NOTE

CITIZENSHIP AND THE WAR ON TERROR: SHOULD FEDERAL COURTS CONSIDER A PLAINTIFF'S CITIZENSHIP IN POST-9/11 LITIGATION?

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Introduction

On December 25, 2009, a Nigerian man named Umar Farouk Abdulmutallab unsuccessfully attempted to blow up an airplane as it was landing in Detroit.[1] When FBI agents interrogated Abdulmutallab, he told them that Anwar Al-Aulaqi, an American citizen living in Yemen, had directed Abdulmutallab to detonate a bomb over U.S. soil.[2] U.S. officials had previously investigated Al-Aulaqi, particularly for his online videos in which he incited his followers to commit acts of terrorism on U.S. soil.[3] Abdulmutallab's confession, however, piqued the U.S. intelligence community's interest in Al-Aulaqi.[4]

Following Abdulmutallab's testimony, the Department of Justice wrote a memo justifying the targeted killing of Al-Aulaqi.[5] Though the U.S. government has routinely used drone missiles to kill aliens living in countries such as Pakistan and Yemen, U.S. officials sought a full analysis on the legality of killing Al-Aulaqi because he was a U.S. citizen.[6] The memo provided several justifications for the legality of killing Al-Aulaqi, including that a targeted killing would not violate his Fourth or Fifth Amendment rights.[7]

Before U.S. officials could kill Al-Aulaqi, his father sought to enjoin President Obama and other national security officials from authorizing the killing.[8] The District Court for the District of Columbia dismissed the claim, holding that the case was nonjusticiable because the court lacked a standard for reviewing this type of military decision of the executive branch.[9]

Following the district court's decision, several Reaper drones hit a convoy in Yemen in which Al-Aulaqi was travelling and killed him.[10] Politicians and legal scholars criticized the Obama administration's decision to kill Al-Aulaqi. Senator Rand Paul filibustered the nomination of John O. Brennan for CIA director because Attorney General Eric Holder refused to rule out drone strikes against U.S. citizens on

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1 *See* Mazzetti et al., *How a U.S. Citizen Came to Be in America's Cross Hairs*, N.Y. Times, Mar. 10, 2013, at A1, *available at* http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html?_r=0.

2 *See id.*

3 *See id.*

4 *See id.*

5 *See id.*

6 *See* Greg Miller, *Plan for Hunting Terrorists Signals U.S. Intends to Keep Adding Names to Kill Lists*, Wash. Post (Oct. 23, 2012), http://www.washingtonpost.com/world/national-security/plan-for-hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408fbe6a4b_story.html.

7 For a full analysis of the memo, see *infra* Part III.B.

8 *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 12 (D.D.C. 2010). For further analysis of this case, see *infra* notes 194–202 and accompanying text.

9 *See Al-Aulaqi*, 727 F. Supp. 2d at 47–52.

10 *See* Mazzetti et al., *supra* note 1.

U.S. soil.[11] Scholars have criticized the decision, contending that "the President does not have a 'blank check'" to kill citizens.[12]

In July 2012, Al-Aulaqi's estate sued Secretary of Defense Leon Panetta, seeking a *Bivens* remedy based on an alleged deprivation of Al-Aulaqi's Fifth Amendment rights.[13] In *Bivens v. Six Unknown Named Agents*, the Supreme Court held that the Constitution provided a cause of action for monetary damages for constitutional deprivations committed by federal officials.[14] The Court noted that such remedies are available, except if (1) Congress has provided an alternative remedy or (2) "special factors counsel[ ] hesitation" against granting judicial relief.[15] Plaintiffs may receive a *Bivens* remedy for Fourth, Fifth, and Eighth Amendment violations.[16]

The District Court for the District of Columbia dismissed the estate's *Bivens* claim, holding that the case was nonjusticiable because the judiciary should not intervene in national security matters.[17] Al-Aulaqi's U.S. citizenship gave the court "pause," but his citizenship ultimately did not affect the court's analysis.[18] A *New York Times* editorial called the decision "poorly reasoned."[19] The two Al-Aulaqi cases and reactions to them raise the question whether citizenship should determine which victims of the "War on Terror"[20] the government protects and compensates.

This Note addresses whether courts in ruling on post-9/11 *Bivens* litigation should consider a plaintiff's citizenship,[21] and whether citi-

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11 *See* Ashley Parker, *Rand Paul Leads Filibuster of Brennan Nomination*, N.Y. TIMES (Mar. 6, 2013, 4:59 PM), http://thecaucus.blogs.nytimes.com/2013/03/06/rand-paul-filibusters-brennan-nomination/.

12 *See, e.g.*, Samuel S. Adelsberg, *Bouncing the Executive's Blank Check: Judicial Review and the Targeting of Citizens*, 6 HARV. L & POL'Y REV. 437, 438 (2012).

13 *See* Complaint at 15, Al-Aulaqi v. Panetta, No. 12-cv-01192 (D.D.C. July 18, 2012). For further analysis of this case, see *infra* Part I.B.1.

14 *See* 403 U.S. 388, 397–98 (1971).

15 *Id.* at 396–97.

16 *See, e.g.*, *id.*; Carlson v. Green, 446 U.S. 14, 24–25 (1980) (allowing a *Bivens* claim to proceed against a prison warden who had allegedly subjected an inmate to cruel and unusual punishment in violation of the Eighth Amendment); Davis v. Passman, 442 U.S. 228, 230–31, 248–49 (1979) (allowing a *Bivens* claims to proceed based on alleged sexual discrimination, which violated the Due Process Clause of the Fifth Amendment).

17 *See* Al-Aulaqi v. Panetta, No. 12-1192, 2014 WL 1352452, at *17–18 (D.D.C. July 18, 2012).

18 *See id.* at *16–17.

19 Dorothy J. Samuels, *Do the Courts Have a Role to Play in Drone Strikes?*, N.Y. TIMES (Apr. 9, 2014, 12:31 PM), http://takingnote.blogs.nytimes.com/2014/04/09/do-the-courts-have-a-role-to-play-in-drone-strikes/?_php=true&_type=blogs&_r=0.

20 It should be noted that while this Note uses the term "War on Terror," the Obama administration has moved away from using the term.

21 Though a few scholars have discussed the issue of citizenship in the context of post-9/11 damages litigation, most of these works have discussed the results of these lawsuits and focused less on developing a normative theory for whether courts should treat aliens differently from citizens. *See* Gwynne L. Skinner, *Roadblocks to Remedies: Recently Developed*

zenship should be a relevant factor in determining which types of protections the government gives individuals before placing them on the kill list. More broadly, this Note analyzes the importance of citizenship in the post-9/11 context. I use post-9/11 *Bivens* cases and the targeted killings program as case studies because these areas of national security law raise the same fundamental issues. Both require courts to determine the extent to which they should protect potential victims of the War on Terror, either through providing monetary compensation under *Bivens* or granting individuals procedural hearings in the context of targeted killings. Furthermore, both areas require balancing noncitizens' and citizens' rights against the United States' interest in maintaining an effective national security regime.

One may assume intuitively that U.S. officials should in particular protect U.S. citizens who are victims of the War on Terror because the U.S. government is fighting the War on Terror on behalf of its citizens. This Note, however, argues that citizenship should not be a factor in determining which victims should receive *Bivens* remedies or which individuals are placed on the kill list.[22] To reach this conclusion, this Note develops a two-part argument.

First, I contend that courts and executive branch officials have improperly concluded that constitutional rights do not extend to aliens detained or killed abroad by U.S. authorities.[23] In reaching this

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Barriers to Relief for Aliens Injured by U.S. Officials, Contrary to the Founders' Intent, 47 U. RICH. L. REV. 555, 626 (2013) (concluding that the Founders wanted to ensure that aliens who were victims of torts could seek redress in federal court); Elizabeth A. Wilson, *"Damages or Nothing": The Post-*Boumediene *Constitution and Compensation for Human Rights Violations After 9/11*, 41 SETON HALL L. REV. 1491, 1514–16 (2011) (concluding that the Supreme Court's holding in *Boumediene v. Bush* has not altered the lower courts' analysis in deciding whether to extend *Bivens* remedies to noncitizens); Katrina Carmichael, Note, *The Unconstitutional Torture of an American by the U.S. Military: Is There a Remedy Under* Bivens*?*, 29 GA. ST. U. L. REV. 1093, 1120–26 (2013) (contending that when the plaintiff is an American citizen, courts should either extend *Bivens* remedies or Congress should pass a statute providing monetary remedies).

22 While this Note implicitly argues that at least some of the victims of unlawful post-9/11 torture committed by the U.S. government should be able to receive *Bivens* claims, I leave to other commentators to delve more deeply into *Bivens* jurisprudence. *Compare* Stephen I. Vladeck, *National Security and* Bivens *After* Iqbal, 14 LEWIS & CLARK L. REV. 255, 277 (2010) (contending that national security concerns never "furnish a special factor counseling hesitation in inferring a *Bivens* remedy" (quotation marks omitted)), *with* George D. Brown, *"Counter-Counter-Terrorism via Lawsuit"—The* Bivens *Impasse*, 82 S. CAL. L. REV. 841, 848–49, 910–11 (2009) (positing that Congress, not federal courts, should determine the proper balance between individual liberties and national security), *and* Andrew Kent, *Are Damages Different?:* Bivens *and National Security*, 87 S. CAL. L. REV. 1123, 1125–26 (2014) (providing several justifications why lower courts have refused to grant *Bivens* remedies in post-9/11 damages litigation).

