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THE JOHN MARSHALL LAW REVIEW

**The Mercenary Gap:
How to Protect the Constitutional Rights
of American Contractors in the Age of the
Private Military Firm**

John J. Sviokla

THE MERCENARY GAP: HOW TO PROTECT THE CONSTITUTIONAL RIGHTS OF AMERICAN CONTRACTORS IN THE AGE OF THE PRIVATE MILITARY FIRM

JOHN J. SVIOKLA II*

I. INTRODUCTION

Donald Vance, a private military firm employee,² a modern day mercenary, sat at a coffee shop in Chicago's loop knowing that he was going to put his life in peril by informing the FBI about his boss in Iraq.³ This was nothing new to Vance, a Navy veteran, he had served his country his entire life.⁴ The implicit promise had always been that when he was done taking care of his nation, his nation would tend to him. Vance probably did not imagine that because of his actions that day, he and his coworker and friend,

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1. These, in the day when heaven was falling,
The hour when earth's foundations fled,
Followed their mercenary calling
And took their wages and are dead.
Their shoulders held the sky suspended;
They stood, and earth's foundations stay;
What God abandoned, these defended,
And saved the sum of things for pay.

Alfred Edward Houseman, *Epitaph On An Army of Mercenaries*, in THE BROADVIEW ANTHOLOGY OF BRITISH LITERATURE: CONCISE EDITION 1112, 1112 (Don LePan et al. eds., 2007).

* J.D. Candidate, May 2014. The author would like to thank the four most important women in his life for their support: his wife, his mother, and his editors, Megan Monaghan and Nicole Pradun. He would also like to thank Deputy Sheriffs Mary Garay and Daniel Castillo, Deputy Clerk Mary Annerino, ASA Susie Bucaro, and the Honorable Judge Dennis J. Porter for showing him what justice looks like on a day to day basis. He is extremely grateful to the Cook County Assistant State's Attorneys of the Sex Crimes Division, as well as the support staff, especially Amy Balicki, for all of the opportunities they have afforded him over the last year. Thank you to Professor Steven D. Schwinn for his input and guidance. Finally, he would like to dedicate this Comment to his two Godsons, both to the enduring memory of Michael Marchetti as well as the bright future of Fred Mann. I love you both.

2. Amended Complaint ¶ 44, *Vance v. Rumsfeld*, No. 06 C 6964 (N.D. Ill. Feb. 12, 2007), 2007 WL 928914.

3. *Id.* ¶ 51.

4. *Id.* ¶ 3.

Nathan Ertel, would be held without process, incommunicado from the rest of the world, tortured in violation of Congress's intent for over ninety days.⁵ And if he did suspect such a possibility, he certainly did not imagine that his own country, the country that he had served so loyally, would be the one perpetuating the acts.⁶

Claims stemming from *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,⁷ have been part of the menu of federal remedies for over forty years.⁸ *Bivens* has specifically precluded aliens from recovering damages against members of the American military.⁹ *Vance v. Rumsfeld*,¹⁰ is likely the first case of a new breed—the private American citizen working for a military contractor abroad, hired by the Department of Defense (“DoD”), and who has a grievance against the military for his handling.¹¹ Through studying the history of *Bivens*, as well as the separation of powers concerns recognized and protected in the Supreme Court's jurisprudence, it will become apparent that the only counsel that provides guidance in this case is congressional silence.

Since the morning of September 11, 2001, the United States has been engaged in a global war on terror. During two presidential administrations, liberties that had been taken as given bowed at what were presumed to be their strongest joints.¹² Agencies and groups, whose role was a certainty, seemed to shift.¹³ Part of this is that the current war is unconventional in comparison to almost every war in which the U.S. has engaged.¹⁴

5. *Id.* ¶ 4.

6. *Id.* ¶ 6.

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

8. Michelle Byers, Comment, *As Luck Would Have It: Pollard v. GEO Group's Extension of the Bivens Remedy Against Private Prison Employees*, 46 NEW ENG. L. REV. 185, 188 (2011).

9. ALIEN'S ACTION FOR TORT, 28 U.S.C. § 1350 (West 2012).

[Plaintiff] argues that the district court also erred by failing to consider alternatives to the dismissal of his complaint. However, the district court's dismissal without prejudice of [plaintiff's] complaint was proper because it is obvious that [plaintiff] cannot prevail, and it would be futile to give him an opportunity to amend his complaint at this time.

Cohen v. Clemens, 321 F. App'x 739, 742 (10th Cir. 2009).

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

11. *Id.* at 594.

12. See Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 489 (2010) (discussing the ramifications of the Authorization of Use of Military Force [hereinafter AUMF] after 9/11 as a means to abridge commonly accepted personal liberties such as Fifth and Sixth Amendment rights).

13. *Id.*

14. Hendrik Hertzberg, *Unconventional Warfare*, THE NEW YORKER (May 24, 2004), http://www.newyorker.com/archive/2004/05/24/040524ta_talk_hertzberg.

The battlefield is ambiguous; the enemy refuses to wear insignia or uniforms, and major military decisions are no longer made by commanders in a war room, but rather by small groups of rebels meeting in cafés, places of worship, or living rooms.¹⁵

To react to this structurally distinct threat, the world's last superpower has resorted to innovation in the structure, allocation, and use of its resources.¹⁶ While armed conflict was once thought to be solely the province of sovereign nations and their militaries, it has become the business of private contractors and corporations.¹⁷ How this waxing trend will react with the law largely remains to be seen.¹⁸ But within the example of Donald Vance and Nathan Ertel lies an interesting test case.

There are two components of the Background. Donald Vance and Nathan Ertel's story is told in Section A. The history of the *Bivens* claim is the backdrop against which the U.S. government's conduct and liability is examined in Section B. Section A of the Analysis will focus on the way the Supreme Court has treated *Bivens* claims in five distinct situations that present analogous concerns: federal prisoners held in both private and public prisons; military personnel; non-military federal employees; aliens; and defendants who are entitled to qualified immunity. The Analysis will demonstrate that none of these are satisfactory paradigms in the case of Ertel and Vance. Each section will examine a relevant subgroup.¹⁹ Finally, turning to congressional silence in the Analysis, it will become evident that the proper role of the Judiciary would be to accept the lack of legislation as a tacit endorsement of the judge-made law. Tracing the trajectory inferred from these two analyses, it is clear that Vance and Ertel should be given their day in court and that Defendant Rumsfeld's motion for summary judgment should have been denied. This argument serves as the substance for the Proposal Section.²⁰ By providing these two plaintiffs a forum, a tentative roadmap is drawn from which future parties may draw guidance.

15. *Id.*

16. See P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 179 (Cornell University Press 1st ed. 2003) (discussing the innovations in infrastructure resulting from widespread use of private military in American conflicts).

17. *Id.*

18. *Id.*

19. See *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (discussing *Bivens* claims in state-run prisons); *Bush v. Lucas*, 462 U.S. 367, 388 (1983) (discussing *Bivens* among military personnel). See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (addressing *Bivens* claims and their relationship to foreign nationals); *Saucier v. Katz*, 533 U.S. 194 (2001) (examining *Bivens* and its relation to the doctrine of qualified immunity); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001) (discussing *Bivens* in privately-run prisons).

20. *Vance*, 653 F.3d at 591.

II. BACKGROUND

A. *Donald Vance and Nathan Ertel*

In October 2005, Donald Vance telephoned the Federal Bureau of Investigation (“FBI”) in the Dirksen Federal Building in Chicago at 219 South Dearborn to act as a whistleblower against the private corporation he worked for in Iraq.²¹ Almost exactly six years later, on the top floor of the same building, arguments were heard in the Seventh Circuit Court of Appeals as to whether or not he and his partner, Nathan Ertel, could pursue a lawsuit against former Secretary of Defense Donald Rumsfeld under a *Bivens* claim for the torture they had experienced.²²

Donald Vance, an honorably discharged U.S. Navy veteran,²³ had joined Shield Group Security (“SGS”)²⁴ in the fall of 2005 as a private military contractor in Iraq.²⁵ Vance had thirteen years’ experience working for private military firms.²⁶ SGS, an Iraqi corporation, contracted with the Iraqi government, local corporations, and U.S.-aligned Non-Governmental Organizations (“NGOs”).²⁷ Almost immediately, Vance witnessed his supervisor and Vice-president of SGS, fellow American Jeff Smith,²⁸ take cash payments in exchange for dealing arms.²⁹ Vance also suspected Smith of smuggling in alcohol and other contraband³⁰ to use in an

21. Plaintiffs’ Response in Opposition to Defendants’ Motion to Transfer the Case at 2, *Vance v. Rumsfeld*, No. 06 C 6964 (N.D. Ill. Apr. 6, 2007), 2007 WL 1605880.

22. *Id.*

23. Amended Complaint, *supra* note 2, ¶ 30.

24. Plaintiffs’ Response in Opposition to Defendants’ Motion to Transfer the Case, *supra* note 21, at 2.

25. *Vance v. Rumsfeld*, No. 06 C 6964, 2007 WL 2746845, at *1 (N.D. Ill. Sept. 19, 2007).

26. Amended Complaint, *supra* note 2, ¶ 30.

27. *Id.* ¶ 37.

28. Plaintiffs’ Response in Opposition to Defendants’ Motion to Transfer the Case, *supra* note 21, at 2.

29. *Id.*

30. Amended Complaint, *supra* note 2, ¶ 105. Alcohol, while not illegal in Iraq, is certainly still taboo. *Alcohol Business Dangerous in Chaotic Baghdad*, NBCNEWS.COM (Sept. 15, 2007, 4:05 AM EST), http://www.msnbc.msn.com/id/20783441/ns/world_news-mideast_n_africa/t/alcohol-business-dangerous-chaotic-baghdad/#.UGdxAxhOx2U. Vendors who carry liquor have been subject to violent religious militias burning down their businesses and sending death threats. *Id.* After Saddam Hussein suffered embarrassment because of his failed attempt to invade Kuwait, he tried to polish his image by encouraging solidarity amongst Muslims. *Id.* Following his lead, Baathists in the Iraqi government put incredibly onerous restrictions on the import and sale of alcohol in 1993. *Id.* After Hussein was toppled, the ban on alcohol was repealed in 2005. *Id.* Immediately following Hussein’s fall there was a bit of a liquor boom. *Id.* However, there still remains a strong social stigma

effort to acquire arms to be used in Iraq and as currency for the black and grey markets.³¹ Smith called this program “Beer for Bullets.”³²

Vance knew Smith’s conduct was illegal.³³ Shortly after reaching Iraq, Vance returned to Chicago, where he was born and raised,³⁴ to attend his father’s funeral.³⁵ On that trip home, Vance called the FBI to inform them of his supervisor’s actions.³⁶ Vance eventually reached Special Agent Travis Carlisle.³⁷ He related to Agent Carlisle what he had witnessed while in Iraq.³⁸ Carlisle immediately took interest and set up a lunch so that Vance could fully explain what he had witnessed.³⁹ Carlisle also took the opportunity to sketch out logistical support so that Vance could relay information back to the FBI.⁴⁰

After that meeting, Carlisle set Vance up with American members of the U.S. State Department working in Iraq, specifically Agent Deborah Nagel and Agent Douglas Treadwell.⁴¹ These State Department Agents set up fake buys in order to determine what kind of weapons SGS could procure.⁴² Vance, and later, his friend and fellow American Nathan Ertel, would contact Agent Carlisle multiple times a day to convey information.⁴³ Carlisle encouraged Vance and Ertel to gather as much information as they possibly could and expressed an almost insatiable interest in their reports.⁴⁴

Vance and Ertel documented, among other activities,⁴⁵

surrounding libations due to the conservative Muslim community in Iraq gaining power. *Id.*

31. Amended Complaint, *supra* note 2, ¶ 140. “Grey market” goods are goods that are imported into a country without the country’s consent, or imported to be used contrary to the country’s intent. *Bordeau Bros., Inc. v. Int’l Trade Comm’n*, 444 F.3d 1317, 1322 (Fed. Cir. 2006).

