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## THE UNCONSTITUTIONAL TORTURE OF AN AMERICAN BY THE U.S. MILITARY: IS THERE A REMEDY UNDER *BIVENS*?

Katrina Carmichael\*

### INTRODUCTION

After the conflict in Iraq began in 2003,<sup>1</sup> two young American civilians, Donald Vance and Nathan Ertel, moved to the war-torn nation to help “rebuild the country and achieve democracy.”<sup>2</sup> They began work at an Iraqi security services company, but, after becoming suspicious of illegal activity by their employer, they volunteered as whistleblowers for the FBI.<sup>3</sup> Following the company’s discovery of Vance and Ertel’s espionage, the men were taken hostage in the company compound by their employers.<sup>4</sup> After calling on their U.S. contacts for aid, the men believed they would be rescued.<sup>5</sup> However, Vance and Ertel were not rescued; instead, they were apprehended by the U.S. military, taken to a detention camp, and “tortured by their own government, without notice to their families and with no sign of when the harsh physical and

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\* J.D. Candidate, 2013, Georgia State University College of Law. Many thanks to Associate Dean Kelly Cahill Timmons for her input and advice, and to my family and friends for their unending support.

1. In late 2002, the Senate authorized the use of U.S. military force in Iraq to “defend the national security of the United States against the continuing threat posed by Iraq . . . .” Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498. Later, in March of 2003, President George W. Bush ordered U.S. coalition forces to commence air strikes in Iraq. See Address to the Nation on Iraq, 39 WEEKLY COMP. PRES. DOC. 342 (Mar. 19, 2003).

2. Vance v. Rumsfeld, 653 F.3d 591, 595 (7th Cir.), *reh’g en banc granted, opinion vacated*, (Oct. 28, 2011), *and rev’d*, 701 F.3d 193 (7th Cir. 2012). See Thom Shanker & James Glanz, *Civilians Heading to Iraq to Aid Local Development*, N.Y. TIMES, Mar. 24, 2007, at A7 (discussing the challenges civilians face when working alongside U.S. military in the rebuilding of Iraq); William Matthews, *U.S. Contractor Use in Iraq Expected to Rise*, DEFENSE NEWS (July 12, 2010, 6:00 AM), <http://www.defensenews.com/story.php?i=4704826> (examining the use of private contractors in the redevelopment of Iraq’s infrastructure).

3. Amended Complaint at 7–11, Vance v. Rumsfeld, 694 F. Supp. 2d 957 (N.D. Ill. 2010) (No. 06-C-6964), *rev’d*, 701 F.3d 193 (7th Cir. 2012). As informants for the FBI, Vance and Ertel reported observations of “illegal arms trading, stockpiling of weapons, bribery, and other suspicious activity.” Vance, 653 F.3d at 596.

4. Amended Complaint, *supra* note 4, at 24–25.

5. *Id.* at 26.

psychological abuse would end.”<sup>6</sup> Under such facts, most observers would agree that a wrong has clearly occurred. And where there’s a wrong, shouldn’t there be a remedy? Perhaps; but for Vance, Ertel, and other plaintiffs like them, curing such a wrong is a complex matter.

Under United States law, an American civilian who is tortured by the government, especially while in a war zone, has limited options for recovery.<sup>7</sup> While federal statute provides a remedy for persons deprived of constitutional rights by *state* officials under 42 U.S.C. § 1983, no such statutory equivalent exists when the same deprivation of rights occurs at the hands of *federal* officials.<sup>8</sup> Thus, an American civilian whose constitutional rights have been violated by a federal official is left with but one judicially created remedy: *Bivens*, the common law right to sue a federal official who deprives a citizen of his constitutional rights established in the 1971 case *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>9</sup> However, *Bivens* may not be sufficient to establish a proper remedy for constitutional violations, especially when courts are reluctant to

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6. *Vance*, 653 F.3d at 596–97. Vance and Ertel were kept captive at Camp Cropper in Iraq for several months before their release. *Id.* While in custody, they were strip-searched while blindfolded and kept in intolerably cold cells with bright lights on constantly. *Id.* There were insects and feces on the walls, and the plaintiffs were denied basic medical care and regularly deprived of food and water. *Id.* at 597. Further, they were forbidden from sleeping and were berated if ever caught doing so. *Id.* Physical abuse included “hooding” and “wall[ing],” where they were slammed into walls while blindfolded. *Id.* Lastly, the psychological abuse was relentless: the men were told they would never be allowed to leave the detention facility if they did not “do the right thing,” despite full cooperation in their interrogations. *Id.* Most disturbingly, they were kept in strict isolation, without contact with one another, their families, legal counsel, or even clergy. *Id.* After the fiasco came to an end and Vance and Ertel returned to the U.S., they filed a *Bivens* action against Secretary of Defense Donald Rumsfeld and others for violation of their constitutional right to due process. *Id.* at 598.

7. See generally *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012); *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012); *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir.), *cert. denied*, 132 S. Ct. 2751 (2012).

8. 42 U.S.C. § 1983 (2006) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .”); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (creating an implied right against federal officials parallel to the right established against state officials in § 1983); see generally 2 RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS §§ 14:1–:169 (3d ed. 2012) (discussing the development of *Bivens* and its relationship to § 1983).

9. *Bivens*, 403 U.S. 388; see also 2 SMOLLA, *supra* note 9, §§ 14:159–:167 (discussing the establishment of *Bivens* claims, under which a citizen deprived of his constitutional rights may sue federal officials responsible for the violation).

allow *Bivens* claims to proceed.<sup>10</sup> Unfortunately for Vance and Ertel, the Seventh Circuit denied their *Bivens* claims.<sup>11</sup> Likewise, other courts have similarly found a *Bivens* remedy untenable, finding that *Bivens* claims have been severely curtailed in recent decades by the Supreme Court's insistence on deference to Congress.<sup>12</sup> Several courts and scholars have suggested that such deference to Congress is appropriate; others have found that Congress's failure to legislate on the issue speaks to its desire to leave *Bivens* to the courts.<sup>13</sup>

In analyzing the extension of a *Bivens* remedy to American civilians tortured by the U.S. military, this Note proceeds in four parts. Part I traces the origin, development, and retraction of *Bivens*.<sup>14</sup> Part II analyzes the competing judicial approaches in applying a *Bivens* remedy for American citizens tortured by the federal government, comparing *Doe v. Rumsfeld*, *Lebron v. Rumsfeld*, and the majority opinion in *Vance v. Rumsfeld*, all of which denied a *Bivens* action, to the dissenting opinions of Judges Hamilton, Williams, and Rovner and the concurring opinion of Judge Wood, all

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10. For recent cases holding a *Bivens* remedy unavailable, see *Minneci v. Pollard*, 132 S. Ct. 617, 626 (2012); *Wilkie v. Robbins*, 551 U.S. 537, 561–62 (2007); *Vance*, 701 F.3d 193; *Doe*, 683 F.3d at 397; *Lebron*, 670 F.3d 540; *Arar v. Ashcroft*, 585 F.3d 559, 574–77 (2d Cir. 2009).

11. *Vance*, 701 F.3d at 195.

12. See *Doe*, 683 F.3d at 394; *Lebron*, 670 F.3d at 544. A number of courts denying *Bivens* remedies, including the *Lebron* and *Doe* courts, have focused on “special factors counseling hesitation,” which the Court in *Bivens* identified as a requirement before a claim can proceed against a federal official. *Bivens*, 403 U.S. at 396. Such special factors include the threat discovery poses to national security, the potential interference of courts with military discretion, and the burden such litigation places on limited government resources. *Lebron*, 670 F.3d at 548–52; *Ali v. Rumsfeld*, 649 F.3d 762, 773–74 (D.C. Cir. 2011); *Arar*, 585 F.3d at 574–77.

13. See *Doe*, 683 F.3d at 394 (noting that “the Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence”); *Lebron*, 670 F.3d at 548–52 (interpreting recent Supreme Court decisions as mandating a retraction of *Bivens*); George D. Brown, “Counter-Counter-Terrorism Via Lawsuit”—the *Bivens* Impasse, 82 S. CAL. L. REV. 841, 848 (2009) (highlighting the “need for judicial deference to the political branches” and suggesting that courts must restrict *Bivens* when litigating constitutional claims arising from the war on terror). But see *Brown v. Mississippi*, 297 U.S. 278, 287 (1936) (“The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective.” (quoting *Fisher v. State*, 110 So. 361, 365 (Miss. 1926))); *Vance*, 701 F.3d at 210 (Wood, J., concurring) (suggesting that a *Bivens* remedy is appropriate here because “[c]ourts must balance the risk of over-deterrence against ‘the public interest in deterrence of unlawful conduct and in compensation of victims.’” (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982))).

14. See discussion *infra* Part I.

of which argued that a *Bivens* remedy is appropriate.<sup>15</sup> Finally, Part III proposes that Congress establish a *Bivens* remedy modeled after an existing statute, such as § 1983 or the Torture Victim Protection Act, and that, until Congress takes such action, courts should not curtail *Bivens* beyond the already-established exceptions.<sup>16</sup> Part IV further proposes that the extension of *Bivens* is particularly appropriate when American civilians' constitutional rights are at stake.<sup>17</sup>

## I. ORIGIN AND EVOLUTION OF *BIVENS*

### A. *Bivens* Begins

Section 1983 of the United States Code provides a remedy for civilians deprived of their constitutional or statutory rights by a state government official.<sup>18</sup> No such analogous federal statute exists.<sup>19</sup> However, in 1971 the Supreme Court handed down a judicially created remedy in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, establishing a right of action against federal officials equivalent to that provided by § 1983.<sup>20</sup> However, in *Bivens*, Justice Brennan outlined two limitations under which a *Bivens* remedy would be unavailable: (1) if Congress has provided an adequate statutory alternative<sup>21</sup> or (2) if “special factors counsel[]

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15. See discussion *infra* Part II.

16. 42 U.S.C. § 1983 (2006); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note). See discussion *infra* Part III.

17. See generally *Ali*, 649 F.3d 762; *Arar*, 585 F.3d 559; see also discussion *infra* Part III.

18. 42 U.S.C. § 1983.

19. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (establishing a remedy under the Fourth Amendment where no alternative remedy existed under a federal statute). For a general discussion of the development of *Bivens*, see 2 SMOLLA, *supra* note 9, §§ 14:159–167.

20. *Bivens*, 403 U.S. 388. In *Bivens*, the petitioner was subjected to a warrantless entry into his apartment, where officers “manacled petitioner in front of his wife and children, and threatened to arrest the entire family.” *Id.* at 389. Later, he was subjected to a visual strip search. *Id.* In his action against the federal government for violating his Fourth Amendment right to be free of unreasonable searches and seizures, the Court held that “where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.” *Id.* at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

21. The Court found there were no alternative statutory remedies, noting “we have here no explicit congressional declaration that persons injured by a federal officer’s violation of the Fourth Amendment

hesitation . . . .”<sup>22</sup> While the Court did not invoke such exceptions in *Bivens*, it soon would.