23 *See* Ali v. Rumsfeld, 649 F.3d 762, 772–74 (D.C. Cir. 2011) (determining that the Supreme Court's *Boumediene* holding did not apply to bases in Afghanistan and Iraq because the United States did not exercise sovereignty over these bases); Al Maqaleh v. Gates, 605 F.3d 84, 97 (D.C. Cir. 2010) (noting that while the United States has maintained "total

conclusion, lower courts and executive branch officials have misinterpreted the normative concerns behind the Supreme Court's *Boumediene v. Bush* opinion. In *Boumediene*, the Court held that aliens detained at Guantánamo have a constitutionally guaranteed right to habeas corpus review.[24] The decision sought to prevent U.S. officials from "switch[ing] the Constitution on or off" merely by detaining suspected terrorists in foreign, rather than domestic, prisons.[25] Based on this concern underlying the *Boumediene* decision, I argue that U.S. officials cannot turn off constitutional protections for aliens merely by detaining or killing aliens abroad. Consequently, in light of *Boumediene*, courts should hold that constitutional rights extend to aliens that U.S. authorities plan to kill or detain abroad.

The second prong of this Note's analysis is that aliens do not inherently pose a greater threat to national security. The War on Terror is distinct from a conventional war, such as World War II. In World War II, particular nation-states represented threats to U.S. national security. In the War on Terror, individuals, not nation-states, are the enemy. Thus, citizenship is a poor proxy for determining which individual cases may implicate national security concerns. A U.S. citizen trained by al-Qaeda constitutes a greater threat to national security than a Pakistani civilian whom the U.S. government mistakenly detains. Consequently, federal courts should not rely on citizenship to determine which cases to dismiss, and U.S. officials in the targeted killings context should not assume that an alien necessarily poses a greater imminent threat to U.S. national security than a citizen.

Thus, citizenship should not be a factor in resolving post-9/11 national security issues. Instead, courts and officials should employ a fact-intensive approach before making national security decisions such as dismissing a *Bivens* claim or placing an individual on the kill list.

Part I discusses the most significant post-9/11 damages cases and is divided between cases where the plaintiff was an alien and where the plaintiff was a U.S. citizen. This section highlights how courts have treated plaintiffs differently based on their citizenship. Part II provides a two-part argument for why citizenship should not determine which plaintiffs receive damages. Part III uses the analysis developed in Part II to analyze the U.S. targeted killings program. In particular, this section argues that because nationality serves as a poor proxy for determining the United States' enemies in the War on Terror, the U.S. government should use the same fact-intensive proce-

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control" over Guantánamo for more than a century, the United States did not intend to control Bagram indefinitely).

24 *See* Boumediene v. Bush, 553 U.S. 723, 732 (2008).

25 *Id.* at 765.

dures before placing an individual, whether a citizen or an alien, on the kill list. Part III also suggests that a specialized court within the executive branch should be set up to review kill list decisions.

I
POST-9/11 *BIVENS* LITIGATION

Bivens jurisprudence has received renewed attention since 9/11 with the United States' War on Terror generating numerous *Bivens* suits. Plaintiffs have primarily alleged that U.S. officials violated their Fifth and Eighth Amendment rights during detentions and interrogations that have generally occurred in U.S.-controlled military prisons abroad.[26] This section analyzes several of these cases and is divided between cases where plaintiffs were aliens and where plaintiffs were U.S. citizens. Many commentators have determined that courts have not treated citizen plaintiffs differently from alien plaintiffs because no plaintiff has successfully received *Bivens* remedies in post-9/11 damages litigation.[27]

Courts, however, have treated plaintiffs differently based on their citizenship. When alien plaintiffs raise *Bivens* claims, courts have generally dismissed these claims for one of two reasons. Some lower courts have held that aliens do not have constitutional protections when tortured abroad.[28] The lower court decisions have suggested that the Supreme Court's decision in *Boumediene v. Bush* did not impact their analyses.[29] A different group of decisions has held that national security constitutes a special factor that counsels hesitation against granting *Bivens* remedies to alien plaintiffs.[30] No district court has recognized a *Bivens* cause of action for an alien plaintiff.[31] Furthermore, several district court decisions have recognized a cause of action for U.S. citizens, but circuit courts have then dismissed those

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26 The Supreme Court has granted certiorari in only two post-9/11 damages cases. *See* Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2079 (2011); Ashcroft v. Iqbal, 556 U.S. 662, 666 (2009).

27 *See, e.g.*, Vladeck, *supra* note 22, at 268–69 (noting the emergence of national security as a factor "counseling hesitation" (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971))).

28 *See, e.g.*, Ali v. Rumsfeld, 649 F.3d 762, 771–74 (D.C. Cir. 2011) (holding that constitutional protections do not extend to aliens detained in U.S. military prisons in Afghanistan or Iraq).

29 *See infra* Part II.A for an analysis of *Boumediene*.

30 *See infra* Part I.B.

31 *See, e.g.*, Arar v. Ashcroft, 414 F. Supp. 2d 250, 283 (E.D.N.Y. 2006), *aff'd*, 532 F.3d 157 (2d Cir. 2008), *vacated and superseded on reh'g en banc*, 585 F.3d 559 (2d Cir. 2009), *and aff'd*, 585 F.3d 559 (2d Cir. 2009) (dismissing an alien plaintiff's claim because of national security concerns).

decisions on appeal on qualified immunity grounds without reaching the constitutional merits of the cases.[32]

A. Alien Plaintiffs

1. El-Masri v. Tenet

Khaled El-Masri, a German citizen, alleged that in 2003 CIA agents took him into custody in Macedonia, alleging that he was associated with al-Qaeda.[33] The agents then flew him to Kabul, detained him for over a year, and tortured him.[34] Officials had in fact mistaken El-Masri for a similarly named terrorism suspect and he was released.[35]

El-Masri brought a claim under *Bivens* for a due process violation against several CIA agents based on America's extraordinary rendition program.[36] The United States intervened into the case and moved to dismiss based on the state-secrets privilege.[37] The district court granted the defendants' motion because any admission or denial of America's extraordinary rendition program would "present a grave risk of injury to national security."[38] The Fourth Circuit affirmed, holding that the district court had properly applied the state-secrets doctrine.[39]

2. Ali v. Rumsfeld

Nine plaintiffs, Iraqi and Afghani citizens, sued Secretary of Defense Donald Rumsfeld and several lower-ranking military officers.[40]

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32 *See, e.g.*, Padilla v. Yoo, 678 F.3d 748, 768–69 (9th Cir. 2012) (reversing the district court's decision and dismissing on qualified immunity grounds a case brought by a U.S. citizen).

33 *See* El-Masri v. Tenet, 437 F. Supp. 2d 530, 532–33 (E.D. Va. 2006).

34 *See id.* at 534–35.

35 *See* Wells Bennett, *El-Masri Awarded Damages by ECHR*, LAWFARE (Dec. 13, 2012, 10:22 AM), http://www.lawfareblog.com/2012/12/el-masri-awarded-damages-by-echr/.

36 *See El-Masri*, 437 F. Supp. 2d at 534–35.

37 *See id.* at 535. The state-secrets doctrine is an evidentiary privilege that the government may assert to protect information that it considers important to national security. *See* United States v. Reynolds, 345 U.S. 1, 10–11 (1953); Henry Lanman, *Secret Guarding: The New Secrecy Doctrine So Secret You Don't Even Know About It*, SLATE (May 22, 2006, 3:57 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/05/secret_guarding.html (discussing how the Department of Justice's invocation of the state-secrets privilege increased during the Bush administration).

38 *El-Masri*, 437 F. Supp. 2d at 537.

39 *See* El-Masri v. United States, 479 F.3d 296, 302 (4th Cir. 2007).

40 *See In re* Iraq and Afghanistan Detainees Litig., 479 F. Supp. 2d 85, 88 (D.D.C. 2007). The specific allegations included one plaintiff being "anally probed multiple times, stripped naked in front of other people and photographed, and forced to wear blackout goggles and sound-deadening headphones for prolonged periods to induce sensory deprivation." *Id.* at 89. The suit gained public prominence in the wake of leaked photos of military officials abusing detainees at the Abu Ghraib military prison in Iraq. *See, e.g.*, Seymour M. Hersh, *Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far Up Does*

The plaintiffs alleged that U.S. officials tortured them while detaining them at either the Abu Ghraib prison in Iraq or one of the various U.S. controlled prisons in Afghanistan.[41] All plaintiffs were eventually released, and they subsequently brought a *Bivens* claim based on Fifth and Eighth Amendment violations.[42] The district court granted the defendants' motion to dismiss, observing that the Fifth and Eighth Amendments "do[ ] not apply extraterritorially to nonresident aliens detained in Iraq and Afghanistan where the United States lacks sovereignty and is engaged in a war."[43] To reach this conclusion, the opinion relied on the D.C. Circuit's decision in *Boumediene v. Bush*.[44] The opinion also stated that if aliens could bring these types of claims, enemies could use the discovery process to obtain information about "military affairs."[45]

On appeal, the plaintiffs contended that the Supreme Court's reversal of the D.C. Circuit's holding in *Boumediene v. Bush* created the possibility that constitutional provisions, other than the Suspension Clause, may apply extraterritorially to aliens.[46] The D.C. Circuit, however, upheld the district court decision on two separate grounds.[47] First, the circuit court held that despite the Supreme Court's holding in *Boumediene*, nonresident aliens, detained in Afghanistan and Iraq, still lacked Fifth and Eighth Amendment constitutional protections.[48] The circuit court reasoned that because the United States did not permanently exercise sovereignty over military bases in Iraq and Afghanistan, constitutional protections did not extend extraterritorially to these places.[49] Second, granting a trial in this case "would hamper the war effort and bring aid and comfort to the enemy."[50]

3. Rasul v. Myers

Four British plaintiffs claimed that while detained at Guantánamo, U.S. officials repeatedly beat and tortured them.[51] These plain-

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the Responsibility Go?, THE NEW YORKER (May 10, 2004), http://www.newyorker.com/archive/2004/05/10/040510fa_fact?currentPage=1.

