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RESPONSE

CATCH-ALL DOCTRINALISM AND JUDICIAL DESIRE

ANYA BERNSTEIN[†]

In response to Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509 (2013).

INTRODUCTION

Courts confronting *Bivens*¹ claims—damages suits for constitutional violations committed by federal employees—like to note that the remedy is hanging on for dear life. Supreme Court Justices have stated that *Bivens* should be a thing of the past.² Appeals courts, in dicta, have described the threshold for dismissing a *Bivens* claim as “remarkably low.”³ One court has even suggested that *Bivens* remedies, which vindicate constitutional rights when a statutory cause of action is not available, should be allowed

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¹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

² 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 *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring))). Of course, *Bivens* itself was a reaction to the Court’s earlier assumption of common law powers to expand official immunity. See Anya Bernstein, *Congressional Will and the Role of the Executive in Bivens Actions: What Is Special About Special Factors?*, 45 IND. L. REV. 719, 727 (2012) (“As people’s practical ability to sue errant federal actors diminished, the *Bivens* Court reintroduced a remedy that had been universally available when the Constitution was written.”). The Justices who object to *Bivens* have never explained how they distinguish it from other exertions of common law power.

³ E.g., *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009).

only when a statutory cause of action *is* available.⁴ *Bivens* is not dead yet: Fourth Amendment violations that reprise *Bivens* itself,⁵ and Eighth Amendment violations by federally employed officials,⁶ remain solid candidates for relief.⁷ But when cases depart from these prototypical scenarios—and especially when they arise out of national security projects—courts are reluctant to hear them.

In a provocative new article, Professors Carlos Vázquez and Stephen Vladeck suggest that courts dismiss these cases because judges believe that “extending” *Bivens* into any “new context” instantiates disfavored judicial lawmaking.⁸ But, they argue, these judges have it backwards: most often, it is *refusing* to recognize a *Bivens* claim that constitutes judicial lawmaking.⁹ Recognizing one, in contrast, furthers the law Congress has made.¹⁰ Focusing on *Bivens*’s peculiar place in federalism and federal law, Vázquez and Vladeck demonstrate that the logic of

⁴ See *id.* at 581 (stating that once Congress has “enact[ed] legislation that includes enumerated eligibility parameters, delineated safe harbors, defined review processes, and specific relief to be afforded[,] . . . then the courts . . . will be able to . . . provide judicial oversight”).

⁵ *Bivens* involved a warrantless search of a home and an arrest that did not lead to prosecution, 403 U.S. at 389, rendering the exclusionary rule inapplicable.

⁶ *Carlson v. Green* held that constitutional damages suits could be brought directly against federal prison guards. 446 U.S. 14, 23 (1980). In 2012, the Supreme Court declined to recognize a constitutional damage remedy against privately employed prison guards working at a federal prison because, as private employees, the guards were subject to common law liability under California tort law. *Minneci v. Pollard*, 132 S. Ct. 617, 626 (2012).

⁷ See Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 842 (2010) (“[I]f *Bivens* claims survive [sua sponte judicial] screening, their rate of success is somewhere in between the . . . success rates for prisoner civil rights litigation and nonprisoner civil rights litigation.”).

⁸ Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 518 n.34, 524–26 (2013). What constitutes an “extension” into a “new context” therefore becomes a central debate. Compare, e.g., *Arar*, 585 F.3d at 572 (concluding that the “context” of the lawsuit was “extraordinary rendition,” which was a “new context” for a *Bivens* action), with *id.* at 583, 597 (Sack, J., concurring in part and dissenting in part) (arguing that “Arar’s allegations do not present a ‘new context’ for a *Bivens* action,” insofar as they are premised on procedural and substantive due process violations by federal agents). For an argument that courts should explicitly decide whether a suit requires an extension of *Bivens* before deciding whether one is warranted, see Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens After Minneci*, 90 WASH. U. L. REV. (forthcoming 2013) (manuscript at 22–25), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2042175.

⁹ See Vázquez & Vladeck, *supra* note 8, at 527 (asserting that “the displacement of common law remedies against federal officials would be just as much a legislative function as the creation of new federal rights of action,” and noting that “the status quo at the time of *Bivens* recognized the availability of common law remedies against federal officials”).

