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Notes and Comments

QUALIFIED IMMUNITY, CONSTITUTIONAL STAGNATION, AND THE GLOBAL WAR ON TERROR

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As long as there is no accepted procedure for making detention decisions, the public diplomacy woes that plague [Guantánamo Bay] will continue to plague any future detention site—which will become, in the public mind, Guantánamo by some other name.[†]

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[†] BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 153 (2008).

INTRODUCTION

Around noon on September 26, 2002, a dual Canadian–Syrian citizen named Maher Arar walked between terminals at Kennedy Airport in New York as he returned from vacation.[1] However, instead of returning to work in Montreal, Arar spent the night in the airport.[2] He had been detained by Immigration and Naturalization Service officials and FBI agents on suspicion of associating with al Qaeda.[3] Only twelve days later, Arar slept—if he slept at all—in a six-by-three foot underground cell in Syria.[4] U.S. officials had questioned him for days in New York before he was sent to Jordan in a small plane and then delivered to Syria.[5] During his first interrogations—which Arar alleges were facilitated by the United States—he was beaten with a two-inch-thick electric cable.[6] All told, Arar lived in his small Syrian cell for ten months and was not recovered by Canadian officials for an entire year.[7] Although his ordeal has become a notorious story about U.S. antiterrorism efforts, it is impossible to truly understand the fear and pain of Arar's experience. It is, perhaps, easier to empathize with his desire for reparations from the U.S. government.

In recent years, several people like Arar, detained or mistreated by the United States during the "Global War on Terror" (GWOT),[8] have brought *Bivens* actions seeking compensation from executive officials for alleged constitutional torts.[9] These suits are "inevitable"[10] and will become increasingly common as the repercussions of the GWOT continue filtering through the judicial system.[11] Opponents and victims of the GWOT view a

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[1] Arar v. Ashcroft, 585 F.3d 559, 565 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

[2] *Id.*

[3] *Id.* at 566.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] The term "Global War on Terror" includes the government's and military actors' accusations and enforcement activities—e.g., detention, torture, forcible transport, and illegal searches—directed at suspected enemies as part of U.S. efforts to deter and extinguish terrorist threats or related to U.S. military activity in the Middle East. This focus on people suspected of terrorism-related activity is not meant to ignore or minimize the extent to which civilians and military personnel and their families have been and continue to become victims of the GWOT.

[9] *See, e.g.*, Ashcroft v. al-Kidd (*al-Kidd III*), 131 S. Ct. 2074 (2011); *Arar*, 585 F.3d 559; Turkmen v. Ashcroft, 589 F.3d 542 (2d Cir. 2009); Rasul v. Myers (*Rasul II*), 563 F.3d 527 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009); Khorrami v. Rolince, 539 F.3d 782 (7th Cir. 2008); Padilla v. Yoo, 633 F. Supp. 2d 1005 (N.D. Cal. 2009); Farag v. United States, 587 F. Supp. 2d 436 (E.D.N.Y. 2008); *In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85 (D.D.C. 2007); Elmaghraby v. Ashcroft, No. 1:04-CV-01809, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005), *rev'd sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); Complaint, Hamad v. Gates, No. 2:10-CV-00591 (W.D. Wash. Apr. 7, 2010), 2010 WL 2935653.

[10] George D. Brown, *"Counter-Counter-Terrorism via Lawsuit"—The* Bivens *Impasse*, 82 S. CAL. L. REV. 841, 847 (2009).

[11] *Id.* at 841.

Bivens right of action as an appropriate safeguard for human rights and the rule of law and have focused on securing the availability of such suits for wronged individuals.[12] Although GWOT plaintiffs face inherent challenges in seeking to invoke the nearly dead *Bivens* right of action,[13] these obstacles to relief are not insurmountable.

The qualified immunity defense almost universally claimed by the defendant officials in detainees' *Bivens* actions[14] has received less attention from courts and commentators than the questions of whether constitutional rights and *Bivens* actions should be available to detainees, but it likely presents the more formidable barrier to compensatory relief. In January 2009, in *Pearson v. Callahan*,[15] the Supreme Court overturned the qualified immunity test that had been mandatory since 2001.[16] The old test, taken from *Saucier v. Katz*, required courts to consider the constitutional merits of the plaintiff's claim before determining whether the constitutional right involved was "clearly established" when the defendant official acted.[17] The *Pearson* Court, in removing this sequencing requirement, asserted that courts could decide most cases solely on the "clearly established" question.[18] However, recognizing that the mandatory sequence of the *Saucier* test serves important notice-giving and rights-development functions, the Court explained that merits-first sequencing remains "especially valuable"

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[12] *See, e.g.*, Press Release, Ctr. for Constitutional Rights, Six Friend of the Court Briefs Ask Supreme Court to Hear Case of Rendition Survivor Maher Arar (Mar. 8, 2010), http://ccrjustice.org/newsroom/press-releases/six-friend-court-briefs-ask-supreme-court-hear-case-rendition-survivor-maher. Ultimately, the Supreme Court declined to hear Arar's petition. Arar v. Ashcroft, 130 S. Ct. 3409 (2010).

Indeed, the *Bivens* cause of action is, to some degree, a remedy for the "presentist bias (or 'myopia') [that] often afflicts officials, who order short-term fixes like mass detentions or curbs on free speech with troubling long-term consequences." Peter Margulies, *Judging Myopia in Hindsight:* Bivens *Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195, 198 (2010) (footnote omitted). Potential downsides to the extension of a *Bivens* right of action to GWOT detainees include enemy use of litigation as a tactic (or weapon) of distraction. *See, e.g.*, Kristina A. Kiik, Comment, *Quantum of Competence: Balancing* Bivens *During the War on Terror*, 62 SMU L. REV. 1945, 1946–47 (2009).

[13] *See* Brown, *supra* note 10, at 845; *see also id.* at 845 n.15 (citing sources expressing concern about whether *Bivens* actions continue to be viable). *But see* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 837–43 (2010) (reporting that plaintiff success rates in *Bivens* actions are higher than commentators have reported).

[14] *See, e.g.*, *al-Kidd III*, 131 S. Ct. at 2089; *Arar*, 585 F.3d at 563; *Turkmen*, 589 F.3d at 544–45; *Rasul II*, 563 F.3d at 528; *Khorrami*, 539 F.3d at 786; *Padilla*, 633 F. Supp. 2d at 1030; *Farag*, 587 F. Supp. 2d at 443; *Iraq & Afg. Detainees*, 479 F. Supp. 2d at 92; *Elmaghraby*, 2005 WL 2375202, at *10.

[15] 129 S. Ct. 808 (2009).

[16] *See* Saucier v. Katz, 533 U.S. 194 (2001).

[17] *Id.* at 200.

[18] *Pearson*, 129 S. Ct. at 818.

for claims that are unlikely to arise in other law-developing suits where qualified immunity is unavailable.[19]

This Comment argues that courts should follow the *Saucier* sequence when evaluating *Bivens* claims brought by victims of the GWOT because these claims fit into the "especially valuable" category. To date, lower courts have disagreed as to whether they should apply *Saucier* sequencing to these claims. However, this Comment shows that the constitutional rights of the victims of the GWOT and the constitutionality of executive detention policies are unlikely to develop through alternative legal procedures. Therefore, the lower courts should address the constitutional merits of these claims before proceeding to the question of whether any constitutional rights that may have been violated were "clearly established" when the defendant official acted. Additionally, the Supreme Court should explicitly endorse the continued value of the *Saucier* sequence for assessing qualified immunity in GWOT *Bivens* claims.

Part I of this Comment introduces *Bivens* actions and the defense of qualified immunity and reviews the recent *Pearson* decision recasting the *Saucier* sequence as discretionary. Part II explains why victims of the GWOT are precisely the type of plaintiffs in whose suits qualified immunity determinations should continue to require a merits-first test. Part II analyzes injunctive and declaratory relief, habeas corpus petitions, and motions to suppress evidence, in order to show that detainee rights are unlikely to develop through these alternative rights of action. Part III examines contradictory decisions by the D.C. Circuit and the Ninth Circuit and shows that the lower courts have applied *Saucier* sequencing inconsistently to the qualified immunity defense in detainees' *Bivens* actions. This Part then predicts how this lower court confusion will affect the Judiciary Branch's notice-giving and rights-development functions in the U.S. antiterrorism efforts. Part IV addresses common criticisms leveled against *Saucier* sequencing and demonstrates why they are misconceived in the context of GWOT victims' *Bivens* actions. Part IV then explains why the Judiciary Branch should assume any role at all rather than defer to the Executive and Legislative Branches in shaping wartime detainee rights and the parameters for future wartime executive action. It argues that judicial involvement is important because of the infrequent opportunities to clarify and update constitutional laws related to wartime activities and the Judiciary Branch's quintessential role of protecting the rights of unpopular minorities.

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[19] *Id.*

I. BACKGROUND

A. Bivens *Actions for Global War on Terror Detainees*

In 1971, the Supreme Court decided that a person can sue for monetary damages when federal officials violate that person's Fourth Amendment rights.[20] Since 1971, the Court has extended the availability of *Bivens* suits to vindicate other constitutional violations as well.[21] Just as § 1983 permits tort claimants to bring actions against agents acting under color of state law, *Bivens* provides the only mechanism by which individuals can seek damages for federal officials' violations of their constitutional rights.[22]

Unlike § 1983 claims, no federal statute expressly authorizes *Bivens* suits.[23] Each time a court permits a novel *Bivens* claim, it creates a new right of action. Even when a plaintiff sufficiently pleads that federal officials violated her constitutional right, her claim still may be defeated by (1) "special factors counseling hesitation"[24] to create a new right of action or (2) the congressional provision of "an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution."[25]

To date, GWOT *Bivens* plaintiffs have primarily alleged violations relating to their detention and alleged mistreatment both by U.S. interrogators and jailors and by foreign countries to which the United States transferred them.[26] Courts have been reluctant to recognize new *Bivens* rights of action for these plaintiffs even though they have not identified a substitute cause of action for the constitutional violations the GWOT victims assert. None of the existing statutory schemes—the Alien Tort Statute,[27] the Torture Victim Protection Act,[28] the Religious Freedom Restoration Act,[29] or the Feder-

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[20] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[21] *See, e.g.*, Carlson v. Green, 446 U.S. 14 (1980) (extending *Bivens* to violations of the Eighth Amendment right to be free from cruel and unusual punishment); Davis v. Passman, 442 U.S. 228 (1979) (recognizing a *Bivens* action for a violation of the plaintiff's due process rights under the Fifth Amendment).

[22] James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 123 (2009); *see* 42 U.S.C. § 1983 (2006).

[23] Pfander & Baltmanis, *supra* note 22, at 125.

[24] *Carlson*, 446 U.S. at 18 (quoting *Davis*, 442 U.S. at 245) (internal quotation mark omitted).

[25] *Id.* at 18–19 (citing *Bivens*, 403 U.S. at 397; *Davis*, 442 U.S. at 245–47).

[26] *See, e.g.*, *supra* note 9 (listing cases that featured these claims).

[27] *See In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85, 112 (D.D.C. 2007) ("[T]he Alien Tort Statute [28 U.S.C. § 1350 (2006)] is not a federal statute that authorizes recovery against a federal employee."); *Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1161 (2009) [hereinafter *Access to Courts*].

[28] Torture Victim Protection Act of 1991 § 2(a), 28 U.S.C. § 1350 note; *see Access to Courts*, *supra* note 27, at 1161. Under the Torture Victim Protection Act, an addendum to the Alien Tort Statute, the defendant must have acted under "actual or apparent authority, or color of law, of any foreign nation," Torture Victim Protection Act of 1991 § 2, a requirement that excludes claims against U.S. officials who acted only under domestic law.

al Tort Claims Act[30]—authorizes victims of wartime executive action to seek damages from federal officials for constitutional violations. Nor do the Geneva Conventions[31] give GWOT victims a right of action for damages based on torture violations.[32] The courts have foreclosed most GWOT *Bivens* actions based on "special factors counseling hesitation."[33] They have not extended *Bivens* actions to detainees held at Guantánamo Bay,[34] and plaintiffs have not yet come forward with *Bivens* claims related to detention and treatment at other foreign sites. Indeed, courts have only recently begun to accept *Bivens* claims by U.S. citizens detained as "enemy combatants" in the United States.[35]

The Supreme Court's broad view of special factors has made *Bivens* relief all but impossible to obtain for many plaintiffs.[36] The special factors

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[29] Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1 to -4 (2000), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997); *see Access to Courts*, *supra* note 27, at 1162 n.28 ("Congress's stated purpose in enacting the [Religious Freedom Restoration Act] was to restore strict scrutiny review to Free Exercise Clause jurisprudence, not to deter torture." (citing Rasul v. Myers (*Rasul I*), 512 F.3d 644, 670–71 (D.C. Cir. 2008))).

[30] Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–80 (2006); *see Access to Courts*, *supra* note 27, at 1160 ("Congress enacted the FTCA [Federal Tort Claims Act] to make the government liable for certain 'garden-variety torts' by federal employees, such as the negligent operation of government motor vehicles." (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 706 n.4 (2004))).

[31] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 356, 75 U.N.T.S. 287; Geneva Convention Relative to the Protection of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[32] *See Access to Courts*, *supra* note 27, at 1161. *But see* Deborah Pearlstein, *U.S. Supreme Court Can't Wait to Say More About the Geneva Conventions*, OPINIO JURIS (Jan. 29, 2010, 2:20 PM), http://opiniojuris.org/2010/01/29/us-supreme-court-can%e2%80%99t-wait-to-say-more-about-the-geneva-conventions (discussing dissents from a denial of certiorari in a case in which the Supreme Court could have "settle[d] once and for all" whether detainees can invoke the Geneva Conventions in federal court).

The U.S. government has established several Foreign Claims Commissions (FCCs) in Iraq to compensate Iraqi citizens for injuries suffered during the U.S. war efforts there, but the claims settled by the FCCs usually involve injuries like inadvertent killings at checkpoints or property damage in vehicle collisions. *See Access to Courts*, *supra* note 27, at 1164. Prisoners seeking reparation for wrongful or abusive detention have received very little of this compensation. In a few settlements, the United States has paid between $350 (for lost cash and documents) and $5000 (for lost wages). *Id.* at 1165.

[33] *See* Pfander & Baltmanis, *supra* note 22, at 130 (pointing specifically to *Wilson v. Libby*, 535 F.3d 697, 711 (D.C. Cir. 2008), and *Rasul I*, 512 F.3d at 663, 667); *see also* Arar v. Ashcroft, 585 F.3d 559, 564 (2d Cir. 2009) (en banc) ("[I]f a civil remedy in damages is to be created for harms suffered in the context of extraordinary rendition, it must be created by Congress . . . ."), *cert. denied*, 130 S. Ct. 3409 (2010).