41 *See In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d at 88.

42 *See id.* at 88, 91.

43 *Id.* at 94.

44 *See id.* at 95–102. The Supreme Court later overturned the D.C. Circuit's holding in *Boumediene v. Bush*. *See* 553 U.S. 723, 798 (2008). For an analysis of the Supreme Court's *Boumediene* decision, see *infra* Part II.A.

45 *See In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 3d at 104.

46 *See* Ali v. Rumsfeld, 649 F.3d 762, 771 (D.C. Cir. 2011).

47 *See id.* at 765, 772–74.

48 *See id.* at 771–74.

49 *See id.*

50 *Id.* at 773 (quoting Johnson v. Eisentrager, 339 U.S. 763, 779 (1950)).

51 *See* Rasul v. Rumsfeld, 414 F. Supp. 2d 26, 28 (D.D.C. 2006), *aff'd sub nom.* Rasul v. Myers, 512 F.3d 644 (D.C. Cir. 2008), *cert. granted, judgment vacated*, 555 U.S. 1083 (2008), *and aff'd*, 563 F.3d 527 (D.C. Cir. 2009).

tiffs raised a *Bivens* claim for deprivations of their Fifth and Eighth Amendment rights.[52] The district court reserved on the issue of whether constitutional rights extended to aliens detained at Guantánamo but dismissed the suit on qualified immunity grounds.[53] On appeal, the D.C. Circuit affirmed the dismissal, holding that constitutional protections did not extend to Guantánamo detainees.[54] The Supreme Court, however, vacated this decision because of its *Boumediene* decision.[55] On remand, the D.C. Circuit dismissed the claim based on qualified immunity grounds because the alleged torture occurred prior to the Supreme Court's *Boumediene* decision.[56]

B. American Plaintiffs

1. Doe v. Rumsfeld *and* Al-Aulaqi v. Panetta

In *Doe v. Rumsfeld*, the plaintiff was working as a translator in Iraq when NCIS agents detained him and allegedly "blindfolded him, kicked him in the back, and threatened to shoot him if he tried to escape."[57] Authorities eventually released him, and he returned to the United States.[58] He then filed a suit against Secretary of Defense Donald Rumsfeld under a *Bivens* cause of action.[59] Rumsfeld moved to dismiss, but the district court held that the plaintiff had sufficiently pleaded a substantive due process claim and thus might be eligible for monetary damages.[60] The D.C. Circuit reversed, holding that special factors relating to military, intelligence, and national security cautioned against granting a *Bivens* remedy.[61] The D.C. Circuit also noted that *Bivens* decisions "d[o] not hinge on the plaintiffs' citizenship status" because U.S. "citizenship does not alleviate the . . . special factors counseling hesitation."[62]

The *Doe v. Rumsfeld* opinion is the leading case for the D.C. Circuit on post-9/11 damages claims raised by U.S. citizens. When Anwar Al-Aulaqi's estate brought a *Bivens* claim against Secretary of Defense Leon Panetta for violating Al-Aulaqi's Fifth Amendment rights, the District Court for the District of Columbia relied heavily on the *Doe*

52 *See id.* at 39.
53 *See id.* at 40–44.
54 *See* Rasul v. Myers, 512 F.3d 644, 663–67 (D.C. Cir. 2008).
55 *See* Rasul v. Myers, 555 U.S. 1083, 1083 (2008).
56 *See* Rasul v. Myers, 563 F.3d 527, 529–32 (D.C. Cir. 2009) (noting that prior to the *Boumediene* decision, "neither the Supreme Court nor this court had ever held that aliens captured on foreign soil and detained beyond sovereign U.S. territory had any constitutional rights—under the Fifth Amendment, the Eighth Amendment, or otherwise").
57 Doe v. Rumsfeld, 683 F.3d 390, 392 (D.C. Cir. 2012).
58 *See id.*
59 *See id.* at 392–93.
60 *See id.*
61 *See id.* at 394.
62 *Id.* at 396.

precedent.[63] In dismissing the *Bivens* claim raised by Al-Aulaqi's estate, the district court cited to *Doe* and held that "[u]nder binding D.C. Circuit precedent, this Court finds that special factors preclude the implication of a *Bivens* remedy here."[64]

2. Padilla v. Yoo *and* Lebron v. Rumsfeld

Authorities arrested José Padilla, an American citizen, in early May 2002 at Chicago O'Hare International Airport and subsequently held him in federal custody in New York.[65] On June 9, 2002, President Bush declared Padilla an "enemy combatant," and U.S. officials took Padilla into military custody.[66] Officials held Padilla in military custody for over three and a half years[67] until a federal district court convicted him of providing material support to terrorists.[68]

After his military detention, Padilla sued John Yoo, Deputy Assistant Attorney General in the U.S. Department of Justice's Office of Legal Counsel.[69] The complaint alleged that Yoo wrote and promulgated several memoranda that led military officials to torture Padilla.[70] Yoo moved to dismiss the claim.[71] The District Court for the Northern District of California denied the motion because no factors counseled hesitation against granting a judicial remedy.[72] The opinion noted that unlike in cases where plaintiffs were aliens, foreign relations concerns did not bar *Bivens* remedies for American citizens suing on American soil.[73] Yoo appealed.[74]

Before the Ninth Circuit ruled on Yoo's appeal, Padilla sued Secretary of Defense Donald Rumsfeld and other U.S. officials in the Dis-

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63 *See* Al-Aulaqi v. Panetta, No. 12-1192, 2014 WL 1352452, at *15 (D.D.C. Apr. 4, 2014).

64 *Id.* at *18.

65 Padilla v. Yoo, 678 F.3d 748, 751 (9th Cir. 2012).

66 *Id.*

67 *Id.*

68 *See* John Yoo, *Litigating for Terrorists*, WALL ST. J. (May 3, 2012, 7:28 PM), http://online.wsj.com/news/articles/SB10001424052702304746604577381841940350560.

69 *Padilla*, 678 F.3d at 751.

70 *See* Padilla v. Yoo, 633 F. Supp. 2d 1005, 1013–16 (N.D. Cal. 2009), *as amended* (June 18, 2009), *rev'd*, 678 F.3d 748 (9th Cir. 2012). Padilla claims that government officials, informed of Yoo's memoranda, subjected him to interrogation tactics including "extreme and prolonged isolation" and "sleep adjustment." *Id.* at 1013. *See also* Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., to William J. Haynes II, Gen. Counsel of the Dep't of Def. 11 (Mar. 14, 2003) *available at* https://www.aclu.org/files/pdfs/safefree/yoo_army_torture_memo.pdf (observing that "criminal statutes do not apply to the properly-authorized interrogation of enemy combatants by the United States Armed Forces during an armed conflict").

71 *Padilla*, 633 F. Supp. 2d at 1011.

72 *See id.* at 1022–25.

73 *See id.* at 1029–30.

74 *See Padilla*, 678 F.3d at 757.

trict Court of South Carolina.[75] Padilla sought relief based on his detention as an enemy combatant.[76] The district court granted all the defendants' motions to dismiss, citing national security as a special factor, which counseled hesitation against granting a judicial remedy.[77] Unlike the district court in *Padilla v. Yoo*, the court here held that the case was factually similar to *Ali v. Rumsfeld* because granting discovery in both cases could potentially allow "our enemies to obtain valuable intelligence."[78] By comparing Padilla to the plaintiffs in these two other cases, the South Carolina district court was implicitly suggesting that citizenship did not determine whether a plaintiff could successfully obtain *Bivens* remedies. Furthermore, this opinion suggested that suits brought by U.S. citizens could also raise national security concerns.

The Fourth Circuit affirmed the decision, holding that national security concerns counseled hesitation against granting a *Bivens* remedy in this case.[79] The Fourth Circuit worried that allowing discovery would hamper the work of national security officials.[80]

Following the Fourth Circuit's opinion in *Lebron v. Rumsfeld*, the Ninth Circuit in *Padilla v. Yoo* dismissed all claims against Yoo.[81] The Ninth Circuit did not hold that Padilla was barred from a *Bivens* remedy.[82] Rather, the court dismissed the case on qualified immunity grounds for two reasons.[83] The opinion noted that when Yoo was working at the Department of Justice, no judicial opinion had held that U.S. citizen enemy combatants "possessed rights against the kind of treatment to which Padilla was subjected."[84] Instead, the Supreme Court had held that American enemy combatants could receive worse treatment than ordinary prisoners.[85] The Ninth Circuit then noted that if Padilla's alleged treatment had occurred today, it would have constituted torture.[86] During Yoo's tenure, however, the law was

75 *See* Lebron v. Rumsfeld, 764 F. Supp. 2d 787, 794 (D.S.C. 2011), *aff'd*, 670 F.3d 540 (4th Cir. 2012).

76 *See id.* at 794.

77 *Id.* at 800.

78 *Id.* at 799.

79 *See* Lebron v. Rumsfeld, 670 F.3d 540, 551, 562 (4th Cir. 2012).

80 *See id.* at 551.

81 Padilla v. Yoo, 678 F.3d 748, 769 (9th Cir. 2012).

82 *See id.* at 759–61.

83 *See id.* at 768.

84 *Id.* at 759.

85 *See Ex parte* Quirin, 317 U.S. 1, 37 (1942); *see also Padilla*, 678 F.3d at 760 (interpreting *Ex parte Quirin* to hold that an American citizen who was "detained as an unlawful combatant could be afforded *lesser* rights than ordinary prisoners or individuals in ordinary criminal proceedings").

