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CURBING REMEDIES FOR OFFICIAL WRONGS: THE NEED FOR *BIVENS* SUITS IN NATIONAL SECURITY CASES

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INTRODUCTION

The Japanese-American internment litigation[1] demonstrated the difficulty of holding the government accountable for overreaching in national security cases. While some have argued that post-9/11 decisions break with that trend,[2] the Supreme Court has severely limited suits

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1. Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944); *see also* ERIC L. MULLER, AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II 116–21 (2007) (discussing government stereotypes in wartime determinations of Japanese-Americans' loyalty); PETER IRONS, JUSTICE AT WAR (1983) (discussing the course of litigation and strategies of key lawyers in cases).

2. *See generally* Andrew Kent, *Are Damages Different?:* Bivens *and National Security*, 87 S. CAL. L. REV. 1123 (2014).

for damages against senior officials.[3] In *Ziglar v. Abbasi*,[4] the Supreme Court erected virtually impassable barriers to such actions, in a case brought by post-9/11 immigration detainees whom senior officials had shifted to a high-security facility in the absence of any proof of terrorist ties.[5] As a result, the detainees had allegedly been subjected to unduly long periods of detention and serious physical abuse.[6] This Article argues that the Court's parsimonious approach to damage suits against senior officials will hinder habits of deliberation that the Framers prized and impede learning the lessons of the internment.

The constitutional tort remedies that the Supreme Court hobbled in *Abbasi* stem from a Warren Court precedent, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[7] in which the Court held that the Constitution itself directly implied the existence of a cause of action for damages against federal officials.[8] *Bivens* was the contemporary manifestation of two lines of precedent that pre-dated the Constitution's enactment. English cases well-known to the Framers allowed suits for damages against officials by individuals harmed by abusive government searches.[9] During the Founding Era, individuals obtained monetary compensation against officials in prize cases.[10] In addition, the Framers drafted Article III of the Constitution specifically to

3. *See generally* Carlos M. Vazquez & Steven I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509 (2013) (broadly criticizing development of limits on *Bivens* suits); Jonathan Hafetz, *Reconceptualizing Federal Courts in the War on Terror*, 56 ST. LOUIS L.J. 1055, 1075–86 (2012) (criticizing curbs on monetary remedies in national security cases); Peter Margulies, *Judging Myopia in Hindsight:* Bivens *Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195 (2010) (critiquing judicial limits on *Bivens* remedies in national security cases and suggesting alternative approaches). *But see* Kent, *supra* note 2, at 1147–54 (arguing that sound doctrinal and pragmatic reasons explain evolution of limits on *Bivens* litigation).

4. 137 S. Ct. 1843 (2017).

5. The Supreme Court first limited detainees' relief in *Ashcroft v. Iqbal*. 556 U.S. 662, 665 (2009) (holding that allegations of discriminatory intent in initial investigation of detainees were implausible and that senior officials did not have supervisory liability for abuses); *see also* JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 42–44 (2017) (critiquing *Iqbal*'s premises and analysis); Shirin Sinnar, *The Lost Story of* Iqbal, 105 GEO. L.J. 379 (2017) (discussing the human story behind the case).

6. *Abbasi*, 137 S. Ct. at 1852–53.

7. 403 U.S. 388 (1971).

8. *Id.* at 395–97.

9. *See* PFANDER, *supra* note 5, at 6–14.

10. *Id.*

provide the newly created federal courts with jurisdiction over suits for damages and other relief brought *by* foreign nationals.[11] Admittedly, the Framers viewed federal jurisdiction over such actions as a corrective measure for the biases of *state courts*.[12] Nevertheless, the concerns of the Framers—particularly Alexander Hamilton—support a broader reading: remedies are apt *whenever* precipitous action by government officials stokes the "spirit of injustice" at the state *or* federal level.[13]

Writing for the Court in *Abbasi*, Justice Kennedy failed to acknowledge either precedential strand. Justice Kennedy's opinion limited *Bivens* claims to three areas carved out in the decade after *Bivens*: searches by federal agents in criminal investigations, prison conditions, and employment discrimination in violation of the Equal Protection Clause.[14] In "new" contexts that moved beyond these confines, Justice Kennedy opined that the "factors counselling hesitation" alluded to by the *Bivens* Court precluded access to remedies for constitutional torts.[15] According to Justice Kennedy, suits for damages could unduly chill officials' sense of initiative[16] and usurp a function that Kennedy asserted belonged to Congress: balancing the deterrence of constitutional violations against the preservation of officials' discretion in coping with evolving national security threats.[17]

To shift to an anti-remedy default stance, Justice Kennedy had to ignore the Founding Era pedigree of suits for damages against public officials and the constitutional role of suits by foreign nationals. Justice Kennedy's opinion also failed to acknowledge Hamilton's praise of judicial review as a check against the haste, myopia, and prejudice of the political branches—praise that also applies to *Bivens* actions. This Article seeks to recover that understanding to counter the deference the Court displayed in *Abbasi*.

The Article is divided into three parts. Part I discusses the history of suits for damages against U.S. officials as well as the constitutional importance of federal jurisdiction over actions by foreign nationals. This history, supported by Hamilton's vision of judicial review, installed a pro-remedy presumption regarding actions for monetary relief against

11. U.S. CONST. art. III, § 2.

12. THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

13. *Id.* (discussing the rationale for judicial review).

14. Ziglar v. Abbasi, 137 S. Ct. 1843, 1854–55 (2017).

15. *Id.* at 1857 (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971)).

16. *Id.* at 1868.

17. *Id.* at 1862 (cautioning against judicial crafting of remedy such as suit for damages absent "affirmative action by Congress").

public officials. Part II outlines the *Abbasi* Court's rationale for shifting from a pro-remedy presumption to an anti-remedy default that brought a "full stop" to *Bivens* actions development. Part III critiques the *Abbasi* Court's pivot as unduly discounting history and Hamilton's vision.

I. HISTORY AND FOUNDING ERA

Suits for damages against public officials are not a new development in American law.[18] Their pedigree stretches back to England in the era before the Revolutionary War. From that beginning, the history of suits for damages or other monetary compensation against officials extends to state and federal systems from the Founding Era to the Civil War and beyond. That history overlaps within an equally prominent commitment at the time of the Constitution's enactment to conferring jurisdiction on the federal courts to hear suits for damages and other relief brought by aggrieved foreign nationals.[19]

In England, courts before the Revolution had clearly established the right of individuals to sue officials for unreasonable searches and seizures.[20] In groundbreaking English cases, courts awarded damages for abuses committed by officials engaged in searches and seizures, including searches authorized by uncabined general warrants that allowed officials to search homes for evidence of political opposition to the government. The Framers were aware of these prominent English cases, which formed part of the backdrop for enactment of the Fourth Amendment.[21] The latter provision's protection of "the people" against "unreasonable searches and seizures"[22] borrowed in part from the English cases upholding suits for damages against errant or abusive government officials. Indeed, a key reason for seeking a specific warrant to search a home or other property for evidence of crime was the utility of such a warrant as a *defense* against a subsequent suit for damages brought by the owner of the property.[23]

18. *See* PFANDER, *supra* note 5, at 6–14.

19. Anthony J. Bellia, Jr. & Bradford R. Clark, *Two Myths About the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1609, 1623–24 (2014).

20. *See* Boyd v. United States, 116 U.S. 616, 626 (1886); Sina Kian, *The Path of Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 145–46 (2012).