[34] *See, e.g.*, *Rasul II*, 563 F.3d 527, 530–32 & n.5 (D.C. Cir. 2009) (refusing to permit a *Bivens* action by former Guantánamo Bay detainees), *cert. denied*, 130 S. Ct. 1013 (2009); Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 111–12 (D.D.C. 2010) (same).

[35] In 2009, two courts within the Ninth Circuit permitted two such *Bivens* suits. *See* al-Kidd v. Ashcroft (*al-Kidd II*), 580 F.3d 949 (9th Cir. 2009), *rev'd*, *al-Kidd III*, 131 S. Ct. 2074 (2011); Padilla v. Yoo, 633 F. Supp. 2d 1005 (N.D. Cal. 2009). These cases are discussed more fully *infra* at Part III.B.

[36] *See* 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, 1150 (1996); Daniel L. Rotenberg, *Private Remedies for Constitutional Wrongs—A Matter of Perspective, Priority, and Process*, 14 HASTINGS CONST. L.Q. 77, 108 (1986).

inquiry has devolved from a focus on congressional participation in crafting damages relief to sensitivity to "*any* concern the Court might find important to the creation of a cause of action."[37] In GWOT *Bivens* suits, courts have had no difficulty declining to create a new *Bivens* right of action based on what Professor Vladeck has termed the "national security exception to *Bivens*."[38]

However, recent jurisprudential and scholarly developments may free courts to consider recognizing novel GWOT *Bivens* claims. Two scholars have argued that Congress's enactment of the Federal Tort Claims Act and the Westfall Act clearly demonstrates its explicit ratification of the *Bivens* action[39] and that this manifest approval means courts should *presume* a *Bivens* remedy is available in the absence of clear congressional intent to preclude one.[40] In the terrorism context, the Supreme Court's extension of constitutional habeas corpus rights to Guantánamo Bay detainees in *Boumediene v. Bush* in 2008[41] may suggest that the Constitution should protect foreign detainees held at other extraterritorial U.S. detention facilities.[42] *Boumediene* relied on the "objective degree of control" that the United States exercises at the detention facility in question,[43] so *Boumediene* might not be limited to Guantánamo Bay and its unique territorial status.[44]

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[37] Kiik, *supra* note 12, at 1959.

[38] *Id.* at 1949 & n.38 (quoting Stephen I. Vladeck, *Rights Without Remedies: The Newfound National Security Exception to* Bivens, A.B.A. NAT'L SECURITY L. REP., July 2006, at 4–5) (internal quotation marks omitted); *see, e.g.*, *Arar*, 585 F.3d at 573–77 (describing the broad range of "special factors counseling hesitation," including executive prerogatives and the need to protect classified information, that led it to prohibit the plaintiff's *Bivens* action).

As a positive matter, as Professor Brown notes, "to designate the entire war on terror as *a* special factor is perhaps a stretch beyond previously recognized contexts given that those contexts are both narrower and more specific," Brown, *supra* note 10, at 894–95, and "it is error to suppose that every case . . . which touches foreign relations lies beyond judicial cognizance," *id.* at 895 (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)) (internal quotation marks omitted). Similarly, when the court defers to a presidential maneuver, like the assertion of state-secrets privileges, rather than a congressional one, the Executive effectively determines whether a *Bivens* right of action should exist. Kiik, *supra* note 12, at 1969.

[39] *See* Pfander & Baltmanis, *supra* note 22, at 121–22, 133–36.

[40] *See id.* at 121; *see also* Margulies, *supra* note 12, at 202–03, 220 (proposing that courts view the availability of a *Bivens* remedy as the "default position" and place the burden on officials to show that they implemented proportional alternative methods when confronted with similar situations proximate in time to the one at issue in the lawsuit).

[41] 553 U.S. 723 (2008).

[42] *Boumediene* can be read to reject any per se rules against the application of constitutional protections to noncitizens abroad. Jules Lobel, *Extraordinary Rendition and the Constitution: The Case of Maher Arar*, 28 REV. LITIG. 479, 493 (2008). Others have argued more generally that the Supreme Court's recent habeas corpus jurisprudence points toward the extension of constitutional rights, and *Bivens* relief, to extraterritorial detainees. *E.g.*, Brown, *supra* note 10, at 846–47.

[43] *Boumediene*, 553 U.S. at 754.

[44] Lobel, *supra* note 42, at 494 (citing *Boumediene*, 553 U.S. at 727). The *Boumediene* decision can be read to reject broadly the circumscription of constitutional rights based on geography, an approach that led to the "legal black hole[s]" that proved so tempting to the Bush Administration in establishing a

Indeed, in April 2009, a district judge ruled that three aliens detained at Bagram in Afghanistan were entitled to habeas review.[45] Following *Boumediene*, the court examined the United States' "objective degree of control" at the site of detention[46] and found that a Status of Forces Agreement and a lease afforded the U.S. government "near-total operational control."[47] The court acknowledged that the bases for its finding would apply to nearly any U.S.-run military facility in the world.[48] Although the D.C. Circuit later reversed the holding,[49] it did so not by invalidating the *Boumediene* "objective degree of control" test, but by reaching a different conclusion as to whether the facts surrounding Bagram satisfied the test.[50] The opinions, therefore, may still foretell a *Boumediene*-inspired trend toward extending constitutional rights to detainees abroad. This trend will allow courts to consider whether *Bivens* rights of action should be available to vindicate any newly extended rights. To date, courts and commentators have made much ado about the availability of *Bivens* rights of action and the special factors that might preclude them,[51] but they have paid little attention to the

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foreign detention scheme after September 11, 2001. *See* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 195–97 (2009).

Long before the GWOT, others suggested that constitutional restraints should attach to federal officials' actions rather than to their locations. *See, e.g.*, John A. Ragosta, *Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Action*, 17 N.Y.U. J. INT'L L. & POL. 287, 293–94 (1985) ("In applying the Constitution abroad . . . it is always a U.S. citizen—a government official—who is being controlled by the Constitution. Since the Court's decision in *Reid v. Covert* [354 U.S. 1 (1957)], it is clear that these officials are controlled, at home and abroad, by constitutional limitations." (footnote omitted)).

[45] Al Maqaleh v. Gates (*al Maqaleh I*), 604 F. Supp. 2d 205, 207–09 (2009), *rev'd*, *al Maqaleh II*, 605 F.3d 84 (D.C. Cir. 2010). Heeding *Boumediene*, the court analyzed:

> (1) the citizenship of the detainee; (2) the status of the detainee; (3) the adequacy of the process through which the status determination was made; (4) the nature of the site of apprehension; (5) the nature of the site of detention; and (6) the practical obstacles inherent in resolving the petitioner's entitlement to the writ.

Id. at 215. The court also considered the "length of a petitioner's detention without adequate review," which it thought more tacitly informed the *Boumediene* Court. *Id.* at 216.

[46] *Id.* at 221.

[47] *Id.* at 222. U.S. personnel may enter and exit Afghanistan without passports, and U.S. vehicles, imports, and exports are exempt from taxation, regulation, and inspection. *Id.*

[48] *Id.*

[49] *Al Maqaleh II*, 605 F.3d 84, 99 (D.C. Cir. 2010).

[50] *Id.* at 88. The court emphasized that "Afghanistan remains a theater of active military combat" and listed facts contrary to any exclusive U.S. control. *Id.* It concluded that *al Maqaleh I*'s application of the test would make habeas relief available to prisoners at any U.S. military facility in the world and refused to adopt such a broad application of the *Boumediene* test. *Id.* at 95.

[51] *See, e.g.*, Arar v. Ashcroft, 585 F.3d 559, 563–65 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010); *Rasul II*, 563 F.3d 527, 529–30 (D.C. Cir. 2009), *cert denied*, 130 S. Ct. 1013 (2009); Padilla v. Yoo, 633 F. Supp. 2d 1005, 1019–25 (N.D. Cal. 2009); Brown, *supra* note 10; Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755 (2004); Margulies, *supra* note 12; Pfander & Baltmanis, *supra* note 22; Stephen I. Vladeck, *National Security and* Bivens *After* Iqbal, 14 LEWIS & CLARK L. REV. 255 (2010); Vladeck, *supra* note 38; Kiik, *supra* note 12.

defense that stands to eviscerate any hard-fought victory in the availability of *Bivens* rights of action: qualified immunity.

B. The Defense of Qualified Immunity

Most executive officials enjoy qualified immunity from suit,[52] which prevents fear of personal liability and costly litigation from impairing their effectiveness.[53] Qualified immunity exempts government officials from personal liability where their actions are "reasonable in light of current American law."[54] Thus, in order to be protected by qualified immunity, officials must be aware of fundamental constitutional rights and act accordingly.[55] A government actor's claim that he was "just following orders" will not immunize him.[56] While courts require awareness of the law, they do not expect officials to anticipate new extensions of rights or changes in the law "with a prescience that escapes even the most able scholars, lawyers, and judges."[57] As the Court recently explained, "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions."[58] The qualified immunity tests of the last four decades account for these understandings.

*1. The Pre-*Saucier *Merits Bypass.*—The judicial test for qualified immunity has evolved significantly over the last forty-four years. What began in 1967 as a subjective test of the official's "good faith" belief in the constitutionality of his actions[59] has evolved into a purely objective test. Now, under *Harlow v. Fitzgerald*, qualified immunity protects officials whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[60] This retrospective standard can be read to not require any adjudication of the

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[52] The President, judges, and prosecutors, when engaging in prosecutorial conduct, enjoy *absolute* immunity from suits for money damages. Other government officials are protected by qualified immunity. *See* David Rudovsky, Saucier v. Katz*: Qualified Immunity as a Doctrine of Dilution of Constitutional Rights*, *in* WE DISSENT: TALKING BACK TO THE REHNQUIST COURT 172, 173 (Michael Avery ed., 2009). The courts recognize an "interchangeability of immunity precedents between § 1983 suits . . . and *Bivens* actions." Anderson v. Creighton, 483 U.S. 635, 654 (1987) (Stevens, J., dissenting). This Comment, therefore, discusses qualified immunity precedent and scholarship from both types of suits.

[53] JAMES E. PFANDER, PRINCIPLES OF FEDERAL JURISDICTION 208, 210 (2006).

[54] *Anderson*, 483 U.S. at 646 (majority opinion).

[55] *See id.* at 649–50 n.2 (Stevens, J., dissenting).

[56] Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 788 (2006).

[57] *Anderson*, 483 U.S. at 649–50 n.2. Some commentators, however, argue that *Bivens* claims themselves demand too high a degree of foresight from officials. *See* Margulies, *supra* note 12, at 199 ("Graced with the omniscience of hindsight, courts and juries overestimate officials' ability to correctly decide whom to arrest, detain, or interrogate.").

[58] *Al-Kidd III*, 131 S. Ct. 2074, 2085 (2011).

[59] *See* Pierson v. Ray, 386 U.S. 547, 557 (1967).

[60] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see* Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 237–38 (2006).

underlying constitutionality of the official's conduct, implying that rights adjudication is unnecessary in qualified immunity analyses.[61]

A few years after *Harlow*, the Supreme Court in *Mitchell v. Forsyth* implied that courts were not required to reach the merits of the alleged constitutional violation before granting qualified immunity on the basis that the right allegedly violated was not clearly established at the time of the offending conduct.[62] Because of this implied discretion to avoid deciding the merits, in the years after *Mitchell*, courts often opted to forego the merits decision. In 1989 and 1990, lower courts avoided the constitutional question in more than twenty-five percent of constitutional tort cases involving a qualified immunity defense.[63]

In *Siegert v. Gilley*,[64] the Supreme Court sought to slow the growing trend of constitutional avoidance. As was common at the time, the lower court in *Siegert* had skipped over the question of whether the plaintiff had stated any cognizable constitutional claim.[65] In overturning the court of appeals decision, the Supreme Court explained that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all."[66] While pre-*Siegert* cases had given courts the choice of addressing or bypassing the constitutional question with a dose of skepticism that such an inquiry need be undertaken, *Siegert* gave them this choice with a light nudge towards adjudicating the constitutional merits.

The ten-year period after *Siegert* reveals the approach taken by lower courts in qualified immunity analyses when the Supreme Court recommends, but does not mandate, merits-first sequencing. Despite the *Siegert* Court's tacit encouragement, the lower courts were reluctant to decide the constitutional merits first, and seldom did so.[67] Their reluctance continued

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[61] *See* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 874 (2005).

[62] 472 U.S. 511, 527–28 (1985) (reasoning that a decision about the official's qualified immunity addresses a claim that is "conceptually distinct from the merits" and prohibits the plaintiff's *Bivens* claim from going forward); *accord* Chen, *supra* note 60, at 241.

[63] Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 670 (2009).

[64] *See* 500 U.S. 226 (1991).

[65] *See* Healy, *supra* note 61, at 876–77.

[66] *Siegert*, 500 U.S. at 232.

[67] *See* Paul W. Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 411 (2009); Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of* Saucier v. Katz, 16 GEO. MASON L. REV. 53, 70 (2008). *But see* Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523, 531 (2010) (arguing that it is inaccurate to classify the pre-*Saucier* period as a phase of discretionary sequencing because of the lower courts' significant confusion about their discretion at that time).

even after the Supreme Court, in *County of Sacramento v. Lewis*, indicated that a "better approach" would be to adjudicate the constitutional claims before reaching the "clearly established" prong of the test[68] and, in *Wilson v. Layne*, reiterated the benefits of deciding the constitutional question first.[69] The circuit courts split on whether *Siegert*, *Sacramento*, and *Wilson* really demanded merits-first analysis.[70]

2. Saucier *and Merits-First Analysis*.—In 2001, the Supreme Court unambiguously settled the debate in the lower courts about whether they had to address a claim's constitutional merits before proceeding to the "clearly established" inquiry. In *Saucier v. Katz*, the Court clarified no fewer than five times that a court presented with a qualified immunity defense *must* consider the constitutional question first and the "clearly established" question second.[71] Determining the existence or nonexistence of a constitutional right first would aid the case-to-case development of the law[72] and lead courts to define more specifically the constitutional rights at issue.[73] If a court simply jumped to the "clearly established" inquiry, "[t]he law might be deprived of this explanation."[74] After *Saucier*, lower courts' use of the mandatory merits-first *Saucier* sequence jumped to nearly ninety-nine percent.[75]

What is most important to recognize about mandatory *Saucier* sequencing is that it permits courts to find that a constitutional right exists, but then to find that the government official is nonetheless entitled to quali-

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[68] 523 U.S. 833, 841–42 n.5 (1998).

[69] 526 U.S. 603, 609 (1999).

[70] Overall, the lower appellate courts still skipped the constitutional question in twenty-six percent of qualified immunity decisions. Hughes, *supra* note 67, at 424. The district courts, at this time, bypassed the constitutional merits in thirteen percent of qualified immunity decisions. *See* Leong, *supra* note 63, at 711.