32. Amended Complaint, *supra* note 2, ¶ 140.

33. *Id.*

34. *Id.*

35. Plaintiffs’ Response in Opposition to Defendants’ Motion to Transfer the Case, *supra* note 21, at 2.

36. Amended Complaint, *supra* note 2, ¶ 21.

37. *Id.* ¶ 52.

38. Plaintiffs’ Response in Opposition to Defendants’ Motion to Transfer the Case, *supra* note 21, at 2.

39. *Id.*

40. *Id.*

41. Amended Complaint, *supra* note 2, ¶ 57.

42. Plaintiffs’ Response in Opposition to Defendants’ Motion to Transfer the Case, *supra* note 21, at 2.

43. Amended Complaint, *supra* note 2, ¶¶ 45, 53, 56.

44. Plaintiffs’ Response in Opposition to Defendants’ Motion to Transfer the Case, *supra* note 21, at 2.

45. Vance and Ertel observed suspicious payoffs that they suspected were bribes made to obtain influence in the fledgling government of Iraq. Amended Complaint, *supra* note 2, ¶ 50. Vance was regularly charged with being a

evidence that Josef Trimpert, a fellow employee of SGS, was trading U.S. soldiers contraband⁴⁶ alcohol in exchange for their service weapons and munitions.⁴⁷ At least one known U.S. State

bodyguard for an American citizen by the name of Laith Al-Khudaira. *Id.* ¶ 78. Laith was the nephew of an influential Iraqi, Mustafa Al-Khudaira, the owner of SGS. *Id.* ¶¶ 27, 77. Laith would meet with a large number of sheiks at SGS' facilities. *Id.* ¶ 79. Although the Plaintiffs never confirmed it, both suspected Laith Al-Khudaira of power brokering amongst the sheiks. *Id.* ¶ 83. Vance and Ertel reported to Carlisle and Nagel about Laith Al-Khudaira at their request, and upon Ertel's detention, he was interrogated as to what he knew of Latih Al-Khudaira. *Id.* ¶¶ 76, 81. At one point, Josef Trimpert, Vance and Ertel's boss, sought to have a rifle repaired so that it could be sold on the black market. *Id.* ¶ 114. Trimpert brought it to a U.S. military installation and had it repaired. *Id.* A member of the military then emailed Vance asking that the rifle be returned to them, because it had been recently used by insurgents against the United States. *Id.* ¶ 115. To the Plaintiffs' knowledge, Trimpert never returned the rifle. *Id.*

46. Amended Complaint, *supra* note 2, ¶ 105.

47. *Id.* It is worth noting here the tenuous legal ground that private military firms ("PMFs") occupy. The use of mercenaries was widespread throughout much of history. SINGER, *supra* note 16, at 19. The international community did not frown upon the practice of employing mercenaries until shortly after World War II when a number of mercenary groups changed the tenor, degree of gruesomeness, and duration in a number of horrific wars of independence in then-fledgling nation-states. E.L. Gaston, *Mercanism 2.0? The Rise of the Modern Private Security Company and Its Implications for International Humanitarian Law Enforcement*, 49 HARV. INTL L.J. 221, 230 (2008) [hereinafter *Mercanism 2.0*]. Mercenaries became well-known for disregarding international humanitarian law and perpetuating abuses of basic human rights in the wake of the Geneva Convention. *Id.* at 231.

The techniques and habits of mercenaries took a particularly detrimental toll on the then-nascent nations of Africa. *Id.* at 226. This led some nations on the continent to adopt their own sanctions against mercenaries, or enter into pacts with surrounding countries to ban or limit their use. *Id.* at 225. Instability and regime change made these attempts largely ineffective. *Id.* at 231.

The status of private militaries remained fairly constant until the United Nations passed the United Nations Convention Against the Recruitment, Use, Financing, and Training of Mercenaries [hereinafter U.N. Convention Against Mercenaries]. *Id.* This was the first true international ban on the use of mercenaries, although some doubt its effectiveness. *Id.* The Convention did contain a provision that specifically denied mercenaries the same rights afforded to lawful combatants, and instead gave them rights comparable to an unlawful combatant. *Id.*

PMFs have avoided being labeled with the term of "mercenary" by not directly engaging in combat. *Id.* at 234. PMFs have instead played a chiefly defensive role, often setting up or maintaining logistical integrity. *Id.* at 235. One problem is that even when PMFs are playing a purely infrastructural role, if armed combat does erupt, it is difficult, if not impossible, to determine who instigated the conflict and who simply reacted to it. *Id.* at 237. Many contractors, like Donald Vance himself, have extensive military backgrounds, oftentimes in the exact same theaters or locales, which they are now there merely to maintain. *Id.* In cases like those, the question of who began a fight often devolves into a case of "he-said she-said" with a body count. *Id.* at 241.

Another concern is that traditional mercenaries are fairly easy to point

out on the battlefield as their sole job is fighting in a conflict in exchange for money, one that they may have no affiliation with. BLACK'S LAW DICTIONARY 1076 (9th ed. 2009). This becomes more difficult in the case of PMFs as they offer a comprehensive host of services, and combat defense is just one of a litany of options. *Mercanism 2.0, supra*, at 225.

States that lack the technological or fiscal ability to effectuate certain weaponry, strategy, or battle efforts may not be able to afford to own said advantages, but may be able to afford to rent them. *Id.* at 235. PMFs can provide the kind of weapons and battle-ready troops that the state may have never had access to otherwise. *Id.* at 235. As such, the presence of PMFs may very well elevate or intensify both the efficiency and the brutality of the combat between states that otherwise might have been relatively mundane or primitive. *Id.* at 237.

Additionally, in a democracy, hiring PMFs as “force multipliers” obscures the political cost of wars since politicians no longer have to justify the reinstatement of a draft or the increased need for troops to an electorate. *Id.* at 235. Also, it can act to concentrate discretion inequitably if the system of oversight is predicated upon a traditional model of the citizen-combatant. *Id.* at 238. Because of the ambiguity as to accountability, it may encourage abuses of human rights or atrocities, which would be outright condemned if perpetuated by a traditional state actor. *Id.* There is also a significant question as to whether or not the use of PMFs is more cost effective than a state maintaining a comparable sovereign force. *Id.* at 241.

SGS was defined as an NGO, a status that not all PMFs enjoy. Amended Complaint, *supra* note 2, ¶ 41. This does become important though when examining exactly how SGS was able to smuggle alcohol into Iraq without acquiring the corresponding liability. See *Alcohol Business Dangerous in Chaotic Baghdad, supra* note 30 (discussing the precarious legal position that alcohol in Iraq occupies). NGOs are traditionally not-for-profit organizations, and serve humanitarian ends. Fred Scheier & Marina Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, GENEVA CTR. FOR THE DEMOCRATIC CONTROL OF ARMED FORCES 133 (March 2005),

http://mercury.ethz.ch/serviceengine/Files/ISN/14077/ipublicationdocument_singledocument/918d0282-67b9-463d-9ba1-27681d4ea15b/en/occasional_6.pdf.

The Red Cross, Red Crescent, and Oxfam are examples of well-known NGOs. *Id.* In the case of PMFs, what can occur is that an NGO will form an interest group, which in and of itself does not see a profit, and then it will hire a sympathetic private contractor, often themselves, to effectuate that end. Jennifer K. Elsea et al., *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues*, CRS-2 (Congressional Reporting Services, Aug. 25, 2008),

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CEQQFjAA&url=http%3A%2F%2Fwww.fas.org%2Fsgp%2Fcrs%2Fnatsec%2FRL32419.pdf&ei=UKueUK-fC6yLyAGRr4DgBw&usq=AFQjCNGpRdFOKU1DoZUO-6zx6LA9YU6kQ&sig2=_95XJMXEPzTKz7u5qV9Slw&cad=rja.pdf. Here, SGS

decided to provide security and infrastructure building and, shockingly, just happened to have a group of people who were competent to complete that task. Amended Complaint, *supra* note 2, ¶ 42. The distinction is almost analogous to the PAC system of political advertising. Prior to *Citizens United v. FEC*, 130 S.Ct. 876, 889 (2010), the PAC itself was a not-for-profit business, but the people who had influence on the PAC's use would benefit from it if its resources were spent in accordance with their desires. *Id.* NGOs, however, are given an incredibly lax set of standards to meet. Scheier & Caparini, *supra*.

Department member engaged in a planned buy so that the government could document SGS's activity.⁴⁸ Deborah Nagel conducted the controlled buy.⁴⁹ After a series of buys relating to small arms and smoke grenades, Nagel worked on coordinating a buy for C-4, an explosive SGS categorically should not have had access to, much less the ability to sell.⁵⁰

After a number of activities made the SGS management suspicious of Vance and Ertel,⁵¹ a member of SGS took Ertel and Vance's common access cards [CACs].⁵² This action effectively imprisoned Vance and Ertel in their respective apartments.⁵³ They contacted both Agents Nagel and Treadwell, who advised Vance and Ertel to arm and barricade themselves in their apartments, while the U.S. military would rescue them.⁵⁴ Despite SGS's protests, the military removed both Vance and Ertel and brought them back to the U.S. embassy.⁵⁵

After arriving at the embassy, agents seized and inventoried Vance and Ertel's possessions, including their laptops, computers, cell phones, and cameras.⁵⁶ Both men were questioned and

They are given an incredibly wide berth as they are supposedly there to preserve and enhance the humanitarian ends that the NGO is there to serve. *Id.* For an incredibly thoughtful discussion of these issues and proposal of corresponding legislation, see *Mercanism 2.0, supra*, at 231 (advancing a regulatory scheme to address the rapid rise and seeming persistence of the private military contractor). Other notable sources are Elsea, *supra*, and Scheier & Caparini, *supra*.

48. Plaintiffs' Response in Opposition to Defendants' Motion to Transfer the Case, *supra* note 21, at 3.

49. *Id.*

50. *Id.*

51. Vance and Ertel, under pressure to bring in more business for SGS, were asked by Sheik Abu Bakir about why business had precipitously dropped off. Amended Complaint, *supra* note 2, ¶ 121. Plaintiffs responded that it was due to the fact that SGS had outstanding debts which had not been repaid and projects left uncompleted. *Id.* ¶ 122. At that point, the Sheik threatened to behead the Plaintiffs in front of Mustafa Al-Khahairi and a room full of others. *Id.* ¶ 123.

52. Common Access Cards or "CACs" are issued by the DoD to personnel in Iraq. *Id.* ¶ 127. In 2006, Iraq was essentially partitioned into "Red Zones" and "Green Zones." *Id.* The Green Zones were considered secure for the most part and, as such, ingress and egress could be conducted freely without proof of status. *Id.* Vance and Ertel's apartments, however, were not located in a Green Zone, but rather in a Red Zone. *Id.* The Red Zones were heavily monitored by military and private military personnel and documents were needed to move more than a few feet. *Id.* ¶ 132. So, when the SGS officials revoked the Plaintiffs' CACs, they effectively stranded them, knowing full well that the two Plaintiffs had no other way to reach safety. *Id.* ¶ 127, 131.

53. *Id.*

54. *Id.*

55. *Id.* ¶ 137.

