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The Influence of Government Defenders on Affirmative Civil Rights Enforcement

Erratum

Law; President/Executive Department; Litigation; Criminal Law; Civil Rights and Discrimination; Legal Ethics and Professional Responsibility; Law and Society; Law and Race; Law and Gender; Law and Economics; Law and Politics

THE INFLUENCE OF GOVERNMENT DEFENDERS ON AFFIRMATIVE CIVIL RIGHTS ENFORCEMENT

Alexander A. Reinert*

Improving access to justice has received increasing attention from many corners over the past decade. Here in New York, as just one example, spurred by the leadership of former Chief Judge Jonathan Lippman, the New York Court of Appeals has taken steps to improve access to justice in New York state courts in numerous ways: by seeking to enhance pro bono representation, improving assistance for unrepresented persons in state courts, and increasing funding for civil legal aid.¹ The U.S. Department of Justice (DOJ), under the leadership of former Attorney General Eric Holder, established the Office for Access to Justice in March 2010 “to address the access-to-justice crisis in the criminal and civil justice system.”² And at Fordham Law School, David Udell has led a team of researchers at the National Center for Access to Justice to identify access-to-justice trends and metrics in the fifty states.³

These efforts, laudable as they are, for the most part have focused on access to justice for defendants in criminal and civil litigation. As the topic of this Colloquium implies, however, there is another dimension to access to justice: the ability of litigants to obtain justice through affirmative rights enforcement. And as various barriers have arisen to affirmative litigation, it is hard to deny that we live in an era of contracting civil liability.⁴

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1. In 2015, then-Chief Judge Lippman announced that he had created a Permanent Commission on Access to Justice. See *Permanent Commission on Access to Justice*, N.Y. ST. UNIFIED CT. SYS., <https://www.nycourts.gov/accesstojusticecommission/> [http://perma.cc/F3TM-VDGN] (last visited Mar. 15, 2018).

2. *Access to Justice*, U.S. DEP’T JUST., <https://www.justice.gov/atj> [http://perma.cc/ZJ4E-HSQV] (last visited Mar. 15, 2018).

3. NAT’L CTR. FOR ACCESS TO JUSTICE, <http://ncforaj.org/> [http://perma.cc/QX3J-2JHT] (last visited Mar. 15, 2018).

4. Many of the participants in this Colloquium have documented this trend. See, e.g., Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 377; J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1161–75 (2012); Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 251 (2007); Suja A. Thomas,

The focus of this brief Article will be on a conundrum, particularly in the area of civil rights enforcement: the federal government—in particular the DOJ—can be one of the most efficient and powerful vindicators of civil rights, while at the same time one of the most effective advocates for imposing barriers to affirmative civil rights enforcement. At the same time that the DOJ's Civil Rights Division (CRD) is entering federal court to “vindicat[e] rights and remedy[] inequities,”⁵ attorneys in the Civil Division (either from Main Justice or in any number of U.S. Attorney's offices) are appearing in court to prevent the same.⁶ No doubt the same observation applies to certain state governments that have active affirmative civil rights enforcement bodies while also maintaining well-resourced defensive litigation bureaus.

For my purposes, this observation has important consequences. It might bear on the professional obligations of the government attorney who appears in a defensive posture, a topic that Bruce Green and others have addressed in many thoughtful articles.⁷ I will address some potential ethical implications toward the end of this Article, but it is not my principal focus because I am not convinced that that is where the solution lies. Instead, I want to concentrate on what the observation means for executive branch law enforcement priorities, how the dynamic impacts broad access-to-justice concerns, and the implications for institutional design.

I am going to try to do so in four parts. First, this Article contrasts agenda setting in defensive bureaus with agenda setting in the affirmative posture.

The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly, 14 LEWIS & CLARK L. REV. 15, 16–18 (2010); Michael L. Wells, *Constitutional Remedies: Reconciling Official Immunity with the Vindication of Rights*, 88 ST. JOHN'S L. REV. 713, 759 (2014).

5. Vanita Gupta, Head of the Civil Rights Div. of the Dep't of Justice, Remarks at the National Legal Aid and Defender Association Annual Conference (Nov. 10, 2016), <https://www.justice.gov/opa/speech/head-civil-rights-division-vanita-gupta-delivers-remarks-national-legal-aid-defender> [http://perma.cc/DS95-2244].

6. See Barbara Allen Babcock, *Defending the Government: Justice and the Civil Division*, 23 J. MARSHALL L. REV. 181, 182 (1990) (explaining that the Civil Division “was established in 1868 to handle claims against the government—which in a broad sense it still does”).

7. See, e.g., Steven K. Berenson, *Hard Bargaining on Behalf of the Government Tortfeasor: A Study in Governmental Lawyer Ethics*, 56 CASE W. RES. L. REV. 345, 356 (2005); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 840 (2000); Steven K. Berenson, *The Duty Defined: Specific Obligations That Follow from Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 BRANDEIS L.J. 13, 15 (2003); Paul Figley, *Ethical Intersections & the Federal Tort Claim Act: An Approach for Government Attorneys*, 8 U. ST. THOMAS L.J. 347, 357 (2011); Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 267–70 (2000); Geoffrey C. Hazard, Jr., *Conflicts of Interest in Representation of Public Agencies in Civil Matters*, 9 WIDENER J. PUB. L. 211, 221 (2000); Daniel S. Jacobs, *The Role of the Federal Government in Defending Public Interest Litigation*, 44 SANTA CLARA L. REV. 1, 44–48 (2003); Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 951 (1991); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1296–97 (1987); Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269, 272 (1999).

Part I compares the defensive positions taken in two extremely similar cases—*Ashcroft v. Iqbal*⁸ and *Ziglar v. Abbasi*⁹—that were litigated by the DOJ across two different presidential administrations. This is to help illustrate (admittedly by anecdote) that, even while affirmative enforcement priorities can change significantly from one administration to the other, defensive litigating positions can remain remarkably stable.

Parts II and III turn to showing what consequences this has in the context of civil rights enforcement. Part II starts with the DOJ’s affirmative bureaus themselves, with a focus on the CRD. The goal is to show that the defensive bureaus impact the work of the CRD in at least two ways: (1) by channeling enforcement priorities into areas that will not conflict with defensive litigating positions and (2) by making affirmative enforcement priorities more difficult to secure through the spread of transsubstantive doctrine that suppresses rights enforcement, even in the areas in which there are no conflicts with defensive positions. Part III moves beyond the direct impact on CRD because defensive litigation positions taken by the DOJ can also suppress affirmative rights enforcement by “private attorneys general,” enforcement that nonetheless is consistent with the affirmative priorities of Main Justice. Finally, Part IV offers some thoughts on what lessons we might draw from these observations. For the most part, I devote my attention to how institutional design might ameliorate the tensions I identify in this Article.