[71] Saucier v. Katz, 533 U.S. 194, 200 (2001) ("[T]he first inquiry *must* be whether a constitutional right would have been violated on the facts alleged . . . ." (emphasis added)); *id.* ("[T]he requisites of a qualified immunity defense *must* be considered in proper sequence." (emphasis added)); *id.* at 201 ("A court required to rule upon the qualified immunity issue *must* consider, then, this threshold question: . . . do the facts alleged show the officer's conduct violated a constitutional right?" (emphasis added)); *id.* ("This *must* be the initial inquiry." (emphasis added)); *id.* at 207 ("Our *instruction* to . . . concentrate at the outset on the definition of the constitutional right and to determine whether, on the facts alleged, a constitutional violation could be found is important." (emphasis added)).

[72] *See id.* at 201.

[73] *See id.* at 207.

[74] *Id.* at 201.

[75] *See* Hughes, *supra* note 67, at 424; *see also* Sobolski & Steinberg, *supra* note 67, at 538 ("[T]he shift to mandatory sequencing corresponded to a decrease in the frequency with which appellate courts skipped the substantive constitutional question." (citing Hughes, *supra* note 67, at 418, 424)). In 2005, appellate courts declined to resolve the constitutional merits of the plaintiff's claim before proceeding to qualified immunity in only two cases. Hughes, *supra* note 67, at 424. In 2006 and 2007, courts followed the mandatory *Saucier* sequence approximately ninety-five percent of the time. Leong, *supra* note 63, at 711 tbls.3 & 4. The courts that still occasionally deviated from *Saucier* sequencing did not articulate any clear basis for doing so. *See id.* at 682.

fied immunity because the constitutional right was not clearly established at the time the official is alleged to have violated it. In this way, a court may formally recognize and announce a novel constitutional right without punishing an official who had no notice of such a right when he acted.

3. Pearson v. Callahan*: Back to the Future?*.—From 2001 to 2008, the Supreme Court heard, but did not heed, critics of *Saucier* sequencing.[76] In March 2008, however, upon granting review of a Tenth Circuit decision regarding the "consent-once-removed" doctrine,[77] the Supreme Court took the unusual step of directing the parties to brief and argue whether the *Saucier* decision should be overruled.[78] On January 21, 2009, the Supreme Court officially overruled *Saucier* and reinstated discretion to omit the constitutional rights inquiry from qualified immunity analyses.[79]

Importantly, the Court wholeheartedly agreed with the *Saucier* Court that the merits-first sequence promotes constitutional development.[80] It proposed, however, that the articulation of constitutional rights need not rely on qualified immunity analyses in *Bivens* and § 1983 claims.[81] Suits for injunctive relief against government officials, suits against municipalities, and motions to suppress evidence in criminal trials would provide alternative venues for constitutional elaboration[82] because they all necessarily require plaintiffs to litigate the applicability and scope of a constitutional right. The Court emphasized that, where a *Bivens* plaintiff's claim is unlikely to arise in an alternative arena for constitutional development, the two-part test would remain "especially valuable."[83]

The Court's confidence that the lower courts would exercise their discretion to undertake the constitutional rights inquiry based on its reminder that the two-step process is "often appropriate" and sometimes "especially valuable" betrays the Court's short memory. Scholars have already pre-

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[76] *See* Pearson v. Callahan, 129 S. Ct. 808, 817–18 (2009) (citing Supreme Court concurrences and dissents in which the opinion author expressed doubt, or outright disapproval, for a mandatory *Saucier* sequence); *see also supra* Part IV.A. (discussing common criticisms of the *Saucier* approach).

[77] *Pearson*, 129 S. Ct. at 814. The Tenth Circuit case addressed whether a member of a narcotics task force had violated Callahan's Fourth Amendment rights when he conducted a warrantless search of Callahan's property based on the fact that Callahan had given an informant permission to enter. *See* Callahan v. Millard Cnty., 494 F.3d 891 (10th Cir. 2007), *rev'd sub nom*. Pearson v. Callahan, 129 S. Ct. 808 (2009).

[78] Pearson v. Callahan, 128 S. Ct. 1702 (2008) (mem.).

[79] *Pearson*, 129 S. Ct. at 818.

[80] *Id.* Also, in some circumstances a court may not be able to answer the "clearly established" question until it has identified the precise constitutional right involved. *Id.*

[81] *Id.* at 821–22.

[82] *Id.* Suits against municipalities could serve to develop constitutional law because municipal actors have no qualified immunity defense. *Id.* at 822. This Comment does not discuss suits against municipalities as possible alternatives to develop detainee rights because local and municipal governments are not responsible for the GWOT detainees' detention, treatment, or rendition, so these suits are not viable options for recovery.

[83] *Id.* at 818.

dicted a post-*Pearson* reversion to the qualified immunity jurisprudence of the 1990s that necessitated the *Saucier* sequence in the first place.[84] Lower courts, they argue, will find skipping the constitutional question to be the path of least resistance.[85] This presents a nearly insurmountable obstacle for GWOT plaintiffs seeking reparations through *Bivens*.[86] Despite the history of the qualified immunity analysis, the *Pearson* Court decided to rely heavily on the lower courts' willingness to develop constitutional law by identifying claims involving constitutional questions that were unlikely to develop through other types of suits and to apply the *Saucier* sequence in those cases.[87] As the next Part demonstrates, GWOT *Bivens* actions squarely fit within these criteria. Yet the lower courts have not consistently recognized the need for a two-step qualified immunity analysis, and scholars and the Supreme Court have failed to engage in the examination of other possible rights of action as applied to GWOT *Bivens* claims that would reveal the need for *Saucier* sequencing in these instances.

Indeed, in its recent *Ashcroft v. al-Kidd* (*al-Kidd III*) opinion—the first GWOT *Bivens* decision after *Pearson*—the Supreme Court neither condemned nor applauded the Ninth Circuit's decision to apply a merits-first analysis.[88] Although Justice Kennedy's dissent in *Camreta v. Greene*, handed down just five days before *al-Kidd III*, had reemphasized the general availability of alternative causes of action to elaborate constitutional issues,[89] and although the Ninth Circuit's *al-Kidd II* opinion had expressly identified al-Kidd's *Bivens* claim as one for which *Saucier* sequencing re-

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[84] *See, e.g.*, Hughes, *supra* note 67, at 404 ("Either abandoning or relaxing *Wilson-Saucier* would lead to significant constitutional stagnation."). *But see* Sobolski & Steinberg, *supra* note 67, at 527 (arguing that post-*Pearson* lower court behavior cannot be predicted based on pre-*Saucier* trends because *Pearson* conferred sequencing discretion without ambiguity).

[85] *See* John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 131 ("*Saucier*'s benefits are forward-looking and systemic, while its costs are felt here and now. Busy trial judges who see a short route to decision on qualified immunity will often be unwilling to come to grips with the merits, even though the failure to do so may be costly in the long run.").

[86] *But cf.* Reinert, *supra* note 13, at 843 (reporting, without respect to whether cases were in or out of the GWOT context, that, in his sample, qualified immunity accounted for fewer dismissals than merits decisions, frivolity, and failure to exhaust administrative remedies). Professor Reinert noted that this surprising finding that qualified immunity played only a minor role in the overall dismissal rate for *Bivens* claims could reflect "most troublingly . . . that the prospect of qualified immunity deters lawyers from accepting the most difficult *Bivens* cases, thus operating as an unseen thumb on the scale in favor of maintaining the legal status quo." *Id.* at 844.

[87] Professor Jeffries has more broadly and perhaps more explicitly asserted that courts must differentiate their qualified immunity analyses based on the dependence of the right at hand on suits for money damages. *See* Jeffries, *supra* note 85, at 132–36.

[88] *Al-Kidd III*, 131 S. Ct. 2074 (2011). The Court primarily reiterated the principles it developed in *Pearson*: that lower courts have discretion regarding a one- versus two-step approach to qualified immunity analysis and that they should "think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'" *Id.* at 2080 (quoting *Pearson*, 129 S. Ct. at 818).

[89] *See* Camreta v. Greene, 131 S. Ct. 2020, 2043–44 (2011) (Kennedy, J., dissenting).

mained "especially valuable,"[90] the Supreme Court's opinion did not discuss those alternatives in the GWOT *Bivens* context. Had the Court undertaken this inquiry, it likely would have identified GWOT *Bivens* actions as a category of qualified immunity litigation for which the *Saucier* sequence remains essential.

II. WHY *PEARSON*'S RELIANCE ON NON-*BIVENS* SUITS IS MISPLACED FOR GLOBAL WAR ON TERROR DETAINEES

After the September 11, 2001 attacks, U.S. military, intelligence, and law enforcement officials captured and detained thousands of U.S. citizens and alien "enemy combatants." Detained U.S. citizens at times were housed in military brigs[91] and prisons.[92] Aliens who were already on U.S. soil, whether legally or illegally, often were detained domestically until they were cleared for deportation.[93] Aliens captured abroad were held at Bagram, Abu Ghraib, and other secret "black sites."[94] Some of them found themselves at Guantánamo Bay. Many detainees have been released or, more recently, charged with crimes for which they will be tried by military commissions or Article III courts.[95] The number of detainees at Guantánamo Bay has dwindled to fewer than two hundred[96] as President Obama has continued efforts initiated by President Bush to arrange for the transfer of detainees to other countries.

Closing Guantánamo, however, will not end the detention of citizens and aliens in the United States and abroad in connection with the GWOT. In 2008, the detainee population in Iraq was approximately 26,000, much larger than that of Guantánamo.[97] Detainees also remain at other foreign detention sites.[98] For a long time, detention will be part of U.S. efforts to neutralize terrorist threats to the United States.[99] The questions become the following: What kind of detention program may the President implement to

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[90] *Al-Kidd II*, 580 F.3d 949, 964 (9th Cir. 2009), *rev'd*, *al-Kidd III*, 131 S. Ct. 2074.

[91] *See, e.g.*, Padilla v. Yoo, 633 F. Supp. 2d 1005, 1013 (N.D. Cal. 2009).

[92] *See al-Kidd III*, 131 S. Ct. at 2079.

[93] *See, e.g.*, El Badrawi v. Dep't of Homeland Sec., 579 F. Supp. 2d 249, 255 (D. Conn. 2008).

[94] *See generally* James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497, 498 n.2 (2006) (collecting news articles and reports of foreign "black sites").

[95] *See infra* note 141.

[96] BENJAMIN WITTES ET AL., BROOKINGS INST., THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING 4 (2010), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf.

[97] WITTES, *supra* note †, at 160.

[98] *See id.*

[99] *See id.* at 153 ("[T]he United States will end up holding some number of Al Qaeda and Taliban fighters outside of the criminal justice system for some time to come—and we hope to capture more. So if the military closes the detention operation at Guantánamo, it will simply have to re-create it somewhere else.").

accomplish these disablement and intelligence-gathering goals? In the wake of the Guantánamo Bay detentions, which have sparked ire in the United States and the international community, what is constitutionally appropriate?

The answer to these questions is most likely to come from *Bivens* actions brought by detainees. The qualified immunity defense to these claims, when decided based on a *Saucier* merits-first process, serves an important notice-giving function without unfairly penalizing officials for failing to predict the future of constitutional law. Forced to address the underlying constitutional right that the plaintiff claims was violated, a court must directly determine principles, and possibly limitations, that will guide executive officials in future conduct. If the court finds that the Constitution does in fact provide an individual with a right and then clarifies this constitutional right, the President and his officials will know to avoid conduct that would violate that right. In this way, the Executive Branch can escape future litigation, public outcry, and foreign relations debacles. Where the court denies the existence of the asserted constitutional right or finds that it was not violated, the President and his officials learn that they need not hesitate when confronted with similar circumstances in the future.

Unfortunately for both the Executive Branch and GWOT victims, *Pearson* stands to stanch any flow of constitutional guidance that would come out of two-step qualified immunity analyses. The *Pearson* Court did not consider that the constitutional rights of GWOT victims fit into the dangerous category of being unlikely to arise in suits in which qualified immunity defenses are not available.[100] And the Court failed to address this danger even in the GWOT *Bivens* case that it decided this past Term.[101]

This Part demonstrates why the alternative suits that the *Pearson* Court entrusted to continue the march of constitutional law development are unlikely mechanisms for the adjudication of constitutional issues underlying executive detention schemes in the GWOT.

A. Suits for Injunctive or Declaratory Relief

In assuaging concerns that one-step qualified immunity analyses would lead to constitutional stagnation, the *Pearson* Court pointed to motions for injunctive and declaratory relief as alternative legal procedures to facilitate the elaboration of constitutional rules.[102] While these legal procedures generally can serve that purpose, they are unlikely to do so for GWOT victims.

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[100] Indeed, the *Pearson* Court had no reason to recognize the impact of its ruling on GWOT detainee cases since its facts did not implicate those types of plaintiffs or their *Bivens* claims.

[101] *See al-Kidd III*, 131 S. Ct. 2074 (2011).

[102] Although the *Pearson* Court did not explicitly mention declaratory judgments, the logic applying to suits for injunctive relief applies to declaratory judgments as well. *See infra* notes 124–25.

Injunctions come in many forms.[103] As the *Pearson* Court recognized, a motion for a preliminary injunction can lead the deciding court to adjudicate constitutional rights questions.[104] The first element a plaintiff must show on a motion for a preliminary injunction is a substantial likelihood of success on the merits.[105] To make this determination, a court evaluates whether the conduct the plaintiff seeks to enjoin would constitute a violation of her rights. Herein lies the reason for the *Pearson* Court's assurance that, absent constitutional development in civil rights damages actions, orders for and against injunctions will still advance constitutional elaboration. But this assurance rings hollow in the GWOT detainee context.[106]

GWOT detainees have filed preliminary injunctions seeking to enjoin certain confinement conditions,[107] torture,[108] military commission proceedings,[109] transfer to countries where they may be tortured or prosecuted,[110] and even force-feeding during a hunger strike.[111] But, courts have granted very few injunctions that implicate constitutional rights.[112] When they have,

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[103] *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 7 (1978) (describing preventive, reparative, and structural injunctions, as well as interlocutory versus final injunctions, and mandatory versus prohibitory injunctions).

[104] *See* Pearson v. Callahan, 129 S. Ct. 808, 821–22 (2009).

[105] O.K. v. Bush, 377 F. Supp. 2d 102, 111 (D.D.C. 2005). In addition, plaintiffs must show that they will suffer irreparable harm if the anticipated conduct continues, that other parties will not be harmed by the injunction, and that public interests support the injunction. *Id.* Courts must balance the plaintiff's arguments as to each of the four elements. *Id.*

Similarly, a court may grant a motion for a permanent injunction only when it determines that the plaintiff has suffered an irreparable injury, that other legal remedies are inadequate to compensate for that injury, that the balance between the hardships on the plaintiff and those on the defendant warrants an equitable remedy, and that a permanent injunction will not disserve public interests. Ebay Inc. v. Mercexchange, L.L.C., 547 U.S. 388, 391 (2006). A plaintiff seeking an injunction to protect her constitutional rights would have to demonstrate a constitutional injury in the first prong of the test.