86 *See Padilla*, 678 F.3d at 767–68.

unclear on whether Padilla's alleged treatment constituted torture.[87] The opinion of the Ninth Circuit did, however, suggest that courts could not hold national security officials liable for torturing citizen enemy combatants.

3. Vance v. Rumsfeld

Two U.S. citizens, who were working as private defense contractors in Iraq, sued Donald Rumsfeld after U.S. military officials allegedly tortured them while detaining them in a U.S. military prison in Iraq.[88] Plaintiffs alleged that military personnel employed "physically and mentally coercive tactics" to question plaintiffs before ultimately releasing without charging them.[89] In a short decision, the district court denied the defendant's motion to dismiss.[90] The Seventh Circuit initially affirmed the district court's decision.[91]

Rumsfeld requested a rehearing en banc, which the Seventh Circuit granted.[92] Following the en banc rehearing, the Seventh Circuit, in an 8–3 decision, reversed the merits-panel decision.[93] The opinion held that foreign relations concerns counseled hesitation against granting a *Bivens* remedy.[94] For the majority, the plaintiffs' citizenship was not relevant because "it should be offensive to our own principles of equal treatment, to declare that this nation systematically favors U.S. citizens over . . . our [ ] allies."[95] Thus, the majority worried that if courts granted special protections to U.S. citizens, those protections would offend U.S. allies in the War on Terror and have negative consequences on foreign relations.

For the dissent, citizenship was a dispositive factor in determining which types of plaintiffs should receive remedies under *Bivens*.[96] The dissent argued that if the U.S. government deprived aliens of their rights, "they can turn to their home governments to stand up for their

87 *See id.* at 763–64, 767; *see also* Michael W. Lewis, *A Dark Descent into Reality: Making the Case for an Objective Definition of Torture*, 67 WASH. & LEE L. REV. 77, 82–83 (2010) (noting that there is agreement that the definition of torture generally is the intentional infliction of mental or physical pain, but "there is very little consensus on what that definition actually means").

88 *See* Vance v. Rumsfeld, No. 06-C-6964, 2009 WL 2252258, at *1–2 (N.D. Ill. July 29, 2009), *rev'd*, 653 F.3d 591 (7th Cir. 2011), *opinion vacated and rev'd on reh'g en banc*, 701 F.3d 193 (7th Cir. 2012).

89 *Id.*

90 *See id.* at *6.

91 Vance v. Rumsfeld, 653 F.3d 591, 611 (7th Cir. 2011).

92 *See* Vance v. Rumsfeld, 701 F.3d 193, 195 (7th Cir. 2012) (en banc).

93 *See id.* at 197.

94 *See id.* at 200, 205.

95 *Id.* at 203.

96 *See id.* at 211 (Hamilton, J., dissenting).

rights."[97] Other governments, however, would not stand up for U.S. citizens' rights.[98]

C. Case Law Summary

Lower courts have not developed a uniform approach for addressing these post-9/11 damages suits. With a few exceptions, the courts have treated plaintiffs differently based on their citizenship. Most court decisions have substantially limited the possibility that an alien plaintiff may eventually be able to successfully obtain a monetary remedy under *Bivens*. Courts appear less wary of plaintiffs who are U.S. citizens raising similar claims. For these claims, courts have relied on qualified immunity for dismissal. These holdings suggest that a U.S. citizen may eventually be able to win a post-9/11 damages suit.

II
Analysis of *Bivens* Litigation

Thus, courts have treated *Bivens* claims from plaintiffs who are citizens more favorably than *Bivens* claims from noncitizens. Courts should not, however, treat citizens and aliens differently when determining who should receive *Bivens* remedies. Circuit courts have developed two improper lines of argumentation to treat citizens and aliens differently. First, opinions such as *Ali v. Rumsfeld*, which held that due process protections do not apply to aliens detained in U.S. military prisons in Iraq and Afghanistan, have misinterpreted the Supreme Court's underlying policy concerns in the *Boumediene* opinion.[99] In *Boumediene*, the Supreme Court attempted to stop the U.S. government from denying aliens constitutional protections by detaining them overseas.[100] Consequently, the spirit of *Boumediene* dictates that aliens receive Fifth and Eighth Amendment protections while detained in U.S. military prisons abroad.

Second, opinions that state that *Bivens* claims raised by aliens implicate national security concerns counseling hesitation against granting a judicial remedy have erred in their analysis.[101] Courts are correct to hold that for certain *Bivens* claims, national security concerns counsel hesitation against granting a judicial remedy. Relying on a plaintiff's citizenship, however, is not an effective method for protecting national security because in the War on Terror, individu-

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97 *Id.* at 221.

98 *See id.*

99 *See* 649 F.3d 762, 772–74 (D.C. Cir. 2011).

100 *See* Boumediene v. Bush, 553 U.S. 723, 771 (2008).

101 *See, e.g.*, Arar v. Ashcroft, 585 F.3d 559, 576–77 (2d Cir. 2009) (en banc) (holding that national security was a factor counseling hesitation against granting a *Bivens* remedy to an alien).

als, rather than nations, present threats to national security. A U.S. citizen trained by al-Qaeda, such as José Padilla, poses a greater threat to national security than an alien, such as Khaled El-Masri, whom U.S. officials mistakenly detained. Thus, in determining whether to dismiss a *Bivens* claims because of national security concerns, courts must not rely on a plaintiff's citizenship to rule on a claim. Instead, courts must investigate whether allowing a particular claim to proceed to the discovery stage would implicate national security matters.

A. *Boumediene* and the Extraterritorial Constitution

Before explaining why lower courts, in ruling on post-9/11 damages litigation, have misinterpreted the Supreme Court's decision in *Boumediene v. Bush*, a brief discussion of the decision is necessary. *Boumediene* involved a Bosnian citizen, Lakhdar Boumediene, whom U.S. military officials seized in Bosnia and transferred to Guantánamo Bay.[102] Boumediene then filed a writ of habeas corpus challenging his detention.[103] In defending Boumediene's detention, the Bush administration had argued that neither U.S. constitutional law nor international law applied at Guantánamo.[104] The D.C. Circuit denied Boumediene's writ, holding that federal courts lacked jurisdiction to review habeas corpus petitions from alien detainees at Guantánamo.[105]

Justice Kennedy, writing for the majority, reversed the lower court's decision.[106] For Kennedy, constitutional protections for aliens did not necessarily stop where the United States' de jure sovereignty ended.[107] Consequently, Kennedy determined that, in certain situations, aliens detained abroad might receive rights under the Suspension Clause.[108] Kennedy specifically worried about the following implication if constitutional protections did not extend beyond where the United States had de jure sovereignty:

> [I]t would be possible for the political branches to govern without legal constraint. . . . To hold the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say what the law is.[109]

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102 *See Boumediene*, 553 U.S. at 734.

103 *See id.*

104 *See* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 190 (2009).

105 *See* Boumediene v. Bush, 476 F.3d 981, 994 (D.C. Cir. 2007).

106 *See Boumediene*, 553 U.S. at 798.

107 *See id.* at 755.

108 *See id.* at 755–56.

109 *Id.* at 765 (citation omitted) (quotation marks omitted).

Instead of a bright-line territorial test that rested on formalism, Kennedy used a practical test to determine the reach of the Suspension Clause.[110] Kennedy's test focused on three factors: (1) the detainees' citizenship and enemy-combatant status, and whether the status was in dispute; (2) the nature of the sites where officials apprehended and detained the detainee; and (3) the obstacles involved in resolving the prisoner's writ.[111] Kennedy noted that Boumediene's status was in dispute.[112] He then noted that the United States has retained sovereignty over Guantánamo indefinitely and so the Constitution applied there.[113] Finally, he argued that hearing the petitioner's claim would not compromise the military mission at Guantánamo.[114]

Since Kennedy announced the *Boumediene* decision, lower courts, especially the D.C. Circuit, have read the Court's holding narrowly.[115] First, lower courts have limited the impact of *Boumediene* by holding that the Court's decision applies only to writs of habeas corpus and not to due process claims.[116] Second, lower courts have held that the holding of *Boumediene* applies to Guantánamo but not other foreign, American-controlled detention facilities.[117]

Such a crabbed reading of *Boumediene* improperly ignores the spirit and underlying policy concerns of the opinion. A proper and broader reading of *Boumediene* suggests that aliens detained at U.S. military prisons abroad have the same Fifth and Eighth Amendment protections as similarly situated U.S. citizens.

Lower courts have erred in holding that the analysis in *Boumediene* applies only to the Suspension Clause.[118] The opinion did not merely give alien enemy combatants the right to challenge their detention in the habeas context.[119] More broadly, the opinion undermined the assumption that U.S. officials working abroad may choose to afford

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110 *See id.* at 766.

111 *Id.*

112 *See id.* at 766–68.

113 *See id.* at 768–69.

114 *See id.* at 769–70.

115 *See* Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451, 1456 (2011) (contending that the D.C. Circuit is "subverting" the *Boumediene* holding); Wilson, *supra* note 21, at 1516 (2011) ("In the world of damages, *Boumediene* changed little.").

116 *See* Kiyemba v. Obama (*Kiyemba I*), 555 F.3d 1022, 1026–28 (D.C. Cir. 2009), *vacated and rev'd on other grounds*, 559 U.S. 131 (2010) (per curiam).

117 *See* Ali v. Rumsfeld, 649 F.3d 762, 772–74 (D.C. Cir. 2011) (determining that the *Boumediene* holding did not apply to bases in Afghanistan and Iraq because the United States did not exercise sovereignty over these bases); Al Maqaleh v. Gates, 605 F.3d 84, 97 (D.C. Cir. 2010).

