
THE SPY WHO SUED THE KING:
SCALING THE FORTRESS OF
EXECUTIVE IMMUNITY FOR
CONSTITUTIONAL TORTS IN
WILSON V. LIBBY

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I. INTRODUCTION

On July 19, 2007, the United States District Court for the District of Columbia dismissed a constitutional tort action brought by Joseph C. and Valerie Plame Wilson against I. Lewis “Scooter” Libby, Karl Rove, Richard Armitage, and Vice President Richard Cheney individually as members of the Office of the President.¹ The suit arose from the 2003 publication of a Robert Novak column in the *Washington Post* that revealed Ms. Wilson’s classified identity as a covert CIA operative specializing in nuclear disarmament.² The Wilsons alleged that the defendants supplied Novak with Ms. Wilson’s identity in order to retaliate against Mr. Wilson for his public opposition to the invasion of Iraq.³ Mr. Wilson claimed that President Bush used falsified evidence that Saddam Hussein had been pursuing weapons of mass destruction in West Africa as a pretext for war.⁴ As a consequence of her exposure, Ms. Wilson left her employment at the CIA, fearing for the safety of herself and her family.⁵

The Wilsons sued the defendants pursuant to a constitutional tort action under *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*.⁶ The Wilsons argued that the defendants violated their First and Fifth Amendment rights by disclosing Ms. Wilson’s identity.⁷ Nevertheless, the

1. See *Wilson v. Libby*, 498 F. Supp. 2d 74, 88-89 (D.D.C. 2007) (identifying these and other individuals, and not the Office of the President itself, as defendants in a constitutional tort action).

2. See Robert Novak, *Mission to Niger*, WASH. POST, July 14, 2003, at A21 (revealing, for the first time, Ms. Wilson’s CIA status).

3. See Amended Complaint at ¶ 2, *Wilson v. Libby*, 498 F. Supp. 2d 74 (D.D.C. 2007) (Civ. No. 06-1258) (claiming that the disclosure of Ms. Wilson’s identity was the result of a conspiracy designed to punish Mr. Wilson for his expression of political dissent).

4. See Joseph C. Wilson IV, Op-Ed., *What I Didn’t Find in Africa*, N.Y. TIMES, July 6, 2003, § 4, at 9 (rebuking Bush’s citation of such evidence in his 2003 State of the Union address by referencing his 2002 diplomatic visit to Niger in which he encountered documentary evidence that Iraq had not been pursuing enriched yellowcake uranium there).

5. See generally VALERIE PLAME WILSON, *FAIR GAME: MY LIFE AS A SPY, MY BETRAYAL BY THE WHITE HOUSE* (2007) (describing the devastating personal and professional impact of the disclosure of her covert status on the Wilsons’ lives, careers, and marriage).

6. 403 U.S. 388, 397 (1971) (allowing plaintiffs to recover monetary damages directly from federal employees for the violation of their constitutional rights); see *Wilson*, 498 F. Supp. 2d at 82 (citing *Bivens* as the legal basis for the Wilsons’ cause of action against the defendants).

7. See Amended Complaint, *supra* note 3, at ¶¶ 46-64 (alleging that Ms. Wilson’s outing was an unconstitutional retaliation against Mr. Wilson’s First Amendment right to free speech and constituted a constructive deprivation of her privacy rights and property interest in CIA employment under the Due Process Clause of the Fifth

district court dismissed the suit on the heels of President Bush's commutation of Libby's criminal sentence for obstruction of justice and perjury in the criminal investigation into Ms. Wilson's disclosed identity.⁸ This led many to believe that political machinations had triumphed over the fair administration of civil justice.⁹ The court dismissed the Wilsons' claims outright, despite the significant body of case law supporting the claims.¹⁰ The Wilsons subsequently filed a notice of appeal to the D.C. Circuit, which heard oral arguments on May 9, 2008.¹¹

This Comment contends that the Wilsons should not have been denied proper relief by the district court on the grounds that the violation of a constitutional right creates the presumption of a damages remedy that can only be supplanted where Congress has provided a meaningful statutory alternative or where the government presents a clear showing that the claim should not be adjudicated. Part II provides the jurisprudential context for *Bivens* that led to the dismissal of the Wilsons' claims.¹² Part III argues

Amendment); Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' and the United States' Motion to Dismiss at 15-28, *Wilson v. Libby*, 498 F. Supp. 2d 74 (D.D.C. 2007) (No. 06-1258) [hereinafter Plaintiff's Memorandum] (alleging that defendants improperly retaliated against Mr. Wilson's free speech rights, discriminated against Ms. Wilson as a so-called "class of one" under Equal Protection, violated her expectation of privacy, and deprived her of her property interest in her employment at the CIA).

8. See *United States v. Libby*, 495 F. Supp. 2d 49, 56 (D.D.C. 2007) (upholding the constitutionality of the President's grant of clemency to Libby).

9. See Amy Goldstein, *Bush Commutes Libby's Prison Sentence*, WASH. POST, July 3, 2007, at A1 (citing three polls indicating that roughly seventy percent of Americans opposed any form of leniency for Libby).

10. See, e.g., *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (recognizing "class of one" Equal Protection actions where a homeowner suffered irrational and arbitrary discrimination when public officials forced her to accept a 33-foot easement over her property); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 73 (1990) (recognizing standing for public employees who were discriminated against on the basis of their political affiliation); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 465 (1977) (protecting the right of an individual to keep secret certain information for which he or she has a reasonable expectation of privacy); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (holding that the government may not retaliate against its employees for their exercise of free speech); *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 586 (D.C. Cir. 2002) (ruling that a prisoner who was transferred on the basis of his exercise of free speech suffered an impermissible "adverse action"); *Butera v. District of Columbia*, 235 F.3d 637 (D.C. Cir. 2001) (denying qualified immunity to public employees who have reason to know that their actions are patently illegal and/or unconstitutional); *Ashton v. Civiletti*, 613 F.2d 923, 930 (D.C. Cir. 1979) (recognizing a property interest in federal employment at the FBI and requiring due process for the termination thereof). *But see Doe v. Gates*, 981 F.2d 1316, 1321 (D.C. Cir. 1993) (holding that the National Security Act of 1947, 50 U.S.C. § 403(c) (2000), which allows for the at-will termination of CIA employees, denies a right to continued expectation of employment).

11. *Wilson v. Libby*, 2007 U.S. App. LEXIS 29844 (D.C. Cir. Dec. 20, 2007). See *Plame Appeals Dismissal of Suit*, CHI. TRIB., May 11, 2008, at C9 (reporting that the Wilsons asked the D.C. Circuit to remand the case to the district court for a full consideration of the merits of their claims).

12. See *infra* Part II (exploring the early development of *Bivens* in light of the right

that *Bivens* created a presumptive default remedy in damages for the violation of vested constitutional rights.¹³ Part IV calls for reversal of the district court on appeal and suggests possible statutory alternatives.¹⁴

II. BACKGROUND

A. Ubi Jus, Ibi Remedium: *The Remedial Right Maxim in Anglo-American Tort Law*

Bivens rests upon the common law tort principle that a violation of any legal right entitles victims to a commensurate remedy.¹⁵ The concept of a right to a remedy can be traced as far back as the Magna Carta of 1297, establishing the basic right of Englishmen to vindicate injuries to their rights.¹⁶ Common law jurists interpreted this “remedial right” as a guarantee providing individuals with free and open access to the courts to redress grievances.¹⁷ This is the principle of *ubi jus, ibi remedium*: where there is a right, there must also be a remedy.¹⁸

The remedial right maxim is embedded in American constitutional jurisprudence.¹⁹ Specifically, it provides American courts with the impetus to establish independent causes of action where none exist by statute.²⁰

to a remedy and the recent application of “special factors” to bar otherwise valid *Bivens* claims).

13. See *infra* Part III (offering a “clear statement” rule presuming a *Bivens* remedy and applying this rule to *Wilson v. Libby*).

14. See *infra* Part IV (observing the trajectory of *Bivens* away from the presumption of a remedy and calling on Congress to either augment or replace *Bivens* by statute).

15. Cf. Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 293 (1995) (arguing that *Bivens* is a straightforward application of the right to a remedy for constitutional violations and charging federal courts with the responsibility of fashioning damages where none exist on remedial rights grounds).

