 and accompanying text.

subtle that even some members of the Court did not recognize them at the time.

These changes would be cemented five years later in *Schweiker v. Chilicky*.<sup>120</sup> Unlike *Bush* and *Chappell*, the plaintiffs in *Chilicky* were not federal employees. They were disabled people who had been wrongfully denied federal disability benefits under a program that put pressure on administrators to terminate ongoing disability claims.<sup>121</sup> Through administrative redress procedures, their benefits had been reinstated, with back pay.<sup>122</sup> The plaintiffs claimed, however, that because they depended on these benefits to sustain themselves, restitution and back pay alone could not remedy the damage caused by going without basic life necessities for months on end.<sup>123</sup> They also argued that administrative process could not address the constitutional violations of administrators “adopt[ing] illegal policies that led to the wrongful termination of benefits by state agencies.”<sup>124</sup> Although the plaintiffs were not federal employees, the Court concluded that the case “cannot reasonably be distinguished from *Bush v. Lucas*”<sup>125</sup> because the Social Security Act provided a comprehensive scheme governing social security benefits.<sup>126</sup> Because this “suggest[ed] that Congress ha[d] provided what it consider[ed] adequate remedial mechanisms for constitutional violations that may occur in the course of [the program’s] administration,” *Bivens* was not available even if the scheme did not provide remedies for the particular kind of wrong at issue.<sup>127</sup>

*Chilicky* cemented the new special factors implicit preclusion approach, stating that “the concept of ‘special factors counselling hesitation in the absence of affirmative action by Congress’ has proved to include an appropriate judicial

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120. 487 U.S. 412 (1988).

121. *Id.* at 417.

122. *Id.*

123. *Id.* at 418.

124. *Id.* The opinion details a congressional investigation of the Social Security Agency’s Continuing Disability Review (CDR), under which claimants who appealed the denial of benefits were denied benefits pending administrative review. Administrators reviewing disability claims had been pressured to deny them even though “benefits were too often being improperly terminated by state agencies, only to be reinstated by a federal administrative law judge.” *Id.* at 415. The inquiry found that the program had had disastrous consequences, improperly denying support to “hundreds of thousands of truly disabled Americans.” *Id.* at 416 (quoting 130 CONG. REC. 26000, 13234 (1984) (statement of Sen. Moynihan)). “There is little doubt,” *Chilicky* concluded, “that CDR led to many hardships and injuries that could never be adequately compensated.” *Id.* at 417. *Chilicky*’s named plaintiff, for instance, “was in the hospital recovering from open-heart surgery when he was informed that his heart condition was no longer disabling.” *Id.* at 418. The *Chilicky* plaintiffs alleged that administrators had knowingly failed to use public and equal criteria to judge their claims, ignored evidence of their disabilities, selected biased doctors to perform review, and imposed quotas requiring that a certain number of people be denied the continuation of benefits regardless of the actual state of their disability. *Id.* at 418-19.

125. *Id.* at 425.

126. *Id.* at 424-25.

127. *Id.* at 423.

deference to indications that congressional inaction has not been inadvertent.”<sup>128</sup> After *Chilicky*, courts focused less on the sufficiency and explicitness of existing remedies and more on the simple question of whether Congress had “enacted a comprehensive . . . scheme governing the area involved,” and on “Congress’[s] expertise and authority in the field in question.”<sup>129</sup> If there was a comprehensive scheme, then a “failure to provide a damages remedy for constitutional violations” would be interpreted as “deliberate rather than inadvertent.”<sup>130</sup> This effectively reversed the earlier presumption that constitutional damages would be available in situations where Congress had “heavily regulated a certain subject . . . but ha[d] said nothing about a right of action for constitutional violations.”<sup>131</sup>

Dissenting from *Chilicky*, Justice Brennan, who had written the opinions in *Bivens*, *Davis*, and *Carlson* and had joined the opinions in *Bush* and *Chappell*, acknowledged for the first time the changes wrought by the 1983 cases. “I find it inconceivable,” he wrote, “that Congress meant by mere silence to bar all redress for such injuries.”<sup>132</sup> There were two important distinctions, he explained, between the *Bush* and *Chappell* situations and the one in *Chilicky*.<sup>133</sup> First, the remedial schemes at issue in *Bush* and *Chappell* provided relief for constitutional violations.<sup>134</sup> In *Chilicky*, “by stark contrast,” the disability “recipients cannot even raise constitutional challenges to agency action . . . and . . . can recover no consequential damages whatsoever.”<sup>135</sup> Second, military personnel and federal employees stood in a unique relation to the legislature: Congress has plenary power over the first, and “enjoys a special expertise” regarding the second.<sup>136</sup> It was the unique relationship of Congress to the military and the civil service, not simple “congressional authority over a given subject,” that were the special factors in *Chappell* and *Bush*.<sup>137</sup> But Congress has no special relationship to, and no special expertise with, disabled people and their benefits. It was “simply competent to legislate in [that] area” as in any other.<sup>138</sup>

As Justice Brennan’s dissent demonstrates, *Chilicky* entrenched the new style of special factors analysis introduced in *Chappell* and *Bush*. No longer would the Court require an explicit legislative substitute to preclude constitutional damages, and no longer would it even require Congress to have any special expertise in, or relationship to, the subject or people covered by a remedial scheme. This new approach greatly expanded the range of situations in which courts would find *Bivens* remedies precluded. At the same time, the new approach rested on the

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128. *Id.*

129. *Jones v. Tenn. Valley Auth.*, 948 F.2d 258, 264 (6th Cir. 1991).

130. *Id.*

131. *McIntosh v. Turner*, 861 F.2d 524, 525 (8th Cir. 1988).

132. *Chilicky*, 487 U.S. at 432 (Brennan, J., dissenting).

133. *See id.* at 436-42.

134. *Id.* at 436-37.

135. *Id.* at 437.

136. *Id.* at 441.

137. *Id.* at 442.

138. *Id.*

same foundation as the previous one: The Court still looked to Congress to provide an alternative remedial scheme or to delegate the provision of such a scheme to an administrative agency. The separation of powers issue at the heart of *Bivens* remained the separation of judicial from legislative authority.

#### *D. Manageability (2007)*

One final case added a new concern to *Bivens* decisions while retaining the components of special factors analysis. *Wilkie v. Robbins*<sup>139</sup> has caused considerable confusion, but did not disturb the existing framework for special factors preemption analysis. *Wilkie* introduced for the first time what it called a “familiar sequence” for determining whether a *Bivens* remedy should be available.<sup>140</sup> First, a court should ask “whether any alternative, existing process for protecting the interest amounts to a convincing reason for the [j]udicial [b]ranch to refrain from providing a new and freestanding remedy in damages.”<sup>141</sup> This first step harks back to older cases’ requirement that Congress provide some adequate alternative remedy if *Bivens* is to be precluded. If no such process exists, *Wilkie*’s second step requires a court to “make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.”<sup>142</sup> Appending special factors analysis as a subsection of the common law determination in this way can lead to the confusion of courts that do not realize that each inquiry has its own jurisprudential tradition. A careful reading of *Wilkie*, however, reveals that the special factors analysis remains the same as it was before the Court announced its decision.

In *Wilkie*, a landowner sued agents of the Bureau of Land Management (BLM) for trying to force him to grant an easement over his land in abrogation of his Fifth Amendment right to just compensation for a taking of property.<sup>143</sup> The previous owner had granted the BLM an easement, but BLM officials neglected to record the grant; under local law, the easement was therefore not passed on to the new landowner.<sup>144</sup> *Robbins*, the plaintiff, alleged that when he refused to simply grant the easement with no compensation, BLM officials

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139. 551 U.S. 537 (2007).

140. *Id.* at 550.

141. *Id.* (citing *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

142. *Id.* (internal quotation marks omitted) (citing *Bush*, 462 U.S. at 378).

143. *Id.* at 541. *Wilkie* declined to recognize a cause of action for a Fifth Amendment Takings Clause violation, but it did not categorically exclude the Takings Clause from *Bivens*’s ambit. Rather, it found *Bivens* inappropriate in that particular case. *Id.* at 562. *Wilkie* did not, for instance, question, or even mention, a Fourth Circuit case that recognized a Takings Clause *Bivens* remedy. See *Dunbar Corp. v. Lindsey*, 905 F.2d 754 (4th Cir. 1990) (recognizing a constitutional damages remedy under the Fifth Amendment’s Takings Clause for a private company with a possessory interest in property taken over by the government).

144. *Wilkie*, 551 U.S. at 542-43.

launched a multi-year campaign to force him to do so or to force him out of business.<sup>145</sup> The campaign included both acts that were themselves illegal (such as trespass) and acts that were otherwise legal but that were undertaken for an illegal purpose (such as selectively refusing to grant Robbins standard permits necessary to run his business).<sup>146</sup>

After determining that Robbins had no statutory or administrative remedy,<sup>147</sup> *Wilkie* went on to the new second step of the *Bivens* analysis, weighing the interests at stake while remaining cognizant of the possibility of special factors.<sup>148</sup> This part of *Wilkie*<sup>149</sup> has sometimes been read to be *about* special factors, but the opinion itself did not purport to find any special factors. In fact, it never mentioned the term again. This makes sense, as the Court expressly found that no remedial scheme encompassed the wrongs of which Robbins complained but did not find that Congress, in failing to legislate remedies for these kinds of harms, had purposely excluded plaintiffs like Robbins from access to remedies.<sup>150</sup> Thus, the Court's analysis showed that the existing requirements for finding special factors had not been met.

Rather than rely on special factors, *Wilkie* upheld the dismissal of Robbins's claims on two grounds. First, the Court concluded that allowing the suit would enable a flood of lawsuits from people disgruntled with their interactions with bureaucrats.<sup>151</sup> Justice Ginsburg's dissent called this a new kind of "special factor."<sup>152</sup> But, as a prudential concern, the floodgate argument is better seen as part of the weighing of interests "that is appropriate for a common-law tribunal."<sup>153</sup> There is, as Justice Ginsburg herself pointed out, no precedent for the floodgate argument in a special factors analysis.<sup>154</sup> And the opinion itself did

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145. *Id.* at 543.