118 *See Kiyemba I*, 555 F.3d at 1032.

119 *See Boumediene*, 553 U.S. at 732–33.

fewer constitutional protections to aliens than to U.S. citizens.[120] As Ronald Dworkin has persuasively argued, the Constitution's protections against unjust imprisonment are interlinked and so "[i]t makes little sense to think that aliens have full constitutional rights to habeas corpus without also assuming that they have the rest of the due process rights the Constitution has been understood to grant."[121] Applying *Boumediene* only to the Suspension Clause leads to the bizarre result that detained aliens can successfully petition for release from unlawful detention but cannot sue for any torture they suffered while unlawfully detained.

Lower courts have also improperly determined that the holding of *Boumediene* applies to aliens only when detained at Guantánamo.[122] Kennedy, in emphasizing the unique history of Guantánamo,[123] may not have imagined that his opinion could include other U.S.-controlled foreign military prisons. In analyzing the policy concerns that Kennedy addressed, however, U.S. officials' actions at other foreign military prisons must also fall within the jurisdictional scope of federal courts. Kennedy worried that if the Suspension Clause did not extend to Guantánamo, then executive and legislative branches would "have the power to switch the Constitution on or off" by moving foreign detainees from the United States to Guantánamo.[124]

If the *Boumediene* opinion applied only to Guantánamo, then U.S. officials could "switch the Constitution on or off" by flying aliens detained at Guantánamo to other foreign U.S.-controlled military prisons. As Kal Raustiala has noted, Kennedy's focus on practicality suggests that the *Boumediene* holding is "subject to change given technological and political developments."[125] Government officials may not escape liability merely by finding new places to torture individuals.[126] Thus, lower courts that have argued that *Boumediene* is limited to Guantánamo are improperly imposing a bright-line test rather than utilizing Kennedy's flexible, practical test.

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120 *See* Ronald Dworkin, *Why It Was a Great Victory*, THE NEW YORK REVIEW OF BOOKS, Aug. 14, 2008, *available at* http://www.nybooks.com/articles/archives/2008/aug/14/why-it-was-a-great-victory/.

121 *Id.*

122 *See Ali*, 649 F.3d at 772–74.

123 *See Boumediene*, 553 U.S. at 768–69.

124 *Id.* at 765.

125 *See* RAUSTIALA, *supra* note 104, at 216.

126 *See* Dworkin, *supra* note 120 (arguing that Kennedy's "functional" standard means that "the president cannot escape his constitutional responsibilities by finding some spot on a map to hold those he wants to torture that is fully controlled by but not leased to the US").

Furthermore, a detention facility such as the Bagram military prison[127] in Afghanistan or Abu Ghraib in Iraq meets the second factor of Kennedy's three-part *Boumediene* test.[128] Though the United States never intended to lease Bagram indefinitely, when these *Bivens* claims arose U.S. officials controlled Bagram and Abu Ghraib in a manner similar to Guantánamo.[129] In examining "the nature of the sites where apprehension and then detention took place,"[130] courts should recognize that the relationship between U.S. officials and alien detainees was similar at Bagram, Abu Ghraib, and Guantánamo. Consequently, the D.C. Circuit erred in its *Ali v. Rumsfeld* decision by holding that *Boumediene* did not apply to detention facilities in Afghanistan and Iraq because the United States did not exercise sovereignty over these facilities.[131] In future litigation, courts should recognize that *Boumediene* requires that courts grant Fifth and Eighth Amendment rights to aliens detained at U.S.-controlled detention facilities.

Critics of this reading of *Boumediene* may argue that even if this reading is proper, federal officials deserve qualified immunity because their actions at the time of the alleged incidents did "not violate clearly established statutory or constitutional rights."[132] Courts may arguably grant individuals such as Donald Rumsfeld and John Yoo qualified immunity. These courts, however, should first rule on the constitutional question and then determine whether these officials violated "clearly established" rights.[133] Thus courts, such as the D.C.

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127 In 2009, U.S. officials opened up a new prison at the Bagram Air Base, which U.S. officials referred to as the Parwan detention facility. *See* Alissa J. Rubin, *U.S. Readies New Facility for Afghan Detainees*, N.Y. TIMES, Nov. 16, 2009, at A8, *available at* http://www.nytimes.com/2009/11/16/world/asia/16bagram.html?ref=bagramairbaseafghanistan&gwh=A8D92D61CE3AAB3941C087B32D2D7135&gwt=pay.

128 *Boumediene*, 553 U.S. at 766–68.

129 *See* Baher Azmy, *Executive Detention,* Boumediene, *and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 483 (2010) (noting that the United States previously had complete and exclusive control over Bagram and the terms of the Bagram Lease bore striking resemblance to the Guantánamo lease); HUMAN RIGHTS FIRST, ARBITRARY JUSTICE: TRIALS OF BAGRAM AND GUANTÁNAMO DETAINEES IN AFGHANISTAN (2008), https://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-080409-arbitrary-justice-exec-sum.pdf (referring to Bagram as "[t]he [o]ther Guantánamo"). In March 2013, the United States transferred control of nearly all of Bagram, including the Parwan detention facility, to the Afghan government. *See US Military Transfers Parwan Detention Centre to Afghan Government Control*, THE GUARDIAN (Mar. 25, 2013, 6:39 AM), http://www.theguardian.com/world/2013/mar/25/us-military-parwan-prison-afghanistan. The United States still runs part of the detention facility and has refused to hand over approximately fifty prisoners whom the U.S. military captured outside of Afghanistan. *See* Jonathan Beale, *Afghanistan: US Hands Over Controversial Bagram Jail*, BBC NEWS (Sept. 10, 2012, 1:04 PM), http://www.bbc.co.uk/news/world-asia-19539412.

130 *Boumediene*, 553 U.S. at 766.

131 649 F.3d 762, 772–74 (D.C. Cir. 2011).

132 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

133 *See* 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; second, assuming the

Circuit Court in *Rasul v. Meyers*, have erred in reserving on the issue of whether *Boumediene* extends beyond Guantánamo and dismissing claims on qualified immunity grounds.[134] By relying on qualified immunity rather than articulating a constitutional principle, courts have thus far foreclosed alien plaintiffs from raising successful *Bivens* claims. By articulating a constitutional principle based on *Boumediene* and then dismissing on qualified immunity grounds, courts could shield individuals such as Rumsfeld and Yoo from liability based on their past actions. The lower courts could still, however, articulate a proper reading of *Boumediene* and allow future alien plaintiffs to raise successful *Bivens* claims.

B. The Individual and the Nation in the War on Terror

Circuit courts have also incorrectly dismissed *Bivens* claims citing national security as a special factor "counseling hesitation" against granting judicial relief to alien plaintiffs.[135] When the plaintiff is a U.S. citizen, however, circuit courts have not generally citied national security as a special factor.[136]

Lower courts have erred in relying on a plaintiff's citizenship to determine whether the complaint implicates national security concerns. The War on Terror is distinct from previous, more conventional wars because in the War on Terror, state armies do not represent threats to national security.[137] Instead individuals, with diverse citizenships, including U.S. citizens, are the threats to national security.[138]

In conventional wars, such as World War II, citizenship served as a justifiable basis for identifying potential national security threats.

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violation is established, the question [is] whether the right was clearly established . . . ."); *see also* Sarah L. Lochner, Note, *Qualified Immunity, Constitutional Stagnation, and the Global War on Terror*, 105 NW. U. L. REV. 829, 839 (2011) (observing that the *Saucier* opinion clarified at least five times that a court must first consider the constitutional question before ruling on a qualified immunity defense). The Court did note in 2009 that this ordering principle was optional even though the merits-first order remained "especially valuable." *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009).

134 *See* Rasul v. Myers, 563 F.3d 527, 529–32 (D.C. Cir. 2009).

135 *See, e.g.*, *id.* at 532 n.5 (finding that an "alternative ground" for dismissing the suit was the "danger of obstructing U.S. national security policy"); *see also* Benjamin Wittes, *Andrew Kent on* Al Aulaqi *and* Bivens, LAWFARE (Aug. 3, 2012, 7:44 AM), http://www.lawfareblog.com/2012/08/andrew-kent-on-al-aulaqi-and-bivens/ (arguing that lower courts have been formally and informally recognizing a "national security exception" to granting *Bivens* remedies).

136 *Compare* El-Masri v. United States, 479 F.3d 296, 302 (4th Cir. 2007) (dismissing a claim brought by an alien because of the government's state-secrets privilege), *with* Kar v. Rumsfeld, 580 F. Supp. 2d 80, 85–86 (D.D.C. 2008) (dismissing a claim brought by a U.S. citizen on qualified immunity grounds).

137 *See* Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521, 1528 (2013).

138 *See id.* at 1525–30, 1565 n.158.