16. See MAGNA CARTA 1297, cl. 29 (1297) (providing that no Englishman will be denied “Justice or Right” before the courts).

17. See generally *Ashby v. White*, (1703) 92 Eng. Rep. 126 (K.B.) (cementing as fundamental the right of aggrieved plaintiffs to access the courts to seek remedies for wrongs they suffered); WILLIAM BLACKSTONE, 3 COMMENTARIES *23 (declaring that the right to obtain a remedy where one has sustained a cognizable injury is a general and indisputable rule).

18. See 16 AM. JUR. 2D *Constitutional Law* § 104 (2007) (linking the remedial right maxim to the vindication of constitutional rights).

19. See *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (echoing Blackstone’s assessment of the necessity of a legal remedy to sustain the authenticity of individual rights); *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) (grounding the historical role of American courts to provide equitable relief on the right to a remedy); see also Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1636 (2004) [hereinafter *Ubi Jus, Ibi Remedium*] (proposing that the right to a remedy has risen to the level of a fundamental right under Due Process).

20. See *Bell v. Hood*, 327 U.S. 678, 684 (1946) (affirming that courts may use any

Accordingly, federal courts have historically provided a default remedy in damages wherever injunctive relief is insufficient.²¹ A number of states provide constitutional guarantees that plaintiffs enjoy open access to judicial remedies.²²

B. From Bell to Bivens: The Forging of a Judicial Remedy for Constitutional Torts

Prior to *Bivens*, a number of commentators invoked the remedial rights maxim to argue that Article III judges could fashion damages remedies for violations of constitutional rights without specific statutory authorization.²³ Though Congress afforded citizens the right to sue state governments for constitutional torts, it did not waive the sovereign immunity of the federal government for the same, creating a remedial gap between state and federal liability for constitutional torts.²⁴

In *Bell v. Hood*, Arthur Bell attempted to close this gap by seeking monetary damages against individual FBI agents for infringing the Fourth and Fifth Amendment rights of members of a California religious cult.²⁵ Bell contended that constitutional tort claims could be inferred directly from the Constitution, pursuant to federal statutory jurisdiction over all claims arising under the Constitution or a federal statute.²⁶ Though the Supreme Court accepted Bell's argument that it could hear this novel constitutional claim under general jurisdiction, it avoided the substantive

available remedy to address an injury to a constitutional right even where the legislature has provided no specific cause of action to enforce it).

21. See *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 43 (1990) (noting that injunctive relief is necessary to restore plaintiffs to a position comparable to the position they occupied before the infliction of harm).

22. See *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 356 (Or. 2001) (interpreting the Oregon Open Courts clause in light of *ubi jus, ibi remedium* to allow access to judicial remedies even where a statutory alternative was already available).

23. See, e.g., Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1, 41 (1968) (arguing that the Constitution itself is a source of substantive rights that imply judicially created causes of action).

24. See Civil Rights Act, 42 U.S.C. § 1983 (1871) (providing statutory authorization for tort suits against state governments for violations of constitutional rights); Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 697-98 (2001) (discussing Congress's power to waive state, but not federal, sovereign immunity under the Fourteenth Amendment); Michael B. Hedrick, Note, *New Life for a Good Idea: Revitalizing Efforts to Replace the Bivens Action with a Statutory Waiver of the Sovereign Immunity of the United States for Constitutional Tort Suits*, 71 GEO. WASH. L. REV. 1055, 1056 (2003) (arguing that Congress should waive its sovereign immunity and enter itself as a defendant in *Bivens* suits).

25. See *Bell*, 327 U.S. at 679-80 (describing the forceful arrest of Bell and his followers as the alleged grounds for an Article III tort action).

26. See *id.* at 680-81 (quoting 28 U.S.C. § 41(1) (2006) for the proposition that general jurisdiction implies any necessary legal or equitable action to correct the violation of a substantive right).

question whether Bell had truly stated a claim and remanded review of the merits of the decision to the district court.²⁷ In so doing, the Court opened the door for the possibility of individual liability for constitutional torts, noting that it was the responsibility of courts to use any means available to heal constitutional injuries.²⁸

Twenty-five years elapsed before the Supreme Court reexamined this question in *Bivens*.²⁹ In 1965, Webster Bivens sued six federal narcotics agents individually for damages arising out of a warrantless search of his New York apartment in violation of his Fourth Amendment rights.³⁰ The lower courts dismissed the case for failure to state a claim on which relief can be granted.³¹ On appeal, the Supreme Court reversed and remanded, holding that if Bivens could prove that the agents caused his alleged injuries, then he could recover damages directly under the Fourth Amendment.³² The Court's analysis was a direct response to the questions left unanswered in *Bell*.³³ The Court quickly dispensed with the respondents' contention that Bivens could find relief in a state tort action, noting that local trespass laws do not serve the same prophylactic purpose of the Fourth Amendment and thus could not form the basis of relief for a plaintiff in Bivens' situation.³⁴ While conceding that the Fourth Amendment does not explicitly create such a cause of action, the Court contended that the federal courts should still exercise their responsibility to fashion appropriate remedies for rights violations.³⁵ Because no injunctive

27. *See id.* at 684-85 (distinguishing between the question of subject matter jurisdiction over alleged constitutional tort claims and the actual merits of Bell's claim for the purposes of surviving a motion to dismiss for failure to state a legitimate claim).

28. *See id.* at 683-84 (linking the legitimacy of a constitutional tort claim to general jurisdiction and the historic role of the courts to apply remedies at law and equity).

29. *See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (establishing precedent for constitutional tort action against individual government employees who violate the Constitution in their capacity as government employees).

30. *See id.* (describing how the officers "manacled" Bivens in front of his family and subjected him to a visual strip search).

31. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 276 F. Supp. 12, 14-16 (E.D.N.Y. 1967), *rev'd*, 403 U.S. 388 (1971) (asserting that state tort law, and not the Constitution, provided the appropriate grounds for relief).

32. *See Bivens*, 403 U.S. at 397 (applying the remedial right maxim to justify the creation of a cause of action for Bivens).

33. *See id.* at 389 (affirming that the Constitution implied a private cause of action in tort).

34. *See id.* at 393-94 (explaining that government agents could lawfully enter areas that private persons could not, rendering local trespass laws virtually inapplicable).

35. *See id.* at 392, 395-96 (citing the *Bell* rule that courts must provide relief where no alternative remedy exists and that, historically, damages have been the common remedy); *see also Butz v. Economou*, 438 U.S. 478, 504 (1978) (viewing statutory omission of a remedy as deference to the traditional responsibility of the courts to fashion them).

or declaratory relief would mend his injury, Bivens was entitled to damages, irrespective of the absence of any specific statutory cause of action.³⁶

C. Bivens' Slippery Slope: "Special Factors" as a Jurisprudential Bar to Recovery

Bivens broke new ground in federal jurisprudence by constructing a damages remedy for constitutional violations by federal employees where none previously existed.³⁷ However, *Bivens* proved to be fertile ground for conflict among commentators over the next thirty-seven years.³⁸ Much of this conflict is rooted in Justice Brennan's ambiguous dicta at the end of his majority opinion in *Bivens*, which at once declared the necessity of matching rights with remedies while conceding that there may be certain "special factors" under which otherwise valid *Bivens* claims might not be justiciable.³⁹ If a claim could not be preempted by a special factor or precluded by a statutory alternative, then the claim would be allowed to go forward.⁴⁰

The Court, however, failed to offer a clear standard for the purposes of dismissing a *Bivens* claim under special factors.⁴¹ In the decade that followed, the special factors analysis remained significantly underdeveloped as the Court focused on extending the applicable scope of

36. See *Bivens*, 403 U.S. at 392, 395-96; cf. Katz, *supra* note 23, at 5 (arguing that constitutional rights are self-executing when coupled with general jurisdiction).

37. See Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1532 (1972) (commenting on the rarity of constitutional rights as affirmative causes of action and the possible implications of the creation of a self-executing remedy for constitutional torts in *Bivens*).

