# ANSWERING THE "SERIOUS CONSTITUTIONAL QUESTION": ENSURING MEANINGFUL REVIEW OF ALL CONSTITUTIONAL CLAIMS

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## ABSTRACT

In 2012, the Supreme Court of the United States, in *Elgin v. Department of the Treasury*, clarified the standard that should apply when a federal statute purports to remove judicial review of all constitutional claims. The Court confirmed that, if a statute only channels judicial review of a constitutional claim into a specific avenue (for example, through administrative review and then the Federal Circuit Court of Appeals), then congressional intent to do so need only be "fairly discernible." Alternatively, if a statute precludes *all* judicial review of a constitutional claim, there must be "clear congressional intent." The Court explained that the reason for these differing standards is to avoid the "serious constitutional question that would arise if an

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agency statute were construed to preclude all judicial review of a constitutional claim." Courts have a duty to protect and interpret the Constitution and claimants have a right to meaningful review of their constitutional claims.

That serious constitutional question does arise when probationary federal public employees, who are not fully covered by Civil Service Reform Act ("CSRA") protections, allege constitutional violations related to their employment. For example, the CSRA right to directly petition the Merit Systems Protection Board ("MSPB") and to appeal to the Federal Circuit Court of Appeals is unavailable to these employees. Instead, probationary federal employees who allege that their employment was terminated in violation of the U.S. Constitution may only petition the U.S. Office of Special Counsel. If the Office of Special Counsel denies an employee's claim, that claim is terminated without any further administrative or judicial review.

This result raises the serious constitutional question, one that dates back to *Marbury v. Madison*, about the judicial duty of review of constitutional claims, particularly those involving individual rights. Given the lack of meaningful review of constitutional claims brought by federal probationary employees, a judicial remedy must be provided to ensure deterrence of unconstitutional acts by federal employers. That remedy should be extending a cause of action from *Bivens v. Six Unknown Federal Agents* to probationary federal employees who otherwise will not receive meaningful review of their constitutional claims.

## I. INTRODUCTION

> *The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality.*
>
> – Justice Louis Brandeis[1]

> *The presumptive power of the federal courts to hear constitutional challenges is well established.*
>
> – Justice Samuel Alito[2]

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[1] St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring).

[2] Elgin v. Dep't of Treasury, 132 S. Ct. 2126, 2147 (2012) (Alito, J., dissenting).

The Supreme Court of the United States, in *Elgin v. Department of the Treasury*,[3] addressed whether the Civil Service Reform Act ("CSRA")[4] was the exclusive remedy for federal employees who alleged that the federal laws authorizing their terminations were facially unconstitutional.[5] In *Elgin*, the plaintiff employees were terminated for having failed to register for the military selective service.[6] Federal law both requires all males between 18 and 26 years of age to register for the draft[7] (a registration requirement) and bans anyone who "knowingly or willfully" violates the registration requirement from employment with any executive agency (an employment condition).[8]

Several males, who failed to register and thereby were terminated from their employment with federal agencies,[9] challenged the federal employment condition as unconstitutional on its face, arguing that it constituted a bill of attainder and violated the Equal Protection Clause of the Fourteenth Amendment, because the registration requirement applies only to men.[10] These plaintiffs filed an original action in federal district court.[11]

The CSRA required the plaintiffs to exhaust their administrative remedies before the Merit Systems Protection Board ("MSPB"), with appeal to the Federal Circuit Court of Appeals.[12] The plaintiffs in *Elgin* argued that, because they challenged the federal selective service statute as unconstitutional on its face, theirs was not a case that Congress intended to channel into the CSRA's administrative scheme as the exclusive remedy, and therefore suit could be brought by the plaintiffs in a federal district court in the first instance.[13] The plaintiffs argued for the application of the heightened standard from *Webster v. Doe*.[14] In *Webster*, the Supreme Court held that, in order to find that Congress meant to preclude all judicial review of constitutional claims in federal court, there must be a "heightened showing" of clear congressional intent.[15]

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3 132 S. Ct. 2126 (2012).

4 Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified at 5 U.S.C. §§ 1101–1105 (2013)).

5 *Elgin*, 132 S. Ct. at 2130.

6 *Id.* at 2131.

7 5 U.S.C. § 3328 (2012); 50 U.S.C. app. § 453 (2013).

8 *Elgin*, 132 S. Ct. at 2131.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.* at 2130–31.

13 *Id.* at 2131.

14 486 U.S. 592 (1988).

15 *Elgin*, 132 S. Ct. at 2132 (citing *Webster*, 486 U.S. at 603).

While the plaintiffs pressed the *Webster* standard, the federal government argued in favor of an alternative, lower standard from *Thunder Basin Coal Co. v. Reich*.[16] Under *Thunder Basin*, congressional intent to preclude federal court review need only be "fairly discernible"[17] where Congress did not preclude all federal judicial review but merely channeled review through one specific avenue.

In *Elgin*, the Supreme Court held that the *Webster* heightened standard applies only when a statute purports to remove *all* federal judicial review of a constitutional claim.[18] The Court emphasized that federal district court review is unnecessary when constitutional claims can be "meaningfully addressed in the Court of Appeals" of the Federal Circuit and that the *Elgin* plaintiffs' case therefore did "not present the *serious constitutional question* that would arise if an agency statute were construed to preclude *all judicial review of a constitutional claim*."[19]

The Court went on to note that, "like the statute in *Thunder Basin*, the CSRA does not foreclose all judicial review of . . . constitutional claims, but merely directs that judicial review shall occur in the Federal Circuit."[20] Accordingly, only the lower, "fairly discernible" standard from *Thunder Basin* applied.[21] Therefore, the Court held that the federal district court lacked jurisdiction to consider the plaintiffs' non-exhausted claims.[22]

While the Court introduced these dual standards as a means to avoid a "serious constitutional question," that serious constitutional question has already arisen for probationary federal employees who allege constitutional violations. For these employees, the only remedy for an alleged constitutional violation is to file a complaint with the U.S. Office of Special Counsel ("OSC"). Under the current scheme, if the historically under-resourced OSC[23] denies the probationary employee's constitutional claim, the employee has no further remedy available. Within the OSC, review is undertaken by a lone staff attorney, without a hearing, and with minimal opportunity for input by the employee-complainant.[24] The OSC staff attorney's decision to deny an

16 510 U.S. 200 (1994).

17 *Elgin*, 132 S. Ct. at 2132 (quoting *Thunder Basin*, 510 U.S. at 207).

18 *See id.*

19 *Id.* (emphasis added) (quoting *Thunder Basin*, 510 U.S. at 215 n.20 (internal quotation marks omitted)).

20 *Id.*

21 *Id.* at 2132–33.

22 *Id.* at 2140.

23 Spagnola v. Mathis, 809 F.2d 16, 21 (D.C. Cir. 1986), *vacated in pertinent part and rev'd on other grounds on reh'g*, 859 F.2d 223 (D.C. Cir. 1988) (en banc) (per curiam).