146. *Id.* at 543-47.

147. *Id.* at 554 (summarizing the argument for granting a *Bivens* remedy as "the inadequacy of discrete, incident-by-incident remedies").

148. *Id.*

149. *Id.* at 577 (Ginsburg, J., dissenting).

150. *Id.* at 555 (majority opinion).

151. While "[i]t is true that the Government is no ordinary landowner," the Court concluded, allowing constitutional damages against agents acting on the government-as-landowner's behalf "would invite claims in every sphere of legitimate governmental action affecting property interests, from negotiating tax claim settlements to enforcing Occupational Safety and Health Administration regulations." *Id.* at 558, 561.

152. *Id.* at 577 (Ginsburg, J., dissenting).

153. *Id.* at 550 (majority opinion) (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

154. *Id.* at 577 (Ginsburg, J., dissenting) (calling the floodgates argument "a special factor counseling hesitation quite unlike any we have recognized before"). Indeed, *Bivens* itself had rejected a floodgates argument without suggesting that it might be a special factor. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 391 n.4 (1971) ("In estimating the magnitude of any such 'avalanche [of new cases],' it is worth noting that a survey of comparable actions against state officers under 42 U.S.C. § 1983 found only 53 reported cases in 17 years (1951-1967) that survived a motion to dismiss. Increasing this figure by 900% to allow for



not refer to it as such. Rather, the floodgate argument appeared in the part of the opinion devoted to common-law weighing of relevant interests.

Second, the Court concluded that a *Bivens* remedy would force courts to draw hard-to-see lines, having to distinguish between bureaucratic conduct that zealously pursues the public interest and that which oversteps zeal and violates constitutional rights.<sup>155</sup> Such line-drawing would tax the Court's institutional competence because Robbins challenged "actions that, on their own, fall within the [g]overnment's enforcement power," and because he challenged a multi-year accrual of pressure rather than discrete acts.<sup>156</sup> The Court lacked the competence to make a remedy in this case because of "the elusiveness of a limiting principle for Robbins's claim."<sup>157</sup> In that context, the Court concluded, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf."<sup>158</sup>

This second ground concludes that courts are ill-equipped to deal with claims against long-term campaigns of largely lawful action taken with unlawful intent: It is simply too difficult to define what the violation is. *Wilkie*'s second ground thus says less about whether a particular *remedy* is appropriate and more about a court's ability to recognize a particular kind of *claim*. The problem with Robbins's suit was not that it would be inappropriate to provide a remedy for a Fifth Amendment wrong but that it was unclear how to define, or even identify, the wrong that had been committed against him.<sup>159</sup> The *Wilkie* opinion does not call this a special factor. If anything, this definitional issue harks back to *Bivens*'s requirement that constitutional damages remedies be given only where plaintiffs successfully allege violations of a constitutional magnitude—more a threshold pleading requirement than a special factor.

The two grounds on which the Court resolved *Wilkie*, then, were both aimed at making claims practically and conceptually manageable. Practically, recognizing a remedy should not give rise to a large and unnecessary amount of new litigation. Conceptually, a remedy should be recognized only for injuries that fit within the normal parameters of a legal claim. *Wilkie* did not discuss the relative authority of the courts and the legislature, and it never doubted that the Court had the authority to recognize a remedy. Rather, it doubted the Court's *ability* to handle the remedy it could create.<sup>160</sup> This concern fits more comfortably into the common-law weighing of interests that *Wilkie* introduced than the separation of powers concerns of special factors analysis. *Wilkie*, in sum, found that intra-judicial concerns raise sufficient grounds to bar a *Bivens*

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increases in rate and unreported cases, every federal district judge could expect to try one such case every 13 years." (internal citation omitted)).

155. *Wilkie*, 551 U.S. at 562.

156. *Id.* at 560.

157. *Id.* at 561 n.11.

158. *Id.* at 562 (quoting *Bush v. Lucas*, 462 U.S. 367, 389 (1983)).

159. *Id.* at 561 n.11.

160. *Id.* at 562.

remedy.<sup>161</sup> It did not turn to the inter-branch concerns that special factors implicate and, in the end, simply did not perform a special factors analysis. It may be that the Court will eventually subsume the special factors analysis into *Wilkie*'s common-law weighing, but if that is the case, the Court has not made any such movement clear. Thus, the special factors analysis after *Wilkie* remains unchanged.

### III. CONSOLIDATING SPECIAL FACTORS ANALYSIS IN THE COURTS OF APPEAL

Part II showed how special factors emerged in *Bivens* as an inchoate reference, loosely oriented around ensuring that judicial remedies did not encroach on the prerogatives of Congress. The concept gained definition over the ensuing decades, coming into sharper focus in the 1980s, when the Court shaped its inquiry into one of congressional will, with techniques drawn from preemption analysis. When Congress explicitly provided alternative remedies, legislatively occupied the field, or implicitly indicated that no additional remedies should be provided, the Court refused to recognize a remedy. Because the Court developed this approach over only a few cases, the special factors analysis at the Supreme Court level retains somewhat vague outlines. The latest case to touch upon it, *Wilkie*, mentioned special factors without actually utilizing the concept.<sup>162</sup>

The Federal Courts of Appeal have lent coherence and specificity to these somewhat vague outlines by keeping the focus of special factors analysis consistently on congressional will. In the past two decades, the circuit courts have consistently based the availability of *Bivens* remedies on whether a comprehensive statutory remedial scheme addressed the situation at issue. While the courts have been consistent in how they actually approach special factors, courts of appeal have *described* the analysis in a variety of ways. Some explicitly look to remedies available by statute. Others say that they consider the categories of parties in the case. Still others rely on the simple fact that some law touches on the case without examining whether it provides a relevant comprehensive scheme. Sometimes courts combine these phrasings. As I demonstrate in this Part, however, what appear as different approaches are, in fact, merely different ways of describing the same underlying question: whether Congress has indicated that it wishes the judiciary not to create remedies in a particular situation. Sometimes explicitly, sometimes unwittingly, courts of appeal have converged on and developed the implicit preclusion style of special factors analysis that the Supreme Court introduced in the 1980s.

#### A. *Self-Conscious Implicit Preclusion Analysis*

Most appellate courts recognize that the special factors analysis serves to prevent courts from treading on ground already claimed by Congress. Some courts find it important to determine whether a statutory remedial scheme

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161. *Id.* at 577 (Ginsburg, J., dissenting).

162. *See supra* Part II.D.

specifically addresses constitutional violations while others do “not require a foray into the meaningfulness of [a plaintiff’s] remedies under the [statutory scheme],” and simply “focus . . . on the comprehensive nature of the administrative system protecting the rights of the plaintiff, as well as Congress’[s] expertise and authority in the field in question.”<sup>163</sup> Generally, courts do not ask whether the statutory scheme affords relief comparable to what a plaintiff would have under *Bivens* or even whether it affords any relief at all. The question instead is whether Congress appears to have considered the kind of claim at issue and has indicated a preference about how to handle it.<sup>164</sup> Courts interpret both inclusion in, and exclusion from, a statutory remedial scheme as a statement of congressional policy. Thus, for instance, because the statutory remedial scheme relevant to a particular case *addressed* violations of constitutional rights but did not provide damages for them, the Seventh Circuit concluded that Congress had intended to preclude a constitutional damages remedy.<sup>165</sup>

A small number of statutory schemes preclude *Bivens* most frequently. Chief among these is the Civil Service Reform Act (CSRA), which provides a complex remedial framework for public employees.<sup>166</sup> Courts agree that Congress has occupied the field of federal employment and find that the CSRA precludes *Bivens* remedies both where it provides federal employees with redress and where it does not. For instance, the CSRA has precluded a *Bivens* suit by a federal educator, a kind of employee not covered by the full range of CSRA protections<sup>167</sup> and by an employee of the federal judiciary, to whom the CSRA

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163. *Jones v. Tenn. Valley Auth.*, 948 F.2d 258, 264 (6th Cir. 1991) (citing *Feit v. Ward*, 886 F.2d 848, 854-55 (7th Cir. 1989)) (providing examples from the U.S. Supreme Court, as well as the Eighth, Ninth, and D.C. Circuits).

164. *Dotson v. Griesa*, 398 F.3d 156, 166 (2d Cir. 2005).

165. *Feit v. Ward*, 886 F.2d 848, 853-54 (7th Cir. 1989).

166. Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.). Scholarship suggests that CSRA remedies are in fact inadequate to address constitutional claims, especially under the First Amendment. *See, e.g.*, John F. Preis, *Constitutional Enforcement by Proxy*, 95 VA. L. REV. 1663, 1714 (2009) (“A recent study of First Amendment claims by federal employees suggests that the ‘administrative scheme [utilized in such cases] is not vindicating the First Amendment . . . rights of federal employees.’” (alterations in original) (quoting Paul M. Secunda, *Whither the Pickering Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101, 1103 (2008))). As has become clear through subsequent *Bivens* jurisprudence, courts are loath to investigate the *adequacy* of remedies that a statutory scheme provides as long as the statutory scheme indicates congressional attention to the matter. One could, however, argue that inadequate remedies indicate that Congress did not, in fact, exercise its expertise or imply its will in a particular area.