Soldiers belonged openly to organized militaries that were under state control.[139] By joining an opposing army, individuals posed threats to national security, not because of their actions but because they belonged to a particular state-based army.[140]

In quasi-conventional wars, such as the Cold War, citizenship could arguably serve as a justifiable proxy for identifying potential national security threats. Although the threat in the Cold War, communism, was not state-based, the threat originated from an enemy state, the Soviet Union.[141] Thus, at a superficial level, Congress had some basis to fear that aliens from European nations sympathetic to communism were more likely to be communist sympathizers themselves.[142] Consequently, Congress used immigration and deportation laws to deport aliens whom it believed posed national security threats.[143] The Supreme Court upheld the constitutional validity of these deportation laws, noting that aliens may continue to harbor an allegiance to their nation of origin and "[s]o long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure."[144]

Yet on closer inspection, these Cold War deportation laws did not accurately identify aliens who posed national security threats. For example, in the 1952 case *Harisiades v. Shaughnessy*, the Supreme Court upheld a decision to deport a Greek national who had previously belonged to the Communist Party.[145] Born in Greece in 1901, Peter Harisiades lawfully immigrated to the United States as a teenager.[146] He had worked as an organizer for the Communist Party in the 1920s and 1930s but was dropped from the party's membership in 1939.[147] In 1944, while raising two American-born children, he applied for citizenship.[148] He was arrested at his Immigration Services interview and subsequently deemed deportable based on his previous membership in the Communist Party.[149] Upon deportation, Poland granted Harisiades asylum because he feared that the Greek government, now ruled by a right-wing military dictatorship, would kill him.[150] The

139 *See id.* at 1525.
140 *See id.* at 1526.
141 *See* Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 78 (2004).
142 *See id.* at 78–82.
143 *See id.*
144 Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952).
145 *See id.* at 581–82, 591.
146 *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 203 (2007).
147 *See id.* at 203–04.
148 *See id.* at 204.
149 *See id.*
150 *See id.* at 205.

Harisiades narrative demonstrates that Cold War laws, which relied on citizenship to test for loyalty, resulted in deportations of lawful aliens who had demonstrated ties to the United States.

In the War on Terror, citizenship serves as an even weaker proxy than it did in the Cold War for identifying potential national security threats. The War on Terror has complicated the methods by which officials can identify an individual's allegiance. Terrorists often do not wear uniforms, become members of a party, or even swear an oath of allegiance.[151] They do not belong to a distinct nation-state but rather consciously decide to fight for a particular ideology.[152] Consequently, U.S. citizens, such as José Padilla, are able to join enemy terrorist groups. Because in the War on Terror, state actors do not represent direct threats to national security, courts have no reason to differentiate between U.S. citizens and aliens.[153] Rather, courts must differentiate between individual plaintiffs based on the threats that they pose to U.S. national security.[154] If allowing a U.S. citizen's *Bivens* claim to proceed to discovery poses an identical threat to national security as allowing an alien's *Bivens* claim to proceed to discovery, the court lacks a basis for dismissing only the alien's claim based on national security concerns.

A potential reading of this argument would suggest that courts should treat citizens and noncitizens the same by not allowing any plaintiff's claim to proceed to the discovery stage. Some commentators might suggest that this approach would be in line with federal courts' general reluctance to interfere into military affairs.[155] Courts would, however, be misinterpreting the purposes behind *Bivens* if they were to dismiss all plaintiffs' claims. *Bivens* recognized that courts could hold federal officials liable even if Congress had not provided a statutory remedy.[156] By refusing to recognize any post-9/11 *Bivens* claims, courts would be allowing a large number of federal officials to remain unaccountable for their unconstitutional actions.

Under the proposed framework of this Note, courts would no longer recognize citizenship as a relevant factor and would focus more on the nature of a plaintiff's complaint by using a case-by-case analysis to determine which cases to dismiss. This case-by-case analysis would

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151 *See* Issacharoff & Pildes, *supra* note 137, at 1526–27.

152 *See* Melanie J. Foreman, Comment, *When Targeted Killing Is Not Permissible: An Evaluation of Targeted Killing Under the Laws of War and Morality*, 15 U. PA. J. CONST. L. 921, 931 (2013).

153 *See* Issacharoff & Pildes, *supra* note 137, at 1526–27.

154 *See id.* at 1586, 1596–97.

155 *See* United States v. Stanley, 483 U.S. 669, 683–84 (1987); Chappell v. Wallace, 462 U.S. 296, 305 (1983).

156 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395–97 (1971).

require courts to examine complaints in more detail. In examining complaints, courts would be more likely to recognize that certain complaints do not implicate national security matters. Allowing certain plaintiffs' claims that their jailors beat and tortured them to proceed to discovery would not necessarily result in U.S. officials having to expose state secrets. The facts necessary to prove such a claim would be similar to those necessary when an inmate in a domestic prison sues the warden for cruel and unusual punishment.[157] U.S. officials, in invoking the state-secrets privilege, have worried that publicizing black-site detentions would undermine the War on Terror.[158] Media publications that expose treatment at detention facilities, such as Abu Ghraib,[159] do not necessarily undermine national security efforts or provide enemy groups with operational secrets. An article on a detention facility, such as Seymour Hersh's exposé on Abu Ghraib, may describe the general conditions of the facility and the treatment of prisoners without divulging classified information about the facility.[160] Consequently, state secrets do not seem to be implicated in the typical post-9/11 damages case.

This framework also suggests that a court could dismiss, citing national security concerns, a *Bivens* claim that a U.S. citizen raised but allow a claim that an alien raised to proceed to the discovery stage. For example, the District Court of South Carolina and the Fourth Circuit correctly concluded that national security concerns counseled hesitation against allowing José Padilla's suit to proceed to discovery.[161] Because of his alleged previous training with al-Qaeda, allowing Padilla to investigate why officials decided to hold him as an enemy combatant may have improperly exposed information regarding how the U.S. government monitors al-Qaeda. On the other hand, allowing the plaintiffs' case in *Ali v. Rumsfeld* to proceed to discovery would not have enabled terrorist organizations to obtain information about U.S. military affairs.[162] Instead, the suit would have focused on evidence of how low-ranking military officers tortured these plaintiffs. Consequently, this de-emphasis on citizenship promotes the rights of all individuals. Rather than arbitrarily dismissing a complaint because of the plaintiff's citizenship, this approach begins by assuming that all

157 *See* Carlson v. Green, 446 U.S. 14, 16–18 (1980) (allowing a *Bivens* claim to proceed against a prison warden who had allegedly violated an inmate's Eighth Amendment rights).

158 *See* El-Masri v. Tenet, 437 F. Supp. 2d 530, 535–38 (E.D. Va. 2006).

159 *See, e.g.*, Hersh, *supra* note 40.

160 *See id.*; *see also* Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1040–42 (2008) (discussing the aftermath of the leaked Abu Ghraib photos).

161 *See* Lebron v. Rumsfeld, 764 F. Supp. 2d 787, 799–800 (D.S.C. 2011), *aff'd*, 670 F.3d 540 (4th Cir. 2012).

162 *See* 649 F.3d 762, 772–74 (D.C. Cir. 2011).

victims of the War on Terror may receive *Bivens* remedies. Victims lose this access to a remedy only if grave national security concerns require dismissing their claims.

III
Application to the Targeted Killings Debate

This two-pronged analysis also applies to another important area of post-9/11 litigation, the United States' targeted killings program. Targeted killings address similar issues as those raised in post-9/11 *Bivens* litigation. As in *Bivens* litigation, the issue is to what extent the U.S. government should protect potential victims of the War on Terror. While in *Bivens*, courts grant monetary damages post-deprivation, the issue in the context of targeted killings is what protections individuals should receive pre-deprivation. Similar to *Bivens* litigation, U.S. officials have been more inclined to grant greater protections to citizens than to aliens on the kill list.

During the Obama administration, the United States' targeted killings program has received increased media attention.[163] In particular, the media has spotlighted the Obama administration's authorization of the killing of U.S. citizens living abroad and has questioned whether those killings are illegal.[164] On the other hand, there has been less scrutiny over the targeted killings of noncitizens. Though the legality of the targeted killings of U.S. citizens may appear novel, the same issues that have arisen in post-9/11 *Bivens* litigation apply to the targeted killings debate.

In this section of the Note I will argue that noncitizens and citizens deserve equal due process protections before being subjected to targeted killings. The Obama administration has justified the targeted killings program by arguing that targeted killings are acts of self-defense against senior officials of terrorist groups that pose an "imminent" threat of attack.[165] Based on this standard, an individual's citizenship is irrelevant. Before reaching this conclusion, this section will briefly describe the United States' targeted killings program and U.S. officials' justifications for the program. This section will then summarize the Obama Administration's decision to kill Anwar Al-Aulaqi, a U.S. citizen residing in Yemen, and the subsequent litigation over the decision to kill Al-Aulaqi. Finally, this section will outline several proposals that the Obama administration could utilize to

163 *See, e.g.*, Mazzetti et al., *supra* note 1 (describing various targeted military killings during the Obama administration).

164 *See id.*

165 Eric Holder, *Attorney General Eric Holder Speaks at Northwestern University School of Law*, U.S. Dep't of Justice (Mar. 5, 2012), http://www.Justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html.

ensure the due process rights of citizens and noncitizens on the kill list.

A. Overview of the United States' Targeted Killings Program

Following 9/11, the Bush administration adopted a secret policy of targeted killings.[166] White House officials now maintain a secret "kill list" which lists individuals that that administration has determined are high value.[167] Targets do not receive any formal notification or due process protections before being killed.[168] Between 2004 and 2013, U.S. officials conducted 370 total drone strikes in Pakistan and killed between 2,080 and 3,428 individuals.[169]

Bush administration officials viewed targeted killings as an emergency measure that would be used only for a finite period of time.[170] During the Obama administration, the use of targeted killings became a permanent component of the counterterrorism arsenal.[171] Targeted killings have become so routine during the Obama administration that officials have started streamlining the processes involved in placing an individual on the kill list.[172] Officials have recently developed a disposition matrix, which maps out plans for disposing of terrorism suspects, including those residing beyond the reach of drones.[173] The disposition matrix suggests that the United States will continue its targeted killings program even as it winds down its more conventional military operations in Iraq and Afghanistan.

Though international organizations, including the United Nations, have questioned the legality of the targeted killings program,[174] U.S. officials have defended the program's legality. In a 2010 speech, Harold Koh, former legal adviser to the State Department, argued that because the United States was engaged in an active war with organizations such as al-Qaeda, U.S. officials were "not required to provide

166 *See* Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 3–8, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter Alston Report].