24 *See* 5 U.S.C. § 1214 (2012).

employee's complaint of constitutional violations is not appealable.[25] To be clear, there is no further administrative review and no judicial review whatsoever. The current statutory scheme for federal probationary employees leaves the entire review of constitutional claims in the hands of a lone staff attorney within a federal administrative agency. If that lone staff attorney denies the claim, that decision is the final word.[26]

This *de minimus* level of review of constitutional claims is unacceptable, because it is insufficient to deter federal employers from committing unconstitutional acts. For this reason, a *Bivens* remedy must be available to ensure meaningful review of the employees' constitutional claims. Otherwise, the answer to the "serious constitutional question" is that the courts will abrogate their judicial duty to review the constitutionality of executive actions affecting individual rights that has been well-established as least as far back as *Marbury v. Madison.*[27]

*Bivens* is a judicially-created cause of action that permits an individual to sue federal actors for damages to remedy constitutional violations.[28] *Bivens* is important, not only to remedy past unconstitutional conduct, but to deter future such conduct by federal actors. In its most recent, comprehensive articulation of *Bivens*, the Supreme Court in *Minneci v. Pollard*[29] emphasized extending *Bivens* to deter unconstitutional acts by federal actors.[30] When evaluating whether an alternative, non-*Bivens* remedial scheme provided by Congress is sufficient, the Court has assessed whether the scheme provides "roughly similar incentives"[31] to federal actors to avoid unconstitutional conduct.

For federal probationary employees, whose only remedy is found in the OSC, the "roughly similar incentives" to deter unconstitutional acts do not exist.[32] The "serious constitutional problem" therefore arises in at least the following respects: the employees are without a meaningful remedy for constitutional violations, the executive branch will be able to commit unconstitutional acts without judicial review, and the courts will have ceded their critical function to a lone staff attorney in the OSC. To afford these

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25 *Id.*

26 The case only proceeds to MSPB and then judicial review *if* the Office of Special Counsel permits it to proceed. *See id.*

27 5 U.S. 137 (1803).

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

29 132 S. Ct. 617 (2012).

30 *See id.* at 622.

31 *Id.* at 626.

32 *Id.*

employees the basic promise of *Marbury* and to restore the separation of powers, these employees must have a *Bivens* remedy available to them.

This Article discusses how the Supreme Court's most recent *Bivens* jurisprudence must be read to enforce the basic promise of *Marbury*: meaningful review for all constitutional claims. It addresses the importance of the constitutional remedies outlined in *Marbury*, and will present an example that highlights the gaping hole in constitutional remedies created by *Elgin*.

## II. AN EXAMPLE

Bryan Gonzalez was employed as a probationary Border Patrol Agent from October 15, 2007, to September 16, 2009.[33] He served along the Mexican border.[34] During the time of his employment with U.S. Customs and Border Protection, Gonzalez was on two-year probationary status that, but for the termination of his employment, would have expired in October 2009.[35] Instead, Gonzalez was fired weeks before he would have become a permanent Border Patrol Agent. He was fired weeks before he would have been entitled to full CSRA remedies, including direct access to the MSPB with appeal to the Federal Circuit Court of Appeals.[36] At the time of his firing, Gonzalez had been an exemplary Border Patrol Agent who had received excellent performance reviews throughout his employment.[37]

The facts surrounding his termination are as follows. On April 13, 2009, Gonzalez was patrolling the border between New Mexico and Mexico, as was Border Patrol Agent Shawn Montoya.[38] On a break, Gonzalez and Montoya pulled their vehicles alongside each other and began talking about several things, including the drug-related violence in Mexico.[39] Gonzalez remarked that legalization of drugs would end the drug war and related violence in Mexico.[40] He also stated that the drug problems in America were due to American demand for drugs, supplied from Mexico.[41] Gonzalez mentioned the organization, Law Enforcement Against Prohibition ("LEAP"),

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33 Complaint for Damages and Declaratory Relief ¶ 7, Gonzalez v. Manjarrez, No. EP-11-CV-29-KC, 2013 WL 152177 (W.D. Tex. Jan. 4, 2013), 2011 WL 240799.

34 *Id.* ¶ 10.

35 *Id.* ¶ 7.

36 *Id.* ¶ 22; *see also Gonzalez*, 2013 WL 152177, at *2.

37 Complaint for Damages and Declaratory Relief, *supra* note 33, ¶ 8.

38 *Id.* ¶ 10.

39 *Id.* ¶¶ 11–12.

40 *Id.* ¶ 13.

41 *Id.*

made up of former law enforcement officers who oppose the drug war.[42] He also mentioned the organization's website to Montoya.[43]

During the conversation, Montoya asked Gonzalez why Mexicans were always trying to enter the United States and steal jobs.[44] In response, Gonzalez replied that the reason Mexicans came to the United States was because of the lack of jobs in Mexico.[45] Gonzalez noted that he was Mexican because, while he was born in the United States and was a citizen of the United States, he had had dual citizenship with Mexico until he was 18 years old.[46]

Later, Agent Montoya mentioned Gonzalez's remarks to another Border Patrol Agent, Richard Carrasquillo.[47] Carrasquillo subsequently reported Gonzalez's remarks to the Joint Intake Command in Washington, D.C. Soon thereafter, Customs and Border Patrol commenced an Internal Affairs Investigation against Gonzalez.[48]

Gonzalez was then terminated by the Border Patrol on September 16, 2009.[49] The termination letter stated, in relevant part, that Gonzalez held "personal views that were contrary to the core characteristics of Border Patrol Agents, which are patriotism, dedication, and esprit de corps."[50]

Gonzalez filed a complaint with the OSC, alleging that he had been terminated in violation of his First Amendment right to free speech. The OSC staff attorney assigned to the case issued a proposed decision denying Gonzalez's claim, giving Gonzalez 13 days to submit a written response.[51] Gonzalez submitted a written response, but no hearing was held. The OSC then issued a final denial of Gonzalez's claim, applying the wrong First Amendment burden of proof and making findings on legal issues that were not set forth in the initial notice of proposed decision.[52] Gonzalez had no avenue to appeal the decision.

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42 *Id.* ¶ 14.

43 *Id.*

44 *Id.* ¶ 15.

45 *Id.*

46 *Id.* ¶ 16.

47 *Id.* ¶ 17.

48 *Id.* ¶¶ 18–19.

49 *Id.* ¶ 20.

49 *Id.* ¶ 17.

49 *Id.* ¶¶ 18–19.

50 *Id.* ¶ 21.

51 Letter from Malia S. Myers, Att'y, U.S. Office of Special Counsel, to Bryan Gonzalez (Sept. 5, 2013) (on file with author).

52 Letter from Malia S. Myers, Att'y, U.S. Office of Special Counsel, to Bryan Gonzalez (Sept. 30, 2013) (on file with author).