38. Compare Henry Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 23-24 (1975) (construing *Bivens* as a matter of constitutional common law and thus subject to congressional amendment), with Joan Steinmann, *Backing Off Bivens and the Ramifications of this Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269, 279 (1985) (insisting that *Bivens* claims arise directly from the Constitution itself and thus should not be preempted by statute). See generally Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797 (2007) (applying a cost-benefit analysis to demonstrate the necessity of causes of action for any sort of government invasion of right as a means of creating incentives for good political behavior).

39. See *Bivens*, 403 U.S. at 396-97 (providing only anecdotal examples of instances where special factors might mitigate against a *Bivens* claim, including the protection of intelligence or military secrets).

40. See *id.* at 397 (requiring that any statutory alternative must provide a remedy comparable to that supplied by *Bivens*).

41. See Note, *Bivens Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action*, 101 HARV. L. REV. 1251, 1254-55 (1988) [hereinafter *Bivens in Flux*] (lamenting the absence of an unambiguous standard for "special factors" that would forbid courts from dismissing *Bivens* actions on vague and ambiguous grounds).

constitutional tort claims.⁴² Beginning in the 1980s, however, the Court synthesized special factors and statutory preclusion to circumscribe and dramatically narrow the applicability of *Bivens*, to the chagrin of a number of scholars.⁴³ The Court first applied statutory preclusion as a special factor in *Bush v. Lucas* to dismiss a First Amendment retaliatory termination claim brought by a NASA employee.⁴⁴ The Court later expanded this line of analysis in *Schweiker v. Chilicky* by invoking statutory preclusion where minimal relief would be granted under an alternative remedial scheme.⁴⁵ Many commentators decried this narrowing of *Bivens*, asserting that the Court abdicated its responsibility to provide *Bivens* remedies by conflating statutory preclusion with other special factors to deny otherwise valid *Bivens* claims.⁴⁶ After the 1980s, plaintiffs found it increasingly difficult to rely on *Bivens* to obtain judicial relief.⁴⁷

D. Excusing the Executive: The Use of Statutory Preclusion, Qualified Immunity, and the Totten Doctrine to Limit Liability for Scooter Libby

The Supreme Court strengthened the presumption against a *Bivens* remedy just prior to *Wilson* in *Wilkie v. Robbins*, dismissing Wilkie's *Bivens* claim though no alternative remedy was available on policy grounds and denying relief for a cumulative Fifth Amendment violation of a

42. See, e.g., *Carlson v. Green*, 446 U.S. 14, 23-24 (1980) (extending *Bivens* to violations of the Eighth Amendment where an inmate was beaten to death by prison guards under the watch of a negligent warden); *Davis v. Passman*, 442 U.S. 228, 241-42 (1979) (providing a *Bivens* remedy for the wrongful termination of a congressional employee in violation of her First Amendment rights).

43. See Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1126 (1989) (noting that in the 1980s, the Court used special factors as an "escape hatch" to evade preserving liability for certain *Bivens* claims); Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 553-54 (1981) (arguing that implied rights of action arise from all federal rights even absent congressional authorization).

44. 462 U.S. 367, 388-89 (1983) (holding that Congress had implicitly preempted *Bivens* claims for a plaintiff who had not exhausted remedies available through the Civil Services Commission).

45. 487 U.S. 412, 420-21 (1988) (precluding a *Bivens* claim for Social Security recipients on administrative exhaustion grounds).

46. See Betsy J. Grey, *Preemption of Bivens Claims: How Clearly Must Congress Speak?*, 70 WASH. U. L. Q. 1087, 1088-89 (1992) (proposing the application of a bright-line standard requiring Congress to express clear intent to preempt a claim); Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 357 (1989) (highlighting immunity defenses, statutory alternatives, and the burden placed upon plaintiffs in pleading their claims against the government with specificity as major obstacles to recovery under *Bivens*).

47. See George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the Bivens Dissenters Prevailed?*, 64 IND. L.J. 263, 265 (1989) (arguing that the Court wrongly subverted the relationship between constitutional and statutory law by allowing statutory obstacles to block otherwise valid constitutional causes of action).

rancher's right to his land.⁴⁸ Following the reasoning used in *Wilkie*, the district court denied the Wilsons' claims applying a similar mix of statutory preclusion and other factors.⁴⁹ The court reasoned that the civil and criminal remedies provided by the Privacy Act and the Intelligence Identities Protection Act (IIPA), in concert with the special factors of qualified immunity and the necessity of protecting covert espionage activities from discovery in open court, warranted dismissal of the Wilsons' claims.⁵⁰

III. ANALYSIS

As a matter of *stare decisis*, the *Wilson* decision does not venture far from the jurisprudential trail blazed by the application of special factors in

48. See *Wilkie v. Robbins*, 127 S. Ct. 2588, 2600 (2007) (preempting *Bivens* relief for a series of incremental infringements of a rancher's property rights by the Bureau of Land Management, even where a piecemeal combination of federal and state remedies was deemed insufficient for statutory preclusion, because the federal government may induce a citizen into granting an easement through incremental activities); see also Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs without Remedies after Wilkie v. Robbins*, 2007 CATO SUP. CT. REV. 23, 24-25 (2007) (arguing that many constitutional violations are cumulative and thus merit *Bivens* actions just as if the violation were accomplished with only one act).

49. See *Wilson v. Libby*, 498 F. Supp. 2d 74, 85 (D.D.C. 2007) (noting that *Wilkie* mirrors established law in the D.C. Circuit regarding general principles relating to statutory remedial schemes and *Bivens* remedies); cf. *Spagnolia v. Mathis*, 859 F.2d 223, 227 (D.C. Cir. 1988).

50. See *Wilson*, 498 F. Supp. 2d at 88, 91-92 (holding that combined application of statutory preclusion, qualified immunity, and other special factors are sufficient to defeat a *Bivens* claim even if none of these applications would independently defeat a claim, and acknowledging that the Privacy Act is a "highly technical statute" with limited application, and that the IIPA is a criminal statute, which provides no civil recourse); see also Privacy Act, 5 U.S.C. § 552(a) (2000) (prohibiting federal agencies from disclosing personal records on file without the consent of the person in question); Intelligence Identities Protection Act, 50 U.S.C. §§ 421-426 (2000) (criminalizing the exposure of clandestine intelligence agents); *Tenet v. Doe*, 544 U.S. 1, 11 (2005) (arguing that *Totten v. United States* applies to any case that would precipitate the disclosure of espionage activity); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (providing qualified immunity for federal officials where a claim does not implicate clearly established law applicable at the time of the offense); *Totten v. United States*, 92 U.S. 105, 107 (1876) (barring the adjudication of contractual claims pertaining to secret espionage agreements); Daniel L. Pines, *The Continuing Viability of the 1875 Supreme Court Case of Totten v. United States*, 53 ADMIN. L. REV. 1273, 1299 (2001) (insisting that *Totten* is necessary to prevent former CIA employees from "grey mailing" the agency into settlement through the threat of litigation). But see *Webster v. Doe*, 486 U.S. 592, 603-04 (1988) (granting the power of judicial review for constitutional claims against the CIA); *Halpern v. United States*, 258 F.2d 36, 43 (2d Cir. 1958) (allowing for *in camera* judicial review of sensitive military secrets in some cases); Sean C. Flynn, *The Totten Doctrine and its Poisoned Progeny*, 25 VT. L. REV. 793, 801 (2001) (challenging the expansion of *Totten* to apply to cases other than those involving espionage agreements); J. Steven Gardner, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567, 591-95 (1994) (proposing alternatives to outright dismissal of claims implicating national security secrets, including the use of *in camera* review, magistrates, and special juries).

Bush, Chilicky, and Wilkie.⁵¹ It also demonstrates how far this trail travels away from the original spirit of *Bivens*.⁵² *Bivens* stood for the proposition that rights require meaningful remedies for their violation, and that if constitutional rights are to be meaningful, then the federal judiciary must fashion a remedy in the absence of a statutory cause of action.⁵³ Today, however, *Bivens* plaintiffs must shoulder an increasingly difficult burden to prove to the courts that their rights were not only violated, but are also meaningful enough to merit those remedies.⁵⁴ Although the Wilsons demonstrated a set of alleged facts that formed the basis of a legitimate cause of action, the district court, under the guise of *Wilkie*, effectively insulated key players within the Bush Administration from any form of civil accountability.⁵⁵

A. From Damages to Nothing: Wilson Demonstrates that Bivens Should Be Interpreted to Create the Presumption of a Remedy

In denying the Wilsons the opportunity to recover damages from the defendants, the district court suggested that *Bivens* actions are not universally applicable to all violations of constitutional rights.⁵⁶ This construction is wholly inconsistent with the underlying principle of constitutional torts.⁵⁷ *Bivens* stands for the proposition that rights require remedies and, where a plaintiff has stated a valid *Bivens* claim, said plaintiff should be entitled to the presumption of a damages remedy.⁵⁸ Therefore, courts should entertain *Bivens* suits with this presumption in

51. See *Wilson*, 498 F. Supp. 2d at 85 (holding that alternative schemes do not need to provide an adequate remedy to counsel against the adjudication of a *Bivens* claim).