167 *See Targeted Killings*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/national-security/targeted-killings (last visited Jan. 16, 2015); Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1, *available at* http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all&_r=0.

168 *See Targeted Killings*, *supra* note 167.

169 *See Drone Wars Pakistan: Analysis*, NEW AMERICA FOUNDATION, http://natsec.newamerica.net/drones/pakistan/analysis (last visited Jan. 16, 2015).

170 *See* Miller, *supra* note 6.

171 *See id.*

172 *See id.*

173 *See id.*

174 *See* Alston Report, *supra* note 166, at 9–12.

targets with legal process" before using lethal force.[175] Attorney General Eric Holder has also argued that U.S. officials need not provide notice to targets. Holder has contended that the United States' targeted killings are legal because the United States is acting in self-defense against senior officials of enemy organizations who pose an "imminent threat of violent attack."[176] Officials have emphasized the benefits of the targeted killing program with Jeh Johnson, then Department of Defense general counsel, contending that drone missiles enabled the United States to "target military objectives with much more precision . . . [so] that civilian casualties are minimized in carrying out such operations."[177] Thus, targeted killings will likely remain a cornerstone of the United States' counterterrorism program.

B. Targeted Killings of U.S. Citizens

Though the U.S. government has regularly used drone missiles to kill individuals living in Pakistan, Yemen, Afghanistan, and other foreign countries,[178] the most controversial aspect of the drone missile program is the targeted killing of U.S. citizens living abroad.[179] In particular, the media and scholars have criticized the Obama administration's decision to kill Anwar Al-Aulaqi.[180] Al-Aulaqi was a dual U.S.-Yemeni citizen, residing in Yemen, who was allegedly a senior al-Qaeda operative.[181] U.S. officials accused Al-Aulaqi of recruiting Umar Farouk Abdulmutallab for a suicide mission.[182] Abdulmutallab eventually attempted to blow up an airplane on December 25, 2009.[183] Following Abdulmutallab's failed suicide mission, U.S.

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175 Harold Hongju Koh, *Annual Meeting of the American Society of International Law*, U.S. DEP'T OF STATE (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm.

176 Holder, *supra* note 165.

177 Jeh Charles Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, LAWFARE (Feb. 22, 2012), http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/.

178 *See* Miller, *supra* note 6.

179 *See, e.g.*, Nasser al-Awlaki, *The Drone that Killed My Grandson*, N.Y. TIMES, July 18, 2013, at A23, *available at* http://www.nytimes.com/2013/07/18/opinion/the-drone-that-killed-my-grandson.html?_r=0; Mark Mazzetti & Eric Schmitt, *U.S. Debates Drone Strike on American Terrorism Suspect in Pakistan*, N.Y. TIMES, Feb. 11, 2014, at A1, *available at* http://www.nytimes.com/2014/02/11/world/asia/us-debates-drone-strike-on-american-terror-suspect-in-pakistan.html?_r=0; Charlie Savage, *Relatives Sue Officials Over U.S. Citizens Killed by Drone Strikes in Yemen*, N.Y. TIMES, July 19, 2012, at A7, *available at* http://www.nytimes.com/2012/07/19/world/middleeast/us-officials-sued-over-citizens-killed-in-yemen.html?pagewanted=all&_r=0.

180 *See, e.g.*, Adelsberg, *supra* note 12, at 438 (contending that the President does not have a "blank check" to kill citizens (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004))); Mazzetti et al., *supra* note 1.

181 *See* Mazzetti et al., *supra* note 1.

182 *See id.*

183 *See id.*

officials determined that Al-Aulaqi was an imminent threat to U.S. national security interests.[184]

Subsequently, the Department of Justice's Office of the Legal Counsel wrote a secret, fifty-page memorandum justifying the killing of Anwar Al-Aulaqi even though he was a U.S. citizen.[185] After concluding that capturing Al-Aulaqi alive was not feasible, the memo provides several legal arguments for killing him.[186] The memorandum first notes that federal murder statutes were not relevant to the decision to kill Al-Aulaqi.[187] The memorandum then contends that a federal statute prohibiting Americans from murdering other Americans did not apply to the killing of wartime enemies in compliance with the laws of war.[188] Further, the memorandum concludes that the President had the authority to "use lethal force abroad" against "a United States citizen who is part of the forces of an enemy organization."[189] Finally, the memorandum concludes that even though Al-Aulaqi, as a U.S. citizen, was protected under the Fourth and Fifth Amendments, the President could kill him prior to hearing in federal court because Al-Aulaqi posed a "continued" and "imminent" threat to U.S. national security.[190]

Following the circulation of the memorandum, Attorney General Eric Holder justified the killing of U.S. citizens during a speech at Northwestern University Law School.[191] Holder noted that for the "small number of United States citizens who have decided to commit violent attacks against their own country from abroad . . . it's clear that United States citizenship alone does not make such individuals immune from being targeted."[192] For Holder, the President did not need to get permission from a federal court before killing a U.S. citizen.[193] The executive branch alone could make this determination.

Before U.S. officials could kill Al-Aulaqi, his father brought a suit in the federal District Court for the District of Columbia, seeking to enjoin President Obama and other national security officials from

184 *See id.*

185 *See* Memorandum from U.S. Dep't of Justice, Office of Legal Counsel, to Attorney General re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi (July 16, 2010), at 38–41, *available at* https://www.aclu.org/sites/default/files/assets/2014-06-23_barron-memorandum.pdf.

186 *See id.* at 12–41.

187 *See id.* at 12–19.

188 *See id.* at 20–30.

189 *Id.* at 23.

190 *Id.* at 39–42.

191 *See* Holder, *supra* note 165.

192 *Id.*

193 *See id.*

authorizing the killing.[194] The defendants moved to dismiss on several grounds, including the political question doctrine.[195]

The district court held that the plaintiff's claim was nonjusticiable.[196] The court held that there were "no judicially manageable standards by which courts can endeavor to assess the President's interpretation of military intelligence and his resulting decision—based on that intelligence—whether to use military force against a terrorist target overseas."[197] Furthermore, the court reasoned that "decision-making in the realm of military and foreign affairs is textually committed to the political branches, and . . . courts are functionally ill-equipped to make the types of complex policy judgments that would be required to adjudicate the merits of plaintiff's claims."[198] Thus, the court's reasoning mirrored the reasoning of the post-9/11 *Bivens* cases.[199] Again, the judiciary remained wary of intervening into the military decision-making process.

The court further held that Al-Aulaqi's U.S. citizenship did not bear on the outcome of the case.[200] The court noted that the political question doctrine did "not contain any 'carve-out' for cases involving the constitutional rights of U.S. citizens."[201] Once the president determined that an individual, even a U.S. citizen, posed an imminent threat to national security, the courts could not review this determination.[202]

Following the court's decision, several Reaper drones hit a convoy in Yemen in which Al-Aulaqi was traveling, and the drones killed Al-Aulaqi.[203] Politicians criticized the killing of Al-Aulaqi. For example, Senator Rand Paul led a thirteen-hour filibuster opposing the nomination of John O. Brennan for CIA director after Paul received a letter from Attorney General Eric Holder refusing to rule out drone strikes against U.S. citizens on U.S. soil.[204] Several legal scholars have also criticized the Al-Aulaqi killing. These scholars have argued that Al-Aulaqi retained his due process rights, even though residing abroad, and that U.S. officials violated these rights.[205] In developing

194 *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 12 (D.D.C. 2010).
195 *Id.*
196 *See id.* at 47–52.
197 *Id.* at 47.
198 *Id.* at 52.
199 For an analysis of post-9/11 *Bivens* cases, see *supra* Part II.
200 *See Al-Aulaqi*, 727 F. Supp. 2d at 49.
201 *Id.* at 51.
202 *See id.* at 52.
203 *See* Mazzetti et al., *supra* note 1.
204 *See* Parker, *supra* note 11.
205 *See, e.g.*, Adelsberg, *supra* note 12, at 442; Mike Dreyfuss, Note, *My Fellow Americans, We Are Going to Kill You: The Legality of Targeting and Killing U.S. Citizens Abroad*, 65 VAND. L. REV. 249, 282–83 (2012).

these arguments, however, these scholars have not suggested that targeted killings of noncitizens violate those individuals' due process rights.

C. The Individual and Targeted Killings

The reasoning developed in Part II applies equally to the targeted killings debate, and consequently courts should not differentiate between citizens and noncitizens when ruling on the legality of the targeted killings. Legal scholars writing on targeted killings correctly argue that U.S. citizens retain their constitutional rights even when they are residing abroad.[206] A broader and more accurate reading of *Boumediene* suggests that noncitizens who are on the kill list should also receive due process protections before being killed. If noncitizens do not receive due process protections before being killed, then U.S. officials could effectively circumvent the *Boumediene* ruling by opting to kill high-value targets rather than capturing and detaining these targets. The underlying policy concern of *Boumediene*, however, was to ensure that the U.S. officials could not escape liability through technological and political developments.[207] Thus, even if the Obama administration opts to hold fewer suspected terrorists in military prisons and instead increasingly uses drone missiles to kill them, *Boumediene* dictates that the administration must continue to grant the same level of due process protections to suspected terrorists whether they are citizens or noncitizens.

