

## A Government Lawyer's Liability under Bivens

Marc Stepper

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## NOTE

### A GOVERNMENT LAWYER'S LIABILITY UNDER *BIVENS*

Marc Stepper\*

*To what extent should government attorneys face civil liability for their roles advising government officials? Jose Padilla made national headlines when he initiated an action against John Yoo, federal attorney to the President and Executive Branch, for his alleged role in Mr. Padilla's detention and torture. How should courts address such suits? This Note seeks to answer that question by exploring the intersection between two unconventional legal relationships that form when: 1) a private citizen seeks redress from a federal official, and 2) a non-client brings suit against an attorney. This Note argues that our system should explicitly recognize the role of an attorney as a limitation to suits against government officials. Without imposing a bright-line bar to such suits, courts should nevertheless acknowledge their inherent dangers and be ready to dismiss such suits on this basis alone.*

*Through so-called Bivens actions, private parties may bring claims for damages against federal officials who have violated their constitutional rights. In hearing such claims, courts must balance the need for relief with the dangers such suits pose to government performance and national security. Attorney liability to non-clients provides another area in which the needs of an injured plaintiff must accord with the protection granted to attorneys to freely dispense client advice. Both regimes, then, attempt to open the door to relief widely enough to allow certain classes of victims, but not so widely that these suits destroy defendants' ability to perform their important societal roles.*

*Where defendants occupy the roles of both government official and attorney, as did John Yoo, courts must draw the boundaries of their liability even more narrowly. Specifically, the role of a federal agent-attorney should itself be a Bivens "special factor" that cautions hesitation against allowing a lawsuit to proceed. Acknowledging this government attorney factor would give courts a clear means to dismiss harmful litigation while providing the flexibility to hear such cases that may, in fact, cry out for relief.*

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#### INTRODUCTION

*"No man is above the law and no man is below it: nor do we ask any man's permission when we ask him to obey it."*<sup>1</sup>

*"The King can do no wrong."*<sup>2</sup>

In a break from the common law tradition of sovereign immunity, American courts permit private suits against certain state and federal officials who violate the law. The law, however, places various restraints on would-be plaintiffs who bring these suits. For example, government officials enjoy partial protection, or qualified immunity, against private causes of action.<sup>3</sup> Hurdles to imposing government agent liability are necessary, in part, to facilitate effective government performance. The concern for effective performance in the face of legal challenges has heightened in the age of terror threats and unlawful combatants. Detainees are one very prominent group of would-be plaintiffs that have forced the judiciary to consider not only what standards apply to government officials, but also if such suits can proceed at all.<sup>4</sup>

<sup>1</sup> Theodore Roosevelt, U.S. President, State of the Union Address (Dec. 7, 1903), in 2 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966: 1861-1904, 2073, 2076 (Fred Israel ed., 1966).

<sup>2</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS AND CONSTITUTION OF ENGLAND 244 (William C. Jones ed., Bancroft-Whitney Co. 1915) (1765).

<sup>3</sup> See *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009); *Harlow v. Fitzgerald*, 457 U.S. 806, 807 (1982).

<sup>4</sup> See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950-52 (2009) (dismissing a Pakistani detainee's suit against multiple federal officials because detainee did not meet the "plausibility standard" for pleadings under FED. R. CIV. P. 8(a)(2)).

Jose Padilla is among the most famous of these litigants: his suit against a former Bush Administration official raises exactly those concerns over national security, the role of the courts, and the effect on government performance that have been heavily debated over the last decade. U.S. officials arrested Padilla in Chicago in 2002 for allegedly plotting with al Qaeda to detonate a dirty bomb on U.S. soil and subsequently held him without charge for three and a half years in a detention facility in South Carolina.<sup>5</sup> Although Padilla was eventually transferred to the federal court system, tried, and convicted of taking part in a conspiracy to give money and supplies to Islamic extremist groups,<sup>6</sup> his fight against the Bush Administration has continued.

Padilla brought a civil claim against former government attorney John Yoo for Yoo's role in the alleged deprivation of Padilla's constitutional rights that occurred during his time in military detention.<sup>7</sup> This suit drew much attention in the summer of 2009 when it partially survived Yoo's motion to dismiss. Rather than deny Padilla a legal remedy because of Yoo's position as legal counsel to the executive branch, the Northern District of California reasoned that Yoo, as an attorney, could be held liable for the consequences of his legal work.<sup>8</sup>

In so doing, the court recognized the possibility of a unique cause of action. Padilla's lawsuit involves the intersection of two unconventional relationships: first, between Yoo as a federal actor and Padilla as a citizen seeking redress for violations of his constitutional rights through a so-called *Bivens* action,<sup>9</sup> and second, between Yoo as an attorney and Padilla as someone other than Yoo's client. Where these two types of relationships meet is the focus of this Note. Specifically, to what extent should courts allow *Bivens* actions against federal policymakers? Moreover, does a policymaker's role as an attorney have any bearing on this decision?

Part I discusses the issues involved in Padilla's action against Yoo. Part II discusses the role *Bivens* claims have played in policing federal actors and how policymakers pose unique challenges to such suits. Part III examines the boundaries of attorney liability and how these should be incorporated in the *Bivens* standard. Part IV applies this information to the Office of Legal Counsel (OLC) by arguing that, while such *Bivens*

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<sup>5</sup> Kirk Semple, *Padilla Gets 17 Years in Conspiracy Case*, N.Y. TIMES, Jan. 23, 2008, at A14.

<sup>6</sup> *Id.* Padilla is currently serving a seventeen-year prison sentence. *Id.*

<sup>7</sup> First Amended Complaint at 2, *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) (No. 3:08-cv-00035 JSW) (claiming Yoo abused his "high position" to cause Padilla's unlawful military detention and interrogation).

<sup>8</sup> See *Padilla v. Yoo*, 633 F. Supp. 2d. 1005, 1033 (N.D. Cal. 2009).

<sup>9</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

claims against the OLC should not be categorically rejected, courts should allow such claims to proceed only in very limited circumstances. Lastly, this Note concludes with an application of these issues to Padilla's suit.

### I. PADILLA'S *BIVENS* SUIT

Padilla's lawsuit against John Yoo holds significance beyond the surface-level plea for legal remedy against a member of the Bush Administration. John Yoo held a unique position as a member of the Office of Legal Counsel—a separate agency within the Department of Justice that provides legal services for the President and executive branch agencies.<sup>10</sup> On legal matters within the executive branch, the OLC acts as a kind of general counsel by providing legal interpretation of the “most difficult and consequential legal questions.”<sup>11</sup> Just what kind of legal role the OLC has or should assume is a matter of debate,<sup>12</sup> but this much is certainly true: members of the OLC, such as John Yoo, often see their advice directly implemented into executive policy.<sup>13</sup>

To an extent then, Padilla correctly asserts that Yoo “shaped government policy” as the “*de facto* head of war-on-terrorism legal issues.”<sup>14</sup> His recommendations went to Attorney General John Ashcroft and President Bush as they implemented their policies of detaining enemy combatants. This seemingly straightforward chain of causation convinced the California district court to find that “Padilla has alleged sufficient facts to satisfy the requirement that Yoo set in motion a series of events that resulted in the deprivation of Padilla's constitutional

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<sup>10</sup> See 28 C.F.R. § 0.25(a) (2009). The OLC is responsible for, among other things, “rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet.” *Id.* See generally THE OFFICE OF LEGAL COUNSEL, <http://www.justice.gov/olc/> (last visited Nov. 4, 2010) (describing OLC personnel and leadership by an Assistant Attorney General).

<sup>11</sup> Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1577 (2007).

<sup>12</sup> Commentators are divided over whether the OLC should be a neutral interpreter of laws or an advocate for the President's policies. Compare Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1309–10 (2000) (supporting a “quasi-judicial,” neutral expositor model), with John O. McGinnis, *Models of the Opinion and Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 403–06 (1993) (arguing the Attorney General “and his modern principal delegate—the OLC” properly functions in a “court-centered,” “independent,” or “situational” Presidential-interest fashion, depending on the circumstances).

<sup>13</sup> Johnsen, *supra* note 11, at 1577 (“By virtue of regulation and tradition, OLC's legal interpretations typically are considered binding within the executive branch, unless overruled by the Attorney General or the President (an exceedingly rare occurrence).”).

<sup>14</sup> First Amended Complaint at 4–5, *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) (No. 3.08-cv-00035 JSW).

rights.”<sup>15</sup> As the court stated, a causal connection can be established “by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.”<sup>16</sup>

But, causation analysis is merely one part of the story. Two more aspects add to the complexity: first, this is a cause of action by a citizen against a federal, *policymaking* agent, and second, this action is against an *attorney* for performing his official duties. The district court attempted to resolve the latter issue by stating that government attorneys are “responsible for the foreseeable consequences of their conduct,” such as drafting a legal opinion or giving legal advice.<sup>17</sup> However, significant costs may result from a court allowing these kinds of suits to go forward. The functionality of policymakers and the performance of government lawyers may suffer under heightened liability. Whatever the cost or benefit of such suits, a strict causation analysis fails to capture all of the implications of allowing such suits to go forward.