167. *See Volk v. Hobson*, 866 F.2d 1398, 1403-04 (Fed. Cir. 1989); *see also Sarullo v. U.S. Postal Serv.*, 352 F.3d 789, 795-99 (3d Cir. 2003) (holding that postal service workplace investigation of plaintiff who was suspected of selling drugs at work constituted a work-related process for which the Civil Service Reform Act provided a comprehensive remedial scheme); *Bennett v. Barnett*, 210 F.3d 272, 275 (5th Cir. 2000) (holding that *Bush* had “left it up to Congress

does not apply at all.<sup>168</sup> As the Fifth Circuit stated, while “[t]he Supreme Court has not held expressly that the CSRA in all cases precludes federal employees from bringing *Bivens* actions arising out of their employment relationship,” the circuit courts “have held that the CSRA precludes at least some *Bivens* actions brought in such circumstances.”<sup>169</sup>

Other kinds of federal employment have been treated similarly. A Veterans Administration (VA) employee, for instance, was precluded from suing superiors under *Bivens* because his employment was governed by the Department of Medicine and Surgery (DMS) regulations.<sup>170</sup> Since Congress had delegated to the department the authority to use internal procedures to address rights violations, the court concluded that Congress intended that “DMS personnel should be subject to a less protective grievance system than is available to ordinary civil service employees” through the CSRA.<sup>171</sup>

At the same time, courts can allow federal employee cases to go forward when they determine that Congress did not intend a particular application of federal employment laws. Thus, when an employee in the department of Agriculture’s Agricultural Stabilization and Conservation Service sued his superiors, the Eighth Circuit noted that the service employed a nonstandard hiring practice that left employees outside the CSRA’s protective ambit.<sup>172</sup> Since Congress had not envisioned nonstandard hiring practices, the court concluded, it could not have intended such employees to be deprived of both CSRA protections and constitutional damages.<sup>173</sup> The plaintiff did have recourse in the form of an internal appeals process, but unlike the appeals process in the CSRA, this nonstandard version allowed him to challenge his supervisor’s unconstitutional conduct only through an appeal to that supervisor himself.<sup>174</sup> Although courts normally view administrative appeals systems as the delegated part of a statutory remedial system, the Eighth Circuit recognized that “[o]nly Congress has the power to decide that a statutory or administrative scheme will foreclose a *Bivens* action.”<sup>175</sup> But since Congress could not have foreseen the service’s employment scheme, the court could not infer that Congress had meant

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to provide the appropriate remedy” for federal employee constitutional violations and that the Postal Reorganization Act provided the appropriate remedy for a postal worker claiming constitutional violations).

168. *Dotson*, 398 F.3d at 163-65. The court determined that Congress was aware of the judiciary’s internal review procedures for employees and purposely excluded such employees from the CSRA’s ambit. *Id.* at 161.

169. *Rollins v. Marsh*, 937 F.2d 134, 139 (5th Cir. 1991); *see also Karamanos v. Egger*, 882 F.2d 447, 453 (9th Cir. 1989) (refusing to recognize a *Bivens* action by an Internal Revenue Service employee on the basis of the CSRA’s comprehensive remedial scheme).

170. *Heaney v. U.S. Veterans Admin.*, 756 F.2d 1215, 1218-19 (5th Cir. 1985).

171. *Id.* at 1219.

172. *Krueger v. Lyng*, 927 F.2d 1050, 1056 (8th Cir. 1991).

173. *Id.* at 1056-57.

174. *Id.* at 1052-53.

175. *Id.* at 1055.

to exclude people in the plaintiff's position from *Bivens* remedies.<sup>176</sup> Cutting employees off from CSRA protections, the court concluded, was an executive policy with no legislative support.<sup>177</sup> It did not indicate that Congress had intended that result.<sup>178</sup> Thus, the mere presence of a comprehensive statutory scheme does not suffice to preclude a constitutional damages remedy. As with implicit preemption, the court must determine that Congress had considered the kind of situation at issue in the case.

The other consistent impediment to recovery under *Bivens* is the Internal Revenue Code. A number of circuits have found that Congress's thorough regulation of taxes and the Code's redress mechanisms demonstrate congressional occupation of the field.<sup>179</sup> Thus, plaintiffs who were tricked by an IRS agent into claiming improper deductions could not sue under *Bivens*.<sup>180</sup> The court noted that the circuits consistently find "*Bivens* actions inapplicable for claims arising from federal tax assessment or collection."<sup>181</sup> Circuit courts also consistently decline to recognize *Bivens* remedies against the IRS even where the Internal Revenue Code does not provide complete relief for the violation at issue. Such cases hold that the existence of that comprehensive remedial scheme, even

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176. *Id.* at 1056; *see also* *Carpenter's Produce v. Arnold*, 189 F.3d 686, 689 (8th Cir. 1999) ("The remedial scheme in *Krueger*, however, unlike that in *Chilicky* . . . was created entirely by regulation, and that was the point of our holding.").

177. *Krueger*, 927 F.2d at 1056 ("Congress did not direct, or in any way imply, that these employees should be excluded from the CSRA; their exclusion is solely the result of the [s]ecretary's *sua sponte* decision to use a 'non-traditional' hiring method. It is not a 'non-inadvertent' act by Congress that excludes *Krueger* from civil service protection; instead, this exclusion results solely from the [s]ecretary's having used standard enabling language as the basis for adopting an uncommon hiring practice.").

178. *Id.* Six years later, however, the Ninth Circuit concluded that Congress had indicated its awareness of these kinds of employees when it permitted their participation in the federal retirement plan, in addition to other civil service benefits, and that their exclusion from the CSRA's remedial ambit had thus been (or become) an intentional omission. *Moore v. Glickman*, 113 F.3d 988, 992-93 (9th Cir. 1997) (explicitly recognizing the "non 'employee'" status of this type of USDA worker). The next year, the Eleventh Circuit followed *Moore*'s reasoning but rested its conclusion on the Administrative Procedure Act rather than the CSRA. *See Miller v. U.S. Dep't of Agric. Farm Servs. Agency*, 143 F.3d 1413, 1416 (11th Cir. 1998); *see also infra* note 208.

179. *See Shreiber v. Mastrogiovanni*, 214 F.3d 148, 152 (3d Cir. 2000) ("[A] *Bivens* action should not be inferred to permit suits against IRS agents accused of violating a taxpayer's constitutional rights in the course of making a tax assessment."); *Fishburn v. Brown*, 125 F.3d 979, 982-83 (6th Cir. 1997) (summarizing extra-circuit case law and concluding that *Bivens* actions may not be brought against IRS agents for due process violations arising out of tax collection activities), *abrogated by Hoogerheide v. IRS*, 637 F.3d 634 (6th Cir. 2011); *McMillen v. U.S. Dep't of Treasury*, 960 F.2d 187, 190 (1st Cir. 1991) (per curiam) (stating that even if alleged IRS actions violated plaintiff's constitutional rights, "we doubt that the creation of a *Bivens* remedy would be an appropriate response").

180. *Adams v. Johnson*, 355 F.3d 1179, 1184 (9th Cir. 2004).

181. *Id.*

if incomplete or not comparable, precludes *Bivens*.<sup>182</sup>

At the same time, courts can be careful to ascertain not just that the defendant is an IRS agent, but that the Internal Revenue Code could realistically be seen to apply to the situation at hand. When taxpayers sued an IRS agent for allegedly outrageous harassment, the Fifth Circuit concluded the Internal Revenue Code and its remedial scheme addressed *property*, not *liberty*, interests.<sup>183</sup> If the plaintiff taxpayers could show that the auditor's conduct implicated liberty interests, the court determined, they would have a *Bivens* claim despite the case implicating the Internal Revenue Code.<sup>184</sup>

Other, less frequently cited, statutes have precluded *Bivens* on these same grounds. Veteran's claims against the Veteran's Association have been rejected because Congress set up an "elaborate remedial structure" for veteran's benefits, including an "administrative process . . . [that] provid[ed] for a comprehensive review of veterans' benefits disputes," but explicitly prohibited "judicial review of [those] disputes."<sup>185</sup> National banking regulation has precluded a *Bivens* claim

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182. See, e.g., *Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 410-11 (4th Cir. 2003) (denying a *Bivens* claim for retaliatory taxation because tax laws provide a comprehensive regulatory scheme, even if they do not provide complete relief); see also *Dahn v. United States*, 127 F.3d 1249, 1254 (10th Cir. 1997) ("[I]n light of the comprehensive administrative scheme created by Congress to resolve tax-related disputes, individual agents of the IRS are also not subject to *Bivens* actions."); *Vennes v. An Unknown Number of Unidentified Agents of the United States*, 26 F.3d 1448, 1454 (8th Cir. 1994) ("Congress has provided specific and meaningful remedies for taxpayers who challenge overzealous tax assessment and collection activities. . . . These carefully crafted legislative remedies confirm that . . . Congress's refusal to permit unrestricted damage actions by taxpayers has not been inadvertent."); *Baddour, Inc. v. United States*, 802 F.2d 801, 807-09 (5th Cir. 1986) ("[C]reation of a damages remedy under circumstances where Congress has provided for corrections of tax collection errors could wreck [sic] havoc with the federal tax system."); *Cameron v. IRS*, 773 F.2d 126, 129 (7th Cir. 1985) ("[I]t would make the collection of taxes chaotic if a taxpayer could bypass the remedies provided by Congress simply by bringing a damage action against Treasury employees.").

183. *Rutherford v. United States*, 702 F.2d 580, 583 (5th Cir. 1983), *superseded by statute* I.R.C. §§ 7432-33 (2006), *as recognized in* *Barron v. United States*, 998 F. Supp. 117 (D.N.H. 1998). The plaintiffs alleged that the IRS auditor "willfully and maliciously assess[ed] them for taxes they did not owe, harass[ed] them into paying those taxes, and forc[ed] them to sue for a refund." *Id.* at 581. The auditor allegedly "invented" over \$100,000 of gross income; assessed the plaintiffs twice for the same income; demanded "useless documentation"; accused the plaintiffs of hiding money; "once insisted that [one plaintiff] empty his pockets of money and let him count it"; told one plaintiff, "You don't think I am going to spend this much time on this audit and not come up with a considerable sum of money due and owing"; and "arranged for his audit report to be delivered to the [plaintiffs'] home at 4:30 p.m. on Christmas Eve." *Id.*

184. *Id.* at 584-85 (remanding for a district court determination of whether allegedly outrageous conduct by an IRS auditor constituted a deprivation of a Fifth Amendment liberty interest, in which case a *Bivens* claim could proceed).