Gonzalez also filed a lawsuit against the supervisor who terminated him, pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[53] alleging violations of his First Amendment rights. The federal district court dismissed Gonzalez's lawsuit, finding that Congress's remedial scheme, under the CSRA, provided an exclusive remedy in the OSC, and precluded the extension of *Bivens*. The Fifth Circuit Court of Appeals affirmed that decision on February 26, 2014.[54] The Court of Appeals stated that "allowing such a remedy would 'encourage aggrieved employees to bypass the statutory and administrative remedies [established under the CSRA] in order to seek direct judicial relief and thereby deprive the Government of the opportunity to work out its personnel problems within the framework it has so painstakingly established.'"[55]

Thus, the federal courts have failed to enforce the promise of *Marbury*, leaving probationary federal employees, like Gonzalez, without an avenue for meaningful review of constitutional claims.

## III. *ELGIN V. DEPARTMENT OF THE TREASURY*

In *Elgin v. Department of the Treasury*,[56] the Supreme Court repeated its long-held concern about the "serious constitutional question" that arises in cases, like Gonzalez's, where Congress precludes all judicial review of constitutional claims. The *Elgin* Court addressed whether the CSRA[57] was the exclusive remedy for federal employees who alleged that the statutes authorizing their terminations were facially unconstitutional.[58] The *Elgin* plaintiff-employees were terminated for having failed to register for the military selective service.[59] The Selective Service Act[60] barred the employees from employment with any executive agency for knowingly and willfully failing to register.[61] Upon discovery that Mr. Elgin had not registered for the draft, the Department of the Treasury terminated his employment. His co-plaintiffs suffered the same fate in other federal agencies.[62]

The *Elgin* plaintiffs filed suit in federal district court and challenged the Selective Service Act as unconstitutional on its face, arguing that it

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53 403 U.S. 388 (1971).

54 Gonzalez v. Manjarrez, 558 F. App'x 350 (5th Cir. 2014).

55 *Id.* at 353–54 (quoting Broadway v. Block, 694 F.2d 979, 985 (5th Cir. 1982)).

56 132 S. Ct. 2126 (2012).

57 5 U.S.C. §§ 1101–1105 (2013).

58 *Elgin*, 132 S. Ct. at 2130.

59 *Id.* at 2131.

60 5 U.S.C. § 3328 (2013).

61 *Elgin*, 132 S. Ct. at 2131.

62 *Id.*

constituted a bill of attainder and imposed unlawful discrimination on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment.[63] However, each of the *Elgin* plaintiffs also had remedies pursuant to the CSRA, including the right to an adversarial hearing before the MSPB with appeal to the Federal Circuit Court of Appeals.

Thus, the question before the Supreme Court in *Elgin* was the exclusivity of the CSRA, which required exhaustion of the administrative remedies before the MSPB with appeal to the Federal Circuit Court of Appeals.[64] The *Elgin* plaintiffs argued that, because they challenged a statute as unconstitutional on its face, theirs was not a case that Congress intended to channel into the CSRA's administrative scheme as the exclusive remedy, and therefore suit could be brought in a federal district court in the first instance.[65] Primarily, the *Elgin* plaintiffs relied on *Webster v. Doe*'s heightened "clear intent" standard, arguing because there was not clear intent to abrogate general federal question jurisdiction, they could bring their lawsuit in federal district court.[66]

In *Webster*, an employee of the Central Intelligence Agency challenged his termination when the Agency fired him shortly after he disclosed that he was gay.[67] The defendant employer in *Webster* moved to dismiss, arguing that section 102(c) of the National Security Act[68] precluded judicial review of the plaintiff's termination, including plaintiff's constitutional claims arising from the termination.[69] The Supreme Court rejected that argument, noting that it had repeatedly re-affirmed that when Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.[70] "We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."[71] Finding that even the strong language of the National Security Act (that favored deference to agency decision-making) failed to evidence the "heightened showing" of clear congressional intent to foreclose judicial review of constitutional claims, the Court held in *Webster* that the employee's constitutional claim could be reviewed by a federal district

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63 *Id.*

64 *Id.* at 2130–31.

65 *Id.* at 2131.

66 *Id.* at 2132.

67 Webster v. Doe, 486 U.S. 592, 595–96 (1988).

68 50 U.S.C. § 3036(e)(1) (2012).

69 *Webster*, 486 U.S. at 603.

70 *Id.*

71 *Id.*

court.[72] There was insufficient evidence of congressional intent to preclude judicial review.

In *Elgin*, however, the Court rejected plaintiff-employees' contention that *Webster* should apply, clarifying the standard that applies when a federal court must discern whether Congress intended to preclude federal court review of constitutional claims.[73] The Court weighed the application of the *Webster* "heightened" standard versus the lower standard from *Thunder Basin Coal Co. v. Reich*,[74] the latter of which requires only that congressional intent to preclude federal district court review be "fairly discernible."[75] In *Thunder Basin*, the Court addressed whether the Federal Mine Safety and Health Amendments Act of 1977[76] ("MSHA") properly precluded federal district court jurisdiction. The MSHA required that pre-enforcement challenges be addressed by the Federal Mine Safety and Health Review Commission, with appeal to the U.S. Courts of Appeals.[77] The Supreme Court found that it was "fairly discernible" that Congress had meant to preclude federal district court jurisdiction.[78] The lower, "fairly discernible" standard had been applied in *Thunder Basin* because Congress had not intended to completely preclude federal court jurisdiction, rather it merely channeled it into one avenue.[79]

In *Elgin*, the Court explained that the heightened *Webster* standard applies only when "a statute . . . purports to 'deny *any* judicial forum for a colorable constitutional claim.'"[80] "*Webster*'s standard does not apply where Congress simply channels judicial review of a constitutional claim to a particular court."[81] The *Elgin* Court emphasized that federal district court review is unnecessary when constitutional claims can be "meaningfully addressed in the Court of Appeals" on appeal from MSPB and that the *Elgin* plaintiffs' case therefore did "not present the 'serious constitutional question' that would arise if an agency statute were construed to preclude all judicial review of a constitutional claim."[82] The Court went on to note that, "[l]ike the statute in *Thunder Basin*, the CSRA does not foreclose all judicial review of . . .

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72 *Id.* at 603–04.

73 Elgin v. Dep't of Treasury, 132 S. Ct. 2126, 2132–33 (2012).

74 510 U.S. 200 (1994).

75 *Elgin*, 132 S. Ct. at 2132.

76 30 U.S.C. §§ 801–804 (2013).

77 30 U.S.C. § 816; *Thunder Basin*, 510 U.S. at 204.

78 *Thunder Basin*, 510 U.S. at 216.

79 *Elgin*, 132 S. Ct. at 2132.

80 *Id.* (emphasis added) (quoting Webster v. Doe, 486 U.S. 592, 603 (1988)).

