

“Damages or Nothing”: The Post-*Boumediene* Constitution and Compensation for Human Rights Violations after 9/11

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Since 9/11, the lower U.S. federal courts and the Supreme Court have decided a series of damages cases implicating national security.¹ These cases have sought monetary compensation for persons injured as a result of detention, abuse, and alleged torture in the course of the United States’ “war on terrorism” and have involved a range of plaintiffs that, in terms of status, fall on a continuum ranging from “insiders” (U.S. citizens detained inside the United States, even as “enemy combatants”) to “borderline” cases (unauthorized aliens within the United States or inadmissible aliens turned away at the border) to total “outsiders” (aliens detained outside the United States without ever entering the country). For the purposes of this Article, this continuum will be called “the continuum

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¹ This Article examines ten damages cases. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (requiring unauthorized alien detained in the United States to plead more specific facts before permitting *Bivens* remedy to go forward); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir.) (deciding against *Bivens* remedy for former Guantánamo detainees on qualified immunity grounds and, as an alternative, on special factor of national security), *cert. denied*, 130 S. Ct. 1013 (2009); *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009) (finding former attorney general not entitled to immunity from *Bivens* suit for devising policy under material witness statute that resulted in U.S. citizen’s detention on suspicion of terrorism-related activities), *cert. granted* 131 S. Ct. 415 (2010), *rev’d* 131 S. Ct. 2074 (2011); *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008) (denying *Bivens* remedy on national security grounds to “inadmissible” alien apprehended while in transit at John F. Kennedy International Airport, detained in the United States, and ultimately rendered to Syria where he was tortured), *aff’d en banc*, 585 F.3d 559 (2d Cir. 2009); *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007); *Vance v. Rumsfeld*, 694 F. Supp. 2d 957 (N.D. Ill. 2010); *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 106 (D.D.C. 2010); *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) (permitting *Bivens* suit to go forward against former Office of Legal Counsel lawyer who crafted legal authorization for torture of a U.S. citizen); *Kar v. Rumsfeld*, 580 F. Supp. 2d 80, 81–82 (D.D.C. 2008); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007) (denying *Bivens* remedy to detainees held in military custody in Iraq and Afghanistan), *aff’d sub nom.* *Ali v. Rumsfeld*, No. 07-5178, (D.C. Cir. June 21, 2011).

of rights” and the damages actions under discussion the “9/11 damages cases.”

Though it has been argued that the outcomes in at least some of these cases can be explained by reference to the “subterranean impact of immigration law,”² it is of course more correct to say that all of these cases, and the fundamental logic of immigration law itself, are shaped by the doctrine of strict territoriality with respect to aliens as previously stated in *United States v. Verdugo-Urquidez*³ and *Johnson v. Eisentrager*.⁴ In constitutional law, strict territoriality means that the U.S. Constitution applies only to the territories under the sovereign control of the United States.⁵ *Verdugo-Urquidez* and *Eisentrager* expressed the doctrine in terms of a continuum of “voluntary contacts,” or sliding “scale,” reflecting the degree to which the alien in question has willingly affiliated himself or herself with the United States and subjected himself or herself to its laws.⁶ Though the continuum is gradual, with gradations of rights at either end, it contains a divide located on the “water’s edge” of U.S. territory. Until the Supreme Court’s recent decision in *Boumediene v. Bush*,⁷ aliens abroad without prior substantial connections to the United States could not lay claim to the protections of the U.S. Constitution beyond this divide. The Court in *Boumediene* breached this divide for the first time with respect to aliens, by holding that detainees in U.S. custody at the Guantánamo Bay Detention Center had a constitutional right to habeas corpus.⁸ With this landmark decision, a majority of the Court embraced the doctrine of “contextual due process” developed in prior concurrences by Justice Anthony Kennedy. The decision gave rise to optimism on the part of those who have long advocated for detainee rights. But although it dislodged the habeas corpus litigation stayed in the district courts,

² Juliet P. Stumpf, *The Implausible Alien: Iqbal and the Influence of Immigration Law*, 14 LEWIS & CLARK L. REV. 231 (2010).

³ 494 U.S. 259 (1990).

⁴ 339 U.S. 763 (1950).

⁵ The territoriality doctrine derives from jurisdictional principles under international law.

⁶ *Verdugo-Urquidez*, 494 U.S. at 271 (finding that the Fourth Amendment has no application in the search of an alien’s home located in a foreign country); *Eisentrager*, 339 U.S. at 770–71. For a criticism of the test created by *Verdugo-Urquidez*, see Jeffrey Kahn, *Zoya’s Standing Problem, Or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673, 676 (2010) (arguing that *Verdugo-Urquidez* created a prudential standing test that “is inconsistent with any theoretical view of the Constitution’s extraterritoriality”).

⁷ 553 U.S. 723 (2008).

⁸ *Id.* at 798.

Boumediene has so far had no appreciable effect on damages cases. Indeed, the current Court is perceived to be hostile even to damages claims resting on the Constitution even when brought by U.S. citizens. *Boumediene* thus represents a breakthrough, but its precise implications are not yet clear.