## II. *BIVENS* ACTIONS: WHEN FEDERAL AGENTS MAY BE SUED

### A. *Stating a Bivens Claim*

In recent years the Supreme Court has allowed parties to bring claims for damages against federal officials in the absence of explicit or adequate statutory authority because “the Constitution itself supports a private cause of action.”<sup>18</sup> First recognized in the landmark case, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>19</sup> a person who brings a *Bivens* suit must allege compensable injury to a constitutional right inflicted by a federal official acting under color of federal law.<sup>20</sup> Webster Bivens filed a complaint against a group of federal narcotics agents for violating his Fourth Amendment rights through a humil-

<sup>15</sup> *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1034 (N.D. Cal. 2009).

<sup>16</sup> *Id.* at 1032–33 (quoting *Johnson v. Duffy*, 588 F.2d 740, 743–44 (9th Cir. 1978)).

<sup>17</sup> *Id.* at 1033. To support its position, the court cites two cases that sanctioned *Bivens* actions against government attorneys. See *Lippoldt v. Cole*, 468 F.3d 1204, 1210 (10th Cir. 2006) (holding a city attorney liable for drafting a legal opinion that was a “substantial factor” in denying a protest group’s parade permit application based on the content of their speech, in violation of the First Amendment); *Anoushiravani v. Fishel*, 2004 WL 1630240, at \*5 (D. Or. July 19, 2004) (holding that Department of Homeland Security attorneys could be liable for their participation in the unconstitutional seizure of property because the seizures were a foreseeable result of their legal advice).

<sup>18</sup> *Bush v. Lucas*, 462 U.S. 367, 374 (1983). Federal courts have jurisdiction to decide “civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (2006). The Court has interpreted this provision as granting the authority to decide both whether the Constitution supports a particular claim and to provide non-statutory remedies for relief. *Bush*, 462 U.S. at 374.

<sup>19</sup> 403 U.S. 388 (1971).

<sup>20</sup> See, e.g., *Bush*, 462 U.S. at 391–92; *Carlson v. Green*, 446 U.S. 14, 19–20 (1980); *Davis v. Passman*, 442 U.S. 228, 234 (1979).

iating and degrading search.<sup>21</sup> Reversing lower court rulings that Bivens's complaint failed to state a cause of action, the Supreme Court held that the Fourth Amendment contained an implied cause of action for money damages.<sup>22</sup> Since then, the Supreme Court has allowed *Bivens* actions for violations of the Fifth Amendment<sup>23</sup> and the Eighth Amendment,<sup>24</sup> and lower courts have recognized *Bivens* actions for other constitutional violations as well.<sup>25</sup>

The justification for *Bivens* actions, apart from "remedying a wrong done,"<sup>26</sup> is deterrence of federal agent wrongdoing.<sup>27</sup> Thus, whether a *Bivens* action should proceed is not merely a determination of harm caused by a federal actor, but whether the remedy will achieve the goal of deterrence. *Bivens* claims should not go forward merely upon proof of harm. As the Second Circuit Court of Appeals noted in *Benzman v. Whitman*: "A *Bivens* action is a blunt and powerful instrument for correcting constitutional violations and not an 'automatic entitlement' associated with every governmental infraction."<sup>28</sup> Thus, the Supreme Court has provided two main hurdles to allowing such suits to go forward:

[T]he decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. But even in the absence of an alternative, a *Bivens* remedy is a subject of

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<sup>21</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) ("The agents manacled [Bivens] in front of his wife and children, and threatened to arrest his entire family. They searched the apartment from stem to stern. Thereafter . . . [Bivens] was interrogated, booked, and subjected to a visual strip search.")

<sup>22</sup> *Id.* at 396. ("Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But 'it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'") (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

<sup>23</sup> *Passman*, 442 U.S. at 243-44.

<sup>24</sup> *Carlson*, 446 U.S. at 20.

<sup>25</sup> *See, e.g.*, *Kotarski v. Cooper*, 799 F.2d 1342 (9th Cir. 1986), *vacated*, 487 U.S. 1212 (1988), *on reconsideration*, 866 F.2d 311 (9th Cir. 1989) (addressing the Ninth Amendment); *Milhouse v. Carlson*, 652 F.2d 371 (3d Cir. 1981) (addressing the First Amendment); *Jones v. City of Memphis*, 586 F.2d 622 (6th Cir. 1978) (addressing the Fourteenth Amendment); *Berlin Dem. Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976) (addressing the Sixth Amendment).

<sup>26</sup> *Bivens*, 403 U.S. at 396.

<sup>27</sup> *See* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations."); *see also* *FDIC v. Meyer*, 510 U.S. 471, 485 (1994); *Carlson*, 446 U.S. at 21; *Benzman v. Whitman*, 523 F.3d 119, 125 (2d Cir. 2008).

<sup>28</sup> 523 F.3d at 125 (quoting *Wilkie v. Robbins*, 551 U.S. 537, 549 (2007)).

judgment: “the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.”<sup>29</sup>

These hurdles have proved especially high for would-be *Bivens* plaintiffs. As the Court noted in 2001: “In 30 years of *Bivens* jurisprudence, the Court has extended its holding only twice, to provide an otherwise nonexistent cause of action . . . .”<sup>30</sup>

Regarding the first hurdle—the availability of an alternative remedy—courts decline to apply *Bivens* to an area in which Congress has already spoken. Before bringing a *Bivens* action against federal agents, the would-be plaintiff must look to other avenues for relief. If the “design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration,” then a *Bivens* remedy will be unavailable.<sup>31</sup> Even where the congressionally mandated remedy provides less relief than would a *Bivens* claim for damages, courts have rejected the applicability of *Bivens*.<sup>32</sup> The message from the courts is clear—if there is a congressionally-sanctioned means to handle a claim, then a *Bivens* remedy is inappropriate.

The second hurdle to allowing *Bivens* actions involves determining whether special concerns outweigh the victim’s plea for relief. Even

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<sup>29</sup> *Wilkie*, 551 U.S. at 550 (2007) (citation omitted) (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

<sup>30</sup> *Malesko*, 546 U.S. at 61–62.

<sup>31</sup> See *Schweiker v. Chilicky*, 487 U.S. 412, 423, 428–29 (1988) (holding that the administrative process for recovering wrongfully withheld Social Security disability benefits precluded a *Bivens* remedy against government agents); *Bennett v. Barnett*, 210 F.3d 272, 276 (5th Cir. 2000) (“Because Congress has provided a comprehensive procedure to address postal employees’ constitutional claims arising from their employment relationship with the USPS, those arbitration procedures preclude plaintiffs’ *Bivens* claims.”) (citation omitted); see also *Benzman*, 523 F.3d at 126 (“[T]he fact that Congress established this exclusive statutory cause of action weighs strongly against the judicial creation of a novel *Bivens* action . . .”).

<sup>32</sup> In *Bush v. Lucas*, 462 U.S. 367 (1983), the Court held that a Congressionally-created remedial scheme precluded a *Bivens* remedy even where such a remedy would not fully compensate the plaintiff for harm suffered. *Id.* at 388–90. This limited the availability of *Bivens* remedies more than previous decisions, which had looked for “equally effective” remedies. See Lawrence H. Tribe, *Death by a Thousand Cuts*, 2007 CATO SUP. CT. REV. 23, 64–65 (2007) (arguing that the “real thrust of *Bush*” was to preclude a wider number of potential *Bivens* actions through alternative congressional remedy); see also *Chilicky*, 487 U.S. at 425 (denying the availability of a *Bivens* remedy even though “Congress has failed to provide for complete relief” (quoting *Bush*, 462 U.S. at 388) (internal quotation marks omitted)); *Libas v. Carillo*, 329 F.3d 1128, 1130–31 (9th Cir. 2003) (precluding fabric importer’s *Bivens* action due to Congressionally-mandated remedial scheme); *Carpenters Produce v. Arnold*, 189 F.3d 686 (8th Cir. 1999) (holding administrative process for race discrimination claim sufficient, even though only restatement of benefits, not damages, was the available remedy).



where relief would otherwise be available under *Bivens*, courts may find “special factors” in a particular case that preclude such a suit from moving forward.<sup>33</sup> Although no enumerated list of special factors exists, two concerns that receive repeated attention from the courts are national security and individual liability. Courts recognize these concerns because they implicate two principles: effectuating government activity and limiting the applicability of *Bivens* causes of action.

*Bivens* actions repeatedly fail where they involve issues that go “beyond the water’s edge.”<sup>34</sup> Thus, courts have denied the application of *Bivens* against government officials allegedly involved in extraordinary rendition,<sup>35</sup> activity “incident to [military] service,”<sup>36</sup> and covert operations.<sup>37</sup> Allowing such suits to proceed could tie the hands of government actors in areas where governmental freedom to operate is necessary. In matters of foreign policy and national security, courts respect executive privilege<sup>38</sup> and recognize the danger judicial involvement poses to the nation’s safety.<sup>39</sup> The latter concern is especially great in the area of classified information. For example, the *Arar* court discusses the danger of “graymail”—lawsuits brought by individuals who push the government to settle by exploiting the government’s reluctance to litigate due to the fear of revealing classified information.<sup>40</sup> Would-be plaintiffs with agendas that go far beyond redress for individual wrongs may bring

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<sup>33</sup> See *Malesko*, 534 U.S. at 74 (rejecting a *Bivens* claim against the private operator of a halfway house). The Court noted “[t]he caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for three decades.” *Id.*

<sup>34</sup> See Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 778 (2006) (“The Court might be particularly reluctant to recognize a *Bivens* claim when doing so would require judicial review of the executive branch’s conduct of foreign affairs and military strategy . . .”).