81 *Id.*

82 *Id.* (quoting *Thunder Basin*, 510 U.S. at 215 n.20).

constitutional claims, but merely directs that judicial review *shall* occur in the Federal Circuit."[83]

Accordingly, the ultimate impact of *Elgin* is that the Supreme Court has clarified the application of the different standards necessary to preclude federal court review of constitutional claims. When a statutory scheme merely channels constitutional claims into an administrative process before judicial review in the Federal Circuit Court of Appeals, a court need only ascertain whether Congress's intent to preclude all federal district court review is "fairly discernible."[84] However, in order to preclude *all* judicial review of constitutional claims, the statute must satisfy the "heightened showing" from *Webster*; that is, it must evidence a "clear" intent by Congress to do so.[85] In *Elgin*, the Supreme Court confirmed that the *Webster* standard should apply to a case such as Bryan Gonzalez's, because an OSC denial forecloses *any* judicial review of constitutional claims, such as Gonzalez's First Amendment claims. That raises the very "serious constitutional question" the Supreme Court was so concerned about in *Elgin*[86]: whether Congress can remove all opportunity for judicial review of constitutional claims. But before getting to the "answer" to that question (extending *Bivens*), it is critical to understand exactly what the Court meant when it referenced the seriousness of the constitutional question at hand.

## IV. THE SERIOUS CONSTITUTIONAL QUESTION

The "serious constitutional question" referenced in *Elgin*—a question that strikes at the core of our government's balance of powers—is over 200 years old: what is the duty of Article III courts to review executive action to ensure its constitutionality? It is the delicate nature of this question that has led the Supreme Court to require a "heightened showing" of congressional intent to preclude all judicial review of constitutional claims.[87] Instead of holding that Congress has precluded judicial review and thereby exceeded its authority, the Court has assumed a judicial remedy when it can in the interest of harmony. This approach helps avoid a constitutional separation of powers conflict between the Court and Congress.[88] The presumption is, and should be, that Congress does not intend to preclude all judicial review under Article III. Anything less would frequently place the Court on a collision course with Congress over the power of judicial review.

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83 *Id.* (emphasis added).

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 *See, e.g.*, *Ex parte* McCardle, 74 U.S. 506 (1868); *Ex parte* Yerger, 75 U.S. 85 (1868); Felker v. Turpin, 518 U.S. 651, 660 (1996) (repeals by implication are not favored).

When the Supreme Court was confronted with that serious question long ago, it answered definitively. "It is emphatically the province and duty of the judicial department to say what the law is."[89] Chief Justice John Marshall in *Marbury* emphasized that was particularly true where individuals sought vindication of legal rights.[90] Indeed, perhaps even more important to the federal probationary employees is *Marbury*'s holding that, where there is a right, there must be a remedy.[91] And by remedy, the Supreme Court has made clear that it means a constitutionally adequate remedy, to wit: one that provides incentive to avoid unconstitutional acts.

The significance of *Marbury*'s affirmation of the duty of judicial review over allegedly unconstitutional acts by a member of the executive branch is illuminated by tracing backwards from *Elgin* through the Court's most recent discussions of the "serious constitutional question."

First, one should look at the lower standard set forth in *Thunder Basin*. There, in applying the minimal "fairly discernible" standard, the Court noted that "'[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.'"[92] The Court noted that rule was "perhaps of less consequence" where, as in *Thunder Basin*, the reviewing body was not an actual federal agency, but an independent commission established exclusively to adjudicate disputes that arose under the statutory scheme (in that case, the MSHA).[93] The Court also noted that the Federal Mine Safety and Health Review Commission had "addressed constitutional questions in previous enforcement proceedings" and that, even if that had not been the case, the constitutional claims at issue in *Thunder Basin* could have been "meaningfully addressed in the Court of Appeals" after the Commission rendered its decision.[94] For this reason, there was no serious constitutional question in *Thunder Basin* because ultimately, judicial review of any constitutional claim was available at the appellate level. Thus, the Supreme Court said it need only ascertain whether it was "fairly discernible" that Congress meant to channel all constitutional claims through the commission and into the Courts of Appeals, rather than permitting them to first be heard in federal district court.[95]

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89 Marbury v. Madison, 5 U.S. 137, 177 (1803).

90 *Id.* at 162–63.

91 *Id.* at 163.

92 Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 (1994) (quoting Johnson v. Robison, 415 U.S. 361, 368 (1974)).

93 *Id.* (citing Secretary v. Richardson, 3 F.M.S.H.R.C. 8, 18–20 (1981)).

94 *Id.*

95 *Id.* at 216.

The alternative standard discussed by the Court and parties in *Elgin* was the heightened standard from *Webster*.[96] The terminated employee in *Webster* claimed that section 102 of the Administrative Procedures Act precluded judicial review of his constitutional claims, and thus, federal district court review must be made available.[97] In *Webster*, the Court rejected the argument that the Administrative Procedures Act could be read to exclude all judicial review of constitutional claims[98]:

> We emphasized in *Johnson v. Robison*, that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. In *Weinberger v. Salfi*, we reaffirmed that view. We require this heightened showing in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.[99]

In *Johnson v. Robison*,[100] referenced by the Court in *Webster*, the Court interpreted a veterans' benefits statute[101] and concluded that it did not mean to preclude federal district court litigation challenging the law as unconstitutional.[102] "Such a construction would, of course, raise serious questions concerning the constitutionality of § 211."[103]

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96 *See* Elgin v. Dep't of the Treasury, 132 S. Ct. 2126 (2012).

97 Webster v. Doe, 486 U.S. 592, 597 (1988).

98 *Id.* at 603.

99 *Id.* (citations omitted) (citing Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986)). Justice Scalia, dissenting in *Webster*, rejected the seriousness of the question:

> I turn, then, to the substance of the Court's warning that judicial review of all "colorable constitutional claims" arising out the respondent's dismissal may well be constitutionally required. What could possibly be the basis for this fear? Surely not some general principle that *all* constitutional violations must be remediable in the courts. The very text of the Constitution refutes that principle . . . .
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> . . . .
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> Once it is acknowledged, as I think it must be, (1) that not all constitutional claims require a judicial remedy, and (2) that the identification of those that do not can, even if only within narrow limits, be determined by Congress, then it is clear that the "serious constitutional question" feared by the Court is an illusion.

*Id.* at 612, 614 (Scalia, J., dissenting).

100 415 U.S. 361 (1974).

101 *Id.* at 366–67.

102 *Id.* at 367.

> Plainly, no explicit provision of § 211(a) bars judicial consideration of appellee's constitutional claims. That section provides that 'the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or

In distinguishing *Johnson* in *Weinberger v. Salfi*,[104] the Court construed the Social Security Act to provide district court jurisdiction over constitutional claims, after review by the Secretary of the Department of Health, Education and Welfare. In concluding that the Social Security Act could not be read to preclude all federal court jurisdiction over constitutional claims, the Court said: "Not only would such a restriction have been extraordinary, such that 'clear and convincing' evidence would be required before we would ascribe such intent to Congress, but it would have raised a serious constitutional question of the validity of the statute as so construed."[105]

The reason the Court avoided any reading of the statutes at issue in *Johnson* and *Salfi* that would have precluded all judicial review, and questioned the constitutionality of the statutes under such a construction, is that such preclusion would have undermined the power of judicial review. Based in *Marbury*,[106] the notion that judicial review must be available to review constitutionality of executive action was steadily reinforced throughout the nation's history.[107] Also reinforced is judicial resistance to any action on the part of Congress that could be construed to remove the "essential function" of

> jurisdiction to review any such decision. . . .' (Emphasis added.) . . . . Thus, as the District Court stated: 'The questions of law presented in these proceedings arise under the Constitution, not under the statute whose validity is challenged.'

