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National Security and the Shadows of Judicial "Common Sense"

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There is a section of the Supreme Court's decision in *Ashcroft v. Iqbal*,[1] in which the Court departs significantly from the script that previously governed the rules of pleading since the seminal decision in *Conley v. Gibson*:[2] the Court, while elaborating on the "plausibility" pleading standard that it had announced two years earlier,[3] invites lower courts to use their "judicial experience and common sense" to decide whether a complaint plausibly alleges a valid cause of action.[4] Peter Margulies's excellent article on the challenges facing courts adjudicating disputes involving national-security concerns offers a thoughtful intervention that should at the very least cause courts to hesitate before applying their "common sense" to complex factual disputes.[5] In particular, the parallels he draws between cognitive-bias and judicial treatment of damages claims in national-security cases suggest how judicial hubris can go awry. After all, what might seem like common sense to some judges may be a function of a collection of cognitive biases that may or may not bring us closer to the truth.[6]

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1. 129 S. Ct. 1937 (2009).

2. 355 U.S. 41 (1957).

3. *See* Bell Atlantic v. Twombly, 550 U.S. 544 (2007).

4. *See Iqbal*, 129 S. Ct. at 1950.

5. Peter Margulies, *Judging Myopia in Hindsight:* Bivens *Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195 (2010).

6. I have suggested elsewhere that the likely costs of the *Iqbal* pleading rule will be borne disproportionately by plaintiffs with meritorious claims who will be denied compensation because of premature dismissal. *See* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. (forthcoming 2011). Except at the margins, there is little reason to think that judges

I understand Margulies to present three related points: first, that certain cognitive biases are particularly salient in the national-security context; second, that judicial opinions in specific cases implicating national security have tended to both anticipate and, in some ways, exacerbate, these biases; and third, that crafting a new liability rule in *Bivens*-national-security cases is a better way to address these biases. As much as I appreciate Margulies's fine line drawing between structural concerns of the framers, cognitive-bias literature, and judicial tendencies (at least as reflected in some opinions), I want to offer here some critical comments about his project. As I suggest above, there is no time like the present to discuss the potential effect of cognitive biases in official decision-making. I see Margulies as working in the vein of those criminal law observers who have drawn a close connection between cognitive biases and tragic errors in the criminal justice system.[7] One would expect that cases involving national security—with their significant public-safety ramifications—could exacerbate the biases of all relevant decisionmakers. Thus, I think Margulies has made a significant contribution to the literature by introducing the problem of cognitive biases in the context of these particular cases.

From his observations about the potential biases in national-security decision-making, Margulies then seeks both to categorize four high-profile decisions and to craft what seems to be an evidentiary-based presumption that would allow defendants to avoid liability in discrete cases. Specifically, Margulies contends that judges are increasingly choosing between a categorical deference to government decisionmakers and a categorical intervention in Executive Branch decision-making and that these two veins of judging mirror the effects of presentist bias and hindsight bias respectively.[8] From there, as I understand it, Margulies proposes an intervention: creating a presumption (apparently irrebuttable) against liability where government defendants can show that, on certain similar occasions, they acted within the bounds of the Constitution. This presumption, as Margulies proposes it, would kick in prior to an adjudication of qualified immunity. In my comments here, I spend some

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will reliably determine which cases have inherent plausibility and which do not. *Cf.* Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (studying the discrepancies between the Supreme Court's interpretation of videotape evidence in *Scott v. Harris* and a random sampling of 1350 respondents).

7. *See generally* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512 (2007); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291.

8. Margulies presumably does not see these biases as being determinative. That is, they are what they are—biases that might influence a decisionmaker in one direction or another. They cannot, and I do not take Margulies to suggest that they can, explain entirely the outcomes in particular cases.

time on both the front end—the choice between categorical deference and interventionism described by Margulies—and the back end—Margulies's proposed intervention to better account for the cognitive biases that he hypothesizes are at work in those decisions. I put forth a slightly different vision of the cases that Margulies describes in his Article and a slightly different vision of how litigation rules avoid some of the tensions inherent in those cases. Finally, I raise some practical concerns regarding how one might implement the evidentiary presumption advanced by Margulies, as well as point out some of the cognitive biases that his proposal might reinforce.