The divide located at the center of the continuum of rights goes a long way to explaining the 9/11 damages cases. U.S. citizens and aliens—legal and illegal—located within the physical territory of the United States have had the greatest success bringing damages claims, while aliens abroad have had virtually no success bringing such claims.⁹ In terms of the degree of injury involved, however, the damage cases have been decided inconsistently. In some cases involving egregious acts of torture and abuse occurring over extended periods of time, the plaintiffs have been barred from pursuing their claims, while some cases involving less serious acts have gone forward or settled.¹⁰ Even worse, the success or failure of the claims bears no relation to the actual innocence of the plaintiffs.

This Article reviews the 9/11 damages cases for the light they shed on the post-*Boumediene* Constitution. Part I describes the contextual due process standard adopted by a majority of the Supreme Court in *Boumediene*. Part II sets out the basic structure of constitutional torts damages actions. Part III provides an overview of the 9/11 damages cases, highlights salient features, and locates each on the continuum of rights. Part IV analyzes what these cases tell us about the direction that constitutional jurisprudence regarding extraterritoriality will likely take in the future.

I. THE CONTEXTUAL DUE PROCESS STANDARD

The litigation involving the question of whether detainees in Guantánamo Bay were entitled to the writ of habeas corpus provided Justice Kennedy with two opportunities to refine the “contextual due process” standard that he had first begun to outline in a concurrence in the 1990 case of *United States v. Verdugo-Urquidez*.¹¹ The first habeas petitions filed on behalf of Guantánamo detainees raised a number of constitutional claims, and the lower federal courts dismissed them

⁹ Compare *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009), with *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26 (D.D.C. 2006).

¹⁰ See *infra* Part III.

¹¹ 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (quoting *Reid v. Covert*, 354 U.S. 1, 75) (“[T]he question of which specific safeguards . . . are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is ‘due’ a defendant in the particular circumstances of a particular case.”).

for lack of jurisdiction, treating the statutory reach of the writ as coextensive with its constitutional reach.¹² In *Rasul v. Bush*, decided in 2004, the Supreme Court held that the federal habeas statute¹³ extended to Guantánamo Bay by virtue of the United States' "exclusive jurisdiction and control" over the territory on which the military base was located.¹⁴ While not finding it necessary to reach the question of whether the Constitution provided an alternative ground for jurisdiction, the Supreme Court intimated in a footnote that the Court might be willing to reconsider its earlier decisions setting down a bright-line rule that aliens abroad could not avail themselves of the protections of the Constitution.¹⁵ Justice Kennedy, concurring, found that the question required "an initial inquiry into the general circumstances of the detention to determine whether the Court has the authority to entertain the petition and to grant relief after considering all of the facts presented."¹⁶

After *Rasul*, the focus of the Guantánamo detainee litigation then turned to the question of whether the detainees had any affirmative rights to vindicate. In a case deciding an early set of consolidated issues, Judge Joyce Hens Green of the District Court for the District of Columbia stated that she was following Justice Kennedy's methodology in holding that detainees could claim the protection of the Fifth Amendment.¹⁷ A holding by Judge Richard Leon reached a contrary result.¹⁸ While the two decisions were on appeal, Congress passed the Detainee Treatment Act of 2005 (DTA), stripping the federal courts of jurisdiction to hear habeas petitions filed under the federal habeas statute.¹⁹ In *Hamdan v. Rumsfeld*, the Supreme Court held that Congress had not clearly expressed its intention to make the DTA retroactive.²⁰ In response to *Hamdan*,

¹² See *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003) ("We cannot see why, or how, the writ [28 U.S.C. § 2241] may be made available to aliens abroad when basic constitutional protections are not."); *Rasul v. Bush*, 215 F. Supp. 2d 55, 65 (D.D.C. 2002) (not clearly distinguishing the statutory and constitutional grounds for dismissal).

¹³ The federal habeas statute requires prisoners in custody of the United States to be released if they can show that they are being held in violation of the "Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c) (3) (2006).

¹⁴ 542 U.S. 466, 482 n. 15 (2004)

¹⁵ *Id.*

¹⁶ *Id.* at 487 (Kennedy, J., concurring).

¹⁷ *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 463–64 (D.D.C. 2005).

¹⁸ *Khalid v. Bush*, 355 F.Supp.2d 311, 322–23 (D.D.C. 2005).

¹⁹ Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742 (codified at 10 U.S.C. § 801 (2006)).

²⁰ 548 US 557 (2006).

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Congress passed the Military Commissions Act (MCA),²¹ in which it made clear its intention to strip retroactively the federal courts of jurisdiction to hear habeas cases.²² The MCA turned the focus of the litigation back to jurisdiction and to the question of whether the federal courts had power to hear habeas petitions brought from Guantánamo. This was the question presented to the Supreme Court and decided in 2008 in *Boumediene v. Bush*.²³

In a majority opinion written by Justice Kennedy, the Supreme Court in *Boumediene* invalidated Section 7 of the MCA as a violation of the Suspension Clause.²⁴ Much of *Boumediene* is devoted to the reasoning underlying the holding; the holding itself, however, is fairly succinct:

[W]e conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.²⁵

Justice Kennedy then applied these factors to the cases before him and concluded that detainees held in U.S. custody at Guantánamo were entitled to the writ of habeas corpus.²⁶ Particularly important factors in his determination included the inadequacy of the process through which the status determinations of the detainees had originally been made, the absolute and indefinite control that the United States exerts over Guantánamo Bay, the security of the naval base, and the lack of potential friction with Cuba resulting from proceedings in U.S. courts.²⁷

Justice Kennedy first examined the history of habeas corpus before the adoption of the Suspension Clause.²⁸ He then turned to the constitutional methodology and outlined a case-by-case,

²¹ Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C. §§ 948a–50w (2006) and in other scattered sections of 10 and 18 U.S.C.).