56. *Id.* ¶ 140.

debriefed by a number of agents.⁵⁷ They relayed their communications with Nagel and Treadwell, as well as their regular communications with Agent Carlisle.⁵⁸ The identity of the agents who questioned Vance and Ertel remains unknown.⁵⁹ After the questioning, both men were allowed to sleep.⁶⁰

Two to three hours later, Vance and Ertel were awoken by a door knock, and escorted by armed guards to the edge of the embassy's grounds where they were placed under arrest.⁶¹ The plaintiffs were handcuffed, blindfolded, and driven to a military installation operated by the United States.⁶² Vance and Ertel spent two days at an unknown installation during which time their access to food and toilets was restricted, the lights were illuminated twenty-four hours per day, and they were deprived of a bed.⁶³ They were then driven to Camp Cropper.⁶⁴

At Camp Cropper, Vance and Ertel were held incommunicado.⁶⁵ They were denied medical treatment, food, water, adequate sleeping conditions, basic hygienic needs, religious texts, access to legal counsel, and other fundamental

57. *Id.* ¶ 141.

58. *Id.*

59. *Id.* ¶ 140.

60. *Id.* ¶ 142.

61. *Id.* ¶ 149.

62. *Id.* ¶ 151.

63. *Id.* ¶ 154.

64. *Id.* ¶ 172. Camp Cropper is a prominent part of the United States' interrogation scheme in Iraq. Amnesty Int'l, *New Order, Same Abuses: Unlawful Detentions and Tortures in Iraq*, AMNESTY INT'L PUBL'NS 6 (2010), available

[at http://www.amnesty.org/en/library/asset/MDE14/006/2010/en/c7df062b-5d4c-4820-9f14-a4977f863666/mde140062010en.pdf](http://www.amnesty.org/en/library/asset/MDE14/006/2010/en/c7df062b-5d4c-4820-9f14-a4977f863666/mde140062010en.pdf) (last visited Jan. 8, 2014). In 2007, the United States held about 23,000 detainees in Iraq. *Id.* Leading up to the withdrawal of coalition troops, the United States considerably scaled back its prison presence and number of detainees being held in prisons. Gregg Carlstrom, *US Military Winds Down Iraq Withdrawal*, ALJAZEERA (Dec. 8, 2010),

<http://www.aljazeera.com/news/middleeast/2011/12/201112717295310300.html> By the time the Iraqis regained control of their prison in July 2010, the number of detainees had dwindled to approximately 1,900. Amnesty Int'l, *supra*, at 6. Camp Cropper was the last base to be transferred to the Iraqi government, partly due to its extensive use during the Second Iraq War, and Cropper's convenient and discrete location near the Baghdad airport. *Id.* Camp Cropper is where Saddam Hussein was held prior to his trial. *Id.* at 13. Although ownership of the prison was transferred to the Iraqi government in 2010, the United States has reached an agreement with the fledgling government that allows it to keep 200 high risk prisoners at the base. *Id.* Although the identities of all the 200 detainees are not known, amongst them is Tariq Aziz, a member of the Ba'ath party's Iraqi Revolutionary Command Council. *Id.* Some leaders of Al-Qaeda captured abroad are also suspected to be held there. *Id.*

65. *Id.* ¶ 172.

rights and needs.⁶⁶ During their time at Camp Cropper, both plaintiffs were also subjected to interrogation techniques that had specifically been proscribed by Congress,⁶⁷ including being “walled”⁶⁸ and “hooded”.⁶⁹ Vance and Ertel both requested an

66. *Id.* ¶¶ 176, 180.

67. Ronald W. Reagan National Defense Authorization Act, 10 U.S.C. 1091 (2005); *see also* General Gordon R. Sullivan, ARMY FIELD MANUAL 34-52, DEP’T OF THE ARMY 1-15 (Sept. 28, 1992), www.fas.org/irp/doddir/army/fm34-52.pdf (showing relevant Army Field Manual at the time).

68. It is unclear as to what exactly the phrase “walling” means. Amended Complaint, *supra* note 2, ¶ 176. The reference might refer to “wall standing,” a practice whereby a detainee puts only his fingers against the wall as high as he can reach and then leans all of the detainee’s weight into them. Memorandum from Jay S. Bybee, Assistant Attorney General on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A to Alberto R. Gonzales, Counsel for the President (Aug. 1, 2002) (on file with the American Civil Liberties Union (“ACLU”), *available at* <https://www.aclu.org/national-security/memo-jay-bybee-regarding-applicability-geneva-conventions>) [hereinafter the Bybee Memo]; Memorandum from Stephen G. Bradbury, Principal Deputy Assistant Attorney General on Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005) (on file with the ACLU) *available at* <https://www.aclu.org/national-security/letter-stein-bradbury-cia>) [hereinafter the Bradbury Memo]. This technique was often used in combination with deprivation of food and water, consistent blaringly loud “hissing” sounds, hooding, and prolonged sleep deprivation. The Bybee Memo, *supra*. The combination of these techniques was never found to be torturous, but only “inhumane and degrading” by the European Court of Human Rights. *Babar Ahmed and Others v. the United Kingdom*, 2012-CXLVI Eur. Ct. H.R. 231.

However, it is more likely that it refers to “walling” as defined in the Bradbury Memo. The Bradbury Memo, *supra*, at 8. There Stephen Bradbury, an Assistant Attorney General, described an interrogation technique whereby detainees were slammed backwards into a false wall. *Id.* at 1. This technique was designed to bring about a response from an unresponsive detainee. *Id.* at 8. The detainee’s shoulder blades would make contact with the wall, and a rolled up towel would be placed in between the wall and the detainee’s neck. *Id.* This was said to prevent whiplash. *Id.* The effect was one that startled and shocked the detainee as it would normally be followed by intense pain if the wall were not hollow, a fact that, of course, was kept from the detainee. *Id.* Although it was sometimes used only once during an interrogation for its disorienting effect on the subject’s psyche, it has also been reportedly used some “perhaps 20-30 times consecutively” during an interrogation. *Id.*

The effect of walling was to wear down the detainee, and to make the detainee believe that the level of physical pain being inflicted was not going to be decreased, but rather stay at a heightened level. *Id.* It was for this psychological effect alone that the technique was to be employed. *Id.* There was no evidence that it left any physical marks or caused any prolonged physical pain. *Id.* However, the office of the Attorney General nevertheless suggested that a physician be present for this interrogation technique. *Id.*

69. “Hooding” is where a hood is used to deprive an interrogation subject of sight. TORTURE AND ILL TREATMENT: ISRAEL’S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES, HUMAN RIGHTS

attorney and the names of their interrogators prior to all interrogations.⁷⁰ These requests were consistently denied without exception.⁷¹

After more than thirty-five days, Nathan Ertel was released.⁷² He was put on a bus for Baghdad Airport and, after fortuitously running into a friend, was able to procure the documents necessary for him to leave the country.⁷³ Vance, however, was held

WATCH/MIDDLE EAST WATCH 174 (Human Rights Watch ed., 1994). Although this seems mundane, and it may be when used by itself, it is the frequency and manner with which the hooding is used that earns it the designation of torture. *Id.* at 171. Hooding can lessen concentration, cause hallucinations, and invoke or create a sense of claustrophobia. *Id.* at 175. Hooding is justified as a practical way of keeping the detainees from identifying each other and becoming familiar enough with their surroundings that they feel comfortable. *Id.* However, when it is used systematically to disturb a detainee's psyche, it becomes a weapon of terror. *Id.* at 171.

The hoods are usually heavy canvas or cotton cloth, and the detainee can only see out the bottom slit. *Id.* at 174. The hoods are often applied after a detainee gives an unsatisfactory answer during interrogation as a means of punishment. *Id.* They are often used to transport the prisoner anywhere, even if it is only a short distance away to the bathroom. *Id.* Guards engaged in hoodings have allegedly purposefully dropped the hoods in feces and urine while the detainee is using the bathroom. *Id.* at 176. After detainees have been hooded, they have reported being put into a very tightly confined space, such as a refrigerator or a closet, and left there unattended. *Id.* at 174-75. This creates a heightened sense of claustrophobia. *Id.* at 175. Hoods have also been doused in water or tightened around the neck in order to restrict or threaten to restrict the detainee's breathing. *Id.* Some detainees have reported that interrogators would jump from behind them and cover their nose and mouth with their hands. *Id.* Although this may have never created a serious threat of suffocation, as the covering of the nose and the mouth did not last very long, the psychological impact was profound. *Id.*

Overall, the hoods are used for the purpose of dehumanizing and demoralizing the detainees. *Id.* at 171. Detainees report being led around the interrogation facility "like donkeys." *Id.* at 176. They have also said that although they would get a new hood every Sunday morning, the new hood was not necessarily better than the last hood, but rather was just different. *Id.* Sometimes one would receive a hood that smelled like gasoline, where the last one may have smelled strongly of feces. *Id.*; see also the Bybee Memo, *supra* note 68 (explaining in incredible detail the procedure and standards set forth by the Attorney General for hooding use); *Vance*, 653 F.3d at 597.

70. Amended Complaint, *supra* note 2, ¶ 209.

71. Although Plaintiffs did receive a hearing to determine their legal status, they were not afforded sufficient process. *Id.* ¶ 190. They were told that they had no right to counsel, only to later appear in court and be told that they would be permitted to produce evidence, call witnesses, and have an appointed representative. *Id.* ¶ 191. Prior to the trial, they were never made aware of the charges, and the evidence they requested was never produced. *Id.* ¶¶ 192, 195. Plaintiffs were not given the opportunity to examine the evidence before them or to call each other as witnesses. *Id.* ¶ 202. These are just a few of the omissions that stripped the trial of any real consequence or legitimacy. *Id.* ¶ 206.

72. *Id.* ¶ 208.

73. *Id.* ¶ 209.

for more than one hundred days.⁷⁴ When he was finally dropped off at Baghdad Airport, he was able to secure a flight to Jordan, and from there, on to Chicago, despite the fact that he had no documentation regarding his citizenship.⁷⁵ At no point during their detainment and interrogation, or for that matter, at any time during their lives, has either plaintiff ever been charged with a crime.⁷⁶

Following their return to the United States, Vance and Ertel sued Secretary of Defense Rumsfeld under a *Bivens* cause of action. Plaintiffs claim that Defendant Rumsfeld, former Secretary of Defense under George W. Bush, perpetuated the use of prohibited interrogation techniques after Congress specifically precluded their use.⁷⁷ A three-judge panel of the Seventh Circuit allowed a claim under *Bivens* to go forward, finding that Vance and Ertel had a claim against the former Secretary of Defense.⁷⁸ The full Seventh Circuit vacated the opinion and reheard the case *en banc* before overturning the three-judge panel.⁷⁹ The Seventh Circuit found that a secretary of defense is not liable to a private citizen for a *Bivens* claim.⁸⁰ To understand this decision, and how it was inconsistent with past *Bivens* jurisprudence, one must examine the history of the *Bivens* claim itself and the rise of private military firms since the 1990s, specifically in the context of the Iraq War.

B. The History of the *Bivens* Claim

Since 1971, the Supreme Court has recognized a citizen's right to recover when a federal agent has violated a clearly established constitutional right.⁸¹ Justice Brennan wrote, "in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute."⁸²

In *Bivens*, six unidentified federal agents raided the plaintiff's home under color of law, arrested the plaintiff in front of his family, and threatened his family that they would be arrested as

74. *Id.* ¶ 212.

75. *Id.* ¶ 212.

76. *Vance*, 653 F.3d at 594.

77. Amended Complaint, *supra* note 2, ¶ 30.

78. *Id.*

79. *Vance v. Rumsfeld*, 701 F.3d 193, 197 (7th Cir. 2012).

80. *Id.* at 198.

81. *See generally Bivens*, 403 U.S. at 388 (establishing a judge-made cause of action for violation of a clearly established constitutional right).