In my view, the cases Margulies discusses, and national-security cases in general, are perceived to be a threat by government officials not because of the potential for liability but because of the potential for disclosure of sensitive information. The varying judicial responses to the government's legal arguments in these cases are thus not examples of excessive deference or interventionism vis á vis Executive decision-making, but reflections of differing degrees of tolerance for modern broad discovery. In this sense, the national-security cases strike me as less a debate about intervention and more about transparency. This leads me to suggest some reasons to question Margulies's proposed intervention.

I. MARGULIES'S CHARACTERIZATION OF THE PROBLEM

Let us start with Margulies's description of the problem: judges adjudicating cases implicating national security have vacillated between excessive deference to the executive and excessive intervention in executive branch decisions. He focuses our attention on four principal cases: *Ashcroft v. Iqbal*[9] (a case I litigated from its inception and argued before the Supreme Court); *Arar v. Ashcroft*;[10] *Padilla v. Yoo*;[11] and *al-Kidd v. Ashcroft*.[12] There are good reasons to start with these cases. Each involves allegations of serious constitutional violations by detainees held after September 11, allegedly as part of the executive's counter-terrorism efforts. And in each case, the plaintiff sought/seeks damages, among other remedies, from high-level officials.[13]

Of course, there are differences between the cases that may be relevant, starting with the characteristics of the detainees. Iqbal was a noncitizen who had lived in the United States for several years prior to his detention, was

9. 129 S. Ct. 1937.

10. 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

11. 633 F. Supp. 2d 1005 (N.D. Cal. 2009).

12. 580 F.3d 949 (9th Cir. 2009), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98).

13. It might be worth noting that Padilla seeks only one dollar in compensatory damages for his injuries and appears to seek no punitive damages. Complaint ¶ 109, *Padilla*, 633 F. Supp. 2d 1005 (No. C 08-00035 JSW).

never charged with any crime related to terrorism, and alleged that he was only treated as a terrorist because of his race, religion, and national origin; Arar was simply passing through the United States on his way home to Canada when he was summarily detained and transferred to Syria to be tortured; Padilla, a United States citizen, was held for several years in a naval brig without any charges prior to being convicted for providing material support to a terrorist organization and for conspiring to murder, kidnap, and maim; and al-Kidd, a United States citizen like Padilla, was detained for invalid and unconstitutional reasons under the material-witness statute, according to his complaint.

Examining the detainees' legal claims also reveals some differences. Iqbal raised rather straightforward due process and equal protection claims; Arar's claims were based primarily in substantive due process but were also novel in some respects; al-Kidd's claims are founded upon the Fourth Amendment; and Padilla's legal claims, like Iqbal's, are straightforward, except insofar as he seeks to hold a legal advisor accountable for his conditions of confinement. Finally, of course, the courts deciding these cases are different: Iqbal's case (so far) is the only one that has progressed to the Supreme Court, although the Supreme Court recently granted a petition for certiorari to review some aspects of the Ninth Circuit's decision in al-Kidd's case;[14] Arar's case was decided en banc by the Second Circuit; and Padilla's case is on appeal in the Ninth Circuit.

These differences only matter because Margulies is focused on how courts have responded to (and perhaps themselves reflected) cognitive biases. It would be good to recognize that such biases may play out differently in a trial court than in an appellate court, in the Second Circuit versus the Ninth Circuit versus the Supreme Court, and that the biases may relate to the legal claims at issue as well as the person making the claims. It so happens that, in the pantheon of cases that Margulies gives us, the plaintiffs who were U.S. citizens fared far better than the plaintiffs who were not citizens—indeed, this was clearly relevant to the decision in *Arar*. Similarly, had the Supreme Court never granted certiorari in *Iqbal*, the case would have looked an awful lot like *al-Kidd* and *Padilla*: the district court and Second Circuit in *Iqbal* had refused to dismiss the complaint,[15] just like the district court in *Padilla* and the Ninth Circuit in *al-Kidd*. Whether any of these differences might mitigate or exacerbate the cognitive biases described by Margulies is, I think, worthy of discussion.