### B. The Development And Retrenchment Of *Bivens*

*Bivens* enjoyed a decade of acceptance and expansion by the courts before facing restriction by the judiciary.<sup>23</sup> In *Davis v. Passman*, the Supreme Court extended *Bivens* to include Equal Protection violations under the Fifth Amendment.<sup>24</sup> Later, in *Carlson v. Green*, the Supreme Court continued to expand *Bivens* by applying the remedy to a claim of cruel and unusual punishment in violation of the Eighth Amendment.<sup>25</sup> This expansion soon met resistance though, resulting in a curtailment of its application.

In 1983, the Court began rejecting the extension of *Bivens*. In *Bush v. Lucas*, the Court denied a *Bivens* claim because other statutory mechanisms giving meaningful, albeit incomplete, remedies existed.<sup>26</sup> The Court also denied a *Bivens* remedy in *Chappell v. Wallace*, finding that the unique disciplinary structure of the military, coupled with the alternative system of justice in place for the military, constituted “special factors” that ultimately barred military personnel from bringing an action against their commanders.<sup>27</sup>

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may not recover money damages from the agents.” *Id.* at 397.

22. *Id.* at 396–97. Justice Brennan suggested that such “special factors” may arise when considering “federal fiscal policy,” when a congressional employee merely exceeds the bounds of authority delegated to him rather than violates a constitutional provision, and when money damages may be unnecessary to enforce the constitutional provision at issue. *Id.*

23. For a detailed discussion of both the early expansion and ultimate contraction of *Bivens*, see 2 SMOLLA, *supra* note 9, §§ 14:159–:168.

24. *Davis v. Passman*, 442 U.S. 228, 230 (1979) (allowing a claim against a congressman for sex discrimination).

25. *Carlson v. Green*, 446 U.S. 14, 15 (1980). In *Carlson*, the Supreme Court again noted that *Bivens* cannot be extended where a federal statutory alternative exists; however, it declined to hold that the Federal Tort Claims Act provided such an alternative. *Id.*

26. *Bush v. Lucas*, 462 U.S. 367, 368–78 (1983) (declining to create “a new judicial remedy . . . paying particular heed . . . to any special factors counselling hesitation before authorizing a new kind of federal litigation” after an aerospace engineer was allegedly demoted and defamed by the director of a federal space flight center).

27. *Chappell v. Wallace*, 462 U.S. 296, 296 (1983). Similarly, in *United States v. Stanley*, the Supreme Court declined to recognize a *Bivens* action for a military veteran who had allegedly been subjected to military experiments involving the use of LSD, reasoning that the disruption caused by “judicial intrusion upon military discipline” was a significant enough factor to counsel hesitation in application of the remedy. *United States v. Stanley*, 483 U.S. 669, 681–83 (1987).

Again, in *Schweiker v. Chilicky*, the Court held that *Bivens* could not be invoked when an administrative program already provided alternative relief.<sup>28</sup> In *Schweiker*, Justice O'Connor made the stringency of limitations on *Bivens* clear, stating, “[o]ur more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts.”<sup>29</sup>

The most decidedly damaging blow to *Bivens* came in 2007 with *Wilkie v. Robbins*, where the Supreme Court denied a *Bivens* remedy to a plaintiff alleging violation of his Fifth Amendment right to due process.<sup>30</sup> In *Wilkie*, government officials continuously harassed the plaintiff in an attempt to coerce him into providing an easement across his property.<sup>31</sup> Despite the clear violations alleged and the lack of alternative remedies, the Court emphasized the disfavor of *Bivens* in recent years and explained, “Congress is in a far better position than a court to evaluate the impact of a new species of litigation.”<sup>32</sup>

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28. *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (finding an administration program providing for the review of termination of social security disability benefits constituted an “alternative remedy”).

29. *Id.* at 421; *see also* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001). In *Malesko*, the plaintiff, a federal prison inmate completing his sentence in a halfway house, was forced to take five flights of stairs up to his room despite a known heart condition for which he had approval to use the elevator. *Id.* at 64–65. After suffering a heart attack, he sued the employees of the correctional facility under *Bivens*. *Id.* However, the Court refused to let the action go forward noting that “[s]ince *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants.” *Id.* at 68. In *Ashcroft v. Iqbal*, the Court ultimately held on the sufficiency of the pleadings and did not deny a *Bivens* claim outright; however, the Court noted that “[b]ecause implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability to any new context or new category of defendants.” *Ashcroft*, 556 U.S. at 675 (quoting *Malesko*, 534 U.S. at 68).

30. *Wilkie v. Robbins*, 551 U.S. 537, 561–62 (2007). In *Wilkie*, the government harassed the plaintiff, Robbins, after discovering that it had failed to record an easement prior to transfer of the land, and the new owner—Robbins—refused to re-grant the easement. *Id.* at 541–43. Robbins sued under *Bivens*, asserting a Fifth Amendment claim of retaliation by the government. *Id.* at 546. In rejecting the plaintiff’s claim, the Court noted that an action under *Bivens* is “not an automatic entitlement” and that “in most instances [the court has] found a *Bivens* remedy unjustified.” *Id.* at 550. Ultimately, the Court’s decision rested on the fact that the government is bound to “drive a hard bargain” when negotiating property claims and that allowing litigation for such an unclear constitutional claim as retaliation would endanger the government’s resources and discretion. *Id.* at 558–63. Justice Souter reasoned, “at this high level of generality, a *Bivens* action to redress retaliation against those who resist Government impositions on their property rights would invite claims in every sphere of legitimate governmental action affecting property interests.” *Id.* at 561. He went on to say that “any damages remedy for actions by Government employees who push too hard for the Government’s benefit may come better, if at all, through legislation.” *Id.* at 562.

31. *Id.* at 561–62.

32. *Id.* at 562 (quoting *Bush v. Lucas*, 462 U.S. 367, 389 (1983)).

Most recently, in the 2012 case *Minneci v. Pollard*, the Supreme Court denied a prisoner's Eighth Amendment claim of cruel and unusual punishment when a federal prison guard allegedly denied him necessary medical care.<sup>33</sup> The Court, applying *Wilkie*, found that because a private company ran the federal prison, the plaintiff could sue the guard and the company as private defendants under state tort law.<sup>34</sup> Thus, an "alternative, existing process" provided protection for the constitutional rights at stake, making *Bivens* an unnecessary and inappropriate form of redress.<sup>35</sup>

### *C. A Recent Development: Bivens And Torture*

In recent years, courts have refused to recognize a *Bivens* claim for foreign citizens who have been mistreated or tortured while detained by U.S. officials, finding that the "special factors" of foreign policy, national security, and military autonomy counsel hesitation.<sup>36</sup> In *Arar v. Ashcroft*, the plaintiff—a dual citizen of Canada and Syria—was detained and mistreated by U.S. officials and then removed to Syria, where he was interrogated and tortured by the Syrian government.<sup>37</sup> In denying a *Bivens* remedy, the Court held that "in the context of extraordinary rendition, hesitation is warranted by special factors"<sup>38</sup> and that "when a case presents the intractable 'special factors' apparent here, it is for . . . the elected members of Congress—and not for us as judges—to decide whether an individual may seek

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33. *Minneci v. Pollard*, 132 S. Ct. 617, 620, 623 (2012).

34. *Id.* at 623–26.

35. *Id.*

36. *See* *Ali v. Rumsfeld*, 649 F.3d 762, 768 (D.C. Cir. 2011); *Arar v. Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009). *But see* *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1025 (N.D. Cal. 2009), *rev'd*, 678 F.3d 748 (9th Cir. 2012) (holding that *Bivens* did not preclude a remedy for an American citizen detained in the United States because "special factors [do not] counsel hesitation where there is no authority evidencing a remedial scheme for designation or treatment of an American citizen residing in America as an enemy combatant").

37. *Arar*, 585 F.3d at 565–66. The facts of *Arar* are all too chilling: after arrival in New York's John F. Kennedy Airport, Arar was interrogated for several days and was ultimately banned from the United States for five years because the government felt his association with a known terrorist categorized him as a "member of a terrorist organization." *Id.* at 566. Despite his request to be removed to Canada, where he worked and lived, the government removed him to Syria, where he was interrogated under torture for over a year. *Id.* Over the course of that year, Syrian officials beat Arar with an electric cable and confined him in an underground cell that only measured six feet by three feet. *Id.*

38. *Id.* at 563.

compensation from government officers and employees . . . for a constitutional violation.”<sup>39</sup>

In *Ali v. Rumsfeld*, nine plaintiffs, including five Iraqi citizens and four Afghani citizens, sued Secretary of Defense Rumsfeld and others for violation of due process under the Fifth Amendment and for violation of the prohibition against cruel and unusual punishment under the Eighth Amendment.<sup>40</sup> The nine men had been detained and tortured at the Abu Ghraib and Bagram detention facilities in Iraq for periods ranging from a few weeks to over six months.<sup>41</sup> Despite the horrific violations alleged by the plaintiffs’ complaint—including physical, psychological, and sexual abuse—the Court denied a *Bivens* remedy due to concern over special factors, observing that “allowing a *Bivens* action to be brought against American military officials engaged in war would disrupt and hinder the ability of our armed forces ‘to act decisively and without hesitation in defense of our liberty and national interests.’”<sup>42</sup>

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39. *Id.* at 565. In analyzing “special factors” under *Bivens* case law, the court concluded that: (1) special factors are limited to factors that “provoke ‘hesitation’” and do not include “countervailing factors,”; and (2) that the standard for what constitutes a special factor counseling hesitation is “remarkably low,” as “[h]esitation is a pause, not a full stop . . . and to counsel is not to require.” *Id.* at 573–74 (quoting *United States v. Stanley*, 483 U.S. 669, 683–84 (1987)). Factors that the Court found persuasive included the risk that courts might overstep the limits of their power and intrude into matters of national security and foreign policy; the threat of revealing classified information; and the difficulties associated with proceeding in open court, especially when considering that much of the information at issue cannot be introduced into the public record. *Id.* at 574–77.

40. *Ali*, 649 F.3d at 764–65.

41. *Id.* at 765–66. If the facts of *Arar* are chilling, then the facts of *Ali* are nothing short of atrocious. Each of these nine men suffered extraordinarily inhumane treatment, including repeated beatings; sexual assault; threats of death; deprivation of food, water, sleep, and necessary medical care; and prolonged exposure to extreme temperatures. *Id.* (citing Consolidated Amended Complaint for Declaratory Relief and Damages ¶¶ 17–18, *Ali*, 649 F.3d 762 (Nos. 07–5178, 07–5185, 07–5186, 07–5187)). Arkan Mohammed Ali, an Iraqi citizen held at Abu Ghraib, specifically alleges that “he was beaten to the point of unconsciousness; stabbed and mutilated; stripped naked, hooded and confined in a wooden phone booth-sized box; subjected to prolonged sleep deprivation enforced by beatings; deprived of adequate food and water and subjected to mock execution and death threats.” *Id.* at 765 (citing Consolidated Amended Complaint for Declaratory Relief and Damages, *supra* ¶ 18). Similarly, Najeeb Abbas Ahmed, also held at Abu Ghraib, alleges that

soldiers held a gun to his head, threatened him with death and with life imprisonment . . . , sexually assaulted him, stepped and sat on his body while he was in extreme restraints, humiliated him by chanting racial epithets . . . , held him in an outdoor cage . . . and intentionally deprived him of medical care after he “suffered more than one heart attack and a possible stroke in detention.”