52. See Rosen, *supra* note 46, at 371 (arguing that 1980s *Bivens* jurisprudence distorted the original premise of the cause of action).

53. See Steinmann, *supra* note 38, at 297-98 (interpreting the First Amendment as automatically giving rise to *Bivens* liability absent a statutory alternative).

54. See Tribe, *supra* note 48, at 46 (arguing that the presumption against a remedy biased the Supreme Court in *Wilkie* into "manipulating out of existence" the plaintiff's Fifth Amendment rights).

55. See generally Plaintiff's Memorandum, *supra* note 7 (describing the independent constitutional merits of the Wilsons' claims and the necessity of recovery for holding culpable members of the Bush Administration accountable for their actions).

56. See *Wilson*, 498 F. Supp. 2d. at 86 (applying the theory that *Bivens* suits may be appropriate in some contexts but not in others to dismiss a suit against an administrative agency).

57. See Rosenthal, *supra* note 38, at 856 (arguing that, on the grounds of political accountability, courts should not apply discretionary means of granting immunity to government defendants in constitutional tort claims).

58. See Tribe, *supra* note 48, at 64 (offering that *Bivens* plaintiffs should be afforded the presumptive right to seek a remedy for the violation of their constitutional rights by federal officials).

mind and place the burden on the defendant either to prove that a meaningful statutory alternative is available or to demonstrate a heightened government interest that the claim should be dismissed.⁵⁹

The presumption of such a remedy would read *Bivens* in its proper light—as a constitutional application of the remedial right maxim.⁶⁰ The Court explicitly invoked the principle of *ubi jus, ibi remedium* in asserting that the remedial right is an essential corollary of a constitutional right.⁶¹ Contemporary commentators read *Bivens* to provide a damages remedy presumptively available to all plaintiffs.⁶² Indeed, this interpretation of *Bivens* governed the first generation of its progeny, in which the Court afforded a plaintiff bringing a *Bivens* action the presumption of a remedy.⁶³

Some critics have countered that *Bivens* did not create the presumption of a damages remedy because such a cause of action is not implicit in the Constitution.⁶⁴ Instead, the argument goes, a federal damages remedy for the violation of a constitutional right is a legal fiction derived from constitutional common law, just as damages remedies for state tort violations are judicial creations from state common law.⁶⁵ Accordingly, these critics contend that, although the Constitution provides the substantive definition of a right, a *Bivens* remedy is simply one of many optional remedies available to the court to alleviate a plaintiff's constitutional injury.⁶⁶

59. See Grey, *supra* note 46, at 1127 (postulating that a “clear statement” rule would simultaneously protect the rights of plaintiffs and prompt Congress to consider *Bivens* closely in drafting legislative remedial systems); cf. *Ubi Jus, Ibi Remedium*, *supra* note 19, at 1634 (suggesting that remedial rights are fundamental rights of due process, the derogation of which should be subject to strict scrutiny).

60. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 401 n.3 (1971) (Harlan, J., concurring) (justifying the creation of judicial remedies for rights violations as consistent with the common law doctrines of the Founding Era).

61. See *id.* at 397 (majority opinion) (citing *Marbury v. Madison*, 5 U.S. 137, 163 (1803)) (stating that the right to a remedy is central to the maintenance of ordered liberty).

62. See *Dellinger*, *supra* note 37, at 1534 (interpreting *Bivens* to mean that damages remedies are presumptively available to any plaintiff who suffers a compensable injury to his or her constitutional rights).

63. See, e.g., *Carlson v. Green*, 446 U.S. 14, 18 (1980) (affirming that *Bivens* created the presumption of a remedy even absent a statutory cause of action); *Davis v. Passman*, 442 U.S. 228, 242 (1979) (holding that absent the presence of a political question, courts must adjudicate the violations of individual rights).

64. See *Monaghan*, *supra* note 38, at 23-24 (implying that unless a particular remedy is codified or determined to be a necessary concomitant of a right, then the remedy is malleable and subject to subsequent revision or revocation by Congress or the courts).

65. See *id.* (declaring that *Bivens* reflected judicial policymaking for the purposes of fulfilling the right to a remedy and that such a remedy should not be considered a canon of constitutional law).

66. See *Bivens*, 403 U.S. at 415 (Burger, C.J., dissenting) (reasoning that all

The fundamental problem with this approach is that it misunderstands the nature of the *Bivens* remedy, which is not simply an optional political nicety available only when courts choose to provide it.⁶⁷ Even if a damages remedy under *Bivens* is merely one enforcement mechanism as a matter of constitutional common law, such mechanisms are necessary auxiliaries to the enforcement of constitutional rights.⁶⁸ While the Constitution does not explicitly require a damages remedy for a constitutional violation, a damages remedy is necessary where no other available remedy would provide the appropriate relief.⁶⁹ *Bivens* stands for the proposition that constitutional rights necessitate judicial mechanisms that provide practical weight and substance to the enforcement of those rights.⁷⁰

The long-standing practice of federal courts granting injunctive relief for constitutional torts, even absent statutory authorization, is instructive on this point.⁷¹ Courts have historically granted injunctions to any plaintiff seeking relief from federal violations of their constitutional rights.⁷² However, injunctive relief is only an effective cure to correct the violation before it is completed; an injunction is per se inadequate where the violation is *fait accompli*.⁷³ Thus, to restrict the guarantee of a remedy to

judicially created remedial measures are created for the purposes of protecting or enforcing an underlying right and are not indispensable requirements of the Constitution itself).

67. See Frankel, *supra* note 43, at 563 (arguing that implied rights of action arise from all federal rights even absent congressional authorization); cf. Rosenthal, *supra* note 38, at 798 (contending that the vindication of constitutional torts should never be left to the whims of discretionary political processes).

68. See *Bivens*, 403 U.S. at 395-96 (majority opinion) (justifying awarding *Bivens* a damages remedy on the grounds that a remedy must be provided to a deserving plaintiff); see also Steinmann, *supra* note 38, at 281-82 (arguing that *Bivens* remedies may, of necessity, arise directly from the Constitution and are not subject to judicial diminution).

69. See *Bivens in Flux*, *supra* note 41, at 1259 (arguing that even if *Bivens* functions as a matter of constitutional common law and therefore does not self-execute, a long line of lower court cases establish a precedent in favor of providing judicial remedies where none currently exist).

70. See Dellinger, *supra* note 37, at 1534 (suggesting that “judicial prerogative” necessarily created the *Bivens* remedy as a means of checking constitutional rights violations).

71. See, e.g., *Brown v. Bd. of Educ.*, 349 U.S. 294, 299, 301 (1955) (requiring injunctive relief to expedite the integration of public schools); *Spagnolia v. Mathis*, 859 F.2d 223, 229-30 (D.C. Cir. 1988) (holding that where a *Bivens* remedy would not be applicable, a plaintiff still retained the right to an injunctive remedy).

72. Cf. *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990) (interpreting the Due Process Clause of the Fourteenth Amendment as placing an obligation on states to provide injunctive relief for constitutional rights violations where appropriate).