*Id.* (quoting Robison v. Johnson, 352 F. Supp. 848, 853 (D. Mass. 1973), *rev'd*, 415 U.S. 361 (1974)).

[103] *Id.* at 366. The Court added that in such case "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question[s] may be avoided." *Id.* at 366–67 (quoting United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 369 (1971)).

[104] 422 U.S. 749 (1975).

[105] *Id.* at 762 (citations omitted) (citing *Johnson*, 415 U.S. at 373). The Court added:

> In the present case, as will be discussed below, the Social Security Act itself provides jurisdiction for constitutional challenges to its provisions. Thus the plain words of the third sentence of § 405(h) do not preclude constitutional challenges. They simply require that they be brought under jurisdictional grants contained in the Act, and thus in conformity with the same standards which are applicable to nonconstitutional claims arising under the Act. The result is not only of unquestionable constitutionality, but it is also manifestly reasonable, since it assures the Secretary the opportunity prior to constitutional litigation to ascertain, for example, that the particular claims involved are neither invalid for other reasons nor allowable under other provisions of the Social Security Act.

*Id.*

[106] *Marbury* is of course generally cited as the seminal case, although some sources for the doctrine pre-date it. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 1.4(b) (5th ed. 2012).

[107] Indeed, this fundamental notion was reaffirmed this past term in *NLRB v. Canning*, 134 S. Ct. 2550, 2559–60 (2014) ("We recognize, of course, that the separation of powers can serve to safeguard individual liberty and that it is the 'duty of the judicial department'—in a separation-of-powers case as in any other—'to say what the law is.'" (citations omitted)).

the federal judiciary to interpret the constitution and to answer questions of federal law.[108]

*Ex parte McCardle*[109] and *Ex parte Yerger*[110] are two Civil War era cases long held as establishing the principle that the Supreme Court would not infer congressional repeal of its jurisdiction over questions of federal or constitutional law. The importance of this judicial protection of its jurisdiction was reinforced most recently in *Felker v. Turpin*,[111] where the Court refused to find that Congress had, in the Anti Terrorism and Effective Death Penalty Act,[112] implicitly removed all of the Court jurisdiction over petitions for writs of habeas corpus.[113] "As we declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this Court by implication [in *McCardle* and *Yerger*], we decline to find a similar repeal of . . . its [statutory] descendant . . . by implication now."[114]

During the New Deal era, concerns were raised about the constitutionality of Congress channeling to one avenue challenges to executive action taken pursuant to New Deal legislation. In *Yakus v. United States*,[115] a man was prosecuted for violating federal price controls. In his defense, the man challenged the price controls as a violation of due process. The Supreme Court held that the federal district court deciding the criminal case did not have jurisdiction to review the constitutionality of a federal agency's decisions or

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[108] *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1378–79 (1953) (noting the importance of judicial review when "an enforceable legal duty is involved").

[109] 74 U.S. 506 (1868).

[110] 75 U.S. 85 (1868).

[111] 518 U.S. 651 (1996).

[112] *Id.* at 658.

[113] *Id.* In the context of federal versus state courts as remedial alternatives, Professor Gerald Gunther discussed the tensions there involving the adequacy of state court systems. These adequacy concerns are even more present when a lone federal bureaucrat has the lone responsibility for assessing a constitutional claim:

> All agree that Congress cannot bar all remedies for enforcing federal constitutional rights. The difficulty lies with the relevance rather than the acceptability of that principle. . . . To cut off the jurisdiction of some or all federal courts over specified classes of cases is *not* to cut off *all* remedies, given the existence of state courts and their traditionally assumed competence and indeed constitutional obligation to enforce federal rights. In short, the argument that curbing federal jurisdiction denies *all* remedies rests on a questionable assumption about the "inherent inadequacy of the state courts."

Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 921 n.113 (1984) (quoting Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 157 (1982)).

[114] *Felker*, 518 U.S. at 661.

[115] 321 U.S. 414, 427–44 (1944).

regulations as applied to Mr. Yakus, because the Emergency Price Control Act conferred exclusive jurisdiction of review of the agency's decisions to the Emergency Court of Appeals and the United States Supreme Court for claims arising under the Act.[116] In doing so, the Court emphasized that the mere channeling of constitutional claims did not present a constitutional concern.[117]

All of these cases demonstrate the Court's willingness to avoid a battle with Congress over the scope of the power of judicial review of constitutional claims. In each of these cases, however, the Court has (sometimes by bending over backwards)[118] found that an avenue remained for judicial review of constitutional questions. The question that remains is the appropriate judicial response when there is *no* judicial review of the constitutional question in a certain case, and the Court could not possibly find an avenue for judicial review, as in the case of federal probationary employees. The answer is found by permitting a civil rights lawsuit against the federal government pursuant to *Bivens*. Otherwise, the Court will have run afoul of its longstanding answer to the very serious constitutional question raised when Congress usurps the plain duty of the judiciary.

## V. THE ANSWER: WHY A *BIVENS* REMEDY MUST EXIST TO ENSURE MEANINGFUL REVIEW

To avoid the serious constitutional question that arises when Congress completely *precludes* judicial review of a constitutional claim (as opposed to simply channeling it into one court), the Supreme Court requires the application of the "heightened showing" of "clear" intent that Congress intends to preclude all review.[119] Because the *Elgin* plaintiffs had "meaningful review" of their claims in the Federal Circuit, the "heightened showing" standard did not apply in that case.[120] The concern expressed by the *Elgin* Court was that Congress must speak clearly when it intends to exclude plaintiffs with constitutional claims from any *judicial* forum in which to air their grievances.[121]

From this general principle, that Congress should speak clearly when it intends to preclude all judicial review of constitutional claims, one can then move to the more specific question—whether a *Bivens* remedy should be extended if Congress otherwise clearly has precluded judicial review of a constitutional claim. If Congress clearly does preclude judicial review in favor of an alternative remedy, courts will next examine whether the alternative

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116 *Id.* at 447.

117 *Id.* at 431–43.

118 *See Felker*, 518 U.S. at 661–62.

119 Elgin v. Dep't of the Treasury, 132 S. Ct. 2126, 2132 (quoting Webster v. Doe, 486 U.S. 592, 603 (1988)).

120 *Id.*

121 *Id.*

remedy is a "meaningful" one. A review of Supreme Court *Bivens* jurisprudence demonstrates the importance of the critical analytical step.