*Id.* (quoting Consolidated Amended Complaint for Declaratory Relief and Damages, *supra* ¶ 21).

42. *Id.* at 773 (quoting *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 105 (D.D.C. 2007),

These recent decisions all clearly restrict the use of *Bivens* in the context of torture; however, the plaintiffs in these unsuccessful torture-based *Bivens* actions share one key characteristic: their citizenship.<sup>43</sup> Until very recently, only non-resident aliens had asserted claims of torture under *Bivens*, and thus limitations on the application of *Bivens* had not yet extended to claims brought by American citizens.<sup>44</sup> As of 2011, however, claims involving American citizens have been asserted.<sup>45</sup>

#### *D. Reshaping Bivens: The Modern Battle Over Two Models*

As is evident from the history of its applications, *Bivens* has undergone significant transformation over the last thirty years. When courts review *Bivens* claims today, they battle two interests: the desire to supply a remedy where rights have been violated and the desire to uphold the limits on *Bivens* delineated by the Supreme Court.<sup>46</sup> Unfortunately, these competing interests have divided the

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*aff'd sub nom*, *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011)). In coming to its conclusion, the court relied heavily on its decisions in *Sanchez-Espinoza* and *Rasul II*, both of which also denied relief under *Bivens* to aliens subject to military abuse overseas. *Id.*; *Rasul v. Myers*, 563 F.3d 527, 530 (D.C. Cir. 2009); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 205 (D.C. Cir. 1985). In *Sanchez-Espinoza*, Nicaraguan citizens sued the President, CIA director, Secretary of State, and Secretary of Defense, alleging that U.S. officials assisted Nicaraguan rebels who engaged in warfare, torture, and rape. *Sanchez-Espinoza*, 770 F.2d at 205. There the lower court followed the Supreme Court's trend in limiting *Bivens*, finding that special factors counseled hesitation because "the danger of foreign citizens' using the courts in [such] situations . . . to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist." *Id.* at 209. In *Rasul II*, four British citizens sued Secretary of Defense Rumsfeld and others after being detained and tortured at Guantanamo Bay. *Rasul*, 563 F.3d at 528. There the D.C. Circuit grounded its holding in government officials' qualified immunity, since the plaintiffs' status as aliens precluded the government from being on notice of any danger to non-citizens' constitutional rights. *Id.* at 530. However, the Court made clear that an alternative basis for precluding the claim could be established by "special factors" which counseled hesitation, including "the danger of obstructing U.S. national security policy." *Id.* at 532 n.5.

43. *Ali*, 649 F.3d at 764; *Arar*, 585 F.3d at 565.

44. See *Vance v. Rumsfeld*, 653 F.3d 591, 594–95 (7th Cir.), *reh'g en banc granted*, *opinion vacated*, (Oct. 28, 2011), and *rev'd*, 701 F.3d 193 (7th Cir. 2012) (rejecting defendant's argument that *Bivens* claims of torture cannot be brought by U.S. citizens).

45. See, e.g., *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012); *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012); *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir.), *cert. denied*, 132 S. Ct. 2751 (2012).

46. For a criticism of this divisive approach, see Brown, *supra* note 14, at 853–54. Brown suggests that *Bivens* decisions fall into two models: the Marbury-rights model, which emphasizes protection of Constitutional rights, and the prudential-deferential model, which emphasizes separation of powers and deference to Congress. *Id.*; see also Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions*,

judiciary, both in general approaches to the *Bivens* analysis and in answering the specific question of whether a *Bivens* remedy is available for American citizens who are allegedly tortured by American military personnel.<sup>47</sup>

## II. ANALYZING THE JUDICIAL SPLIT: DEFERENCE VERSUS INTERVENTION

### A. *The Competing Perspectives*

Almost every case establishing a constitutional claim against a government official comes down to a balancing test: do the interests of the private individual outweigh the interests of the government?<sup>48</sup> And yet, the most recent *Bivens* decisions have arrived at inconsistent conclusions when balancing these interests. In 2011, three courts considered Eighth Amendment *Bivens* claims brought by American citizens against the U.S. military. A Seventh Circuit panel and the District Court for the District of Columbia permitted a *Bivens* remedy for U.S. citizens tortured by U.S. military personnel, whereas the District Court of South Carolina halted *Bivens* actions at the

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*National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195, 203–04 (2010) (suggesting that adherence to either *Bivens* model—categorical deference or interventionism—is flawed and positing an innovation-eliciting approach that would encourage the entities being regulated to work cooperatively to craft remedies for those deprived of constitutional rights).

47. *Vance*, 701 F.3d at 197 (majority opinion); *id.* at 211 (Hamilton, J., dissenting); *Doe*, 683 F.3d at 394; *Lebron*, 670 F.3d at 548.

48. For example, many courts analyzing whether to grant a habeas corpus petition to a person tortured or detained by the U.S. government engage in a balancing test, relying on *Mathews v. Eldridge*, which defined the test as weighing the private interests of the individual against the government's interests. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004); *Al-Marri v. Pucciarelli*, 534 F.3d 213, 263 (4th Cir. 2008), *vacated sub nom.*, *Al-Marri v. Spagone*, 555 U.S. 1220 (2009). In *Hamdi*, the Court applied the *Mathews* balancing test and recognized the strong weight on the private individual's side to be "free from involuntary confinement by his own government without due process of law." *Hamdi*, 542 U.S. at 531.

Courts analyzing *Bivens* claims made by civilians tortured by the U.S. military engage in a similar quasi-balancing test. *Vance*, 701 F.3d at 197 (majority opinion); *id.* at 211 (Wood, J., concurring); *Doe*, 683 F.3d at 394; *Lebron*, 670 F.3d at 548. Those courts do not use the formal structure laid out in *Mathews v. Eldridge*, but instead rely on the framework set out in *Wilkie v. Robbins*, which analyzes: (1) alternative remedies; and (2) special factors. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Nonetheless, they still balance similar considerations, weighing the government's interest in maintaining military discretion and security (special factors) against the individual's interest in maintaining his Eighth Amendment right to be free from cruel and unusual punishment. *Vance*, 701 F.3d at 197 (majority opinion); *id.* at 211 (Wood, J., concurring); *Doe*, 683 F.3d at 394; *Lebron*, 670 F.3d at 548.

summary judgment stage.<sup>49</sup> Those three decisions have all since been appealed and either reversed or affirmed.<sup>50</sup>

First, in January 2012, the Fourth Circuit affirmed the denial of a *Bivens* claim in *Lebron v. Rumsfeld*.<sup>51</sup> Second, in June 2012, the D.C. Circuit reversed the D.C. district court's decision and denied a *Bivens* remedy.<sup>52</sup> And most recently, in November 2012, the Seventh Circuit reheard *Vance v. Rumsfeld* en banc and reversed the panel decision, causing a sharp divide in the court, with the majority denying a *Bivens* remedy for Vance and Ertel, but with four judges firmly disagreeing and instead recommending that the *Bivens* claim go forward.<sup>53</sup>

Those cases share similar facts, and the considerations on both sides of the scale are more or less equitable.<sup>54</sup> And while all three courts ultimately denied the plaintiffs' *Bivens* suits—deferring to the military, Congress, and the government's interest in protecting national security—the dissenting opinions in *Vance* make a strong counterargument for bringing the scale down on the side of personal liberty.<sup>55</sup> How did these judges—when faced with nearly identical facts—come to such different conclusions? They drew their conclusions from inherently and diametrically different beliefs regarding the duty and role of the court.<sup>56</sup> The four judges in *Vance*

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49. *Vance v. Rumsfeld*, 653 F.3d 591, 626 (7th Cir.), *reh'g en banc granted, opinion vacated*, (Oct. 28, 2011), *and rev'd*, 701 F.3d 193 (7th Cir. 2012); *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 100 (D.D.C. 2011), *rev'd*, 683 F.3d 390 (D.C. Cir. 2012); *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787, 800 (D.S.C. 2011), *aff'd*, 670 F.3d 540 (4th Cir.), *cert. denied*, 132 S. Ct. 2751 (2012).

50. *Vance*, 701 F.3d at 197 (majority opinion); *Doe*, 683 F.3d at 394; *Lebron*, 670 F.3d at 548.

51. *Lebron*, 670 F.3d at 548.

52. *Doe*, 683 F.3d at 394.

53. *See generally Vance*, 701 F.3d 193.

54. *Id.* at 197; *id.* at 211 (Wood, J., concurring); *Doe*, 683 F.3d at 394; *Lebron*, 670 F.3d at 548.

55. *Vance*, 701 F.3d at 197 (majority opinion); *id.* at 211 (Hamilton, J., dissenting); *id.* at 205 (Wood, J., concurring); *id.* at 225 (Rovner, J., dissenting); *id.* at 226 (Williams, J., dissenting); *Doe*, 683 F.3d at 394; *Lebron*, 670 F.3d at 548.

56. While the key distinction of these cases comes down to the role of courts, many other considerations arise out of *Bivens* actions that are beyond the scope of this Note. Specifically, even if a court allows a claim to proceed under *Bivens* in theory, surpassing that threshold is only the first step. Qualified immunity then poses a second hurdle, by insulating government officials from liability. Neither *Doe*, *Vance*, nor *Lebron* reached the question of qualified immunity, resolving the case in favor of the defendants on other grounds. *Vance*, 701 F.3d at 205 (majority opinion); *Doe*, 683 F.3d at 397; *Lebron*, 670 F.3d at 556. The 2011 Seventh Circuit panel decision in *Vance* did consider qualified immunity, however, and tackled a number of complicated legal questions, including issues of

who found a *Bivens* remedy was appropriate—Judges Hamilton, Wood, Williams, and Rovner—believe it is the court’s duty to uphold plaintiffs’ constitutional rights and to act assertively in the face of congressional silence.<sup>57</sup> Contrarily, the Fourth Circuit, the D.C. Circuit, and the majority of the Seventh Circuit believe their duty is one of deference—to the military, to the executive branch, and to Congress.<sup>58</sup>

*B. Vance, Doe, And Lebron: Denying Bivens In Cases Of U.S. Citizens Tortured By U.S. Military Personnel*

The leading case on the torture of an American citizen by the U.S. military is *Vance v. Rumsfeld*, a November 7, 2012, Seventh Circuit en banc decision denying recovery under *Bivens*.<sup>59</sup> A few months prior to the Seventh Circuit’s decision, the D.C. Circuit issued its ruling in *Doe v. Rumsfeld*, reversing the lower court and denying a *Bivens* remedy as well.<sup>60</sup>

Both cases presented a similar set of facts, although divergences in their fact patterns warrant a brief review.<sup>61</sup> Like the plaintiffs in

sufficiency of the pleadings, notice to the defendants, supervisory liability, and the existence of precedent clearly establishing “precise constitutional contours applicable to the detention of individuals—citizen and non-citizen alike—seized in a foreign war zone.” *Vance v. Rumsfeld*, 653 F.3d 591, 605–11 (7th Cir.), *reh’g en banc granted, opinion vacated*, (Oct. 28, 2011), *and rev’d*, 701 F.3d 193 (7th Cir. 2012). These broad and complicated issues are not issues that can be taken on in a footnote and are best left to another Note, another time. Compare Denise Gilman, *Calling the United States’ Bluff: How Sovereign Immunity Undermines the United States’ Claim to an Effective Domestic Human Rights System*, 95 GEO. L.J. 591 (2007) (arguing that sovereign immunity, including qualified immunity, should be eliminated when dealing with claims of constitutional violations), with Bardo Fassbender, *Can Victims Sue State Officials for Torture?: Reflections on Rasul v. Myers from the Perspective of International Law*, 6 J. INT’L CRIM. JUST. 347 (2008) (discussing issues raised by the qualified immunity defense in the context of international law).