²² *Id.* at Sec. 7 (codified at 28 U.S.C. 2241(e)(1)).

²³ After several rounds of briefing, the Court of Appeals for the District of Columbia denied jurisdiction in early 2007. *Boumediene v. Bush*, 476 F.3d 981, 994 (2007), *rev'd* 553 U.S. 723 (2008).

²⁴ *Boumediene*, 553 U.S. at 795, 798.

²⁵ *Id.* at 776.

²⁶ *Id.* at 771.

²⁷ *Id.* at 767–71.

²⁸ *Id.* at 739–53.

provision-by-provision standard regarding the application of the U.S. Constitution to territories over which the U.S. government exerts control but not sovereignty.²⁹ Whether the Constitution constrains the actions of the U.S. government abroad—both with respect to citizens and aliens, it would seem—is now subject to a functional, rather indeterminate test.³⁰ A court considering the question must examine the “particular circumstances, the practical necessities, and the possible alternatives which Congress had before it” and, in particular, whether judicial enforcement of the provision would be “impracticable and anomalous.”³¹

Boumediene thus opened a small fissure in the strict territoriality doctrine, through which other rights beyond the Suspension Clause might conceivably flow.

II. STRUCTURE OF DAMAGES SUITS

While the habeas litigation was ongoing, individual suits for damages related to post-9/11 detention and torture commenced. In comparison with the habeas litigation, the damages actions have been isolated and scattershot. In addition to stripping the federal courts of jurisdiction to hear habeas claims, the MCA stripped the courts of jurisdiction

to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.³²

This jurisdictional bar has limited the number of eligible plaintiffs.

The suits that have not been barred have a common structure. Whether brought by citizens or aliens, all of the 9/11 damages cases involve three basic analytical components: a) determination of an underlying right and/or cause of action, b) assertion of defenses related to questions of immunity, and c) use of the ancillary state secrets doctrine.³³ Those three basic components do not always occur in the same sequence, and a particular case may not include all three.

²⁹ See generally *id.*

³⁰ See *Boumediene*, 553 U.S. 723.

³¹ *Id.* at 759.

³² 28 U.S.C. § 2241(e)(2)(2006).

³³ See *infra* Part II.C.

Since a *Bivens* action presupposes a constitutional right, and qualified immunity requires that the right be clearly established, damages cases reveal the underlying constitutional jurisprudence at several stages of the litigation. A court may decide that the plaintiff has no cause of action because she is not entitled to the protections of the U.S. Constitution. The Supreme Court has signaled ambivalence about the *Bivens* doctrine almost since the moment it created the doctrine in 1973 and has recently stated that *Bivens* should not be extended to “new contexts.”³⁴ Federal courts find it easy to dismiss damages cases on qualified immunity grounds when the plaintiffs are aliens and the relevant acts occurred abroad. Even though the Supreme Court has held that detainees at Guantánamo Bay have a constitutional right to habeas corpus, the government has successfully argued that that right was not clearly established when the events took place. In addition, the U.S. government has been quicker to invoke the state secrets privilege when the plaintiffs are aliens and the claims arise out of acts occurring abroad.

A. *The Bivens Cause of Action*

Generally, in a damages action, the first question to address is whether plaintiffs have a cause of action. In the 9/11 damages cases, plaintiffs typically have two alternatives: either the cause of action is based directly on the U.S. Constitution or it is based on international law—in which case the Alien Tort Statute (ATS) provides federal courts with jurisdiction.³⁵ This discussion focuses only on the *Bivens* claims; owing to the structure of domestic U.S. immunity law, the international law claims are effectively subordinate to the constitutional claims.³⁶

A *Bivens* action enables a plaintiff to bring a direct constitutional claim for damages, even where Congress has not created a cause of

³⁴ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

³⁵ 28 U.S.C. § 1350 (2006). U.S. citizen plaintiffs or alien plaintiffs present in the United States when the abuse allegedly occurred usually bring *Bivens* claims only. Plaintiffs who were outside the United States when the abuse allegedly occurred usually bring both *Bivens* and ATS claims.