73. See *Butz v. Economou*, 438 U.S. 478, 504-05 (1978) (noting that an irreparably injured plaintiff definitively receives no remedial satisfaction from an injunction where the harm suffered is permanent and the plaintiff cannot actually be restored to his or her position prior to the commission of the tort).

those situations in which the harm is still in progress is to immunize those government actors whose constitutional torts have been successfully completed.⁷⁴

Injunctive relief is as ineffective for the Wilsons⁷⁵ as the exclusionary rule would have been to Bivens.⁷⁶ Ms. Wilson's CIA cover was blown and she and her husband suffered the various harms alleged in the complaint.⁷⁷ The Wilsons, like Webster Bivens, sustained an injury for which they are faced with the prospect of "damages or nothing."⁷⁸

Consequently, while constitutional rights may not require damages remedies for their violation per se, they do require some form of vindication to be effective.⁷⁹ A right without a remedy is a hollow, normative declaration or idealistic sentiment, a toothless parchment barrier with no real meaning.⁸⁰ If a damages remedy is the ordinary method of relief for the vindication of vested rights and no alternative exists, then a *Bivens* remedy may approach the level of "hard" constitutional law as a default remedy for aggrieved plaintiffs.⁸¹

*B. Piercing Immunity: Constitutional Jurisprudence and the IIPA Defeat
Qualified Immunity under Harlow*

If *Bivens* creates a presumptive right to a damages remedy, then it stands to reason that the Wilsons needed only to state a clear cause of action

74. *Id.* (noting also that, because sovereign immunity is virtually impenetrable, recouping monetary damages from individual defendants is the only real way for a plaintiff in *Bivens*' shoes to obtain relief).

75. *See* *Carlson v. Green*, 446 U.S. 14, 18 (1980) (justifying a damages remedy on the grounds that the victim's relatives satisfied the survivorship requirements of the "federal common law" and could find vindication in no other means); *cf.* Amended Complaint, *supra* note 3, at ¶ 42 (highlighting the totality of the Wilsons' injury which threatens their right to safety and security).

76. *See* *Bandes*, *supra* note 15, at 295, 305 (explaining that, because all actual criminal charges against Bivens were dropped, the actual harm he suffered was not wrongful prosecution, but the humiliation, degradation, and invasion of privacy wrought by the malfeasant agents).

77. *See* *PLAME WILSON*, *supra* note 5, at 181-83 (describing the CIA's efforts to ramp up surveillance around the Wilsons' D.C. home in order to protect them from security threats created by Ms. Wilson's exposure).

78. *See* *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (implying that the purpose of the *Bivens* remedy is to serve as a default for those who have no other recourse available).

79. *See* *Dellinger*, *supra* note 37, at 1542-43 (arguing that in order to properly give weight to the rights implicated in *Bivens*, the Court properly chose to create a remedy for an aggrieved plaintiff rather than wait for Congress to do so).

80. *See* *Ubi Jus, Ibi Remedium*, *supra* note 19, at 1638 (asserting that rights without accompanying remedies are merely normative societal abstracts without any real force at law).

81. *Cf.* *Steinmann*, *supra* note 38, at 280 (refuting the notion that a damages remedy derived directly from the Constitution is anything but a matter of constitutional law, and that such remedies are not mere prophylactic devices).

rooted in existing law to survive the defendants' motions to dismiss.⁸² When constitutional rights are implicated under claims pursuant to either Section 1983 or *Bivens*, plaintiffs must claim a cognizable injury proximately caused by a government official's violation of said rights in order to defeat any invocation of qualified immunity.⁸³ Though the Wilsons articulated clear causes of action with regard to their First Amendment free speech and Fifth Amendment privacy claims resulting from actions that were clearly illegal at the time Ms. Wilson's identity was exposed, the district court grossly misapplied the *Harlow* standard in considering defendants' invocation of qualified immunity.⁸⁴

The policy purpose for applying qualified or "good faith" immunity to public officials is to balance the interest of government and its employees with the rights of individual plaintiffs to recover damages for constitutional torts. It is not designed to create an impenetrable procedural barrier to liability operationally equivalent to absolute immunity.⁸⁵ If the facts alleged in the Wilsons' complaint are presumed to be true for the purposes of a motion to dismiss, then defendants' actions were violations of the Wilsons' rights.⁸⁶ Ironically, the defendants alluded to the wrongful nature of their own actions in an attempt to invoke statutory preclusion under the IIPA, which criminalizes the public release of the identity of any classified intelligence agent.⁸⁷

The Wilsons' First Amendment claim rests upon the rule prohibiting government retaliation against the legitimate exercise of free speech established in *Perry v. Sindermann*.⁸⁸ To support a *Perry* claim, the

82. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (explaining that justice demands that a federal official must be put on notice that actions in violation of existing rights could potentially be grounds for litigation).

83. See *id.* at 819 (explaining that qualified immunity serves the purpose of deterring federal officials from lawless, not merely offensive or inappropriate, conduct, and requires a clear statement of the legal basis for the removal of immunity); see also Civil Rights Act, 42 U.S.C. § 1983 (1871).

84. Compare *Harlow*, 457 U.S. at 818 (requiring only an invocation of clearly established rights), with *Wilson v. Libby*, 498 F. Supp. 2d 74, 86 (D.D.C. 2007) (refusing to explore the merits of the Wilsons' claims on the grounds that not all constitutional rights give rise to liability sufficient to defeat qualified immunity).

85. See *Harlow*, 457 U.S. at 819 (reasoning that an objective standard would simultaneously deter bad conduct and allow compensation of deserving victims).

86. See Amended Complaint, *supra* note 3, at ¶¶ 46-64 (demonstrating how the defendants' actions, in violation of the First and Fifth Amendments, were the proximate cause of the Wilsons' injuries by establishing a causal link between the defendants' intentional and unlawful disclosure of Ms. Wilson's identity and the loss of her employment, privacy, and security).

87. See *Wilson*, 498 F. Supp. 2d at 92 (citing the IIPA, which Congress enacted in order to deter the very harm implicated by the Wilsons' claim, as a special factor precluding that claim).

88. See 408 U.S. 593, 596-98 (1972) (holding that a public college violated the First Amendment by effectively terminating the employment of a professor who

Wilsons must establish both that the speech Mr. Wilson was engaged in was constitutionally protected and that the defendants' response was in direct retaliation against an individual substantial enough to deter a person of "ordinary firmness" from so speaking again.⁸⁹ The record demonstrates a clear causal and temporal link between the publication of Mr. Wilson's op-ed in *The New York Times* and the disclosure of Ms. Wilson's identity as a CIA agent, and that the disclosure was a direct retaliatory response to the op-ed.⁹⁰ The threat that high-level executive officials might jeopardize one's safety, privacy, and career by disclosing a spouse's covert status would almost certainly chill the ordinary American from exercising his or her right to speech.⁹¹

The Wilsons also set forth valid Fifth Amendment claims for the invasion of their privacy and property interests under the Due Process Clause.⁹² Individuals possess a reasonable expectation of privacy in personal information that they objectively choose to keep private.⁹³ This undoubtedly includes personal information that the government itself requires to be kept private under both the Privacy Act and the IIPA.⁹⁴ Furthermore, the D.C. Circuit has explicitly held that undercover government agents involved in treacherous operations possess a privacy right against exposure to unnecessary danger under the state endangerment doctrine.⁹⁵ A blown CIA cover places the exposed agent in a significant degree of peril if foreign agents use the information to target her for hostile

criticized the policies of the school administration).

89. See *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002) (joining the majority of circuits in establishing an objective standard for applying the chilling effect to First Amendment retaliation cases).

90. See Amended Complaint, *supra* note 3, at ¶ 19 (chronicling documented evidence that Libby, Cheney, Rove, and Armitage actively supplied the information pertaining to Ms. Wilson's identity used by Robert Novak in his column outing her as a CIA operative); see also *Novak*, *supra* note 2 (identifying Ms. Wilson to the public shortly after he allegedly received information pertaining to her classified status from the defendants).

91. See Plaintiff's Memorandum, *supra* note 7, at 17 (noting that plaintiffs may sustain First Amendment "chilling effect" claims for even *de minimus* retaliation and the resulting effect on the free exercise of speech).

92. See *id.* at 17-25 (describing how the defendants' actions resulted in a constructive termination of Ms. Wilson's employment and a gross invasion of her privacy, two interests protected by the Fifth Amendment).

93. Cf. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457 (1977) (holding that the President of the United States has a reasonable expectation of privacy in communications that are not subject to statutory disclosure requirements or otherwise do not involve important matters of general public interest).

94. See Plaintiff's Memorandum, *supra* note 7, at 21-22 (explaining how the legislative purpose behind the Privacy Act and the IIPA implicates a right to privacy under the Fifth Amendment).