¹⁰ See *id.* at 530 (“[R]ecognition of a new federal right of action would merely supplement[—rather than displace—]state law.”).

courts' own legal interpretations suggests expanding *Bivens* remedies, yet courts paradoxically choose to narrow them instead.¹¹

Why, and how, does that happen? Courts claim to reject *Bivens* actions out of passive virtue and institutional competence concerns. Vázquez and Vladeck focus on the former. But neither justification fully explains the situation. Examining *how* courts justify their *Bivens* dismissals—through a results-oriented conflation of doctrines—reveals that the outcome drives the reasoning. That outcome is to insulate the Executive from those individuals it harms.

I. JUDICIAL ACTIVISM: CLOSING A DOOR IS ALSO AN ACT

Vázquez and Vladeck's main thrust is that courts misunderstand what constitutes judge-made law in the *Bivens* context. Because there is no statutory right to damages for constitutional violations by federal employees, courts must decide whether to recognize each particular *Bivens* claim.¹² Recent appeals court cases assume that a plaintiff seeking *Bivens* relief has no other avenue of redress, and ask whether the plaintiff is entitled to any remedy *at all*.¹³ In contrast, the Supreme Court has generally asked whether a constitutional remedy should be available *in addition to* those remedies provided under state law.¹⁴ The question a *Bivens* claim raises is thus not whether there ought to be *a* remedy, but whether a *federal* remedy is preferable to existing state remedies.¹⁵

The state law path was complicated in 1988 by the Westfall Act, which made the Federal Tort Claims Act (FTCA) the “exclusive” remedy for torts committed by federal actors, unless the suit was “brought for a violation of the Constitution of the United States.”¹⁶ Courts usually interpret the Westfall Act as foreclosing state lawsuits for constitutional harms by federal

¹¹ *Id.* at 516.

¹² Bernstein, *supra* note 2, at 719; see also James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 121 (2009) (arguing that courts should presume a *Bivens* action is available, which would constitute a “fundamental change in the way courts evaluate the viability of a *Bivens* claim”).

¹³ Vázquez & Vladeck, *supra* note 8, at 519-23.

¹⁴ See *id.* at 542-48 (noting that in *Bivens*, although the majority and dissent disagreed as to whether common law damage remedies were adequate, all nine Justices assumed they were available); see also *id.* at 513 n.16 (citing *Minneci v. Pollard*, 132 S. Ct. 617, 620 (2012), as the latest iteration of this approach).

¹⁵ See *id.* at 512 (noting that, in evaluating a *Bivens* claim, the appropriate inquiry is “*Bivens* or (only) state law,” rather than “*Bivens* or nothing”).

¹⁶ Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (codified as amended at 28 U.S.C. § 2679(b) (2006)).

actors.¹⁷ They view the Westfall Act as preserving *Bivens*, but also making it the sole means of redress for these constitutional violations. This interpretation, Vázquez and Vladeck contend, justifies expanding *Bivens*, not constraining it.¹⁸ Because the Westfall Act clearly preserved plaintiffs' ability to sue for constitutional violations, an exclusively federal regime must be capacious enough to encompass previously available state law remedies.¹⁹ Confining *Bivens* to a narrower scope supplants Congress's decision to preserve federal employee liability with a court's decision to limit it. Moreover, the primary counterweights to *Bivens* claims—official immunity, the state secrets privilege, political question doctrine, and the like—are themselves judge-made law. Courts that constrain *Bivens* must explain why they choose to expand those other judge-made doctrines instead.²⁰

Vázquez and Vladeck accept courts' assertions that the desire to avoid judicial activism leads them to decline *Bivens* claims, but they also ask courts to take their own legal interpretations seriously. The assumption that foreclosing a lawsuit against federal employees is the least dangerous path relies on a very thin notion of judicial activism²¹—one that views opening the courthouse

¹⁷ Vázquez & Vladeck, *supra* note 8, at 566.