185. *Zuspann v. Brown*, 60 F.3d 1156, 1161 (5th Cir. 1995); see also *Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995) (holding that *Bivens* was unavailable against the plaintiff veteran's doctor

by a bank's owner against the Office of the Comptroller of the Currency employees,<sup>186</sup> and congressional regulation of federal disaster relief has precluded applicants' *Bivens* claims against the agents reviewing eligibility for relief for race discrimination.<sup>187</sup> The Parole Commission and Reorganization Act of 1978 has precluded a parolee's *Bivens* action against his parole officer.<sup>188</sup> And when a group of people who had spent time in lower Manhattan sued the Environmental Protection Agency for injuries allegedly arising from the Agency's false statements about air quality and safety in the wake of the World Trade Center attacks of September 11, 2001, the Second Circuit held that the Air Transportation Safety and System Stabilization Act,<sup>189</sup> which "provided a statutory cause of action for claims 'arising out of' the airplane crashes that destroyed the WTC towers," precluded *Bivens* remedies.<sup>190</sup>

One can always question whether Congress's foray into some particular field really indicates its desire to preclude all remedies it did not happen to construct. Did Congress really consider all the possible harms that could come to banks when it created banking regulations? Did it really mean to leave people with no way to enforce their rights to equal protection under the federal disaster relief statute? Regardless of whether the courts' interpretations seem realistic, these cases show the central thread running through special factors analysis: In all these examples, Congress had considered the area of law and the kind of plaintiff, at issue. Focusing on implicit indications of legislative will, courts have consistently found this sufficient to infer that Congress's silence was purposeful.

### *B. Categorical Bars as Shorthand for Implicit Preclusion Analysis*

While most courts explicitly treat special factors analysis as an inquiry into legislative preclusion, some talk about certain kinds of plaintiffs as categorically barred from *Bivens* remedies.<sup>191</sup> In such cases, courts do not analyze how comprehensive a statutory scheme is. They simply determine whether the plaintiff belongs to a category that they consider barred from constitutional damages. These sound like different inquiries—statutory scheme versus plaintiff category—but, in fact, in both kinds of cases, the courts' conclusion rests on an inquiry into implicit preclusion of remedies by the legislature. The difference is

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because Congress had comprehensively regulated veterans' relations with the Veterans Administration through the Veterans Judicial Review Act of 1988).

186. *Sinclair v. Hawke*, 314 F.3d 934, 940-42 (8th Cir. 2003).

187. *Carpenter's Produce v. Arnold*, 189 F.3d 686, 687, 689 (8th Cir. 1999).

188. *Rauschenberg v. Williamson*, 785 F.2d 985, 988 (11th Cir. 1986).

189. Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at in scattered sections of 49 U.S.C.).

190. *Benzman v. Whitman*, 523 F.3d 119, 126 (2d Cir. 2008). *Benzman* also described the area of federal disaster relief as thoroughly occupied by congressional regulation in a way analogous to Congress's control over the military as described in *Chappell* and held that the plaintiffs had failed to plead a constitutional violation. *Id.* at 126-29.

191. *See, e.g., Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70-71, 74 (2001) (holding that *Bivens* remedies would not be extended to private corporations).

simply that courts using categorical bars do not conduct the legislative preclusion inquiry themselves. Instead, they take as their starting point the *conclusion* of an inquiry already conducted by the Supreme Court. The categorical approach thus depends entirely on the question of legislative preclusion. This is because the kinds of plaintiffs that have been barred from constitutional damages have been barred precisely because the Supreme Court has found that the comprehensive remedial schemes available to them indicate Congress's occupation of their field. As discussed above, for instance, civil servants have been barred from *Bivens* because of the CSRA and members of the military because of Congress's occupation of that field.<sup>192</sup> In reality, then, this categorical style of special factors inquiry still focuses on congressional preemption of judicial remedies: asking about plaintiff categories is just a shorthand for asking about remedial schemes. The inconsistency among courts of appeal probably stems from the Supreme Court's own *Bivens* cases, which have described statutory schemes in both ways at different times. In practice, the special factors inquiry, while phrased in varying ways, remains an inquiry into legislative preclusion.

In this vein, a *Bivens* suit by civilian employees at a naval base was precluded solely because the claims arose from a "federal employment relationship,"<sup>193</sup> a decision that treated the Supreme Court's preemption analysis in *Bush v. Lucas*<sup>194</sup> as a categorical bar of federal employee *Bivens* suits. Other courts have combined the categorical bar approach with reference to a comprehensive statutory scheme, as when the Third Circuit determined that "in light of the existence of [statutory] remedies the employer-employee relationship . . . is a special factor."<sup>195</sup>

Similarly, for cases involving members of the military, brief references to the *Feres* doctrine sometimes stand in for analysis. Thus, a plaintiff's status as a member of the military precluded his *Bivens* suit challenging his superiors' racially discriminatory failure to promote him.<sup>196</sup> Additionally, a discharged serviceman was prevented from challenging his military jailers' Eighth

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192. See *supra* notes 167, 185 and accompanying text.

193. *Zimelman v. Savage*, 228 F.3d 367, 370 (4th Cir. 2000); see also *Palermo v. Rorex*, 806 F.2d 1266, 1270-73 (5th Cir. 1987) (holding that the congressionally regulated nature of federal employment weighed against judicially created remedies). *Palermo* preceded *Chilicky*; the Supreme Court analysis at that point still focused on the special relationship of the federal employer and federal employees, rather than on the existence of a statutory remedial scheme per se. *Id.* at 1271.

194. 462 U.S. 367 (1983).

195. *Purtill v. Harris*, 658 F.2d 134, 138 (3d Cir. 1981) (holding that the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633a, provided a comprehensive remedial scheme for a federal employee's complaint); see also *Hall v. Clinton*, 235 F.3d 202, 206 (4th Cir. 2000) (denying a *Bivens* claim because of federal employment and comprehensive regulation by the CSRA, even though the CSRA did not provide relief for the plaintiff's particular claims); *Yokum v. Frank*, No. 90-2196, 1991 WL 118008, at \*12-13 (4th Cir. July 3, 1991) (holding that the combination of a plaintiff's federal employment and the fact that a comprehensive remedial scheme was available for his complaints created a special factor barring *Bivens* remedies).

196. *Randall v. United States*, 95 F.3d 339, 340 (4th Cir. 1996).



Amendment violations because the conduct and the conviction that landed him in prison occurred while he was still in the military.<sup>197</sup> While some courts treat the *Feres* doctrine as part of the special factors analysis,<sup>198</sup> others eschew the analysis altogether. Instead, they treat *Chappell* as importing the *Feres* bar on military suits into the *Bivens* arena. For example, holding that a military serviceman could not challenge a hazing incident, the First Circuit mentioned special factors but performed its analysis exclusively under *Feres*.<sup>199</sup> Courts of appeal have also built on the military personnel analysis to bar *Bivens* suits by employees of the Public Health Service (PHS). The PHS is not part of the military, but it is similarly structured and in many ways treated similarly by Congress.<sup>200</sup> Two circuits have relied on the *Feres* doctrine to bar a PHS employee's discrimination suit against PHS superiors.<sup>201</sup>

Thus, even when courts cite a plaintiff's membership in a particular category as the reason for refusing to recognize a *Bivens* claim, the analysis underlying that decision still rests on whether the *Bivens* remedy has been precluded by legislation. And that makes perfect sense, since the central problem with *Bivens* remedies revolves around the judiciary's attempt not to infringe on the remedy-creating prerogative of the legislature.

#### IV. OUTLIERS

The preceding Part illustrated that the majority of courts agree that the special factors analysis inquires into legislative will regarding constitutional damages remedies, even though they may refer to it by different terms in different cases. In this Part, I turn to courts that have deviated from the mainstream. The first kind of deviation involves mistaken results: Some courts unreasonably interpret statutes that are only peripherally relevant to the situation in a particular case as indicating a legislative desire to preclude *Bivens* remedies. The second kind of deviation is more serious: Courts may mistakenly look to executive will as determining the fate of constitutional damages. In this situation, the court not only deviates from the accepted doctrine of the special

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197. *Ricks v. Nickels*, 295 F.3d 1124, 1130-31 (10th Cir. 2002).

198. *Id.* at 1128-30.

199. *Day v. Mass. Air Nat'l Guard*, 167 F.3d 678, 682, 684 (1st Cir. 1999); *see also* *Wright v. Park*, 5 F.3d 586, 589-91 (1st Cir. 1993) (holding that the claims of a part-military, part-civilian, technician were barred because they arose from events incident to military service, and noting *Chappell's* reasoning without performing a special factors analysis, resting instead on the *Feres* doctrine alone).

200. The PHS provides medical care in prisons and immigration detention centers. The Supreme Court recently barred an inmate's *Bivens* action against the PHS for Eighth Amendment violations, but did so on statutory interpretation grounds, without reference to *Bivens* special factors. *Hui v. Castaneda*, 130 S. Ct. 1845, 1852-55 (2010). The special factors analysis mostly focused on the ability of PHS employees, not inmates, to sue superior PHS personnel. *Id.* at 1851.

201. *See* *Middlebrooks v. Leavitt*, 525 F.3d 341, 350 (4th Cir. 2008); *Diaz-Romero v. Mukasey*, 514 F.3d 115, 118-19 (1st Cir. 2008).

factors analysis, it also fails to recognize that the underlying separation of powers concern in constitutional damages is the relationship between the judiciary and the legislature. Such cases should be read narrowly to prevent these mistakes from setting broad precedent that undermines the logic of the special factors inquiry.

*A. Mistaking Peripheral Statutes for Implicit Preclusion*

A few courts have mistakenly found *Bivens* precluded by statutes that touch only peripherally on the matters at issue in a case. Instead of looking for indications that Congress considered the situation presented in a case, such courts have settled for statutory schemes that merely implicate some of the interests or issues involved. Taking the existence of *some* remedial scheme to preclude a *Bivens* remedy without ensuring that the scheme indicates that Congress considered the situation at stake, such courts mistakenly find a congressional policy preference where none could have been implied. Even this mistaken approach, however, shows that courts look to congressional will to determine whether to recognize a *Bivens* action.