<sup>35</sup> *Arar v. Ashcroft*, 585 F.3d 559, 576 (2d Cir. 2009) (refusing to apply *Bivens* to extraordinary rendition as it would “offend the separation of powers and inhibit . . . foreign policy”).

<sup>36</sup> *United States v. Stanley*, 483 U.S. 669, 683–84 (1987) (refusing to apply *Bivens* to actions incident to military service due to the “unique disciplinary structure of the Military Establishment”); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (refusing to apply *Bivens* due to the “special nature” of the relationship between military officers and enlisted personnel).

<sup>37</sup> *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) (refusing to apply *Bivens* to covert operations, as a judicial inquiry may “implicate job risks and responsibilities of covert CIA agents”).

<sup>38</sup> See *Arar*, 585 F.3d at 575 (“The Supreme Court has expressly counseled that matters touching upon foreign policy and national security fall within an area of executive action in which courts have long been hesitant to intrude absent congressional authorization.” (quoting *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (internal quotation marks and emphasis omitted)); see also *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (noting that “[t]he danger of obstructing U.S. national security policy” is a *Bivens* special factor).

<sup>39</sup> See, e.g., *Arar*, 585 F.3d at 574 (“[I]n the context of extraordinary rendition, [a *Bivens*] action would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation, and that fact counsels hesitation.”).

<sup>40</sup> See *id.* at 578–79.

these suits in the hopes of either bringing classified information to light or forcing the government to settle.

In addition to government-operational concerns, courts jealously restrict the reach of *Bivens* actions, reluctant to apply liability beyond the scope of individual actors. Expanding *Bivens* further than single government agents to include larger collectives is, therefore, the second prominent type of special factor cautioning hesitation. In *FDIC v. Meyer*, for example, the Court declined to extend *Bivens* actions to federal agencies.<sup>41</sup> If a federal agency served as defendant, the Court noted, individual federal agents could avoid liability.<sup>42</sup> Such absolution from individual liability would undermine the very rationale of *Bivens*: individual officer deterrence.<sup>43</sup> Several years later in a similar case, the Court cited “the logic of *Meyer*” in rejecting *Bivens* liability for private corporations acting under color of federal law.<sup>44</sup> Regardless of whether legal pressure would be an effective deterrent for wayward corporations, “*Bivens* . . . is concerned solely with deterring the unconstitutional acts of individual officers.”<sup>45</sup>

Limiting *Bivens* suits to individuals is also necessary to avoid saddling the federal government with new, unsolicited burdens. Responding to *Bivens* claims against individual agents already occupies a significant portion of the Department of Justice’s time.<sup>46</sup> The Torts Branch of the Department of Justice, the entity that represents the government against *Bivens* actions, defends against tens of billions of dollars of liability every year.<sup>47</sup> The Supreme Court is understandingly wary of increasing this burden. Justice Thomas, writing for the majority in *Meyer*, cautioned that expanding *Bivens* liability to groups such as federal agencies “would creat[e] a potentially enormous financial burden for the Federal Government.”<sup>48</sup> Should this “significant expansion of Government lia-

<sup>41</sup> 510 U.S. 471, 486 (1994).

<sup>42</sup> *Id.* at 485.

<sup>43</sup> *Id.*

<sup>44</sup> *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001) (“This case is, in every meaningful sense, the same [as *Meyer*]. For if a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury.”).

<sup>45</sup> *Id.* (emphasis added).

<sup>46</sup> The government faces an estimated 5,000 *Bivens* claims per year. David Zaring, *Personal Liability as Administrative Law*, 66 WASH. & LEE L. REV. 313, 329 (2009) (quoting William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1151 (1996)).

<sup>47</sup> *Id.* at 329 n.74 (citing *Reauthorization of the Dep’t of Justice Civil Division: Hearings Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 107th Cong. 14 (2001) (statement of Stuart E. Schiffer, Acting Assistant Att’y Gen.)), available at 2001 WL 506067 (quoting a Department of Justice Supervisor stating that in 2000 Torts Branch attorneys “successfully defended against claims seeking nearly \$24 billion in damages from the United States”).

<sup>48</sup> *FDIC v. Meyer*, 510 U.S. 471, 485–86 (1994).

bility” be appropriate, it must be “[left] to Congress” not created through judicial decree.<sup>49</sup>

## B. *Bivens Actions Against Policymakers*

### 1. *Bivens* Steps Revisited

In the case of a government attorney, such as a member of the OLC, an added element not clearly addressed by the courts exists—that such suits target a government *policymaker*. Policymakers, in contrast to other kinds of government agents, formulate strategies and give orders, and those strategies and orders affect people indirectly by flowing down government channels towards the victim.<sup>50</sup> Liability for policymakers is still direct, however, and the victim must establish a sufficient causal connection between the policy or orders given and the constitutional harm.<sup>51</sup> Issues of causation notwithstanding, courts should treat suits against policymakers more delicately than suits against government agents tasked with simply carrying out their superiors’ directives. The two steps of a *Bivens* suit apply in particular ways with policymaking government officials. First, other avenues of relief may exist for an individual alleging that a policymaker caused a particular harm. Second, special factors analysis may play a particularly strong role where the direction of federal policy is at issue.

Regarding the alternative remedy analysis of *Bivens* step-one, policymakers may not be the only government officials vulnerable to suit. For example, a plaintiff’s action could also target the agents implementing a given policy, and the availability of suit against these government agents may arguably preclude a remedy against the policymaker.

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<sup>49</sup> *Id.*

<sup>50</sup> Compare *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (rejecting a claim of supervisory liability against former Attorney General John Ashcroft and FBI Director Robert Mueller for their adoption of certain policies), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (rejecting a claim for money damages against the Secretary of Health and Human Services, the commissioner of the Social Security Administration, and state officials for harm caused by policy-making roles), and *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007) (rejecting a *Bivens* right of action against former Secretary of Defense Donald Rumsfeld and other high-ranking military officers under command liability for torture), with *Porter v. Nussle*, 534 U.S. 516 (2002) (dismissing a claim on exhaustion grounds against a corrections officer for allegedly beating an inmate), and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (ruling that damages may be obtained for injuries from a federal narcotics agent’s allegedly illegal search), and *Libas v. Carillo*, 329 F.3d 1128 (9th Cir. 2003) (rejecting a *Bivens* claim against customs agents for allegedly assessing incorrect rates for import duties).

<sup>51</sup> One means of establishing causality links senior officials’ liability to harms committed by their agents. See, e.g., *Application of Yamashita*, 327 U.S. 1, 14–17 (1946) (holding Japanese commander responsible for atrocities committed by his troops in the Philippines, despite no specific orders towards those ends); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (holding Guatemalan government official had “command responsibility” for atrocities committed by the military under his command).

As the Court has stated, an alternative remedy will preclude liability.<sup>52</sup> However, where an unconstitutional policy truly does cause harm, qualified immunity often protects the federal agent who administers the policy.<sup>53</sup> Furthermore, simply punishing the conduit for someone else's poor policy choices will not achieve the underlying deterrence policy of *Bivens*. If policymakers are insulated from suit and therefore suffer no legal consequences for their official actions, this destroys an important safeguard against creating unconstitutional policies in the future.<sup>54</sup>

When courts apply *Bivens* step-two and special factors concerns to a policymaker, they must be sensitive to each plaintiff's particular purpose for bringing such suits. Suits against senior officials and policymakers are often brought for purposes completely separate from remedying the alleged violation in question. As Professor David Zaring notes, *Bivens* actions can essentially amount to policy challenges: "These cases . . . get brought not because the plaintiff thinks she will collect damages, at least not usually, but because the plaintiff thinks she can obtain other benefits from the litigation."<sup>55</sup> These benefits include lengthy discovery of potentially sensitive government documents, press coverage, and direct confrontation with senior officials.<sup>56</sup> Padilla's suit against Yoo, for example, asks for a mere \$1 in damages, plus legal fees.<sup>57</sup> Should Padilla win, he would remain in prison with no material change in his situation.

Accordingly, courts are sensitive to the dangers posed by policy-challenging plaintiffs seeking non-traditional benefits through *Bivens* claims. Rejection of *Bivens*'s applicability often arises in the context of foreigners suing the United States for actions abroad. The Court of Appeals for the District of Columbia, for example, refused to recognize a *Bivens* action brought in part by citizens and residents of Nicaragua for claims arising from U.S. actions in Nicaragua.<sup>58</sup> Their decision turned on the "foreign affairs implications" that such a suit would have:

<sup>52</sup> See Tribe, *supra* note 32, at 64.

<sup>53</sup> Qualified immunity protects government officials who perform discretionary functions from civil damages unless they commit constitutional violations that were "clearly established at the time of [the] . . . alleged misconduct." *Pearson v. Callahan*, 129 S. Ct. 808, 815–16 (2009) (internal quotations omitted). One former Department of Justice attorney described qualified immunity as the "most substantial obstacle to recovery by a constitutional tort plaintiff." Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 356 (1989).

<sup>54</sup> See Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 75 (1999) ("An official who risks paying damages out of his or her own pocket will likely take more care to comply with the Constitution.").

<sup>55</sup> Zaring, *supra* note 46, at 317.

<sup>56</sup> *Id.* at 337.

<sup>57</sup> First Amended Complaint at 21, *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) (No. 3.08-cv-00035 JSW).