82. *Id.* at 402.

well.⁸³ After the plaintiff was booked, interrogated, and strip-searched, it came to light that the federal agents never had a search warrant and never made any effort to procure one.⁸⁴ The District Court held that the plaintiff was limited solely to statutory redress created through the Legislature.⁸⁵ The Second Circuit affirmed.⁸⁶ The Supreme Court overturned the Second Circuit, and held that where a clearly established constitutional right existed, the Court had an obligation to provide a remedy.⁸⁷

In their dissents, Justices Black and Blackmun iterated a fear that creating this cause of action would lead to a new host of frivolous lawsuits by money-hungry litigants.⁸⁸ These fears never materialized, largely due to the Court's refusal to extend a *Bivens* remedy to almost any group other than civilians suing a particular federal officer for a blatant violation of a known constitutional right.⁸⁹ As Chief Justice Rehnquist wrote, the Court has "consistently rejected invitations to extend *Bivens*."⁹⁰ These rejected invitations include refusals to extend damages for violations of a federal employee's first amendment rights,⁹¹ an enlisted member of the military,⁹² claims against a private corporation acting on behalf of the government,⁹³ or claims against an entire agency predicated on the actions of one official of said agency.⁹⁴

The Court has widely acknowledged *Bivens* liability in two scenarios: abridgments of procedural due process⁹⁵ and abuse

83. *Id.*

84. *Id.* at 389.

85. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 409 F.2d 718, 722-23 (2nd Cir. 1969).

86. *Bivens*, 403 U.S. at 390.

87. *Id.*

88. *See id.* at 430 (Blackmun, J., dissenting) (arguing that the Legislature purposefully did not create a *Bivens*-like remedy to encourage judicial efficiency).

89. *See Malesko*, 534 U.S. at 70 (stating that "[i]n 30 years of *Bivens* jurisprudence we have extended its holding only twice").

90. *Id.*

91. *See Lucas*, 462 U.S. at 388 (holding that a comprehensive recovery scheme and a pervasive government interest in maintaining discretion over what government employees present to the public counsels against recovery).

92. *See United States v. Stanley*, 483 U.S. 669, 680 (1987) (holding that a former service member was not allowed to recover under a *Bivens* claim for LSD experiments that he was subjected to while active in the military). The *Stanley* Court also held that Congress' involvement in the creation of a unique form of military justice as well as its constant involvement in its revision meant that there was an adequate alternative means to seek recompense. *Id.* at 684. Additionally, the Judiciary would be overstepping its bounds in creating liability. *Id.*

93. *Malesko*, 534 U.S. at 61.

94. *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 473 (1994).

95. *Davis v. Passman*, 442 U.S. 228, 230 (1978).

while imprisoned.⁹⁶ These issues are fully explored in the Analysis Section of this Comment.

C. *The Rise of the Private Military Firm*⁹⁷

In 1991, for every private contractor present in Iraq during Operation Desert Storm, there were fifty enlisted members of the military present.⁹⁸ Some twenty years later in the United States' occupation of Afghanistan, the ratio had become one to one;⁹⁹ this is not solely the effect of fighting conflicts in both Afghanistan and Iraq.¹⁰⁰ The public military sector has contracted, while the private sector has experienced almost boundless growth.¹⁰¹ In 1997, the average DoD auditor in charge of contract oversight was responsible for just over \$640 million worth of contracts.¹⁰² By February 2010, it had ballooned to \$2.02 billion per auditor.¹⁰³

Although Congress writes the checks for these contractors every year, it has not created legislation to deal with private military firms in the legal quantum in which they operate.¹⁰⁴ The perineum between what has been considered, correctly or incorrectly,¹⁰⁵ the dichotomous realms of the private corporation

96. *Carlson v. Green*, 446 U.S. 14, 18 (1980).

97. Neither this Section, nor this Comment, should be construed as a criticism of Privatized Military Firms. Their use is incredibly important, and at this point, almost certainly necessary to protect American interests at home and abroad. They keep the United States on the bleeding edge of modern security, and ensure that Americans have both the intellectual capital and sweat equity to stay there. For a truly enlightening discussion of the history of privatized warfare and what the prospect looks like going forward for modern-day mercenaries, see SINGER, *supra* note 16, at 19 (discussing the history, impact, and logistics of the privatized military industry). Singer is a brilliantly succinct writer, accessible to those unfamiliar with the subject matter, and a true leader in thought regarding the industry. See *The Daily Show with Jon Stewart: P.W. Singer* (Comedy Central Broadcast Jan. 29, 2009) (describing Singer's work as "so all-encompassing in terms of the robotic revolution, where it came from, the ethical concerns, I wish I had more than an hour to look it over").

98. P.W. Singer, *The Regulation of New Warfare*, THE POLITIC (Feb. 2010), <http://www.brookings.edu/research/opinions/2010/02/27-defense-regulations-singer> [hereinafter *The Regulation of the New Warfare*].

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Singer opens his book with a chapter addressing the long standing, incorrect interpretation that military excursions are historically tied with sovereignty. SINGER, *supra* note 16, at 3. Tracing the lineage of mercenaries from about 2000 B.C. to the modern day, Singer points out that the idea of a national army that belongs solely as the domain of a government is a fairly new concept dating back to the 1700s, specifically to the Napoleonic Wars. *Id.* at 30. While the idea of an American Army has been an integral part of how

and of the sovereign, has never been so thin.¹⁰⁶ Still there are rare accountability mechanisms in place, and with public oversight becoming increasingly scarce, less people are making sure those few mechanisms are functioning.¹⁰⁷

DoD contracts accounted for over \$375 billion in 2011, increasing over 100% since 2001, when they accounted for \$181 billion.¹⁰⁸ Due to the Obama Administration's withdrawal from Iraq as of January 1, 2012,¹⁰⁹ these numbers will surely see a downturn.¹¹⁰ However, the fact remains that America has spent \$7.6 trillion¹¹¹ on defense since 9/11, much of it on private military firms whose relationship to the country is murky at best.¹¹² What protections and liabilities are available for the parties and the participants is still an enigma wrapped in a mystery wrapped in a question mark wrapped in a flak jacket. This archetypical, but fledgling relationship is tested by Donald Vance and Nathan Ertel's situation.

the United States has defined its sovereignty, it is more an occurrence of historical happenstance than part and parcel of an ideology of autonomy. *Id.* It would also be disingenuous not to acknowledge the important strategic and tactical advantages that mercenaries and privateers played in the American Revolution. Matthew Underwood, "Jealousies of a Standing Army": *The Use of Mercenaries in the American Revolution and Its Implications for Congress' Role in Regulating Private Military Firms*, 106 NW. U. L. REV. 317, 324 (2012).

106. SINGER, *supra* note 16, at 179.

107. *The Regulation of New Warfare*, *supra* note 98.

108. Another sea change would be the amount that services have accounted for overall DoD spending. CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, U.S. DEPARTMENT OF DEFENSE CONTRACT SPENDING AND THE SUPPORTING INDUSTRIAL BASE (Sep. 12, 2012), *available at* <http://csis.org/publication/us-department-defense-contract-spending-and-supporting-industrial-base>.

Services accounted for 43% of DoD spending in 2011. *Id.* Although it is worth noting that services, accounting for about 30% of DoD spending in 1990, has steadily risen to well over 40% by the year 2011, with the withdrawal from Iraq and the scaling down of Afghanistan, it is unlikely that that figure will continue to be accurate. *Id.*

109. David Jackson, *Obama Announces Full Withdrawal from Iraq*, USA TODAY (Oct. 21, 2011),

<http://content.usatoday.com/communities/theoval/post/2011/10/obama-to-speak-on-iraq-at-1245-pm/1#.UGd90hhOx2U>.

110. JESSE ELLMAN ET AL., A REPORT OF THE CSIS DEFENSE INDUSTRIAL INITIATIVES GROUP: U.S. DEPARTMENT OF DEFENSE CONTRACT SPENDING AND THE SUPPORTING BASE 35 (Center for Strategic & International Studies ed. 2012), *available at* http://csis.org/files/publication/120914_Berteau_DoDContractSpending_Web2.pdf.

111. *U.S. Security Spending Since 9/11*, NAT'L PRIORITIES PROJECT (May 26, 2011), <http://nationalpriorities.org/analysis/2011/us-security-spending-since-911/>.

112. *The Regulation of New Warfare*, *supra* note 98.

D. The "McCain Amendment"

After the atrocities at Abu Ghraib,¹¹³ Senator John McCain of Arizona proposed the Detainee Treatment Act of 2005.¹¹⁴ The amendment was specifically aimed at prohibiting the interrogation techniques that were used in Abu Ghraib.¹¹⁵ Accordingly, the field army manual, which provides instructions regarding acceptable forms of interrogation, was modified.¹¹⁶ However, Defendant Rumsfeld did not modify the field manual in accordance with Congress' instructions until September 2006.¹¹⁷ During the period between, Plaintiffs were interrogated using illegal techniques.¹¹⁸

III. ANALYSIS

There are two analytical prongs that deserve consideration: a precedential analysis of subgroups and an analysis of the role *Bivens* plays in current jurisprudence. There are five analogous groups that the Supreme Court has addressed relevant to examining Vance and Ertel's claims. These groups, listed in the order in which they are discussed, are: (1) prisoners in state-run facilities,¹¹⁹ (2) prisoners in privately-run facilities,¹²⁰ (3) military personnel,¹²¹ (4) plaintiffs pursuing claims against those with qualified immunity,¹²² and (5) aliens.¹²³ Congressional silence is then briefly addressed.

113. Sam Dagher, *Fresh Paint and Flowers at Iraqi House of Horrors*, N.Y. TIMES (Feb. 22, 2009), <http://www.nytimes.com/2009/02/22/world/middleeast/22iraq.html?ref=abughr aib&r=0>.

114. Prohibition on cruel, inhuman, or degrading treatment or punishment of persons under custody or control of the United States Government (McCain Amendment), 42 U.S.C.A. § 2000dd (West 2006).

115. Charlie Savage, *Bush Could Bypass Torture Ban*, BOSTON GLOBE (Jan. 4, 2006), http://www.boston.com/news/nation/articles/2006/01/04/bush_could_bypass_n e w_torture_ban/?page=full. The bill was signed into law on January 30, 2005 by George W. Bush. *Id.*

116. *Id.*

117. Amended Complaint, *supra* note 2, ¶ 241.

118. *Id.*

119. *See Farmer*, 511 U.S. at 833 (discussing *Bivens* claims in state-run prisons).

120. *See Malesko*, 534 U.S. at 61 (discussing *Bivens* claims in privately-run prisons).

121. *See Lucas*, 462 U.S. at 367 (discussing *Bivens* among military personnel).

122. *See generally Saucier*, 533 U.S. at 194 (discussing *Bivens* and its relation to the doctrine of qualified immunity).

123. *See generally Iqbal*, 556 U.S. at 662 (discussing *Bivens* and foreign nationals).

*A. Bivens Analysis**1. Government Run Prisons*

*Farmer v. Brennan*¹²⁴ featured a pre-operative biological male, who identified as a female, incarcerated in a federal penitentiary.¹²⁵ The plaintiff had silicone breast implants, participated in “black market” testicle removal, took estrogen, and dressed and lived as a woman.¹²⁶ Although the practice of federal prisons at the time was to place people with their biological gender, the plaintiff had been separated from the general population for the majority of plaintiff’s time.¹²⁷ After the plaintiff was transferred to a maximum-security prison, alleged to have had a particularly well-known history of violence, plaintiff was reintroduced into the general population.¹²⁸ Within two weeks, plaintiff claimed to have been beaten and raped by another inmate.¹²⁹ Plaintiff was transferred back to segregation several days after the attack.¹³⁰ Plaintiff then filed a *Bivens* claim against the jailors, claiming that they had placed the plaintiff in the general population despite being aware of the likelihood that plaintiff would be subjected to violence and sexual attack, and that such placement amounted to an abridgment of the plaintiff’s Eighth Amendment rights.¹³¹ The District Court granted the prison’s motion for summary judgment, and the Seventh Circuit affirmed the lower court’s finding.¹³² The Supreme Court vacated and remanded.¹³³

The Court held that if a plaintiff can show deliberate indifference by a federal prison official, then that plaintiff will be able to recover under a *Bivens* theory.¹³⁴ The Court set forth a two-element test: (1) that the official is aware of circumstantial facts from which one could reasonably infer a “substantial risk of serious harm”,¹³⁵ and (2) that the official is in a culpable state of mind if he actually draws the inference.¹³⁶ The Court belabored that the plaintiff was not responsible for giving actual notice if the only reasonable inference drawn from the person in the official’s position would be that the official’s actions would create a serious

124. *Farmer*, 511 U.S. at 829.