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14. A petition for rehearing en banc was denied over the vociferous objection of eight judges. *See* Al-Kidd v. Ashcroft, 598 F.3d 1129, 1137 (9th Cir. 2010) (O'Scannlain, C.J., dissenting from denial of rehearing en banc), *cert. granted*, 79 U.S.L.W. 3062.

15. *See* Elmaghraby v. Ashcroft, No. 04 Civ. 1809, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005), *aff'd in part and rev'd in part*, Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), *rev'd sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

In addition, it would enrich Margulies's project to consider cases beyond those addressed in his article. The Supreme Court's Guantanamo decisions, for instance,[16] could well be classified as interventionist, even more so than *Padilla* or *al-Kidd*. Margulies makes reference to these cases at the beginning of his article but does not seek to integrate them fully into his analytical framework. Indeed, as I have maintained elsewhere,[17] one difficult question to resolve is how to square the Supreme Court that issued *Boumediene* with the Court that issued *Iqbal*. This question introduces an entirely different problem to account for in the national-security context—when the same court seems to issue both interventionist and deferential decisions. It might be worth considering what prompts a court to deal with national-security concerns in so varied a way.

II. MARGULIES'S CHARACTERIZATION OF THE RELEVANT CASES

But putting aside whether Margulies has selected the right cases, or enough of the right cases, to consider the problem of how judges account for cognitive biases in official decision-making, a close reading of the cases suggests subtleties that I think his article obscures. Let us take *Iqbal*, which Margulies describes as an opinion reflecting categorical deference and therefore feeding into a presentist bias by decisionmakers. Despite the surface appeal of this treatment of *Iqbal*, it is important to remember that the Court did not hold that high-level officials like the Attorney General and the Director of the FBI can *never* be held accountable for constitutional violations committed against detainees like Iqbal, but only held that the plaintiff had not alleged sufficient facts to move to the discovery phase against such high-level officials.[18] *Iqbal* was not a case about qualified immunity when it reached the Court—it was simply a case about pleading. Detainees like Iqbal remained free to sue low-level officials for the same causes of action and to allege additional facts to state a claim against high-level officials like Ashcroft and Mueller.

Indeed, even though the dissent in *Iqbal* characterized the Court as rejecting supervisory liability entirely for a *Bivens* claim, the vast majority of lower courts have rejected that interpretation.[19] Instead, most lower courts

16. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008); Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

17. *See* Alexander A. Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931, 939–40 (2010).

18. *Iqbal*, 129 S. Ct. at 1943.

19. *See* Argueta v. U.S. ICE, No. 08-1652, 2010 WL 398839, at *7 (D.N.J. Jan. 27, 2010) (finding *Iqbal*'s supervisory-liability holding inapplicable to Fourth Amendment claim because the defendant's state of mind is irrelevant); Damore v. Untig, No. 09-2778, 2009 WL 4666876, at *7–8 (D.N.J. Dec. 2, 2009) (dismissing supervisory-liability claims but applying a knowledge and acquiescence standard); Young v. Speziale, No. 07-03129, 2009 WL 3806296, at *7 (D.N.J. Nov. 10, 2009) (distinguishing *Iqbal* in deliberate indifference case); Ayres v. Ellis, No. 09-4247, 2009 WL 3681892, at *3–4 (D.N.J. Nov. 4, 2009) (continuing to apply actual knowledge and

have read the Supreme Court as rejecting a respondeat superior liability for supervisory liability but still permitting supervisors to be held liable for violating their "superintendent responsibilities."[20] At most, what *Iqbal* seems to have done in the *Bivens* context is narrow the scope of supervisory liability by some degree. On remand, Iqbal proceeded to a settlement with the United States. A similar case, *Turkmen v. Ashcroft*, is now proceeding through the district court with new plaintiffs having made additional allegations to buttress the legal claims against Ashcroft and Mueller.[21] Thus, I think it is an over-reading of *Iqbal* to suggest that the Court was abdicating its role as an adjudicator of individual rights and granting categorical deference to high-level executive branch officials.