[106] Some of the problems with injunctions as mechanisms for constitutional elaboration are not limited to the GWOT context. As Professor Jeffries notes, most victims of constitutional torts have no notice that a constitutional violation is going to occur, and many would encounter standing limitations. Jeffries, *supra* note 85, at 132–33.

[107] *See, e.g.*, *In re* Guantanamo Bay Detainee Litig., 570 F. Supp. 2d 13, 15 (D.D.C. 2008); Paracha v. Bush, 374 F. Supp. 2d 118, 119 (D.D.C. 2005).

[108] *See O.K.*, 377 F. Supp. 2d at 103.

[109] *See, e.g.*, Al Sharbi v. Bush, 430 F. Supp. 2d 1, 1 (D.D.C. 2006); Hicks v. Bush, 397 F. Supp. 2d 36, 37 (D.D.C. 2005).

[110] *See, e.g.*, Belbacha v. Bush, 520 F.3d 452, 454 (D.C. Cir. 2008); Sliti v. Bush, 407 F. Supp. 2d 116, 117 (D.D.C. 2005). Detainees have also demanded advance notice of such transfers. *See, e.g.*, Kiyemba v. Obama, 561 F.3d 509, 511 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010); Mammar v. Bush, 407 F. Supp. 2d 77, 78 (D.D.C. 2005); *O.K.*, 377 F. Supp. 2d at 111; Al-Anazi v. Bush, 370 F. Supp. 2d 188, 189 (D.D.C. 2005).

[111] *See* Al-Adahi v. Obama, 596 F. Supp. 2d 111, 114 (D.D.C. 2009).

[112] Aside from the barrage of motions for injunctions compelling notice before transfer out of Guantánamo, detainees have succeeded on motions for injunctions in only four instances, and only two of the injunctions asserted any judicial opinion as to the detainee's rights. *See* Adem v. Bush, 425 F. Supp. 2d 7, 8 (D.D.C. 2006) (compelling compliance with a protective order requiring that the detainee have access to counsel); Al-Joudi v. Bush, 406 F. Supp. 2d 13, 23 (D.D.C. 2005) (compelling the detainee's

they have avoided the constitutional underpinnings, often due to the separation-of-powers implications of a judicial order restraining military or national security activities. In 2005, a Guantánamo Bay detainee sought a preliminary injunction against his interrogation, torture, and other cruel and degrading treatment.[113] The court denied the detainee any injunction against interrogation, finding no law for the "extraordinary notion" that a court could prohibit federal executive officers from interrogating captives from live military hostilities,[114] especially in light of military officials' assertions that barring these interrogations could threaten national security.[115] While the detainee's motion for an injunction against torture received more scrutiny,[116] the court still avoided deciding whether the detainee had any constitutional right to be free from torture and where the Constitution would draw the line between acceptable interrogation and impermissible torture in this situation.[117] The court held that such allegations still did not warrant the "exceptional remedy of a preliminary injunction" against the U.S. military in this setting.[118] Although the court could conceive of facts sufficiently extreme to warrant a determination of whether officials had violated whatever Fifth Amendment due process rights a detainee may have, these allegations were not enough.[119] Unless the petitioner convincingly alleged conditions so severe as to constitute an imminent threat to his health, "the Court [would] not insert itself into the day-to-day operations of Guantánamo."[120]

The court was unwilling to exert prospective control over the military operations of executive officers during wartime.[121] This is, undoubtedly, a

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access to counsel during a hunger strike). The other two injunctions merely stayed the detainees' military commissions while the Supreme Court was deciding whether those commissions were lawful in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). *See Al Sharbi*, 430 F. Supp. 2d at 1–2; *Hicks*, 397 F. Supp. 2d at 44–45.

In the notice-of-transfer context, detainees have asserted two primary bases for requiring notice before being transferred from Guantánamo Bay to some other nation: (1) that such transfers would "unlawfully circumvent review of [their] pending habeas petitions" and (2) that such transfer, and the torture that allegedly would follow, would violate their rights under international conventions, namely the Geneva Conventions, the Convention Against Torture, and the International Covenant on Civil Rights. *See* Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 667–69 (2006). As of 2006, D.C. district judges had ruled in favor of the detainees on notice-of-transfer injunctions twenty-seven out of thirty-four times, thus requiring the government to give at least thirty days notice before transferring a detainee out of Guantánamo Bay. *Id.* at 668.

[113] *O.K.*, 377 F. Supp. 2d at 111.

[114] *Id.*

[115] *Id.* at 112.

[116] *Id.* The detainee's torture allegations included short-shackling and being used as a "human mop" to soak up urine and pine solvent. *Id.*

[117] *Id.* at 113.

[118] *Id.* at 112.

[119] *Id.*

[120] *Id.* at 114.

[121] *See id.* ("This Court is not equipped or authorized to assume the broader roles of a congressional oversight committee or a superintendent of the operations of a military base.").

legitimate concern given the nature of injunctive relief. If an official violates the terms of an injunction, the issuing judge may hold the official in contempt, which may include a fine or imprisonment, until the official complies with the injunction.[122] Imprisonment could completely incapacitate executive officials during wartime, a restriction that likely would prevent them from protecting national security interests. The consequences of an injunction on government operations, therefore, are far greater than an obligation to pay damages for bygone conduct after wartime exigencies have cooled.[123]

This same argument against relying on injunctions to develop the constitutional rights of GWOT victims applies to motions for declaratory relief. A declaratory judgment pronounces the legality (sometimes the constitutionality) of the defendant's anticipated conduct.[124] While conduct not in conformity with a declaratory judgment does not lead directly to penalties, the official's nonadherence entitles the plaintiff to an injunction to enforce the declaratory judgment, thereby activating the same potential conduct-restricting penalties for noncompliance that exist with an injunction.[125]

In *O.K. v. Bush*,[126] the court itself seemed skeptical about the value of injunctive relief to remedy harms caused by torture, mistreatment, and unjustified detention. The petitioner's treatment at Guantánamo had been at its worst eighteen months earlier, and the petitioner had not offered any evidence that it would rise to that level again.[127] Without saying so, the court seemed to consider the petitioner's claims effectively moot. Protection for the *O.K.* detainee going forward seemed an inappropriate remedy for the past harms.[128] That said, the court did not believe that federal courts should condone the petitioner's mistreatment.[129] Clearly, in this type of scenario, damages for past violations are preferable to an injunction preventing future conduct that the Executive Branch claims will not occur.

Injunctions and declaratory judgments are also ineffective remedies for wartime detainees because of the Executive Branch's historical and continuing ability to sidestep impending judicial decisions. Since injunctions and declaratory judgments only apply to future actions, an executive official seeking to evade a constitutional ruling can merely shift or cease his chal-

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[122] MICHAEL L. WELLS & THOMAS A. EATON, CONSTITUTIONAL REMEDIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 186 (2002).

[123] *See id.* at 188 ("The consequences of granting prospective relief may be far greater than the simple obligation to pay damages, as government may have to change its operations in important ways.").

[124] *See* Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 573 n.27 (1995) (collecting cases adjudicating constitutional rights through motions for declaratory relief).

[125] *See* WELLS & EATON, *supra* note 122, at 186.

[126] 377 F. Supp. 2d 102.

[127] *Id.* at 112–14.

[128] *See id.* at 114.

[129] *See id.*

lenged behavior. For example, when the Supreme Court undertook constitutional review of the Japanese internments during World War II in *Korematsu v. United States*,[130] President Roosevelt nearly mooted the issue the day before the Supreme Court issued its opinion by announcing the closure of the camps.[131]

Executive avoidance has become a familiar phenomenon in the GWOT in two contexts: (1) the Executive Branch's decision to house GWOT detainees at offshore sites to evade judicial review and (2) the Executive Branch's last-minute maneuvering to evade pending judicial decisions about the legality of certain detention and treatment policies.[132] When U.S. courts started reviewing executive detentions, the Executive Branch began mooting issues before the courts could decide them. A few examples suffice to demonstrate the phenomenon. The unexpected transfer of detainee Jose Padilla out of military custody mooted an appeal to the Supreme Court[133] from the Fourth Circuit's decision in *Padilla v. Hanft* holding that he was lawfully detained under the President's congressionally authorized Authorization for Use of Military Force powers.[134] When an American citizen who had been arrested, detained, and interrogated in Saudi Arabia and later flown back to the United States to await trial[135] filed a habeas corpus petition, and a court ordered discovery into U.S. officials' role in his foreign detention, the government mooted the petition and the order by transferring him back stateside and indicting him on criminal charges.[136] In doing so, the government may have avoided a ruling extending rights to detainees held abroad or transferred abroad by the United States.

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[130] 323 U.S. 214 (1944).

[131] Stephen I. Vladeck, *The Long War, the Federal Courts, and the Necessity/Legality Paradox*, 43 U. RICH. L. REV. 893, 917–18 (2009) (book review).

[132] The choice to call these U.S. efforts a "war" may have constituted another form of executive avoidance. By calling the U.S. response "war," President Bush ensured that the most recent law regarding alien detention rights was *Johnson v. Eisentrager*, 339 U.S. 763 (1950), a World War II case that, at more than fifty years old, was woefully out of date in terms of available technologies, cultural beliefs, and international conceptions of human rights. *Cf.* RAUSTIALA, *supra* note 44, at 198–200 ("The war against Al Qaeda certainly differed from prior wars . . . ."). Otherwise, more recent cases about the detention of Haitians at Guantánamo Bay might have constrained military activities there. *See id.* at 199–200. For examples of executive-avoidance maneuvers in the GWOT, see Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661, 674 n.70 (2009).

[133] Padilla v. Yoo, 633 F. Supp. 2d 1005, 1038 n.4 (N.D. Cal. 2009).

[134] Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005). When the Government first petitioned to transfer Padilla to a criminal court and vacate the Fourth Circuit's decision, Padilla was lawfully detained—although his petition for certiorari on the question was then pending before the Supreme Court. The Fourth Circuit perceived the transfer as an avoidance maneuver and denied the transfer and vacatur on that very basis. *See id.*

[135] United States v. Abu Ali, 528 F.3d 210, 221–25 (4th Cir. 2008).

[136] Stephen I. Vladeck, *The Problem of Jurisdictional Non-precedent*, 44 TULSA L. REV. 587, 611 (2009).

The government's evasion of judicial review of its detention programs is most evident in its recent effort to evacuate Guantánamo Bay in the wake of extensions of constitutional habeas corpus rights there and consequent judicial inquiries into the evidence used to justify detentions. Between 2002 and 2008, the U.S. government released or transferred more than four hundred Guantánamo Bay detainees either because they no longer posed threats or because other countries were willing to accept them.[137] In the year after the Supreme Court's *Rasul v. Bush* decision in 2004, which held that the D.C. courts could entertain detainees' habeas corpus petitions, custodial transfers increased while outright releases decreased.[138] Since then, the U.S. government has further increased the pace at which it transfers Guantánamo detainees.[139] Given the increasing number of opportunities for judicial review in the post-*Boumediene* realm, this transfer program can be viewed as another executive avoidance measure.[140] Executive avoidance in the GWOT detention context demonstrates the nonviability of motions for injunctions and declaratory relief as venues for constitutional development.

B. Motions to Suppress in Criminal Prosecutions

Contrary to the *Pearson* Court's assurances, motions to suppress evidence at criminal trials will not prevent constitutional stagnation of GWOT victims' rights. Constitutional law develops whenever a criminal defendant argues that evidence offered against him was obtained unconstitutionally, for example in violation of his Fourth Amendment right to be free from unlawful searches and seizures or his Fifth Amendment right against compelled self-incrimination. However, many GWOT suspects do not have the opportunity to face criminal prosecutions in Article III courts, where these rights are well established.[141]

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[137] Owen Fiss, *The Perils of Minimalism*, 9 THEORETICAL INQUIRIES L. 643, 644 (2008).

[138] Chesney, *supra* note 112, at 660–65. There were seventeen custodial transfers between January 2002 and June 2004, as compared to the fifty-one that occurred between July 2004 and July 2005. *Id.*

[139] In the three-and-a-half years covered by Professor Chesney's review (January 2002 to July 2005), there were sixty-eight custodial transfers. *Id.* Between January 2007 and March 2010, the U.S. government transferred approximately 210 Guantánamo detainees to other countries. *See The Guantánamo Docket—Timeline*, N.Y. TIMES, http://projects.nytimes.com/guantanamo/timeline (last visited Aug. 21, 2011) (providing a chronological list of transfers and how many detainees were transferred on each occasion).

[140] Increased pressure from the international community and President Obama's presidential campaign promises to close Guantánamo undoubtedly also have motivated the rush to close Guantánamo. *See* Senator Barack Obama, The War We Need to Win, Address at the Woodrow Wilson Int'l Ctr. for Scholars (Aug. 1, 2006), *available at* http://www.americanrhetoric.com/speeches/barackobamawilsoncenter.htm.

[141] For two such criminal prosecutions, see *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), and *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004).

In November 2009, President Obama announced that five Guantánamo detainees would face criminal prosecution in New York City. Charlie Savage, *U.S. to Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. TIMES, Nov. 14, 2009, at A1. Based on President Obama's remarks, it

The trial records and facts of some of the GWOT's most notorious trials are instructive with respect to the extent of rights-protective trial procedures that alleged terrorists can expect to be guaranteed.[142] In *United States v. Abu Ali*, the defendant claimed the court should apply U.S. standards of admissibility to his statements made during questioning by foreign officials because that interrogation was conducted as part of a "joint venture" with the United States.[143] Although the United States had submitted questions to the Saudi Mabahith to be asked during its interrogation, watched the interrogation through a one-way mirror, and consulted with the Saudi Mabahith at the end of the interview, the district court construed "joint venture" nar-

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appeared that detainees' eligibility for criminal prosecution would be based precisely on the likelihood that they would not present difficult evidentiary questions that might give rise to rulings awarding the detainees constitutional rights. *See* Editorial, *Terror on the Docket*, CHI. TRIB., Nov. 16, 2009, at 18; Phil Bronstein, *Obama & Khalid Sheikh Mohammed: If One Branch Is Good, Two Must Be Better?*, HUFFINGTON POST (Nov. 19, 2009, 05:58 PM), http://www.huffingtonpost.com/phil-bronstein/obama-khalid-sheikh-moham_b_364503.html. The Obama Administration later withdrew its plans for "terror trials" in New York City. Scott Shane & Benjamin Weiser, *U.S. Drops Plan for a 9/11 Trial in New York City*, N.Y. TIMES, Jan. 30, 2010, at A1. As of April 2011, the Administration had offered no indication that its criteria for selecting cases for Article III criminal trials would change if trials were again slated to proceed. *See, e.g.*, William J. Bennett & Seth Leibsohn, *Obama Administration Learns Lesson on Terrorism Trials*, CNN OPINION (Apr. 6, 2011), http://articles.cnn.com/2011-04-06/opinion/bennett.liebsohn.trials_1_civilian-courts-obama-administration-military-commission?_s=PM:OPINION (reporting that the Obama Administration had decided to try Khalid Sheikh Mohammed in a military tribunal and offering potential reasons for the decision, including the likelihood that "[u]sing civilian courts presented all sorts of evidentiary issues, Fourth and Fifth Amendment issues" (quoting lawyers Lee Casey and David Rivkin)).