¹⁸ *Id.*

¹⁹ The House Report accompanying the Act explained that the Act “would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees.” H.R. REP. NO. 100-700, at 6 (1988), reprinted in 1988 U.S.C.C.A.N. 5945, 5949-50, cited in Vázquez & Vladeck, *supra* note 8, at 514. To “not affect” plaintiffs' ability to sue, the scope of *Bivens* must be at least as broad as the scope of the relief available under *any* law—including state tort law—in effect at the time of the Act's passage in 1988. Vázquez & Vladeck, *supra* note 8, at 578. Vázquez and Vladeck also argue that the usual interpretation of the Westfall Act is wrong. In 1988, plaintiffs could sue federal employees both under *Bivens* and at common law. Thus, Vázquez and Vladeck contend, the Westfall Act preserves not only *Bivens* remedies, but also state common law remedies for constitutional violations. *Id.* at 577-79. The Act preserves individual liability in “a civil action against an employee of the Government[,] . . . which is brought for a violation of the Constitution of the United States.” 28 U.S.C. § 2679(b)(2). Whether this language preserves actions at common law depends on whether one construes a common law action as an action “for” a violation of the federal Constitution, as opposed to “for” a common law tort. Although the House Report supports Vázquez and Vladeck, their interpretation would be easier to accept had Congress phrased the provision to exempt not just suits “for” constitutional violations but also suits arising from *acts* that violate the Constitution. Their more expansive reading would then better reflect the plain language of the statute. The standard, narrower reading, however, is also reasonable. It is at least open to question whether a state law suit would be “for” a constitutional violation absent a state statutory cause of action available to “persons injured by action under color of federal law that violates the Constitution”—a so-called “converse-1983” provision. Vázquez & Vladeck, *supra* note 8, at 537 n.130 (citing Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 U. COLO. L. REV. 159, 160 (1993)).

²⁰ Vázquez & Vladeck, *supra* note 8, at 530.

²¹ The concept of judicial activism is famously broad and malleable. See, e.g., Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*,

door as an action, but closing it as a form of “not-doing.”²² The Supreme Court has warned against expanding *Bivens* liability without congressional support, but Congress has left the door for expansion open. Closing that door, Vázquez and Vladeck point out, is also an act.

I agree that avoiding judge-made law is the primary reason courts give for dismissing *Bivens* cases. And I agree that it makes little sense. But, precisely because it makes so little sense, it can provide only a limited explanation of the courts’ hostility to *Bivens*.

II. INSTITUTIONAL INCOMPETENCE: A FRAMING CHOICE

In addition to citing judicial modesty, courts often point to relative institutional competence to justify rejecting *Bivens* claims. Because the Executive knows more about foreign affairs, military order, and national security than courts do, the judiciary should yield in these arenas.²³ Yet, the relative competence of an institution depends largely on what we need that institution to be competent *at*. Courts may be less competent than the Executive at determining the national security implications of a particular policy. But the question underlying *Bivens* claims is whether someone has violated another’s constitutional rights. Nobody beats the courts at answering that question.²⁴

105 NW. U. L. REV. 1, 10 (2011) (listing thirteen distinct aspects of judicial activism, which have been noted by various scholars).

²² See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 125 (2d ed. 1986) (discussing the “device[] of ‘not-doing,’” which is among the judiciary’s “passive virtues”).

²³ See, e.g., *Vance v. Rumsfeld*, 701 F.3d 193, 200 (7th Cir. 2012) (en banc) (“Judges lack information that executive officials possess . . . Congress and the Commander-in-Chief . . . , rather than civilian judges, ought to make the essential tradeoffs, not only because the constitutional authority to do so rests with the political branches of government but also because that’s where the expertise lies.”).

²⁴ Of course, it is an overstatement to say that courts are the only, or even the best, arbiters of legality. Popular constitutionalism holds that more decentralized views should, and in practice do, have comparable effects. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 227 (2004) (“Americans in the past always came to the same conclusion: that it was their right, and their responsibility, as republican citizens to say finally what the Constitution means.”); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1030 (2004) (“[N]o one would accept any version of judicial supremacy that would prevent citizens from acting to alter the meaning of the Constitution”). Scholars have also noted that administrative agencies now interpret law as much as, if not more than, courts do. See, e.g., Jerry L. Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 U. TORONTO L.J. 497, 499 (2005) (“[I]n [our] legal world[,] agencies are of necessity the primary official interpreters of federal statutes and . . . that