57. *Vance*, 701 F.3d at 218 (Hamilton, J., dissenting) (noting that “[u]nder the majority holding here . . . U.S. courts are closed to U.S. citizens who are victims of torture by U.S. military personnel [while being open to non-citizens]. The majority thus errs by attributing to Congress an intention to deny U.S. civilians a right that Congress has expressly extended to the rest of the world”).

58. See *Lebron*, 670 F.3d at 549–52. The court relied on policy set forth in *United States v. Gilman*, explaining that “[b]eing judicial requires that we be judicious, and adherence to our constitutional role in this area requires that we await ‘affirmative action by Congress.’ Put simply, creating a cause of action here is ‘more appropriately for those who write the laws, rather than for those who interpret them.’” *Id.* (quoting *United States v. Gilman*, 347 U.S. 507, 513 (1954)).

59. *Vance*, 701 F.3d at 193 (majority opinion).

60. *Doe*, 683 F.3d at 390.

61. See *supra* note 7 and accompanying text.

*Vance*, who went to Iraq as contractors for a private security company, the plaintiff in *Doe*—also an American citizen—traveled to Iraq to work for a private defense contracting firm.<sup>62</sup> However, unlike Vance and Ertel, Doe was a United States Army veteran, and he soon began work as an Arabic translator for the United States Marine Corps Human Exploitation Team, an intelligence unit that gathered information about Iraqi contacts through highly secretive meetings.<sup>63</sup> When Doe attempted to travel home to the United States for annual leave, the Navy Criminal Investigative Service detained him for interrogation.<sup>64</sup> Just as Vance and Ertel had, Doe ultimately found himself at Camp Cropper.<sup>65</sup> There he was held in solitary confinement for three of his nine-month stay and subjected to torture, including exposure to extreme cold and light, sleep deprivation, and repeated choking.<sup>66</sup> Doe was never charged with a crime, and eventually the military released him.<sup>67</sup>

*Lebron v. Rumsfeld* also involved an American citizen alleging torture by the U.S. military.<sup>68</sup> In that case, the Fourth Circuit found the risks to national security constituted “special factors counseling hesitation” and barred the *Bivens* claim.<sup>69</sup> The facts of *Lebron*, while similar to the facts presented in *Vance* and *Doe*, present some key differences. First, the plaintiff in *Lebron*, Padilla, was not captured in a war zone, although his apprehension was during wartime and in

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62. *Doe*, 683 F.3d at 392.

63. *Id.* As part of his work with the Human Exploitation Team, Doe established contact with Iraqi Sheik Abd Al-Sattar Abu Risha and served as a central point of contact between the Sheikh and the Marine Corps. *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 100 (D.D.C. 2011), *rev'd*, 683 F.3d 390 (D.C. Cir. 2012). Doe stated that as a result of communications established by him during the team’s secret meetings with the Sheikh, “the Sheikh pledged to support the United States and ultimately became ‘one of America’s staunchest allies.’” *Id.* at 101.

64. *Doe*, 683 F.3d at 392.

65. *Id.*

66. *Id.*

67. *Id.* The government held two hearings on Doe’s status, but they never gave Doe access to an attorney or to evidence used against him. *Id.* Despite being released and never charged with a crime, the United States military still maintains Doe’s name on a “blacklist” that prevents defense contracting firms from hiring him and on a terrorist “watch” list that makes international travel nearly impossible. *Id.*

68. *Lebron v. Rumsfeld*, 670 F.3d 540, 545 (4th Cir.), *cert denied*, 132 S. Ct. 2751 (2012).

69. *Id.* at 548.

relation to a war—the war on terror.<sup>70</sup> Second, he was held in a facility located in the U.S. rather than one located overseas.<sup>71</sup> Third—and perhaps most significantly—Padilla was ultimately convicted of the terrorist activities for which he was detained—having planned with members of Al Qaeda to detonate bombs within the United States.<sup>72</sup> But the divergences in facts end there, as Padilla, like Vance, Ertel, and Doe, was an American citizen and was similarly treated during his detention.<sup>73</sup>

The opinions in *Vance*, *Doe*, and *Lebron* each rely on three central arguments: (1) *Bivens* precedent disfavors creating new causes of action, especially when related to military conduct; (2) the “special factors” of improper judicial intervention in military affairs and the risk of disclosing state secrets “counsel hesitation”; and (3) the doctrine of separation of powers requires that new causes of action under *Bivens* be left to Congress, especially when Congress has already established a position regarding military torts.<sup>74</sup> All three courts approach each case similarly, using the framework set forth in *Wickle v. Robbins*, which outlines a two-part inquiry, asking (1) whether there are alternative remedies available to the plaintiff and (2) even if no alternative remedies exist, whether “special factors counsel[] hesitation.”<sup>75</sup> This analysis focuses on the second part of that inquiry—whether any special factors counsel hesitation.<sup>76</sup>

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70. *See id.* at 545.

71. *Id.*

72. *Id.* at 544–45. To explain further: Padilla was traveling from Pakistan to Chicago when he was detained by Customs officials in the O’Hare International Airport. *Id.* at 545. He was later transferred to a naval brig in South Carolina, declared an enemy combatant by President George W. Bush, and held incommunicado from legal counsel, family, and friends for over three years. *Id.*; *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1012–14 (N.D. Cal. 2009), *rev’d*, 678 F.3d 748 (9th Cir. 2012). There, he was allegedly interrogated and tortured by U.S. military officials, who deprived him of sleep, shackled him, exposed him to extreme temperatures and lights, engaged in sensory deprivation, denied him access to the Koran and other religious items, denied medical care, and threatened him with death. *Id.* at 1013–14. For further details of this case, see the related decision in *Padilla v. Yoo*, and for information on the complex procedural history of the case, see *Padilla v. Hanft*, which addressed Padilla’s petition for habeas corpus in relation to this same serious of events. *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012); *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

73. *Lebron*, 670 F.3d at 544–45; *Yoo*, 633 F. Supp. 2d at 1012–14.

74. *See generally* *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012); *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012); *Lebron*, 670 F.3d 540.

75. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *Vance*, 701 F.3d at 199; *Doe*, 683 F.3d at 393; *Lebron*, 670 F.3d at 548. The test *Wilkie* set forth provided:

*1. Unfavorable Precedent: A Historical and Comparative Analysis of Bivens Denials*

The *Lebron* and *Doe* courts and the majority in *Vance* all focused on the lack of precedent favoring *Bivens* claims.<sup>77</sup> In their analyses, they found that for decades the Supreme Court has limited the expansion of *Bivens*<sup>78</sup> and that recent decisions from lower courts have also declined to extend *Bivens* beyond the ambit of already recognized contexts.<sup>79</sup> They relied specifically on *Chappell v.*

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In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: “the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.”

*Wilkie*, 551 U.S. at 550 (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

76. Although *Doe*, *Lebron*, and *Vance* acknowledge the “alternative remedies” prong of the *Wilkie* test, all three courts focus their discussion on whether “special factors counsel[] hesitation.” *Vance*, 701 F.3d at 199; *Doe*, 683 F.3d at 393; *Lebron*, 670 F.3d at 548.

77. *Vance*, 701 F.3d at 198–99 (“Whatever presumption in favor of a *Bivens*-like remedy may once have existed has long since been abrogated.”); *Lebron*, 670 F.3d at 547–48; *Doe*, 683 F.3d at 394–96. All three courts emphasized the limited extension of *Bivens* into new contexts, with the *Doe* court explaining:

In the forty-two years since the Supreme Court decided *Bivens*, only twice has it extended *Bivens* remedies into new classes of cases—once in the context of a congressional employee’s employment discrimination due process claim, and once in the context of a prisoner’s claim against prison officials for an Eighth Amendment violation. In 1988, the Supreme Court acknowledged that “[o]ur more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts.” More recently, the Court explained that “[b]ecause implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability to any new context or new category of defendants.”

*Id.* at 394 (alterations in original) (citations omitted).

78. The courts relied on: *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988), where the Supreme Court denied *Bivens* for social security cases; *United States v. Stanley*, 483 U.S. 669 (1987), and *Chappell v. Wallace*, 462 U.S. 296 (1983), where the Court denied *Bivens* remedies for military servicemen; *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009), where the Court emphasized its reluctance to extend *Bivens* “to any new context or new category of defendants”; *Wilkie*, 551 U.S. at 537, where the Court denied an action to a property owner alleging the use of coercive tactics by the government in their obtaining of an easement; *Lucas*, 462 U.S. at 367, which denied a First Amendment action for a federal employee; *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 61 (2001), which emphasized the Court’s reluctance to expand *Bivens* into new legal territory; and *Minnecci v. Pollard*, 132 S. Ct. 617, 618 (2012), which most recently denied an Eighth Amendment claim against employees of a privately-operated federal prison. See generally *Vance*, 701 F.3d 193; *Doe*, 683 F.3d 390; *Lebron*, 670 F.3d 540; discussion *supra* Part I.

79. *Vance*, 701 F.3d at 195 (“This appeal presents the question whether the federal judiciary should create a right of action for damages against soldiers . . . who abusively interrogate or mistreat military

*Wallace*, *United States v. Stanley*, *Arar v. Ashcroft*, and *Ali v. Rumsfeld*, all of which denied *Bivens* claims to plaintiffs alleging misconduct or torture by the military because the risks of intervening in military and foreign policy and of exposing national secrets constituted special factors counseling hesitation.<sup>80</sup> In particular, all three courts emphasized the position of *Stanley*—that “[i]n the military context, the Court has explained that ‘the insistence . . . with which the Constitution confers authority over the Army, Navy, and militia upon political branches . . . counsels hesitation in our creation of damages remedies in this field.’”<sup>81</sup>

Further, the *Vance* majority and the *Doe* court dismissed concerns over citizenship, arguing that the foreign citizenship of the plaintiffs in *Arar* and *Ali* (as opposed to the American citizenship of the plaintiffs in *Vance*) was not a distinguishing factor among the cases where precedent established that prohibiting claims by foreign citizens would negatively affect diplomacy, foreign policy, and national security.<sup>82</sup> As explained by the *Vance* majority, “[w]e do not think that the plaintiffs’ citizenship is dispositive one way or the other. *Wallace* and *Stanley* also were U.S. Citizens. The Supreme Court has never suggested that citizenship matters to a claim under *Bivens*.”<sup>83</sup> Thus, despite factual differences between the citizenship and civilian statuses of the plaintiffs in *Vance*, *Doe*, and *Lebron* and

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prisoners . . . . Both other courts of appeals that have resolved this question have given a negative answer . . . . We agree with those decisions.” (citing *Lebron*, 670 F.3d 540; *Doe*, 683 F.3d 390; *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011)).