125. *Id.*

126. *Id.*

127. *Id.* at 829-30.

128. *Id.* at 830.

129. *Id.*

130. *Id.*

131. *Id.* at 830-31.

132. *Id.* at 831-32.

133. *Id.* at 851.

134. *Id.* at 828.

135. *Id.* at 834.

136. *Id.* at 837.

risk of harm.¹³⁷

The strongest argument for *Bivens* liability as to Defendant Rumsfeld through this paradigm is that the federal penal system parallels detainment. However, the two serve fundamentally different purposes: one punishment and rehabilitation,¹³⁸ the other information gathering and threat prevention.¹³⁹ Also, special

137. *Id.* at 839.

138. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 232 (Vintage Books 2d ed. 2009).

This “self-evident” character of the prison which we find so difficult to abandon, is based of all on the simple form of “deprivation of liberty.” How could prison not be the penalty *par excellence* in a society in which liberty is a good that belongs to all in the same way and to which each individual is attached, as Duport put it, by a “universal and constant” feeling? Its loss has therefore the same value for all; unlike the fine, it is an “egalitarian” punishment. The prison is the clearest, simplest, most equitable of penalties.

Id.

139. *Hamdi v. Rumsfeld*, 542 U.S. 507, 537-38 (2004). The seemingly never-ending tale of Yaser Esam Hamdi is a fascinating one. *Id.* at 510-12. In the wake of 9/11, Congress passed the Authorization for Use of Military Force (AUMF). *Id.* at 510; Authorization for Use of Military Force, 50 U.S.C.A. § 1541 (West 2002). The AUMF authorized the President to take unilateral action to address immediate concerns regarding the safety of the United States. *Id.*; Richard W. Stevenson & Adam Liptak, *Cheney Defends Eavesdropping Without Warrants*, N.Y. TIMES (Dec. 21, 2005), available at http://www.nytimes.com/2005/12/21/politics/21cheney.html?pagewanted=all&_r=0. Although it is not clear whether it was the Legislature’s intention, the Bush Administration used the AUMF as an opportunity to gain some ground utilizing the unitary executive theory, a neoconservative concept that some, such as former-Vice President Dick Cheney, advanced as far back as 1987. *Id.*

Hamdi left his home of Louisiana and found his way to Afghanistan, where he took up arms against the United States as a member of the Taliban before being captured by the Northern Coalition on the battlefield in Afghanistan in 2001. *Hamdi*, 542 U.S. at 510. He was subsequently transferred to Guantanamo Bay, and then to a Naval brig in Virginia where he was held without habeas relief or access to counsel or his family from sometime in 2001 until January 2002. *Id.* at 510-11.

Hamdi’s father authored a petition for habeas corpus, which the Fourth Circuit flatly rejected. *Id.* at 511-12. His father then filed for a writ of certiorari with the Supreme Court, and it was granted. *Id.* at 516.

The Court initially set out that the grant of power pertaining to those enemies that the AUMF was specifically designed to address meant that the President had almost plenary authority to pursue those responsible for the terrorist attacks of September 11th with little, if any, meaningful oversight. *Id.* at 518. The Court then realized the predicament this put personal liberties in, as the authorization presumably lasted as long as active hostilities continued. *Id.* at 521. There was no way to predict how long, or to even really quantify what qualified as “active hostilities,” as this type of conflict had little precedent. *Id.* The Court found this line of logic persuasive. *Id.*

The Government maintained that since Hamdi’s capture occurred on foreign soil and under combat conditions, there was no issue arising from a habeas claim. *Id.* at 526. The Bush Administration essentially contended that even if Hamdi’s relocation to Afghanistan did not rid him of his constitutional

factors may be present that would counsel hesitation under the *Bush v. Lucas* test.¹⁴⁰ This argument is fundamentally flawed structurally and misses the more profound holding of Justice Souter's opinion. Although discussion of the Special Factor consideration will be reserved until later, the first two points merit immediate discussion.

Civil court is always to be given preference over a military court, when both are open and can be afforded to American citizens.¹⁴¹ Thus, the first flaw is dealt with repeatedly and

rights, then certainly entrance into a combat zone as a known enemy of the United States constituted a waiver of any habeas rights guaranteed him under the Constitution. *Id.* at 526-27. Relying on a World War II case, *Ex Parte Quirin*, 317 U.S. 1, 21 (1942), the Court found that insurrection could absolutely compromise any constitutional rights to habeas that Hamdi was seeking to assert. *Hamdi*, 542 U.S. at 518.

The Court also found that if the military was able to single-handedly decide who was an enemy combatant and being an enemy combatant exempted one from due process, then the military could effectively detain anyone, unilaterally declare them to be an enemy combatant, and deprive them of any rights they wanted. *Id.* at 532. The Court realized that this was circular logic. *Id.*

The Court recognized that there is a need for expediency during exigent circumstances, as well as a need to respect that a prisoner must have some forum to make the government assert its basis for holding him. *Id.* at 533. The Court acknowledged that certain concessions must be made at some point, simply based on pragmatism and logistical demands. *Id.* at 533-34. As such, there may be a lightened standard as far as hearsay requirements go, and other Sixth Amendment protections. *Id.* at 534. Likewise, the burden of persuasion may be adjusted to allow for speedier trials. *Id.*

The Court found that providing these barebones rights would not create an undue burden or obstacle for the military to continue to preserve national security and interests. *Id.* at 534. Ultimately, the Court considered this a compromise in between the full monty procedural protections afforded the average American and the complete deprivation of process that Hamdi was then subject to. *Id.* at 535. Shortly after Hamdi's case made it to the Supreme Court, the military let him go. Adam Liptak, *John Walker Lindh's Buyer's Remorse*, N.Y. TIMES (Apr. 23, 2007), available at <http://select.nytimes.com/2007/04/23/us/23bar.html>. Hamdi then returned to Saudi Arabia where he presumably still resides. *Id.*

140. *Lucas*, 462 U.S. at 367. In *Lucas*, the Court expounded on the meaning of the special factors initially raised in *Bivens*. *Id.* at 377. "In the absence of such a congressional directive, 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 counseling [sic] hesitation before authorizing a new kind of federal litigation." *Id.* at 378.

141. In *Ex Parte Merryman*, TANEY 246, 150 (1861), the District Court of Maryland held that if the civil courts are open even a suspected combatant should still be afforded protection and process that comports with the civil courts. This basic concept serves two important functions. *Id.* First, it reinforces the concept of strictly enumerated powers, in that it firmly maintains that the sole power to suspend habeas corpus belongs to the Legislature, not the Executive. *Id.* Second, it confirms that although the Executive possesses wide discretion regarding waging war, Congress still has

consistently in American jurisprudence.¹⁴² To find that Vance or Ertel gave some form of implicit consent to be tried in a military court without engaging in combat after both had left the military would be a flat abridgment of their Sixth Amendment protection against forced conscription.¹⁴³ They are distinguishable from the plaintiffs in *Rumsfeld v. Padilla*¹⁴⁴ and *Hamdi v. Rumsfeld*,¹⁴⁵ just by virtue of the fact that they have never been accused of any crime and they have never engaged in combat.¹⁴⁶ The enemy combatant doctrines¹⁴⁷ that have been developed in light of those two cases are completely inapposite to the present case.¹⁴⁸

These arguments also fail to address the looming decision of the *Farmer* Court—deliberate indifference can create liability.¹⁴⁹

the prerogative to prescribe the bounds by which the Executive must abide. *Id.* 142. See *Duncan v. Kahanamoku*, 327 U.S. 304, 337 (1946) (Stone, C.J., concurring) (arguing,

[t]he military authorities themselves testified and advanced no reason which has any bearing on public safety or good order for closing the civil courts to the trial of these petitioners, or for trying them in military courts. I can only conclude that the trials and the convictions upon which petitioners are now detained, were unauthorized by the statute, and without lawful authority).

See also *Caldwell v. Parker*, 252 U.S. 376, 386-87 (1920) (holding that “a state of war, in the absence of some occasion for the declaration of martial law or conditions consequent on military operations, gave no power to the military authorities where the civil courts were open and capable of performing their duties”); *Ex Parte Milligan*, 71 U.S. 2, 8 (1866) (holding that “the petitioner might be brought before the court, and either turned over to the proper civil tribunal to be proceeded with according to the law of the land, or discharged from custody altogether”).

143. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22-23 (1950) (holding,

Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades. Consequently considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury We hold that Congress cannot subject civilians like Toth to trial by court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution).

144. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

145. *Hamdi*, 542 U.S. at 540.

146. Amended Complaint, *supra* note 2, ¶ 4.

147. The enemy combatant doctrine, as elucidated in *Boumediene v. Bush*, 553 U.S. 723, 793 (2008), iterates that foreigners held as enemy combatants must exhaust all U.C.M.J. options before being allowed access to the federal courts to petition for habeas corpus.

148. See Plaintiffs’ Response in Opposition to Defendants’ Motion to Transfer the Case, *supra* note 21 (discussing how Vance and Ertel were never charged with a crime, whereas both Hamdi and Padilla were held for their role in terrorist organizations).

149. See *Farmer*, 511 U.S. at 837 (holding that failing to abide by a

Here, Defendant Rumsfeld's actions, which were in direct opposition to the legislation passed by Congress, must be read, at the very least, as deliberate indifference. Rumsfeld must have not only known of the risk, and thus drawn the requisite inference, but his memos serve no purpose if not to make sure the risk was present.¹⁵⁰

2. *Privately Run Prisons*

In the 2012 term the Court specifically limited a plaintiff's right to recover against a federal prison to those institutions that are state run, and not those run by private corporations.¹⁵¹ In *Minneci v. Pollard*, the Court reaffirmed the two-prong test stemming from *Wilkie v. Robbins*¹⁵² [the "Wilkie test"] that must be satisfied before *Bivens* liability is available to a plaintiff.¹⁵³ The two limitations are: (1) being a remedial measure, courts are limited to extending a remedy in cases where there are no alternative causes of action that the plaintiff may pursue; and (2) that there may not be any special factors present that would counsel hesitation.¹⁵⁴ Justice Breyer, in his majority opinion, found that whether or not a private corporation acted under color of law¹⁵⁵ is irrelevant,¹⁵⁶ and a fundamental purpose that *Bivens* serves is to provide a remedy where sovereign immunity would protect against recovery.¹⁵⁷ Thus, whether or not the party was fulfilling a traditional role of the sovereign, such as maintaining and running a prison, was immaterial because a plaintiff could still pursue a traditional civil suit.¹⁵⁸ Whether or not the recovery

subjective standard of indifference can create liability in a prison official).

150. See also the Bybee Memo, *supra* note 68 (expounding on risks involved with various types of torture and the requisite steps needed to safeguard interrogees from unintended harm). Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee, to Stephen G. Bradbury, Principal Deputy Assistant Attorney General (May 10, 2005) (on file with the ACLU), available at <http://www.justice.gov/olc/docs/memo-bradbury2005-3.pdf> [hereinafter the Rizzo Memo].

151. *Minneci v. Pollard*, 132 S. Ct. 617, 626 (2012).

152. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

153. *Minneci*, 132 S. Ct. at 621.

154. *Id.*

155. "[T]he word 'color,' as in 'color of authority,' 'color of law,' 'color of office,' 'color of title,' and 'colorable,' suggests a kind of holding out and means 'appearance, semblance, or simulacrum,' but not necessarily the reality." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 211 (1970).