21. William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 402–03 (1995).

22. U.S. CONST. amend IV.

23. Stuntz, *supra* note 21, at 410.

Payment of monetary compensation was also well-known during the U.S. Founding Era. In prize cases, for example, courts regularly required that captains who had wrongfully seized vessels provide compensation to the vessel's rightful owner. This practice occurred in two celebrated cases. In *Little v. Barreme*,[24] Chief Justice John Marshall, in his opinion for the Court, overcame his initial hesitation in requiring that a U.S. navy captain pay compensation to the owner of a ship seized in violation of a federal statute.[25] In *Murray v. The Schooner Charming Betsy*,[26] the Court ordered a U.S. navy commander to pay for seizing a vessel owned by a foreign national not subject to provisions of U.S. neutrality law that limited trade with France.[27]

During this time, officials under an obligation to provide such compensation regularly received indemnification from Congress.[28] Indemnification, which often occurs today along with funding for legal representation, held the official harmless for any adverse award. Officials' knowledge that indemnification would be forthcoming mitigated any chilling effect wrought by the prospect of liability on officials' discharge of public duties. Congress typically opted for this regime of judicial redress and subsequent indemnification as a superior alternative to immunity from suit, which Congress doled out sparingly.[29]

Other early cases tell the same tale. For example, in one case a court authorized the award of monetary damages against a collector of an illegal fine who had entered the defendant's home and seized property to pay a fine.[30] State courts regularly considered suits for damages against both state and federal officials.[31] Through the Civil War, individuals sued officials alleging torts both constitutional and common-law

24. 6 U.S. 170 (1804).

25. *Id.* at 179; *cf.* PFANDER, *supra* note 5, at 6–9 (discussing Marshall's opinion).

26. 6 U.S. 64 (1804).

27. *Id.* at 125.

28. PFANDER, *supra* note 5, at 9–11.

29. *Id.* at 11; Vazquez & Vladeck, *supra* note 3, at 531–42.

30. Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806).

31. Vasquez & Vladeck, *supra* note 3, at 570–71.

in nature.[32] Congress enacted legislation intended to provide officials with protection from liability.[33]

In sum, in English courts and U.S. courts from the Founding Era through the aftermath of the Civil War, the courts' default position favored the availability of suits for damages against public officials. Specific legislation from Congress could either immunize or indemnify those officials. However, *absent* such express congressional action, courts would routinely entertain lawsuits against official defendants.[34]

32. These suits usually sought redress for detention associated with that conflict. Plaintiffs typically alleged that the detentions were unlawful and a violation of the Suspension Clause, which courts have read to guarantee access to habeas corpus to persons within the United States not charged with a crime, who are also not belligerents in the armed conflict prompting the detention. *See* Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1560–62 (2007); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 651–55 (2009); *see also Ex parte* Quirin, 317 U.S. 1, 31–33 (1942) (discussing Civil War precedent); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (discussing detention of presumptive U.S. citizen and alleged Al Qaeda fighter after 9/11).

33. Starting over eighty years after the end of the Civil War, Congress also played a role in providing compensation to the victims of the Japanese-American internment. The Supreme Court never formally adjudicated the constitutional merits of the detention of Japanese-Americans pursuant to the internment program. *See* Korematsu v. United States, 323 U.S. 214 (1944). Rather, the Court merely upheld the conviction of Fred Korematsu for declining to obey the military evacuation order that applied to Japanese-Americans on the West Coast. *Id.* at 224. Congress had made failure to comply with such orders a federal offense. Almost forty years after the Court's *Korematsu* decision, a federal district court granted Korematsu's writ of *coram nobis* seeking to vacate his conviction on grounds that the government's evacuation order and legal defense of the order were riddled with misrepresentations and material omissions. *See* Korematsu v. United States, 584 F. Supp. 1406, 1419–20 (N.D. Cal. 1984); *see also* Hirabayashi v. United States, 828 F.2d 591, 597–604 (9th Cir. 1987) (summarizing the district court's findings); Hohri v. United States, 782 F.2d 227, 232–36, 246–53 (D.C. Cir. 1986) (detailing facts of government deception at time of internment while holding that concealment of government misrepresentations warranted tolling of statute of limitations for claims for damages); *vacated on jurisdictional grounds*, 482 U.S. 64 (1987). Around this time, Congress, which had enacted a measure shortly after World War II, provided modest compensation to internees as well as an acknowledgment of official wrongdoing. *See* Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1321 (2003).

34. It is true that over time courts adjudicating suits for damages against officials began to distinguish between conduct based on delegated discretion and unauthorized acts. *See* Kian, *supra* note 20, at 154. However, this distinction never fully addressed the departure it entailed from prior doctrine and practice. *Id.*

Justice Kennedy's concern in *Abbasi* with the novel nature of certain suits for damages by foreign nationals should not obscure the fact that Framers viewed openness to those lawsuits as a key rationale for the Constitution's enactment. While the Articles of Confederation were in force, private violence was common against foreign nationals, particularly British subjects.[35] United States citizens who were indignant about British ownership of property in the post-Revolution republic often resorted to self-help, taking property when it suited them. Under the international law of the period, the failure to redress such wrongs constituted just cause for war waged by the country whose citizens were deprived of remedies. In drafting the Constitution, the Framers authorized Congress to "define and punish . . . Offences against the Law of Nations."[36] Pursuant to the Define and Punish Clause, Congress passed legislation, including the Alien Tort Statute ("ATS"), which gave a remedy to foreign nationals injured by torts committed in violation of international law.[37] In addition, in Article III of the Constitution, the Framers expressly conferred on the federal courts jurisdiction to hear claims involving "foreign . . . Citizens."[38] This sustained attention was no accident.

In *Federalist No. 80*, Hamilton squarely linked the need for federal courts with their role in upholding fairness for foreign nationals in the United States.[39] Hamilton acknowledged that the United States' "denial or perversion of justice" in a matter concerning a foreign national would rank highly among the "just causes of war."[40] To avoid this risk to the new republic, Hamilton championed Article III's provision of a neutral, independent tribunal for adjudication of such disputes.[41] Notably, Hamilton viewed the role of the federal courts as "essential to the

35. *See* Bellia & Clark, *supra* note 19, at 1623–24.

36. U.S. CONST. art I, § 8, cl. 10.

37. 28 U.S.C. § 1350 (2012).

38. U.S. CONST. art. III, § 2.

39. *See* THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

40. *See id.* Views articulated in the Federalist Papers are instructive, although caution is appropriate in extrapolating from essays by Hamilton, Madison, and Jay to the intentions of the Framers as a group. *See* David McGowan, *Ethos in Law and History: Alexander Hamilton,* The Federalist*, and the Supreme Court*, 85 MINN. L. REV. 755, 755–59 (2001).

41. Federalist No. 78 famously articulates Hamilton's vision of an independent federal judiciary protected by life tenure under Article III. *See* The FEDERALIST NO. 78, *supra* note 12, at 465 (describing an independent judiciary as an "excellent barrier" to the risk of oppression by the political branches).

preservation of the public faith"[42] in the rule of law, not merely as an expedient to avoid foreign entanglements. As we shall see, Hamilton's view here suggests that federal courts adjudicating matters involving foreign nationals would have the same salutary effect that such neutral tribunals would have elsewhere on instilling sound habits of deliberation in public officials.[43]

Legal *defenses* in tort asserted by foreign nationals also played a vital role in the development of U.S. constitutionalism, including the institution of judicial review. A vital case under the Articles of Confederation, *Rutgers v. Waddington*,[44] pitted the brilliant young Alexander Hamilton against the plain reading of a New York statute allowing U.S. citizens to sue British citizens who had obtained title to U.S. nationals' land during the Revolution. Often this change of title occurred as British troops assumed control over land during the Revolution's military campaigns. British forces then conveyed the land to British subjects to ensure the loyalty of property owners. The treaty with Britain ending the conflict provided protection for British nationals who had taken title based on military orders.

Hamilton argued that both the treaty and customary international law provided the British owners with a defense against trespass actions lodged by the former U.S. owners who had fled during the fighting.[45] According to Hamilton, the New York court hearing the trespass action had to construe the state statute in light of international law, providing the British nationals with a defense despite the clear wording of the New York statute.[46]

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42. THE FEDERALIST NO. 80, *supra* note 39, at 476.