80. *Vance*, 701 F.3d at 198–99 (“The Supreme Court has never created or even favorably mentioned the possibility of a non-statutory right of action for damages against military personnel, and it has twice held that it would be inappropriate to create such a claim for damages.” (citing *Chappell*, 462 U.S. at 296; *Stanley*, 483 U.S. at 678)); *Lebron*, 670 F.3d at 547–48; *Doe*, 683 F.3d at 394–96; see also *Arar v. Ashcroft*, 585 F.3d 559, 574–77 (2d Cir. 2009); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 103–07 (D.D.C. 2007), *aff’d sub nom*, *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011).

81. *Doe*, 683 F.3d at 394 (quoting *Stanley*, 483 U.S. at 682); *Vance*, 701 F.3d at 199–200; *Lebron*, 670 F.3d at 548. In *Stanley*, the Supreme Court—relying on the *Feres* doctrine—held that a *Bivens* remedy could not be available for injuries arising “out of or . . . in the course of activity incident to service.” *Stanley*, 483 U.S. at 673 (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)).

82. *Vance*, 701 F.3d at 203; *Doe*, 683 F.3d at 394–95.

83. *Vance*, 701 F.3d at 203 (internal citation omitted). The majority continued, “It would be offensive to our allies, and it should be offensive to our own principles of equal treatment, to declare that this nation systematically favors U.S. citizens over Canadians, British, Iraqis, and our other allies when redressing injuries caused by our military or intelligence operations.” *Id.*

the statuses of the plaintiffs in *Arar*, *Ali*, *Chappell*, and *Stanley*, the *Doe*, *Vance*, and *Lebron* courts found such precedent—which discourages application of *Bivens* in the military context—persuasive.

2. “Special Factors”: Risks to Military and State Secrets Favor Dismissing a *Bivens* Claim

The opinions in *Lebron*, *Doe*, and *Vance* ultimately rested on the finding that “special factors counsel[] hesitation,” including (1) the impact of judicial intervention in military and foreign affairs and (2) the risk of disclosing state secrets.<sup>84</sup>

a. *The Impact of Judicial Intervention in Military and Foreign Affairs*

All three courts found that the risk of the judiciary intervening in national security matters and intruding upon the authority of the Executive branch in carrying out military action should counsel hesitation in permitting a *Bivens* claim.<sup>85</sup> The concern of the courts in negatively impacting the military is two-fold.

First, military affairs are not a “core area[] of judicial competence”; therefore, judges may be prone to make mistakes or venture upon policy decisions outside the ambit of the judiciary’s authority.<sup>86</sup> Second, by delving into such affairs, the judiciary would likely disrupt the military chain of command, distract its officers

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84. *Id.* at 199–203; *Doe*, 683 F.3d at 394–96; *Lebron*, 670 F.3d at 551–55.

85. *Vance*, 701 F.3d at 200–03; *Doe*, 683 F.3d at 394–96; *Lebron*, 670 F.3d at 551–55. The *Doe* court recognized several special factors, including the

importance of “[p]reserving the constitutionally prescribed balance of powers”; the sensitive nature of the allegations involved in detainee cases; the need to review the military command structure in order to determine liability; and administrability concerns regarding the need to require current and former officials to testify about the rationale for the policy at issue.

*Doe*, 683 F.3d at 395 (quoting *Lebron*, 670 F.3d at 544–54).

86. *Lebron*, 670 F.3d at 552; see also *Vance*, 701 F.3d at 200–01 (“If the judiciary never erred, damages awards against soldiers and their civilian supervisors would be all gain and no loss. But judges make mistakes: They may lack vital knowledge, may accept claims that should be rejected on the facts or the law, or may award excessive damages on justified claims or create supervisory liability when they shouldn’t.”).

from their duties, and misdirect limited resources into defending and managing such litigation.<sup>87</sup> The majority in *Vance* specifically expressed concern for the distraction of cabinet officials, explaining, “[a] *Bivens*-like remedy could cause other problems, including diverting Cabinet officers’ time from management of public affairs to the defense of their bank accounts.”<sup>88</sup>

The courts also drew support from case law warning of the dangers of judicial interventionism.<sup>89</sup> In particular, the courts in *Doe* and *Vance* both heeded the Supreme Court’s advice in its 1981 opinion, *Haig v. Agee*, which cautioned that “‘matters intimately related to . . . national security are rarely proper subjects for judicial intervention.’”<sup>90</sup>

#### *b. The Risk of Disclosing State Secrets*

The *Doe*, *Vance*, and *Lebron* courts also found that the risk of disclosing state secrets constituted a “special facto[r] that counsel[s]

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87. *Vance*, 701 F.3d at 200–01; *Lebron*, 670 F.3d at 553; *Doe*, 683 F.3d. at 395–96. *Doe* summarized these concerns:

[Allowing] the complaint [to proceed] would require a court to delve into the military’s policies regarding the designation of detainees as “security internees” or “enemy combatants,” as well as policies governing interrogation techniques.

Doe’s allegations against Secretary Rumsfeld implicate the military chain of command and the discretion Secretary Rumsfeld and other top officials gave to NCIS agents to detain and question potential enemy combatants. The allegations raise questions regarding Secretary Rumsfeld’s personal control over the treatment and release of specific detainees. Litigation of Doe’s case would require testimony from top military officials as well as forces on the ground, which would detract focus, resources, and personnel from the mission in Iraq. And . . . allowing such an action would hinder our troops from acting decisively in our nation’s interest for fear of judicial review of every detention and interrogation.

*Id.*

88. *Vance*, 701 F.3d at 202. In response to this reasoning, Judge Wood explained in his concurrence that he had no concern that “*Bivens* liability would cause Cabinet Secretaries to carry out their responsibilities with one eye on their wallets, rather than for the greater good of their department and the country” and instead found such a suggestion by the majority “disrespectful of both the dedication of those who serve in government and the serious interests that the plaintiffs are raising.” *Id.* at 210 (Wood, J., concurring).

89. *Vance*, 701 F.3d at 199 (majority opinion) (“[C]ivilian courts should not interfere with the military chain of command—not, that is, without statutory authority.” (citing *Chappell v. Wallace*, 462 U.S. 296, 300 (1983))); *Doe*, 683 F.3d at 394–96; *Lebron*, 670 F.3d at 553–55.

90. *Vance*, 701 F.3d at 200 (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)); *Doe*, 683 F.3d at 395 (quoting *Haig*, 453 U.S. at 292).

hesitation.”<sup>91</sup> Specifically, military officials would be required to testify “concerning the details of their military commands” and to “convince a civilian court of the wisdom of a wide range of military and disciplinary decisions.”<sup>92</sup> Further, by requiring discovery, courts risk exposing state secrets and compromising the safety of military operations.<sup>93</sup> And lastly, to investigate the plaintiffs’ complaints, the military would have to explain its rationale for its detainee policy and thus reveal military intelligence and tactics.<sup>94</sup>

### 3. Deference to the Legislature: Who Should Extend Bivens?

A final and key consideration discussed in each opinion was whether deference to Congress was appropriate.<sup>95</sup> All three courts chose to defer to Congress because: (1) the doctrine of separation of powers requires judicial restraint; and (2) Congress has already established some legislation regarding military torts and seemingly intentionally omitted the provision of other statutory relief.<sup>96</sup> First, the Constitution is explicit in its conference of decision-making powers related to the military on Congress, as it grants Congress both the enumerated powers to declare war and to establish armed forces.<sup>97</sup> The *Lebron* court again drew support for this position from precedent, citing *Chappell v. Wallace* and *United States v. Stanley*,

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91. *Vance*, 701 F.3d at 200 (alteration in original) (internal quotation marks omitted); *Lebron*, 670 F.3d at 553–55; *Doe*, 683 F.3d at 394–96.

92. *Lebron*, 670 F.3d at 553 (quoting *United States v. Stanley*, 483 U.S. 669, 682–83 (1987); *United States v. Shearer*, 473 U.S. 52, 58 (1985)).

93. *Vance*, 701 F.3d. at 202–03 (noting that “a court would find it challenging to prevent the disclosure of secret information [and that] anyone, whether or not a *bona fide* victim of military misconduct, could sue and then use graymail (the threat of disclosing secrets) to extract an undeserved settlement”).

94. *Lebron*, 670 F.3d at 553. The *Lebron* court expounded upon these concerns:

Any defense to [*Bivens*] claims—which effectively challenge the whole of the government’s detainee policy—could require current and former officials, both military and civilian, to testify as to the rationale for that policy, the global nature of the terrorist threat it was designed to combat, the specific intelligence that led to the application of that policy to [the plaintiff], where and from whom that intelligence was obtained, what specific military orders were given in the chain of command, and how those orders were carried out.

*Id.*

95. *Vance*, 701 F.3d at 199–203; *Doe*, 683 F.3d. at 396; *Lebron*, 670 F.3d at 548–52.

96. *Vance*, 701 F.3d at 199–203; *Doe*, 683 F.3d. at 396–97; *Lebron*, 670 F.3d at 548–52.

97. *Lebron*, 670 F.3d at 548–49.

opinions that both emphasize Congress's control over military affairs as delegated by the Constitution and recognize Congress's control as "explicit and not merely derivative of other powers."<sup>98</sup>

Second, all three courts found that Congress has already indirectly spoken to the issue of compensating victims of military misconduct, thus deference to Congress's implicit position is warranted.<sup>99</sup> In support of this view, they cited Congress's action in creating the Military Claims Act, which provides up to \$100,000 from public funds to any person injured by the military; the Foreign Claims Act, which also provides compensation for those injured by the military in a foreign nation; and the Detainee Treatment Act and Military Commissions Act, both of which prohibit torture by the U.S. military.<sup>100</sup> Further, the *Doe* and *Vance* courts posited that Congress had intentionally omitted a cause of action for American citizens tortured by the U.S. government when it created the Alien Tort Act, the Detainee Treatment Act, and the Torture Victim Protection Act.<sup>101</sup> And, as precedent has mandated, when "Congress has intentionally withheld a remedy . . . we must most refrain from providing one."<sup>102</sup>

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98. *Id.* The *Lebron* court also relied on *Rostker v. Goldberg*, in which the Court emphasized separation of powers concerns when military control is at issue, noting that "in no other area has the Court accorded Congress greater deference." *Id.* at 549 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981)). The court in *Vance* also drew support from *Chappell* and *Stanley*, finding that "Congress and the Commander-in-Chief, . . . rather than civilian judges, ought to make the essential tradeoffs, not only because the constitutional authority to do so rests with the political branches of government but also because that's where the expertise lies." *Vance*, 701 F.3d at 200 (citing *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983)).

99. *Vance*, 701 F.3d at 199–203; *Doe*, 683 F.3d. at 396; *Lebron*, 670 F.3d at 548–52.

100. 10 U.S.C. § 2733 (2006); *id.* § 2734; 42 U.S.C. §§ 2000dd–2000dd-1; Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified 28 U.S.C. § 1350 note); *Vance*, 701 F.3d at 200–01; *Lebron*, 670 F.3d at 551–52 ("Congress was no idle bystander to this debate. Indeed, it devoted extensive attention to the precise questions [the plaintiff] presents pertaining to the treatment of detainees and to the legitimacy of interrogation measures.").