156. *Minneci*, 132 S. Ct. at 621.

157. *Id.* at 623.

158. Exclusiveness of Remedy, 28 U.S.C.A. § 2679(d) (West 2012). Colloquially known as "The Westfall Act," it authorizes the Attorney General of the United States to decide whether or not a federal employee was working within the scope of his employment, although the Attorney General's decision

would be consummate to what a plaintiff might recover under tort law was irrelevant, as *Bivens* was designed to be a merely remedial measure.¹⁵⁹ As such, the Court never reached the issue of whether there were special factors counseling hesitation.¹⁶⁰

The Court reversed the Ninth Circuit in *Minneci*.¹⁶¹ The Ninth Circuit had held that proxy could hold the private corporation liable because they were acting under color of federal law and, as such, private agents could be “federal agents” within the meaning of agency.¹⁶² The Court flatly rejected this argument.¹⁶³

Thus, precluded is the argument that since Vance and Ertel were acting in a function historically identified with sovereignty, they are prevented from asserting a right traditionally reserved for private parties.¹⁶⁴ It would be hypocritical and logically

is subject to judicial review. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425 (1995).

If so, then the plaintiff may proceed against the U.S. Government, the employee being dismissed, and the Government being substituted under the Federal Tort Claim Act (“FTCA”), so that the plaintiff may complete her claim. *Id.* at 427. If the employee was acting outside of the scope of his employment, then he is personally liable. *Id.* However, even if the employee is acting within the scope of his employment, the government is only held liable if one of the FTCA’s exceptions does not apply. *Id.*

159. *See Malesko*, 532 U.S. at 72-73 (holding that in a comparable private prison situation, the right to a *Bivens* remedy is precluded if there is an alternative remedy available to a plaintiff). *But see Malesko*, 532 U.S. at 75-76 (Stevens, J., dissenting) (arguing under a common law interpretation of agency that a private prison acting under color of federal law is essentially an exercise of the sovereign, the private actor must assume the corresponding liabilities, like *Bivens*); *Minneci*, 132 S. Ct. at 627 (Ginsburg, J., dissenting) (arguing that although the Court should have found that the plaintiff was entitled to pursue his claim in *Malesko*, that where a specific person can be identified, the deterrent effect served by *Bivens* liability is even greater).

160. *Minneci*, 532 U.S. at 626.

161. *Id.*

162. *Pollard*, 629 F.3d at 859.

163. *Minneci*, 532 U.S. at 626. Here, the Court pointed out that the Fourth Amendment specifically calls for remedies. *Id.* The Court found that particular consideration taken in tandem with the Eighth Amendment implications raised by the specter of torture creates a situation of particular concern for the Judiciary. *Id.* at 623. This is largely due to the fact that Eighth Amendment abuses have been the most widely accepted realm in which *Bivens* has been exercised, even in times of considerable judicial restraint, rising occasionally to the level of contempt towards the *Bivens* action. *Id.* What the Court largely rests on in *Minneci* is the alternative availability of a remedy that is precluded by Eleventh Amendment immunities. *Id.* at 624.

164. Justice Frankfurter puts forward one of the Court’s more “Pythonesque” hypotheticals in *Indian Towing Co., Inc. v. United States*, 350 U.S. 61, 66 (1950), which consisted of a petty officer who runs over a pedestrian in his coast guard car on his way to inspect a lighthouse. *Id.* While he is inspecting the lighthouse, he injures a second bystander after tripping over a wire. *Id.* While ignoring the broken connector that is the reason the

incongruous on the most basic level to invoke the protection associated with a private party on one level, and not provide the corresponding protection on another.¹⁶⁵

3. *Military Members Pursuing Bivens Claims*

The group that at first glance may seem to be most on point with Vance and Ertel's *Bivens* claim would be members of the military whose claims accrued during their active duty. In *United States v. Stanley*,¹⁶⁶ the Court held that because of the extensive nature of the Uniform Code of Military Justice [U.C.M.J.] and the Legislature's consistent involvement in it, a *Bivens* remedy was precluded.¹⁶⁷ The extensive nature of the U.C.M.J. was a special factor that counseled hesitation.¹⁶⁸ The concern voiced by Justice Scalia in the majority opinion was that the *Bivens* remedy might overstep structural boundaries and create a remedy where the Legislature had specifically not created one.¹⁶⁹ In this way, Scalia's opinion very closely aligns with Justices Blackmun and Black's concern in their *Bivens* dissent.¹⁷⁰

The special factors considerations that have provoked hesitance in *Bivens* decisions has been a uniform manifestation of concern that the judiciary might usurp the role of Congress.¹⁷¹ Justice Scalia specifically finds that the special factors consideration is there to preserve Congress' law-making role "[t]o make Rules for the Government and the Regulation of the land and naval Forces."¹⁷² This is in keeping with a traditional understanding of the special factors consideration, and looking at the history of the concern will cement that proposition.¹⁷³

light is out, he touches up against an uninsulated wire that sparks. *Id.* The sparks fly off into the water, catching on a barge carrying explosives before blowing the entire thing sky high. *Id.*

165. *Id.*

166. *Stanley*, 483 U.S. at 683.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Bivens*, 403 U.S. at 429 (Black, J., dissenting). "Should the time come when Congress desires such lawsuits, it has before it a model of valid legislation, 42 U.S.C. § 1983, to create a damage remedy against federal officers." *Id.*

171. *Bivens*, 403 U.S. at 396.

The present case involves no special factors counseling hesitation *in the absence of affirmative action by Congress* The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.

Id. (emphasis added).

172. *Stanley*, 483 U.S. at 682.

173. *Carlson*, 446 U.S. at 19. "[T]he case involves no special factors counseling [sic] hesitation in the absence of affirmative action by Congress.

In the seminal *Bivens* case *Bush v. Lucas*,¹⁷⁴ Justice Marshall traced the history of special factors.¹⁷⁵ He specifically enumerated special factors as a caution arising out of a concern that the Court would usurp any of the core legislative functions.¹⁷⁶ For support, Justice Marshall pointed to the fact that when the Court was designing the special factors constraint, it drew on *United States v. Standard Oil Company of California*.¹⁷⁷ In that opinion, Justice Jackson held, on behalf of the majority, that the Court should be hesitant to create a separate body of law, and that one of the fundamental purposes of the separation of powers was to prevent usurpation.¹⁷⁸ In fact, not once in the nine cases that the Court has heard on *Bivens* dealing with special factors, had the consideration been anything other than a legislative consideration.¹⁷⁹ To extend a special factors consideration to the Executive, as has been suggested by Defendant Rumsfeld's briefs, would be a stark departure and discordant with more than forty years of

Petitioners do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Id.* at 14-15; *see also* Schweiker v. Chilicky, 487 U.S. 412, 422 (1988) (holding that it is the comprehensiveness of Congress' involvement in the U.C.M.J. that leads to considerable deference by the Judiciary, that Congress defines the military and its role so thoroughly allows the courts to take a step back and allow the self-sustaining system and the Legislative vision for the military work itself out). "[A] federal district court may provide relief in damages for the violation of constitutional rights if there are 'no special factors counseling hesitation in the absence of affirmative action by Congress.'" *Davis*, 442 U.S. at 245. "Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf." *Wilkie*, 551 U.S. at 562 (emphasis in original).

174. *Lucas*, 462 U.S. at 367. A NASA engineer made a number of highly critical and inflammatory remarks about the operation of the government agency to members of the press. *Id.* at 369. NASA, somewhat predictably, demoted him. *Id.* After his second appeal determined that he was improperly demoted, he filed a suit in an Alabama court for defamation and abridgment of his First Amendment rights. *Id.* at 371. The Supreme Court took as true that his rights were violated, and only had left to determine, whether or not a *Bivens* remedy was available to him. *Id.* at 372.

The Court specifically noted that Congress intended the FTCA and *Bivens* claims to complement each other, and be construed in tandem. *Id.* at 378. The Court finally decided that because Congress so heavily and uniquely manages their relationship with federal employees, to create a cause of action for a First Amendment violation would be an improper exercise of power, thus finding for the defendant. *Id.* at 385.

175. *Id.* at 380.

176. *Id.* "The special factors counseling hesitation in the creation of a new remedy in *Standard Oil* and *Gilman* did not concern the merits of the particular remedy that was sought. Rather, they related to the question of who should decide whether such a remedy should be provided." *Id.*

177. *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 311 (1954).

178. *Id.* at 309.

179. *Arar v. Ashcroft*, 585 F.3d 559, 624 (2009).

jurisprudence.¹⁸⁰

4. The Doctrine of Qualified Immunity

The first case to lay out a comprehensive version of the qualified immunity doctrine was *Wood v. Strickland*,¹⁸¹ although it should be noted that the case was not pursued under *Bivens*.¹⁸² Therein, the Court prescribed a two-step test for qualified immunity that contained a subjective element, as well as an objective element.¹⁸³ An official can be held liable if they acted with subjective malice and if they violated an objectively clearly established constitutional right.¹⁸⁴ If either prong was not violated, the defendant was not only relieved of liability, but relieved of the burden of defending the suit at all.¹⁸⁵ For this reason, whether or not a person is entitled to qualified immunity is a total sum game, as it proves dispositive of the litigation as a whole.¹⁸⁶

Within a *Bivens* context, the qualified immunity¹⁸⁷ doctrine was applied in *Saucier v. Katz*.¹⁸⁸ In *Saucier*, a Secret Service Agent was the defendant in a *Bivens* suit after he allegedly used excessive force in detaining and removing a protester from a rally for Vice President Gore.¹⁸⁹ The Court held that the test for

180. Reply Brief for the Appellants, *infra* note 210.

181. *Wood v. Strickland*, 420 U.S. 308 (1975).

182. *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). Although the case was pursued under a 42 U.S.C. § 1983 claim, it is a very close analogue to *Bivens* that allows a plaintiff to abrogate state immunity in order to pursue a violation of a known right. *Id.* In *Strickland*, students were expelled for violating a school's ban on drugs and alcohol, and sued two school officials. *Strickland*, 420 U.S. at 309-10.

The Court found that officials were entitled to a presumption of "qualified good-faith immunity." *Id.* at 318. The test was laid out as,

[The official] is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff].

Id. at 322.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. There are two major types of immunity that warrant discussion, absolute immunity and qualified immunity. Absolute immunity comes out of the common law protection for judges. *Imbler v. Patchman*, 424 U.S. 409, 420 (1976). The immunity is that as long as the person is acting within the scope of their role, they are totally immune from having a suit even brought against them. *Id.* Qualified immunity, on the other hand, only provides immunity within the scope of their role, assuming neither of the two-prongs of the *Strickland* test is triggered. *Strickland*, 420 U.S. at 322.

188. *Saucier*, 533 U.S. at 200.

189. *Id.* at 198.

whether or not a government agent can claim qualified immunity is a question of whether a reasonable person in the agent's position would have known that he was violating a clearly established law.¹⁹⁰ The Court held that the idea of charging someone in the Secret Service Agent's position with excessive force was preposterous, as someone in his position was redoubtably allowed to use force.¹⁹¹ As such, the fact that he may have exceeded what was reasonable force, since he was exerting it within the purview of his employ, excused him by virtue of the qualified immunity doctrine.¹⁹²

The Court made this doctrine a little easier to apply in a § 1983 claim¹⁹³ in *Pearson v. Callahan*.¹⁹⁴ In *Pearson*, the Supreme Court removed the two-step elemental test raised in *Strickland*, in favor of a two-prong test that does not have a mandatory progression.¹⁹⁵ This decision was made in the interest of judicial efficiency.¹⁹⁶ The qualified immunity doctrine was created to preserve immunity for entitled defendants; prior to the Court's revision in *Pearson*, defendants had to put forth a vivacious defense on the first prong, knowing that their opponent's claim would fail once it reached the second.¹⁹⁷ The fundamental issue comes down to whether or not the actor was acting in good faith within the scope of his agency, and whether he was violating a clearly established constitutional right as observed by Congress.¹⁹⁸

5. Aliens Pursuing Bivens Claims

Aliens constitute the final group whose access to *Bivens* claims will be examined. Generally, aliens have not been able to recover in torts actions against the U.S. government, even in situations very similar or more severe than those that gave rise to the original *Bivens* claim itself.¹⁹⁹ *Mirmehdi v. United States*²⁰⁰ addressed the situation facing aliens.²⁰¹ The Ninth Circuit held that four undocumented Iranians who had been detained illegally

190. *Id.* at 200.