I. THE PERSISTENCE OF DEFENSIVE AGENDAS ACROSS ADMINISTRATION THROUGH THE LENS OF *IQBAL* AND *ZIGLAR*

Much ink has been spilled on the role that affirmative enforcers have played in the DOJ and how a new executive branch can set new agendas.¹⁰ And some enforcement areas have significant access-to-justice implications, such as affirmative enforcement of civil rights through the CRD or similar state enforcement bodies. As one example, it is no surprise that over time there are significant differences between CRD’s work in Republican and Democratic administrations.¹¹ Along the same lines, it is taken as a given

8. 556 U.S. 662 (2009).

9. 137 S. Ct. 1843 (2017).

10. See, e.g., Margaret H. Lemos, *Democratic Enforcement?: Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 973–74 (2017) (summarizing literature).

11. See, e.g., Samuel R. Bagenstos, *Civil Rights Déjà Vu, Only Worse*, AM. PROSPECT (Dec. 12, 2016), <http://prospect.org/article/civil-rights-d%C3%A9j%C3%A0-vu-only-worse> [<https://perma.cc/VW3K-H7KW>]; see also Jennifer Nou, *Sub-Regulating Elections*, 2013 SUP. CT. REV. 135, 170 (summarizing reports of political decision-making within the Bush and Obama CRDs). Although unusual, there also can be conflict within the same administration, as when the DOJ recently filed an amicus brief in a case involving discrimination on the basis of sexuality in which it stated that the EEOC, which had filed a brief taking the opposite position, was “not speaking for the United States.” Brief for the United States as Amicus Curiae at 1, *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775), 2017 WL 3277292, at *1.

that prosecutorial decisions and priorities will change from administration to administration, sometimes profoundly.¹²

Thus, although the scholarship regarding prosecutorial priorities, affirmative litigation, and high-level departmental priorities for agencies such as the DOJ is rich and deep, scholars have for the most part failed to consider the role of the defensive bureaus present in entities like the DOJ. The literature has generally overlooked the work of lawyers who defend against Federal Tort Claims Act lawsuits, *Bivens* suits, and the like. Other than work regarding high-visibility decisions to defend (or not) particular laws from constitutional challenge,¹³ the role of defensive bureaus and the lawyers who staff them has been underexamined, even though the work of the defensive bureaus vastly exceeds that of entities like CRD.

Although affirmative enforcement priorities may shift from one administration to another, this Part exposes how defensive litigating positions are far less likely to do the same. This is illustrated through two concrete examples—the government’s litigating positions in *Iqbal* and *Ziglar*, two important Supreme Court cases that nearly book-end President Obama’s time in office. The first, *Iqbal*, argued in December 2008 and decided in May 2009, involved claims of abuse by pretrial detainees held in federal custody in Brooklyn, New York, during the investigation of the September 11 attacks.¹⁴ *Ziglar*, argued in January 2017 and decided in June 2017, involved nearly identical claims brought by immigration detainees.¹⁵ In the interest of full disclosure, I was lead counsel in the *Iqbal* case, from its inception until the case concluded; and I was one of the attorneys who represented the plaintiffs in *Ziglar* when the case reached the U.S. Supreme Court. In both cases, the Supreme Court rejected the plaintiffs’ claims. In *Iqbal*, the Court rested on pleading grounds, while in *Ziglar* the Court relied on *Bivens* doctrine¹⁶ and qualified immunity. And both cases have significant access-to-justice implications beyond their context.

12. See generally Rachel E. Barkow & Mark Osler, *Designed to Fail: The President’s Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387 (2017).

13. See, e.g., Sanford Levinson, *Identifying the Compelling State Interest: On “Due Process of Lawmaking” and the Professional Responsibility of the Public Lawyer*, 45 HASTINGS L.J. 1035, 1044–45 (1994); Daniel J. Meltzer, Lecture, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1187 (2012) (questioning the “regime in which each administration views itself as having significant latitude to refuse to enforce and defend acts of Congress”); Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 215–16 (2014); see also Carlos A. Ball, *When May a President Refuse to Defend a Statute?: The Obama Administration and DOMA*, 106 NW. U. L. REV. COLLOQUY 77, 77 n.1 (2011); Charles Fried, *The Solicitor General’s Office, Tradition, and Conviction*, 81 FORDHAM L. REV. 549, 549 (2012) (criticizing the Obama administration’s decision to abandon its defense of DOMA).

14. See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

15. See generally *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

16. See generally *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). For a summary and critique of recent trends in the doctrine, see generally Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens after Minneci*, 90 WASH. U. L. REV. 1473 (2013).

Both cases serve as useful points of comparison for the role that administrative change may (or may not) play in agenda setting by the DOJ's defensive bureaus. *Iqbal* was litigated during the administration of President George W. Bush. Every significant legal argument in the case was made by lawyers within the Bush administration's DOJ. *Ziglar* was litigated after the decision in *Iqbal*, with every significant legal argument made by lawyers within the Obama administration's DOJ.¹⁷

Nonetheless, the legal arguments advanced in each case were barely distinguishable. If anything, the lawyers within the Obama administration made arguments that could be said to be more aggressive in terms of their impact on access to justice in civil rights actions. In *Iqbal*, for example, defendants Ashcroft and Mueller focused most of their attention in the lower courts on qualified immunity, arguing that in the chaos surrounding the September 11 attacks and the ensuing investigation, it was not "clearly established" that constitutional law prohibiting discrimination and the like applied to the treatment of the plaintiffs.¹⁸ The argument, reduced to its basics, was that the context of September 11 and the ensuing investigation were so unique that law that had been well established up until September 11, 2001, became murky on September 12.

The Court's decision in *Bell Atlantic Corp. v. Twombly*¹⁹ shifted the landscape of the argument in *Iqbal*. Announced after the Second Circuit heard oral argument in *Iqbal*, *Twombly* suggested that the pleading standard of Rule 8 of the Federal Rules of Civil Procedure had changed, which created space for defendants to argue that a complaint should be dismissed if it did not state a "plausible" claim for relief.²⁰ The United States had supported this position as amicus curiae in *Twombly*,²¹ and the DOJ lawyers in *Iqbal* shifted gears once *Twombly* was decided.²² After the Second Circuit rejected the government's arguments regarding qualified immunity, it distinguished *Twombly* and held that the plaintiffs' complaint was sufficient even under the plausibility standard.²³ Up until that point, the heart of the defendants' argument had been focused on qualified immunity, not pleading. But with the decision in *Twombly* and the Solicitor General's decision to file a

17. In both cases, although some of the defendants were represented by private counsel, the highest-level defendants, as well as the United States, were represented by the DOJ.