95. See *Butera v. District of Columbia*, 235 F.3d 637, 649 (D.C. Cir. 2001) (recognizing a right to informational privacy in one's covert status if unveiling such status endangers the covert operative).

action, clearly implicating the prospect of physical injury as a proximate result of the disclosure.⁹⁶

The D.C. Circuit has also consistently held that government employees possess a property interest in their employment if they have a reasonable expectation that such employment will continue uninterrupted.⁹⁷ Though Ms. Wilson continued in her capacity as an employee of the CIA for a short time after the disclosure of her identity, her exposure effectively prevented her from continuing her ordinary operations undercover.⁹⁸ Further, the suggestion that Ms. Wilson did not have a sufficient property interest to implicate Due Process simply because her employment could have been lawfully terminated by the CIA director at will is erroneous. In fact, ample precedent exists for the adjudication of CIA employment termination claims arising out of direct agency action, let alone instances concerning constructive termination by the political malfeasance of other Executive officials that are not in the interests of national security.⁹⁹

Each of the Wilsons' allegations is thus rooted in clearly established jurisprudence and the commission of activities that are criminalized by federal statute.¹⁰⁰ In spite of this legal clarity, the district court weakly alluded to a bizarre amalgamation of policy rationales for denying the substantive merits of the Wilsons' claims.¹⁰¹ Interestingly, the court does not speak to these rationales with specificity, nor do they offer any substantive rebuttal to the Wilsons' claims.¹⁰² Instead, the court punted on

96. See PLAME WILSON, *supra* note 5, at 179 (explaining that the Wilsons received numerous threats to their persons and property in the immediate aftermath of her public exposure).

97. See, e.g., Ashton v. Civiletti, 613 F.2d 923, 928 (D.C. Cir. 1979) (holding that an FBI agent terminated solely on the grounds that he publicly admitted his homosexuality had been deprived of his property interest in FBI employment without Due Process under the Fifth Amendment).

98. See Plaintiff's Memorandum, *supra* note 7, at 25 (advancing the argument that disclosure of Ms. Wilson's identity resulted in constructive termination as a CIA agent, and ruined all prospects for promotion); see also PLAME WILSON, *supra* note 5, at 202-03 (noting specifically that Ms. Wilson could no longer effectively function as a Covert Operations Officer without putting her family at risk of significant harm).

99. Compare Doe v. Gates, 981 F.2d 1316, 1320-21 (D.C. Cir. 1993) (holding that a CIA employee did not have a property interest in his employment because the director of the CIA could lawfully terminate him at will), with Webster v. Doe, 486 U.S. 592, 603 (1988) (upholding the jurisdiction of federal courts to hear a constitutional claim pursuant to termination of CIA employment under the same statute).

100. See Intelligence Identities Protection Act, 50 U.S.C. §§ 421-426 (2000) (criminalizing the same actions the defendants allegedly engaged in).

101. See Wilson v. Libby, 498 F. Supp. 2d 74, 83 (D.D.C. 2007) (failing to establish any one independent special factor as sufficient grounds for dismissal of the Wilsons' claims while combining many insufficient factors to justify dismissal).

102. Compare *id.* at 86 (avoiding any exploration of the substantive merits of the Wilsons' *Bivens* claim), with Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (asserting that qualified immunity is an affirmative defense predicated in part on the objective

the qualified immunity question by melding it with statutory preclusion and other special factors.¹⁰³ If the Wilsons' claims were dubious in the least, the court should have simply recognized the defendants' invocation of qualified immunity and dismissed the case without further discussion.¹⁰⁴ If a claim is invalid to begin with, then there is no need to invoke special factors.¹⁰⁵ The district court's decision to avoid answering the straightforward qualified immunity question directly suggests that the court was searching for a way to dismiss the claim and found an escape hatch in the ambiguous special factors standard provided by *Wilkie*.¹⁰⁶

*C. False Alternative: Misapplication of the Privacy Act in Wilson
Underscores the Need for a Clear Statement Rule*

If *Bivens* supports the normative presumption of a remedy and a plaintiff sets forth a constitutional claim sufficient to survive a qualified immunity defense, then statutory preclusion under special factors should only be allowed where an alternative statutory or administrative remedial scheme provides sufficient relief.¹⁰⁷ Though the *Bivens* Court advanced a strong case for the presumption of a remedy, later decisions have contradicted that by allowing Congressional omission or inferences from vague legislative history to undermine that presumption.¹⁰⁸ Indeed, immediate post-*Bivens* case law articulates that alternative remedial schemes should only displace *Bivens* claims where Congress clearly states that the alternative remedy was intended to be the exclusive remedy for a specific cause of action by a specific class of plaintiffs against a specific class of defendants.¹⁰⁹

merits of the plaintiff's legal claims).

103. See *Wilson*, 498 F. Supp. 2d at 83 (passing on an independent analysis of qualified immunity on the grounds that other special factors were sufficient grounds to dismiss the Wilsons' claims).

104. See *Harlow*, 457 U.S. at 818 (explaining that a finding of qualified immunity should result in the quick dispensation of frivolous claims with no legal merit).

105. See, e.g., *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971) (highlighting possible special factors as defenses only after a lengthy discussion of the merits of the plaintiff's claim).

106. See *Wilson*, 498 F. Supp. 2d at 85-86 (applying the *Wilkie* framework to obfuscate the qualified immunity question). See generally *Nichol*, *supra* note 43, at 1150 (asserting that the Court's use of the special factors analysis is generally an indefensible means of avoiding *Bivens* questions entirely).

107. See *Bivens*, 403 U.S. at 397 (suggesting that Congress must intend to displace *Bivens* through the creation of a statutory alternative remedy of subjectively equal effect as a *Bivens* claim); see also *Grey*, *supra* note 46, at 1127 (explaining that Congress must clearly express its intent to preempt a *Bivens* claim in light of a careful consideration of the presumption of the right to a remedy).

108. See *Spagnolia v. Mathis*, 859 F.2d 223, 227 (D.C. Cir. 1988) (setting a relatively low legislative inadvertence standard that views a legislative omission to cover a specific tort in a particular remedial scheme as grounds for statutory preclusion).

109. See *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (ruling that the mother of a

The standard the district court used to support statutory preclusion fundamentally misconstrues the relationship between congressional remedial power and constitutional rights.¹¹⁰ As a general principle, Congress may not amend or otherwise denigrate a constitutional right by statute.¹¹¹ Congress may, however, determine the proper venue for the adjudication of constitutional claims through statutory grants of jurisdiction.¹¹² As *Bivens* made clear, Congress has already provided jurisdiction for the adjudication of a *Bivens* claim through its grant of general jurisdiction over constitutional and statutory claims to federal courts.¹¹³ Thus, the “equally effective alternative” to which the *Bivens* Court referred was the purposeful removal of constitutional tort jurisdiction from Article III courts to another venue of adjudication, not the diminution of available remedies by yielding to statutory alternatives that may provide a less effective remedy or none whatsoever.¹¹⁴

The district court nonetheless invoked statutory preclusion under the inapplicable Privacy Act on the grounds that preclusion is legitimate both where Congress provides a remedy for a specific injury *and* where it fails to do so.¹¹⁵ In this case, the district court followed the D.C. Circuit reasoning in *Spagnolia*: sifting through indistinct legislative history to find evidence that it was not “inadvertent” that Congress failed to provide a meaningful remedy to a class of plaintiffs.¹¹⁶ The problem with the *Spagnolia* “inadvertence” standard is that it allows courts to make inferences from Congressional silence in a statute that may or may not be

prisoner killed as a result of warden’s negligence, in violation of the Eighth Amendment, was entitled to relief on the grounds that the Constitution itself gives rise to the *Bivens* cause of action despite the lack of any specific statutory authorization).

110. See Thomas, *supra* note 24, at 706 (contending that Congress’s role with regard to remedial rights is generally limited to providing a venue for their enforcement).

111. See Steinmann, *supra* note 38, at 281 (insisting that Congress may not revise or amend the substance of any provision of the Constitution).