Nevertheless, when asked to determine constitutionality, courts often rephrase the question as one of competence in some other domain, such as national security or foreign affairs.²⁵ Courts' reluctance to justify this reframing—or even to acknowledge that it occurs—suggests that they use the language of competence—and of incompetence—toward a particular end.²⁶ After all, competence is not inherent to either a person or an institution. It emerges, or atrophies, through practices over time. The Westfall Act's preservation of constitutional damages actions against federal employees attributes to courts the institutional competence to hear such claims. If courts disagree with that assessment, it might have less to do with incompetence than with their unwillingness to bear the responsibility that the Act, and the Constitution, implies.

Circuit courts also appeal to another theory of institutional competence when rejecting *Bivens* claims. They note that the Supreme Court has not expanded *Bivens* liability in decades, and that individual Justices have expressed hostility toward *Bivens* claims.²⁷ However, the Supreme Court has also declined many opportunities to eliminate *Bivens* liability. Perhaps some Justices are wary of creating a constitutional regime that lacks any way to effectuate its ostensible guarantee of individual rights.²⁸ In any event, the American case law system depends on the articulation of legal reasoning in judicial opinions, not on winks and nods. For all the Supreme Court's institutional superiority, its reticence hardly presents a convincing legal reason.

Institutional incompetence, though often cited by the courts, provides an unsatisfying explanation of courts' propensity to dismiss *Bivens*

role has been judicially legitimated as presumptively controlling"). Even so, it is at least roughly accurate to say that courts have competence to determine constitutionality.

²⁵ For example, in *Arar v. Ashcroft*, the plaintiff alleged that United States employees had conspired to effectuate his torture by the Syrian government. 585 F.3d 559, 566 (2d Cir. 2009). The Second Circuit refused to recognize a *Bivens* claim, in part because it would interfere with the executive policy of extraordinary rendition, which implicates national security and foreign policy concerns. *Id.* at 574-75. But the fact that certain acts were taken in the context of a particular policy cannot determine, legally speaking, whether those acts violated the Constitution. The *Arar* court thus reframed a question of constitutionality as a question of national security and foreign policy.

²⁶ Of course, there are doctrines that specifically allow for balancing relative institutional competence; I address these in the following section.

²⁷ See, e.g., *Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir. 2012) (explaining that "the Supreme Court has monitored the limits of judicial competence to design implied remedies" and has "itself consistently refused to extend *Bivens* liability to any new context or new category of defendants" (internal quotation marks omitted)); *Vance*, 701 F.3d at 198 (noting that, after recognizing *Bivens* remedies in three specific contexts, the Supreme Court "has not created another during the last 32 years").

²⁸ They may be right to be wary. Limited government and the vigorous protection of individual rights are central pillars of the United States' self-presentation, both domestically and internationally.

claims. Perhaps focusing instead on *how* courts avoid *Bivens* claims will help get at *why* they do so.

III. CATCH-ALL DOCTRINALISM: ANALOGICAL REASONING FROM RESULTS

As Vázquez and Vladeck point out, some recent opinions that purport to dismiss *Bivens* claims on the ground that a cause of action ought not be available in fact hang their analysis on other doctrines: immunity, privilege, preemption,²⁹ state secrets, and political question, among others. I will refer to this as *catch-all doctrinalism*.

Here is how catch-all doctrinalism works: Courts determine whether a constitutional damages claim may be adjudicated on the merits by asking whether Congress wished to preclude it and whether the plaintiff has recourse elsewhere. If the claim is precluded or the remedy is redundant, the case cannot go forward. There are also other situations in which a case cannot go forward: defendants who have immunity cannot be sued; the state secrets privilege may bar lawsuits whose revelations would adversely affect national security; courts may refuse to review certain acts under the political question doctrine. Catch-all doctrinalism employs concepts such as immunity, state secrets, and the political question doctrine to answer unrelated questions about concepts such as causes of action.³⁰ The doctrines appear connected because they may all lead to the same result: precluding the lawsuit. But they are not connected in the way catch-all doctrinalism suggests, because law's analogical reasoning proceeds from facts and legal issues, not results.