18. See, e.g., Reply Memorandum of Law in Support of Motion to Dismiss the Claims Against Attorney General John Ashcroft in His Individual Capacity at 3–5, *Elmaghraby v. Ashcroft*, No. 04 Civ. 1809, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005).

19. 550 U.S. 544 (2007).

20. *Id.* at 555–56.

21. See generally Brief for the United States as Amicus Curiae Supporting Petitioners, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2482696.

22. The story is slightly more complex than this. Certiorari had been granted in *Twombly* by the time oral argument was heard in *Iqbal*. During oral argument, the Second Circuit asked the parties to submit letter briefs as to whether they expected the pending decision in *Twombly* to have an impact on the Second Circuit's resolution of *Iqbal*. Plaintiffs and the DOJ lawyers representing Ashcroft and Mueller agreed that they did not expect *Twombly* to have an impact, no matter how it was resolved.

23. *Iqbal v. Hasty*, 490 F.3d 143, 157–59 (2d Cir. 2007).

certiorari petition in *Iqbal*, the defendants abandoned their qualified immunity arguments and turned entirely to pleading.

But even in making their pleading arguments, the Solicitor General's office under President Bush construed them narrowly. As with its qualified immunity arguments in the lower courts, the government argued that in a case like *Iqbal*—that is, one involving the confluence of national security, high-level officials, and qualified immunity—the pleading standard should be stricter than is typically expected.²⁴ The government refrained from making the novel qualified immunity argument it had raised below and never argued that there was no *Bivens* remedy available for allegations like the plaintiffs'.

The Court's decision in *Iqbal* gave the defendants more than they asked for. Implicitly rejecting the defendants' argument that pleading standards should depend on whether the case involves high-level officials in a national security context, the Court made clear that *Twombly*'s plausibility pleading standard applied across the board, even if applying it required cognizance of the substantive legal context of a particular case.²⁵ Even though the government had never quarreled with the plaintiff's theory of supervisory liability (based on well-worn Second Circuit case law),²⁶ the Court *sua sponte* decided that a heightened level of liability (intentionality rather than recklessness) was appropriate when suing supervisors, at least in cases involving equal protection claims.²⁷ Finally, the Court invited district courts to apply their "judicial experience and common sense" to resolve pleading disputes, even when doing so might require substituting unsworn assertions in a defendant's brief for allegations in a plaintiff's complaint.²⁸

Each of these holdings has significant access-to-justice implications, which I and others have documented in other writings.²⁹ But the aspect of this story that I want to emphasize is not necessarily that *Iqbal* itself had access-to-justice implications, but that it went beyond the (arguably) narrow confines of the arguments put forward by the Bush-era DOJ lawyers who litigated the case on behalf of defendants Ashcroft and Mueller.

This sets the table for a consideration of the arguments raised in *Ziglar*, a case that, by the time it reached the Supreme Court, had been litigated entirely by the Obama administration's DOJ. *Ziglar* came to the Court in a similar posture as did *Iqbal*, with the Second Circuit having rejected most of the defendants' arguments for dismissing the case.³⁰ And on certiorari, the

24. Brief for Petitioners at 11–13, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (No. 07-1015), 2008 WL 4063957, at *11–13.

25. *Iqbal*, 556 U.S. at 678–79.

26. See *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (outlining the myriad ways a "supervisory defendant" may be liable).

27. *Iqbal*, 556 U.S. at 676–77.

28. *Id.* at 679.

29. See generally Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015) [hereinafter Reinert, *Plausibility Pleading*]; Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011).

30. *Turkmen v. Hasty*, 789 F.3d 218, 301–02 (2d Cir. 2015), *rev'd sub nom. Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

Solicitor General's office was arguably more aggressive in defending against the litigation than it had been in *Iqbal*.

The defense lawyers in *Ziglar* raised not only pleading, resting heavily on the Court's decision in *Iqbal*, but also made two other arguments with quite stark access-to-justice consequences. First, the Solicitor General's office argued that there should not even be a *Bivens* damages remedy for the kinds of allegations of abuse and mistreatment alleged by the plaintiffs in *Ziglar*.³¹ This argument was certainly available to the defendants when *Iqbal* was litigated, yet at no point was it raised in briefs at any level of the proceeding. Second, the Obama Solicitor General's office argued that there should be qualified immunity (an argument that was essentially abandoned by the time the case reached the Court in *Iqbal*) for reasons that, if accepted, could resonate beyond the *Bivens* context to § 1983 and the like.³²

For the most part, the government's arguments prevailed in the Court. Most dramatically, the Court issued a decision on *Bivens* remedies that already is resonating in every *Bivens* case being heard in the lower courts.³³ As Justice Breyer argued in dissent, the majority's opinion was comparable to setting fire to one's house to escape the cold.³⁴

A natural inquiry, at this stage, is where this takes us and why. The attorneys in both *Iqbal* and *Twombly* were making arguments to protect their individual clients; these were, perhaps, the best arguments that could be made given the law. Some have argued that government lawyers defending civil cases are obliged to behave precisely in this way—to make the best arguments on the facts and law in every case.³⁵

But this, perhaps, is precisely the point. Absent intervention, we should not expect the mission or agendas of defensive bureaus sited in government agencies to change from one administration to the next. As opposed to affirmative enforcers who can choose which cases to take and which legal theories to push or not, defensive bureaus take what they are given and make the arguments they can. They likely feel their strongest obligation is to their clients, often individual officers accused of misconduct (or sometimes even the federal government itself, potentially on the hook for misconduct through its application of the Federal Tort Claims Act). The larger issue is not whether the arguments made by the attorneys in *Ziglar* or *Iqbal* were

31. Brief for Petitioners at 14, *Ziglar*, 137 S. Ct. 1843 (No. 15-1359), 2016 WL 6873020, at *14.

32. *Id.* at 14–16; see 42 U.S.C. § 1983 (2012).

33. *Ziglar*, 137 S. Ct. at 1854–64. Since *Ziglar*, every Court of Appeals to consider whether to extend *Bivens* to a new context has declined to do so. See *Doe v. Hagenbeck*, 870 F.3d 36, 44 (2d Cir. 2017); *Vanderklok v. United States*, 868 F.3d 189, 199 (3d Cir. 2017); *González v. Vélez*, 864 F.3d 45, 55–56 (1st Cir. 2017).

34. *Ziglar*, 137 S. Ct. at 1884 (Breyer, J., dissenting) (“If you are cold, put on a sweater, perhaps an overcoat, perhaps also turn up the heat, but do not set fire to the house.”).