112. Cf. Thomas, *supra* note 24, at 678 (asserting that Congress’s limited role over the judicial enforcement of constitutional rights under Article I and Section 5 of the Fourteenth Amendment is in carrying out the underlying interest of seeing that the rights are enforced, not to redefine their substance).

113. See *Bell v. Hood*, 327 U.S. 678, 681-82 (1946) (interpreting the federal general jurisdictional statute to allow the adjudication of all constitutional claims, even those rooted in novel theories).

114. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 399 (1971) (Harlan, J., concurring) (noting that the abdication of the Court’s jurisdiction would render the Constitution virtually meaningless).

115. See *Wilson v. Libby*, 498 F. Supp. 2d 74, 90 (D.D.C. 2007) (elevating the omission of an equivalent remedy to the same status as the enactment of an equivalent remedy for the purposes of statutory preclusion).

116. See *Spagnolia v. Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (arguing that courts should defer to Congress where it has purposefully considered yet withheld liability for a specific class of defendants through a comprehensive remedial scheme).

supported by the legislative history.¹¹⁷ Congressional inaction thus does not have to clear a very high threshold to be interpreted to preclude a *Bivens* remedy.¹¹⁸ This posture effectively turns *Bivens* on its head by elevating the policy decisions—and indecisions—of Congress over the constitutional responsibilities of the federal courts to provide relief to aggrieved plaintiffs.¹¹⁹

The conflation of statutory preclusion with other special factors in *Wilkie* is rooted in the Court's inability to articulate a clear standard for statutory preclusion in *Bush* and *Chilicky*.¹²⁰ By using inadequate alternatives as mere special factors, the Court left the door wide open for the dismissal of *Bivens* claims on vague grounds of policy discretion.¹²¹ Rather than looking to whether the administrative alternative effectively vindicates the rights of constitutional tort victims, courts now look to the "comprehensiveness" of the alternative.¹²² Evidently, "comprehensiveness" applies to statutes with remote purposes that provide a plaintiff with absolutely no civil relief whatsoever.¹²³

Thus, although the district court conceded that the Privacy Act is a highly technical statute that definitively excludes defendants as members of the Office of the President, omissions inferred from tenuous legislative history somehow demonstrated that Congress had intentionally omitted such relief, justifying denial of a *Bivens* remedy.¹²⁴ Ironically, the district

117. See *Bivens in Flux*, *supra* note 41, at 1267 (noting inconsistency in decisions of the Court in determining how much latitude courts should be afforded in interpreting Congressional silence in *Bivens* claims, particularly with regard to administrative employment claims).

118. See *Nichol*, *supra* note 43, at 1148 (highlighting *Chilicky* as an example of how the Court's new reading of special factors and statutory preclusion could effectively deprive a plaintiff of any remedy).

119. See *Brown*, *supra* note 47, at 272 (pointing out that *Bivens* treated the absence of Congressional action as deference to the judiciary and that modern "special factors" analysis had effectively nullified that rule by requiring Article III courts to defer to Congressional silence before performing their adjudicative function).

120. See *Nichol*, *supra* note 43, at 1121-22 (predicting that the *Chilicky* standard would effectively expand the use of ambiguous special factors to preempt otherwise valid *Bivens* claims).

121. See *id.* (distinguishing the court's legitimate interest in avoiding political questions from mere deference to any and all congressional decisions with regards to the remedies available to constitutional tort victims).

122. See *Bush v. Lucas*, 462 U.S. 367, 385 (1983) (expanding the scope of statutory displacement beyond schemes that are truly effective to encompass those that are comprehensive in nature, regardless of whether or not they provide the necessary relief for the aggrieved plaintiff).

123. See *Spagnolia v. Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (allowing courts to infer from silence that Congress did not unintentionally withhold a meaningful remedy from a *Bivens* claimant).

124. See *Wilson v. Libby*, 498 F. Supp. 2d 74, 88-89 (D.D.C. 2007) (conceding that the Privacy Act provides no relief to plaintiffs while simultaneously using the Act as a special factor shielding the defendants from liability).

court failed to note the parallels between the invocations of the Privacy Act and IIPA provisions in *Wilson* from the hodgepodge of state and federal remedies of *Wilkie*.¹²⁵ Yet in *Wilkie*, the existence of an incomplete remedial alternative alone did not constitute sufficient evidence that Congress sought to prevent the open adjudication of *Bivens* actions.¹²⁶

In hindsight, the quicksand at the end of the Court's slippery slope was entirely foreseeable.¹²⁷ Many commentators have taken a hard line with the *Bush* progeny for failing to provide any standards or guidance for invoking statutory preclusion.¹²⁸ On appeal, the *Wilson* case would present the Supreme Court with an opportunity to correct this problem by replacing the confusing *Wilkie* framework with a clear statement rule.¹²⁹ For a court to preclude a *Bivens* claim on statutory grounds, Congress must have elucidated a clear intent either to displace *Bivens* expressly or to provide the exclusive means for the government to supply a remedy through an administrative alternative.¹³⁰

Such a rule would eliminate or at least significantly reduce the speculative uncertainty of the propriety of a *Bivens* claim, allowing plaintiffs to bypass the expense of filing frivolous *Bivens* claims where an alternative scheme is clearly provided.¹³¹ It would also put defendants on notice, analogous to that provided by qualified immunity, as to when they might be subjected to *Bivens* liability where no administrative alternative is available to plaintiffs.¹³² A clear statement rule would assist courts in

125. Compare *id.* at 93 (considering both the Privacy Act and the IIPA special factors absent any provision of relief for the Wilsons), with *Wilkie v. Robbins*, 127 S. Ct. 2588, 2600 (2007) (holding that the sum total of available state and federal administrative remedies were alone insufficient to defeat the plaintiff's *Bivens* claim).

126. See *Wilkie*, 127 S. Ct. at 2600 (citing *Bush v. Lucas*, 462 U.S. 367, 388 (1983)) (expanding on the jurisprudence on legislative silence that allows the courts to abdicate their duty to provide relief to aggrieved plaintiffs whose claims fall in the gaps left open by administrative alternatives).

127. See Steinmann, *supra* note 38, at 269 (predicting that the new special factors jurisprudence would make it easier for defendants to invoke insufficient special factors to evade liability for constitutional torts).

128. See *Bivens in Flux*, *supra* note 41, at 1254-55 (questioning the logic of the *Bush* Court in utilizing a statute as a special factor justifying preclusion of a *Bivens* claim even when it did not qualify as an equivalent alternative remedy).

129. Cf. Bandes, *supra* note 15, at 338 (encouraging the Court to abandon the two prong test of statutory preclusion and special factors, and instead allow Congress either to defer to judicial review or explicitly replace *Bivens* with other options).

130. See Brown, *supra* note 47, at 298 (suggesting that there are other ways to resolve the difficulties inherent in adjudicating *Bivens* short of abandoning the responsibility to provide a remedy).

131. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (providing that the objective standard for qualified immunity would conserve judicial resources by preempting unnecessary factual inquiries necessitated by a subjective test).

132. See *id.* (providing that the objective standard for qualified immunity would properly put defendants on notice of their own tort liability).

appraising the worthiness of *Bivens* claims by sharpening the boundaries between *Bivens* and other schemes.¹³³ This rule would also allow courts to avoid wholly unsustainable conclusions that a statute which provides no relief to the plaintiff in question could possibly be grounds for preclusion.¹³⁴

D. Airing Dirty Secrets: The Court Should Narrow the Scope of Totten and Explore Alternatives to Outright Dismissal

The final hurdle in the Wilsons' path, the *Totten* doctrine, presents the most enigmatic "special factor" utilized by the district court to dismiss the claim.¹³⁵ It also underscores the unique nature of the Wilsons' *Bivens* claim, involving high-level Executive officers waging political warfare against a high-ranking member of the intelligence community.¹³⁶ Under *Totten*, federal courts will not adjudicate civil claims specifically arising out of covert espionage contracts in order to protect state intelligence.¹³⁷

The *Totten* doctrine is rooted in sound jurisprudential and policy considerations.¹³⁸ As a general matter, it is neither in the interests of the plaintiff nor national security to subjugate the well-being of the nation as a whole to the interests of one individual plaintiff seeking relief.¹³⁹ As a procedural matter, however, individual defendants are not entitled to invoke *Totten* as a defense; it has long been established that only the United States government can invoke *Totten* to prevent litigation.¹⁴⁰ Yet the U.S. government filed a brief in support of the defendants' motions to dismiss

133. See Grey, *supra* note 46, at 1128 (suggesting that similar clear statement tests in other contexts are judicially manageable and place no undue burden on the legislature).