In *Bivens*, the Supreme Court held that a cause of action existed against federal actors for violations of constitutional rights. Prior to *Bivens*, constitutional rights against federal actors were generally only enforceable through injunctive relief or the exclusionary rule in criminal cases.[122] In *Bivens*, the Court found a cause of action existed against federal actors for Fourth Amendment violations. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[123] "From the beginning" alludes to *Marbury*'s declaration that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[124]

In finding a *Bivens* remedy, the Court noted that there may be times when there exist "special factors counseling hesitation" when a court considers whether to provide a *Bivens* remedy for a constitutional claim against federal actors.[125] As an example, the Court noted that the case did not involve a matter of federal fiscal policy.[126] Nor did the matter involve an instance where Congress has precluded a damage award but provided some other, "equally effective" remedy.[127]

Justice John M. Harlan pointed out in his important concurrence that since the general grant of federal question jurisdiction is sufficient to provide a basis for equitable relief, it should be enough to provide a remedy at law.[128] The Court had long been willing to stop ongoing or threatened constitutional violations. Harlan noted, "For people in Bivens' shoes, it is damages or nothing."[129]

According to the most recent Supreme Court cases determining whether to extend remedies brought pursuant to *Bivens*, the decision requires two steps: "In the first place, there is the question whether any alternative, existing process for protecting the [constitutionally recognized] interest

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122 ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 9.1.2 (5th ed. 2007); *see* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949).

123 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

124 Marbury v. Madison, 5 U.S. 137, 163 (1803).

125 *See Bivens*, 403 U.S. at 396.

126 *Id.*

127 *Id.* at 397.

128 *Id.* at 400–11 (Harlan, J., concurring).

129 *Id.* at 410.

amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages."[130]

The second question is whether there exists any "special factors counseling hesitation before authorizing a new kind of federal litigation."[131] Lack of a meaningful, alternative review will weigh in favor of the Court extending a *Bivens* remedy, barring other "special factors counseling hesitation,"[132] such as claims brought against the military.[133]

Applying these two questions to the federal probationary employee context, the alternative, non-judicial remedy for such claims must be "meaningful"—that is, it must provide "roughly similar incentives" compelling federal actors to comply with the Constitution.[134] And as noted, placing a probationary employee's constitutional violation entirely in the hands of a lone staff attorney at the OSC does not provide the "roughly similar incentives" for constitutional compliance. A *Bivens* remedy should be extended in such a case because the alternative remedy is not meaningful; an Office of Special Counsel review does not carry "roughly similar incentives" to command constitutional compliance from federal actors.

In the Supreme Court's most recent *Bivens* case, *Minneci v. Pollard*,[135] the Court emphasized that the effectiveness of the alternative remedy turns on its deterrent effect.[136] That is, in deciding whether or not a *Bivens* remedy is available, a court must look to whether or not the alternative remedy offers "roughly similar incentives" for the federal actor to avoid unconstitutional conduct as a cause of action in federal district court for damages.[137] Even before the Court clearly based its extension of a *Bivens* remedy on the "deterrent value," the cases discussing *Bivens* demonstrated an assessment of meaningful alternative remedies. The Supreme Court has repeatedly emphasized that the alternative remedy must be "meaningful."[138]

In refusing to extend *Bivens* in the case most closely analogous to that of the federal probationary employee, the Court assessed the effectiveness of

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130 Minneci v. Pollard, 132 S. Ct. 617, 621 (2012) (alteration in original) (quoting Wilkie v. Robbins, 551 U.S. 537, 550 (2007)).

131 *Id.* (quoting *Wilkie*, 551 U.S. at 550).

132 *Id.* (quoting *Wilkie*, 551 U.S. at 550).

133 *See* Chappell v. Wallace, 462 U.S. 296, 298–300 (1983) (special factors related to the military counsel against implying a *Bivens* action); *see also* United States v. Stanley, 483 U.S. 669, 683–84 (1987). These "special factors" in the second step of a *Bivens* determination are not applicable in Gonzalez's case.

134 *Minneci*, 132 S. Ct. at 625.

135 132 S. Ct. 617 (2012).

136 *Id.* at 627.

137 *Id.* at 625.

138 *See id.* at 622 (discussing prior Supreme Court holdings where a *Bivens* action was not implied because of meaningful alternative remedies available).

the alternative remedy. In *Bush v. Lucas*,[139] the Supreme Court rejected a federal employee's *Bivens* claim for damages because the employee already had CSRA remedies available to him, which he in fact utilized. The Court found that the CSRA remedies were "comprehensive procedural and substantive provisions giving meaningful remedies against the United States."[140] The *Bush* Court held that additional *Bivens* remedies were not necessary where the CSRA "provides meaningful remedies for employees."[141] In a case such as Gonzalez's, however, because the OSC chose not to petition MSPB on Gonzalez's behalf, he will have *no remedy*, much less a "meaningful" one as required by the Supreme Court in *Elgin*,[142] unless the court permits a *Bivens* action.

Like Gonzalez, the *Bush* plaintiffs were federal employees who alleged First Amendment violations. However, these employees had access to the full CSRA remedies, including a three-day, adversarial, public hearing before the MSPB, with appeal to the Federal Circuit Court of Appeals. Given this, the Court found the employees had access to alternative remedies that were an "equally effective substitute" when compared to the proposed *Bivens* remedy, and thus the Court declined to extend *Bivens*.[143]

Likewise, in *Schweiker v. Chilicky*,[144] the Court addressed claims brought pursuant to *Bivens* by individuals who had been wrongfully denied Social Security disability benefits by Reagan Administration officials. After the systemic denials, Congress acted to establish a statutory process by which individuals who claimed they had been wrongfully denied could seek relief. As in *Bush*, the statutory scheme provided a sufficient alternative avenue, including judicial review of any constitutional claims arising from the denial of their payments.[145] The Court declined to extend *Bivens*, holding that the statutory scheme was a constitutionally adequate alternative.[146]

Similarly, in *Davis v. Passman*,[147] the Court considered a former congressional employee's claim for damages suffered as a result of her employer's unconstitutional discrimination based on gender. In extending a *Bivens* claim to the employee in that case, the Court emphasized the

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139 462 U.S. 367 (1983).

140 *Id.* at 368.

141 *Id.* at 386.

142 Elgin v. Dep't of Treasury, 132 S. Ct. 2126, 2132 (2012).

143 *Bush*, 462 U.S. at 378 n.14.

144 487 U.S. 412 (1988).

145 *Id.* at 424, 428–29.

146 *Id.* at 429.