<sup>58</sup> *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

Whether or not the present litigation is motivated by considerations of geopolitics rather than personal harm, we think that as a general matter the danger of foreign citizens' using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist.<sup>59</sup>

A recent *Bivens* suit brought by alien detainees against former Secretary of Defense Rumsfeld and other high-ranking officials for alleged torture and abuse was similarly dismissed.<sup>60</sup> There, the D.C. District Court held that special factors precluded a *Bivens* action that would serve as a tool of the enemy in wartime: discovery could yield sensitive information about military affairs and distract officials from the battlefield, the negative attention focused on high-ranking officials would erode morale and military discipline, and commanders would act overcautiously for fear of personal liability.<sup>61</sup> Additionally, courts reject *Bivens* claims that are potentially harmful to foreign policy when brought by Americans.<sup>62</sup>

This does not suggest that courts will always give government policymakers protection against *Bivens* liability. In rejecting *Bivens* actions against policymakers, courts have not explicitly connected their dismissals to the policy-making position of the government agent. For example, although the court in *Sanchez-Espinoza v. Reagan* held that a *Bivens* action would not proceed against certain military and foreign policy officials, this decision was not based on the specific policymaking roles of the agents themselves but the "special needs of foreign affairs" that cautioned against judicial meddling in that instance.<sup>63</sup> Elsewhere, the Supreme Court required dismissal of a *Bivens* action against former Attorney General Ashcroft and FBI Director Mueller for their policymaking roles but based its holding on the insufficiency of the pleadings.<sup>64</sup> The Court suggested that if the plaintiff alleged sufficient

<sup>59</sup> *Id.* at 209.

<sup>60</sup> *See In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007).

<sup>61</sup> *Id.* at 105.

<sup>62</sup> *See Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) (rejecting the plaintiffs' *Bivens* claim because, among other things, the revelation of classified information "may undermine ongoing covert operations") (quoting *Tenet v. Doe*, 544 U.S. 1, 11 (2005)).

<sup>63</sup> *Sanchez-Espinoza*, 770 F.2d at 208–09 ("The foreign affairs implications of suits such as this cannot be ignored—their ability to produce what the Supreme Court has called in another context 'embarrassment of our government abroad' through 'multifarious pronouncements by various departments on one question.'") (quoting *Baker v. Carr*, 369 U.S. 186, 226, 217 (1962)).

<sup>64</sup> *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950–52 (2009) (holding that plaintiff failed to meet the plausibility requirement mandated by FED. R. CIV. P. 8(a)(2) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 554 (2007)).

“factual matter to show that petitioners adopted and implemented the detention policies at issue . . . for the purpose of discriminat[ion],” then this action could proceed.<sup>65</sup>

Judicial attitudes towards *Bivens* suits against policymakers therefore depend on the circumstances of the particular case. Courts have taken an ad hoc approach to the viability of these suits rather than create blanket preclusion against them. As long as a plaintiff can show sufficient factual details to overcome an *Iqbal*-type dismissal, *Bivens* cases should therefore be permissible against policymaking individuals absent special factors. Even *Bivens* claims filed as impact litigation may still be viable. Although the goals of these suits often go beyond the actual damages remedy recognized by *Bivens*,<sup>66</sup> they may still serve the deterrence rationale that lies at the core of *Bivens* by pressuring policymakers to refrain from constitutional violations.

## 2. Individual vs. Group Liability

Policymaker liability will also depend on the degree to which such a suit can target individual government actors. Policymaking is a collaborative effort, and often, many individuals contribute to the final product by the time the policy applies to the public at large. If a group of individuals, rather than a single individual, is responsible for this policymaking, a *Bivens* action must not go forward. The Court in *Malesko* clearly rejected group liability, holding that a *Bivens* claim does not exist against a private “policymaking entity.”<sup>67</sup> Because this suit did not implicate individuals, it did not further the deterrence rationale of *Bivens*.<sup>68</sup> Thus, the challenge in selecting a *Bivens* defendant in these actions is to identify the actual policymaker who has truly produced the harmful policy and ignore those government agents who perhaps share only nominal liability for its creation.<sup>69</sup>

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<sup>65</sup> *Id.* at 1948–49; *see also* *Kwai Fun Wong v. United States*, 373 F.3d 952, 966–67 (9th Cir. 2004) (noting that direct participation is not necessary to establish *Bivens* liability, but rejecting plaintiff’s *Bivens* claim for failure to identify the specific roles of the officials who allegedly violated her rights); *Bruns v. Nat’l Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997) (declining to allow a *Bivens* claim to proceed because “[v]ague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss”) (internal quotation marks omitted).

<sup>66</sup> Remedy for plaintiffs cannot be ignored, however. The Court in *Bivens* recognized damages as essential to the plaintiff’s cause of action: “For people in *Bivens*’[s] shoes, it is damages or nothing.” *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring); *see also id.* at 407–08 (“[T]he appropriateness of according *Bivens* compensatory relief does not turn simply on the deterrent effect liability will have on federal conduct.”).

<sup>67</sup> *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001).

<sup>68</sup> *See id.*

<sup>69</sup> *See Rosen, supra* note 53, at 347.

Claims brought under 42 U.S.C. § 1983<sup>70</sup> may help clarify how policymaker liability relates to the individual. This statutory cause of action is similar to *Bivens* and allows individuals to bring suit against defendants who have allegedly violated their constitutional rights while acting under color of state law.<sup>71</sup> Although courts in the earliest cases applied this statute exclusively to individuals, the Court expanded the applicability of § 1983 to include “local governing bodies” in *Monell v. Department of Social Services*.<sup>72</sup> The legal standard now holds municipalities liable where the “execution of a government’s policy or custom . . . inflicts the injury.”<sup>73</sup>

Should this reasoning apply to *Bivens* causes of action, thus allowing suits against policymaking entities? The argument that the reasoning should apply draws from the close relationship between causes of action under *Bivens* and § 1983. Because *Bivens* “is the federal analog to suits brought against state officials under . . . § 1983,”<sup>74</sup> both types of suits should arguably apply in many of the same instances. Following this logic, the Court of Appeals for the Sixth Circuit, in *Hammonds v. Norfolk Southern Corporation*,<sup>75</sup> suggested a *Bivens* action could go forward against a private railroad company.<sup>76</sup> The court foreclosed this possibility in *Malesko*,<sup>77</sup> but whether a suit against a policymaking government entity could proceed remains an open question.<sup>78</sup> This expan-

<sup>70</sup> 42 U.S.C. § 1983 (2006).

<sup>71</sup> Although Congress enacted this statute in 1871, litigants began applying it to civil rights abuses by state officials only after *Monroe v. Pape*, 365 U.S. 167 (1961). MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 1–2 (2d ed. 2008).

<sup>72</sup> 436 U.S. 658, 690–91 (1978) (basing an expansive interpretation of § 1983 on the legislative history of the Civil Rights Act of 1871 (the precursor to § 1983)).

<sup>73</sup> *Id.* at 694; see also *City of Canton v. Harris*, 489 U.S. 378 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). Accordingly, respondeat superior, or vicarious liability, is inapplicable to § 1983 claims against state governmental bodies. See *Monell*, 436 U.S. at 694 (“[A] municipality cannot be held liable solely because it employs a tortfeasor . . .”). This rule applies to both § 1983 claims and *Bivens* claims. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) (“Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.”).

<sup>74</sup> *Iqbal*, 129 S. Ct. at 1948 (internal quotation marks omitted); see also *Egervary v. Young*, 366 F.3d 238, 246 (3d Cir. 2004) (“*Bivens* actions are simply the federal counterpart to § 1983 claims brought against state officials . . .”).

<sup>75</sup> 156 F.3d 701 (6th Cir. 1998).

<sup>76</sup> See *id.* at 708 (“If it can be shown that the corporate policy at issue has violated Hammons’[s] constitutional rights under the Fourth Amendment, and that the policy is attributable to the federal government, Hammons is entitled to relief.”); see also *Abate v. S. Pac. Transp. Co.*, 993 F.2d 107, 111 (5th Cir. 1993) (suggesting a *Bivens* remedy would be available against defendant railroad company if the company “caused the tortious conduct by its accepted custom or policy”).

<sup>77</sup> 534 U.S. 61, 71 (2001) (abrogating *Hammons* by rejecting the viability of a “constitutional tort remedy against a private entity”).