134. See *id.* at 1126 (arguing that *Chilicky* took the "final step in the wrong direction" by abandoning any inquiry into legislative intent and simply deferring to the alleged "expertise" of Congress).

135. See *Wilson v. Libby*, 498 F. Supp. 2d 74, 94-95 (D.D.C. 2007) (invoking a broad application of the *Totten* doctrine to bar adjudication of the Wilsons' claims).

136. See *id.* at 77 (acknowledging that the Wilsons' claim arose out of a high-profile incident, with intense media coverage, that implicated significant political ramifications).

137. See *Totten v. United States*, 92 U.S. 105, 107 (1875) (explaining that because such contracts are forged in secret, even a speculative inquiry into their formation would necessarily compromise national security).

138. See Pines, *supra* note 50, at 1299 (explaining how *Totten* serves to deter CIA informants from bringing suit or using "grey mail" tactics used to induce expensive settlements).

139. See *id.* at 1291 (insisting that any litigation that would involve a dissection of the contractual terms of espionage litigation would undermine the entire intelligence community).

140. See Plaintiff's Memorandum, *supra* note 7, at 37 (disputing the defendants' invocation of *Totten* on the grounds that the doctrine is designed to protect the interests of the government and not individual tortfeasors).

that contained no reference to or invocation of *Totten* on their behalf.¹⁴¹

Additionally, the district court admits that *Wilson* does not completely square with *Totten*.¹⁴² The principal purpose of the *Totten* doctrine, barring the revelation of the identities of intelligence agents, is inapplicable to *Wilson* because Ms. Wilson's identity had already been revealed.¹⁴³ A substantial portion of the litigation would involve the validation of non-sensitive information originally pleaded in the facts.¹⁴⁴ As such, the defendants' assertion that the Wilsons' claim would necessarily involve adjudication of sensitive internal functions of the CIA is preposterous where the defendants themselves leaked the sensitive information in question, in contravention of their duty to protect classified security secrets.¹⁴⁵

Furthermore, even a broader application of *Totten* is inappropriate in *Wilson* because it effectively immunizes the government from liability for legitimate claims simply because of the possibility, however remote, that sensitive information may be subject to discovery.¹⁴⁶ The possibility that sensitive national security information may be revealed in discovery does not necessitate an absolute barrier to adjudication under *Totten*.¹⁴⁷ Outright dismissal is simply one legal shield at the government's disposal to prevent sensitive information from open discovery.¹⁴⁸ In cases like *Wilson*, the

141. *See id.* (noting that the government likely would not have remained silent on the *Totten* question if its invocation were truly appropriate).

142. *See Wilson v. Libby*, 498 F. Supp. 2d 74, 94 (D.D.C. 2007) (employing *Totten* as a special factor while simultaneously acknowledging that *Totten* does not "squarely apply" to the case at bar).

143. *See* Plaintiff's Memorandum, *supra* note 7, at 38 (noting the irony that defendants, accused of revealing the sensitive identity of a key intelligence operative for partisan political gain, are now arguing against adjudication of the Wilsons' claims on the grounds that litigation in open court could possibly reveal the identity of other intelligence operatives); *see also* *Tenet v. Doe*, 544 U.S. 1, 11 (2005) (allowing for the invocation of *Totten* only where there is a possibility that the litigation itself would reveal the existence of a clandestine espionage agreement, not where *post hoc* litigation involves a relationship that has already been revealed).

144. *See generally* PLAME WILSON, *supra* note 5 (demonstrating how the facts as pleaded by the Wilsons would not necessarily implicate sensitive information because the facts necessary for sustaining a *Bivens* claim were not redacted from Ms. Wilson's memoirs of her time working for the CIA).

145. *See id.* at 179 (detailing how media apologists for the defendants spun Ms. Wilson's exposure by attributing it not to the defendants, but to Mr. Wilson himself, in an attempt to deflect the fact that the defendants had indeed engaged in seriously wrongful conduct). *But see Wilson*, 498 F. Supp. 2d at 94 (predicating its invocation of the *Totten* doctrine on the need for the alleged protection of sensitive information).

146. *See Flynn*, *supra* note 50, at 801 (attacking the government's frequent abuse of *Totten* to dismiss claims in the second half of the twentieth-century).

147. *Cf. Gardner*, *supra* note 50, at 576 (noting that invocation of the State Secrets Privilege for sensitive evidence does not automatically bar adjudication if its suppression or exclusion does not prejudice a trial).

148. *See Flynn*, *supra* note 50, at 807-12 (contending that even where *Totten* applies, outright dismissal of a claim is not necessary where other more plaintiff-

court may utilize a wide array of judicial tools for protecting sensitive information while proceeding with the ordinary course of litigation, including *in camera* review of sensitive evidence or referral to a Rule 53 magistrate for review.¹⁴⁹ As such, *Totten* dismissal should not be applied broadly to cases, like *Wilson*, where alternative means sufficiently protect sensitive evidence while still allowing the adjudication of a claim.¹⁵⁰ The district court could easily provide for the private review of classified documents while simultaneously allowing for the open adjudication of non-sensitive questions of fact.¹⁵¹

IV. CONCLUSION

The Wilsons have highlighted a major problem with *Bivens* jurisprudence, underscoring the need for effective civil mechanisms for holding our highest public officials accountable to the rule of law.¹⁵² The *Bivens* problem is systemic; the Wilsons are simply the most prominent *Bivens* plaintiffs to be denied their rightful remedy on the basis of a perplexing standard, confounded by *Wilkie*, and tilted against recovery for constitutional injuries.¹⁵³ In effect, federal courts have abandoned their responsibility to provide a remedy where none exists for aggrieved *Bivens* plaintiffs.¹⁵⁴ The D.C. Circuit or, pending further appeal, the Supreme Court should reconsider the special factors analysis to *Bivens* claims in light of the deleterious impact it has had on plaintiffs like the Wilsons and affirm the presumption of a remedy for the plaintiff faced with “damages or nothing.”¹⁵⁵ If the Court fails to do so, then Congress should take steps to

friendly practices are applicable).

149. *See id.* at 808-09 (arguing that courts have successfully adjudicated many *in camera* claims that implicated military secrets); *see also* Gardner, *supra* note 50, at 593-94 (suggesting that magistrates with the requisite expertise could effectively separate sensitive and non-sensitive evidence for discovery).

150. *See Wilson v. Libby*, 498 F. Supp. 2d 74, 92-93 (D.D.C. 2007) (barring the Wilsons’ claim absolutely while simultaneously implying that criminal adjudication under the IIPA is still appropriate).

151. *See* Gardner, *supra* note 50, at 593-94 (providing examples of how courts can apply measures far less extreme than outright dismissal).

152. *See* Bandes, *supra* note 15, at 340 (explaining the need for *Bivens* liability in the absence of a statutory waiver of federal sovereign immunity for constitutional torts).

153. *Cf.* Tribe, *supra* note 48, at 25 (rejecting the *Wilkie* framework for lack of a workable standard and providing judges with too much discretion in the dismissal of *Bivens* claims).

154. *See* Steinmann, *supra* note 38, at 281-82 (asserting that courts have a responsibility to deliver a remedy for the violation of constitutional rights where Congress has not provided such).

155. *See Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (filling the remedial gap between federal and state constitutional torts where no other remedy exists).

bolster *Bivens* by either creating an explicit statutory alternative or amending the Federal Tort Claims Act to encompass constitutional claims against the federal government otherwise subject to *Bivens* actions.¹⁵⁶

Regardless of the outcome, the Wilsons have at the very least demonstrated the need for real civil accountability in the context of a Washington political culture that sorely lacks it. Friends of Webster Bivens, and the integrity of the Constitution, should salute the spy who dared to sue the king, scaling the fortress of executive immunity for constitutional torts.

156. See Hedrick, *supra* note 24, at 1065-69 (proposing the incorporation of *Bivens* claims into the framework of a statute similar to the Federal Tort Claims Act for federal liability under state tort law).