35. See *supra* note 7 and accompanying text. This is not to say that the matter is beyond dispute. See, e.g., Matthew Windsor, *(Pro)motion to Dismiss?: Constitutional Tort Litigation and Threshold Failure in the War on Terror*, 1 BRIT. J. AM. LEGAL STUD. 241, 256 (2012) (“In short, by facilitating threshold failure, government lawyers become complicit with their clients in the administration in cutting off processes of public proof and accountability.”); see also Green, *supra* note 7, at 239–40.

appropriate. The issue is what impact defensive litigators might have on access to justice and how that will affect affirmative rights enforcers both within and without the government.

II. IMPACT OF DEFENSIVE LITIGATION DECISIONS WITHIN THE DOJ

This Part shows that affirmative rights enforcers within the DOJ can be undermined by defensive litigation bureaus. This Part focuses on the CRD, where the tension might be most salient. Part II.A suggests that the CRD has historically shied away from taking positions that would jeopardize the ability of defensive bureaus to defend federal employees and agencies. Second, Part II.B. demonstrates how arguments made by defensive bureaus directly undermine litigation positions taken by the CRD.

A. *Relationship Between Defensive Bureaus and Affirmative Enforcement Decisions*

The DOJ's CRD is rightly renowned for its aggressive enforcement, especially during the Obama administration. It focuses its sights on police departments, local jails, and the like. When it enters the fray, it typically is able to secure consent decrees that are broader and longer lasting than those obtained through litigation by NGOs and private civil rights lawyers.

But there is ample evidence that the affirmative enforcement decisions of the CRD are made conscious of the posture of the defensive bureaus. For example, at the same time that CRD was aggressively seeking to intervene in local law enforcement practices and cases involving conditions of confinement for people in jails and prisons, there was widespread litigation and advocacy regarding the overuse and harms of solitary confinement throughout federal and state prisons.³⁶ The CRD never intervened or filed a

36. See Reuven Blau & Stephen Rex Brown, *Number of Rikers Island Inmates Placed in Solitary Confinement Shrinks to Just 1.7% of City Jail Population*, N.Y. DAILY NEWS (Apr. 21, 2016, 12:01 PM), <http://www.nydailynews.com/new-york/rikers-island-solitary-population-drops-167-inmates-article-1.2609868> [https://perma.cc/H6U2-NJQY] (reporting on changes to rules in Rikers Island to reduce use of solitary confinement); Tim Hull, *Arizona Agrees to Fix Prison Health System*, COURTHOUSE NEWS SERV. (Oct. 14, 2014), <https://www.courthousenews.com/arizona-agrees-tofix-prison-health-system/> [https://perma.cc/HHR5-9SYC] (reporting a settlement in Arizona); Randall Pinkston & Phil Hirschhorn, *Mississippi Rethinks Solitary Confinement*, CBS NEWS (May 18, 2013, 9:13 PM), <https://www.cbsnews.com/news/mississippi-rethinks-solitary-confinement/> [https://perma.cc/N9N7-85EJ] (reporting a settlement in Mississippi); Rick Raemisch, *Why We Ended Long-Term Solitary Confinement in Colorado*, N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/opinion/solitary-confinement-colorado-prison.html> [https://perma.cc/Q7E9-YJVK] (announcing end to long-term solitary confinement in Colorado state prisons in an editorial by the executive director of Colorado Department of Corrections); Michael Schwartz & Michael Winerip, *New York State Agrees to Overhaul Solitary Confinement in Prisons*, N.Y. TIMES (Dec. 16, 2015), <https://www.nytimes.com/2015/12/17/nyregion/new-york-state-agrees-to-overhaul-solitary-confinement-in-prisons.html> [https://perma.cc/7LHP-56PK] (reporting a New York State settlement); Paige St. John, *California Agrees to Move Thousands of Inmates out of Solitary Confinement*, L.A. TIMES (Sept. 1, 2015, 8:09 PM),

statement of interest in any case seeking to reform the use of extreme isolation in jails and prisons. Even if CRD had been interested in doing so,³⁷ any action in the area of solitary confinement would have created tension with the Bureau of Prisons (BOP), which operates one of the most dehumanizing units for extreme isolation at a federal prison in Florence, Colorado.³⁸ Indeed, CRD has never intervened or sought to investigate conditions of confinement or the use of solitary confinement as part of its civil rights enforcement authority. Nor has it ever investigated conditions of confinement for immigration detainees, which would inevitably ensnare them in a conflict with ICE.

The evidence suggests that CRD limits its involvement to challenging law enforcement practices that are inconsistent with the best practices of federal law enforcement personnel. As one example, from 2010 to 2011, the BOP announced a change to its policy by which it provided medical treatment to transgender prisoners diagnosed with gender dysphoria held in BOP custody.³⁹ It announced that it would no longer follow a so-called “freeze-frame” policy, in which hormone treatment for any person with gender dysphoria is kept frozen at the level provided at the time he or she entered the federal prison system.⁴⁰ This freed up the CRD to file a Statement of Interest in February 2015, which argued that a “freeze-frame” policy used by the Georgia Department of Corrections was unconstitutional.⁴¹ In the statement, the CRD made specific reference to the BOP’s policy regarding the treatment of transgender prisoners, acknowledging that the BOP had changed its policy in response to litigation.⁴² To my knowledge, this was the first time that the CRD had asserted its enforcement power in a case involving the treatment of transgender prisoners.

B. How Defensive Litigation Positions Undermine CRD’s Existing Affirmative Enforcement Priorities

While affirmative arms of the DOJ appear to have steered clear of taking legal positions that would jeopardize the defensive bureaus, the same cannot be said for the defensive bureaus’ regard for the constraints on affirmative

me-ln-california-will-move-thousands-of-inmates-out-of-solitary-20150901-story.html [https://perma.cc/M2H8-E525] (reporting a settlement in California).

37. See 42 U.S.C. § 1997 (1980).

38. The Florence ADX is where some of the BOP’s most infamous prisoners are housed and has been the subject of lawsuits and media coverage regarding the extreme conditions found there. See Mark Binelli, *Inside America’s Toughest Federal Prison*, N.Y. TIMES (Mar. 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/inside-americas-toughest-federal-prison.html> [https://perma.cc/9G6G-NSHJ].

39. See Memorandum from Newton E. Kendig & Charles E. Samuels Jr. to Chief Exec. Officers (May 31, 2011), http://www.governmentattic.org/8docs/BOP-GID-Memos_2010-2011.pdf [https://perma.cc/VP85-ABJL]; Memorandum from Newton E. Kendig & D. Scott Dodrill to Chief Exec. Officers (June 15, 2010), http://www.governmentattic.org/8docs/BOP-GID-Memos_2010-2011.pdf [https://perma.cc/VP85-ABJL].