43. *See* THE FEDERALIST NO. 78, *supra* note 12, at 470–71 (Alexander Hamilton) (arguing that prudent public officials who wished to avoid rebuffs in the courts would "qualify their attempts" at overreaching; the "moderation" yielded by this tempering "influence upon the character of our governments" would enhance long-term thinking and thus aid constitutionalism).

44. Rutgers v. Waddington (N.Y. Mayor's Ct. 1784), *reprinted in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 393–419 (Julius Goebel, Jr. ed., 1964); *see also* Daniel M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 963–66 (2010) (analyzing *Rutgers*); Peter Margulies, *Defining, Punishing, and Membership in the Community of Nations: Material Support and Conspiracy Charges in Military Commissions*, 36 FORDHAM INT'L L.J. 1, 17–19 (2013) (same).

45. Margulies, *supra* note 44, at 18.

46. *See id.*

Scholars have rightly recognized *Rutgers* as a landmark in the development of U.S. theories of judicial review.[47] Hamilton nodded to its reasoning in Federalist No. 78, in which he argued that judicial discretion included the venerable craft of endeavoring that two provisions in tension be "by any fair construction . . . reconciled to each other."[48] Where this was impossible, Hamilton explained, a court would have to prioritize one provision over the other.[49] In *Rutgers*, Hamilton persuaded the New York court to stretch construction of the New York statute in order to avoid a clash with international law.[50] This move set the stage for Chief Justice Marshall's articulation in *Marbury v. Madison* of the rationale for judicial review.[51] It also was a template for Marshall's formulation in the *Charming Betsy* case of the canon that the courts should construe federal statutes to avoid conflict with international law.[52] This vital conceptual work all flowed from *Rutgers*, a suit involving a tort defense asserted by a *foreign national*. In sum, suits and defenses by foreign nationals played a prominent role in building U.S. constitutionalism.[53]

47. *See* Golove & Hulsebosch, *supra* note 44, at 963.

48. THE FEDERALIST NO. 78, *supra* note 12, at 468.

49. *Id.*

50. *See* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 487 n.41 (1998).

51. *See id.*

52. *Id.* at 487.

53. The passage of the Alien Act during the presidency of John Adams does not undercut this early record of due regard for the rights and interests of foreign nationals. The Alien Act gave the President authority to deport any foreign national whom the President deemed to be "dangerous to the peace and safety of the United States." STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 591 (1993). However, President John Adams did not invoke the Alien Act, which expired in June of 1800. *Id.* at 591–92. Moreover, political figures closely involved in the Constitution's enactment, including both Madison and Hamilton, were wary of the Act. Hamilton, himself an immigrant from the West Indies, found the statute "deficient in precautions against abuse." *From Alexander Hamilton to Theodore Sedgwick, 2 February 1799*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-22-02-0267 [https://perma.cc/AQT8-KUBC] (last visited Feb. 22, 2018); *see* H. Jefferson Powell, *The Principles of '98: A Essay in Historical Retrieval*, 80 VA. L. REV. 689, 704 n.52 (1994). Madison, for his part, viewed both statutes as a signal of the Federalists' arrogance and predilection for abuse of power. *See, e.g.*, ELKINS & MCKITRICK, *supra*, at 700–05. Those excesses helped usher in the victory of the Jeffersonian Democratic Republicans in 1800, who campaigned in large part against the effects of the Alien and Sedition Acts. *See, e.g.*, *id.* at 696–701. If anything,

The Supreme Court's decision over 150 years later in *Bivens* did not directly acknowledge the extended pedigree of suits for damages against public officials. However, the decision continued the pro-remedy default position that characterized this area during the Founding Era and in subsequent years. In *Bivens*, the plaintiff sought damages for a warrantless search for drugs at his home in which federal agents allegedly used flagrantly excessive force on him in full view of his family.[54] According to Bivens, the search violated the Fourth Amendment's prohibition on unreasonable searches and seizures.[55] The search yielded no evidence of drugs, and authorities never charged Bivens with a crime.[56]

Both Justice Brennan, writing for the Court, and Justice Harlan, who authored an influential concurrence, cited the equitable discretion that federal courts presumptively possess.[57] Each Justice noted that equitable discretion traditionally includes weighing the efficacy of proposed remedies. In Bivens' case, those remedies were limited. An injunction would not be appropriate in the absence of evidence that federal agents planned further warrantless searches of Bivens' residence. Moreover, the exclusionary rule was not applicable, since the government had not charged Bivens with a crime, let alone sought to admit illegally seized evidence in such a prosecution. Given the absence of other remedies for the alleged official misconduct against Bivens, Justices Brennan and Harlan in their respective opinions agreed that equitable discretion pointed to damages against the offending officials as the most appropriate remedy.[58]

Although the *Bivens* Court's invocation of equitable discretion was a persuasive rationale, the omission by Justices Brennan and Harlan of damage suits' long pedigree made the reasoning of these opinions appear evanescent. Each opinion addressed Congress's role in ways that augured ill for expansion of *Bivens*. Justice Harlan's concurrence cited contemporary cases in which the Court had found that inferring the availability of a private right of action for violation of a *statute*

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the Alien Act's toothless implementation and speedy demise demonstrate the regard for foreign nationals during the Founding Era.

54. *See* PFANDER, *supra* note 5, at 20.

55. *Id.* at 23.

56. *Id.* at 20.

57. Justice Brennan stated that "where legal rights have been invaded [and there is a right to sue] . . . federal courts may use any available remedy to make good the wrong done." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S 388, 396 (1971) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946) (internal quotations omitted)). Justice Harlan echoed this proposition in his concurrence. *Id.* at 400–02 (Harlan, J., concurring).

58. *Id.* at 395–97 (majority opinion); *id.* at 406–10 (Harlan, J., concurring).

effectuated legislative intent.[59] That reference, as we shall see, weakened the case for *Bivens* remedies when the Court turned against implied rights of action, finding them an intrusion into Congress's prerogatives. In addition, Justice Brennan added an important caveat, observing that permitting a suit for damages against public officials would not be appropriate in the presence of what Justice Brennan cryptically called "special factors counselling hesitation" in creating such a remedy.[60] Those "special factors," Justice Brennan explained, should trigger judicial restraint in creating remedies absent some "affirmative" indication from Congress that it believed such a remedy was necessary.[61] Over time, as we shall see, Supreme Court decisions culminating in *Abbasi* cited these concerns as a basis for reversing the pro-remedy default position that had prevailed since the Framers' day.

In the last thirty years, the Supreme Court has consistently rejected efforts to make *Bivens* actions available in different contexts. For example, in *Wilkie v. Robbins*,[62] the Court declined to find that *Bivens* extended to a property owner's claim that federal officials had retaliated against him because of a long-simmering land dispute.[63] Similarly, in *Hartman v. Moore*,[64] the Court held that no claim for damages was available to a person who alleged that federal officials retaliated against him by initiating an unfounded criminal prosecution.[65]

In addition, in *Ashcroft v. Iqbal*,[66] which involved the post-9/11 immigration detentions also at issue in *Abbasi*, the Court held that the plaintiffs had not plausibly pleaded their allegations that senior officials intentionally targeted the plaintiffs for arrest because of their race, religion, or national origin.[67] As Justice Kennedy put it in his opinion for the Court in *Iqbal*, this line of precedent has shown that the Court is "reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'"[68] In other words, the Court has balked at recognizing an action for damages directly under the Constitution against federal officials in any setting apart from those narrow contexts recognized by *Bivens* itself and its two immediate progeny: searches by federal agents, prison conditions, and employment discrimination in

59. *Id.* at 402 (Harlan, J., concurring).

60. *Id.* at 396 (majority opinion).

61. *Id.*

62. 551 U.S. 537 (2007).