³⁶ This subordination occurs because of the structure of the federal immunity policy. In a suit against a federal officer in his personal capacity, unless the claimant alleges a violation of a federal constitutional or statutory right, or unless the court finds that the official has been acting outside of the scope of his employment, the United States will automatically be substituted as defendant. 28 U.S.C. §1346(b), §2679(b)(1). In cases arising in a foreign country, this substitution will result in automatic dismissal. *Id.* §2680(k).

action by statute.³⁷ A violation of the U.S. Constitution does not, however, automatically give rise to a *Bivens* cause of action. *Bivens* is a judge-made remedy and, in recent years, the doctrine has been increasingly narrowed by the Supreme Court. In order to determine whether it is appropriate to create a *Bivens* remedy, courts use a two-prong test. First, the court must determine whether any alternative, existing process for protecting the interest amounts to a convincing reason for the judicial branch to refrain from providing a new and freestanding remedy in damages;³⁸ second, if no such process exists, “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 hesitation before authorizing a new kind of federal litigation.”³⁹ As a threshold question, the court must ask whether “the petitioner asserts a constitutionally protected right.”⁴⁰ Accordingly, the existence of this right is either assumed or assessed first.

Scholars and other Supreme Court watchers are generally of the view that the Court has become increasingly hostile to *Bivens* actions, cutting back the doctrine whenever possible.⁴¹ In *Correctional Services Corporation v. Malesko*, the Court stated that *Bivens* should not be extended to any “new context” or “new category of defendants.”⁴² The meaning that the Supreme Court has given to “context” in its jurisprudence has aptly been described as “less than clear.”⁴³ A “new context” could mean a new “cause of action.” Or, it could mean a claim under another constitutional amendment. The Supreme Court’s 2007 decision *Wilkie v. Robbins* suggests an understanding of “context” as a “cause of action.”⁴⁴ Lower courts, however, have interpreted *Wilkie* to mean that *Bivens* should not be extended to new

³⁷ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

³⁸ *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (citing *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

³⁹ *Id.* at 550 (quoting *Lucas*, 462 U.S. at 378).

⁴⁰ *Davis v. Passman*, 442 U.S. 228, 234 (1979).

⁴¹ See Joan Steinman, *Backing off Bivens and the Ramifications of this Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269 (1984); Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies after Wilkie v. Robbins*, 2007 CATO S. CT. REV. 23 (2007).

⁴² 534 U.S. 61, 68 (2001) (“We have consistently refused to extend *Bivens* liability to any new context or category of defendants.”).

⁴³ *Arar v. Ashcroft*, 585 F.3d 559, 596–97 (2d Cir. 2009) (Sack, J., dissenting).

⁴⁴ *Wilkie*, 551 U.S. at 555 (describing difficulty in “defining a workable cause of action”).

“situations” defined in a more “gestalt”-like sense.⁴⁵ Two years after *Wilkie*, in *Iqbal v. Ashcroft*, the Court seemed to incline to the meaning of “context” as a claim under another amendment.⁴⁶ In *Iqbal*, the Court cast doubt on whether it would recognize a *Bivens* action under the First Amendment, even though the Supreme Court had previously fashioned *Bivens* actions under the Fourth, Fifth, and Eighth Amendments.⁴⁷

In the 9/11 damages cases, the second *Bivens* prong has played the most important role in judicial decisions. It is manifestly clear that Congress has not yet created an alternative remedial scheme for victims of 9/11 counterterrorism actions. There have been no high-level prosecutions, no public apologies, and no compensation funds, even in instances where the United States has admitted cases of mistaken identity. As a result, victims of human rights violations in the war on terrorism have been forced to pursue the route of civil damages claims.⁴⁸ While the distinction between the first and second *Bivens* prongs is blurred and unclear in some Supreme Court cases,⁴⁹

⁴⁵ For example, the Second Circuit in *Arar* described “extraordinary rendition” as a new “context” and declined to recognize a *Bivens* remedy for a legal alien who was detained in transit on U.S. territory. *Arar*, 585 F.3d at 572 (“[N]o court has previously afforded a *Bivens* remedy for extraordinary rendition.”).

⁴⁶ See 129 S. Ct. 1937, 1948 (2009).

⁴⁷ *Id.* But see *Hartman v. Moore*, 547 U.S. 250 (2006) (involving a *Bivens* claim under the First Amendment for retaliatory prosecution). It currently seems well settled among the lower courts that First Amendment violations give rise to a *Bivens* cause of action. See, e.g., *White v. Boyle*, 538 F.2d 1077 (4th Cir. 1976); *Paton v. LaPrade*, 524 F.2d 862 (3d Cir. 1975); *Hostrop v. Bd. of Junior College Dist.*, 471 F.2d 488 (7th Cir. 1972). In an earlier First Amendment case, *Bush v. Lucas*, 462 U.S. 367 (1983), the Supreme Court held that the availability of a meaningful remedial scheme precluded the fashioning of a *Bivens* remedy.

⁴⁸ See, e.g., *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009).