40. See *supra* note 7 and accompanying text.

41. See Statement of Interest of the United States at 1, *Diamond v. Owens*, 131 F. Supp. 3d 1346 (M.D. Ga. 2015) (No. 15 Civ. 50).

42. See *id.* at 17.

enforcement arms of the DOJ. Take pleading doctrine, for example. Since *Iqbal*, defensive bureaus have aggressively pushed to expand the barriers posed by the plausibility pleading doctrine, even though to do so could theoretically have a deleterious impact on the ability of affirmative enforcers to do their jobs.

Perhaps the most salient example can be found in issues relating to supervisory liability.⁴³ When federal officials are sued on a *Bivens* theory, it is now commonplace for DOJ lawyers defending the case to seek to extend *Iqbal*'s supervisory-liability holding by arguing that recovery against supervisory officials is only permissible when the officials themselves participate directly in the same constitutional misconduct that lower-level officials have engaged in.⁴⁴ In these cases, the defendants argue that a supervisor's knowledge of, and acquiescence in, a subordinate's wrongful conduct is *never* sufficient to hold a supervisor liable in a *Bivens* action.⁴⁵ Although courts do not always take up the invitation to resolve the issue,⁴⁶ the position taken by the defensive bureau, in service of its individual clients, is in substantial tension with the affirmative enforcement position of the CRD.⁴⁷

The CRD, contrary to the government lawyers defending supervisory liability claims in *Bivens* cases, has historically taken a position that seeks to limit the reach of *Iqbal*'s supervisory-liability holding. This can be seen in the CRD's own affirmative litigation enforcing constitutional rights, its amicus briefs in support of civil rights plaintiffs, and its prelitigation investigations of allegations of constitutional violations by state and municipal agencies. In almost all actions instituted by the CRD pursuant to its civil rights enforcement authority, the United States has explicitly relied on, among other things, allegations of supervisory involvement identical to those it derides as legally insufficient when defending *Bivens* claims.⁴⁸

43. The Court in *Iqbal* termed "supervisory liability" a "misnomer" while simultaneously stating that individuals can be liable for violating their "superintendent responsibilities." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009).

44. Brief for Appellants at 18, *Argueta v. U.S. Immigration & Customs Enf't*, 643 F. 3d 60 (3d Cir. 2010) (No. 10-1479), 2010 WL 4469175, at *18 (insisting that plaintiffs allege that the defendants themselves "searched or seized . . . the plaintiffs or participated in or planned" the allegedly unconstitutional home raids).

45. *Id.* at 17, 24.

46. *Argueta*, 643 F.3d at 70 (declining to decide the supervisory-liability standard).

47. In the interest of full disclosure, I authored an amicus brief in *Argueta* that identified the tension. See generally Brief for Public Justice et al. as Amici Curiae Supporting Plaintiffs-Appellees, *Argueta*, 643 F. 3d 60 (No. 08-cv-1652), 2010 WL 5558358.

48. See Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 17, *United States v. Arizona*, No. 97-476 (D. Ariz. May 15, 2007), <https://www.clearinghouse.net/chDocs/public/PC-AZ-0002-0004.pdf>

[<https://perma.cc/K69U-HDBE>] (relying on a theory of supervisory liability where the defendants failed to provide adequate training and investigation of sexual misconduct by staff); Complaint para. 16, *United States v. Nassau County*, No. 2:01-2382 (E.D.N.Y. dismissed Jan. 1, 2002), <https://www.clearinghouse.net/chDocs/public/JC-NY-0010-0001.pdf> [<http://perma.cc/WK27-DJ8Y>] (alleging that defendants violated the Eighth and Fourteenth Amendments by "tolerat[ing] and condon[ing] the use of excessive force against" detainees, failing to train and supervise, failing to maintain adequate policies, failing to adequately investigate complaints, and failing to discipline errant staff); Complaint para. 14, *United States*

The United States' affirmative litigating position did not change with the announcement of *Iqbal*. When required to by district courts, the United States includes supervisory-liability allegations that are based on the same theory that the DOJ argues is insufficient in defending *Bivens* claims.⁴⁹

Even when the United States has not been a formal litigant, the CRD has consistently taken a position at odds with that of the DOJ in *Bivens* cases. In the Ninth Circuit, the CRD filed an amicus brief arguing that a district court improperly granted judgment as a matter of law on punitive damages, in part arguing that punitive damages, like supervisory liability, was necessary to ensure adequate enforcement of civil rights laws.⁵⁰ Indeed, the CRD drew a useful comparison between punitive damages and supervisory liability, and it urged a standard for supervisory liability that is far broader than the position taken by the DOJ in its defensive posture.⁵¹

In so doing, the United States favorably cited the pre-*Iqbal* supervisory liability standard from the First Circuit, in which that court applied a deliberate indifference standard for supervisory liability in police misconduct. The Ninth Circuit ultimately agreed with the United States' position. Indeed, the Ninth Circuit held that a defendant's "reckless indifference" was sufficient to entitle a plaintiff to punitive damages, and that a plaintiff could show such indifference by demonstrating that the defendant knew of unlawful conduct by subordinates and failed to take any action.⁵²

Plaintiff-friendly theories of supervisory liability are important to the CRD's affirmative enforcement priorities. On many occasions, the CRD has clearly articulated the importance of supervisory oversight of governmental

v. Columbus Consol. City/Cty. Gov't, No. 99-cv-00132-HL (M.D. Ga. dismissed Sept. 30, 1999), <https://www.clearinghouse.net/chDocs/public/JC-GA-0003-0002.pdf> [<https://perma.cc/2E7K-MCTL>] (seeking relief for violations of the Constitution caused by the supervisory-defendants' failure to provide "adequate staffing and staff training, and fail[ure] to develop and implement appropriate policies and procedures to safely operate the Jail"); *see also* Third Amended Complaint para. 28, *Johnson v. Insley*, No. 87-369-Civ-T-10A (M.D. Fla. Dec. 14, 1988), <https://www.clearinghouse.net/chDocs/public/MH-FL-0001-0009.pdf> [<https://perma.cc/9DCX-RFH9>] (alleging that supervisors violated substantive due process by failing to protect hospital patients from harm by failing to supervise staff, and failing to investigate abuse).