63. *Id.* at 541–43.

64. 547 U.S. 250 (2006).

65. *Id.* at 262–66.

66. 556 U.S. 662 (2009).

67. *Id.* at 669, 686–87.

68. *Id.* at 675 (citation omitted).

violation of the Equal Protection Clause. That reticence set the stage for the Court's decisive retreat from *Bivens* in *Abbasi*.

II. *ABBASI* AND THE STORY OF THE POST-9/11 IMMIGRATION ROUNDUP

Abbasi was not the first Supreme Court case to address the arrest and detention of immigrants after 9/11; as noted above, *Iqbal* came before. Indeed, the skepticism about *Bivens* in national security cases that Justice Kennedy revealed in *Iqbal* was a harbinger of the glum reception that the *Bivens* claims received from the Court in the latter case. However, the facts of *Abbasi* also present a counter-narrative, which could have impelled a different Court to recognize the *Bivens* action's value in national security litigation.[69] Understanding that counter-narrative is essential to grasping the cost to constitutionalism of the road not taken in *Abbasi*.

A. Immigration, Detention, and National Security

One obstacle to the counter-narrative in *Abbasi* was a fact not lost on the Court: the deference the Court has often displayed to the political branches on immigration matters. Well over a century ago, the Court held that Congress has plenary power over immigration.[70] That power is at its height on issues concerning criteria for the admission of foreign nationals to the United States. National security justifications have contributed to this deferential posture.

In the past, the Supreme Court has upheld the indefinite detention of foreign nationals seeking to enter the United States.[71] In one case during the Cold War, the detainee was a lawful permanent resident, but not a citizen, who departed from the United States; officials cited national security reasons for barring his subsequent reentry. In that case, *Shaughnessy v. United States ex rel. Mezei*,[72] the government relied on secret evidence that it refused to disclose to the courts.[73] The

69. Shirin Sinnar has provided the most compelling account of that counter-narrative, framed by an insightful analysis of the *Iqbal* decision. *See generally* Sinnar, *supra* note 5.

70. *See* Chae Chan Ping v. United States, 130 U.S. 581, 600–03, 609 (1889).

71. This paragraph and the following two borrow from earlier work. *See* GEOFFREY CORN, JIMMY GURULÉ, ERIC TALBOT JENSEN & PETER MARGULIES, NATIONAL SECURITY LAW: PRINCIPLES AND POLICY 296 (2015).

72. 345 U.S. 206 (1953).

73. *Id.* at 217 (Black, J., dissenting).

Supreme Court nonetheless upheld the detention, viewing the executive branch as exercising power duly delegated to it by Congress.[74]

While the government claimed that its post-9/11 immigration detentions focused on possible terrorist links, the Justice Department's own Inspector General subsequently found that government personnel participating in this effort detected virtually no evidence of terrorist ties among the detainees.[75] Instead, the investigation from the start centered on routine immigration violations committed by Muslim immigrants from the Middle East and South Asia. The FBI received 96,000 tips about individuals who in some fashion prompted suspicion.[76] Many tips stemmed from gossipy neighbors, landlords looking for the latest rent check, and old employers with a grudge.[77]

Many other tips in the FBI's sprawling post-9/11 investigation flowed from more generic fears, as a jumpy populace chafed about the *mere presence* of Middle Eastern or South Asian persons. For example, one tipster warned investigators that a grocery store was "operated by numerous Middle Eastern men."[78] Government investigators raided the store, checked employees' immigration status, and arrested those without valid immigration documents.[79] In another case, facts underlying an initial arrest suggested a possible terrorist link, but subsequent evidence disproved that theory.[80] In that case, New York City police officers cited the Middle Eastern driver of a car for a traffic violation. In searching the vehicle, which also contained two passengers from the Middle East, the police found plans for a public school. Police contacted the men's employer, who informed the authorities that the men needed the plans because they were doing construction work on school grounds.[81] Despite

74. *Id.* at 214–16.

75. *See* Office of the Inspector Gen., U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 41–42 (2003) [hereinafter *September 11 Detainees*], https://oig.justice.gov/special/0306/full.pdf [https://perma.cc/K3JW-5DPK] (concluding that arrests generally occurred because of "chance encounters or tenuous connections" rather than "genuine indications" of terrorist ties).

76. Turkmen v. Hasty, 789 F.3d 218, 225–27 (2d Cir. 2015), *rev'd sub nom.* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).

77. PETER MARGULIES, LAW'S DETOUR: POLITICS, IDEOLOGY, AND JUSTICE IN THE BUSH ADMINISTRATION 28 (2010).

78. *Id.* at 28–29.

79. *Id.*

80. *Turkmen*, 789 F.3d at 231.

81. *Id.*

this clear evidence that was counter to the terrorism theory, federal officials arrested and detained the individuals in question.[82]

Far from being foreign agents, a large majority of the detainees were ordinary undocumented immigrants who had lived in the New York metropolitan area for years. Like most undocumented immigrants, the detainees had participated in the underground economy and scrambled to find unskilled work.[83] Prior to 9/11, the detainees had melded into the metropolitan landscape, living from paycheck to paycheck like many U.S. citizens and lawful residents. In some cases, like some U.S. citizens and lawful residents struggling to make ends meet, the detainees had engaged in low-level criminal conduct such as identity theft, albeit conduct with no link to terrorism.[84]

In the weeks following the 9/11 attacks, the government used such sweeps to arrest and detain in federal correctional facilities more than 700 undocumented immigrants from a range of countries in the Middle East and South Asia.[85] Many of the detainees could not contact lawyers. Moreover, federal correction officers and other nonimmigrant inmates subjected a substantial number of the detainees to egregious physical abuse.[86] When detainees sought release from detention as they awaited their removal from the United States, government lawyers told immigration judges in the Justice Department's Executive Office for Immigration Review that the detentions were part of an investigation into the 9/11 attacks. However, the government never presented specific, concrete evidence of terrorist links, apparently because such links did not exist.[87]

Plaintiffs—in allegations that courts found to be plausible—asserted that senior officials knowingly or intentionally made decisions that led to the ill treatment and excessive detention experienced by some of the detainees.[88] The plaintiffs' pleadings did not allege that senior officials *ordered* the ill treatment.[89] However, senior officials allegedly merged a "New York List" of detainees with a broader nationwide list compiled by what was then the Justice Department's

82. *Id.*

83. *See* Sinnar, *supra* note 5, at 394–95.

84. *Id.* at 395–96.

85. Ziglar v. Abbasi, 137 S. Ct. 1843, 1852 (2017).

86. *Id.* at 1853.

87. *Id.*

88. *Id.* at 1853–54.

89. *Id.* at 1854.

Immigration and Naturalization Service ("INS").[90] The INS List included persons whom the FBI had, typically without any evidence, designated as "of interest" to the 9/11 investigation.[91] Senior officials had earlier decided to "exert maximum pressure" on this group by restricting their contacts, delaying final immigration hearings, and informing law enforcement authorities that the detainees were suspected terrorists, even though no evidence revealed terrorist ties.[92] The effect of that merger was the subjection of many New York detainees to harsh conditions such as segregation in maximum-security federal correctional units and subjection to physical abuse, even when "no . . . suspicion existed" that the detainees had links to terrorism.[93] Moreover, abundant publicity should have made reasonable officials aware of these horrendous conditions early on in the detention process.[94]

B. Retrenching on Remedies: The Court's Decision in Ziglar v. Abbasi

In *Abbasi*, the Court held that a *Bivens* action was not available to the post-9/11 plaintiffs. The majority's rationale[95] definitively reversed the pro-remedy presumption that had governed actions for damages against public officials since before the Founding Era. To accomplish this, Justice Kennedy, writing for the Court, invoked the proviso in Justice Brennan's opinion in *Bivens*. According to Justice Kennedy, "special factors counselling hesitation" precluded a *Bivens* action in *Abbasi* and would likely have the same effect in most "new" contexts beyond the hoary troika of domestic searches, prison conditions, and employment discrimination that the Court had set out decades earlier.[96] In new contexts, Justice Kennedy contended, a *Bivens* action was likely to chill officials' legitimate discretion and interfere with Congress's

90. *See generally* Turkmen v. Hasty, 789 F. 3d 218, 227–28 (2d Cir. 2015). Subsequently, Congress reorganized immigration agencies, and INS became the division of Immigration and Customs Enforcement ("ICE") within the new federal Department of Homeland Security.