Moving to *Arar*, I find more to agree with Margulies, but again the picture is complex. There were three claims at issue in *Arar*: a Torture Victim Protection Act ("TVPA")[22] claim, a Fifth Amendment conditions-of-confinement/access-to-courts claim, and a substantive due process claim. The TVPA claim was dismissed on statutory-interpretation grounds. Arar could not establish that U.S. officials were acting under color of foreign law, as is required by the statute.[23] The substantive due process claim was dismissed at least in part for reasons that resonate with Margulies's thesis: the Second Circuit found that it would not extend *Bivens* to this new context (namely, extraordinary rendition) because of concerns surrounding deference:

> Although this action is cast in terms of a claim for money damages against the defendants in their individual capacities, it operates as a

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acquiescence standard for supervisory liability in Eighth Amendment cases); Gioffre v. Cnty. of Bucks, No. 08-4232, 2009 WL 3617742, at *5–6 (E.D. Pa. Nov. 2, 2009) (applying Third Circuit's traditional test for supervisory liability without even referring to *Iqbal*); Jackson v. Goord, 664 F. Supp. 2d 307, 316 n.7 (S.D.N.Y. Sept. 21, 2009) (citing to pre-*Iqbal* supervisory-liability standard and stating that *Iqbal*'s effect on supervisory liability concerns claims of intentional discrimination, not claims of deliberate indifference); Chao v. Ballista, 630 F. Supp. 2d 170, 178 n.2 (D. Mass. July 1, 2009) ("Notably, the state of mind required to make out a supervisory claim under the Eighth Amendment—i.e., deliberate indifference—requires less than the discriminatory purpose or intent that Iqbal was required to allege in his suit against Ashcroft and Mueller.") (citation omitted); Banks v. Montgomery, No. 3:09-CV-23-TS, 2009 WL 1657465, at *1 (N.D. Ind. June 11, 2009) (finding *Iqbal*'s supervisory-liability language inapplicable to Eighth Amendment claim); *cf.* Swagler v. Neighoff, 2010 WL 4137530, at *6–7 (4th Cir. 2010) (unpub. op.) (finding First Amendment claim plausible against supervisory officials).

20. *See Iqbal*, 129 S. Ct. at 1949; *see also* Dodds v. Richardson, 614 F.3d 1185, 1199–203 (10th Cir. 2010) (permitting supervisory liability on a deliberate indifference theory for substantive due process claim); *supra* note 19 (citing cases where lower courts refused to interpret *Iqbal* as entirely rejecting supervisory liability in *Bivens* actions).

21. *See* No. 02 Civ. 2307 (E.D.N.Y. June 30, 2010) (report and recommendation granting leave to amend).

22. 28 U.S.C. § 1350(1) (2006).

23. Arar v. Ashcroft, 585 F.3d 559, 568 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

> constitutional challenge to policies promulgated by the executive. Our federal system of checks and balances provides means to consider allegedly unconstitutional executive policy, but a private action for money damages against individual policymakers is not one of them.[24]

It is worth recognizing, however, that Arar's Fifth Amendment conditions-of-confinement/access-to-courts claim was dismissed for more pedestrian reasons: applying the Supreme Court's decision in *Iqbal*, the Second Circuit held that Arar's complaint insufficiently alleged a constitutional violation.[25] Thus, much like the plaintiff in *Iqbal*, Arar could theoretically seek leave to amend to make additional allegations to support his Fifth Amendment claim.[26]

On one hand, I don't want to overstate my disagreement with Margulies as to his categorization of *Iqbal* and *Arar*. They are both high-profile cases in which the courts seem to be highly attuned to the difficult decisions that high-level executive branch officials were making in the aftermath of September 11. But deference is nothing new in the constitutional context: it is the story of the Fourth Amendment, at least since the early 1970s, and as Margulies himself recognizes, it is instantiated in doctrines like qualified immunity. It is also true, as Margulies points out, that the pleading decision in *Iqbal* left little opportunity for plaintiffs to gather the kind of evidence that might be necessary to plead with more detail against high-level policymakers. However, in neither of these cases did the Court grant defendants something like absolute immunity for unconstitutional conduct, even in the midst of the chaos and insecurity occasioned by the aftermath of the September 11 attacks. They certainly have made it harder to challenge such unconstitutional conduct, but they are not categorically deferential in the way that Margulies implies.