⁴⁹ Consideration of an alternative remedial scheme was initially articulated as part of a “special factors” analysis in *Bivens* itself. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396–97 (1971); see also *Davis v. Passman*, 442 U.S. 228, 247–48 (1979). In *Carlson v. Green*, a case against federal prison officials, the Court bifurcated the considerations and articulated a two-step test that required a clear statement from Congress that an alternative remedial scheme was intended to preclude a *Bivens* remedy. 446 U.S. 14, 18–19 (1980). In *Bush v. Lucas*, the Court redefined the “special factors” standard as the balancing test recently reaffirmed in *Wilkie*. 462 U.S. 367 (1983). The *Lucas* Court maintained a distinction between considering the alternative remedies and the “special factors” analysis, but the entirety of its reasoning shows that the “special factor” on which the Court based its decision not to recognize a remedy in the absence of explicit authorization from Congress was the existence of “an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations.” *Id.* at 380–89. In *Schweiker v. Chilicky*, the Court folded the alternative remedial scheme prong back into the “special factors” test, dropping the requirement of a clear statement from Congress and defining “special factors” to

lower courts since 9/11 have invoked special factors to justify, on national security grounds, refusal to fashion a remedy that would hold officials liable.⁵⁰ For aliens outside of the United States (or subject to the entry fiction), special factors have operated as an absolute bar, as courts have essentially crafted a new “national security” component to the doctrine.⁵¹

B. *Qualified Immunity*

Immunity is the second integral component to damages claims that may reveal the underlying constitutional jurisprudence.⁵² The doctrine of qualified immunity protects “government officials

“include an appropriate judicial deference to indications that congressional inaction has not been inadvertent.” 487 U.S. 412, 423 (1988). Although *Wilkie* did not involve a comprehensive scheme already created by Congress, the Court considered the remedies available to the plaintiff in reaching the conclusion that “any damages remedy for actions by Government employees who push too hard for the Government’s benefit may come better, if at all, through legislation.” *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007).

⁵⁰ For a discussion of the “special factors” doctrine in the context of national security cases, see Stephen I. Vladeck, *National Security and Bivens After Iqbal*, 14 LEWIS & CLARK L. REV. 255 (2010). Though agreeing with Professor Vladeck that *Bivens* remains an important “national security remedy of last resort,” *id.* at 266, the Author takes issue with his view that the Supreme Court’s decision in *Wilkie* turned on “special factors.” *Id.* at 265–66. The *Wilkie* dissent characterized the majority holding in that way, *Wilkie*, 551 U.S. at 577 (Ginsburg, J., dissenting), but the majority did not actually invoke “special factors.” Rather, the majority claimed to have difficulty “defining a workable cause of action” for the deprivation of rights the plaintiff suffered. *Id.* at 555 (majority opinion). The majority thus suggested that it was simply making “the kind of remedial determination that is appropriate for a common-law tribunal.” *Id.* at 550. “Special factors” are *part* of that remedial determination but not coextensive with it.

⁵¹ See, e.g., *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009).

⁵² If a plaintiff successfully alleges a constitutional violation, or the court assumes that a claim will be successful, the case falls under one of the two exceptions to absolute immunity found in the Westfall Amendment to the Federal Tort Claims Act (FTCA), Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C. (2006)). Plaintiffs who are subject to these exceptions may overcome the absolute immunity provided to the United States by 28 U.S.C. §§ 1346, 2671 (2006). The case then continues against the individual defendants, and the court must determine if the individual defendants are protected by qualified immunity. In a suit against a federal officer as an individual, the FTCA provides for the automatic substitution of the U.S. government as defendant if the officer was acting within the scope of his or her employment, unless the claim alleges a violation of the U.S. Constitution or a federal statute that provides for a private right of action. See, e.g., *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 114–15 (D.D.C. 2007) (“[T]he plaintiffs’ lawsuit is converted to one against the United States under the Federal Tort Claims Act, in which case Rumsfeld [and other defendants] . . . shall be dismissed as parties and the United States shall be substituted as the sole defendant . . .”).

performing discretionary functions” from liability for civil damages so long as their conduct, at the time that it occurred, did not violate any “clearly established” constitutional or statutory rights of which a reasonable person would have known.⁵³ The qualified immunity doctrine has recently been in some flux with regard to the order in which courts should decide its component prongs.⁵⁴ Under current Supreme Court precedent established in *Pearson v. Callahan*, it is not necessary to first establish that a constitutional right exists in order to conclude that, even if such a right existed, it would not be “clearly established.”⁵⁵ Courts may now dismiss a case on qualified immunity grounds without first determining if the right clearly exists. Many of the cases discussed below, however, were decided under the earlier rule, set down in *Saucier v. Katz*, that existence of a right should be decided before deciding whether it is “clearly established.”⁵⁶

C. Ancillary Doctrines: State Secrets Privilege

In several 9/11 damages cases—usually those involving extraordinary rendition—the government has successfully used the state secrets doctrine to bring about dismissals.⁵⁷ Specific to civil litigation, the state secrets doctrine is an evidentiary privilege that the government may assert in order to protect information deemed important to national security. The law is currently unsettled as to whether the privilege may apply only to discrete pieces of evidence or may apply broadly, as a jurisdictional bar, to force dismissal of entire lawsuits. Whether held to be broad or narrow, the state secrets privilege is absolute and not subject to judicial balancing.⁵⁸

⁵³ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is an affirmative defense. See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Once the defendant pleads qualified immunity, the burden shifts to the plaintiff to show that the right allegedly violated was “clearly established” at the time the conduct at issue occurred. Qualified Immunity is intended to provide “immunity from suit rather than a mere defense from liability.” *Mitchell v. Forsythe*, 472 U.S. 511, 526 (1985). A denial of qualified immunity may be immediately certified for interlocutory appeal. *Id.* at 530.