91. *Id.* at 231.

92. *Id.*

93. *Id.* at 232.

94. Margulies, *supra* note 3, at 222. Because this publicity was so extensive, a reasonable factfinder could readily have inferred that senior officials knew of these abuses.

95. Justice Kennedy wrote the opinion of the Court, joined by Chief Justice Roberts and Justices Alito and Thomas. Justice Breyer filed a dissent, which Justice Ginsburg joined. Justices Sotomayor, Kagan, and Gorsuch took no part in the case. Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).

96. *See id.* at 1857–58.

ability to balance deterrence, compensation, and the risk of hampering officials' discharge of their duties.[97]

To justify reversing the pro-remedy presumption that *Bivens* continued, Justice Kennedy cited the Court's post-*Bivens* pivot from finding of implied rights of action under *statutes*.[98] Justice Kennedy asserted that the separation of powers concerns that had driven the Court's reticence in inferring private rights of action under statutes should prompt similar caution regarding causes of action for *constitutional* rights.[99] According to Justice Kennedy, just as finding an implied statutory right of action might skew a carefully calibrated statutory scheme, finding a right of action directly under the Constitution might upset a framework that met Congress's needs.[100] Courts should therefore be cautious, absent the "affirmative" indication from Congress that the *Bivens* majority had stated would be necessary when "special factors counselling hesitation" suggested the importance of judicial restraint.[101]

On this view, courts intrude on Congress's prerogatives if they recognize a right of action that can affect relationships between state and federal governments or among private sector entities. The unintended consequences wrought by litigation are a fit subject for Congress to weigh in the balance against the importance of deterring wrongdoing and compensating victims. Requiring Congress to expressly recognize a private right of action for damages ensures that Congress will engage in this balancing task, for which it is more suited than the courts. Moreover, Justice Kennedy noted in *Abbasi*, the potential for litigation can distract senior officials from their duties. In addition, the adverse consequences of suits for damages may be unnecessary to prevent abuse, since other remedies such as habeas corpus are available to victims.[102]

Elaborating on this theme, Justice Kennedy outlined a number of factors that should guide courts in deciding when to recognize *Bivens* actions. First, Justice Kennedy cited the newness test, noting that courts should decline to imply a right of action under the Constitution when the case is "different in a meaningful way from previous *Bivens*

97. *See id.* at 1860–63.

98. *Id.* at 1855.

99. *Id.* at 1856.

100. *Id.* at 1858.

101. *See id.*; *see also* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402–03 (2018) (invoking reluctance to infer that Congress authorized suits for damages in holding that foreign corporations were not cognizable defendants under Alien Tort Statute); Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Adjudication After* Kiobel, 64 DUKE L.J. 1023, 1069–72 (2015) (discussing parallels between the Court's evolving view of implied statutory and constitutional rights of action).

102. *Abbasi*, 137 S. Ct. at 1862–1863.

cases decided by this Court."[103] Expanding on this amorphous caveat, Justice Kennedy noted certain differences that would be "meaningful enough" to frame the action as "new" under the Court's definition.[104] For example, a court could consider the:

> [R]ank of the officers involved; the constitutional right at issue; the generality or specificity of the official action, the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.[105]

With these criteria as a general guide, Justice Kennedy dug deeper in the details of the post-9/11 detention. Justice Kennedy's rationale relied heavily on the same tacit view of government probity that he had exhibited earlier in *Iqbal*—the Court's earlier decision holding that the post-9/11 immigration detainees' complaints of discrimination were not plausible.[106] In *Iqbal*, Justice Kennedy described the decisions authorizing the arrest and detention of immigrants after 9/11 as a "legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks."[107] As we have seen, Justice Kennedy's anodyne description contrasted sharply with the random

103. *Id.* at 1859. In January, 2018, the Court also refined its test for determining when government officials enjoyed qualified immunity from suit. *See* District of Columbia v. Wesby, 138 S. Ct. 577, 589–90 (2018) (clarifying that, even when a cause of action is available to sue officials for damages, officials lose qualified immunity only when legal rule barring their conduct is not merely "*suggested* by then-existing precedent" but is "clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply") (emphasis added); *see also* Kisela v. Hughes, 138 S. Ct. 1148, 1152–54 (2018) (per curiam) (in determining whether law is "clearly established" for purpose of abrogating official's qualified immunity from suit, reading "clearly established" test narrowly to preserve qualified immunity when police officer shot individual carrying a knife who officer believed posed a threat to another). While the subject of qualified immunity is beyond the scope of this Article, the Court's high threshold for "settled law" that vitiates qualified immunity parallels the analysis in *Abbasi* of the precedent required to establish the availability of a *Bivens* remedy in a particular factual context.

104. *Abbasi*, 137 S. Ct. at 1859–60.

105. *Id.* at 1860.

106. Ashcroft v. Iqbal, 556 U.S. 662, 681–83 (2009) (holding that allegations of discriminatory intent in initial investigation of detainees were implausible and that senior officials did not have supervisory liability for abuses).

107. *Id.* at 682.

roundup that the Justice Department's own Inspector General described.[108]

Justice Kennedy's evaluation in *Abbasi* of the risks and benefits posed by the availability of *Bivens* was a study in asymmetry. In marked distinction to the premises that usually prevail under judicial review of detention, Justice Kennedy viewed the risk of unlawful official conduct as remote.[109] In contrast, Justice Kennedy viewed the risk of hindering "legitimate" national security efforts as immediate.[110] According to Justice Kennedy, the decision to detain certain noncitizens for substantial periods under harsh conditions despite the absence of evidence linking detainees to terrorism was not heedless or vindictive; rather, it was a "high-level executive policy created in the wake of a major terrorist attack on American soil."[111] Justice Kennedy asserted that officials need to "discharge . . . their duties"[112] in the face of such crises. Those duties include deliberation about possible responses to the threat of future attacks.

According to Justice Kennedy, pursuit of a damages claim against the senior officials responsible for the policy could impede official decisions that must of necessity compress deliberation into a tight temporal window.[113] As Justice Kennedy observed, litigation would entail "inquiry and discovery into the whole course of the discussions and deliberations" that drove those official actions.[114] Justice Kennedy asserted that such judicial proceedings would "interfere in an intrusive way with sensitive functions of the Executive Branch."[115] The prospect of litigation could cause officials to "second-guess difficult but necessary decisions,"[116] stifling capabilities that the executive branch needs to respond to an evolving spectrum of threats.[117]

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108. *Cf.* Sinnar, *supra* note 5, at 428–30 (noting the tenor and substance in the *Iqbal* majority opinion and cautioning about its insidious long-term effects).

109. *Abbasi*, 137 S. Ct. at 1863.

110. *Id.* at 1861.

111. *Id.* at 1860.

112. *Id.*

113. *Id.*

114. *Id.* at 1860–61.

115. *Id.* at 1861.

116. *Id.*

117. *Id.* at 1862 (cautioning against judicial crafting of remedy such as suit for damages absent "affirmative action by Congress") (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971)). Shortly after deciding *Abbasi*, the Supreme Court remanded a case involving a border shooting with instructions to the court below to consider the case in light of *Abbasi*'s approach. *See* Hernandez v. Mesa, 137 S. Ct.