Recently, the National Security Division of the Department of Justice (DOJ) unsealed records of 403 criminal prosecutions under various terror-related statutes. NAT'L SEC. DIV., U.S. DEP'T OF JUSTICE, STATISTICS ON UNSEALED INTERNATIONAL TERRORISM AND TERRORISM-RELATED CONVICTIONS, *available at* http://theplumline.whorunsgov.com/wp-content/uploads/2010/03/March-26-2010-NSD-Final-Statistics.pdf (last visited Aug. 21, 2011). According to the DOJ, the prosecutions all involve offenses related to international terrorism. *Id.* at intro. However, only 150 of the defendants were prosecuted for Category I offenses, which involve actions more commonly associated with the term "terrorism": acts of terrorism against U.S. citizens abroad, use of weapons of mass destruction, provision of material support to terrorist organizations overseas, bombings, and receipt of military-style training from terrorist organizations. *Id.* The majority of the convictions relate to Category II offenses, which involve "fraud, immigration, firearms, drugs, false statements, perjury, and obstruction of justice, as well as general conspiracy charges under 18 U.S.C. § 371." *Id.* Because of the secrecy of these trials to date, it is impossible to know the extent of rights-protective trial procedures afforded the defendants.

[142] 528 F.3d 210, 227–30 (4th Cir. 2008).

[143] *Id.* at 228–29. The court said:

> The "joint venture" doctrine provides that "statements elicited during overseas interrogation by foreign police in the absence of *Miranda* warnings must be suppressed whenever United States law enforcement agents actively participate in questioning conducted by foreign authorities." . . . [The] general rule [is that] mere presence at an interrogation does not constitute the "active" or "substantial" participation necessary for a "joint venture," but coordination and direction of an investigation or interrogation does.

Id. (quoting United States v. Yousef, 327 F.3d 56, 145 (2d Cir. 2003)) (citations omitted).

rowly and refused to suppress the evidence garnered from the interrogations.[144]

The uncertainty of trials, coupled with the possibility that terrorism trials in Article III courts may not fully safeguard rights-protective procedures, means that motions to suppress evidence are insufficiently reliable for the development of detainees' constitutional rights. Moreover, the exclusionary rule has never been an avenue for vindicating certain constitutional claims, such as claims that police officers used excessive force.[145] But while terror suspects as a group have had relatively few opportunities to test trial mechanisms for rights development, they have been able to pursue release through habeas corpus.

C. Habeas Corpus

As with the other would-be alternative legal procedures, habeas corpus hearings are unlikely to be effective fora for the judicial articulation of GWOT victims' constitutional rights.[146] Unlike the other causes of action discussed above, however, habeas corpus is not without value to the development of restraints on executive detention power in the GWOT context. Habeas corpus claims are best viewed as valuable but limited corollaries to GWOT *Bivens* actions, ones that develop law applicable to earlier detention actions rather than constitutional torts. While a writ of habeas corpus can impose restraints on executive power,[147] thereby imposing some constitutional limits and arguably developing some constitutional rules, it is not designed to delineate the contours of individual constitutional rights.

Even more importantly, those who are not detained at the time of their challenges have no habeas right of action at all. Indeed, as with motions for

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[144] United States v. Abu Ali, 395 F. Supp. 2d 338, 382 (E.D. Va. 2005).

[145] *See, e.g.*, Jeffries, *supra* note 85, at 135–36 ("Even within the doctrinal ambit of the Fourth Amendment, for example, there are constitutional violations for which exclusion of evidence is irrelevant. They include what is arguably the greatest challenge in all the law of constitutional remedies—inhibiting the abusive and excessive use of force by law enforcement. Although such wrongs are analyzed under the Fourth Amendment, illegal seizure is not the problem, and exclusion of evidence not a remedy. Under current law, the most (nearly) plausible redress for excessive force is the award of money damages." (footnote omitted)).

[146] While the *Pearson* Court did not expressly reference habeas corpus petitions as proceedings that can advance constitutional law, their prevalence in GWOT detainee litigation to date calls for an explanation as to why those suits will not advance individual rights. Indeed, three commentators have suggested that the D.C. district courts' numerous habeas corpus decisions constitute a form of "lawmaking" that could develop some detainee rights. *See* WITTES ET AL., *supra* note 96.

[147] *See, e.g.*, Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?*, 84 NOTRE DAME L. REV. 1975, 2029 (2009) (explaining that habeas was designed to allow the Judiciary to "monitor" the other branches); *id.* at 2050 (describing the GWOT habeas challenges as an "opportunity to announce new legal limits on the President"); *cf.* WITTES, *supra* note †, at 122 ("[T]he effect of habeas so far has been salutary: sustained pressure on the administration to move toward a fairer and more accountable system."); Margulies, *supra* note 12, at 208–09, 224, 247 (opining that habeas cannot *supplant* a *Bivens* remedy but rather must be used in tandem with damages actions in order to address both executive myopia ex ante and hindsight bias ex post).

injunctive relief, all an executive official needs to do to eliminate the value of a habeas corpus claim is to release that particular detainee.

When the *Pearson* Court asserted that the development of constitutional rights is not dependent on actions for which qualified immunity is a defense, it nonetheless recognized that some questions do not often arise outside of such cases. For those constitutional questions, *Pearson* urged the continued application of *Saucier* sequencing.[148] Motions for injunctions or declaratory judgment and motions to suppress evidence in criminal trials will not guard against constitutional stagnation in the context of GWOT issues. Habeas corpus petitions are likewise unavailing for the majority of GWOT plaintiffs and for individual rights-development even though habeas corpus does provide an essential complementary cause of action for those presently detained and for purposes of delimiting preliminary executive detention powers. These alternative avenues for constitutional articulation are unlikely to provide the benefit of notice to the Executive Branch, the benefits of compensation and personal vindication to injured detainees, or the benefits of rights-development and rights-clarification to future detainees. It is becoming increasingly clear that *Bivens* actions likely will be GWOT victims'[149] only avenue for litigation of these questions and for constitutional rights development and reparations.[150] Unless a merits-first qualified immunity analysis is applied to detainees' *Bivens* claims, future GWOT victims' rights will be almost as unclear as the rights of the first detainees to arrive at Guantánamo Bay were.[151]

III. GLOBAL WAR ON TERROR *BIVENS* ACTIONS AFTER *PEARSON*: A VIEW OF THINGS TO COME

In *Pearson*, the Court was careful to say that it had not eliminated the opportunity for courts to address the merits of the constitutional violations alleged by a civil rights plaintiff seeking damages. To the contrary, the

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[148] *See supra* notes 80–83 and accompanying text.

[149] GWOT detainees are not the only class of plaintiffs for whom the sole realistic cause of action is one for monetary damages. *See, e.g.*, Jeffries, *supra* note 85, 135–36; Leong, *supra* note 63, 668–69; Rudovsky, *supra* note 52, at 172.

[150] *Cf.* Vladeck, *supra* note 51, at 258 (discussing the GWOT *Bivens* actions and explaining that "so long as *Bivens* remains on the books, it seems uniquely suited to provide a remedy in those cases in which no other legal or political remedy is feasible"). Although compensation remedies may be all that is left, they need not be viewed as leftovers. The Executive Branch may at times prefer paying compensatory damages in civil actions rather than foregoing mass detentions that confer significant security advantages or meet security necessities. *See* Kontorovich, *supra* note 51, at 797–98.

While some commentators have correctly pointed out that "[i]n individual cases, rulings about seemingly mundane procedural issues . . . have accelerated the release of . . . detainees who were held at Guantánamo Bay," *see* Landau, *supra* note 132, at 664, even "muscular" procedural rulings cannot replace constitutional pronouncements and will not serve the law-updating function that is so desperately needed in this context. *See infra* Part IV.B; *see also* Landau, *supra* note 132, at 673 ("[P]rocedural decisions often create uncertainty in the law and delay final resolutions.").

[151] *See* WITTES, *supra* note †, at 153.

two-step test will be "especially valuable" when alternate fora for the plaintiff's claims are unlikely to be available or are unlikely to develop the constitutional law on the subject of the plaintiff's claim. As demonstrated in Part II, suits by GWOT detainees fit squarely within the class of claims about which the *Pearson* Court was concerned. Most courts that have ruled on qualified immunity defenses in detainees' *Bivens* actions since *Pearson*, including the Supreme Court, seem not to have recognized this.

Much like the pre-*Saucier* years, the two years since *Pearson* have demonstrated that different circuits apply different standards to their decisions about when to take on the constitutional question in qualified immunity decisions. As U.S. military and defense entities continue to detain suspected al Qaeda and Taliban operatives, the courts' conflicting protocols for addressing qualified immunity prevent the clarification of the rights of these detainees to the detriment of both the detainees and executive officials. Detainees, and their attorneys, can only wonder about their rights. Executive officials learn nothing about the constitutionality of their detention policies that can guide their ongoing decisionmaking.

Moreover, if the lower courts fail to address the merits of detainees' *Bivens* claims as part of qualified immunity analyses, they indefinitely postpone any constitutional clarification. The more circuits that bypass the constitutional merits in qualified immunity analyses, the less robust the body of lower court law available to the Supreme Court. In the absence of percolation of novel detainee rights questions in the lower courts, the Supreme Court is unlikely to grant certiorari and issue a disposition that would inform detainees and executive officials.[152]

In 2009, two circuits considered qualified immunity in GWOT detainees' *Bivens* actions. Courts in the Ninth Circuit decided *al-Kidd v. Ashcroft*[153] and *Padilla v. Yoo*.[154] On the other coast, the D.C. Circuit ruled on *Rasul v. Myers*,[155] which the Supreme Court had remanded for consideration in light of *Boumediene*.[156] The discrepant results suggest that the essential percolation of the constitutional issues underlying detainees' *Bivens* actions is unlikely to occur without further guidance.[157]

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[152] *See* Michael S. Catlett, Note, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1051 (2005). *See generally* Todd J. Tiberi, Comment, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 861 (1993) (describing percolation and discussing views on its effectiveness).

[153] *Al-Kidd II*, 580 F.3d 949 (9th Cir. 2009), *rev'd*, *al-Kidd III*, 131 S. Ct. 2074 (2011).

[154] Padilla v. Yoo, 633 F. Supp. 2d 1005 (N.D. Cal. 2009).

[155] *Rasul II*, 563 F.3d 527 (D.C. Cir. 2009) (per curiam), *cert. denied*, 130 S. Ct. 1013 (2009).

[156] *Rasul I*, 512 F.3d 644 (D.C. Cir. 2008), *vacated*, 129 S. Ct. 763 (2008) (mem.).

[157] Some scholars have noted the lower courts' different approaches to the *Bivens* question rather than to the qualified immunity question. *See* Margulies, *supra* note 12, at 237 (calling the difference between the courts' resolutions of *Arar* and *Iqbal* and the courts' resolutions of *al-Kidd* and *Padilla* a battle between "categorical deference" and "intervention"); Vladeck, *supra* note 51, at 268–78 (comparing the courts' approaches to the *Bivens* right of action in these and other GWOT cases).

A. A Return to Avoidance: Rasul v. Myers

The D.C. Circuit's one-step approach to qualified immunity analysis in *Rasul v. Myers*[158] signals a return to familiar pre-*Saucier* constitutional avoidance and all but guarantees the continued uncertainty of detainee rights. In 2004, four British citizens filed a complaint alleging that they were tortured after being captured in Afghanistan and sent to Guantánamo Bay.[159] They claimed they were held for two years without being charged before they were released to return to their homes in the United Kingdom.[160] The *Rasul* plaintiffs claimed their detention and mistreatment, which they said amounted to torture, infringed their Fifth Amendment rights to liberty and due process and their Eighth Amendment right to be free from cruel and unusual punishment.[161] They claimed that then-Secretary of Defense Donald Rumsfeld and his senior officials conceived their detention and treatment as part of a "deliberate and foreseeable" plan.[162]

Despite the *Rasul* plaintiffs' grisly allegations, the D.C. district court granted Rumsfeld's motion to dismiss on the basis of qualified immunity.[163] Since the issue of the constitutional rights of Guantánamo detainees was pending in the court of appeals, the court reserved its ruling on the then-mandatory merits prong of the *Saucier* test.[164] It skipped to the "clearly established" second prong and held that any constitutional rights the *Rasul* plaintiffs may have had were not clearly established at the time of the Rumsfeld defendants' conduct.[165] The D.C. Circuit affirmed the district court's qualified immunity ruling, finding against the plaintiffs on the constitutional merits and holding in the alternative that even if the plaintiffs had rights under the Fifth and Eighth Amendments, those rights were not clearly established.[166] When the Supreme Court granted certiorari, it took the unusual path of vacating the D.C. Circuit's judgment and remanding the case for consideration in light of *Boumediene*.[167]

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[158] *Rasul II*, 563 F.3d 527.

[159] Complaint ¶¶ 2–6, Rasul v. Rumsfeld, 414 F. Supp. 2d 26 (D.D.C. 2006) (No. 04-1864), *aff'd sub nom.* Rasul v. Myers (*Rasul I*), 512 F.3d at 644, *vacated*, 129 S. Ct. 763 (2008) (mem.). The detainees claimed they were hit with rifle butts, punched, kicked, short-shackled, threatened with unmuzzled dogs, forced to strip naked, subjected to cavity searches, exposed to extreme temperatures, kept in dirty cages, denied medical care, and deprived of adequate food and sleep. *Id.* ¶ 6.

[160] *Id.* ¶¶ 4–5.

[161] *Id.* ¶ 7. The *Rasul* plaintiffs also claimed that their detention and mistreatment (torture) clearly violated U.S. statutes, the Geneva Conventions, and international norms against torture and other cruel or degrading treatment. *Id.* This Comment discusses only the *Rasul* plaintiffs' *Bivens* claims.

[162] *Id.* ¶¶ 8–12 (listing reports and memoranda allegedly formalizing and authorizing the practices).

[163] *Rasul*, 414 F. Supp. 2d at 40–44.

[164] *Id.* at 40–41.

[165] *Id.* at 41–44.

[166] *Rasul I*, 512 F.3d 644, 665–67 (D.C. Cir. 2008), *vacated*, 129 S. Ct. 763 (2008) (mem.).