49. *See* Amended Complaint para. 21, *United States v. Erie County*, No. 09-CV-0849 (W.D.N.Y. July 23, 2010), <https://www.clearinghouse.net/chDocs/public/JC-NY-0059-0006.pdf> [<https://perma.cc/A8GM-SK8Q>] (alleging that defendants knew of serious risks of harm to detainees); *id.* para. 22 (alleging that defendants "have repeatedly failed to take reasonable measures to prevent staff from inflicting serious harm on inmates"); *id.* paras. 23, 27, 31, 35 (alleging that subordinates' unconstitutional conduct was caused by supervisors' "failure to adopt policies necessary to prevent [such] violations"); *id.* paras. 24, 28, 32, 36 (failure-to-train allegations); *id.* paras. 25, 29, 33, 37 (allegations of failure to discipline or supervise).

50. *See generally* Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants/Cross-Appellees, *Reed v. Penasquitos Casablanca Owner's Ass'n*, 381 Fed. App'x 674 (9th Cir. 2010) (No. 08-55151), 2009 WL 2824432.

51. *See* Brief for Public Justice et al. as Amici Curiae Supporting Plaintiffs-Appellees, *supra* note 47, at 27-28 (citing law indicating that under 42 U.S.C. § 1983, "supervisory inaction" can be reckless where defendant failed to act on knowledge of illegality").

52. *Id.* at 27.

agency operations and staff to preventing constitutional violations by line officers. When such violations occur in a recurrent or systematic way, improved supervision is almost always an essential component of an effective remedy. This connection is drawn quite explicitly by the CRD in its prelitigation letters to state and local governmental agencies, which present the CRD's findings regarding the prevalence of constitutional violations and its recommendations for preventing their recurrence. Thus, when investigating the Mercer County Geriatric Center in New Jersey, the CRD found widespread constitutional violations and recommended, among other remedial measures, meaningful training, investigation, and follow-up of incidents of abuse.⁵³ As the CRD observed when investigating the Virgin Islands Police Department, “[p]olicies and procedures are the primary means by which police departments communicate their standards and expectations to their officers,”⁵⁴ and thus supervisory oversight and training is essential to remedying constitutional misconduct.⁵⁵

53. See Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., to Robert D. Prunetti, Mercer Cty. Exec. (Oct. 9, 2002), <https://www.justice.gov/crt/findings-letter-mercercounty-geriatric-center> [<http://perma.cc/5VTJ-W2KM>]. The CRD similarly drew a link between inadequate supervision and unconstitutional conduct when investigating a Woodbridge, New Jersey, facility. See Letter from Alexander Acosta, Assistant Attorney Gen., to Hon. James E. McGreevey, Governor of N.J. 3, 34–36 (Nov. 12, 2004), <https://www.clearinghouse.net/chDocs/public/ID-NJ-0004-0001.pdf> [<http://perma.cc/6MVQ-4DUA>] (detailing minimal supervision and training remedies to prevent unconstitutional harm at the Woodbridge Developmental Center); see also Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., to Hon. James E. McGreevey, Governor of N.J. 5 (Apr. 8, 2003), https://www.justice.gov/sites/default/files/crt/legacy/2011/04/14/newlisbon_finding_letter.pdf [<http://perma.cc/7SKG-4TK2>] (identifying lack of staff training and incident reporting as one cause of unconstitutional failure to protect from harm at the New Lisbon Developmental Center); Letter from Thomas E. Perez, Assistant Attorney Gen., to Hon. Jack Markell, Governor of Del. 14 (Nov. 9, 2010), https://www.ada.gov/olmstead/documents/delaware_findings.pdf [<https://perma.cc/FEZ8-3P3V>] (criticizing the lack of investigation of incidents of abuse and the lack of interventions to “minimize or eliminate risks of harm” at the Delaware Psychiatric Center).

54. Letter from Shanetta Y. Cutlar, Chief of the Special Litig. Unit of the Dep’t of Justice, to Kerry Drue, Attorney Gen. et al. 2 (Oct. 5, 2005), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/virgin_island_pd_talet_10-5-05.pdf [<https://perma.cc/R27R-DN8R>].

55. *Id.* at 22–27; see also Letter from Loretta King, Acting Assistant Attorney Gen., to Hon. Chris Collins, Erie Cty. Exec. 41 (July 15, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/Erie_findlet_redact_07-15-09.pdf [<http://perma.cc/39SE-E9NU>] (recommending oversight and training on use of force at Erie County Holding Center and Erie County Correctional Facility); Letter from Loretta King, Acting Assistant Attorney Gen. of the Civil Rights Div., to Marlin N. Gusman, Orleans Parish Criminal Sheriff 5–6, 9–10, 24–25 (Sept. 11, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/parish_findlet.pdf [<https://perma.cc/HLA8-EPE9>] (providing recommendations on oversight remedies to prevent excessive use of force at Orleans Parish Prison); Letter from Loretta King, Acting Assistant Attorney Gen. et al., to Raymond P. Fitzpatrick, Jr. 5, 17, 18, 30 (June 9, 2009), <https://www.clearinghouse.net/chDocs/public/PN-NY-0041-0001.pdf> [<http://perma.cc/Q4UE-EPPB>]; Letter from Thomas E. Perez, Assistant Attorney Gen. and Preet Bharara, U.S. Attorney for the S. Dist. of N.Y., to Hon. Andrew J. Spano, Westchester Cty. Exec. 7, 32–35 (Nov. 19, 2009) https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/Westchester_findlet_11-19-09.pdf [<https://perma.cc/S346-BM62>] (detailing recommendations regarding changes in supervision necessary to prevent unconstitutional uses of force and describing supervisory oversight as critical to ensure that

It would not be hard to find similar examples of tension between the positions taken by the DOJ in a defensive posture and the positions taken by the United States in an affirmative litigation position. For example, arguments regarding pleading doctrine made from a defensive posture will be in direct tension with the kinds of arguments that a plaintiff might make. And while the federal government might worry less than the typical plaintiff about meeting higher pleading standards,⁵⁶ this does not dissolve the potential for tension.

The bottom line is not to police the kinds of arguments made by the government in a defensive posture—at least not yet—but merely to observe that even though affirmative litigation units have ample resources to achieve enforcement priorities, they can be undermined by their colleagues who wear different hats and are pursuing different agendas.

III. IMPACT OF DEFENSIVE AGENDA SETTING ON PRIVATE ATTORNEYS GENERAL

Affirmative enforcement of civil rights is not done primarily by the federal government. Most cases are brought by “private attorneys general.” Indeed, the government expects and hopes that most affirmative rights enforcement will be accomplished this way because affirmative enforcement bureaus cannot intervene in every case in which there is a potential civil rights violation. But despite the symbiotic relationship between private enforcers and governmental enforcers, the arguments made by defensive bureaus naturally interfere with private civil rights enforcement.