Moreover, Justice Kennedy portrayed the trade-off between compensating victims and hindering future national security efforts as a zero-sum game. For Justice Kennedy, even the *prospect* of a detainee lawsuit for damages litigated to a disposition on the merits would adversely affect future officials' vigilance against national security threats. Justice Kennedy never acknowledged that a space might exist in which future officials would steer clear of egregious abuses while still remaining devoted to the protection of the U.S. public. Justice Kennedy's vision of a stark choice between overreaction and utter abdication would have puzzled the Framers, who favored moderation in official decisions.

III. CRITIQUING *ABBASI*'S ANTI-REMEDY PRESUMPTION

On several fronts, the reasoning in Justice Kennedy's opinion for the Court in *Abbasi* should elicit countervailing arguments. The opinion's equation of statutory and constitutional causes of action is flawed. In addition, the opinion's view of damages as an extraordinary remedy and injunctions or habeas corpus as the norm conflicts with traditional assumptions. More broadly, the opinion's reliance on the perceived novelty of a lawsuit as the boundary between accepted and disfavored uses of *Bivens* liability introduces a subjective and arbitrary element into judicial review. Similarly, the opinion's zero-sum account of the trade-off between deterrence of constitutional violations and vigilance against terrorist threats unduly shrinks the space available to honor both virtues.

2003, 2006–07 (2017) (per curiam). In *Hernandez*, an agent of the U.S. Customs and Border Patrol ("CBP"), which along with ICE is now part of the Department of Homeland Security, stood on U.S. territory and from that position shot and killed an unarmed Mexican teenage boy on Mexican territory. The culvert where the CBP agent, the boy, and the boy's friends were located was an area straddling the U.S.-Mexican border that by custom, practice, and formal agreement, had been maintained by the United States for years. *Id.* at 2009–10 (Breyer, J., dissenting). The boy's family sued the CBP agent for damages, claiming that the shooting violated the boy's rights under the Fourth and Fifth Amendments. The Fifth Circuit had resolved the case by holding that the boy, as a Mexican national on Mexican territory, had no Fourth Amendment rights. *Id.* at 2007. The Supreme Court declined to resolve this issue, citing its sensitivity and "far reaching" consequences. Instead, the Court directed the Fifth Circuit to first consider whether *Abbasi* barred assertion of a claim for damages, whatever the merits of the underlying substantive issue. Justice Breyer dissented, arguing that the Court should have held that the Fourth Amendment applied, given the close cooperation between the United States and Mexico on maintenance of the culvert in which the shooting occurred. *Id.* at 2009–10. Justice Breyer would have remanded solely on the *Abbasi* question. *Id.* at 2011. On remand, the Fifth Circuit held that the lawsuit presented a "new context" and therefore was an inappropriate vessel for a *Bivens* claim. *See* Hernandez v. Mesa, 885 F.3d 811, 816–18 (5th Cir. 2018).

A. The Difference Between Constitutional and Statutory Claims

Justice Kennedy's analogy between constitutional and statutory causes of action is flawed. First, constitutional causes of action have a much sturdier pedigree, dating back to English courts' invocation of unwritten "ancient rights" prior to the American Revolution and the enactment of the U.S. Constitution. Those actions informed the U.S. colonists' fight for independence and the Framers' understanding of fundamental legal rights. In the Founding Era and after, courts upheld damage suits against officials for comparable reasons.[118]

Rights guaranteed by the Constitution require a fuller suite of protections than those afforded statutory duties. The latter Congress can confer or take away, as it chooses. However, the former are part of the fundamental charter of governance itself. As Hamilton noted in his denunciation of pre-Constitution efforts to confiscate the property of colonists who had remained loyal to Britain during the Revolutionary War, "the constitution is the compact made between the society at large and the individual. The society therefore cannot, without breach of faith and injustice, refuse to any individual, a single advantage which he derives under that compact."[119] To do so is a recipe for "arbitrary" government, not the rule of law.[120] Without a robust capacity to deter this overreaching, officials can quickly assume the role of "perpetual

118. Justice Story was particularly clear on this point. *See* The Apollon, 22 U.S. 362, 366–67 (1824). Justice Story explained that:

> It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the [executive] responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity. But this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands that the injured party should receive a suitable redress.

Id; see also PFANDER, *supra* note 5, at 165 (discussing ramifications of Story's view for post-9/11 abuses).

119. Second Letter from Phocion to the Considerate Citizens of New York, *reprinted in* WORKS OF ALEXANDER HAMILTON; COMPRISING HIS CORRESPONDENCE, AND HIS POLITICAL AND OFFICIAL WRITINGS, EXCLUSIVE OF THE FEDERALIST, CIVIL AND MILITARY 301, 322 (C. John ed., 1851) [hereinafter Second Letter from Phocion]; *see also* Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825, 841 (2006) (discussing Hamilton's vigorous advocacy against measures targeting loyalists).

120. *See* Second Letter from Phocion, *supra* note 119, at 322.

dictators."[121] The failure of deterrence thus strains the separation of powers and other structural provisions that enable the legislature to function. The stakes for constitutional governance require a cause of action to fully remedy constitutional torts.

Hamilton's warning about the risks of post-Revolution confiscatory policies toward loyalists dovetails with the stain of the Japanese-American internment and the needlessly harsh post-9/11 roundup of Muslims. Hamilton criticized the "passion . . . prejudice . . . [and] resentment" that drove state measures in New York and elsewhere to strip loyalists of their property.[122] Those negative emotions at the state level drove federal actions against Japanese-Americans in the aftermath of Pearl Harbor.[123]

In certain respects, the impetus and nature of the post-9/11 roundup was different. Virtually all of the detainees lacked a lawful immigration status, which meant that officials could lawfully arrest and remove them, with detention authorized when necessary to prevent acts of violence and ensure their appearance for subsequent proceedings.[124] Moreover, public pronouncements by senior officials after the 9/11 attacks lacked the pervasive bigotry that characterized discourse about the need for internment during World War II. On the other hand, senior officials' willingness to order harsh detention of a particular group of immigrants with distinctive markers for religion, ethnicity, and national origin echoed the abuses of earlier eras. The determination to "exert maximum pressure"[125] on this particular group absent any evidence of terrorist ties suggests that senior officials viewed the need for fairness and individualized criteria as what Hamilton sardonically called "partial inconveniences."[126] When rule-of-law principles become inconvenient, Hamilton warned, "the constitution is slighted or explained away."[127] Maintaining constitutionalism is hard work; officials cannot slacken their efforts to promote constitutionalist values because the rule of law seems to be a nuisance. Diverging from the deference to official discretion exhibited in *Abbasi*, Hamilton appeared to suggest that preserving constitutionalism required robust remedies.

121. *Id.*

122. *See id.* at 328.

123. *See generally* IRONS, *supra* note 1, at 7; YAMAMOTO ET AL., *supra* note 33, at 1274–75 (citation omitted).

124. MARGULIES, *supra* note 77, at 27–28.

125. Turkmen v. Hasty, 789 F. 3d 218, 227–28 (2d Cir. 2015).

126. Second Letter from Phocion, *supra* note 119, at 322.

127. *Id.* at 328.