147 442 U.S. 228 (1979).

unavailability of "other alternative forms of *judicial* relief."[148] As the Supreme Court noted in *Davis v. Passman*:

> At least in the absence of a "textually demonstrable constitutional commitment of [an] issue to a coordinate political department," we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means *other than the judiciary* to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.[149]

Despite complaints by members of the Supreme Court that the "heady days" of extending *Bivens* to new situations have passed,[150] the Court has recently clarified the law in two important cases, *Wilkie v. Robbins*[151] and *Minneci v. Pollard*.[152]

In *Wilkie*, the Court addressed an effort to extend a *Bivens* remedy to a rancher who claimed a variety of harassment by Bureau of Land Management officials.[153] At the end of the day, the case is unique, in that the Court declined to extend *Bivens* in part because the complexity of the multitude of potential claims the rancher might have brought counseled against extending *Bivens*.[154] But most importantly for the issue discussed in this Article, the Court noted that, even without *Bivens*, the rancher had "an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints."[155] That is, rancher Robbins had and avenue for *meaningful* review. Notably, in dicta in *Wilkie*, the Court noted that what it *did not* have before them was a hypothetical case much like Bryan Gonzalez's. "Robbins's claim of retaliation for exercising his property right to exclude the Government does not fit this Court's retaliation cases, which involve an allegation of impermissible purpose

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148 *Id.* at 245 (emphasis added).

149 *Id.* at 242 (alteration in original) (emphasis added) (citations omitted) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962) (internal quotation marks omitted)); *see also* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72–73 (2001) (considering availability of state tort remedies in refusing to recognize a *Bivens* remedy).

150 *Malesko*, 534 U.S. at 75 (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition.").

151 551 U.S. 537 (2007).

152 132 S. Ct. 617 (2012).

153 *See generally Wilkie*, 551 U.S. 537.

154 *Id.* at 555.

155 *Id.* at 553.

and motivation—e.g., an employee is fired after speaking out on matters of public concern."[156]

Most recently, in *Minneci*, the Court declined to extend *Bivens* to Eighth Amendment claims brought by inmates against employees at privately-operated prisons.[157] The Court emphasized that the key factor in deciding whether or not to extend *Bivens* is the extent to which an alternative remedy provides sufficiently similar deterrent effects to keep federal actors from violating the Constitution.[158] In *Minneci*, the inmates were able to bring state law tort claims against the employees of the private prison, which the Court found had sufficiently similar deterrent value, precluding the extension of *Bivens*.

The Court's conclusion in *Minneci* properly reconciled a long line of otherwise seemingly inconsistent cases handed down interpreting *Bivens*. In *Minneci*, the Supreme Court defined a "meaningful" alternative remedy as one that provides "roughly similar incentives for potential defendants to comply with [the constitutional requirements] while also providing roughly similar compensation to victims of violations."[159] There can be little doubt that subjecting a First Amendment violation for review by a likely overtaxed administrative agency such as the OSC does not carry "roughly similar incentives" to comply with the constitution as would review by an Article III court.[160] Because the OSC does not provide "roughly similar incentives for constitutional compliance,"[161] federal probationary employees do not have the guarantee of meaningful review.

Two recent decisions from the Courts of Appeals further illuminate this analysis. In *Engel v. Buchan*,[162] the Seventh Circuit extended a *Bivens* claim to a plaintiff alleging due process violations resulting from prosecutors' failure to abide by the disclosure requirement articulated in *Brady v. Maryland*.[163] In response to the *Bivens* suit brought in *Engel*, the prosecutors argued that the *Brady* requirement itself, combined with the right to petition for a writ of habeas corpus, was sufficient to remedy any due process violations.[164] The

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156 *Id.* at 539 (citing Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr, 518 U.S. 668, 675 (1996)).

157 Minneci v. Pollard, 132 S. Ct. 617 (2012).

158 *Id.*

159 *Id.* at 625 (alteration in original).

160 Contrast the alternative remedies available in *Minneci*: "[I]n principle, the question is whether, in general, state tort law remedies provide roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations. . . . [T]he answer to this question is 'yes.'" *Id.*

161 *Id.*

162 710 F.3d 698 (7th Cir. 2013).

163 373 U.S. 83 (1963).

164 *Engel*, 710 F.3d at 705–06.

Seventh Circuit applied the *Wilkie* formula: the "first question . . . is whether alternative remedies exist to redress the alleged violation of Engel's due-process rights, and whether those alternatives amount to a 'convincing reason' to refrain from extending *Bivens* here."[165] The Seventh Circuit noted that the alternative remedy must provide "roughly similar incentives" for compliance with constitutional requirements and "roughly similar compensation to victims of violations."[166] The Seventh Circuit then held that compliance with *Brady* and the use of habeas corpus did not provide sufficiently similar incentives or compensation to the plaintiff.[167]

Contrast *Engel* with *M.E.S., Inc., v. Snell*,[168] a recent case refusing to extend a *Bivens* remedy to a contractor bringing constitutional claims, who had an alternative remedy under the Contract Disputes Act of 1978 ("CDA").[169] In declining to extend *Bivens*, the Second Circuit noted that under the CDA, an aggrieved contractor had an administrative remedy followed by "further review . . . in the United States Court of Appeals for the Federal Circuit."[170] Unlike a federal probationary employee's case, in *Snell*, the CDA statutory scheme ultimately included judicial review, thus ensuring meaningful review.[171]

An alleged remedy whose availability depends upon the "discretion" of a government bureaucrat is no remedy at all, especially when constitutional rights are involved. It is significant that, in all of these cases addressing the refusal to recognize a *Bivens* remedy, the Court has deferred to an administrative remedy that ultimately includes judicial review. Why? Because that provides "similar incentives" for the federal actors to avoid unconstitutional conduct. For this reason, *Bivens* should be extended to a case involving federal probationary employees as well.

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165 *Engel*, 710 F.3d at 705 (quoting Wilkie v. Robbins, 551 U.S. 537, 550 (2007)).

166 *Id.* (quoting *Minneci*, 132 S. Ct. at 625).

167 *See id.* at 706 ("The failure of the government's agents to adhere to the *Brady* obligation is the very constitutional wrong that wants for redress, so it cannot be right to say that the duty of disclosure is itself a sufficient remedy for the constitutional violation. The disclosure rule cannot be both the duty *and* the remedy for its violation. . . . The habeas writ is akin to an injunction; it cannot provide a retrospective compensatory remedy. Stated differently, habeas corpus is categorically incapable of compensating the victim of a *Brady* violation for the constitutional injury he has suffered.").

168 712 F.3d 666 (2d Cir. 2013).

169 41 U.S.C. §§ 7101–7107 (2013).

170 *Snell*, 712 F.3d at 673.