The impact of the defensive bureaus stretches beyond similar cases in which federal officials or entities bear the risk of loss. Take qualified immunity, for example, where some of the most significant decisions have arisen in the context of federal officials. The lineage starts with *Harlow v. Fitzgerald*,⁵⁷ which made qualified immunity an objective test and thereby made it easier to dismiss claims on qualified immunity grounds.⁵⁸ It moves on to *Behrens v. Pelletier*,⁵⁹ which gives defendants multiple bites at the qualified immunity apple through interlocutory appeals.⁶⁰ More recently, *Ashcroft v. al-Kidd*⁶¹ made it clear that “all but the plainly incompetent” were protected by qualified immunity.⁶² And, most recently, there is *Ziglar*, discussed above.⁶³

In all of these cases, *Bivens* defendants successfully raised qualified immunity, but their success bleeds into similar cases brought against state

subordinates’ conduct is consistent with constitutional standards at the Westchester County Jail).

56. Reinert, *Plausibility Pleading*, *supra* note 29, at 2154–56 (presenting data suggesting that federal government was not adversely impacted by plausibility pleading standards).

57. 457 U.S. 800 (1982).

58. *Id.* at 819.

59. 516 U.S. 299 (1996).

60. *Id.* at 311.

61. 563 U.S. 731 (2011).

62. *Id.* at 743 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

63. *See supra* Part I.

and local officials. This is because the qualified immunity recognized in § 1983 has been construed to be identical to the scope of immunity applicable in *Bivens* claims. This can have an impact not only on the work of private attorneys general but also, by extension, on affirmative enforcement priorities of the federal government because private attorneys are expected to fill the substantial gaps in the work of the CRD in enforcing civil rights against state and local actors.

It is not hard to come up with other areas where positions taken by defensive bureaus within the state or federal government have access to justice implications for affirmative rights enforcers both within and without the government. For example, just as the defensive arguments made regarding supervisory liability in *Bivens* cases can impact the CRD's work directly, they likely have a greater impact on civil rights litigators bringing claims against state and local officials—claims that are in keeping with the CRD's mission but that the CRD cannot litigate themselves because of their limited bandwidth.

Ensuring that supervisors are liable for their constitutional violations has historically been important to meeting both goals of civil rights damages litigation. Where a plaintiff has suffered a distinct constitutional injury caused by the conduct of both direct participants and supervisory officials, compensation from all parties is just and sometimes necessary to ensure a complete remedy. For instance, when a direct officer has insufficient funds to fully compensate an injured plaintiff, a supervisor who is also culpable may be able to fill the gap. Moreover, there may be circumstances when line officers are not available to pay damages because, for example, they cannot be identified or because of a lack of indemnification, but supervisors are available to pay such damages.

Supervisors may also be more subject to the deterrent effect of individual liability and more important to deter, given their greater authority, greater institutional affiliation with their employing agencies, better access to information necessary to prevent constitutional violations, and responsibility to ensure that line-officer staff are properly trained and supervised.⁶⁴ Indeed, analogous to well-accepted principles of common law tort theory, supervisors are the “cheapest cost avoiders” in the constitutional tort context.⁶⁵

The importance of maintaining supervisory liability is reflected in the case law. Take as one example the well-documented problem of sexual abuse and rape in prisons.⁶⁶ Prisoners who have been victimized by such abuse often

64. See, e.g., *Butz v. Economou*, 438 U.S. 478, 505–06 (1978) (emphasizing the importance of liability for high-ranking officials).

65. Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972); Stephen G. Gilles, *Negligence, Strict Liability and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291, 1292 (1992); cf. Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1332 (1989) (“The most efficient method of discouraging sexual harassment may be by creating incentives for the employer to police the conduct of its supervisory employees, and this is done by making the employer liable.”).

66. See generally ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP’T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008–09 (2010), <https://www.bjs.gov/content/pub/pdf/svpjri0809.pdf> [<https://perma.cc/RJR7-T68Y>].

have limited remedies against the direct participants; if the direct participants are other detainees, they will likely be judgment proof, and if they are correction officers, they will almost certainly not be indemnified by their employing agencies.⁶⁷ Yet under the arguments made by the DOJ in numerous *Bivens* cases, even supervisors who know of and acquiesce in the rape of prisoners will not be held liable because they did not participate directly in the rape or its planning.⁶⁸

Even outside of the context of prison sexual-abuse cases, supervisory-liability claims have forced the exposure and examination—and, one can reasonably expect, the correction in many cases—of practices or omissions by higher-level officials that exposed prisoners to an excessive risk of harm. Thus, just as the defensive arguments made in the *Bivens* context can have significant implications for the work of the CRD, they also have the potential to interfere more broadly with civil rights enforcement outside of litigation that involves the federal government.

IV. RAMIFICATIONS OF RECOGNIZING THE AGENDA-SETTING ROLE OF THE DEFENSIVE GOVERNMENT LITIGATOR

Although affirmative enforcement priorities are expected to shift from one administration to the next, we also can expect that defensive priorities will remain static. If we could isolate one from the other, this would not raise the concerns I have identified here. But that is by its nature impossible in a legal regime in which doctrine, whether technically transsubstantive or not, cannot easily be cabined to one particular area, and where the government occupies litigating postures in the same area of law, such as civil rights or employment discrimination. As a result, defensive litigation positions can interfere with, and even overwhelm, affirmative enforcement priorities.

This concluding Part suggests some ramifications for the tension between defensive litigation and affirmative enforcement priorities. First, it is worth considering whether an answer is to be found in considering the professional obligations of government lawyers, and lawyers in defensive bureaus in particular. Most scholarship that has examined the ethics of government lawyers has focused on prosecutors, and even the minority of scholars who have considered the civil government litigator have not generally focused on

67. See, e.g., N.J. STAT. ANN. § 59:10-1 (West 2017) (stating that the state need not indemnify an employee who committed an “intentional wrong”); N.Y. PUB. OFF. LAW § 17 (McKinney 2017) (same).