[167] 129 S. Ct. at 763.

Arguably, *Boumediene* was a liberal move by a Court not willing to permit the Executive Branch to make Guantánamo a "legal black hole" where military and intelligence officers would be unchecked.[168] This remand, then, may signal to lower courts that they should not be reluctant to extend additional constitutional protections to the Guantánamo detainees.[169] Whatever the Court's hopes, when it issued its *Pearson* decision one month after it remanded *Rasul I*, it ensured that the D.C. Circuit's second look at Rumsfeld's qualified immunity defense need not involve any constitutional inquiry at all.[170] On remand the D.C. Circuit rejected the plaintiffs' argument that *Boumediene* required it to engage in a "multi-factor, 'functional' test to determine whether aliens in their predicament can invoke constitutional rights."[171] Rather, extolling the virtues of judicial restraint and expediency, the Court opted for a one-pronged qualified immunity analysis and rested its decision to affirm *Rasul I* on its finding that any existing rights were not clearly established.[172]

B. Judicial Awareness: Al-Kidd v. Ashcroft *and* Padilla v. Yoo

Since September 11, 2001, the D.C. Circuit and the Ninth Circuit have issued conflicting opinions more than once. For example, in March 2003, the D.C. Circuit held that the writ of habeas corpus was not available to aliens detained at Guantánamo Bay.[173] In December 2003, the Ninth Circuit expressed its opposite opinion that Guantánamo Bay was an American territory for habeas corpus purposes and that "enemy combatants" detained there could petition for habeas relief.[174] The Ninth Circuit historically has been "reliably liberal" on constitutional rights jurisprudence.[175] It is therefore unsurprising that, given the option by *Pearson* between avoiding and addressing a constitutional question, Ninth Circuit courts have been eager to engage. In doing so, they have recognized the damages-or-nothing posture GWOT *Bivens* actions present.

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[168] *See supra* notes 42–44 and accompanying text.

[169] *See* Vladeck, *supra* note 136, at 589 n.17. One could argue instead that remanding "in light of *Boumediene*" was meant to focus the circuit court's attention on the newness of constitutional rights for Guantánamo detainees, which would suggest such rights were *not* clearly established.

[170] *See* discussion *supra* Part I.B.3.

[171] *See Rasul II*, 563 F.3d 527, 529 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009).

[172] *See id.* at 529–30. The court held, in the alternative, that "special factors counseling hesitation" would preclude the *Bivens* claim from moving forward even if qualified immunity was no defense. *Id.* at 532 n.5. Many have criticized the Supreme Court's denial of certiorari on *Rasul II*. *See, e.g.*, Editorial, *Yes, It Was Torture, and Illegal*, N.Y. TIMES, Jan. 4, 2010, at A20.

[173] *See* Al Odah v. United States, 321 F.3d 1134, 1141 (D.C. Cir. 2003), *rev'd sub nom.* Rasul v. Bush, 542 U.S. 466 (2004).

[174] *See* Gherebi v. Bush, 352 F.3d 1278, 1289–94 (9th Cir. 2003), *vacated*, 542 U.S. 952 (2004) (mem.).

[175] *See* RAUSTIALA, *supra* note 44, at 169.

1. Padilla v. Yoo.—Jose Padilla, although a U.S. citizen, has become something of a mascot for GWOT victims.[176] Padilla's *Bivens* claim, however, filed against former Deputy Attorney General in the Office of Legal Counsel John Yoo, sought a remedy that was not available in his prior suits—monetary compensation.[177] Holding both that a new *Bivens* cause of action was warranted—the legislature had not provided an alternative remedy and no "special factors counsel[ed] hesitation"—and that qualified immunity was not available to Yoo, the district court advanced Padilla's *Bivens* claims past summary judgment.[178]

Officials arrested Padilla in 2002 at Chicago O'Hare Airport pursuant to a material witness warrant.[179] While Padilla's motion to vacate the warrant was pending, President Bush declared Padilla an "enemy combatant" and ordered him taken into protective custody.[180] Executive officials detained Padilla without charge for nearly four years at a military brig in South Carolina.[181] For two of those years, officials denied Padilla access to counsel and the outside world.[182] Padilla's *Bivens* complaint alleged that his detention and abusive interrogation[183] violated his right to due process, his right to legal counsel, and his right to be free from unconstitutional seizures, detentions, and cruel punishment.[184] Padilla alleged that Yoo was personally culpable for the systematic program of illegal detentions and interrogations that dictated Padilla's treatment.[185]

The district court recognized Padilla's novel *Bivens* claim since it could not identify an alternative remedy or any preclusive special factors.[186] As a preliminary matter, its decision to recognize the cause of action supports the viability of *Bivens* claims for GWOT victims going forward.[187] In

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[176] *See, e.g.*, WITTES, *supra* note †, at 180 ("[I]t has become somewhat fashionable to describe Padilla . . . as a small-fry victim of government overreaction . . . .").

[177] Complaint ¶ 6, Padilla v. Yoo, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) (No. 08-0035) [hereinafter *Padilla* Complaint].

[178] *Padilla*, 633 F. Supp. 2d at 1019–25, 1038, 1039.

[179] *Id.* at 1012–13.

[180] *Id.* at 1013.

[181] *Id.*

[182] *See id.* at 1014.

[183] *See id.* (providing a complete list of techniques allegedly used against the petitioner, including sleep and sensory deprivation, exposure to extreme temperatures and noxious fumes, and long-term shackling).

[184] *See Padilla* Complaint, *supra* note 177, ¶ 2; *see also Padilla*, 633 F. Supp. 2d at 1016–17 (providing a complete breakdown of the claims Padilla asserted).

[185] *Padilla* Complaint, *supra* note 177, ¶ 3. When Yoo's "torture memos" became public, scholars, politicians, and the public fiercely criticized his legal reasoning; some called for his imprisonment. *See, e.g.*, Margulies, *supra* note 12, at 234; Maria L. La Ganga, *Scholar Calmly Takes Heat for His Memos on Torture*, L.A. TIMES, May 16, 2005, at A1.

[186] *See Padilla*, 633 F. Supp. 2d at 1019–30.

[187] *But see, e.g.*, Arar v. Ashcroft, 585 F.3d 559, 563–65 (2d Cir. 2009) (en banc) (refusing, based on special factors, to recognize a *Bivens* remedy against officials allegedly responsible for the extraordi-

addressing Yoo's qualified immunity defense, the court cited both *Saucier* and *Pearson* before proceeding to discuss the constitutional merits of each of Padilla's claims.[188] Unlike the majority of lower courts,[189] the district court in *Padilla* apparently was unaffected by temptations of judicial avoidance. The court made quick work of finding that Padilla's detention and treatment had violated his constitutional rights.[190] The court further held that the law governing the civilian prison context clearly established the unconstitutionality of Padilla's detention and treatment; assigning Padilla a special designation did not erase his citizen protections.[191] The nascent nature of citizen "enemy combatant" designations at the time of Yoo's conduct did not justify ignorance or dismissal of basic civil constitutional rights.[192] The court rejected Yoo's defense of qualified immunity.[193] Less than three months later, the Ninth Circuit lent credence to the use of a merits-first analysis in detainees' *Bivens* actions.

2. Al-Kidd v. Ashcroft.—In 2003, officials arrested U.S. citizen Abdullah al-Kidd at a Dulles airport ticket counter pursuant to a material witness warrant.[194] Executive officials never called al-Kidd to testify[195] but held him in various prisons for sixteen days, during which time he claims that he was only allowed out of his cell for two hours each day and that his cell was lit for twenty-four hours each day, and imposed supervised release for an additional fourteen months.[196] Within months of his release, al-Kidd had lost his job and separated from his wife.[197] Al-Kidd alleged that then-Attorney General John Ashcroft had created a policy for using the federal material witness statute as a pretext for arresting and detaining terrorism suspects.[198]

When the Ninth Circuit analyzed Ashcroft's qualified immunity defense, it acknowledged its recently rejuvenated discretion to abort the

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nary rendition of the alien plaintiff to Syria, where he claimed he was tortured), *cert. denied*, 130 S. Ct. 3409 (2010).

[188] *See Padilla*, 633 F. Supp. 2d at 1031–38.

[189] *See* discussion *supra* Part I.B.

[190] *See Padilla*, 633 F. Supp. 2d at 1034–38.

[191] *See id.* at 1036–38.

[192] *See id.* at 1037.

[193] *See id.* at 1038.

[194] Al-Kidd v. Gonzales (*al-Kidd I*), No. 05-093, 2006 WL 5429570, at *1 (D. Idaho Sept. 27, 2006), *aff'd in part, rev'd in part sub nom.* al-Kidd v. Ashcroft (*al-Kidd II*), 580 F.3d 949, 954 (9th Cir. 2009), *rev'd*, *al-Kidd III*, 131 S. Ct. 2074 (2011).

[195] *Al-Kidd II*, 580 F.3d at 954.

[196] *Id.* at 953.

[197] *Id.* at 953–54.

[198] Complaint and Demand for Jury Trial ¶¶ 89–94, *al-Kidd I*, 2006 WL 5429570 (No. 05-093), 2005 WL 975750. Plaintiff al-Kidd pointed to Ashcroft's press briefings, internal DOJ memoranda, and at least one FBI statement touting the arrest of al-Kidd as a success in U.S. efforts to dismantle terrorist networks. *Al-Kidd II*, 580 F.3d at 954–55.

Saucier sequence but, like the *Padilla* court, chose to address the constitutional question anyway.[199] It applied the *Saucier* sequence, extolling its special value in promoting constitutional development and referencing its propriety for addressing detainee rights that do not frequently arise in alternative legal proceedings.[200]

In invoking *Pearson*, the Ninth Circuit legitimized two important reasons why *Saucier* sequencing is imperative to GWOT victims' rights adjudication. First, it noted that GWOT civil rights claims belong in the "especially valuable" category that the *Pearson* court had urged would still benefit from application of the two-pronged test.[201] Second, it appreciated the notice-giving value of two-step qualified immunity holdings.[202] Ultimately, the court held that al-Kidd's Fourth Amendment right to be free from pretextual use of the material witness statute to detain him had been violated[203] and that this right was clearly established when Ashcroft promulgated the strategy.[204] The Ninth Circuit denied Ashcroft qualified immunity.[205] In doing so, it cemented the Ninth Circuit's support for merits-first qualified immunity analysis in detainee *Bivens* actions.

The Supreme Court overruled the Ninth Circuit on both the question of whether Ashcroft's alleged pretextual use of material witness warrants violated the Fourth Amendment and the question of whether the unconstitutionality of this practice was clearly established at the time of al-Kidd's

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[199] *See al-Kidd II*, 580 F.3d at 964. The district court had issued its qualified immunity opinion before *Pearson* revoked mandatory *Saucier* sequencing, but the Ninth Circuit still exercised *Pearson* discretion because it reviewed the qualified immunity claim de novo after the Supreme Court's *Pearson* decision. *See id.* at 956. The *al-Kidd II* court did not consider the propriety of the *Bivens* cause of action because Ashcroft had filed an interlocutory appeal of his immunity claims. *Id.* Because Ashcroft's Supreme Court petition involved only his motion to dismiss on qualified immunity grounds, the Supreme Court did not address the propriety of extending a *Bivens* action to al-Kidd. *See al-Kidd III*, 131 S. Ct. at 2079.

[200] *Al-Kidd II*, 580 F.3d at 964 (citing Pearson v. Callahan, 129 S. Ct. 808, 818 (2009)).

[201] *Id.* ("[T]he two-step *Saucier* analysis in the traditional sequence . . . is especially valuable in addressing constitutional questions such as the one at hand, 'that do not frequently arise in cases in which a qualified immunity defense is unavailable.'" (quoting *Pearson*, 129 S. Ct. at 818)).

[202] *Id.* ("[T]he two-step *Saucier* analysis in the traditional sequence . . . 'promotes the development of constitutional precedent . . . .'" (quoting *Pearson*, 129 S. Ct. at 818)).

[203] *Id.* at 970. The court rejected the plaintiff's Fifth Amendment "conditions of confinement" claim because he had not sufficiently shown Ashcroft's plausible personal involvement in setting the harsh conditions. *See id.* at 979.

[204] *See id.* at 970–72 (finding the right clearly established by dicta regarding material witness detentions, the definition of probable cause, the history and purposes of the Fourth Amendment, and perhaps most uniquely, a footnote in a New York district court case calling out Ashcroft by name and describing as illegitimate this reliance on the material witness statute to detain people presumed innocent under the Constitution). The Ninth Circuit is willing to look to a broader range of decisional law than other circuits, *see infra* note 224, and the Supreme Court's *al-Kidd III* opinion condemned the broadness of the Ninth Circuit's view in no uncertain terms, *al-Kidd III*, 131 S. Ct. at 2084 ("We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." (citation omitted)).

[205] *See al-Kidd II*, 580 F.3d at 973.

arrest and detention.[206] However, the Court did not disapprove of the Ninth Circuit's use of the merits-first approach to Ashcroft's qualified immunity claim; it acknowledged that its *Pearson* decision gave lower courts discretion on this analysis and asserted its authority to review whatever rulings lower courts decide to issue.[207] As Justice Sotomayor's concurrence suggested,[208] the Court's decision to consider both prongs of the Ninth Circuit's qualified immunity analysis when the second prong alone would have provided grounds for a resolution of the case allies the Court with the Ninth Circuit's approach. The Court's adjudication of the Fourth Amendment merits issue shirked constitutional avoidance principles in favor of elaborating the law—here, determining that this use of material witness warrants is not constitutionally condemned[209] and implying that officials may pursue this course of conduct again in the future.

Further, the Court rejected the Ninth Circuit's broad view of what types of legal authority can clearly establish a constitutional rule.[210] "Absent controlling authority[,] a robust 'consensus of cases of persuasive authority'" is required, and neither solitary district court holdings, let alone their dicta, nor broad purposes of constitutional provisions can clearly establish a legal standard.[211] The inability of district court holdings or less persuasive authorities to clearly establish legal principles that can guide officials' conduct makes merits-first analysis at the circuit level even more important. Thus, despite overturning the ultimate outcome of *al-Kidd II*, the Supreme Court's *al-Kidd III* reasoning may amplify the call for *Saucier* sequencing in some cases.

Padilla v. Yoo and *al-Kidd II*, as written, are unlikely to persuade other courts to abandon their constitutional avoidance tendencies. First, both cases involved U.S. citizens captured and detained on U.S. soil, which differentiates them from many of the cases likely to give rise to GWOT *Bivens* claims. The *al-Kidd II* court, however, in explicitly discussing the value of the two-step approach for cases like this GWOT *Bivens* action, showed that al-Kidd's citizenship was not the cause for its adoption of the *Saucier* sequence. Furthermore, a plaintiff's U.S. citizenship does not give a court a reason to choose the less efficient two-step mechanism. Finding that the right was clearly established when it was violated without considering the first constitutional-right prong would equally vindicate the citizen plaintiff

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[206] *Al-Kidd III*, 131 S. Ct. at 2085.