<sup>78</sup> See *Rosen*, *supra* note 53, at 346 (noting that while lower courts have assumed *Bivens* actions are inapplicable to the federal government “employer” instead of the agent, the Su-

sion of *Bivens* actions does hold potential benefits, at least for plaintiffs. A former trial attorney for the Department of Justice who specialized in *Bivens* cases cited two advantages to opening up governmental bodies to suits: it provides a “deep pocket” for damages awards and eliminates the hurdle of an individual’s qualified immunity defense.<sup>79</sup>

On the other hand, § 1983 is a more expansive remedy and courts have historically been reluctant to expand *Bivens* to apply in *Monell*-like situations.<sup>80</sup> *Bivens* actions remedy constitutional violations alone, whereas § 1983 allows plaintiffs to sue for both violations of rights “secured by the Constitution and laws.”<sup>81</sup> Furthermore, the application of *Monell* liability to *Bivens* claims has no precedent in forty years of caselaw.<sup>82</sup> Notably, the *Arar* court found this lack of precedent significant enough to caution against the application of *Bivens* against government policies.<sup>83</sup> Most importantly, introducing *Monell* liability into the *Bivens* context would have an expansive effect on government liability. Rather than imposing liability on individuals, courts could hold larger groups liable, and the financial strain could be significant.<sup>84</sup> As noted above, where financial considerations weigh heavily, Congress, as opposed to the judiciary, is often the appropriate avenue for change.<sup>85</sup>

Therefore, the law should recognize policymaker liability in ways that do not implicate the government generally. This would avoid expanding a historically narrow set of *Bivens* defendants and avoid saddling the government with an enormous increase in litigation costs.<sup>86</sup> The applicability of a *Bivens* cause of action against a policymaking individual should be *prima facie* viable, absent other reasons for dismissal. Such claims promote deterrence of federal agent wrongdoing and provide avenues to individuals in need of remedy for violations of their constitutional rights.<sup>87</sup> As the Court noted in *Bivens*: “The very essence of

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preme Court has never addressed the issue); see also Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1489 (1987) (arguing that the Constitution’s “structural principle” of remedy to governmental injury cuts in favor of allowing governmental liability although in some cases, blanket government immunity from liability conflicts with this principle).

<sup>79</sup> Rosen, *supra* note 53, at 363.

<sup>80</sup> See *Arar v. Ashcroft*, 585 F.3d 559, 579 (2d Cir. 2009).

<sup>81</sup> 42 U.S.C. § 1983 (2006) (emphasis added). Accordingly, Section 1983 protects rights created by statute and regulation. See Seamon, *supra* note 34, at 803.

<sup>82</sup> See *Arar*, 585 F.3d at 579.

<sup>83</sup> *Id.* (“Precisely because *Bivens* has never been approved as a *Monell*-like vehicle for challenging government policies, this factor also counsels hesitation in extending a private damages action . . .”).

<sup>84</sup> See *FDIC v. Meyer*, 510 U.S. 471, 486 (1994).

<sup>85</sup> See *supra* Part II.A.

<sup>86</sup> See *id.*

<sup>87</sup> See *id.* at 485.



civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”<sup>88</sup>

### C. Attorney Liability

When a *Bivens* action targets a federal agent performing duties as an attorney, such as a member of the OLC, another level of caution in adjudication arises. Attorney liability carries with it distinct costs, not just to the parties involved but to society as a whole, and courts must be wary about the application of such liability. As Professor Geoffrey C. Hazard, Jr. notes, “[G]reat care must be taken in statements by a law-giver about the relationships between a lawyer’s services and legally wrongful consequences.”<sup>89</sup> Therefore, the courts must establish the contours of a viable *Bivens* action against a government attorney cautiously so as to ensure the attorney’s duties, the government’s responsibilities, and society’s interests are all preserved.

#### 1. Responsibilities of an Attorney

Attorneys play a unique role in society as both “zealous advocate[s]”<sup>90</sup> for their clients and officers of the court. Lawyers must balance the duty to fight for their clients with the responsibility to uphold the rule of law. Put another way, lawyers have a duty towards both the individual particularly and to society generally.<sup>91</sup> These dual responsibilities often complement each other, but they may also conflict. “There is an inherent tension,” notes Professor Michael H. Rubin, “between the duty to represent a client and the duty to the profession. There is a practical tension in wanting to get the best deal possible for your side and the duty of ethical fair dealing.”<sup>92</sup>

No one can serve two masters, however, and the duty to represent the client has historically outweighed most other considerations. An attorney owes a duty primarily to the client, and the starting point for lia-

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<sup>88</sup> 403 U.S. 388, 397 (1970) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

<sup>89</sup> Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don’t Get It*, 6 GEO. J. LEGAL ETHICS 701, 729 (1993).

<sup>90</sup> Since 1983, this term has not been included in the Model Rules of Professional Conduct; however, it still enjoys use among lawyers and courts. Michael H. Rubin, *The Ethical Negotiator: Ethical Dilemmas, Unhappy Clients, and Angry Third Parties*, 26 CONSTRUCTION LAW. 12, 12 (2006) (citing CANONS OF PROFESSIONAL ETHICS Canon 7 (1980)).

<sup>91</sup> See Katerina P. Lewinbuk, *Let’s Sue All the Lawyers: The Rise of Claims Against Lawyers for Aiding and Abetting a Client’s Breach of Fiduciary Duty*, 40 ARIZ. ST. L.J. 135, 137 (2008) (“Traditionally . . . lawyers were encouraged to represent the interests of individuals within society, with of course, a goal towards promoting the common good.” (quoting Christina R. Salem, Note, *The New Mandate of the Corporate Lawyer After the Fall of Enron and the Enactment of the Sarbanes-Oxley Act*, 8 FORDHAM J. CORP. & FIN. L. 765, 770 (2003))).

<sup>92</sup> Rubin, *supra* note 90, at 24.

bility under this duty has been the assumption of an express or implied duty under the attorney-client agreement.<sup>93</sup> Outside this client relationship, the attorney traditionally owed no professional duty to others.<sup>94</sup> The privity of contract between lawyer and client meant, for example, the lawyer was not liable for professional negligence claims.<sup>95</sup> With exceptions for malicious prosecution, abuse of process, ordinary tort suits, as well as certain statutory allowances (e.g., securities laws), traditional attorney-client privity almost completely barred civil suits against lawyers by non-clients.<sup>96</sup>

This rule, however, has relaxed in recent history, and the law now holds attorneys liable to a greater set of potential non-client plaintiffs. Beginning in the mid-twentieth century, courts began to ignore the rule of privity in some cases. Attorneys began facing suits by “quasi-clients,” or individuals who were more than strangers but less than actual clients.<sup>97</sup> The earliest claims most often involved beneficiaries of a will, bringing suit against the testator’s attorney.<sup>98</sup> Over time, viable non-client plaintiffs encompassed a much broader set of individuals such as lenders suing borrowers’ attorneys.<sup>99</sup> Currently, courts recognize exceptions to privity under one of three basic theories: third-party beneficiary law, a balancing test, or the “composite” approach of the Restatement of the Law Governing Lawyers.<sup>100</sup>

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<sup>93</sup> 1 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 8:2, at 1033 (2009).

<sup>94</sup> *E.g.*, *id.* § 7:7, at 902–07. Lawyers have seen a long history of protection against civil suits by non-clients. Beginning in 1880 and extending into the second half of the twentieth century, the “privity-based bar operated to completely preclude almost all civil suits against lawyers by non-clients.” Eugene J. Schiltz, *Civil Liability for Aiding and Abetting: Should Lawyers be “Privileged” to Assist Their Clients’ Wrongdoing?* 29 *PACE L. REV.* 75, 86 (2009).

<sup>95</sup> *See* Rubin, *supra* note 90, at 18 (“It used to be hornbook law that a lawyer could not be liable to nonclients because (a) the only cause of action against a lawyer was in malpractice, and (b) there could be no malpractice claim in the absence of a contractual relationship to the plaintiff.”).

<sup>96</sup> Kevin H. Michels, *Third-Party Negligence Claims Against Counsel: A Proposed Unified Liability Standard*, 22 *GEO. J. LEGAL ETHICS* 143, 150 (2009).

<sup>97</sup> Rubin, *supra* note 90, at 18 (quoting Nancy Lewis, *Lawyers’ Liability to Third Parties: The Ideology of Advocacy Reframed*, 66 *OR. L. REV.* 801, 828 (1997)).

<sup>98</sup> *Walker v. Lawson*, 514 N.E.2d 629, 633–34 (Ind. Ct. App. 1987) (holding that intended beneficiaries under will could bring an action against drafting attorney); Michels, *supra* note 96, at 146 (citing *Lucas v. Hamm*, 364 P.2d 685, 689 (Cal. 1961) (“[I]ntended beneficiaries of a will who will lose their testamentary rights because of failure of the attorney who drew the will to properly fulfill his obligations under his contract with the testator may recover as third-party beneficiaries.”)).

<sup>99</sup> *See, e.g.*, *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987).

<sup>100</sup> Michels, *supra* note 96, at 146. The Restatement approach has been called a “contractarian” view of liability because of its balancing approach, which includes the ability to allow limits to liability through contractual language. Rubin, *supra* note 90, at 19 (citing Richard W. Painter, *Rules Lawyers Play by*, 76 *N.Y.U. L. REV.* 665, 696 (2001)).

The primary justification for the relaxation of privity is protection of non-clients that are most directly impacted by an attorney's actions. Under modern attorney liability rules, the most broadly accepted class of non-client plaintiffs is comprised of beneficiaries of the attorney's legal services,<sup>101</sup> but in some cases, those non-clients that suffer foreseeable injury by an attorney can bring suit as well.<sup>102</sup> Another reason for relaxing privity standards is to facilitate better legal service to the client. Comment (f) of Restatement § 51 states that attorney liability to non-clients "[m]ay promote the lawyer's loyal and effective pursuit of the client's objectives."<sup>103</sup> Echoing this sentiment, one court stated that the threat of liability to non-clients "likely motivates the lawyer to draft and execute testamentary instruments with great care."<sup>104</sup> The importance of this motivation is most easily seen in cases where clients are no longer able to ensure that the attorney follows their instructions (as in the case of the client's death), so that the "non-client may be the only person likely to enforce the lawyer's duty to the client."<sup>105</sup>

However, there are negative consequences to expanding liability beyond its traditional limits. The first and most immediate problem is the potential for harm to the client. As Comment (e) to Restatement § 51 notes, it is important that, "[r]ecognition of [a non-client] claim does not conflict with duties the lawyer properly owed to the client."<sup>106</sup> Accordingly, "[c]ourts have refrained from imposing liability when such liability had the potential of interfering with the ethical obligations owed by an attorney to his or her client."<sup>107</sup> How would non-client claims interfere with an attorney's duties to a client? The quality of legal services may decline where attorneys fear liability to third parties.<sup>108</sup> Attorneys would certainly exercise more restraint in determining what information to give their clients or what services to provide should they be held more

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<sup>101</sup> MALLEN & SMITH, *supra* note 93, § 7:8 ("No matter the legal theory, the predominant inquiry [for identifying the beneficiary] usually has focused on one criterion: was the principal purpose of the attorney's retention to provide legal services for the benefit of the plaintiff?" (citation omitted)).