Turning to Margulies's characterization of *al-Kidd* and *Padilla*, I have similar concerns. First, using the term "interventionist" to describe two cases in which a court declines to dismiss a case strikes me as an overstatement. Margulies describes the majority in *al-Kidd* as finding that "the government had detained the plaintiff solely to investigate his own possible involvement in a terrorist conspiracy" and therefore held that the detention was pretextual.[27] But the majority made no findings whatsoever in *al-Kidd*—the plaintiff alleged that the detention was pretextual and the majority held both that these allegations were sufficiently detailed to provide notice to the defendants and that the facts as stated established a claim for a violation of

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24. *Id.* at 574.

25. *Id.* at 569.

26. The fact that Arar had waived the opportunity to amend in the district court may have made this option less feasible. *See id.*

27. Margulies, *supra* note 5, at 232–33.

the Fourth Amendment.[28] If the Supreme Court upholds the Ninth Circuit's decision, it remains for al-Kidd to seek discovery and establish that, in fact, the defendants detained him for pretextual reasons.[29] Similarly, in *Padilla*, the district court held only that sufficient facts had been alleged against Yoo to state a claim for a violation of the constitution and to overcome qualified immunity.[30] The district court nowhere held that Yoo actually was liable to Padilla, and facts could emerge which would defeat Padilla's claims either as a matter of substantive law or as a matter of qualified immunity. In some sense, then, *Padilla* and *al-Kidd* demonstrate that the Supreme Court's decision in *Iqbal* was not as deferential as Margulies suggests. Both cases demonstrate that even after *Iqbal*, detainees challenging executive decisions regarding detention can survive the motion-to-dismiss stage, at least where they have similar factual details that the plaintiffs had in those cases.[31]

To call these cases "interventionist" strikes me as accepting the premise that any inquiry into the facts underlying executive branch decisions regarding national security treads on the power of the executive. Some within the executive surely adhere to this view, but I take Margulies to be making a more limited assumption, which is that whenever liability is established against executive branch officials, it has the function of affecting their behavior going forward, which is a form of intervention. If this is indeed his assumption, then I think it is more difficult to call *Padilla* and *al-Kidd* interventionist decisions.

Relatedly, I think that Margulies overstates the effect that threatened liability has on officials within the executive branch, especially the high-level defendants who are the subjects of these lawsuits. No one within or without the executive believes that, if Attorney General Ashcroft is found liable in al-Kidd's case that he will pay a penny of compensation out of his own pocket. Indeed, it is a widespread assumption that *Bivens* defendants are rarely if ever threatened with personal liability for unconstitutional conduct, even in run-of-the-mill cases.[32]

Instead, what I think is at stake for the government in the cases Margulies discusses, and even in the Guantanamo habeas cases, is information and transparency. Put broadly, I think what ties these cases

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28. al-Kidd v. Ashcroft, 580 F.3d 949, 969–70, 977 (9th Cir. 2009), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98).

29. *Id.* at 977.

30. Padilla v. Yoo, 633 F. Supp. 2d 1005, 1035, 1038 (N.D. Cal. 2009).

31. The complaints in *Padilla* and *al-Kidd* were more detailed than the complaint in *Iqbal*, in large part because Padilla and al-Kidd were highly publicized targets of investigation and in part because the government conduct challenged therein was much more transparent.