[207] *Id.* at 2080.

[208] *See id.* at 2089–90 (Sotomayor, J., concurring in the judgment) ("We have never considered whether an official's subjective intent matters for purposes of the Fourth Amendment in [this] novel context, and we need not and should not resolve that question in this case. All Members of the Court agree that, whatever the merits of the underlying Fourth Amendment question, Ashcroft did not violate clearly established law.").

[209] *Id.* at 2080–83 (majority opinion).

[210] *Id.* at 2083–85.

[211] *Id*.

and equally acknowledge the existence of the violation and the right at hand. More importantly, other courts understandably will want an explanation as to why the concerns that led the Supreme Court to retract the *Saucier* mandate in the first place do not counsel against applying the merits-first sequence in the detainees' *Bivens* cases.

IV. RESPONDING TO THE CRITICS

A. Why Saucier*'s Potential Dangers Are Less Compelling in the Global War on Terror*

Back in 2001, courts and scholars did not respond uniformly to *Saucier*'s mandatory two-step analysis. Many harshly criticized the prescription of merits-first adjudication based on fundamental principles of resource conservation and constitutional passivity thought to govern the federal judiciary. Foreseeably, these critics might disagree with using the *Saucier* sequence even in cases the *Pearson* Court declared would still benefit from it. The familiar arguments against *Saucier* sequencing, however, are not compelling in the GWOT *Bivens* context.

Critics have argued that *Saucier* sequencing's potential to simultaneously declare a right and yet deny recovery because that right was not clearly established violates the famous *Marbury v. Madison* principle that "where there is a right, there must be a remedy."[212] However, *Marbury* itself undermines the strictness of any right–remedy principle.[213] The *Marbury* Court resolved a number of significant constitutional questions without ultimately awarding any remedy.[214] The right–remedy rule may rank below the need for a "general structure" of constitutional remedies to ensure the government behaves lawfully.[215] This hierarchy of right–remedy understanding conforms to contemporary jurisprudence and facilitates the development of constitutional law.[216] Because *Saucier* sequencing permits

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[212] *See, e.g.*, Leong, *supra* note 63, at 702–06 & n.38 (quoting *Marbury*'s right–remedy maxim and explaining judges' potential cognitive dissonance in recognizing a right without granting a remedy in *Saucier* analyses). *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (holding that legal rights, when violated, must have remedies); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 87–88 (1999) (introducing scholarly protest to the absence of a remedy in any constitutional adjudication).

[213] *See* John M.M. Greabe, Mirabile Dictum!*: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 419 (1999).

[214] Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1800–01 (1991).

[215] *See* Jeffries, *supra* note 212, at 88–90 (quoting and discussing Fallon & Meltzer, *supra* note 214, at 1736, but also arguing that full individual remediation should remain the ideal even if it is sometimes subverted in the name of securing broader constitutional rights development). The D.C. Circuit recently agreed that constitutional law does not always reflect the *Marbury* maxim: "Not every violation of a right yields a remedy, even when the right is constitutional." Kiyemba v. Obama, 555 F.3d 1022, 1027 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (mem.).

[216] Jeffries, *supra* note 212, at 88–90.

courts to recognize a novel right without awarding a remedy, courts can elaborate and update constitutional understandings at a lower cost to executive officials who were unaware at the time that their conduct was unconstitutional.[217]

Some observers contend that *Saucier*'s vision of qualified immunity may leave constitutional tort plaintiffs little incentive to sue. In some cases, their suits may only subsidize the development of constitutional law that will benefit not them, but those on whom government officials may act in the future.[218] "Precedent-seeking law firms" and other third-party organizations, however, likely will offset plaintiffs' reluctance to sue.[219] This has been the case with Guantánamo litigation to date. Major U.S. law firms and ideological rights-supportive groups have represented the Guantánamo detainees,[220] and there is no reason to believe their interest in publicity, or their generosity, will cease to exist when detainees want to file *Bivens* actions to recover for their constitutional injuries.

Other commentators maintain that *Saucier* decisions about the constitutional merits of claims that ultimately fail on "clearly established" grounds are dicta that should not govern the outcomes of future cases.[221] Of course, viewing these rights decisions as nonprecedential would erode the constitutional-development value of *Saucier* sequencing. The first-prong articulation of a constitutional right is what deters future violations of the right and takes away officials' qualified immunity defenses in future suits for violations of the right. According to the Supreme Court's recent *Camreta v. Greene* decision, this "significant future effect on the conduct of public officials . . . and the policies of the government units to which they belong"[222] means that first-prong constitutional determinations cannot logi-

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[217] *See id.* at 99–100 (arguing that qualified immunity analysis "allows courts to embrace [constitutional] innovation without the potentially paralyzing cost of full remediation" for officials' past violations).

[218] *See* Kontorovich, *supra* note 51, at 810; *see also* Landau, *supra* note 132, at 675 ("It would not be a stretch therefore to argue that many of the detainees—if they could choose—might be better off with a procedural resolution than a decision of substance.").

[219] *See* Kontorovich, *supra* note 51, at 809–10.

[220] *See, e.g.*, Neil A. Lewis, *Official Attacks Top Law Firms over Detainees*, N.Y. TIMES, Jan. 13, 2007, at A1 (reporting that Michael Ratner, from the Center for Constitutional Rights, had received offers to aid in detainee representation from "about 500 lawyers from about 120 law firms"); *Pro Bono*, COVINGTON & BURLING LLP, http://www.cov.com/probonooverview/probono.aspx?show=morehighlights (last visited Aug. 21, 2011) (reporting that the firm represents fourteen men detained at Guantánamo Bay); *Pro Bono & Public Service—Guantanamo Bay*, JENNER & BLOCK, http://www.jenner.com/probono/probono.asp?id=000014186424 (last visited Aug. 20, 2011) (reporting that its lawyers had represented more than a dozen Guantánamo Bay detainees).

[221] *See* Ted Sampsell-Jones, *Reviving* Saucier*: Prospective Interpretations of Criminal Laws*, 14 GEO. MASON L. REV. 725, 759–60 (2007).

[222] Camreta v. Greene, 131 S. Ct. 2020, 2030 (2011).

cally be classified as "mere dicta or 'statements in opinions.'"[223] Even where the second-prong analysis finds the rights were not clearly established, constitutional decisions can still notify officials of what constitutional rights exist and what conduct may violate them.[224] Indeed, the United States has claimed that a first-prong constitutional merits ruling can "ha[ve] an effect similar to an injunction or a declaratory judgment against the government as a whole."[225] In turn, this notice can chip away at any future qualified immunity claims that the unconstitutionality of the kind of detentions they considered was not clearly established in 2009.[226]

Given the purely prospective value of recognizing a constitutional right that was not clearly established, some characterize such decisions as impermissible advisory opinions.[227] Similarly, they claim that where the defendant official is confident either that the constitutional right at issue was not clearly established, or that it does not exist at all, the official may de-

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[223] *Id.* (quoting California v. Rooney, 483 U.S. 307, 311 (1987)). *But see id.* at 2037 (Kennedy, J., dissenting) (arguing that a lower court's ruling on the constitutional merits of a qualified immunity claim, where that court goes on to find the constitutional rule not clearly established and thus awards the defendant qualified immunity, constitutes a dictum "not to be treated as a judgment standing on its own").

[224] *See* Sampsell-Jones, *supra* note 221, at 759–60; *see also* Melissa Armstrong, Note, *Rule Pragmatism: Theory and Application to Qualified Immunity Analysis*, 38 COLUM. J.L. & SOC. PROBS. 107, 126–27 (2004) ("Even assuming that dicta are less reliable, the Second Circuit offers at least a partial mitigation of its own accuracy concern. As long as everyone understands that the finding of a constitutional violation is dictum not binding on a future court facing a similar fact pattern, the likelihood that the first court was mistaken presents less of a danger. In other words, the dictum of the first case merely puts officials on notice that certain conduct probably violates rights, removing the availability of qualified immunity, but does not burden them in the second case with binding precedent on point about the existence of a rights violation." (footnote omitted)).

The Supreme Court has not firmly established the sources of decisional law a court may consult in determining whether a right has been clearly established. *See* Catlett, *supra* note 152, at 1041. Controlling precedent or a "robust 'consensus of cases of persuasive authority'" that does not conflict with controlling precedent suffices to clearly establish a legal rule. *Al-Kidd III*, 131 S. Ct. 2074, 2084 (2011) (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999)). The Court has implied that cases outside the controlling circuit might inform the analysis. Catlett, *supra* note 152, at 1041–42. Some federal circuits, including the Ninth Circuit, have recognized dicta as a source of decisional law that can establish a constitutional right as clearly established, the broadest standard employed by the circuits, *id.* at 1048, but the Supreme Court rejects this "high level of generality," *see al-Kidd III*, 131 S. Ct. at 2084.

[225] *Camreta*, 131 S. Ct. at 2041 (Kennedy, J., dissenting) (citing Brief for United States as *Amicus Curiae* at 13, *Camreta*, 131 S. Ct. 2020).

[226] *See id.* at 2030 (majority opinion) (explaining that first-prong constitutional rulings are "rulings self-consciously designed to [affect government officials' behavior] by establishing controlling law and preventing invocations of immunity in later cases" and "with [the] Court's permission, to promote clarity—and observance—of constitutional rules"). However, there may be a limitation on which courts' qualified immunity decisions can serve these purposes: "district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity." *Id.* at 2033 n.7.

[227] *See, e.g.*, *id.* at 2037–38 (Kennedy, J., dissenting) (arguing that permitting Supreme Court review of first-prong constitutional rulings where an official prevails on his qualified immunity claim in the second prong of the analysis amounts to issuing advisory opinions); Healy, *supra* note 61, at 902–04.

cline to expend resources to argue the constitutional merits.[228] While this argument is compelling—surely, new constitutional law should only arise out of hearty motions practices—it ignores government institutions' strong motivations to fight vigorously against the declaration of new constitutional rights. Those rights, after all, could complicate their task of crafting constitutionally compliant policies and could expose their officials to liability.[229] In practice, government defendants rarely decide not to contest a novel constitutional claim when asserting qualified immunity because the disputed right is often a matter of "*institutional* concern."[230]

The government defendants in GWOT *Bivens* cases are especially unlikely to forego arguing novel constitutional issues especially when the constitutional rights involve a new type of enemy engaged in a new and potentially multigenerational type of war. Additionally, since few detainees have brought *Bivens* claims thus far, it is doubtful that a lack of government resources will preclude executive officials from fervently litigating the constitutional questions these suits raise. The high concentration of potentially far-reaching constitutional implications in detainees' *Bivens* actions further supports this prediction.

Saucier sequencing also presents the problem of insulating from appellate review a court's finding that a constitutional right exists. As the argument goes, because parties may appeal only adverse outcomes, a defendant who wins on the "clearly established" prong cannot appeal a court's constitutional finding even though, for many government officials, the court's recognition of a new constitutional right or contour of a constitutional right is more detrimental than the case's dismissal is beneficial.[231] In May 2011, the Supreme Court created an exception to the general rule against appeals of favorable outcomes for qualified immunity cases, recognizing that they

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[228] *See* Healy, *supra* note 61, at 856 ("Because a ruling on the constitutional issue in these cases can never affect the outcome, there is a greater risk that the [constitutional] issue will not be argued vigorously and that the Court's decision will therefore be inadequately informed.").

[229] *See, e.g.*, *Camreta*, 131 S. Ct. at 2041 (Kennedy, J., dissenting) (pointing out the United States' amicus curiae argument that first-prong constitutional rulings sometimes alter or control government policy and officials' conduct as much as an injunction or declaratory judgment would).

Indemnification practices further incentivize the government to argue fully the novel constitutional right asserted in a detainee's *Bivens* action. *Cf.* David Zaring, *Personal Liability as Administrative Law*, 66 WASH. & LEE L. REV. 313, 330–31 (2009) (explaining that individuals are rarely personally liable for torts they commit in the course of their duties because of the government's policy of indemnifying its employees).

[230] Greabe, *supra* note 213, at 435 (emphasis added). One commentator has pointed out that even outside the GWOT context, the thousands of cases decided between 2001 and 2009 under *Saucier* have not yielded obvious examples of disastrously uninformed dispositions. *See* Sampsell-Jones, *supra* note 221, at 761.

[231] *See, e.g.*, Hughes, *supra* note 67, at 414–17 (describing this phenomenon in the context of *Bunting v. Mellen*, 541 U.S. 1019 (1998), in which the Supreme Court declined to review a decision that the Virginia Military Institute's dinner prayer tradition was unconstitutional because the Fourth Circuit had found that right was not clearly established and thus had granted the Institute qualified immunity); Jeffries, *supra* note 85, at 127–28 (same).

represent "a special category when it comes to [the Supreme Court's] review of appeals brought by winners."[232] The danger that novel constitutional rulings otherwise could be insulated from review might lead lower courts to avoid articulating constitutional rulings in qualified immunity cases.[233] The "regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo,"[234] so an exception that "permit[s] lower courts to avoid avoidance" was justified.[235] As constructed, the exception requires that the appealing litigant have a continuing "personal stake" in the appeal to preserve the case or controversy.[236] This personal stake exists in qualified immunity cases, the Court reasoned, because a first-prong constitutional ruling causes a government official to "either change the way he performs his duties or risk a meritorious damages action."[237] In the wake of *Camreta*, the unreviewability dilemma does not condemn *Saucier* sequencing.

Finally, any argument that *Saucier* sequencing's mandatory first prong is inefficient bears less weight given that a constitutional question's adjudication in one case prevents the need for its adjudication in future cases.[238] That said, *Pearson* acknowledges one possible exception to this: where the constitutional question is already pending in a higher court.[239] In the GWOT context, there will undoubtedly be future cases. The U.S. struggle to dismantle extremist terrorist regimes is a long-term endeavor. Osama bin Laden's death has not dismantled al Qaeda's increasingly diffuse network of affiliates, and in general, terrorist networks have become self-reliant and largely independent of central leadership.[240] U.S. strategies will continue to

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[232] *Camreta*, 131 S. Ct. at 2030 (majority opinion). Some scholars have been calling for this type of narrow exception. *See* Jeffries, *supra* note 85, at 127 n.47 (quoting *Bunting*, 541 U.S. at 1023 (Scalia, J., dissenting from denial of certiorari)); Leong, *supra* note 63, at 678–79. Moreover, this exception is congruent with the existing exception to the final judgment rule, which allows officials to file interlocutory appeals of denials of motions to dismiss or denials of summary judgment if their appeals pertain to qualified immunity. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 825 (2010).