For instance, in *Downie v. Middleburg Heights*,<sup>202</sup> the Sixth Circuit held that the Privacy Act precluded a constitutional damages suit by a Customs Service informant against his handler.<sup>203</sup> The handler had allegedly asked the Customs Service to “blacklist[]” the plaintiff from future work; arranged to have his firearms license revoked and his firearms seized; arranged for a false arrest record to be entered about him; and threatened to stop working with the plaintiff’s boss if the plaintiff were not fired.<sup>204</sup> The Sixth Circuit assumed that because the case involved records created by government agents, the Privacy Act addressed the issues it raised.<sup>205</sup> However, the plaintiff’s claim was not primarily that the defendant collected incorrect information or even created false records—issues the Privacy Act addresses. Rather, the plaintiff claimed that a federal actor requested retaliatory action by the agency (rather than merely

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202. 301 F.3d 688 (6th Cir. 2002).

203. *Id.* at 696. The Privacy Act of 1974 regulates how government agencies collect, keep, use, and disseminate information about individuals. 5 U.S.C. § 552a (2006 & Supp. 2010). With certain exceptions, it requires agencies to announce the kinds of information they collect and the “routine uses” they put it to, maintain accurate records; and allow individuals to access and contest inaccurate records. *See id.* § 552a(a)(3) (defining “maintain” to include “maintain, collect, use, or disseminate”); *id.* § 552a(a)(4) (defining “record” as “item, collection, or grouping of information about an individual that is maintained by an agency”); *see also id.* §§ 552a(b), (d), (e)(4). The Act allows individuals to sue agencies for damages for failure to adhere to its requirements. *Id.* § 552a(g). The Privacy Act makes no provisions for constitutional violations, but as discussed above, after *Chilicky* the alternative statutory remedial scheme no longer needed to provide comparable relief to *Bivens*; in a preemption-like approach, the fact that Congress has considered the issue suffices, even if Congress then decided not to provide remedies for constitutional violation.

204. *Downie*, 301 F.3d at 690-91.

205. *Id.* at 692.

provided an incorrect record); provided false information to law enforcement (rather than failed to properly maintain a record); and threatened third parties with sanctions to achieve his retaliatory goal.<sup>206</sup>

There is no indication that Congress ever considered these kinds of wrongs relevant to the area that the Privacy Act regulates: government agency record maintenance.<sup>207</sup> The Sixth Circuit's reasoning perversely suggests that a federal employee can immunize himself from *Bivens* suits simply by creating records relating to his conduct. The Privacy Act, in short, may be peripherally related to the issues in *Downie*, but it cannot reasonably be read to indicate a congressional preference regarding them. *Downie* amply demonstrates how a peripherally relevant statute—a statute that has something to do with the facts of a case but does not primarily regulate the parties or situations at issue—can be recruited to preclude a *Bivens* remedy by a court that fails to perform the special factors analysis correctly.<sup>208</sup> At the same time, such decisions demonstrate that, even

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206. *Id.* at 696.

207. *See* 5 U.S.C. § 552a(g)(1) (providing grounds for suit against agency); *see also* *Quinn v. Stone*, 978 F.2d 126, 131 (3d Cir. 1992) (discussing the elements of a claim brought under the Privacy Act). In addition, the Privacy Act provides only for suit against the agency, not against the individual agent. *Id.* at 135.

208. *Downie*, 301 F.3d at 696. A similar mistake motivated the decision in *Wilson v. Libby*, which declined to recognize a *Bivens* remedy for Valerie Plame Wilson, the undercover CIA operative whose identity was revealed in a newspaper column by Robert Novak. *Wilson v. Libby*, 535 F.3d 697, 702 (D.C. Cir. 2008). Novak obtained the information from then-Deputy Secretary of State Richard Armitage, and employees in the Offices of the President and Vice President also revealed Ms. Wilson's identity to the press. *Id.* The D.C. Circuit declined to recognize Wilson's claim against those employees, holding that because the Privacy Act, which "regulates the collection, maintenance, use, and dissemination of information about individuals by federal agencies," excluded the Offices of the President or the Vice President from its definition of "agency," the Act itself must preclude Wilson's *Bivens* claim. *Id.* at 704-09 (citation omitted) (internal quotation marks omitted). By its own description, *Wilson* thus concluded that a comprehensive statutory scheme regulating agencies precluded claims not brought under that statute against individuals who were not part of an agency. A more logical approach might conclude that the Privacy Act does not control claims against persons it does not regulate. The *Wilson* court suggested that there was a connection as the plaintiffs' *Bivens* claims all "alleg[ed] damages from the improper disclosure of information covered by the Privacy Act." *Id.* at 707. But the Privacy Act does not purport to regulate *information*; it regulates agencies. The *Wilson* court thus unreasonably inferred a congressional intent from the mere fact that the Privacy Act, like the lawsuit, dealt with information.

In a final example of peripheral-statute preclusion, a federal employee excluded from CSRA protections could not bring a *Bivens* suit because he had recourse to remedies under the Administrative Procedure Act (APA), which the court held was a comprehensive statutory remedial scheme. *Miller v. U.S. Dep't of Agric. Farm Servs. Agency*, 143 F.3d 1413, 1416 (11th Cir. 1998). Rather than holding, like other circuits, that Congress had occupied the field of federal employment, the court asserted that "the existence of a right to judicial review under the APA is, alone, sufficient to preclude a federal employee from bringing a *Bivens* action." *Id.* at 1416. It thereby treated the

when they mistakenly read irrelevant statutes to preclude *Bivens* remedies, courts confronting constitutional damages cases consistently attempt to discern how Congress wants such cases to be addressed.

*B. Mistaking the Executive for the Legislature*

Another kind of outlier may become more prominent as *Bivens* cases emerging from national security projects become more common.<sup>209</sup> The publicized, politicized nature of such cases may blind courts to the doctrinal coherence and rationale of the special factors analysis. Instead of asking whether Congress has indicated a preference for the availability of remedies, such a decision asks about the preferences of the Executive. As this Article has detailed, however, executive preferences do not fit the logic, the rationale, or the doctrinal history of the special factors analysis. As a matter of doctrinal history, I have demonstrated a broad, cross-circuit agreement that special factors analysis looks for implicit legislative preclusion of remedies. The rationale of the special factors analysis focuses on maintaining a balance between the Judiciary and the Legislature, not the Executive. Logically, because the Executive is usually named as a defendant in *Bivens* cases, it makes little sense to hinge a case's justiciability on the defendant's desire to allow the plaintiff a remedy.<sup>210</sup>

*Arar v. Ashcroft*,<sup>211</sup> a prominent example of this mistaken approach, declined to recognize a constitutional damages remedy for a plaintiff secretly detained and then rendered to Syria, where he was tortured for a year.<sup>212</sup> United States

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APA's provisions for review of agency action as though they regulated the federal employment relationship. However, other courts have disagreed that the APA is a sufficient ground. *See* *Munsell v. Dep't of Agric.*, 509 F.3d 572, 590 (D.C. Cir. 2007) ("[W]e are unaware of any Supreme Court decision holding that APA review *alone* is sufficient to eliminate the need for a *Bivens* remedy.").

209. *See, e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Vance v. Rumsfeld*, 653 F.3d 591 (7th Cir. 2011), *reh'g en banc granted, vacated* (Oct. 28, 2011).

210. This is not to say that the Executive is irrelevant to remedy creation. As I point out above, the modern Executive plays an important role in crafting legislation, and the comprehensive remedial schemes that preclude *Bivens* suits often come partly from administrative agencies. Even in these cases, the creation of remedies is, in the end, authorized or delegated by Congress. It may be that Congress can, and maybe even should, delegate the power to create and to preclude statutorily implied causes of action to administrative agencies. *See* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 126-27 (2005). Even if that were the case, the delegation, and thus the decision, would come from Congress. One can also question whether any such congressional delegation would be valid insofar as it allowed the executive to preclude constitutional, rather than only statutory, causes of action. The point for my purposes is that, for special factors analysis, the power to decide lies with Congress.

211. 585 F.3d 559 (2d Cir. 2009).

212. *Id.* at 563-64, 566. *Arar* is a complex case with a complex opinion and several dissents. I outline it here but limit my discussion to the use of special factors to deny the plaintiff's *Bivens*

officials seized Arar, a Canadian-Syrian dual national, while he was changing planes at John F. Kennedy Airport in New York on his way to Canada. Held in New York without access to an attorney for nearly two weeks of interrogation—Arar claimed that federal agents lied to his lawyer to prevent her from finding him—he was subsequently deported to Syria without a hearing, despite his Canadian passport and his assertion that he feared torture in Syria.<sup>213</sup> In an en banc decision, the Second Circuit concluded that special factors precluded Arar’s *Bivens* suit.<sup>214</sup>

The court first decided that the case presented a new “context” for *Bivens*: “extraordinary rendition,” a term referring to “the *extrajudicial* transfer of a person from one [country] to another.”<sup>215</sup> Despite determining that the Immigration and Nationality Act (INA), a comprehensive statutory scheme regulating aliens in the United States, did not address the kind of situation of which Arar complained,<sup>216</sup> the court concluded that special factors barred relief.

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claims. The facts of Arar’s experience have been widely reported. *See, e.g.*, Benjamin Weiser, *Appeals Court Rejects Suit by Canadian Man Over Detention and Torture Claim*, N.Y. TIMES, Nov. 2, 2009, <http://www.nytimes.com/2009/11/03/nyregion/03arar-web.html>; Editorial, *The Unfinished Case of Maher Arar*, N.Y. TIMES, Feb. 18, 2009, at A26, available at <http://www.nytimes.com/2009/02/18/opinion/18wed2.html>.