⁵⁴ See *Pearson v. Callahan* 555 U.S. 223, 237 (2009) (“There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.”).

⁵⁵ *Id.*

⁵⁶ See, e.g., *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 274 n.9 (2006) (stating that qualified immunity arguments “will be considered, as necessary, only after the underlying constitutional questions have been addressed”).

⁵⁷ See, e.g., *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir 2007).

⁵⁸ *United States v. Reynolds*, 345 U.S. 1, 11 (1953) (“[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”).

III. THE 9/11 DAMAGES CASES

In the 9/11 damages cases, courts have appeared reluctant to abandon the continuum of rights implicit in the constitutional territoriality doctrine, especially in light of a highly controversial cause of action, such as *Bivens*.⁵⁹ The details of a number of these cases are well-known in isolation, but reviewing them side-by-side throws the continuum of rights into particular relief. This Part divides the 9/11 damages cases into three categories—first, cases brought by U.S. citizens; second, cases brought by legal, illegal, or inadmissible aliens, when the injuries occurred or were initiated in the United States; and third, cases brought by aliens when the injuries occurred outside the United States. The litigation in a number of these cases had not run its course when the Supreme Court decided *Boumediene* and a few cases were reconsidered in light of that decision. *Boumediene* has had no appreciable effect, except perhaps in making it easier to deny rights to U.S. citizens injured in locations outside the United States.

A. U.S. Citizens

Citizenship is not a guarantor of recovery, but citizen status means that courts generally have not engaged in a protracted analysis before concluding that claimants have constitutional rights to assert. The rights to be free from torture and arbitrary detention are at the core of the rights guaranteed by the Constitution. Nonetheless, it is surprising that special factors have not weighed more heavily even in these cases.

1. *Ashcroft v. Al-Kidd*

Abdullah Al-Kidd is a U.S. citizen and Muslim convert who was arrested at Dulles International Airport as he waited to board a plane to Saudi Arabia.⁶⁰ He was subsequently detained under the material witness statute in 2003.⁶¹ After his arrest, Al-Kidd was held in custody

⁵⁹ See, e.g., *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074 (2011).

⁶⁰ *Al-Kidd v. Ashcroft*, 580 F.3d 949, 951 (9th Cir. 2009), cert. granted 131 S. Ct. 415 (2010), rev'd 131 S. Ct. 2074. Al-Kidd was not charged with a crime, but the government alleged that he possessed "information germane" to the case against another individual, Sami Omar Al-Hussayen (indicted for visa fraud and making false statements to U.S. officials), and that this information would be "crucial to the prosecution" of Al-Hussayen. *Id.* at 953.

⁶¹ *Id.* at 952; see also 18 U.S.C. § 3144 (2006).

for sixteen days, during which time he was held at several high-security federal prison facilities, placed in cells lit twenty-four hours a day, strip searched repeatedly, and allowed out of his cell for only one to two hours a day.⁶² Al-Kidd alleged that the government never intended to subpoena him as a material witness—and in any event he was never called as a witness—and that the material witness statute had been used as a pretext for holding him preventatively.⁶³ He brought suit against Attorney General John Ashcroft and a number of lower-level officials.⁶⁴ The district court held that none of the defendants were protected by qualified immunity; Ashcroft was the only defendant who appealed the denial, losing in the Ninth Circuit.⁶⁵ Al-Kidd's right to bring a *Bivens* action was never in question, and he eventually settled with lower level officials.⁶⁶ His case against Ashcroft reached the Supreme Court and was reversed on qualified immunity grounds, though it appears that the outcome might have been different had Al-Kidd, on the appeal, challenged the constitutionality of his seizure.⁶⁷ In the course of the litigation, Al-Kidd's right to travel was restricted, his marriage fell apart, and he was unable to find employment.⁶⁸

2. *Padilla v. Yoo*

In two cases raising more complicated national security questions, Jose Padilla brought a number of *Bivens* and other claims related to his incommunicado detention in the United States as an

⁶² *Al-Kidd*, 580 F.3d at 953. Even after he was released from detention, by court order, he had to surrender his passport, restrict his domestic travel to three states, and consent to home visits for a supervisory period of almost a year. *Id.*

⁶³ *Id.* at 982–83.

⁶⁴ *Id.* at 955.

⁶⁵ *Id.* at 956.

⁶⁶ *Ashcroft v. al-Kidd*, ALLIANCE FOR JUST., <http://www.afj.org/connect-with-the-issues/the-corporate-court/ashcroft-v-al-Kidd.html> (last visited Sept. 23, 2011). Al-Kidd eventually settled with the wardens of the various facilities where he had been held, for a combination of monetary and institutional reforms. *Abdullah al-Kidd v. John Ashcroft, et al.*, AM. CIVIL LIBERTIES UNION (Mar. 4, 2011), <http://www.aclu.org/immigrants-rights-national-security/abdullah-al-Kidd-v-john-ashcroft-et-al>.

⁶⁷ *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (“Because al-Kidd concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant; we find no Fourth Amendment violation.”).

⁶⁸ *See Al-Kidd*, 580 F.3d at 952–53.