B. Misplacing Damages in the Hierarchy of Remedies

Citing available alternatives to a suit for damages also misconceives the rationale for such suits and their venerable place in the hierarchy of relief for official wrongs. At common law, suits for damages were the default, and injunctions were an "extraordinary remedy."[128] Under long-standing principles guiding equitable discretion, a court would not issue an *injunction* unless a suit for damages was an inadequate remedy. By making issuance of an injunction contingent on there being no "adequate remedy at law,"[129] courts limited the availability of injunctive relief. Determination of whether an award of damages was an "adequate" remedy would hinge on whether a party would suffer "irreparable harm" from ongoing violations of law while litigating the award of damages.[130] One reason for this doctrinal distinction is the potential for overreaching in injunctions, which mandate certain conduct as a means of compliance with the injunction's terms.[131] In contrast, a suit for damages leaves the defendant a choice—engage in wrongful conduct and pay damages to wronged persons, or refrain from that conduct. That choice, according to the common law, is less intrusive than injunctive mandates.[132] On this view, an award of damages is more in keeping with individual liberty in private law disputes and more consistent with appropriate deference for government in public law. Given this traditional view of injunctions as a more intrusive remedy than damages, it is ironic that Justice Kennedy in *Abbasi* highlighted the potential for disruption wrought by suits for damages. That perspective turns traditional equitable doctrine on its head.[133]

128. *See* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941); *see also* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1028–29 (2015) (analyzing case law).

129. eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006); Bray, *supra* note 128, at 1004. *But see* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 3–36 (1991) (arguing that finding of irreparable injury is often irrelevant in practice when courts determine whether or not to grant a permanent injunction).

130. Bray, *supra* note 128, at 1005.

131. Winter v. Nat. Res. Def. Council, 555 U.S. 7, 33 (2008) (holding that the court failed to exercise appropriate discretion when it enjoined naval training exercise because U.S. Navy had failed to complete environmental impact statement). *But see* Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 486 (2010) (critiquing *Winter* as exhibiting undue deference to government).

132. *See Winter*, 555 U.S. at 30–31 (noting that a "more intrusive restriction" in the form of an injunction on a naval training exercise may threaten the navy's preparedness for war).

133. Justice Kennedy made this inversion of traditional approaches express by noting that concerns about judicial intrusion on executive decision-making

Moreover, Justice Kennedy was unduly optimistic in surmising that the post-9/11 immigration detainees could have *availed themselves* of any alternative remedies. Justice Kennedy suggested that the detainees might have been able to seek "injunctive relief" or challenge conditions of confinement by filing petitions for habeas corpus.[134] However, Justice Kennedy did not acknowledge that the lack of access to lawyers while the *Abbasi* plaintiffs were in high-security detention effectively precluded access to these remedies.[135] Under the circumstances, a suit for damages was the only legal remedy available to deter future abuses or compensate those wronged.

C. Misconstruing Congressional Silence

The *Abbasi* Court's upending of the traditional pro-remedy presumption is even more salient in its discussion of Congress's post-9/11 posture regarding remedies for official misconduct. Justice Kennedy asserted that Congress was aware of the risk of harsh detention conditions and chose to authorize only limited measures to address the problem, such as requiring reports by the Justice Department's Office of the Inspector General ("OIG").[136] According to Justice Kennedy, Congress's minimalist approach to remedies constituted evidence that legislators' failure to expressly authorize suits for damages was more than a "mere oversight" or product of inadvertence.[137] However, Justice Kennedy failed to acknowledge that the meaning of congressional silence is frequently subject to multiple interpretations.[138]

At least one plausible interpretation of legislative silence *supports* the availability of *Bivens* remedies. The litigation on the detainees' behalf was the subject of multiple decisions in district and appellate courts prior to the Supreme Court's 2010 decision limiting remedies in *Iqbal*. At any time prior to the Court's issuance of its decision in *Abbasi*, Congress could have acted to *preclude Bivens* remedies for detainees. Congress never did so. Congress's inaction may, without more, constitute slender evidence that legislators favored monetary relief for detainees. Nevertheless, that inference is at least as plausible as Justice

are "even more pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief . . . [t]he risk of personal damages liability is *more likely* to cause an official to second-guess difficult but necessary decisions concerning national-security policy." Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017) (emphasis added).

134. *Id.* at 1862–63.

135. *See* CORN ET AL., *supra* note 71, at 296.

136. *Abbasi*, 137 S. Ct. at 1862.

137. *Id.*

138. *See* Ethan J. Leib & James J. Brudney, *Legislative Underwrites*, 103 VA. L. REV. 1487, 1545 (2017).

Kennedy's construction of silence as connoting legislative disfavor. Justice Kennedy's opinion failed to explain why his construction was superior. That omission is particularly glaring in light of the traditional pro-remedies presumption that dates back to Founding Era national security cases, such as *Little v. Barreme* and *Murray v. The Schooner Charming Betsy*.

D. The Novelty Test and Moral Hazard Versus Sound Judgment on National Security Issues

In addition, Justice Kennedy's focus on novelty as the touchstone for denying access to *Bivens* increases moral hazard for officials. Moral hazard is a pervasive risk of insurance: individuals who know they will be shielded from the consequences of wrongdoing have an incentive to fall short of what law or practice requires.[139] Insurance can take many forms. It can provide financial assistance, as in insurance policies or the public indemnification that protects most if not all federal officials from paying out of pocket for lawsuits against them.[140] In addition, "insurance"—defined broadly—can include legal doctrines that hinder litigation against officials in the first place. These doctrines include the limits on *Bivens* suits that the Court articulated in *Abbasi*. Indeed, the combination of *Abbasi* and indemnification doubles down on moral hazard.

Moral hazard discourages officials from heeding the lessons of the past. Precedents like *Abbasi* signal to officials that a proactive approach to legal requirements is unnecessary, since only a limited range of conduct will trigger even the *possibility* of recovery by plaintiffs alleging official wrongs. That double dose of legal protection encourages the "spirit of injustice" that Hamilton cautioned against in *Federalist No. 78*:[141] a toxic elixir that victimized Japanese-Americans during World War II and the post-9/11 immigration detainees.

139. Nobel Prize winner Kenneth Arrow first explained the concept of moral hazard. *See* Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 961 (1963) (explaining that in health care, the availability of reimbursement care diminishes a consumer's incentive to seek the most cost-effective provider); Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 270 (1996) (noting that individuals with insurance will often take less care); Steven Shavell, *On Moral Hazard and Insurance*, 93 Q. J. ECON. 541, 541–42 (1979) (discussing moral hazard and insurance); *cf.* Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts*, 7 U.C. DAVIS BUS. L.J. 55, 79–80 (2006) (discussing moral hazard in corporate compensation to managers on reimbursement of defense costs).

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

141. THE FEDERALIST NO. 78, *supra* note 12, at 470.

Abbasi and *Iqbal* portray the exercise of legal reasoning in national security law as an arena fraught with peril, instead of a venue for sound judgments that balance vigilance against threats and the maintenance of constitutional values. To illustrate how the Court's view clashes with our best view of official decision-making, consider the example of a highly fraught decision in the foreign policy realm: the U.S. approach to the Cuban Missile Crisis.[142]

Robert F. Kennedy, who served as the Attorney General and in that capacity was a principal advisor to his brother, President John F. Kennedy, was acutely conscious of the law. Robert Kennedy counseled against a military strike on Cuba in part because he rightly saw such action as a violation of international law limiting the use of force and as a discordant echo of the attack over twenty years earlier by Japan on *American* forces at Pearl Harbor.[143] Citing that analogy as a cautionary tale, Kennedy and lawyers in the Administration recommended a targeted naval blockade against Soviet missile shipments to Cuba rather than an all-out attack.[144]

That approach diffused the crisis, although its international law bona fides were not entirely settled—then or now. Attorney General Kennedy's appreciation of legal constraints did not have a chilling effect. Quite the opposite: it informed President Kennedy's thinking,[145] generating an ingenious approach that resolved the situation.

Law as analogy frequently plays this constructive role. That should not be surprising, since any system of law—especially a common law system—relies on courts and other players to decide what is reasonable in new situations. Looking to that system for guidance is a straightforward move that will typically *refine* official decisions, instead of stifling decisions at their inception, as Justice Kennedy seemed to fear in *Abbasi*.