This exception is sure to generate vigorous debate because it effectively forgives what have traditionally been considered deficiencies of constitutionally mandated standing requirements. *See, e.g.*, Orin Kerr, Camreta v. Greene *and Article III Standing*, VOLOKH CONSPIRACY (May 26, 2011, 2:16 PM), http://volokh.com/2011/05/26/camreta-v-greene-and-article-iii-standing. Indeed, several Justices objected on such grounds. *See Camreta*, 131 S. Ct. at 2037–34 (Kennedy, J., dissenting).

[233] *See Camreta*, 131 S. Ct. at 2030–32 (majority opinion).

[234] *Id.* at 2031.

[235] *Id.*

[236] *Id.* at 2029.

[237] *Id.*

[238] *See* Leong, *supra* note 63, at 680–82.

[239] *See* Pearson v. Callahan, 129 S. Ct. 808, 819 (2009).

[240] *See, e.g.*, Nathan Freier, *Bin Laden's Gone: What Now for Defense Policy?*, CENTER FOR STRATEGIC & INT'L STUD. (May 4, 2011), http://csis.org/publication/bin-ladens-gone-what-now-

include the detention of suspected al Qaeda terrorist cell members and Taliban fighters even if wartime exigencies abate. Just as surely, some of these detentions will be mistakes. There is no long-run efficiency to be gained, or cost to be saved, by omitting *Saucier* first-prong constitutional adjudications now.

B. Why the Courts Should Not Defer: The Judiciary's Role in the Global War on Terror

Since GWOT victims' rights are unlikely to develop outside of *Bivens* actions, courts should follow the *Saucier* sequence when adjudicating the qualified immunity defenses raised in these suits. The *Saucier* sequence contemplates an active rights-defining and notice-giving role for the judiciary despite the availability of a one-pronged test that can support a disposition. In this way, the *Saucier* sequence betrays popularized principles of judicial avoidance.[241] The familiar call for judicial passivity is even louder where cases involve executive wartime conduct. This section justifies the Judiciary Branch's role in elaborating and defining GWOT victims' rights that will constrain and, more importantly, guide executive decisionmaking.

Judicial passivity is not always a virtue. "Minimalist" judicial philosophies come with unbalanced costs in the form of cyclic litigation, hardships on individual plaintiffs, and the consumption of resources.[242] Furthermore, avoidance in the lower courts leads to a less robust body of lower court law for the Supreme Court to mine for an ideal rule.[243] Finally, the propriety of more gradual constitutional development is not at all clear.[244] Several historical periods have seen rapid and profound changes in constitutional jurisprudence that have survived the march of time, such as the equal protection revolution of the mid-1900s.[245] When judicial intervention clashes with executive wartime prerogatives, however, separation-of-powers principles usually sway in favor of less judicial participation.

One of the primary objections to the judicial review of executive actions is that the possibility of liability will impede swift executive deci-

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defense-policy; Eric Schmitt, *Bin Laden's Death Doesn't Mean the End of Al Qaeda*, N.Y. TIMES (May 2, 2011), http://www.nytimes.com/2011/05/03/world/asia/03terror.html.

[241] *See* Leong, *supra* note 63, at 676–78.

[242] *See* Fiss, *supra* note 137, at 657; *see also* Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CALIF. L. REV. 301, 303–12 (2009) (providing a thoughtful discussion about how strict adherence to clear rules during times of emergency can increase national security).

[243] *See* Catlett, *supra* note 152, at 1051 ("Sometimes a legal issue is better fleshed out when it is considered by multiple judges with differing viewpoints. . . . 'The many circuit courts act as the "laboratories" of new or refined legal principles . . . providing the Supreme Court with a wide array of approaches to legal issues and thus, hopefully, with the raw material from which to fashion better judgments.'" (quoting J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CALIF. L. REV. 913, 929 (1983)) (footnote omitted)).

[244] *See* Fallon & Meltzer, *supra* note 214, at 1803–04 & n.396.

[245] *See* Greabe, *supra* note 213, at 435–36.

sionmaking and deter or delay action when it is needed most. Judicially imposed liability may, it famously has been said, "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."[246] These policy arguments against an active Judiciary Branch become considerably louder when judges seek to review executive activities during war.

The potential for detrimental executive hesitation does not mean, however, that the judiciary must sit idly by while actions taken in the name of national security and victory in warfare threaten the liberties these lethal and expensive wars seek to protect. It is, after all, the judiciary's fundamental purpose to "say what the law is."[247] Arguments that the judiciary should have a seat at the metaphorical table in wartime[248] are even stronger in the context of this new, unfamiliar, and potentially long-term global war.[249] This war is "amorphous" and is fought against an ill-defined enemy.[250] In this type of war, an outside minority—here, the Guantánamo detainees—will likely bear the burden of our fearful, self-preservationist reactions.[251]

The federal courts have expansive authority to assess the legality of both U.S. domestic and extraterritorial detention and other executive conduct.[252] While decisions to commit troops are presidential prerogatives, determinations about how the Constitution applies to extraterritorial activities may best be addressed by judges.[253] Whether the judiciary constitutionally *can* review executive detention and military activities, however, does not settle whether it *should*.

The infrequency of wartime opportunities for legal issues to ripen and come before the Supreme Court, coupled with the need to imbue the law governing wartime activities with contemporary constitutional sensibilities, also militates in favor of reasonable nonavoidance policies during wartime.[254] Courts must review wartime activity in order to bring wartime laws

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[246] Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

[247] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Moreover, judicial involvement will not undermine the military as an authoritarian institution. *See* Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 442, 460–61 (1999).

[248] *See* Fiss, *supra* note 137, at 659.

[249] To be sure, some commentators disagree. *See, e.g.*, WITTES, *supra* note †, at 257–58 (arguing that trying to answer "war on terror" dilemmas with the Constitution and past precedents is "an illusion" and that, in this new war, "we are the Founders"). Wittes acknowledges, however, that, in the long run, a seat at the table for the Judiciary Branch could at most "prove harmless" to the Executive Branch's ability to do its job. *Id.* at 123.

[250] Fiss, *supra* note 137, at 659.

[251] *Id.*

[252] Pfander, *supra* note 94, at 499.

[253] *See* Leah E. Kraft, Comment, *The Judiciary's Opportunity to Protect International Human Rights: Applying the U.S. Constitution Extraterritorially*, 52 U. KAN. L. REV. 1073, 1102–03 (2004).

[254] Professor Jeffries argues that excluding judges from qualified immunity analyses could lead "the Constitution [to] be defined not by what judges, in their wisdom, think it does or should mean, but by

into compliance with constitutional understandings that have evolved since the creation of previous wartime jurisprudence. When President Bush and the DOJ were called upon to present the legal justifications for the detentions at Guantánamo Bay, they were relegated to discussing fifty-year-old precedents.[255] One case they relied upon, *Johnson v. Eisentrager*,[256] had been meaningfully discussed by the Supreme Court only once in the five decades between its writing and September 11, 2001.[257] The absence of subsequent opportunities for courts to clarify *Eisentrager*, namely wartime detentions, had amplified its original lack of clarity.[258]

Nonavoidance policies serve a critical notice-giving function. By saying "what the law is" at the few and intermittent wartime opportunities the judiciary has, the judiciary guarantees that, when facing the next threat, the President will be able to rely on constitutional law that reflects, at worst, the law at the time of the most recent war rather than law that has not been updated in decades. In the absence of this judicial guidance, "an Executive solicitous of civil liberties has no way of knowing how to structure a detention policy to minimize its potential unconstitutionality."[259] President Franklin D. Roosevelt's approach to the World War II Japanese internments and Attorney General Francis Biddle's statements are demonstrative:

> Biddle . . . wrote that "the constitutional difficulty" of the Japanese internments did not seem to worry President Roosevelt. "That was a question of law, which ultimately the Supreme Court must decide. And meanwhile—*probably a long meanwhile*—we must get on with the war." This shows that Presidents can anticipate and exploit the Court's procrastination. On the other hand, it also suggests Roosevelt would have heeded judicial guidance had it been available. He was wrong about one thing: A Supreme Court practicing abstention need not decide anything. Thus "meanwhile" has lasted to this very day.[260]

President Bush's detention decisions in the wake of the September 11, 2001 attacks similarly suffered from a lack of prescient constitutional precedent. The *Eisentrager*-based belief that Guantánamo Bay would shield operations there from judicial scrutiny significantly motivated President Bush's decision to hold suspected al Qaeda terrorists and Taliban figh-

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the most grudging conception that an executive officer could reasonably entertain." Jeffries, *supra* note 85, at 120.

[255] *See al Maqaleh II*, 605 F.3d 84, 90, 92 (D.C. Cir. 2010); Vladeck, *supra* note 136, at 604–06.

[256] 339 U.S. 763 (1950).

[257] *See* Vladeck, *supra* note 136, at 600. The case that discussed *Eisentrager* was *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

[258] *See* Vladeck, *supra* note 136, at 600.

[259] *See* Kontorovich, *supra* note 51, at 805.

[260] *Id.* (quoting FRANCIS BIDDLE, IN BRIEF AUTHORITY 219 (1962)) (footnote omitted).

ters there.[261] These examples highlight why courts should aim to provide timely and decipherable wartime opinions to the other decisionmaking branches during wartime.[262]

Moreover, judicial avoidance maneuvers can bind the judiciary to a certain decisional path *without* a full deliberative process. As Professor Jenny Martinez has explained,

> [T]he Court's procedural approach does not leave these substantive questions genuinely open for de novo review some other day. Having invited Congress to fix things, for example, the Court has put itself in an institutionally weaker position to later strike down Congress's fix on rights-based grounds. Moreover, having applied the law of war to al Qaeda detainees, the Court has made it difficult to later find that the "war on terror" may not really be a war at all. And the Court has done so without the benefit of fully considering the substantive or rights-based arguments.[263]

The Judiciary's task of defining rights and educating the Executive, in many situations, would be subsidiary to the Legislature's duty to promulgate legislation that serves these purposes. In this new war, however, the legislature has failed utterly to delineate constitutional limits for the Executive Branch.[264] Since the Obama Administration has decided not to request congressional articulation of the contours of the United States' noncriminal detention scheme,[265] Congress is unlikely to do so in the near future. Moreover, the judiciary maintains an apolitical duty to protect the rights of minorities especially at times when the legislature, practically speaking,

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[261] *See* RAUSTIALA, *supra* note 44, at 196. As the DOJ noted, Guantánamo Bay was "probably free of the influence of the American courts due to its location outside the territory of the United States." *Id.* at 187.

Guantánamo was ideal for other reasons, too. It is far from Middle Eastern hostilities and very secure. *Id.* As the American general in charge of the Afghan invasion, Tommy Franks, explained, al Qaeda and Taliban captives resisted their detention with such violence that the government needed to move them to a more secure location. *Id.* at 195.

[262] Kiyemba v. Obama, 561 F.3d 509, 522 (D.C. Cir. 2009) (Kavanaugh, J., concurring), *cert. denied*, 130 S. Ct. 1880 (2010).

[263] Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1030 (2008).

[264] *See* Editorial, *A New Approach*, WASH. POST, Nov. 30, 2003, at B6 ("One of the great problems with the legal response to 9/11 has been Congress's unwillingness to do its job and write law. . . . By inaction, it has left the resolution of such issues to a dialogue between the executive branch and the courts . . . ."); *see also* WITTES, *supra* note †, at 123 ("With Congress content for so long to duck responsibility for policy choices . . . , the alternative to some assertion of judicial power may have been an unchecked executive . . . ."); Landau, *supra* note 132, at 697 (pointing out that "individual members of Congress . . . openly declared their belief in [the Military Commission Act's] unconstitutionality" even though they voted for it); Kiik, *supra* note 12, at 1973 ("Congress has twice issued legislation addressing detainee treatment without creating . . . [or] explicitly prohibit[ing] remedies for these violations . . . . And the Supreme Court has never suggested that congressional inaction prohibits an extension of *Bivens* . . . .").

[265] WITTES ET AL., *supra* note 96, at 4 (citing Peter Finn, *Administration Won't Seek New Detention System*, WASH. POST, Sept. 24, 2009, at A10).

cannot do so for fear of constituent ire. Few savvy politicians would present or support a bill to establish meaningful limits on the military's or federal intelligence agencies' power to detain suspected terrorists on the basis that those terrorists have inviolable rights. This may be especially true after the killing of Osama bin Laden by U.S. Navy SEALs, a military success that spawned patriotic demonstrations and celebrations across the United States;[266] few politicians will be willing to dampen the long-awaited sense of victory with hand-tying legislation.

CONCLUSION

Although the Supreme Court's *Pearson* decision gives courts the option to avoid deciding the constitutional issues underlying the detainees' suits, an option sure to be popular given the stakes, the Court also emphasized that at times constitutional development and notice-giving will still rely on the *Saucier* two-prong protocol. It reiterated the importance of this subset of cases in *Camreta v. Greene*.[267] Because GWOT detainees otherwise have no opportunities to mount a meaningful challenge to executive detention policies,[268] *Bivens* actions present one such scenario. Constitutional adjudication in these cases is even more important because the official conduct being challenged is likely to involve technologies and methods the Executive Branch has never before deployed, at least not in a wartime context. Therefore, courts can serve not only a notice-giving purpose, but also a constitutional-updating purpose.[269] Employing the two-step *Saucier* approach in these cases will also avoid repeated unconstitutional abuses that, in the absence of a judicial ruling to "clearly establish" them as such, could continue into perpetuity with court after court deciding that any rights the detainees may have are not clearly established.[270] For these reasons, the lower courts should follow the Ninth Circuit's lead and invoke *Saucier* sequencing when deciding the validity of qualified immunity defenses raised in detainee *Bivens* actions. If the lower courts continue to decline to do so, the Supreme Court should clarify that detainees' *Bivens* actions are precisely the type of claim for which *Pearson* declares *Saucier* analysis to be "especially valuable."

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[266] *See, e.g.*, Michael Murray, *Osama Bin Laden Dead: The Navy SEALs Who Hunted and Killed Al Qaeda Leader*, ABCNEWS (May 2, 2011), http://abcnews.go.com/US/osama-bin-laden-dead-navy-seal-team-responsible/story?id=13509739; William M. Welch, *Bin Laden Death Prompts Celebrations, Reflection*, USA TODAY (May 2, 2011, 6:07 PM), http://www.usatoday.com/news/nation/2011-05-03-reaction-bin-laden-death_n.htm.

[267] *See Camreta v. Greene*, 131 S. Ct. 2020, 2031 n.5 (2011).

[268] *See supra* Part II.

[269] *See* Greabe, *supra* note 213, at 407–10 (making a similar "new technologies" argument in a more general context and advocating a *Saucier*-like test in civil rights damages actions).

[270] *See Camreta*, 131 S. Ct. at 2030–32; Greabe, *supra* note 213, at 407–10; Jeffries, *supra* note 85, at 120–21; Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 50 (2002).