<sup>102</sup> *See id.* § 7:9 (noting that the balancing test utilized by California is flexible enough to include this type of plaintiff, whereas the third-party beneficiary theory does not).

<sup>103</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 cmt. f (2000).

<sup>104</sup> *Schreiner v. Scoville*, 410 N.W.2d 679, 682 (Iowa 1987) (citation omitted). Note, however, that the court still carefully limited the class to whom this rule would apply and held that the lawyer only owed a duty of care to "to the direct, intended, and specifically identifiable beneficiaries of the testator." *Id.* Accordingly, "a beneficiary who is simply disappointed with what he or she received from the estate will have no cause of action against the testator's lawyer." *Id.* at 683.

<sup>105</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 cmt. f (2000).

<sup>106</sup> *Id.* at cmt. e.

<sup>107</sup> *Krawczyk v. Stingle*, 543 A.2d 733, 736 (Conn. 1988).

<sup>108</sup> *See Lewinbuk, supra* note 91, at 169.

liable to non-clients.<sup>109</sup> In such cases, attorneys' concern for self-preservation ultimately creates a conflict of interest with service to their clients. As one court pointed out, "[L]awyers cannot serve their clients adequately when their own self-interest—[i.e.] the need to protect themselves from potential tort claims by third parties—pulls in the opposite direction."<sup>110</sup> Indeed, avoiding conflicts of interests is the most common reason that courts have restricted attorney suits to plaintiffs in privity of contract.<sup>111</sup>

The second downside to expansive attorney liability is the potential volume of such suits. Actions by attorneys often result in injuries to third parties.<sup>112</sup> It is difficult to distinguish harm caused by inappropriate conduct by a lawyer on one hand and harm caused by the lawyer simply fulfilling her duty to a client on the other.<sup>113</sup> Consequently, attorneys face a potential mountain of plaintiffs for any given representation. A landmark case in third-party liability, *Ultramares Corporation v. Touche*,<sup>114</sup> aptly articulated the dangers of liability in this area. The court expressed concern that third-party liability would expose the defendant-accountants to liability of an "indeterminate amount for an indeterminate time to an indeterminate class" and held that no duty of care extends to members of a class of unknown investors or lenders.<sup>115</sup> Conferring a benefit to a wide target such as the public at large is insufficient to create liability; instead, the plaintiff must identify a more specific target of the duty.<sup>116</sup> Courts have applied this reasoning to the attorney-client context and have often concluded that if a class is potentially limitless or unfixed, a duty does not arise.<sup>117</sup>

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<sup>109</sup> Vulnerability to increased suits by beneficiaries of a will, for example, may discourage attorneys from facilitating the creation or amendment of wills in general. *See Moore v. Anderson*, 135 Cal. Rptr. 2d. 888, 896–97 (Ct. App. 2003) (refusing to acknowledge attorney had a duty to beneficiaries to ascertain the testamentary capacity of testator-client); *see also Krawczyk*, 543 A.2d at 736 ("Fear of liability to potential third party beneficiaries would contravene the attorney's primary responsibility to ensure that the proposed estate plan effectuates the client's wishes . . .").

<sup>110</sup> *Reynolds v. Schrock*, 142 P.3d 1062, 1068 (Or. 2006); *see also Moore*, 135 Cal. Rptr. 2d. at 899 (holding attorney not liable to the beneficiary of a previously drafted will because "the specter of liability would subject the attorney to conflicting burdens and would dilute the undivided duty of loyalty to the client.").

<sup>111</sup> MALLEN & SMITH, *supra* note 93, § 7.8 (noting that this concern is with the risk of conflict, not the presence of actual conflict).

<sup>112</sup> *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 cmt. b (2000) ("Lawyers regularly act in disputes and transactions involving non-clients who will foreseeably be harmed by inappropriate acts of the lawyers.").

<sup>113</sup> *Id.*

<sup>114</sup> 174 N.E. 441 (N.Y. 1931).

<sup>115</sup> *Id.* at 446.

<sup>116</sup> *Id.* at 445–46.

<sup>117</sup> *See, e.g., Briggs v. Sterner*, 529 F. Supp. 1155, 1178 (S.D. Iowa 1981) (refusing to hold attorney liable to a class of uncertain composition and potentially limitless numbers); *Alpert v. Shea Gould Climenko & Casey*, 559 N.Y.S.2d 312, 316 (N.Y. App. Div. 1990)

Clear limits to attorney liability are therefore necessary to protect both the attorney and her client from harmful non-client suits. To prevent the risk of overbroad attorney liability, the law could completely reject non-client liability or, less severely, limit liability through judicially or legislatively created rules. Courts in Texas, for example, follow the former approach and hold strongly to the rule of privity.<sup>118</sup> These courts do not deny that third parties suffer harm or insist that such harm is unforeseeable.<sup>119</sup> Instead, they recognize that the rule of privity of contract is a policy choice, and like other bright line rules, it exists to serve interests that outweigh the inevitable harm that it sometimes causes: “[T]he greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent.”<sup>120</sup>

The alternate solution would require courts or legislatures to draw specific parameters to non-client suits.<sup>121</sup> Under the Restatement’s approach, for example, suits by non-client beneficiaries are limited to situations where “the nonclient is not reasonably able to protect its rights.”<sup>122</sup> Courts have drawn their own lines, as well, by narrowing the class of potential plaintiffs to avoid the “indeterminate number” problem. Illinois courts, for example, permit non-clients to sue for attorney malpractice only if they can “prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party.”<sup>123</sup> Other courts have held that an attorney’s duty can only arise if a plaintiff is a member of a “particularized class”<sup>124</sup> or if the defendant-

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(holding investors did not have viable breach of duty claim against the law firm that prepared tax opinion letters, due in part, to the fact that “the class of potential investors [was] not fixed and identifiable”).

<sup>118</sup> See, e.g., *Belt v. Oppenheimer*, 192 S.W.3d 780, 783 (Tex. 2006). However, jurisdictions that still follow the attorney-client privity standard are now few in number. *Lewinbuk*, *supra* note 91, at 139.

<sup>119</sup> See *Belt*, 192 S.W.3d at 783 (recognizing the state-law rule that no duty of care is owed to non-client beneficiaries, “even if they are damaged by the attorney’s malpractice”).

<sup>120</sup> *Id.* (quoting *Barcelo v. Elliott*, 923 S.W.2d 575, 578 (Tex. 1996)).

<sup>121</sup> See, e.g., *Lewinbuk*, *supra* note 91, at 172 (advocating the use of a pre-screening statute that gives judicial discretion to disallow claims); *Schiltz*, *supra* note 86, at 150 (explaining the benefits of letting judges police the boundaries of non-client suits, as they understand the attorney’s predicament).

<sup>122</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4)(c) (2000). The non-client must be in a vulnerable position, such as that of a juvenile or an incapacitated person, in contrast to a businessperson with adequate access to information. See *id.* § 51 cmt. h.

<sup>123</sup> *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1563 (7th Cir. 1987) (quoting *Pelham v. Griesheimer*, 440 N.E.2d 96, 100 (Ill. 1982) (permitting suit filed by lender against borrower’s attorney because the attorney was hired for the sole purpose of facilitating the loan)).

<sup>124</sup> See *Eisenberg v. Gagnon*, 766 F.2d 770, 780 (3d Cir. 1985) (“The jury was therefore entitled to conclude that the information was circulated for the specific purpose of inducing members of a particularized class to rely thereupon, a circumstance that would create a duty of due diligence in the maker of the statements and a reasonable expectation of accuracy in the

attorney could “reasonably have apprehended that [the plaintiff] was among the class of nonclients” that could have been injured.<sup>125</sup> Although this approach lacks the simplicity of the Texas privity rule, it avoids the harshness of a bright-line rule while attempting to protect the parties involved from the heavy cost of making attorneys more vulnerable to lawsuits.<sup>126</sup> The hope for such a system depends on its refinement over time, as court decisions smooth the rough edges of non-client exceptions to make their application more stable and predictable.<sup>127</sup>

#### *D. Attorney Liability as a Bivens Special Factor*

The challenges of expanding attorney liability mirror those of allowing *Bivens* suits against a larger number of federal actors. First, the concern over guarding client and third-party interests in the attorney liability context mirrors the protection of government interests and individual rights in *Bivens* cases. Just as an attorney’s client suffers from an excessively cautious approach to advocacy, so does the government’s functioning suffer from timid agents fearful of performing their tasks. Second, both areas demonstrate the need to firmly limit their respective doctrine’s expansion. Due to the large number of people affected, attorney exposure to suit must have its limits, and government agents cannot be liable to any member of the public for any official action.