213. *Arar*, 585 F.3d at 565-66. Under the Convention Against Torture (CAT), to which the United States is a party, “[n]o State Party shall expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture,” regardless of the ground on which such torture would occur. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 3, U.N. Doc. A/RES/39/46 (Dec. 10, 1984); *see also* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (codified at 8 U.S.C. § 1231 (2006 & Supp. 2010)); *see also* 8 U.S.C. § 1231(b)(3)(A) (“[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”). Arar’s complaint further alleged that his fear of torture in Syria was justified. He was incommunicado for a year in an underground cell measuring “six feet by three, and seven feet high.” *Arar*, 585 F.3d at 566. Furthermore, he was beaten with electrical wire and threatened with permanent injury. Complaint and Demand for Jury Trial at 16, *Arar*, 585 F.3d 559 (No. CV-04-0249). Arar also made a claim under the Torture Victim Protection Act, which I do not discuss here. *Arar*, 585 F.3d at 563; *see* 28 U.S.C. § 1350(a)(1) (2006).

214. *Arar*, 585 F.3d at 563.

215. *Id.* at 564 & n.1. The dissenters in *Arar* disputed that the case presents a “new context.” *Id.* at 583 (Sack J., concurring in part and dissenting in part).

216. *Id.* at 571. The court noted that Arar was not attempting to enter the United States, but was merely passing through, and concluded that “it is not clear that the INA’s judicial review provisions govern circumstances of involuntary rendition.” *Id.* It also noted that, given the alleged conduct of the United States employees who detained Arar, such as serving him “with the removal order while he was already en route to Amman, the INA could have afforded him no relief” at the time of the events in question. *Id.* Although *Arar* is clearly not an immigration case—insofar as

The opinion did not clearly distinguish all the special factors it pointed to, naming some and implying several others. Examining the concerns the court raised, however, shows that none of the concerns constituted a special factor under the accepted doctrine. Had the court analyzed its concerns within the parameters of the applicable case law, moreover, it would have found Arar's suit was not barred.<sup>217</sup> *Arar*, in short, mistakenly treated special factors not as a legal term of art, but as an appeal to the political intuitions of judges.<sup>218</sup>

*Arar* is important for two main reasons. First, it may set precedent that would confuse the special factors doctrine and render its rationale incoherent, encouraging other courts to believe that executive desires and judges' own inchoate misgivings suffice to "counsel hesitation"<sup>219</sup> in *Bivens* cases. For this reason, it should be read narrowly. Second, by analyzing concerns that belong to diverse legal doctrines, it may encourage other courts to forego a legally grounded analysis of the issues raised by a *Bivens* suit, stymieing the development of other doctrines by lumping unrelated issues under the special factors label.

The Second Circuit cited the lack of clarity in the law regarding extraordinary rendition as one reason to uphold dismissal.<sup>220</sup> Lack of clarity in

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Arar was not attempting to enter the United States but merely changing planes in it—this description does suggest another interpretation: that the INA *did* provide a remedial scheme for at least the parts of Arar's experience that occurred while in United States custody, but United States employees actively obstructed Arar's recourse to that remedial scheme. It is unclear why the court did not discuss this possibility, which suggests that federal employees who breached statutorily imposed constraints violated Arar's right to due process.

217. For a similar reading of the *Arar* court's mistake, see Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question After Minneci v. Pollard*, 161 U. PA. L. REV. (forthcoming 2012) (manuscript at 10), available at <http://ssrn.com/abstract=2038641> (explaining that the *Arar* court's concerns were "potentially relevant . . . to questions of immunity or privilege or preemption" but were "not relevant to the decision whether to recognize a *Bivens* claim").

218. The *Arar* court affirmed the dismissal of the case on a number of grounds. Specifically, it listed the following reasons as special factors: the law surrounding extraordinary rendition is not clear; classified information would be relevant to adjudicating the claims, and the potential revelation of classified or sensitive information would allow the plaintiff to pressure the government to settle the case irrespective of the merits ("graymail"); because classified and sensitive information would be relevant to adjudicating the claims, the case would likely require closed hearings and sealed evidence; Arar's lawsuit is actually aimed not at individual actors but at the executive policy of extraordinary rendition; the court would have to determine whether Syria offered reliable assurances that Arar would not be tortured there, and whether federal employees acted in good faith on the basis of any such assurances; and the case would force the court to adjudicate issues of national security and foreign policy. *Arar*, 585 F.3d at 573-77. In what follows, I examine each factor to show why it is not a *Bivens* special factor and what doctrine it properly belongs to.

219. *Id.* at 573.

220. *Id.* at 581. The court did concede that this lack of clarity "may or may not amount to a special factor." *Id.* at 580.

the law governing defendants' conduct is, however, amply addressed by qualified immunity, an affirmative defense which provides that a federal agent is only liable for conduct that violates rights that were clearly established at the time of the events at issue.<sup>221</sup> The special factors analysis, in contrast, attends to the availability of remedies for plaintiffs, not the legal regime governing the conduct of defendants. The distinction matters. The qualified immunity inquiry asks whether a defendant's conduct violated clearly established laws, and whether a law is clearly established turns on social and legal expectations that may change over time. Courts assessing that question "promote[] the development of constitutional precedent."<sup>222</sup> The Supreme Court recently reaffirmed the desirability of this developmental process, noting that if courts' qualified immunity inquiry does not serve to specify existing and emerging rights, "[q]ualified immunity . . . may frustrate . . . the promotion of law-abiding behavior" as "[c]ourts fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with legal requirements."<sup>223</sup> Special factors analysis, which focuses on Congress's views about *remedies* rather than on the contours of *rights*, has no such developmental process built in. By mistaking qualified immunity for a special factor, *Arar* thus impeded the development of constitutional precedent that the Supreme Court has said is central to "the promotion of law-abiding behavior."<sup>224</sup>

The *Arar* court also upheld dismissal because the case would inevitably involve classified information.<sup>225</sup> This concern does not relate to Congress's views on the availability of remedies; it is a prudential concern, not one of special factors. It has been addressed by Congress in the Classified Information Procedures Act, which lets courts balance their need for information with the Executive's need to keep certain information secret through techniques like protective orders and discovery privileges.<sup>226</sup> Congress's regulation of classified information illustrates that Congress assumed that judicial proceedings would sometimes use such information, and did not intend to allow the mere presence of classified information to preclude remedies.<sup>227</sup>

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221. See, e.g., *Rasul v. Myers*, 563 F.3d 527, 530 (D.C. Cir. 2009) (dismissing a *Bivens* suit on qualified immunity grounds because "[n]o reasonable government official would have been on notice that plaintiffs had any Fifth Amendment or Eighth Amendment rights" at the time of the events at issue).

222. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

223. *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011).

224. *Id.*

225. *Arar*, 585 F.3d at 576.

226. Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. app. §§ 1-16 (2006 & Supp. 2010)).

227. Strangely, the *Arar* court explicitly recognized that governments, like courts, routinely announce the results of their investigations while keeping classified information secret. As the opinion notes, the Canadian government completed a thorough investigation of *Arar*'s claims and "paid [him] compensation for [his] role in the events surrounding this lawsuit, but has *also* asserted the need for Canada itself to maintain the confidentiality of certain classified materials related to

*Arar* further cited the possibility of “graymail,”<sup>228</sup> or a “lawsuit[] brought to induce the [government] to settle a case . . . out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations,’ or otherwise compromise foreign policy efforts.”<sup>229</sup> This factor merely reiterated the court’s concern with classified information, and the government’s susceptibility to graymail is simply one potential reaction to the possibility that information will be revealed. While the term “graymail” raises the specter of impropriety due to its color-based proximity to *blackmail*, pressure to settle is a normal byproduct of our legal system.<sup>230</sup> The court’s discussion revealed no indication of a congressional preference as to the availability of remedies.

The *Arar* court also grounded its finding of preclusion on the possibility that “[t]he court’s reliance on information that cannot be introduced into the public record” would necessitate closing judicial proceedings to the public.<sup>231</sup> The Supreme Court has held the public’s right to witness judicial proceedings is “implicit in the guarantees of the First Amendment”<sup>232</sup> but has maintained that this right is not absolute. Instead, the Court has laid out, with some specificity, the requirements for closing a court to the public.<sup>233</sup> It is clear, then, that the Supreme Court does not consider the possibility that a case may require closing the court a reason for precluding the case itself,<sup>234</sup> and there is no indication that Congress disagrees.

The ostensible policy-oriented nature of the lawsuit also posed a concern in *Arar*. “Although this action is cast in terms of a claim for money damages against the defendants in their individual capacities,” the court stated, “it operates as a constitutional challenge to policies promulgated by the executive.”<sup>235</sup> But

[his] claims.” *Arar*, 585 F.3d at 576.

228. *Id.* at 578.

229. *Id.* at 578-79 (second alteration in original) (quoting *Tenet v. Doe*, 544 U.S. 1, 11 (2005)).

230. *See, e.g.*, *Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1066 (9th Cir. 1998) (“Exerting pressure on parties is part of the settlement process . . .”).

231. *Arar*, 585 F.3d at 577.

232. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion).

233. *Waller v. Georgia*, 467 U.S. 39, 48 (1984) (citing *Press-Enter. Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 509-12 (1984)). The Second Circuit, which decided *Arar*, has specifically adopted the *Waller* standard. *See Williams v. Artuz*, 237 F.3d 147, 152 (2d Cir. 2001).

234. *See Arar*, 585 F.3d at 609-10 (Sack, J., concurring in part and dissenting in part) (“The presumption of openness . . . can be, and routinely is, overcome. We regularly hear, on the basis of partially or totally sealed records, not only cases implicating national security or diplomatic concerns, but those involving criminal defendants’ cooperation with prosecutors, other criminal matters, . . . probation department reports, upon which federal criminal sentences are to a significant extent typically based, . . . trade secrets, and any manner of other criminal and civil matters. Hardly a week goes by, in our collective experience, in which some document or fact is not considered by a panel of this Court out of the public eye.” (internal citations omitted)).