Vázquez and Vladeck recognize that catch-all doctrinalism can be outcome-determinative. Had the courts denying *Bivens* claims considered the proper doctrines, they "could not have ruled for the defendants merely because of a disinclination to engage in judicial lawmaking," but would have had to engage in more wide-ranging interest balancing.³¹ There is more at stake as well. Courts are supposed to reach results by considering facts and legal issues. Catch-all doctrinalism does the opposite, interpreting facts and legal issues through the lens of results, and grounding outcomes not on legal analysis but on judges' intuitions about whether recovery should be precluded. Rather than treating like cases alike, catch-all doctrinalism

²⁹ Vázquez & Vladeck, *supra* note 8, at 523-24.

³⁰ Elsewhere, I illustrate how catch-all doctrinalism operates by discussing each irrelevant doctrine cited in *Arar v. Ashcroft*, 585 F.3d 559, one of the cases Vázquez and Vladeck address. See Bernstein, *supra* note 2, at 754-64.

³¹ Vázquez & Vladeck, *supra* note 8, at 529-30.

treats as dispositive cases that address altogether different questions. Substituting one question for another is more than mere sloppiness. It violates a basic principle of the rule of law.

Catch-all doctrinalism harms not only the doctrine that it should use, but also those doctrines that it uses instead. When a court finds a *Bivens* action inappropriate because the governing law is unclear,³² it fails in its duty to clarify the law and further develop the qualified immunity doctrine.³³ When a court refuses to hear a case because secret information may be implicated, it fails to enforce laws specifically designed to balance the Executive's need for secrecy with the adversarial system's need for disclosure.³⁴

One might defend this approach on efficiency grounds. If all doctrines lead to the same result, why not get to it as quickly as possible? But a look at how catch-all doctrinalism actually works refutes this defense. Courts generally do not perform the doctrinal analysis necessary to determine whether qualified immunity, the state secrets privilege, political question doctrine, or other doctrines will eventually preclude a *Bivens* action. Rather, they invoke the specter of these doctrines—or the specter of the harms these doctrines are intended to prevent—to provide an atmospheric analysis in which the actual doctrine plays little part.³⁵

Catch-all doctrinalism resembles psychology's "substitution principle," in which a mind confronting a difficult question answers an easier one instead.³⁶ This principle suggests that judicial laziness—the desire for a simple analysis—might account for courts' reliance on catch-all doctrinalism. Yet, the question substituted in *Bivens* cases is not always easier to answer

³² See, e.g., *Arar*, 585 F.3d at 580 (declining to recognize a *Bivens* claim in part because the situation presents a "complex and rapidly changing legal framework beset with critical legal judgments that have not yet been made").

³³ See *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011) ("[I]f [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[,] . . . [q]ualified immunity . . . may frustrate the development of constitutional precedent and the promotion of law-abiding behavior." (citations and internal quotation marks omitted)).

³⁴ See, e.g., Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1-16 (2006 & Supp. 2010) (laying out procedures by which to prevent disclosure of classified information in criminal proceedings); *Arar*, 585 F.3d at 605 (Sack, J., concurring in part and dissenting in part) (discussing the purpose of the state secrets privilege and when that privilege may be invoked); see also 26 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5661, at 416 (1992 & Supp. 2012) (noting that Congress considered and rejected a rule specifically limiting the use of classified information in civil proceedings).

³⁵ See Bernstein, *supra* note 2, at 754-64 (explaining how *Arar* exemplifies this type of analysis).

³⁶ See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 97 (2011) (explaining that "[i]f a satisfactory answer to a hard question is not found quickly, [individuals] will find a related question that is easier and will answer it [instead]," without realizing that they are not, in fact, answering the original question).

than the question originally posed. A court analyzing qualified immunity, for example, should not find it difficult to determine whether clearly established law prohibits federal employees from torturing American citizens,³⁷ or detaining individuals in the United States incommunicado to prevent access to counsel.³⁸

Looking past the doctrinal muddle reveals that recent opinions rejecting *Bivens* claims focus predominantly on prudential, rather than legal, considerations. They stress that the Executive is busy doing a difficult job, and that individual lawsuits disrupt the efficient performance of that job;³⁹ that national security is of paramount importance;⁴⁰ and that individual complaints have no business affecting policy.⁴¹ This reasoning suggests that it is neither doctrinal efficiency nor simplicity that motivates catch-all doctrinalism. Catch-all doctrinalism is driven by the desirability of the outcome.