101. *Vance*, 701 F.3d at 201–02; *Doe*, 683 F.3d. at 397. The court in *Doe* explained, "Congress [has never] extended a cause of action for detainees to sue federal military and government officials in federal court for their treatment while in detention. It would be inappropriate for this Court to presume to supplant Congress's judgment in a field so decidedly entrusted to its purview." *Id.*

102. *Doe*, 683 F.3d at 397 (quoting *Wilson v. Libby*, 535 F.3d 697, 704 (D.C. Cir. 2008)).

*C. Disagreement Among The Seventh Circuit: A Case For Bivens For U.S. Citizens Tortured By The Military*

While the courts in *Vance*, *Doe*, and *Lebron* ultimately found that the considerations weighed in favor of denying a *Bivens* action, it is easy to imagine that other courts might tip the scales in the other direction. In fact, in *Vance* itself the outcome was not unanimous.<sup>103</sup> Judge Wood wrote a concurrence in favor of a *Bivens* remedy, agreeing only with the majority insofar as it granted Secretary Rumsfeld qualified immunity, and Judges Hamilton, Williams, and Rovner all wrote vehement dissents challenging the majority's interpretation of the "special factors" requirement.<sup>104</sup>

The judges grounded their disagreement with the *Vance* majority on four principle arguments: (1) precedent—including cases cited by the majority—strongly favors a *Bivens* remedy in cases concerning the torture of U.S. citizens by the U.S. military; (2) Congress's past legislation has impliedly recognized a *Bivens* cause of action for such plaintiffs; (3) the American citizenship of the plaintiffs is a distinguishing factor in such claims; and (4) policy concerns over the implications of torture mandate a remedy.<sup>105</sup>

*1. Precedent: A Favorable History*

Judge Hamilton, who authored the most extensive dissent, found support for a *Bivens* remedy in precedent.<sup>106</sup> First, courts have repeatedly made *Bivens* available to prisoners who are mistreated in federal prison, allowing Eighth Amendment claims alleging cruel and unusual punishment.<sup>107</sup> Second, civilians in the United States may

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103. *Vance*, 701 F.3d at 211–24 (Hamilton, J., dissenting); *id.* at 205–11 (Wood, J., concurring); *id.* at 225 (Rovner, J., dissenting); *id.* at 226 (Williams, J., dissenting).

104. *Id.* at 211–24 (Hamilton, J., dissenting); *id.* at 205–11 (Wood, J., concurring); *id.* at 225 (Rovner, J., dissenting); *id.* at 226 (Williams, J., dissenting).

105. *Id.* at 211–24 (Hamilton, J., dissenting); *id.* at 205–11 (Wood, J., concurring); *id.* at 225 (Rovner, J., dissenting); *id.* at 226 (Williams, J., dissenting).

106. *Id.* at 211–17 (Hamilton, J., dissenting).

107. *Id.* at 213. Judge Hamilton relied on *Carlson v. Green*, where the Supreme Court allowed a deceased prisoner's representative to state a claim for violation of the Eighth Amendment after prison officials deprived the petitioner of necessary medical care. *Id.* (citing *Carlson v. Green*, 446 U.S. 14 (1980)). He also found support in subsequent cases, such as *Bagola v. Kindt*, permitting a claim for a

state a *Bivens* claim against military personnel who violate their constitutional rights, typically in cases of unreasonable searches or the use of excessive force under the Fourth and Fifth Amendments.<sup>108</sup> Third, the Supreme Court made clear in *Reid v. Covert* that civilians carry their constitutional rights with them when they travel abroad.<sup>109</sup> And fourth, courts continually permit suits against Cabinet officials, such as Secretary Rumsfeld, despite concerns over holding such high-level officials accountable.<sup>110</sup> Judge Williams similarly found support in precedent, noting that judicial interference with military affairs has historically been permitted where constitutional rights are at stake.<sup>111</sup>

Judges Hamilton and Williams also disagreed with the majority's characterization of *Chappell v. Wallace* and *United States v. Stanley*, finding those cases provided support—rather than disapproval—for a *Bivens* remedy in Vance and Ertel's case.<sup>112</sup> In particular, both *Chappell* and *Stanley* based their holdings on the *Feres* doctrine, which prohibits *military* personnel from suing their superiors for injuries “incident to [military] service.”<sup>113</sup> However, Vance and Ertel were mere *civilians*, not members of the military, and thus the *Feres*

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prisoner injured during a prison work program, and *Del Raine v. Williford*, allowing a *Bivens* action by a prisoner forced to sleep in a bitterly cold cell. *Id.* (citing *Bagola v. Kindt*, 131 F.3d 632 (7th Cir. 1997); *Del Raine v. Williford*, 32 F.3d 1024 (7th Cir. 1994)).

108. *Id.* (relying on *Saucier v. Katz*, 533 U.S. 194 (2001) a Supreme Court case recognizing a Fourth Amendment claim after a military police officer used excessive force on a civilian, and noting several circuit court cases extending the remedy).

109. *Reid v. Covert*, 354 U.S. 1 (1957); *Vance*, 701 F.3d at 214. In *Reid*, Justice Black affirmed citizens' rights abroad, stating, “[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.” *Reid*, 354 U.S. at 5–6.

110. *Vance*, 701 F.3d at 214–15.

111. *Id.* at 228–29 (Williams, J., dissenting). In his dissent, Williams relied on several Supreme Court cases recognizing the judiciary's place in restraining the military when necessary, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Mitchell v. Forsyth*, 472 U.S. 511 (1985), *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), and *Boumediene v. Bush*, 553 U.S. 723 (2008). *Id.* at 229. He emphasized, “[e]xecutive power to protect national security or conduct foreign affairs does not deprive the judiciary of its authority to check abuses that violate individual rights.” *Id.*

112. *Id.* at 215–16 (Hamilton, J., dissenting); *id.* at 226–28 (Williams, J., dissenting).

113. *Id.* at 215–16 (Hamilton, J., dissenting) (noting that “[n]othing in *Chappell* hinted that its reasoning would apply to civilians whose constitutional rights were violated by military personnel, and it is well established that the *Feres* doctrine does not apply to claims by civilians”).

doctrine would not extend to the circumstances of their detention.<sup>114</sup>

## *2. Congress's Implied Recognition of Bivens for American Victims of Torture: A Look at Existing Legislation*

In addition to finding support in case law, Judges Hamilton, Wood, Williams, and Rovner found support in Congressional action.<sup>115</sup> First, the Detainee Treatment Act provides an affirmative “good faith” defense against civil claims for government officials who believed their actions were legal and authorized.<sup>116</sup> And while Congress did not explicitly state what potential civil liability it had in mind when creating that defense, only one—the civil claim against federal officials that had existed for forty years—was clearly implied: *Bivens*.<sup>117</sup>

Second, the dissenting judges also examined the Alien Tort Statute and the Torture Victim Protection Act, both of which provide a cause of action for aliens tortured by another foreign government.<sup>118</sup> After examining those acts, they found that it would be irreconcilable, unsettling, and even hypocritical for Congress to provide a statutory remedy to aliens who are tortured by either the U.S. or their own

114. *Id.* at 215–16; *id.* at 226–28 (Williams, J., dissenting) (“This court’s decision leaves unexplained how or why a suit by an American civilian, with no connection to the chain of command, would interfere with military discipline in the manner anticipated by *Chappell* and *Stanley*.”).

115. *Id.* at 205–11 (Wood, J., concurring); *id.* at 211–24 (Hamilton, J., dissenting); *id.* at 225–26 (Rovner, J., dissenting); *id.* at 226–32 (Williams, J., dissenting).

116. 42 U.S.C. § 2000dd (2006); *Vance*, 701 F.3d at 219 (Hamilton, J., dissenting).

117. *Vance*, 701 F.3d at 220. In support of his reading of the Detainee Treatment Act to imply a *Bivens* cause of action, Judge Hamilton explained:

Young doctors are taught, “When you hear hoofbeats, think horses, not zebras.” The point is that when trying to explain an unknown phenomenon, it’s usually sensible to look first to the familiar and only later to the exotic. That reasoning applies here. When Congress created the limited good-faith immunity from civil claims by aliens in the Detainee Treatment Act, *Bivens* had been a major part of U.S. law for 40 years.

*Id.* Judge Wood similarly found that Congress could only have been referring to *Bivens* when it provided a “good faith” defense to federal officials, as it had done in the earlier Westfall Act of 1988. *Id.* at 208 (Wood, J., concurring).

118. 28 U.S.C. § 1350; Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note) (“An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture . . . or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages . . . .”); *Vance*, 701 F.3d at 209; *id.* at 218 (Hamilton, J., dissenting).

government while simultaneously precluding any remedy for its own citizens.<sup>119</sup>

Third, and finally, Judges Wood and Hamilton found that even the State Department took the position that Congress intended to provide a *Bivens* remedy to victims of torture by the U.S. military. That is, when the United Nations questioned the United States' compliance with international treaties against torture, the U.S. assured the United Nations that a *Bivens* remedy was available to those tortured by the U.S. military.<sup>120</sup>

### 3. American Citizenship: A Key Factor in the Provision of a *Bivens* Remedy

Judges Wood, Hamilton, Rovner, and Williams all disagreed with the majority's view that the plaintiffs' American citizenship was not a dispositive factor.<sup>121</sup> The majority argued that it would be "offensive to our allies" to provide a *Bivens* cause of action to U.S. citizens alone without recognizing foreign citizens as well.<sup>122</sup> However, as explained by Judge Hamilton, although prohibitions

119. *Vance*, 701 F.3d at 218–19. Judge Hamilton continued:

The majority thus errs by attributing to Congress an intention to deny U.S. civilians a right that Congress has expressly extended to the rest of the world. A victim of torture by the Syrian military, for example, can sue in a U.S. court, but a U.S. citizen tortured by the U.S. military cannot. That conclusion should be deeply troubling, to put it mildly. We should not attribute that improbable view to Congress without a far more compelling basis than the majority offers.

To illustrate this anomaly further, suppose another country has enacted its own law identical to the U.S. Torture Victim Protection Act. Under the majority's reasoning, there are no "adequate and available remedies in the place" where the conduct occurred (a U.S. military base). If Mr. Rumsfeld could be found visiting a country with its own TVPA (so he could be served with process), plaintiffs Vance and Ertel could sue him in that country under its TVPA because U.S. law would provide no remedy. Surely the Congress that enacted the Torture Victim Protection Act would rather have such claims against U.S. officials heard in U.S. courts.

*Id.*

120. *Id.* at 208 (Wood, J., concurring); *id.* at 219 (Hamilton, J., dissenting); *United States Written Response to Questions Asked by the Committee Against Torture*, U.S. DEP'T ST. (Apr. 28, 2006), <http://www.state.gov/j/drl/rls/68554.htm>. The State Department wrote, "U.S. law provides various avenues for seeking redress, including . . . suing federal officials directly for damages under provisions of the U.S. Constitution for 'constitutional torts' [as established by] *Bivens v. Six Unknown Named Agents*." *Id.*

121. *Vance*, 701 F.3d at 209 (Wood, J., concurring); *id.* at 221–22 (Hamilton, J., dissenting).