32. *E.g.*, Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 76–78 (1999). This is not to say that *Bivens* claims are unsuccessful, but simply that the government typically pays the costs of defense and any resulting damages. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 851 (2010).

together is not so much excessive deference or interventionism as it relates to executive decision-making, but differing degrees of tolerance for the information-forcing aspects of modern discovery. In these cases, whether they be the habeas cases out of Guantanamo or the *Bivens* damages cases discussed by Margulies, the central motivation of the government is to resist disclosure of any information for as long as possible.[33] In this sense, *Padilla* and *al-Kidd* strike me as less about intervention and more about transparency.

This is the extent of what I have to say about Margulies's characterization of the problem. It is not that I think there is no tension between the cases that Margulies highlights; I only mean to shift some of the emphasis away from the dichotomy that his article supposes. Nonetheless, whether or not the cases reflect the tension that Margulies identifies, his proposed solution is a thoughtful effort to try to balance the biases that might affect ex ante decision-making by government officials and ex post judgments by jurors, judges, and the like. So let me turn to the prescriptive part of Margulies's article.

III. MARGULIES'S PROPOSED SOLUTION TO TEMPER COGNITIVE BIASES

As I read the proposal, Margulies suggests that government defendants should be shielded from liability for constitutional violations whenever they can identify a factually similar situation in which they confronted a similar conflict between lawful and unlawful conduct and chose to behave lawfully. For several reasons, I fear that this proposal will ultimately undermine the goals Margulies seeks to achieve. To begin with, I assume that we agree that a damages remedy under *Bivens* ideally functions both to compensate victims of unconstitutional conduct and to deter officials from violating the law in the future.[34] As a matter of compensation, the difficulty with Margulies's proposal needs little explanation: it contemplates that some victims of unconstitutional conduct will be deprived of compensation simply because on another occasion the same defendant treated someone else within the

33. As other observers have noted, the government's reliance on the so-called "state secrets" doctrine has increased markedly in the post-September-11th context, and not just in cases involving potential damages liability. *See* Robert M. Chesney, *Legislative Reform of the State Secrets Privilege*, 13 ROGER WILLIAMS U. L. REV. 443, 446–47 (2008).

34. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 409–10 (1971) (Harlan, J., concurring) (focusing on compensation as key to *Bivens* decision); *see also* Corr. Services Corp. v. Malesko, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations."); FDIC v. Meyer, 510 U.S. 471, 485 (1994) ("It must be remembered that the purpose of *Bivens* is to deter *the officer*."); Carlson v. Green, 446 U.S. 14, 21 (1980) ("[I]n addition to compensating victims, [*Bivens*] serves a deterrent purpose."); Butz v. Economou, 438 U.S. 478, 504–06, 525 (1978) (declining to provide absolute immunity to federal executive officials under *Bivens* because doing so would eviscerate the deterrent effect); Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 341 n.244 (1995) (noting that the original purpose of *Bivens* was primarily compensation rather than deterrence).

bounds of the law. Imagine a defendant in an employment discrimination case being absolutely excused from liability in a suit on the ground that, six months after the company declined to hire the plaintiff, another person of the same race was hired for a similar position. Such evidence might be relevant to whether discrimination occurred in the first instance, but one can hardly imagine a just system in which such evidence would be dispositive of whether discrimination occurred.

This concern is amplified in the context of *Bivens* suits, where qualified immunity already contemplates that some defendants will be immune from liability for unconstitutional conduct where the law governing their conduct was insufficiently clear. Thus, the defense of qualified immunity guarantees that some plaintiffs who are treated unconstitutionally will be left with no remedy because of the novelty of the right asserted in their lawsuit. Margulies's proposal would go beyond qualified immunity to apply not only when the law was unclear to the defendants, but also when it was crystal clear that the defendants' treatment of the plaintiff violated well-established constitutional norms.

As for deterrence, Margulies has a better argument. Assuming that officials are motivated to avoid liability for their conduct, his proposal will create some incentive to act constitutionally on some occasions. It might only go so far. That is, officials might determine that there is an optimum balance that permits them to act unconstitutionally with impunity on some occasions, but this assumes that there are benefits to acting unconstitutionally (there surely are some) and insufficient deterrents outside of litigation.