CONCLUSION

Professors Vázquez and Vladeck make an important contribution to our understanding of *Bivens* in both its federal and its federalist contexts. They challenge courts to follow through on their own statutory interpretations and claimed goals. If the authors' aim is to make courts less averse to *Bivens* claims,⁴² then I applaud their elucidation of the law and their exhortation to take its implications seriously.

³⁷ See, e.g., *Vance v. Rumsfeld*, 701 F.3d 193, 196 (7th Cir. 2012) (en banc) (noting that the Army Field Manual classifies much of the treatment to which military officers subjected plaintiffs "as 'physical torture,' 'mental torture' or 'coercion'" (citation omitted)).

³⁸ See, e.g., *Arar*, 585 F.3d at 566 (noting that the complaint alleged that plaintiff's "attorney was given false information about [plaintiff's] whereabouts" by defendants).

³⁹ See, e.g., *Lebron v. Rumsfeld*, 670 F.3d 540, 553 (4th Cir. 2012) (noting that, on a practical level, plaintiff's claim "risks interference with military and intelligence operations on a wide scale"); *Vance*, 701 F.3d at 199 (observing that "military efficiency depends on a particular command structure, which civilian judges could mess up without appreciating what they were doing" (citation omitted)); *Arar*, 585 F.3d at 574 (determining that plaintiff's suit would "unavoidably . . . invade[] government interests, enmesh[] government lawyers, and thereby elicit[] government funds for settlement").

⁴⁰ See, e.g., *Arar*, 585 F.3d at 575 (explaining courts' traditional reluctance to intrude upon executive authority with regard to national security matters absent express authorization from Congress).

⁴¹ See, e.g., *Lebron*, 670 F.3d at 551 ("[Plaintiff's] complaint seeks quite candidly to have the judiciary review and disapprove sensitive military decisions made after extensive deliberations within the executive branch . . .").

⁴² See James E. Pfander & David P. Baltmanis, Response, *W(h)ither Bivens?*, 161 U. PA. L. REV. ONLINE 231, 248 (2013), <http://www.pennlawreview.com/responses/4-2013/PfanderBaltmanis.pdf> (agreeing with Vázquez and Vladeck's goal of restoring a "presumptive recognition of the right to pursue a *Bivens* action," despite disputing their statutory interpretation).

At the same time, I am not convinced, as a matter of analysis, that elucidating the *law* addresses what courts are actually doing when they reject *Bivens* claims. It is difficult to understand these opinions' doctrinal conflations as simple misreadings of law. They make more sense as expressions of a policy desire—conscious or not—to protect the Executive from the individuals it harms.⁴³

This motivation may be rooted in a number of convictions: the belief that lawsuits excessively disrupt executive efficiency, and that such efficiency should override individual rights; the belief that national security requires an Executive free to act as it thinks it needs to, even if its acts violate individual rights;⁴⁴ the belief that elections provide all the influence an individual ought to have over executive policy choices. But it is impossible to make sense of recent *Bivens* jurisprudence without, in some way, assuming the goal of executive insulation. Evaluating the relevant prudential concerns—and their relation to institutional realities—may tell us more about *Bivens* than the Westfall Act can.

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⁴³ This is not necessarily the same as shielding the Executive against *all* intrusions. For instance, one study found that, in noncriminal detention cases arising out of national security projects, federal courts loath to provide “individualized . . . remedies” nonetheless tend to “grant injunctive relief that disrupts and reorders the structure of entire government programs.” Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 236.

⁴⁴ For instance, judges likely share the widely held tendency to accept violations of individual rights when the salience of terrorism and ethnonational belonging are heightened. See Aziz Z. Huq, *Political Psychology of Counterterrorism*, 9 ANN. REV. L. & SOC. SCI. (forthcoming Dec. 2013) (manuscript at 16) (on file with author) (canvassing psychological literature to conclude that perceptions of “security threats” tend to elicit “responses in favor of restrictions on liberty”).