68. See, e.g., *Mitchell v. Rappahannock Reg'l Jail Auth.*, 703 F. Supp. 2d 549, 559–60 (E.D. Va. 2010) (finding that a supervisor was not liable even when multiple instances of sexual assaults and “obsession” with a specific inmate by a line officer were known, but no steps were taken to intervene); *Hammond v. Gordon County*, 316 F. Supp. 2d 1262, 1288–90 (N.D. Ga. 2002) (holding that supervisors are not liable when supervisors provide no formal training to most subordinates concerning sexual harassment or proper contact with inmates, allowing subordinates “essentially [to do] as they please[,]” notwithstanding a history of complaints about staff sexual misconduct); *Peddle v. Sawyer*, 64 F. Supp. 2d 12, 18–19 (D. Conn. 1999) (finding that there is no liability even when supervisors know of an officer’s history of sexual abuse but nonetheless assign him to posts with “prolonged and unsupervised contact with female inmates, including the overnight shift in the sexual trauma unit”).

the tension identified here.⁶⁹ Instead, scholars have focused more on conflicts that might arise between agencies and their employees, or the validity of pursuing nonfrivolous—but losing—defenses.⁷⁰

If ethical obligations have something to say regarding this conundrum, I suspect it might be found in our understanding of the client in defensive litigation. If, for example, the client is—as some have argued—the “public” or the “common good,” or even the agency rather than the individual defendant,⁷¹ one could thread a needle, perhaps, to ensure that defensive litigators keep affirmative enforcement obligations in mind when deciding which arguments to raise (or reserve) in particular cases. But even if this were part of the answer, one cannot escape the fact that it requires a form of institutional design that permits the communication of priorities between affirmative and defensive bureaus, as well as a means to resolve conflicts when they arise.

Rachel Barkow and Mark William Osler came to similar conclusions when considering the Obama administration’s overall failure to meet the high expectations of criminal justice reform that accompanied his election.⁷² As Barkow and Osler describe it, because President Obama gave too much deference to the career prosecutors who occupy most (high- and low-level) positions in the DOJ, progressive goals to reduce incarceration and punitiveness in the federal system were stymied at every turn.⁷³ They proposed—in the form of advice to future administrations—designing institutions both within and without the DOJ to create more space for a fulsome discussion and consideration of reforms that career prosecutors would instinctively resist.⁷⁴

Returning to the topic of this Article, one could imagine, for instance, creating a “Civil Rights Protection Agency” which would exist outside of the DOJ and do all of the current work of the CRD, focused on rights violations caused by state and local governments, but also include within its purview advice and consultation with federal agencies. There would be costs to this—the CRD, situated as it is within the DOJ, might have a certain legitimacy and internal role that it would sacrifice were it placed outside of the DOJ.

Alternatively, the DOJ could more consciously consider when it was necessary for affirmative enforcement priorities to displace defensive agendas. This is not unheard of. In 2014, Attorney General Eric Holder

69. See *supra* note 7 and accompanying text.

70. Figley, *supra* note 7, at 371; Jacobs, *supra* note 7, at 1 (arguing for constraints on a government lawyer who is defending suits that seek remedies that benefit a broad class of persons rather than the individual plaintiff). Neither Jacobs nor Figley focuses on potential tensions arising between defensive posture and affirmative litigation.

71. See, e.g., Figley, *supra* note 7, at 372–74 (proposing guidelines for government attorneys defending FTCA claims based on the duty of a government lawyer to serve the “public interest”); Green, *supra* note 7, at 269–70 (arguing that even if an individual government official is a client, lawyer’s duties to the public are derivative of the official’s “fiduciary” duty to the public).

72. Barkow & Osler, *supra* note 12.

73. See generally *id.*

74. *Id.* at 457–58.

issued a memorandum stating that in any litigation that came before it, the DOJ would take the position that the protections afforded by Title VII would be extended to include a person's gender identity, including transgender status.⁷⁵ The federal government, as the nation's largest employer, would presumably be hard pressed to articulate a different position in a Title VII suit brought against a federal agency.

Perhaps the DOJ's Office of Access to Justice could be given a larger footprint to develop access-to-justice principles that would guide argumentation made in defensive and affirmative cases. To date, the agency has worked with the CRD to file amicus briefs or statements of interest in cases focused on criminal justice issues, mostly indigent defense and cash-bail systems in state and local governments.⁷⁶ The Office was instrumental in preparing a report to the White House on civil legal aid.⁷⁷ The Office could take on a broader portfolio that evaluates the impact of DOJ actions on access to justice metrics.

Finally, however the DOJ might incorporate the insight that there can be tension between defensive and affirmative positions, there will be moments where a choice of priorities cannot be avoided. For example, imagine that the DOJ (or the Solicitor General's office) is considering whether to file an appeal (or a petition for certiorari) in two different cases. One is a case in a defensive posture, where the government unsuccessfully argued for dismissal of a civil rights case, and one is a case in an affirmative posture, in which the government's civil rights case was dismissed on the defendant's motion. A successful argument on appeal in the defensive case will result in a slight extension of prodefendant doctrine. A successful argument on appeal in the affirmative case will result in a slight extension of proplaintiff doctrine. An administration that cares about access to justice should at least think through how to make that decision and recognize that there are consequences to choosing whether and when to make those arguments on appeal.

Again, this kind of thinking is not foreign to the government. The Solicitor General routinely files amicus briefs in the Supreme Court in which it articulates the United States' interest as resting both in its role as enforcer of rights and common defendant in litigation.⁷⁸ And the DOJ has taken positions in other contexts, such as in proposed amendments to the Federal Rules of Civil Procedure, in which it acknowledges its dual interests as both

75. See generally Memorandum from Eric Holder, Attorney Gen., to U.S. Attorneys (Dec. 15, 2014), <https://www.justice.gov/file/188671/download> [<http://perma.cc/JW2T-GLEH>].

76. *Court Filings in Support of Access to Justice*, U.S. DEP'T JUST. (Nov. 18, 2016), <https://www.justice.gov/atj/court-filings-support-access-justice> [<https://perma.cc/4CMW-K76Q>].

77. See *White House Legal Aid Interagency Roundtable Issues First Annual Report to the President*, U.S. DEP'T JUST. (Nov. 30, 2016), <https://www.justice.gov/opa/pr/white-house-legal-aid-interagency-roundtable-issues-first-annual-report-president> [<https://perma.cc/5V9N-JHQJ>].

78. See, e.g., *Blum v. Stenson*, 465 U.S. 886, 893 (1984); Brief for the United States as Amicus Curiae at 1, *Wilson v. Seiter*, 501 U.S. 294 (1991) (No. 89-7376), 1990 WL 10022404, at *1; Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae at 1, *Meritor Savs. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979), 1985 WL 670162, at *1.

an enforcer and a defender in civil cases. Thought could similarly be given to how this dual role can be internalized in litigation to limit the tension that I have identified in this Article.

CONCLUSION

It is a given that affirmative enforcement priorities shift with changes in leadership. Less well understood is how the static nature of defensive litigation postures can undermine affirmative enforcement goals. This brief Article is meant to identify the problem, begin to understand its scope, and suggest ways to limit the tension inherent in the dueling litigation roles often occupied by governmental agencies.