“enemy combatant.”⁶⁹ After being apprehended at Chicago O’Hare airport as he sought to enter the United States, allegedly to detonate a dirty bomb in a major American city,⁷⁰ Padilla was indicted on material support to terrorism charges and was eventually convicted for a number of offenses connected to an unrelated alleged plot.⁷¹ After his initial arrest, Padilla was transferred to a military brig where, for two years, he was allegedly denied access to a lawyer, held incommunicado, and subjected to “enhanced interrogation techniques.”

While serving his criminal sentence, he filed, along with his mother, two damages suits alleging a number of constitutional violations, one against Donald Rumsfeld and other military defendants in South Carolina⁷² and another in California against former Bush administration lawyer John Yoo, the Office of Legal Counsel lawyer who allegedly designed and implemented the enhanced interrogation policy.⁷³ In his defense, Yoo relied primarily on the special factors and qualified immunity.⁷⁴ In a well-reasoned opinion, the district court rejected the contention that national security should be considered a special factor and noted that Yoo had construed the special factors doctrine so as to make it tantamount to the state secrets privilege, which can only be asserted by the government itself.⁷⁵ Yoo immediately appealed the qualified immunity holding as of right.⁷⁶ On appeal, the U.S. government did not formally intervene in the case and did not assert the state secrets defense. Rather, supporting Yoo, the government as *amicus curiae*, urged the court to dismiss the case based on the special factors of

⁶⁹ *Lebron v. Rumsfeld*, 764 F.Supp.2d 787 (D.S.C. 2011); *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1034 (N.D. Cal. 2009).

⁷⁰ *Padilla*, 633 F. Supp. 2d at 1012–13. According to Attorney General John Ashcroft, “[i]n apprehending Al Muhajir [Padilla’s alleged Muslim name,] as he sought entry into the United States, [the government] ha[s] disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive “dirty bomb.”” *Ashcroft Statement on ‘Dirty Bomb’ Suspect*, CNN (June 2, 2002), http://articles.cnn.com/2002-06-10/us/ashcroft.announcement_1_dirty-bomb-abdullah-al-muhajir-al-qaeda-officials?s=PM:US.

⁷¹ Jenny S. Martinez, *The Real Verdict on Jose Padilla*, WASH. POST., Aug. 17, 2007, at A23.

⁷² *Lebron*, 764 F. Supp. 2d 787.

⁷³ *Padilla*, 633 F. Supp. 2d at 1014. Padilla alleged that he was subjected to twenty-five separate techniques. *Id.* at 1013–14.

⁷⁴ *See id.* at 1025–26.

⁷⁵ *Id.* at 1028–29.

⁷⁶ Civil Appeals Docketing Statement at 1, *Padilla v. Yoo*, No. 09-16478 (9th Cir. July 24, 2009).

national security and foreign affairs.⁷⁷ The case in South Carolina was dismissed on special factors and qualified immunity, among other grounds.⁷⁸

3. *Vance v. Rumsfeld* and *Kar v. Rumsfeld*

A pair of recent cases deal with the unusual circumstances of American citizens held, incommunicado, in military custody outside of the United States and subjected to abusive treatment and enhanced interrogation techniques. The earlier of these cases, *Kar v. Rumsfeld*, involved a U.S. citizen who was in Iraq to make a documentary and was taken into custody by the U.S. military after a taxi he had hired was searched at a checkpoint and found to contain materials that could be used to make roadside explosives.⁷⁹ Kar was held for a short time in an “outdoor cage” in Iraq’s “sweltering heat,” slammed against a wall in Abu Ghraib, held for seven weeks in solitary confinement at Camp Cropper in a room without a sink or a toilet, and denied access to a lawyer.⁸⁰ The district court found that Kar had made out a Fourth Amendment claim that he was unlawfully denied a probable cause hearing; nevertheless, it held that “his rights were not clearly established ‘in light of the specific context of the case.’”⁸¹

Vance v. Rumsfeld involved two American citizens working for a private Iraqi security firm, Shield Group Security (SGS).⁸² Donald Vance and Nathan Ertel became suspicious that the firm was involved in selling arms to insurgents and made their suspicions known to the FBI.⁸³ After SGS became distrustful of the two and took away their access cards, the two had to be forcibly removed from the SGS compound by U.S. forces.⁸⁴ Thereafter, they were taken into U.S. custody and held in several U.S. military compounds, subjected to harsh detention conditions and coercive interrogation tactics, and denied access to a lawyer until their release was ultimately authorized.⁸⁵ The abuses they alleged were typical of suspects held in

⁷⁷ Brief of the United States as Amicus Curiae Supporting Appellant at 2–4, 24, *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (9th Cir. 2009) (No. 09-16478).

⁷⁸ *See Lebron*, 764 F. Supp. 2d 787.

⁷⁹ 580 F. Supp. 2d 80, 81–82 (D.D.C. 2008).

⁸⁰ *Id.* at 82.

⁸¹ *Id.* at 83 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

⁸² No. 10-1687, 2011 U.S. App. LEXIS 16338 (7th Cir. Aug. 8, 2011).

⁸³ *Id.* at *7.

⁸⁴ *Id.* at *9.