122. *Id.* at 203 (majority opinion).

against torture “reflect basic and universal human rights” granted to all, a distinction based on citizenship is prudent where the current system leaves American citizens without a remedy.<sup>123</sup> Indeed, “[i]f the U.S. government harms citizens of other nations, they can turn to their home governments to stand up for their rights. That is not true for these U.S. citizens alleging torture by their own government. No other government can stand up for them.”<sup>124</sup>

Further, statutes and previous case law have repeatedly made distinctions based on citizenship. First, both the Torture Victim Protection Act and the Alien Tort Statute provide remedies for *aliens* only, and thus distinguish statutory remedies based on foreign citizenship.<sup>125</sup> Second, in *Johnson v. Eisentrager* and *Munaf v. Geren*, the Supreme Court distinguished between citizens and aliens when addressing the provision of civilian courts for U.S. military detention overseas.<sup>126</sup> Both cases insisted that aliens in military custody overseas could not seek habeas corpus relief in U.S. civilian courts but recognized that Americans in custody should be entitled to such relief as citizens.<sup>127</sup>

Last, Judges Hamilton and Williams noted that a further distinction among citizens—between enemy combatants and ordinary civilians—may be pertinent.<sup>128</sup> In particular, Judge Williams challenged the majority’s misplaced reliance on *Lebron v. Rumsfeld*, where the plaintiff—although an American citizen—was a member of al Qaeda, had been designated an enemy combatant by the

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123. *Id.* at 221 (Hamilton, J., dissenting).

124. *Id.*

125. *Id.* at 209 (Wood, J., concurring). Judge Wood explained the discrepancy in the law as such: [I]f it were true that there is no *Bivens* theory under which a U.S. citizen may sue an official of the U.S. government (including a military official) who tortures that citizen on foreign land under the control of the United States (including its military), then U.S. citizens will be singled out as the only ones *without* a remedy under U.S. law. That is because existing law permits a U.S. citizen to sue a foreign official, and an alien can sue anyone who has committed a tort in violation of the law of nations. Only by acknowledging the *Bivens* remedy is it possible to avoid treating U.S. citizens worse than we treat others.

*Id.*

126. *Id.* at 221–22 (Hamilton, J., dissenting) (citing *Munaf v. Geren*, 553 U.S. 674, 685–88 (2008); *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950)); *see also* *Rasul v. Bush*, 542 U.S. 466 (2004).

127. *Vance*, 701 F.3d at 221–22 (citing *Munaf*, 553 U.S. at 685–88; *Eisentrager*, 339 U.S. at 785).

128. *Id.* at 221; *id.* at 230 (Williams, J., dissenting).

President, and later was convicted of treason.<sup>129</sup> He distinguished the plaintiffs in *Vance*, who were not designated enemy combatants but were merely ordinary citizens.<sup>130</sup> Judge Hamilton agreed, explaining,

U.S. courts have been reluctant to extend constitutional protections to [enemy combatants]. . . . [but] [w]e do not need to decide those difficult issues in this case, which was brought not by members of al Qaeda or designated enemy combatants, but by U.S. citizens working for military contractors and trying to help the FBI. . . .<sup>131</sup>

#### 4. Policy Concerns: Upholding the Duty of the Court

Ultimately, the dissenting judges in *Vance* concluded that while some factors may counsel hesitation, those factors do not outweigh the risk to the individual liberty of American citizens.<sup>132</sup> A policy argument—the interest in safeguarding constitutional liberties—underscored the judges’ positions.<sup>133</sup> Putting it plainly, Judge Williams stated:

Every member of this court recognizes that the job of the military is challenging, dangerous, and critical to our national security. For these reasons and more, members of the armed forces enjoy unparalleled respect in our society. But this respect does not put the military’s highest officers beyond the reach of the Constitution or adjudication by Article III courts. We would abdicate our duty if we permit *Bivens* to become a

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129. *Id.* at 230.

130. *Id.*

131. *Id.* at 221 (Hamilton, J., dissenting). Judge Hamilton continued, “[t]he enemy combatant cases are difficult, but we should not let those difficulties lead us to turn our backs on legitimate constitutional claims of U.S. citizens.” *Id.*

132. *Id.* at 211–24; *id.* at 205–11 (Wood, J., concurring); *id.* at 225 (Rovner, J., dissenting); *id.* at 226 (Williams, J., dissenting). Judge Wood emphasized the high stakes of the conduct at hand stating, “[c]ivilized societies do not condone torture committed by governmental agents, no matter what job title the agent holds.” *Id.* at 205 (Wood, J., concurring). “I am confident that every member of this court would agree with that proposition.” *Id.* “This is therefore a case of system failure . . . .” *Id.*

133. *Vance*, 701 F.3d at 211–24 (Hamilton, J., dissenting); *id.* at 205–11 (Wood, J., concurring); *id.* at 225 (Rovner, J., dissenting); *id.* at 226 (Williams, J., dissenting).

mirage. . . [W]e have an independent obligation to individual citizens and to the Constitution to apply the precedent even in difficult cases. Otherwise we risk creating a doctrine of constitutional triviality where private actions are permitted only if they cannot possibly offend anyone anywhere.<sup>134</sup>

Ultimately, the opinions in *Lebron, Doe*, and the majority opinion in *Vance* held on ideological grounds diametrically opposed to those of *Vance*'s dissenting and concurring judges. Judges Hamilton, Wood, Williams, and Rovner felt judicial intervention was the only appropriate remedy absent Congressional action to the contrary.<sup>135</sup> But for the majority in *Vance* and the courts in *Lebron* and *Doe*, the absence of express Congressional authorization gave them pause and their hesitations outweighed any desire to remedy the wrong.<sup>136</sup> Despite these differences in ideology, however, a solution is nonetheless possible. By looking to Congress, applicable legislation, and policy considerations for guidance, the courts may be able to navigate similar *Bivens* claims in the future.

### III. PROPOSING A REMEDY THROUGH AN EXAMINATION OF MODEL LEGISLATION AND EQUITABLE CONSIDERATIONS

#### A. A Resolution From Congress

Many courts, including the Supreme Court, have expressed a desire and need for Congress to legislate on the topic of *Bivens*.<sup>137</sup> Therefore, the ideal solution to the confusion surrounding *Bivens* is for the legislature to act. If Congress chooses to legislate on this matter, it has two options in approaching the issue: (1) it can legislate broadly by codifying *Bivens*, modeling such a statute after § 1983; or,

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134. *Id.* at 230.

135. *Id.* at 211–24 (Hamilton, J., dissenting); *id.* at 205–11 (Wood, J., concurring); *id.* at 225 (Rovner, J., dissenting); *id.* at 226 (Williams, J., dissenting).

136. *Id.* at 193 (majority opinion); *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012); *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir.), *cert. denied*, 132 S. Ct. 2751 (2012).

137. *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007) (quoting *Bush v. Lucas*, 462 U.S. 367, 389 (1983)); *Vance*, 701 F.3d at 203; *Lebron*, 670 F.3d at 548; *Arar v. Ashcroft*, 585 F.3d 559, 580–81 (2d Cir. 2009).

(2) it can legislate narrowly by providing a cause of action for this particular type of plaintiff for this specific violation—that is, the subjecting of an American civilian to torture by the U.S. government.

*1. Broad Legislation*

If Congress wants to codify *Bivens* in its entirety, then § 1983—the equivalent action for constitutional violations by state officials—provides a model statute.<sup>138</sup> Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .<sup>139</sup>

As is clear from the broad language of the statute, such as “every person,” “any citizen or *other person*,” and “Constitution *and laws*,” § 1983 encompasses a wide range of claims against state officials.<sup>140</sup> Therefore, a *Bivens* claim using similar language would also encompass a variety of claims against federal officials. Further, modeling a *Bivens* statute after § 1983 could be very effective, as § 1983 has been well-received in the legal community and is often praised.<sup>141</sup> As Justice Brennan once observed, “[i]t would be difficult to imagine a statute more clearly designed ‘for the public good,’ and ‘to prevent injury and wrong,’ than § 1983.”<sup>142</sup>

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138. 42 U.S.C. § 1983 (2006); see *Ashcroft v. Iqbal*, 556 U.S. 662, 675–76 (2009) (noting that “the [*Bivens*] implied cause of action is the ‘federal analog to suits brought against state officials under . . . 42 U.S.C. § 1983’”).

139. 42 U.S.C. § 1983.

140. *Id.*; see also 2 SMOLLA, *supra* note 9, §§ 14:8, :104 (discussing the Supreme Court’s broad construction of the law and noting that § 1983 is used in virtually every conceivable setting to enforce every conceivable right in the Constitution).

141. See 2 SMOLLA, *supra* note 9, § 14:7.

142. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 73 (1989) (Brennan, J., dissenting) (praising the policy promoted by § 1983 and expressing admonition after the Court denied a claim under the statute).

Nonetheless, § 1983 may be too wide-reaching to model a *Bivens* statute after. First, the Supreme Court has construed the requirement that the action be “under color of law” broadly, only mandating that there be “[m]isuse of power” and that the power be “made possible only because the wrongdoer is clothed with the authority of state law.”<sup>143</sup> Second, § 1983 allows claims brought under the Constitution *and other laws*, exceeding those Constitutional claims permitted under *Bivens* to include claims brought under *any* federal statute or regulation.<sup>144</sup> Last, unlike in *Bivens* actions, the exhaustion of alternative remedies is not a prerequisite to bringing a § 1983 claim.<sup>145</sup> These differences may lead Congress to fear the expansion of *Bivens* under such all-encompassing statutory language. If that fear restrains Congress, then a narrower statutory scheme may be appropriate.

## 2. Narrow Legislation

An alternative to the wide-ranging codification of *Bivens* is the codification of certain claims under *Bivens*, and in particular, claims by U.S. citizens asserting torture at the hands of the U.S. government. The Torture Victim Protection Act (TVPA), which provides a cause of action for an individual subjected to torture under color of foreign law, provides an appropriate model for such a statute.<sup>146</sup> The pertinent portion of the TVPA states, “An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual . . . .”<sup>147</sup>

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143. *United States v. Classic*, 313 U.S. 299, 326 (1941). Section 1983 was developed as part of the Ku Klux Klan Act of 1871, but the statute was not regularly used to bring claims until it was revitalized in 1961 in *Monroe v. Pape*. 2 SMOLLA, *supra* note 9, § 14:2. Since then, § 1983 has been used as the prominent means of vindicating rights deprived by persons acting under color of state law. *See id.* § 14:104.

144. *See Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 430–32 (1987) (extending § 1983 claims to rights established under federal regulations); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (holding that rights established under any federal statutes can be enforced under § 1983).

145. *See Wright*, 479 U.S. at 427–28; 2 SMOLLA, *supra* note 9, § 14:112.

146. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note).