235. *Id.* at 574 (majority opinion).



neither Congress nor the courts have ever conditioned the availability of remedies for constitutional wrongs on the plaintiff's motivation.<sup>236</sup> Indeed, according to the dissenting justices in *Arar*, a broader policy orientation is typical of civil rights actions,<sup>237</sup> and Congress has never indicated its intent to preclude civil rights remedies on this basis.<sup>238</sup>

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236. A litigant's motivation may sometimes influence how a court deals with a lawsuit. For example, a government prosecutor who pursues criminal charges for improper purposes may be civilly liable to that defendant on a *Bivens* theory of retaliatory prosecution. *See, e.g., Hartman v. Moore*, 547 U.S. 250, 263-66 (2006) (holding that a *Bivens* plaintiff suing for malicious prosecution, based on retaliation against the plaintiff's exercise of First Amendment rights, must show that the prosecutor had no probable cause on which to proceed). Similarly, the common-law torts of malicious prosecution and abuse of process "provided causes of action against private defendants for unjustified harm arising out of the misuse of governmental processes." *Wyatt v. Cole*, 504 U.S. 158, 164 (1992). In contrast, the *Arar* court took the opposite approach and treated a plaintiff's purportedly improper motivation as a bar to the underlying process itself. It is unclear what legal theory supported this approach.

*Arar* also did not explain why it would be wrong for a plaintiff to seek vindication of his rights through a judicial determination that they had been violated, notwithstanding any desire for monetary damages. *See, e.g., Pfander, Resolving the Qualified Immunity Dilemma, supra* note 21, at 1620-26 (proposing that plaintiffs seeking to vindicate rights through judicial determinations that rights have been violated should sue for nominal damages, thus eliminating the need for qualified immunity, which is meant only to alleviate the threat of individual liability by public officials). Pfander notes that the violation of individual rights is, itself, a cognizable injury quite apart from any monetary damages. *Id.* at 1620 ("Today, no one questions the power of the federal courts to declare the rights of the parties in a case of actual controversy.").

237. *Arar*, 585 F.3d at 605 (Sack, J., concurring in part and dissenting in part); *id.* at 634-35 (Calabresi, J., dissenting).

238. Aside from being ungrounded in legislation or case law, precluding a lawsuit because it targets a policy implies that a plaintiff's desire to affect executive policy immunizes the federal employees who carry out that policy from suit. The *Arar* court appeared to view this kind of plaintiff-induced immunity as a form of judicial deference to executive policy. *Id.* at 574-75 (majority opinion). But a court's ability to determine whether a federal employee violated a constitutional right does not depend on an evaluation of the policy the employee was working under. *Id.* at 574. Moreover, such immunity presents a practical problem: It burdens courts with evaluating the motivation of a lawsuit to determine whether it seeks individual remedy or policy change. *See, e.g., id.* at 576. This burden is unmanageable not only because the court has little access to a litigant's inner states, but also because litigants often act on a variety of motivations, some of which they may not even recognize. Empirical studies of people involved in the civil justice system consistently reveal that litigants have multiple, often conflicting, attitudes toward the cases in which they are involved. *See, e.g., CAROL J. GREENHOUSE ET AL., LAW AND COMMUNITY IN THREE AMERICAN TOWNS 1-2* (1994) ("[W]e address the irony that, although courts and law are central to the ways some residents construct their sense of community, these same individuals disparage the courts as having been captured by the 'wrong' people for the 'wrong' kinds of cases."); SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 5-6 (1990).

Executive control over national security and foreign policy also led the *Arar* court to find that *Bivens* actions were precluded.<sup>239</sup> Executive policy control, however, does not indicate how Congress would treat claims by those whose legal rights are violated in the course of carrying out a policy. Using executive policy as a rationalization for precluding *Bivens* actions implies that Congress's delegation of policy powers to the Executive would also delegate an authority to violate constitutional rights. Of course, Congress has no such authority to delegate.<sup>240</sup> Thus, this concern does not belong in a special factors analysis.

Rather, courts' relations to executive policy properly fit the framework of the political question doctrine.<sup>241</sup> Although the political question doctrine does not traditionally include conduct related to national security, courts often bundle national security and foreign affairs into related areas that fall particularly under the Executive's control.<sup>242</sup> The political question doctrine has caused courts to refrain from matters which include: determining the start and end points of military hostilities;<sup>243</sup> recognizing foreign powers and their representatives;<sup>244</sup> ratifying and interpreting treaties;<sup>245</sup> and, adjudicating presidential decisions to engage in hostilities abroad.<sup>246</sup> *Arar*, in contrast, alleged that he was denied due

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239. See *Arar*, 585 F.3d at 575 (“A suit seeking a damages remedy against senior officials who implement an extraordinary rendition policy would enmesh the courts ineluctably in an assessment of the validity and rationale of that policy and its implementation in this particular case, matters that directly affect significant diplomatic and national security concerns.”).

240. The U.S. Constitution itself grants the President some foreign policy powers, but just as Congress has no authority to violate constitutional rights and therefore cannot delegate any such authority, the Constitution provides no authority to violate itself. 16 C.J.S. *Constitutional Law* § 265 (2012) (“[T]he legislature may not delegate to the people the power to enact a law which the legislature itself is forbidden by the [C]onstitution to enact.”).

241. See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 2.6 (5th ed. 2007).

242. See *Haig v. Agee*, 453 U.S. 280, 291-92 (1981).

243. See, e.g., *Commercial Trust Co. of N.J. v. Miller*, 262 U.S. 51, 57 (1923) (holding that Congress alone determines when military hostilities have ended); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29-30 (1827) (holding that Congress delegated authority to the President to determine when hostilities have begun and to call up the militia in response).

244. See, e.g., *United States v. Belmont*, 301 U.S. 324, 330 (1937) (holding that the President had the authority to recognize and pursue diplomatic relations with the Soviet Union).

245. See, e.g., *Terlinden v. Ames*, 184 U.S. 270, 288-90 (1902) (holding that courts cannot decide whether a treaty survives when a signatory country becomes part of another country).

246. See generally *Crockett v. Reagan*, 720 F.2d 1355, 1356 (D.C. Cir. 1983) (per curiam) (In a challenge to the United States' “presence in, and military assistance to, El Salvador,” the “war powers issue presented a nonjusticiable political question.”); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309 (2d Cir. 1973); *DaCosta v. Laird*, 471 F.2d 1146, 1147, 1152 (2d Cir. 1973) (“[J]udicial inquiry with respect to the Vietnam War into the domain of tactical and strategic military decisions [of the President presents a] nonjusticiable political question.”); *Ange v. Bush*, 752 F. Supp. 509, 517-18 (D.D.C. 1990) (addressing the Persian Gulf); see also ANTHONY A. D'AMATO & ROBERT M. O'NEIL, *THE JUDICIARY AND VIETNAM* 51-58 (1972) (collecting cases and discussing the dilemma of political questions in determining whether justiciable).

process while in the United States and that U.S. employees conspired to have him tortured. Actions governed under U.S. law are far removed from the kinds of foreign relations considerations that arise from military action in foreign states.<sup>247</sup> As the Second Circuit, where *Arar* was heard, noted shortly before the *Arar* decision came down, the mere fact that a case implicates foreign policy or national security does not bring the political question doctrine into play.<sup>248</sup> The claims in *Arar* would be justiciable under the political question doctrine. As the Supreme Court recently held, “an appeal of the President presenting free-ranging assertions of foreign policy consequences,” but “unaccompanied by a persuasive legal claim,” cannot in itself suffice to sustain a decision in the Executive’s favor.<sup>249</sup>

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247. See, e.g., Solomon B. Shinerock, *Samantar v. Yousuf: Recent Development in the Laws Governing Civil Torture Claims in U.S. Courts*, 17 BUFF. HUM. RTS. L. REV. 155, 159 (2011) (“The central issue before the Court in *Samantar* was whether an individual sued for conduct undertaken in his official capacity is immune as a ‘foreign state’ within the meaning of the [Foreign Sovereign Immunities] Act [of 1976].”).

248. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 322-23 (2d Cir. 2009), *rev’d on other grounds*, 131 S. Ct. 2527, 2529-30, 2535 (2011). *American Electric* held that the political question doctrine did not bar a nuisance suit based on harms arising from climate change. *Id.* The Supreme Court did not disturb that holding, but reversed the Second Circuit on the substantive issue of preemption by the Environmental Protection Act. *Am. Elec. Power Co.*, 131 S. Ct. at 2540. In *American Electric*, the Second Circuit emphasized that the political question doctrine should not be applied lightly, even in cases that involved important political issues; rather, courts should examine whether settled legal rules could address the actual issues presented in the case. *Am. Elec. Power Co.*, 582 F.3d at 323. The Second Circuit cited approvingly another decision, involving a wrongful death case in which an American was killed by the Palestinian Liberation Organization (PLO). *Id.* at 328-29. The PLO argued that the political question doctrine barred the case “because it raised ‘foreign policy questions and political questions in a volatile context[, i.e., international terrorism,] lacking satisfactory criteria for judicial determination.’” *Id.* at 329 (alteration in original) (quoting *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44, 49 (2d Cir. 1991)). The Second Circuit, however, “looked beyond ‘[t]he fact that the issues before us arise in a politically charged context,’” to determine that the claims themselves were those of “an ordinary tort.” *Id.* (alteration in original) (quoting *Klinghoffer*, 937 F.2d at 49).