More importantly, U.S. officials have no meaningful way to distinguish between citizens and noncitizens on the kill list. As previously discussed, the War on Terror is distinct from conventional or quasi-conventional wars because individuals, rather than members of organized armies, present threats to U.S. national security interests.[208] Individuals, even U.S. citizens, may become threats to national security after they have joined belligerent groups such as al-Qaeda. If the United States' interest in maintaining a targeted killings program is to eliminate imminent threats, then no legal or moral justification exists for granting greater legal protection to a citizen who poses a similar threat as a noncitizen.[209] As David Luban has correctly noted, "[i]f

206 *See, e.g.*, Adelsberg, *supra* note 12, at 442.
207 *See supra* Part II.A.
208 *See supra* Part II.B.
209 *See* Issacharoff & Pildes, *supra* note 137, at 1586 ("[I]t is not at all clear why, in principle, an American citizen in the same overseas location who poses a threat identical to that posed by a non-American should have greater legal protection.").

they are enemy belligerents, they can be targeted, regardless of their nationality."[210]

Some critics of this framework may suggest that it leads ultimately to the conclusion that the U.S. government could treat similarly situated citizen and noncitizen targets equally by granting neither of them due process protections. The *Al-Aulaqi v. Obama* decision seems to follow this framework.[211] By ruling that the targeted killing program was a nonjusticiable matter, the District Court was permitting the executive branch to avoid granting due process protections to both citizen and noncitizen targets.[212]

The *Al-Aulaqi v. Obama* decision, however, incorrectly deferred to the executive branch. In reaction to the public disapproval of the Al-Aulaqi killing, President Obama acknowledged that U.S. officials must impose a "high threshold" to using lethal force.[213] Adherence to this "high threshold," however, is less likely if the president reviews and authorizes all the targeted killings.

D. Options for Reviewing Authorized Targeted Killings

Two separate options exist for ensuring that kill list targets receive some type of adequate protection before being killed. The first is allowing relatives of targets to bring suits in federal district courts to enjoin the U.S. government from killing these targets. The second is using specialized courts, similar to the United States Foreign Intelligence Surveillance Court (commonly known as the FISA court), to review the executive branch's targeted killing decisions.

1. *Article III Courts*

One option would be for targets, generally through relatives, to bring suits in federal court enjoining the United States from killing them. Though the District of Columbia District Court held in *Al-Aulaqi v. Obama* that "courts are functionally ill-equipped to make the types of complex policy judgments" necessary to adjudicate the merits of Al-Aulaqi's claim, judicially manageable standards do exist for reviewing this type of presidential action.[214] Eric Holder has argued that the United States uses targeted killings to eliminate individ-

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210 David Luban, *What Would Augustine Do?: The President, Drones, and Just War Theory*, BOSTON REV. (June 6, 2012), http://bostonreview.net/david-luban-the-president-drones-augustine-just-war-theory/.

211 *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 52 (D.D.C. 2010).

212 *See id.*

213 Barack Obama, *Remarks of President Barack Obama*, WHITE HOUSE (May 23, 2013), http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama.

214 727 F. Supp. 2d at 52.

uals posing an imminent threat to U.S. national security.[215] Federal courts could review petitions to enjoin targeted killings under this "imminence" standard and require the United States to prove that a particular individual does pose an imminent threat to U.S. national security. In utilizing this framework, federal courts would not, however, differentiate between citizens and noncitizens in making this determination.

Using a federal court does, however, raise the issue that the federal government might have to divulge state secrets regarding intelligence operations to justify a targeted killing. The *Al-Aulaqi* opinion never reached the issue of the state-secrets privilege but did acknowledge that the case could "expose military matters which, in the interests of national security, should not be divulged."[216] This state-secrets privilege would, however, be implicated whether the target was a citizen or noncitizen because both situations could potentially require U.S. officials to disclose how they collected intelligence on a particular individual or how they formulate the kill list.

2. *Specialized Courts*

To avoid this state-secrets issue, the government could create a specialized drone court, which would review all executive decisions on targeted killings, both of citizens and noncitizens, under a more fact-intensive analysis. One option would be to model this specialized court on the current FISA court. The FISA court is an eleven-member court to which the Chief Justice of the Supreme Court appoints active Article III judges for seven-year terms.[217] The U.S. government makes requests to the FISA court to obtain surveillance warrants for foreign intelligence investigations.[218] The surveillance warrants authorize the U.S. government to engage in intelligence activities such as wiretapping and collecting metadata.[219] The FISA court conducts all its hearings in secret, and its decisions are not public.[220]

In arguing that the government should establish a drone court similar to the FISA court, a few commentators have proposed the following model.[221] Senate-confirmed Article III judges would sit on

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215 *See* Holder, *supra* note 165.

216 *See Al-Aulaqi*, 727 F. Supp. 2d at 53 (quoting United States v. Reynolds, 345 U.S. 1, 10 (1953)) (quotation marks omitted).

217 *See* Bill Mears & Halimah Abdullah, *What Is the FISA Court?*, CNN (Jan. 17, 2014, 2:21 PM), http://www.cnn.com/2014/01/17/politics/surveillance-court/.

218 *See id.*

219 *See id.*

220 *See Support Oversight of the Secret FISA Court*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/support-oversight-secret-fisa-court.

221 *See, e.g.*, Adelsberg, *supra* note 12, at 445–52 (suggesting that the government create a drone court based on the FISA model).

this court.[222] The government would present its case at a hearing, and a state-appointed attorney, similar to a public defender, would represent the targeted individuals.[223] The judges would write opinions, with any sensitive information redacted, in order to guide future targeted killing decisions.[224] This court would, however, be different from an Article III court because the potential target would not receive notice of this hearing.[225] The significant drawback to this type of model is that Article III judges may lack the expertise and skills to adjudicate issues surrounding targeted killings. The adjudicators of a drone court would ideally need national security expertise and the ability to make fast decisions before, rather than after, the fact.

An even more compelling model would involve having a court within the executive branch, rather than the judicial branch, that would review kill list decisions. The court's adjudicators would be a group of national security experts rather than the FISA court model of using Article III judges.[226] These experts would review the president's kill list decisions, ignoring the target's citizenship, and write nonpublic opinions that the congressional intelligence committees would then review.[227] These experts would have the requisite national security knowledge and would be selected based on their ability to review intelligence reports surrounding the proposed targeted killing of an individual and then make decisions quickly. Furthermore, as national security experts, these adjudicators could review the president's kill list decisions from both a constitutional and public-policy perspective. Such a court would not consider the citizenship of the target and instead make a fact-intensive determination on whether the target should remain on the kill list.

CONCLUSION

Though some commentators have argued that courts will continue deferring to the executive branch regarding national security matters,[228] as the Al-Aulaqi litigation has demonstrated, individuals will continue raising claims in federal courts seeking *Bivens* remedies

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222 *See id.* at 446.

223 *See id.* at 447.

224 *See id.* at 446.

225 *See id.* at 447.

226 *See* Neal K. Katyal, Op-Ed., *Who Will Mind the Drones?*, N.Y. TIMES, Feb. 21, 2013, at A27, *available at* http://www.nytimes.com/2013/02/21/opinion/an-executive-branch-drone-court.html (proposing that the executive branch house a drone court); Editorial, *A Court for Targeted Killings*, N.Y. TIMES, Feb. 14, 2013, at A26, *available at* http://www.nytimes.com/2013/02/14/opinion/a-special-court-is-needed-to-review-targeted-killings.html?ref=opinion.

227 *See* Katyal, *supra* note 226; *see also A Court for Targeted Killings*, *supra* note 226.

228 *See, e.g.*, Vladeck, *supra* note 22, at 268–69 (contending that courts are recognizing "national security" as a factor "counseling hesitation" in *Bivens* cases).

and trying to enjoin targeted killings. Unless Congress passes an alternative statutory remedy providing monetary damages to victims of the War on Terror,[229] plaintiffs will continue bringing post-9/11 damages claims under a *Bivens* cause of action. In future post-9/11 damages cases, courts should use a two-pronged analysis to reject the notion that while U.S. citizens may raise a *Bivens* cause of action, aliens may not. First, courts should recognize that a proper reading of *Boumediene* dictates that aliens detained in U.S. military prisons abroad receive Fifth and Eighth Amendment protections. Second, a claim of an alien plaintiff does not necessarily implicate national security concerns. In the War on Terror, individuals, rather than nations, pose threats to national security. Consequently, courts must determine whether the nature of a claim raised by a particular plaintiff threatens national security. Employing a case-by-case analysis would properly balance national security interests against a plaintiff's individual liberties.

Similarly, in the targeted killings context, litigants will continue seeking to enjoin the president from killing suspected terrorists. Though much of the public outrage on targeted killings has focused on the United States killing its own citizens without due process protections, both noncitizens and citizens merit due process protections before being killed. Based on the underlying principles of the Kennedy opinion in *Boumediene*, U.S. officials cannot violate noncitizens' due process rights merely by killing them using drones missiles rather than holding them in detention facilities such as Guantánamo. More importantly, if the United States' legal justification for using drones is to kill terrorists that pose an "imminent threat" to U.S. national security, then no meaningful basis exists for distinguishing between citizens and noncitizens. Individuals of any nationality may pose an imminent threat.

Two potential solutions exist for ensuring that targets receive adequate due process protections. First, federal courts, rather than deferring to presidential authority, could require that U.S. officials demonstrate that a target is an imminent threat. This solution is somewhat problematic because it could require the government to divulge state secrets. A second, more preferable solution would be to establish a specialized drone court. In particular, a specialized drone court composed of national security experts could be established within the executive branch to review the president's decisions to kill both citizen and noncitizen targets. Either solution would properly

229 *See* Carmichael, *supra* note 21, at 1120–22 (proposing that to address these types of claims, Congress should pass a statute either (a) modeled after 28 U.S.C. § 1983 or (b) provide remedies only to U.S. citizens who are subject to torture by the U.S. government).

recognize that citizens and noncitizens can pose equally imminent threats to national security, and thus the United States must grant these individuals adequate due process protections before killing them.