147. *Id.*

As evidenced by the TVPA's language, it is a narrow act, only permitting a claim against "[a]n individual" acting "under . . . color of law [] of [a] foreign nation" and only for the specific act of torture.<sup>148</sup> If modeled after such terms, a *Bivens* statute could be narrowly written to include only claims by American citizens against individuals acting under color of federal law for allegations of torture.<sup>149</sup> Further, the TVPA requires that the claimant first exhaust all alternative remedies available to him or her in the place where the violation occurred.<sup>150</sup> Congress could easily adapt this prong of the TVPA in a *Bivens* statute to reflect the common law requirement that the court first determine whether adequate alternative remedies exist.<sup>151</sup> In formulating this narrower statute, Congress could also look to the TVPA as an indication of how and to what extent a *Bivens* torture statute would be used.<sup>152</sup>

### 3. Congressional Silence

Despite multiple invitations from courts to legislate on the issue of *Bivens*, Congress has still not acted. Some courts interpret this silence as an indication that Congress disapproves of the extension of *Bivens*.<sup>153</sup> Others interpret its silence as acquiescence to the

148. *Id.* The TVPA also allows a claim against an individual who "subjects an individual to extrajudicial killing" in a wrongful death action. *Id.*

149. It is also useful that the TVPA, like *Bivens*, developed out of existing case law governing human rights claims. VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 9:18 (2d ed. 2012). In codifying the case law, Congress faced similar concerns as those here regarding the maintenance of a narrow claim reflective of limits already carved out by the judiciary. *Id.*

150. Torture Victim Protection Act, § 2. ("A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.")

151. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); see discussion *supra* Section II.B.1.

152. In general, the TVPA has been applied narrowly, although there have been some expansions of the act. See NANDA & PANSIUS, *supra* note 150, § 9:20. First, even though the act is codified in the Alien Tort Statute, courts have held that not only do aliens have standing to bring TVPA claims against foreign officials, but U.S. citizens may as well. *Id.* § 9.20 n.6 (citing *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005)). Second, courts have expanded the TVPA's definition of torture—the intentional infliction of "severe pain or suffering . . . whether physical or mental . . ."—to include deprivation of basic necessities, such as lights, a bed, windows, clothing, and bathroom facilities. Torture Victim Protection Act, § 2; *Surette v. Islamic Republic of Iran*, 231 F. Supp. 2d 260, 264 (D.D.C. 2002); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 45 (D.D.C. 2000).

153. *McIntosh v. Turner*, 861 F.2d 524, 526 (8th Cir. 1988). In *McIntosh*, the Eighth Circuit held that a *Bivens* claim cannot exist where Congress has omitted a constitutional tort claim when legislating on

application of *Bivens* and tacit approval of *Bivens* as an effective way to handle such claims.<sup>154</sup> In either case, this silence suggests that Congress has no intention of legislating on the issue in the near future. Therefore, while modeling a *Bivens* statute after § 1983 or the TVPA is an ideal solution, courts must be prepared to address the split between the District of Columbia and the Seventh Circuit without help from Congress.

*B. Resolution By The Courts: The Argument For A Judicial Consensus*

Without an express indication from Congress that it disapproves of the application of *Bivens* within the context of the torture of American citizens, the judiciary should adopt the position of the dissenting judges in *Vance* and allow those claims to proceed.<sup>155</sup> In support of that position, note that the denial of a *Bivens* claim to American civilians alleging torture by their own government would result in two anomalies. First, a comparison of *Bivens* claims to actions under § 1983 demonstrates the potential incongruity that would occur if a citizen was granted a remedy against a *state* official but not against a *federal* official for the same violation. Second, an examination of the TVPA shows that Congress has provided broader and more effective statutory remedies for foreign citizens against their governments for torture than for its own American citizens.

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the precise subject, unless the omission was “inadvertent.” *Id.* They explained:

It may be true that injured citizens will thus receive less than “complete relief,” but that is a decision that Congress has both the power and the competence to make. To some it may seem odd that congressional silence can, in effect, limit the right to be fully compensated for constitutional wrongs, but that is the message of [the Supreme Court’s decision in] *Chilicky*, and we are obliged to heed it.

*Id.* (citation omitted).

154. *Vance v. Rumsfeld*, 701 F.3d 193, 208 (7th Cir. 2012) (Wood, J., concurring); *id.* at 219–20 (Hamilton, J., dissenting); *see also* Brown, *supra* note 14, at 868 (noting that interpretation of congressional silence is a key source of tension in the *Bivens* debate, dating back to the original decision, where the dissenters were “reluctant to create a ‘freestanding’ constitutional remedy” without express congressional authorization).

155. *Vance*, 701 F.3d at 205–11 (Wood, J., concurring); *id.* at 211–25 (Hamilton, J., dissenting); *id.* at 225–26 (Rovner, J., dissenting); *id.* at 226–31 (Williams, J., dissenting).

### 1. *The Incongruent Treatment of State and Federal Officials*

Section 1983 provides a remedy for citizens whose constitutional rights are violated by individuals acting under color of state law,<sup>156</sup> while *Bivens*—applied broadly—provides a similar remedy to citizens deprived of constitutional liberties by individuals acting under color of *federal* law.<sup>157</sup> However, if courts adopt the limitation of *Bivens* advocated for by the Fourth Circuit in *Lebron*, the Seventh Circuit in *Vance*, and the D.C. Circuit in *Doe*, citizens asserting a remedy under *Bivens* will be afforded lesser protection of their constitutional rights than those stating a claim under § 1983. Surely such a result is incompatible with basic principles of justice.<sup>158</sup>

To illustrate, imagine two events: scenario A and scenario B. In scenario A, the governor of a state in the U.S. condones the torture of a man being detained, pending criminal charges. In scenario B, the Secretary of Defense condones the torture of the same man. The same wrong has occurred to the same plaintiff; the only difference is whether the official committing the constitutional violation was a state official or a federal official. To allow a remedy in scenario A under § 1983 but not in scenario B under *Bivens* seems nothing short of hypocritical. Just as § 1983 provides the opportunity to hold state officials accountable, *Bivens* should provide the same opportunity to hold federal officials accountable *to the same extent*.<sup>159</sup>

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156. 42 U.S.C. § 1983 (2006).

157. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

158. Without venturing into a discussion of the Equal Protection Clause and its effect on constitutional rights, it is worth noting that the United States has a history of grappling with inequality and the law, which informs modern day notions of justice. See generally JAMES A. KUSHNER, *GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION* §§ 1:1–7 (2012–2013 ed. 2012).

159. See Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 *YALE L.J.* 2195, 2208 (2003) (positing that while § 1983 is limited to actions against state officials, the Supreme Court has “inferred a parallel damages action against federal officers” under *Bivens*); Marc Stepper, Note, *A Government Lawyer’s Liability Under Bivens*, 20 *CORNELL J.L. & PUB. POL’Y* 441, 454 (2010) (suggesting that “[b]ecause *Bivens* ‘is the federal analog to suits brought against state officials under . . . § 1983’ [identical] types of suits should arguably apply in many of the same instances”).

## 2. *The Incongruent Treatment of Foreign and American Citizens*

If courts find the inconsistency between actions under § 1983 and actions under *Bivens* unpersuasive, they must still address the discrepancy between the remedies afforded to foreign citizens and the remedies afforded to American citizens. This discrepancy should not only shock the courts; it should sway them. The single most convincing argument that Judges Wood, Hamilton, Williams, and Rovner make in *Vance* is this: the plaintiffs in *Vance* were American—not foreign—citizens acting as ordinary civilians—not as military personnel.<sup>160</sup> This is not just a semantic, or even factual, distinction; this is a legal distinction. It is not a coincidence that courts have most vigorously limited remedies under *Bivens* for foreign citizens, military personnel, and enemy combatants.<sup>161</sup> First, foreign citizens present a greater risk to foreign policy and the exposure of state secrets.<sup>162</sup> Further, they are already afforded remedies under the Alien Tort Statute and the TVPA that American citizens are not.<sup>163</sup> Second, military personnel must forfeit complaints against their superiors to preserve military command structure and protect national security.<sup>164</sup> And third, designated enemy combatants have been deemed dangerous not only by the military, but by the President himself.<sup>165</sup>

Thus, when it comes to this narrow claim—an American civilian's assertion of torture by his own government—the *Vance* dissenters got

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160. *Vance*, 701 F.3d at 209 (Wood, J., concurring); *id.* at 221–22 (Hamilton, J., dissenting); *see also* discussion *supra* Section II.B.3.

161. *Vance*, 701 F.3d at 209 (Wood, J., concurring); *id.* at 221–22 (Hamilton, J., dissenting); *see also* *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983); *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir.), *cert. denied*, 132 S. Ct. 2751 (2012); *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985); *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 110 (D.D.C. 2011), *rev'd*, 683 F.3d 390 (D.C. Cir. 2012); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007), *aff'd sub nom*, *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011); *see also* discussion *supra* Section II.B.3.

162. *See Ali*, 649 F.3d 762; *Arar*, 585 F.3d at 579; *Rasul*, 563 F.3d 527; *Sanchez-Espinoza*, 770 F.2d at 209; *Doe*, 800 F. Supp. 2d at 111; *Detainees Litig.*, 479 F. Supp. 2d 85; *see also* discussion *supra* Section II.B.3.

163. *Vance*, 701 F.3d at 209 (Wood, J., concurring); *id.* at 221–22 (Hamilton, J., dissenting).

164. *Stanley*, 483 U.S. at 700.

165. *Lebron*, 670 F.3d at 549.

it right. It would not only be hypocritical, but it would be fundamentally unjust to provide a remedy in U.S. courts for alien citizens tortured by their government but not for American civilians tortured by the United States government. A remedy is not only necessary—it is right.

#### CONCLUSION

Above all else, policy reasons justify the allowance of *Bivens* claims. Although torture-based claims may pose risks to national security and military authority, the conscience of the United States is put at risk if the judiciary forfeits American ideals and allows the torture of U.S. citizens to proceed without holding the actors accountable for their wrongdoing.<sup>166</sup> Despite the challenges of the war on terror, torture is not now and never has been approved of in modern American history.<sup>167</sup> Vance's attorney in his suit against Rumsfeld emphasized that "[t]reating an American citizen in this fashion would have been unimaginable before 9/11."<sup>168</sup>

While ideally the torture of citizens at the hands of American officials would never occur, where it does, accountability for such actions is essential.<sup>169</sup> Commenting on the diminishing protection of liberty in the United States, plaintiff Donald Vance observed, "the same democratic ideals [the United States is] trying to instill in the fledgling democratic country of Iraq, from simple due process to the Magna Carta, we are absolutely, positively refusing to follow ourselves."<sup>170</sup> Such casting aside of individual liberties falls far short

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166. In the moments before his release from detention, officials interrogated Vance about his future plans to take legal action. Michael Moss, *American Recalls Torment as a U.S. Detainee in Iraq*, N.Y. TIMES, Dec. 18, 2006, at A1, available at 2006 WLNR 21932011. He recalled, "[t]hey asked me if I was intending to write a book, would I talk to the press, would I be thinking of getting an attorney. I took it as, 'Shut up, don't talk about this place,' and I kept saying, 'No sir, I want to go home.'" *Id.*

167. The United States has made its prohibition against torture clear on a number of occasions, serving as a party to international treaties against torture, including the Convention Against Torture and the Geneva Convention. See NANDA & PANSIUS, *supra* note 150, §§ 10:19–23.

168. Moss, *supra* note 167.

169. Accountability for constitutional violations is a key tenet of American values and yet, Vance was left to feel as though "Saddam Hussein had more legal counsel than [he] ever had" while detained. *Id.*

170. *Id.*

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of the nation's ideals. Due process and freedom from cruel and unusual punishment are not luxuries or privileges; they are rights, and it is the duty of the judiciary to uphold them.