The Framers understood this well. The Federalist Papers feature scores of analogies to history or past practice. These analogies were

142. *See* Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 985 (2016); Bob Bauer, *The National Security Lawyer, in Crisis: When the "Best View" of the Law May Not Be the Best View* 6–30, (NYU Pub. L. & Leg. Theory Research Paper Series, Working Paper No. 17-08, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2931165 [https://perma.cc/5RZZ-5934]; Peter Margulies, *When to Push the Envelope: Legal Ethics, the Rule of Law, and National Security Strategy*, 30 FORDHAM INT'L L.J. 642, 669–72 (2007).

143. Margulies, *supra* note 142, at 669–70.

144. *Id.* at 670.

145. *Id.* at 669; *cf.* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1826–28, 1835 (2009) (discussing institutionalist vision of international and constitutional law as coordinated games).

considered prime sources of wisdom by Hamilton, Madison, and Jay.[146] Often, those prescriptions may require tailoring to present conditions. However, that look to the past and the tailoring of past prescriptions to present uses is a crucial form of discipline. That discipline, in turn, ensures that, in Jay's words, decisions will be "temperate and cool," not precipitous.[147]

Hamilton's letters as Phocion critiquing the persecution of loyalists after the American Revolution[148] provide a distinctive counterpoint to Justice Kennedy's assertion that the perceived novelty of legal issues weakens the case for robust remedies against errant officials. Hamilton was admittedly often a champion of deference to the Executive on national security and foreign affairs.[149] Nevertheless, Hamilton also wrote eloquently about the need to apply venerable principles to new challenges. In meeting these challenges, Hamilton extolled the avoidance of arbitrariness and "discrimination."[150] Hamilton counseled skepticism about claims that "revolution," including implicitly the American Revolution, had made those principles less useful.[151] While the novelty of certain questions might require tweaking principles in some respects, that adaptive process made the search for useful analogies from the past even more urgent.

A diligent search for analogies would surely have informed the decisions of senior officials regarding the post-9/11 immigration detentions, just as it would have informed deliberations about the Japanese-American internment decades earlier. Consider the broad proposition that detention of an individual should require some individualized evidence that the individual poses a threat. Justice Kennedy's opinion in

146. *See generally* McGowan, *supra* note 40 (discussing the method and perspective of *The Federalist*'s authors).

147. *See* THE FEDERALIST NO. 3, at 45 (John Jay) (Clinton Rossiter ed., 1961). Ironically, in an earlier opinion, Justice Kennedy cited Jay's concern that border states' propensity for "sudden irritation" would skew U.S. foreign policy unless a strong federal authority tempered that tendency. *See* Arizona v. United States, 567 U.S. 387, 395 (2012) (citing a later edition of THE FEDERALIST NO. 3, at 39 (John Jay) (Clinton Rossiter ed., 2003)).

148. *See* Second Letter from Phocion, *supra* note 119, at 288.

149. Typifying this concern, in Federalist No. 23, Hamilton warned, "*it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.*" THE FEDERALIST NO. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original).

150. Second Letter from Phocion, *supra* note 119, at 321.

151. *Id.*

Abbasi acknowledges this principle's force.[152] However, the Justice Department OIG Report concluded that evidence played little or no role in decisions about post-9/11 detention—including the classification of detainees as part of the "INS List" that triggered harsh conditions and restrictions on contact with the outside world.[153] There simply was *no* evidence of terrorist ties for the overwhelming majority of detainees.[154] It is reasonable to assume that senior officials either knew that, or could readily have inferred it, since they surely would have received such evidence if it were available.

Perhaps, as some evidence in the record reflects, senior officials believed that detaining individuals in maximum security settings would dial up the "pressure" on detainees and shake loose information that detainees had previously withheld. However, that strategy casts a different, less flattering light on Justice Kennedy's assertion that liability for damages would exert a chilling effect on official decision making. *No U.S. official*—senior, intermediate, or line-level—can order or knowingly enable physical brutality against those in custody.[155] Curbing such conduct would not engender adverse consequences to national security.

In sum, there was very little that was truly "new" about the legal questions surrounding the post-9/11 immigration detentions. Every plausible explanation for senior officials' decisions regarding the post-9/11 detainees described conduct that the law deters in other contexts.[156] Deterring such wanton behavior would be a feature, not a "bug," of suits for damages.

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152. *See* Ziglar v. Abbasi, 137 S. Ct. at 1861–62 (noting the importance of courts "when individual liberties are at stake") (citing Hamdi v. Rumsfeld, 542 U.S. 507, 527, 532–37 (2004)).

153. *See September 11 Detainees*, *supra* note 75, at 41–42.

154. *Id.*

155. Ordering or knowingly enabling such abuse would be well above the threshold for finding unconstitutional conduct. *See Abbasi*, 137 S. Ct. at 1864–65 (citing principle of "deliberate indifference" of prisoners' medical needs in course of justifying remand to the Second Circuit for review of a claim against a warden of a federal correctional facility where abuse of detainees occurred, while suggesting that the standard for adjudicating the claim that a warden "allowed guards to abuse pre-trial detainees" is "less clear" and reiterating that post-9/11 context was "new" and thus would have required at least a "modest extension" of precedent).

156. At the conclusion of discovery or trial, the plaintiffs in *Abbasi* may not have been able to show that senior officials ordered or knowingly enabled abuse of detainees. However, the effect of the Court's decision was to deny the plaintiffs the opportunity to *try* to make this showing regarding senior officials.

Conclusion

The Supreme Court's decision in *Abbasi* cements a trend that had been evident for some time: the narrowing of *Bivens*. Justifying *Abbasi*'s definitive shift away from permitting suits for damages implied directly from the Constitution, Justice Kennedy's opinion for the Court cited two interrelated factors: 1) the risk of chilling official decisions on important national security cases, and 2) the need to permit Congress to balance that risk against the importance of compensating victims and deterring future official misconduct. Unfortunately, history and constitutional values provide little support for *Abbasi*'s outcome.

Since the Articles of Confederation era, the American law of official liability rested on a pro-remedies presumption. Under this presumption, courts could assess blame, and an official could seek ex-post indemnification from Congress. On rare occasions, Congress would prospectively grant immunity to certain kinds of officials. That said, having a remedy available entailing monetary relief was the default position adopted by courts, including prominent decisions such as *Little v. Barreme* and *Murray v. The Schooner Charming Betsy*. That accountability was viewed as central for the protection of rights in a constitutional republic. Moreover, the views of the Framers coalesced with this view. Hamilton, in particular, understood that judicial review was a vital safeguard. Like his colleagues in drafting and advocating for the Constitution, Hamilton also understood that the ability of foreign nationals to secure monetary remedies in U.S. courts was a crucial asset in the new republic's quest for stability.

The Supreme Court's decision in *Bivens* built on this pro-remedy presumption. Both Justice Brennan, writing for the Court, and Justice Harlan, in his concurring opinion, stressed the presumption that Congress had delegated equitable discretion to the courts to select among remedies and choose to make a damages remedy available when that was necessary to promote compliance with constitutional values.

Upending this presumption, *Abbasi* fails to support the change it marked from history and the Framers' understandings. Justice Kennedy's concerns about chilling executive decisions and supplanting Congress's role ring hollow in light of longtime practice with the availability of damages against errant government officials. In particular, Justice Kennedy's assertion that damages could be more intrusive to officials than injunctive relief ran counter to over two centuries of doctrine and practice. The distinction that Justice Kennedy drew between "new" and traditional uses of *Bivens* allowed officials a convenient "out" from accountability. The *Abbasi* Court's wariness about remedies gives officials no incentive to avoid future abuses that echo the post-9/11 immigration detentions.

Perhaps a culture of fidelity to law will guard against future grim episodes like the Japanese-American internment. However, those who

wished that remedies would encourage learning *Korematsu*'s lessons can rightly fear that *Abbasi* will permit future officials to cut corners. *Abbasi*'s abridgment of remedies seems like a prescription for continued close encounters with official overreaching whenever the symptoms of crisis appear.