249. See *Garcia v. Texas*, 131 S. Ct. 2866, 2868 (2011) (internal quotation marks and citation omitted) (noting the petitioner in *Garcia* was a Mexican national who had not been given access to his consulate, as required under the Vienna Convention on Consular Relations, before being convicted of murder and sentenced to death); see also *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 337 (2006) (addressing Article 36 of the Vienna Convention). The United States, as amicus curiae, asked the Supreme Court to stay the execution pending the passage of congressional legislation implementing the Convention. *Garcia*, 131 S. Ct. at 2867. Acknowledging the United States’ warning “of the grave international consequences that will follow from” allowing the execution to go forward, the Court concluded, “Congress evidently did not find these consequences sufficiently grave to prompt its enactment of implementing legislation” for the Vienna Convention. *Id.* at 2868 (citations omitted). The Court held there was “no authority to stay an execution in light of an

Finally, the *Arar* opinion concluded that *Bivens* remedies were not available because hearing evidence in the case might disturb the “general allocation of authority over foreign relations to the political branches.”<sup>250</sup> *Arar* claimed that he was wrongly removed to a country where he would likely be tortured; federal regulations “authorize the removal of an alien to a foreign country following receipt from that country of sufficiently reliable assurances that the alien will not be tortured.”<sup>251</sup> A district court hearing the case would thus have to “determine whether any such assurances were received from” Syria and “whether the relevant defendants relied upon them in good faith.”<sup>252</sup> According to the *Arar* opinion, such a determination would intrude upon the foreign relations authority of the political branches and therefore posed a special factor.<sup>253</sup> American tradition grants the Executive extra authority over foreign relations and national security, but how federal employees may act in furtherance of executive policies is still subject to the strictures of law created by Congress.<sup>254</sup> The fact that receiving and acting upon foreign assurances can implicate sensitive political areas does not indicate a congressional preference as to how claims *relating to* such assurances should be treated, which is the focus of the special factors inquiry.<sup>255</sup> In fact, this concern properly belongs to the state secrets privilege,

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appeal of the President presenting free-ranging assertions of foreign policy consequences, when those assertions come unaccompanied by a persuasive legal claim.” *Id.* (citation omitted) (internal quotation marks omitted).

250. *Arar v. Ashcroft*, 585 F.3d 559, 578 (2d Cir. 2009).

251. *Id.*; see also Implementation of the Convention Against Torture, 8 C.F.R. § 208.18(c) (2011) (“(1) The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country. (2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention Against Torture.”). Aliens may also be removed absent any assurances, but “[a] government report state[d] that [*Arar*] involve[d] assurances received from other governments in connection with the determination that *Arar*'s removal to Syria would be consistent with Article 3 of the CAT.” *Arar*, 585 F.3d at 577-78.

252. *Arar*, 585 F.3d at 578.

253. The *Arar* opinion does not specify the particular elements of this situation that it considered to be a special factor. Insofar as the court was concerned with the use of sensitive information in itself, that issue resembled the classified information issue discussed above. *See id.* Insofar as the issue was one of foreign relations, it implicated the political question doctrine, also discussed above. *See id.*

254. *Id.* at 575. Moreover, some of *Arar*'s claims, such as the allegation that federal employees denied him access to counsel by lying to his attorney and that federal employees denied him access to a neutral adjudicator to determine his country of destination by serving his Notice to Appear while he was already in transit, did not implicate foreign relations. *Id.* at 563.

255. *Id.* at 577-78.

which implicates the distribution of authority between the Judiciary and the Executive by limiting discovery or, in the extreme case, barring a suit altogether if producing the necessary evidence would pose a grave danger to national security.<sup>256</sup> In *Arar*, the Government did not invoke that privilege.

One can imagine, of course, national security dangers attendant upon producing any assurances the United States received from Syria, and it may be impossible, as well as inappropriate, for a district court to determine if any such assurances were “sufficiently reliable.”<sup>257</sup> It is not clear that either the production or the determination would have been necessary in prosecuting *Arar*’s case. A court could certainly determine *whether* assurances were received without inquiring further into their content, as well as determining *whether* the relevant officials determined that they were “sufficiently reliable,” as required by the regulations,<sup>258</sup> without entering either assurances or official determinations into the record. Similarly, whether federal employees acted in good faith is a fairly standard judicial question about the internal states of individuals subject to U.S. law.<sup>259</sup> Inquiring into good faith does not necessarily require evaluating the objective merit of that faith. Absent the government’s proper invocation of state secrets privilege, then, there is little reason for a court to decide *sua sponte* that it applies, as the *Arar* court effectively did.<sup>260</sup>

None of the concerns cited in *Arar* to preclude constitutional damages fit the existing jurisprudence of special factors. *Arar* thus misunderstood, and muddied, the doctrinal coherence that other courts and cases had achieved. More importantly, *Arar*’s concerns focused on the relationship between the courts and the Executive.<sup>261</sup> As I have detailed, the point of a special factors analysis is to maintain the proper balance of power between the courts and Congress. Misunderstanding that rationale leads to more than just a muddier doctrine: It eliminates the whole reason for special factors analyses to exist at all. Plenty of

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256. See, e.g., *id.* at 605 (Sack, J., concurring in part and dissenting in part); *id.* at 634 (Calabresi, J., concurring in part and dissenting in part). In the Second Circuit, where *Arar* was heard, the state secrets privilege requires the “head of the department with control over the matter in question” to personally assert that “disclosure [of the information in question] would be inimical to national security.” *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991).

257. *Arar*, 585 F.3d at 578.

258. See Implementation of the Convention Against Torture, 8 C.F.R. § 208.18(c) (2011) (instructing that “[i]f the Secretary of State forwards assurances” regarding torture received in foreign countries “to the Attorney General for consideration by the Attorney General . . . , the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien’s removal to that country,” and providing that “[t]he Attorney General’s authority under this paragraph may be exercised by the Deputy Attorney General or by the Commissioner, Immigration and Naturalization Service, but may not be further delegated”).

259. See, e.g., Mark J. Loewenstein, *The Diverging Meaning of Good Faith*, 34 DEL. J. CORP. L. 433, 442-43 (2009).

260. *Arar*, 585 F.3d at 567.

261. See *id.* at 578.

legal doctrines balance the relationship between the Judiciary and the Executive, and those doctrines could have amply addressed *Arar*'s concerns. The special factors analysis, in contrast, is a peculiarity of *Bivens*, designed to overcome the particular separation of powers issue *Bivens* raises.<sup>262</sup> Substituting the Executive's prerogatives for those of Congress will eliminate the justification for doing special factors analysis at all. Rather than allow the *Arar* holding to confuse the doctrine and eliminate the rationale of special factors, other courts should treat the *Arar* decision narrowly, as a statement about the context of extraordinary rendition, rather than about the proper way to perform the special factors analysis.

#### CONCLUSION

The premise of a *Bivens* action is that a constitutional "violation . . . by a federal agent acting under color of his authority gives rise to a cause of action for damages."<sup>263</sup> The point is that the Constitution guarantees certain rights even in the absence of a statutory remedy. To allow this judge-made cause of action, courts must determine that there is, in fact, no statutory remedy that addresses the harms of the plaintiff before them.<sup>264</sup> Courts make this determination through the special factors analysis, which asks whether Congress has afforded any remedy, or has decided to provide no remedy, for the violation of a constitutional right.<sup>265</sup> *Bivens* actions cover those cases for which Congress has neither provided a remedy itself, nor indicated how courts should address a particular kind of harm.<sup>266</sup> *Arar* is the rare outlier, having applied this reasoning backwards and concluding that the *absence* of any indications of congressional preference bars *Bivens* remedies.<sup>267</sup> In fact, it is precisely the absence of any indications of congressional preference that *allows for* remedies for constitutional damages.

As this Article has shown, special factors analyses in *Bivens* cases have developed into an inquiry of legislative will regarding remedies. The inquiry draws on the tools of federal preemption analysis. There are good reasons to eliminate the special factors analysis entirely,<sup>268</sup> but lower courts cannot do this on their own. To avoid the ad hoc (and post hoc) invention of special factors, which is so tempting in the absence of clear judicial definition, courts should

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262. See, e.g., *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 109 (D.D.C. 2011).

263. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 n.4 (1971).

264. *Id.* at 396.

265. See *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988).

266. See *Carlson v. Green*, 446 U.S. 14, 19-20 (1980).

267. *Arar v. Ashcroft*, 585 F.3d 559, 581 (2d Cir. 2009) ("[I]f Congress wishes to create a remedy for individuals like *Arar*, it can enact legislation that includes enumerated eligibility parameters, delineated safe harbors, defined review processes, and specific relief to be afforded. Once Congress has performed this task, *then* the courts in a proper case will be able to review the statute and provide judicial oversight . . .").

268. See Pfander & Baltmanis, *supra* note 4, at 141-48.

adhere to the pattern of the special factors analysis set forth by the Supreme Court, which is usually implemented by most circuit courts and addresses the rationale of having courts determine whether to recognize a *Bivens* remedy in a particular case. This rationale is the proper distribution of authority between the judiciary and the legislature.

The public debate that sometimes goes along with high-profile *Bivens* cases, such as *Arar*, should not blind courts to the legislative focus of the special factors analysis. Public debate may, of course, itself spur Congress to legislate about such situations. Under the special factors analysis, such legislation would render the *Bivens* remedy superfluous. In this sense, figuring out how far *Bivens* goes—and figuring out how to understand how far it goes—may be particularly important now, as the ramifications of executive actions taken in the name of national security increasingly make their way into public consciousness and into the courts.

In a principled, precedent-based special factors analysis, a court uses the tools available for a federal preemption analysis to determine whether Congress has indicated its intent to prohibit a plaintiff's remedy for constitutional damages against individual federal employees. To do so, the court first asks whether a statutory scheme addresses the area at issue, including the kind of harm and the kind of plaintiff involved. If it identifies such a statutory scheme, the court ascertains that the statute does not merely touch on some of the issues or interests in the case: The statute must actually address, not just peripherally relate to, the area at issue in the case. The court also considers whether the statute indicates a congressional presumption that *Bivens* actions *would* be available for constitutional violations not covered in the statutory scheme.

Finally, the court should not mistake the Executive for Congress. As with statutory preemption, whereby administrative agencies can only issue regulations having a preemptive effect if Congress has delegated them the power to do so,<sup>269</sup> in *Bivens* cases, it is the *statutory* scheme that must indicate *Congress's* wish regarding remedies.<sup>270</sup> Without proper delegation, the Executive cannot immunize itself from *Bivens* remedies. Understanding this fundamental aspect of *Bivens* jurisprudence can help courts undertake the special factors analysis in a way that is consistent, in line with mainstream precedent, and faithful to the underlying concern animating the special factors inquiry.

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269. See, e.g., Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 740-41, 760, 768-69 (2008).

270. See *Chilicky*, 487 U.S. at 421-22.