Combining the two types of suits, a *Bivens* action against a government attorney should stimulate greater restraint than a typical suit against a government official. Although a *Bivens* action would preclude simple negligence claims,<sup>128</sup> thus removing some danger of a relaxed standard for attorney-client privity, the remaining problems facing the attorney and the client-government through *Bivens* actions threaten to undermine effective governance. Government attorneys often serve in roles that implicate governmental policy, and this policy-advisor role commands a great need for honest, unrestrained advice. Additionally, because these suits can affect city, state, or even national populations, a limit to their viability is critical.

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recipients, even without a specific formal relationship between the investors and [attorney] Wasserstrom.”).

<sup>125</sup> *Vanguard Prod., Inc. v. Martin*, 894 F.2d 375, 378 (10th Cir. 1990) (holding that a duty to a third party in preparing a title opinion for the sale of property only where they could “reasonably have apprehended that [Plaintiff] was among the class of nonclients” that could be injured as a “natural and probable cause” of the attorney’s actions).

<sup>126</sup> *See, e.g., Lewinbuk, supra* note 91, at 172 (arguing that judicial control of non-client suits saves time and effort in litigating frivolous claims).

<sup>127</sup> *See id.* (noting that an active judiciary in such issues would familiarize judges with this type of claim and provide a record for future litigants to follow).

<sup>128</sup> *See Schweiker v. Chilicky*, 487 U.S. 412, 447 (1988) (“[I]n order to prevail in any *Bivens* action, . . . [plaintiffs must] prove a deliberate abuse of governmental power rather than mere negligence . . . .” (citing *Daniels v. Williams*, 474 U.S. 327 (1986))).

Despite this need to limit *Bivens* suits, courts should not fashion a rule precluding all *Bivens* suits against government attorneys. The wide-reaching influence of these attorneys also brings the potential for greater abuse of the rights of the citizenry. One of the primary purposes of allowing *Bivens* actions is to deter federal agent wrongdoing. Government attorneys have, on multiple occasions, shown themselves capable of violating citizens' constitutional rights.<sup>129</sup> Until government attorneys can prove themselves without sin, *Bivens* must serve as a real, albeit rare, backstop to their constitutional wrongs. Federal courts should therefore adopt an approach much like those jurisdictions that relax privity requirements and allow *Bivens* suits against government attorneys to proceed in a limited number of situations.

The special factors analysis under prong two of *Bivens* actions provides the necessary limitation for these *Bivens* suits. Whether the federal agent in question serves as an attorney should itself represent a special factor advising hesitation against the viability of a *Bivens* cause of action. Recognizing suits against government attorneys as a special factor has two obvious benefits. First, it allows the policing of potentially influential or powerful government agents without opening a Pandora's box of unlimited exposure to suit. It thus avoids the harshness of a bright-line rule and the dangers of wide exposure. Second, it gives the courts clear guidance on how to proceed with these suits, facilitating a more reliable record for future judges and litigants alike. Courts can dispose of inappropriate suits for reasons directly related to defendants' job title or duties rather than search for other acceptable grounds to serve as a proxy. This gives potential plaintiffs and government defendants alike a roadmap for how such cases might proceed, reducing the dangers of excessive litigation and frustration on all sides.

Some may argue that this special factor is unnecessary given the high hurdles already in place for a would-be *Bivens* plaintiff. Qualified immunity, bad faith, and the usual *Bivens* hurdles make the success of a *Bivens* action unlikely.<sup>130</sup> The Supreme Court's recent interpretation of the federal pleading requirements in *Twombly* and *Iqbal* arguably puts

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<sup>129</sup> See, e.g., Lippoldt v. Cole, 468 F.3d 1204, 1219–20 (10th Cir. 2006) (holding that city attorney's role in researching the law and drafting letter regarding plaintiffs played a "substantial factor" in violating plaintiff's First Amendment rights); Donovan v. Reinbold, 433 F.2d 738, 744 (9th Cir. 1970) (holding that plaintiff's complaint sufficiently alleged civil rights violation stemming from the city attorney's advice); Anoushiravani v. Fishel, 2004 WL 1630240, at \*5 (D. Or. July 19, 2004) (finding a causal connection between attorneys' advice to government officials and the alleged injury to permit plaintiff's *Bivens* action to survive defendant's motion to dismiss).

<sup>130</sup> See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001); see also Rosen, *supra* note 53, at 344–45 (arguing that courts have placed "innumerable obstacles" to the success of a *Bivens* action that have tipped the balance too far in favor of government to the detriment of the aggrieved citizen).

greater demands on plaintiffs at the initial stages of litigation.<sup>131</sup> This heightened focus on factual sufficiency places especially weighty burdens on litigants seeking to implicate policymaking officials without sufficiently specific allegations.<sup>132</sup> *Twombly* and *Iqbal*'s requirement of factual detail under the plausibility standard threatens to put plaintiffs in a Catch-22 of needing discovery to obtain incriminatory evidence and needing incriminatory evidence to survive dismissal and obtain discovery. All this, however, ignores the fact that *Bivens* challenges can cause damage even if they do not proceed to trial. Even if courts dismiss such suits in the pre-trial stages of litigation, the cost in time, money, and political standing to government lawyers may take its toll. Further, without clear limitations on government attorney liability, plaintiffs will continue to bring these suits even in the face of already daunting odds of success.<sup>133</sup> A *Bivens* special factors rule policing government attorney liability would serve as a clear message both to plaintiffs about the true difficulty of bringing suit and to government attorneys about the scope of their liability.<sup>134</sup>

### III. *BIVENS* CLAIMS AGAINST THE OLC

Applying this synthesis to the OLC, a small number of *Bivens* suits should be considered viable against these policymaker attorneys. Due to the OLC attorneys' position at the crossroads of legal counsel and executive policy, concerns over detriment to governmental performance and the overbroad reach of *Bivens* claims hold especially strong. The OLC's clients are the President and the executive branch of the United States. Memoranda distributed to government officials and their departments will have significant and widespread effects on the public. In his own words, President Bush sanctioned waterboarding "because the lawyer said it was legal."<sup>135</sup> On the other hand, OLC attorneys can face enor-

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<sup>131</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 554 (2007); see also Rakesh N. Kilaru, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 929–30 (2010) (discussing the heightened pleading standards of *Iqbal* and *Twombly*).

<sup>132</sup> See, e.g., *Iqbal*, 129 S. Ct. at 1952 (holding plaintiff's *Bivens* pleading insufficient for only pleading facts of detainment and not "any factual allegation sufficient to plausibly suggest [defendant's] discriminatory state of mind").

<sup>133</sup> See Pillard, *supra* note 54, at 96 (concluding that too many *Bivens* claims come forward, despite their low success rate and attributing this, in part, to the "obfuscatory quality of the current *Bivens* regime" that masks the true difficulty of obtaining relief).

<sup>134</sup> See *id.* at 97 (criticizing the current *Bivens* regime for the continuing uncertainty about government officials' personal liability).

<sup>135</sup> *NBC News Special: "Decision Points,"* (NBC television broadcast of an interview with President George W. Bush Nov. 9, 2010), available at [http://www.msnbc.msn.com/id/40076644/ns/politics-decision\\_points/](http://www.msnbc.msn.com/id/40076644/ns/politics-decision_points/). President Bush describes the moment that he sanctioned waterboarding this way:



mous pressure from the government officials they serve.<sup>136</sup> Like private attorneys, their success depends on finding the proper balance between observance of the law and service to their clients, even when a client wields great power and influence.<sup>137</sup> The fact that the administration in power typically appoints many OLC members heightens the danger of political pressure.<sup>138</sup> Not surprisingly, even before the War on Terror, critics of the OLC's activities highlighted strong connections between the legal positions taken by the OLC and the objectives of the administration in power.<sup>139</sup>

Special factors analysis under *Bivens* represents the most appropriate way to resolve this tension in subjecting the OLC to civil suit. The liability of these government actors must not be overbroad, and step one of the courts' *Bivens* analysis cannot provide an adequate shield. Only the "special factor" of government attorney liability under step two can give judges adequate discretion to both protect OLC attorneys and preserve the rights of plaintiffs that bring legitimate pleas for relief.

#### A. *An Insufficient Remedy: the OLC and Bivens Step One*

No alternative remedy exists for plaintiffs such as Jose Padilla who seek redress from alleged harms caused by an OLC attorney. According to step one of the analysis, a *Bivens* suit will not go forward in the face of an alternative means of redress. Although these alternative means do not need to serve as a comprehensive remedy, they must at least help restore those who suffered violations of their constitutional rights. Yet none of the possible checks on the OLC's power go toward remedying constitutional rights violations, leaving the door to *Bivens* suits wide open.

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We believe America's going to be attacked again. There's all kinds of intelligence coming in. And— and— one of the high value al Qaeda operatives was Khalid Sheikh Mohammed, the chief operating officer of al Qaeda . . . ordered the attack on 9/11. And they say, "He's got information." I said, "Find out what he knows." And so I said to our team, "Are the techniques legal?" And a legal team says, "Yes, they are." And I said, "Use 'em."

*Id.*

<sup>136</sup> Harold Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 515–16 (1993) ("Like all accommodating lawyers, OLC is eager to please its clients so that it can both maximize its own business and 'stay in the loop.'").