If, however, officials are motivated by restricting access to information, it is not at all clear that Margulies's proposal will create a unidirectional incentive. Under his proposal, defendants would have to come forward prior to discovery with evidence regarding how they conducted themselves on prior occasions. To be dismissed from a case, the government defendant would be required to come forward with more information than they generally need in order to be dismissed now at the qualified-immunity stage. Thus, in a way, Margulies's proposal promises more intrusion than even the approaches of the courts in *Padilla* and *al-Kidd*, or even the lower courts in *Iqbal*, which recognized that discovery must be cabined and tightly restricted as the plaintiffs moved up the chain of command. At the same time that defendants would be obligated to provide sensitive information prior to even beginning discovery on the plaintiff's claim, the plaintiff in Margulies's proposal would be denied access to discovery of the information most relevant to his or her claim of misconduct. I think both parties would leave the table dissatisfied. Finally, I fear that Margulies's proposal, by focusing courts on the instances in which defendants behaved constitutionally, might exacerbate a kind of confirmation bias in court decisions by which judges begin to seek and perceive evidence that confirms their own preconceptions

of the defendant's liability.[35] Surprisingly, there is reason to think that as judges gain more experience, they will become even more susceptible to these biases.[36]

Instead, I would consider other ways to mitigate the kinds of cognitive biases that Margulies has identified. For instance, information-forcing mechanisms that focused on the discovery most relevant to the plaintiff's claims would be less intrusive to the defendants than Margulies's proposal, more satisfactory to the plaintiffs, and provide for better decision-making by judges and future officials. Information is not sufficient in and of itself to mitigate cognitive biases, but it goes some ways towards doing so.[37] Additionally, the consideration of alternative approaches that help prevent path dependency can sometimes be facilitated by adversarial litigation, with surprising results.[38] I recall a deposition I took of a high-level official in a case challenging a particular prison policy in New York State. Despite what some attorneys on the other side had conceded was the strength of our litigating position, they were having no luck convincing their client, the Department of Corrections, that their policy should change. I entered the deposition with the simple goal of educating the witness—I treated it as if I were presenting our case to the jury. By the end of the deposition, the witness was testifying as to his intention to do everything he could to change the policy of the department, and unlike the attorneys I had been dealing with, he actually had the power to do so. In that case, discovery was a process that broke down the defensive litigating posture of the client, and without the adversarial system it is doubtful it would have occurred.

I think the answer to the problem surfaced by Margulies is not nearly so complicated as creating a new kind of liability rule. Instead, it may be a matter of carefully managed discovery—the same kind of model that the lower courts in *Iqbal* had adopted but that the Supreme Court rejected. Such a system would increase access to information, force government defendants and courts to grapple with alternative interpretations of given facts, and improve overall transparency. Indeed, I return to the Supreme Court's decision in *Iqbal* because it has the potential to do the most to exacerbate the cognitive biases discussed by Margulies. It is a decision that essentially forces lower courts to choose between two diametrically opposed paths, with no grey areas in between—either let the case proceed to full discovery or throw the case out. While the district and appellate court in *Iqbal* had taken a path that more carefully balanced the important interests on both sides of

35. *See* Findley & Scott, *supra* note 7, at 311 (summarizing studies).

36. *See id.* at 327–31 (reviewing evidence that prosecutors with more experience suffer from more cognitive biases that affect their decision-making).

37. *See id.* at 370–71 (discussing the importance of education in overcoming cognitive biases); Burke, *supra* note 7, at 1614–15.

38. *See* Findley & Scott, *supra* note 7, at 390–91 (noting the different ways some states and foreign countries promote sharing information during discovery process to alleviate biases).

the litigation by calling for carefully cabined discovery, the Supreme Court imposed high costs on either side—*Iqbal* leaves district courts with the significant choice either to prematurely dismiss a potentially meritorious case without permitting any discovery at all or to permit a "plausible" case to go forward with full discovery. A more flexible approach to the cases implicated by Margulies' article would help minimize the important difficulties he identifies in resolving national-security disputes.