191. *Id.* at 202.

192. *Id.* at 209.

193. *Pearson*, 555 U.S. at 223.

194. *Id.*

195. *Id.* at 236.

196. *Id.* at 235.

197. *See id.* at 231, 234 (discussing the purpose of qualified immunity and judges' avoidance in deciding "constitutional questions" because they are unnecessary when immunity applies).

198. *Id.* at 243-44.

199. *See generally Arar*, 585 F.3d at 559-610 (finding that a Canadian national, who was purposefully handed off to Syrian forces and tortured for twelve days, could not recover because he was an alien).

200. *United States v. Mirmehdi*, 689 F.3d 975, 978 (2011).

201. *See id.* at 985 (describing California's strict bar on recovery in proceedings with an immigration judge).

in inhumane conditions could not assert a *Bivens* claim.²⁰² The Ninth Circuit, with a reputation as one of the more liberal and liability-centric circuits in the country,²⁰³ denied that aliens could maintain a *Bivens* action because deportation proceedings were so heavily regulated.²⁰⁴ Again, substantial deference to Congress was shown to be the only motive for restraint in creating a *Bivens* remedy.²⁰⁵ The *Mirmehdi* Court adopted this mode from *dicta* mentioned in *Sosa v. Alvarez*.²⁰⁶ In that case, a Mexican national sued the Federal Government under very similar facts based on a theory of Federal Tort Claims Act [FTCA]²⁰⁷ and Alien Tort Claims Act [ATCA]²⁰⁸ violations.²⁰⁹

Although aliens attempting to make *Bivens* claims are heavily cited by Defendant Rumsfeld, these cases are completely inapposite from Vance and Ertel's situation,²¹⁰ merely by virtue of the fact that they were American citizens, on American soil when they were arrested, transferred, and tortured on American military bases.²¹¹ It is beyond question that certain constitutional liberties are not offered to aliens or citizens abroad that are threatening American interests, but that is not what this case is about.²¹² Seeing as there is no case on point, one is only left with the option of looking at the negative space, armed by previous decisions, and trying to marry doctrine to the silhouette left behind.

B. Congressional Silence as a Mandate

In the more than four decades since *Bivens* was decided, Congress has passed some legislation that is along those protected

202. *Id.* at 978-80.

203. See John Schwartz, 'Liberal' Reputation Precedes Ninth Circuit, N.Y. TIMES, Apr. 25, 2011, at A33A (describing the Ninth Circuit as liberal).

204. *Mirmehdi*, 689 F.3d at 985.

205. *Id.* at 982. "Congress's failure to include monetary relief can hardly be said to be inadvertent." *Id.*

206. *Sosa v. Alvarez*, 542 U.S. 692, 727 (2004).

207. 28 U.S.C.A. §§ 1346(b), 2671-2680 (West 2012).

208. The Alien Tort Claim Act ("ATCA") is a primarily jurisdictional act that provides relief if: (1) a foreign citizen sues; (2) under a tortious claim; and (3) the commission of the tort was in violation of an established and ratified treaty or national law that the United States respects. *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 116 (2d Cir. 2008).

209. *Sosa*, 542 U.S. at 697.

210. Compare Reply Brief for Appellants at 1-30, *Vance v. Rumsfeld*, Nos. 10-1687, 10-2442 (7th Cir. Dec. 29, 2010), 2010 WL 6019648 (citing several cases as dispositive, without addressing that the cases cited are aliens, not American nationals), with Amended Complaint, *supra* note 2, ¶¶ 1, 3, 139 (describing how two Vance and Ertels were detained and taken to the U.S.).

211. Amended Complaint, *supra* note 2, ¶¶ 1, 3, 22.

212. *Arar*, 585 F.3d at 572.

lines of the Eighth Amendment rights recognized in *Bivens*. Two of the most prominent statutes are the Torture Victims Protection Act [TVPA]²¹³ and the Alien Tort Statute [hereinafter ATS].²¹⁴ When read together, these two statutes have never been construed to confer a *Bivens* remedy to alien torture victims who suffered at the hands of American military.²¹⁵

This has been the result of a historically presumed two-step precursor: (1) Congress legitimately conferred the administration of a war to the Executive, and (2) the Executive is acting within his purview in exercising these power against aliens.²¹⁶ The original grant to be conferred, and the reciprocal power to rein it back in, lies solely within the Legislature's prerogative.²¹⁷ The "McCain Amendment" cannot be seen as anything less than an exercise of that prerogative.²¹⁸ Anything perpetuated by the Executive that is opposite in either spirit or letter to a law passed by the Legislature is a structural assault on the Constitution.²¹⁹ Obviously, Congress did not intend the legislation to be without teeth, and although congressional silence by itself cannot be read as a mandate,²²⁰ where the Legislature clearly expressed its intention, but failed to create a remedy, to deny that intention would be to deny the virtue of the law.²²¹

IV. PROPOSAL

By looking at the five aforementioned groups, we see that

213. Terrorism Exception to the Jurisdictional Immunity of a Foreign State, 28 U.S.C.A. 1605A (West 2012).

214. Alien's Action For Tort, 28 U.S.C. § 1350 (West 2012).

215. *In re Iraq & Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 105-06 (D.C. Cir. 2007). "These are only some of the many reasons why '[e]xecutive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security.'" *Id.*

216. *Id.* at 106.

217. *Id.*

218. U.S. CONST. art. 1, §§ 1, 9. *See generally* 42 U.S.C.A. § 2000dd (West 2012) (limiting specifically the Secretary of Defense's abilities to those interrogation techniques approved by Congress, specifically those listed in the Army Field Manual). 10 U.S.C. § 1006 (2005).

219. *See, e.g., id.* (penalizing inhumane, degrading, or cruel punishment by the government that violates the Fifth, Eighth, or Fourteenth Amendments).

220. *See United States v. Wells*, 519 U.S. 482, 496-97 (1997) (holding "[w]e thus have at most legislative silence on the crucial statutory language, and we have 'frequently cautioned that '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law'").

221. *See Missouri v. Hunter*, 459 U.S. 359, 368 (1983) (quoting *Blockburger v. United States*, 483 U.S. 299, 344 (1932) (arguing that "the question of what punishments are constitutionally permissible is no different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution." (emphasis in original))).

while the *Bivens* claim has rarely been extended,²²² the consistent reason for such incredible caution was that a fear of usurping the role of the Legislature.²²³ Here, what we see in *Vance* is the Court's opportunity to perform one of its constitutional duties and preserve a check on the Executive by protecting the Legislature. This is one of the fundamental roles of the Judiciary.²²⁴ Grade school students learn that the fundamental purpose of the Judiciary Branch is to act as a sort of umpire for the other branches.²²⁵

As unsatisfying as it may seem, Congressional silence may be the clearest mandate on *Vance* and *Ertel*'s behalf. In 1991, Congress enacted the TVPA, which provided a cause of action for U.S. citizens who were tortured by foreign governments.²²⁶ The only reasonable inference to be drawn from such legislative inaction is not that the U.S. is specifically condoning its own government agents to torture American citizens, but rather that the defense against such torture is presumed when the victim is an American citizen.

The most common argument made throughout Defendant Rumsfeld's briefs is essentially an assertion that the Executive Privilege²²⁷ is a Special Factor that counsels hesitation,²²⁸ and failing that, the former secretary is entitled to qualified immunity.²²⁹ First, this would be an incredible departure for the courts to recognize. The underlying concern against extending *Bivens* claims has always been legislative in nature.²³⁰ To ignore that history here would be denying Congress the power to define the scope of a declared war, which is tantamount to making the Executive's prerogative in defining a military conflict plenary, in

222. *Bivens* claims have been extended twice. The latest extension was in the case of the mother of a deceased prisoner suing on her late husband's behalf after he died due to severe beatings he suffered while incarcerated. *Carlson*, 446 U.S. at 16-17. Before that, it was extended for a Congressional aide who alleged that her Congressman fired her from her position based solely on her gender. *Davis*, 442 U.S. at 230-31, 234.

223. *Schweiker*, 487 U.S. at 421-22.

224. *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

225. Craig Walenta, *The Constitution for Kids (4th-7th Grade)*, The U.S. Constitution Online, <http://www.usconstitution.net/constkids4.html> (last modified Aug. 6, 2010).

226. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012) "The Torture Victim Protection Act authorizes a cause of action against '[a]n individual' for acts of torture and extrajudicial killing committed under authority or color of law of any foreign nation." *Id.*

227. See generally *United States v. Nixon*, 418 U.S. 683 (1974) (explaining the outline of executive privileges and the limits thereof).

228. Reply Brief for Appellant, *supra* note 210, at 5.

229. *Id.* at 18-19.

230. See *Schweiker*, 487 U.S. at 421 (evaluating *Bivens* based on congressional action and statutory relief).

stark contrast to not solely the history of *Bivens*, but to those past decisions that have been guideposts for separation of powers analysis.²³¹ Of paramount importance in cabining the executive—decisions such as *Youngstown Sheet Metal and Tube, Co.*²³² and

231. *Nixon*, 416 U.S. at 683. President Nixon had appointed Archibald Cox, one of the greatest names in the history of American politics and jurisprudence, as Special Prosecutor to investigate the Watergate break-ins. Kenneth B. Noble, *New View Emerges of Bork's Role in Watergate Dismissal*, N.Y. TIMES (July 26, 1987), <http://www.nytimes.com/1987/07/26/us/new-views-emerge-of-bork-s-role-in-watergate-dismissals.html?pagewanted=6&src=pm>. When the President became uncomfortable with Cox's progress, the President fired Cox in what became known as "the Saturday Night Massacre." *Id.* Under intense public pressure after outcries from the entire spectrum of society, Nixon then appointed a new Special Prosecutor, Leon Jaworski. The Learning Network, *Nixon Tries to Stop Investigation With 'Saturday Night Massacre'*, N.Y. TIMES (Oct. 20, 2011), <http://learning.blogs.nytimes.com/2011/10/20/oct-20-1973-px-nixon-tries-to-stop-investigation-with-saturday-night-massacre/>.

Jaworski then issued a subpoena for the audiotapes from the White House, and the President claimed executive privilege as to certain portions of the subpoenaed material. *Nixon*, 416 U.S. at 687-88. The Court addressed, in great detail, the President's claim of absolute executive privilege. *Id.* at 703. The Court first reaffirmed its role as a constitutional arbiter and then went on to argue that any privilege the Executive branch claims cannot be an uncabined, absolute right accorded to the office. *Id.* at 707. The Court did recognize a need for confidential communications between the President and his advisors. *Id.* at 708. However, in the face of criminal prosecution, while the President is free to invoke his Fifth Amendment right of protection from self-incrimination, he cannot claim an absolute privilege of secrecy by merely clothing himself in the office. *Id.* at 709-11. Nixon did end up invoking his Fifth Amendment right, and years later the Federal Government compensated him for his seized property. *Court Says Nixon Must Be Compensated For Tapes*, N.Y. TIMES (Nov. 18, 1992), <http://www.nytimes.com/1992/11/18/us/court-says-nixon-must-be-compensated-for-tapes.html>. The subpoena was upheld. *Nixon*, 418 U.S. at 714-16. In so deciding, the Court was essentially empowering Congress to investigate the President by using the Special Prosecutor as a surrogate, and creating a layer of independence between the Attorney General's office and the Special Prosecutor. *Id.* at 694-97.

232. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S. Ct. 863 (1952). In *Youngstown*, President Truman issued an executive order that in effect instructed then Secretary of Commerce, Charles Sawyer, to commandeer a group of sheet metal factories to turn their production around to work on behalf of the Korean War effort. *Id.* at 582, 603. This arose from a labor dispute in 1951, wherein the CIO, on behalf of its members, gave notice that they intended to strike at the end of the year. *Id.* at 582. Congress had twice addressed the labor dispute and had twice refused to take action in addressing the problem. *Id.* at 587.

President Truman sent in mediators about a week and a half before the strike was set to commence. *Id.* at 582-83. Seeing that there was no end in sight, the President issued an executive order authorizing the Secretary of Commerce to commandeer the factory and continue production. *Id.* at 583. The President twice sent word to Congress asking for post hoc approval of his seizure, and twice heard nothing back. *Id.* Although the companies complied

with the President's Executive Order, they also filed a suit against Secretary Sawyer in federal court, arguing that the President was acting well beyond the bounds of his powers in unilaterally commandeering and forcing an industry back to work. *Id.*

The President argued in turn that there was an exigent national emergency and that to threaten the nation's steel supply at the moment was tantamount to espionage. *Id.* at 583-84. The President also maintained that the metal companies were not entitled to court action because they had not exhausted their private remedies before seeking injunctive relief. *Id.* at 584. The Court flatly rejected the President's contention, finding that in absence of a specific grant of power from Congress expressing their approval of the President's military pursuits, and defining the scope of the military conflict, the President was without power to act. *Id.* at 585-87. Justice Black, expressing the somewhat fractured opinion of the Court, found that since there was no enumerated power found in Article II of the Constitution that accorded the President power, this seemed to be a textual and structural overreach by the Executive that was irreconcilable with the structural limits of the Constitution. *Id.* at 582, 587-88.

Justice Black found that this was as if the President had written a law just so he could enforce it. *Id.* at 588. Justice Frankfurter, in his concurring opinion, expressed that the plethora of opinions on the structural allocation of power was important for each Justice to express. *Id.* at 589. (Frankfurter, J., concurring). He held that since Congress had already dealt with this issue twice, it had implicitly, if not explicitly, effectuated its will towards the matter. *Id.* at 598-602. Seeing as how Congress determines the scope of war, as prescribed by Article I, the President would be overreaching to try to redefine the same issue. *Id.* at 603-04, 609.

Justice Douglas took a slightly different tack. *Id.* Douglas found that although the President is uniquely suited to respond quickly to exigent circumstances, this does not create the power to do so unnecessarily. *Id.* at 629. Justice Douglas specifically pointed to the fact that all usurpation of power has historically been done in the need of exigency and efficiency, and that the steadfast protection against this has always been the delineation of powers as structurally laid out in the Constitution. *Id.* at 629-30.

Although all of these opinions articulate fascinating structural analyses of the separation of powers, the one that may have offered the most insight, and proven to have the most staying power, has been Justice Jackson's three-tiered paradigm of Executive power. *E.g.*, *Hamdi*, 124 S. Ct. at 2676 (mentioning that "judicial interference...destroys the purpose of vesting primary responsibility in a unitary executive," as written by Justice Jackson); *e.g.*, *Dalton v. Specter*, 511 U.S. 462, 473 (1994) (distinguishing the *Youngstown* analysis from the situation in *Dalton*); *e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981) (referencing Justice Jackson's thoughts on executive power). Justice Jackson says that there are three degrees of strength that the President's power can possess. *Youngstown*, 343 U.S. at 635-38. The zenith of the President's power is when he is acting in tandem with Congress, because then he is acting as an instrument of the Legislature, as extended by his own set of powers. *Id.* at 635-36. The middle range is the twilight in between express powers of either branch. *Id.* at 637. Here, the President is presumed to be acting within his powers unless there is express Congressional sentiment otherwise. *Id.* The nadir of the President's power is when he is acting in direct defiance of Congressional will. *Id.* Here, he is limited to powers explicitly and solely within his purview, as both the power to declare war and constrain private citizens rests firmly within the domain of Congress. *Id.* at 640-42. Justice Douglas also found that if only emergencies allow the

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Defendant Rumsfeld's conduct towards detainees prior to October 5, 2005 is a question of what is moral in the context of war. After that day, with the enactment of the Detainee Treatment Act [DTA],²³⁴ Rumsfeld is acting in direct defiance of a Congressional mandate if he fails to act in accordance with the legislation passed by the Senate. When preparing the new Field Manual for distribution, Defendant carefully edited out a list of restrictions that the legislation explicitly declared must be in place.²³⁵ Former AAG, Stephen Bradbury, expressly acknowledges in an advisory memo dated April 16, 2006 that the field manual condones actions that Congress has excised.²³⁶ During this period, Nathan Ertel and Donald Vance claim to have been subject to those exact techniques. This clearly satisfies the first prong of *Bivens*, in that it violates a clearly established constitutional right, as codified in the congressional revision of the AFM.

It is a long-held maxim of constitutional interpretation that a statute's constitutionality must be presumed.²³⁷ Here, Congress was effecting their interpretation of protection against cruel and unusual punishment. There was no ambiguity, there was no circuit split, and there was no room for argument. Interpreted through Justice Jackson's *Youngstown* paradigm, the Executive was functioning at the nadir of its powers.²³⁸ Although there may not be a cause of action available for the victims whose DTA rights were violated, it is unlikely that Congress meant it to be a paper tiger. Rather, it is more likely that Congress may have engaged in the naïve belief that the Executive would not have the unmitigated gall to violate a law designed to protect against the torture of American Citizens who were not charged with a crime.

In the case of Donald Vance and Nathan Ertel, there is no alternative remedy for them, and there is no special factor that counsels hesitation in the absence of affirmative action by Congress. In fact, allowing the Plaintiffs to proceed would be

Executive's powers to be expanded, he will seek emergencies to justify the expansion of his powers. *Id.* at 650. Justice Douglas found that historically when a power has been granted, it has not been withdrawn. *Id.* at 640. While the President is one of the most highly visible parts of the government, the Supreme Court is one of the most discrete, and as such it can escape the public ire while meaningfully constraining the executive. *See id.* at 653-55 (asserting that although the President is in the public eye, he is under the law).

233. *Nixon*, 418 U.S. at 714-16.

234. SEN. JOHN MCCAIN, APPROPRIATIONS BILL FY 2006, DEFENSE, S. AMDT. 1977 (2005-06), available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00249.

235. Amended Complaint, *supra* note 2, ¶ 241.

236. The Bradbury Memo, *supra* note 68.

237. *Hunter*, 459 U.S. at 368; *Brennan*, 511 U.S. at 837.

238. *Youngstown*, 72 S. Ct. at 637; TVPA, *supra* note 230.

vindicating and giving effect to the legislative action taken by Congress. Although Defendant Rumsfeld is entitled to the qualified immunity doctrine,²³⁹ he fails under both prongs of its test. First, he violated a clearly established constitutional right as effected by Congress. Second, he knew exactly the type of risk that his actions would impose, in fact it was the only reasonable impetus to attach to his actions.²⁴⁰

In the time it has taken to research and write this Comment, the Seventh Circuit has come down with its *en banc* decision.²⁴¹ After initially holding that Vance and Ertel were entitled to proceed with their *Bivens* claim, the Seventh Circuit vacated the opinion, and reheard the case *en banc*.²⁴² To deal with the claim of qualified immunity, the court relied on *Ashcroft v. Iqbal*²⁴³ and *Wilkie*.²⁴⁴ Its reliance on both cases is misplaced, as both are inapposite to the issues here.²⁴⁵

The Supreme Court subsequently denied writ of certiorari and removed the case from the limbo of summary judgment in which it has been suspended for more than five years.²⁴⁶ The Supreme Court found that there was not enough of an issue to warrant hearing the controversy.²⁴⁷ Furthermore, Congress should create a remedy to specifically enumerate that Americans who have not been qualified as enemy combatants and seek redress because of the technique and variety of interrogation to which they have been privy, has been explicitly found unconstitutional by Congress.

The issues at play in this case are not matters of partisan politics. This matter is not about whether the war in Iraq was just or right, although it certainly begs a discussion of how Americans

239. *Strickland*, 420 U.S. at 308.

240. *Pearson*, 555 U.S. at 236.

241. *Vance v. Rumsfeld*, 701 F.3d 193, 195 (7th Cir. 2012) *cert. denied*, 133 S. Ct. 2796 (2013).

242. *Id.*

243. *Iqbal*, 556 U.S. at 662. Although the court rejected the *Bivens* claim at issue in *Iqbal*, it was due to the heightened standard introduced in *Twombly*, not solely due to qualified immunity. *Id.* at 677-78; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). *Iqbal* is also distinguishable on the basis that the plaintiffs in that case were not American citizens, whereas both Vance and Ertel are U.S. citizens, and are thus entitled to full constitutional protection from their own government. *Iqbal*, 556 U.S. at 666.

244. *Wilkie*, 551 U.S. at 537. In *Wilkie*, the plaintiff tried to advance a *Bivens* claim contesting the taking of his property through eminent domain. *Id.* at 541. The Court has never recognized a basis for a *Bivens* claim under real property rights, but has consistently, and perhaps most importantly, originally, recognized a claim for infractions upon a citizen's Eighth Amendment rights. *Bivens*, 403 U.S. at 389. Vance and Ertel's case obviously does not involve real property rights nor eminent domain.

245. *Wilkie*, 551 U.S. at 537; *Iqbal*, 552 U.S. at 666.

246. *Vance v. Rumsfeld*, 133 S.Ct. 2796 (2013).

247. *Id.*

define their national character, and who they look to embody, protect, and perpetuate those ideals. This is about the simple architecture of American governance. This is about respecting the limits and rights of the trifurcated government, and providing relief when one of those parties exceeds their bounds. This is not about punishing the Executive Branch as much as it is protecting the Legislative Branch. It is about the fundamental protections against tyranny, for even they should offer respite for the mercenary.

V. CONCLUSION

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.²⁴⁸

Ultimately Former Secretary of Defense, Defendant Donald Rumsfeld, should have been denied summary judgment.²⁴⁹ This is a case of first impression. However, this scenario is one that is likely to reoccur - the first of myriad permutations as opposed to a sole, extraordinary example. Although the Supreme Court did not grant certiorari this time, this is an issue that may well present itself again. Vance and Ertel are likely to be defining normal. Due to the unprecedented growth of the private military industry,²⁵⁰ the Legislature has not fully contemplated the implications of this new breed. However, the fact that those situated like the Plaintiffs have not been fully contemplated does not mean they should be denied the fundamentals Americans have identified as underpinnings of our justice system.

That is what this case boils down to - Nathan Ertel and Donald Vance did exactly what we would want people in their situation to do—they saw something wrong and they reported it.²⁵¹ They risked life and limb to provide their country with information they thought it should have, and they suffered because of it.²⁵² Basic policy considerations, if not a fundamental sense of self-preservation, demand that society not punish those who suffer in furtherance of the national interest. A party who lets them suffer, either by direct acts or concerted indifference, needs to be held accordingly liable. Liberally construing the Plaintiff's complaints

248. THE FEDERALIST No. 47 (James Hamilton).

249. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

250. *Mercanism 2.0*, *supra* note 47, at 230.

251. Amended Complaint, *supra* note 2, ¶ 21.

252. *Id.* ¶ 189.

as true,²⁵³ these two men should have been granted their day in court.

253. *Hughes v. Rowe*, 449 U.S. 5, 10 (1980).