171 *Id.*

## VI. WHY THE TYPE OF RELIEF SOUGHT SHOULD NOT MATTER

*Elgin* is an expression of the Court's view that meaningful remedies must be provided for *all* constitutional claims, whether they are equitable in nature or *Bivens* claims for damages. *Elgin* was not a *Bivens* suit. The employees in *Elgin* were seeking money for back pay, benefits, and attorneys' fees as part of their claims for equitable relief. But the *Elgin* Court never focused on the fact that the *Elgin* plaintiffs were seeking only money in the form of equitable relief as opposed to money from a *Bivens* damages claim.[172]

As then-Judge Alito said in *Mitchum v. Hurt*,[173] "We assume that the power of the federal courts to award legal and equitable relief in actions under 28 U.S.C. § 1331 stems from the same source."[174] The source is Article III—that is, the power of judicial review. There is no question as to whether or not the Court has the power to award both.[175] The question is only—*should* they? The Court's *Bivens* jurisprudence provides the answer: if there is not an alternative remedy with a sufficient deterrent effect, the Court will permit judicial determination of equitable relief or monetary damages.

On that point, distinguishing between equitable relief and Bivens damages[176] would be inconsistent with the notion of "similar incentives"

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[172] The manner in which the *Elgin* Court distinguishes its earlier opinion in *United States v. Fausto* underscores this. In *Fausto*, the Court held that Congress intended to preclude all judicial review of the plaintiff's *statutory* claims for back pay damages. In distinguishing *Fausto*, the Court in *Elgin* noted that "heightened scrutiny" need not apply "because Fausto did not press any constitutional claims." Elgin v. Dep't of Treasury, 132 S. Ct. 2126, 2133 n.4 (2012) (citing *Fausto*, 484 U.S. 439, 440–41, 448 (1988)).

[173] 73 F.3d 30 (3d Cir. 1995).

[174] *Id.* at 35–36. Justice Brandeis made the same point in his concurring opinion in *St. Joseph Stock Yards v. United States*: "To that extent, the person asserting a right, *whatever its source*, should be entitled to the independent judgment of a court on the ultimate question of constitutionality." 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) (emphasis added).

[175] *See* Arakawa v. Reagan, 666 F. Supp. 254, 259 n.8 (D.D.C. 1987) ("It seems to this Court that the Supreme Court's decision was predicated on the concept of deference to the legislature's choice of a remedial scheme, and had nothing to do with the fact [that] only damages were sought."); *see also* Bryant v. Cheney, 924 F.2d 525, 528 n.2 (4th Cir. 1991) ("Resolution of this issue is made more difficult by a distinction the Supreme Court seems to have drawn between *Bivens* actions for damages and equitable claims for injunctive or declaratory relief.").

[176] *Elgin*, 132 S. Ct. at 2132 (backpay, declaratory, and injunctive relief); Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215–16 & n.20 (1994) (an injunction); Webster v. Doe, 486 U.S. 592, 603 (1988) (respondent sought no monetary damages); Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986) (challenge to validity of agency regulation); Weinberger v. Salfi, 422 U.S. 749, 762 (1975) (declaratory and injunctive relief); Johnson v. Robison, 415 U.S. 361, 366–67 (1974) (declaratory judgment); United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 369–74 (1971) (injunctions); Yakus v. United States, 321 U.S. 414, 427–44 (1944) (injunction); *St. Joseph Stock Yards Co.*, 298 U.S. at 84 (Brandeis, J., concurring) (injunction).

discussed in *Minneci*.[177] As Justice Harlan said in his *Bivens* concurrence, for some people, it is "damages or nothing."[178] While the Supreme Court has indicated that equitable remedies are the usual course, the Supreme Court in *Minneci* also noted that damages are the historic remedy for invasion of a personal interest.[179] And in cases such as *Elgin*, the Court has not focused on distinguishing between equitable relief and damages claims when expressing concern regarding the "serious constitutional questions."

## VII. EXTENDING *BIVENS* TO PROBATIONARY FEDERAL EMPLOYEES IS CONSISTENT WITH THE COURT'S CONCERNS ABOUT PRESERVING THE INTEGRITY OF ARTICLE III COURTS.

Ensuring that an administrative agency does not have final say over constitutional claims is also consistent with the Supreme Court's jurisprudence addressing congressional efforts to delegate judicial decision-making to non-Article III judges. The most recent case addressing this issue is *Stern v. Marshall*,[180]a "teaching opinion" authored by Chief Justice John Roberts where he reviewed the evolution of the Court's precedent. In *Stern*, the Court held that a non-Article III bankruptcy court could not render the final decision on a counterclaim brought by the parties for tortious interference with contractual relations.[181] The Court emphasized that, when a traditional common law suit is within the bounds of federal court jurisdiction, "the responsibility for deciding that suit rests with Article III judges in Article III courts."[182] The Court explained:

> Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's "judicial Power" on entities outside Article III. That is why we have long recognized that, in general, Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." When a suit is made of "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," and is brought within the bounds of federal jurisdiction, the

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177 Minneci v. Pollard, 132 S. Ct. 617, 625 (2012).

178 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

179 *Id.*

180 131 S. Ct. 2594, 2608 (2011).

181 *Id.* at 2620.

182 *Id.* at 2609.

> responsibility for deciding that suit rests with Article III judges in Article III courts. The Constitution assigns that job—resolution of "the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law"—to the Judiciary.[183]

These same duties—including the duty to resolve cases involving the "mundane" or the "glamorous"—apply to constitutional claims brought by federal probationary employees. Similarly, Congress should not be permitted to "withdraw from judicial cognizance" such claims, by channeling review to a lone staff attorney in the Office of Special Counsel.

## VIII. THE INCONSISTENT REMEDIES PROBLEM

Is there a problem because a probationary employee has a *Bivens* remedy in federal district court, when fulltime federal employees must resort to the machinations of the CSRA remedial scheme? Yes, that is an unforeseen inconsistency that Congress's scheme has created.[184] However, the problem is Congress's to fix. If it provided a sufficient alternative remedy, with "roughly similar incentives" to deter constitutional violations by federal actors, there would be no need to extend *Bivens*. It is relatively easy to channel review through a federal court of appeals. But barring such action, the courts must satisfy their duty of judicial review.

## IX. CONCLUSION

> Although litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances.[185]

Despite the narrowing by the Court of the scenarios to which *Bivens* should apply, it has consistently demanded that some *meaningful* review be available for constitutional claims. Its expression of concern in *Elgin* confirms that it still considers congressional attempts to remove all power of the judiciary to review allegedly unconstitutional executive acts a "serious

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183 *Id.* (citations omitted). The Court also asked itself: "Is there really a threat to the separation of powers where Congress has conferred the judicial power outside Article III only over certain counterclaims in bankruptcy? The short but emphatic answer is yes." *Id.* at 2620.

184 *See* Harrison v. Bowen, 815 F.2d 1505, 1512 (D.C. Cir. 1987) ("Unfortunately, the legislative history is silent concerning the specific question why excepted employees, who were granted substantive and internal agency procedural rights, were not given an express right to appeal to the MSPB.").

185 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

constitutional question." In order to ensure that constitutional rights are vindicated and future wrongs are deterred, probationary federal employees must have access to federal court, so that the judiciary may fulfill its duty to "say what the law is." Because that access is not guaranteed by administrative review in the Office of Special Counsel, a *Bivens* remedy must be extended to those employees who allege constitutional violations against their federal employer.