<sup>137</sup> See Douglas W. Kmiec, *Yoo's Labour's Lost: Jack Goldsmith's Nine-Month Saga in the Office of Legal Counsel*, 31 HARV. J.L. & PUB. POL'Y 795, 799 (2007) (reviewing JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007) and attributing the OLC's past successes to the ability to "preserve its fidelity to the law while at the same time finding a way, if possible, to preserve presidential actions").

<sup>138</sup> McGinnis, *supra* note 12, at 425 (noting that OLC attorneys serve for an average of two or three years at a time, allowing the Attorney General to appoint more people that share the President's point of view on issues).

<sup>139</sup> See Koh, *supra* note 136, at 516 (describing the broad view of executive power taken by the OLC during the Iran-Contra Affair, and the reversals of position on both extraterritorial abductions and the legal status of Haitian refugees interdicted on the high seas).

No current system provides an adequate deterrent for OLC-committed constitutional wrongs. The Office of Professional Responsibility (OPR) within the Department of Justice checks OLC actions,<sup>140</sup> but questions as to the OPR's effectiveness and its inability to help the victim directly make this an insufficient alternative remedy. The OPR has the responsibility to investigate professional misconduct by Department of Justice attorneys and report its findings to bar committees.<sup>141</sup> This oversight could deter OLC members from illegal action, but the OPR is under the authority of the Department of Justice and may not pursue OLC claims aggressively. One possible example of such inter-departmental loyalty is the investigation against John Yoo, Jay Bybee, and Steven Bradbury.<sup>142</sup> When a leak of the draft report that recommended disciplinary action surfaced in May, former Attorney General Michael Mukasey rejected it, and deputy Mark Filip refused to endorse it.<sup>143</sup> Furthermore, any disciplinary action by the OPR will not help restore a particular injured individual.

State ethics rules also arguably serve to deter constitutional violations by OLC attorneys, yet the same problems of weak policing and lack of actual remedy remain. Attorneys that work for the federal government are subject to state ethics rules.<sup>144</sup> Accordingly, John Yoo was subject to the D.C. Rules of Professional Conduct because he practiced in the District of Columbia when he worked for the Office of Legal Counsel.<sup>145</sup> However, state ethics rules may not prove a strong enough deterrent for a government actor subject to pressures from the administration, and censure for unethical conduct, like OPR actions, will not redress harms inflicted on a particular individual.

Potential checks on OLC excess are not only weak but also insufficient to provide redress for the actual victims of the OLC's unconstitutional activities. Habeas petitions provide a possible remedy, but as the district court noted in Padilla's case, this avenue is largely ineffective for would-be plaintiffs.<sup>146</sup> Habeas petitions can only be brought by currently-confined plaintiffs against the official in charge of the confining facility, and furthermore, the number of successful petitions under "the

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<sup>140</sup> Steven Giballa, *Saving the Law from the Office of Legal Counsel*, 22 GEO. J. LEGAL ETHICS 845, 860 (2009).

<sup>141</sup> *Id.*

<sup>142</sup> Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SEC. L. & POL'Y 455, 463 (2005).

<sup>143</sup> *The Pursuit of John Yoo*, WALL ST. J., June 25, 2009, at A13, available at <http://online.wsj.com/article/SB124580586602845075.html>.

<sup>144</sup> Clark, *supra* note 142, at 463.

<sup>145</sup> *Id.* at 464 (by operation of the McDade Amendment).

<sup>146</sup> Padilla v. Yoo, 633 F. Supp. 2d 1005, 1021 (N.D. Cal. 2009) ("[A] habeas proceeding would not have provided an adequate alternative remedy.").

Great Writ” is incredibly small.<sup>147</sup> Victims will also see suits against actors in the chain of command fail because of qualified immunity. Where interrogators and supervisors are following the recommendations of the OLC in good faith, they likely have a “golden shield” from liability.<sup>148</sup> Former Attorney General Michael Mukasey notes that “the Justice Department . . . could not investigate or prosecute somebody for acting in reliance on a Justice Department opinion” even if the opinion contained erroneous advice.<sup>149</sup>

Without either sufficient pressure on the OLC to perform its tasks constitutionally or provide proper redress for citizens who suffer at its missteps, step one of *Bivens* cannot prevent an action against the OLC from moving forward. To police against excessive OLC liability, then, courts must use an alternate means for dismissal.

#### *B. Policing the OLC Through Bivens Step Two: The Attorney Liability Special Factor*

Only special factors analysis under *Bivens*’s step two provides sufficient protection for the OLC without destroying its deterrent force for OLC attorneys or denying avenues for victim remedies. The OLC’s critical advisory position produces situations where the dangers of a case moving forward against an OLC attorney will outweigh a plaintiff’s need for relief. Courts must be equipped with proper justification for dismissing these suits without making pretext to other grounds. Under the special factor of government attorney liability, the OLC’s position itself easily becomes a yellow flag for courts to determine if such a suit should go forward.

The possibility of *Bivens* suits negatively affecting the OLC’s performance is no small matter. Beyond the obvious risk of classified document exposure, the fallout from a costly *Bivens* case for future counseling could be devastating. As the Restatement of the Law Governing Lawyers and many courts have cautioned, lawsuit-friendly environments tend to deter advice-giving, and this could produce serious consequences for an administration asking the OLC for counsel on tough decisions at home and abroad. John C. Eastman, dean of Chapman University School of Law, cautions that holding the OLC liable for terror advice would be “unfortunate and quite frankly . . . dangerous” because

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<sup>147</sup> See *Abuse of the Writ*, CONN. L. TRIB. 30, Apr. 5, 2010, 2010 WLNR 7031283 (“Less than 3 percent of all habeas petitions are successful, and only a tiny fraction of those result in release of the petitioner rather than a new trial.”).

<sup>148</sup> Kmiec, *supra* note 137, at 820.

<sup>149</sup> Note, *The Immunity-Confering Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086, 2086 (2008) (internal quotation marks omitted).

of the resultant excessive risk aversion the OLC would adopt.<sup>150</sup> John Yoo has himself argued that publication of legal memos would discourage government lawyers from giving “straight-talk legal advice” in the future.<sup>151</sup>

This problem increases when the OLC must advise the executive about new and uncertain areas of the law. In the early post-9/11 era, new security problems surfaced, bringing with them a host of legal issues to consider. Assistant Attorney General and head of the OLC under President Reagan and President Bush, Douglas W. Kmiec, writes of the uncertainties of the torture memo era: “At the time OLC was called upon to give its advice, closer to 9/11, there were many legal questions and uncertainties even as to what fit within Congress’s initially narrow definitions of torture.”<sup>152</sup>

Special factors analysis allows courts to address these concerns and take into consideration a lawyer’s unique role as a policymaker tasked with making legal determinations in a changing world of uncertainties. In many, but not all cases, this special factor should preclude *Bivens* liability. Certainly, the presence of two particular special factors often present in suits pertaining to the War on Terror—attorney liability and foreign policy—should usually preclude *Bivens* liability. Courts must still leave open the possibility that such a suit can go forward, for its deterrent and remedial benefits in the OLC context are clear. However, such suits must never go beyond targeting individual OLC attorneys. Collaboration within the OLC on a given policy might tempt plaintiffs to bring a *Bivens* action against the entire department. Courts must vigorously avoid such scenarios. The Supreme Court has been very clear that *Bivens* liability should only apply to *individuals*. Limiting *Bivens* actions to individual OLC attorneys, and then only those in which special factors analysis does not caution against such a suit, will ensure the OLC gives the best advice possible to its Executive-branch client.

#### CONCLUSION

In light of Jose Padilla’s focus on a policymaking government attorney in his *Bivens* suit, allowing such a claim to proceed raises serious concerns about the ability of government officials to function effectively. Courts need a clear standard by which to proceed with such claims. Spe-

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<sup>150</sup> Charlie Savage & Scott Shane, *Terror-War Fallout Lingers over Bush Lawyers*, N.Y. TIMES, Mar. 9, 2009, at A1, available at <http://nytimes.com/2009/03/09/washington/09lawyers.html>.

<sup>151</sup> Debra Cassens Weiss, *Should Yoo Be Punished for Memos?*, A.B.A. J., Mar. 9, 2009, [http://www.abajournal.com/news/article/should\\_yoo\\_be\\_punished\\_for\\_torture\\_memos\\_experts\\_disagree\\_doj\\_opposes\\_liabi/](http://www.abajournal.com/news/article/should_yoo_be_punished_for_torture_memos_experts_disagree_doj_opposes_liabi/).

<sup>152</sup> Kmiec, *supra* note 137, at 819–20.

cial factors analysis under *Bivens* step two provides the appropriate approach. Rather than simply viewing an OLC attorney as just another government agent, courts should recognize the policymaking and legal counseling duties as potential grounds for dismissal.

Special factors analysis both gives important government agents like John Yoo added protection from suit without foreclosing on relief if Padilla or anyone else bring forward a particularly strong claim. A potential plaintiff, such as Jose Padilla, should have difficulty invoking *Bivens* liability against a defendant similarly situated to John Yoo. Courts should diligently weed out such claims while keeping a keen eye on those that would truly provide deterrence of important government actors. This will ensure that important government policymakers and counselors will give sound advice and avoid error. Ultimately, the law transcends government attorneys and policymakers alike.