⁸⁵ *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 959–60 (2010), *aff'd* 2011 App. LEXIS 16338 (7th Cir. Aug. 8, 2011).

war on terrorism operations: “threats of violence and actual violence, sleep deprivation and alteration, extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, denial of medical care, yelling, prolonged, solitary confinement, *incommunicado* detention, falsified allegations, and other psychologically-disruptive and injurious techniques.”⁸⁶ The district court held that the plaintiffs’ allegations were sufficient to survive Rumsfeld’s motion to dismiss on qualified immunity and lack of personal involvement grounds.⁸⁷ The court cited *Kar* in stating that “American citizens do not forfeit their core constitutional rights when they leave the United States, even when their destination is a foreign war zone.”⁸⁸ The Seventh Circuit distinguished *Boumediene* as dealing with procedural due process only⁸⁹ and affirmed most of the district court’s opinion in a decision holding that “[t]he wrongdoing alleged here violates the most basic terms of the constitutional compact between our government and the citizens of this country.”⁹⁰

B. Illegal and Inadmissible Aliens in U.S. Territory

An intermediate category includes non-citizens who were physically present in the United States at the time they were taken into custody. For the purposes of this Article, legal, illegal, and inadmissible aliens will be grouped together in a single category that, it should be recognized at the outset, is broad and heterogeneous in terms of status.

1. *Ashcroft v. Iqbal*

Ashcroft v. Iqbal culminated an action yielding some damages for two illegal aliens.⁹¹ *Iqbal* involved a Pakistani citizen who was living in

⁸⁶ *Id.* at 961.

⁸⁷ *Id.* at 978.

⁸⁸ *Id.* at 970 (citing *Kar v. Rumsfeld*, 580 F. Supp. 2d 80 (2008)).

⁸⁹ *Vance*, 2011 U.S. App. LEXIS 16338, at *55 (“Those procedural issues are undoubtedly difficult. But they shed no useful light on how a reasonable federal official might have thought that the Constitution permitted him to torture, or to authorize the torture of, a civilian U.S. citizen.”).

⁹⁰ *Id.* at *41.

⁹¹ 129 S. Ct. 1937(2009). This case is better known for heightening the pleading standard for all civil actions under Rule 8 of the Federal Rules of Civil Procedure. After the Supreme Court’s decision, *Iqbal* settled his claims against the remaining defendants. See Stipulation Withdrawing Appeal from Active Consideration, *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007) (No. 05-5768-cv). At the district court level, the case name was *Elmaghraby v. Aschroft*, No. 04-CV-1809, 2005 U.S. Dist. LEXIS 21434, at *1 n.1 (E.D.N.Y. Sept. 27, 2005). Co-plaintiff *Elmaghraby* settled his claim for \$300,000 and was not part of the Supreme Court appeal. Brief for Respondent

the United States on 9/11, allegedly with fraudulent immigration papers.⁹² In the domestic sweeps after 9/11, Javaid Iqbal was picked up and detained in the maximum security section of the Metropolitan Detention Center in Brooklyn, New York⁹³ During his detention, Iqbal was allegedly kept in lockdown twenty-four hours a day, kicked and dragged across his cell, subjected to serial strip and cavity searches, not allowed to pray, and subjected to other alleged abuses.⁹⁴ Iqbal sued several lower-level officials, former Attorney General John Ashcroft, and former FBI Director Robert Mueller for various violations of his constitutional rights.⁹⁵

2. *Arar v. Ashcroft*

*Arar v. Ashcroft*⁹⁶ is perhaps the most troubling of all the 9/11 damages cases, because the plaintiff—Syrian-Canadian Maher Arar—was physically present in the United States when the chain of events giving rise to his claims began.⁹⁷ After being wrongly informed by Canadian authorities that Arar was an “Islamic extremist” and the “target,” or “principal subject,” of a terrorism investigation,⁹⁸ U.S. authorities apprehended Arar when he was in transit to Canada from North Africa, where he had been vacationing, took him into U.S. custody, declared him inadmissible to the United States because of alleged membership in Al Qaeda, and initiated deportation proceedings to Syria, a country notorious for its use of torture.⁹⁹

Javaid Iqbal at 39, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015); see also Nina Bernstein, *U.S. Is Settling Detainee's Suit in 9/11 Sweep*, N.Y. TIMES, Feb. 28, 2006, at A1 (reporting on the case details and the settlement amount).

⁹² *Elmaghraby*, 2005 U.S. Dist. LEXIS 21434, at *2–3.

⁹³ *Id.*

⁹⁴ *Id.* at *16–17.

⁹⁵ Iqbal claimed that Ashcroft and Mueller were liable for, respectively, “unconstitutionally designating him as “a person of high interest” on the basis of “race, religion, or national origin” and for designing and implementing the restrictive confinement-conditions policy and knowing of and condoning the abuse. *Iqbal*, 129 S. Ct. 1937, 1944 (2009).

⁹⁶ 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff'd*, 532 F.3d 157 (2d Cir. 2008), *aff'd en banc*, 585 F.3d 559 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010).

⁹⁷ Arar had also lived for some time in the United States as a legal alien. 2 COMM’N INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: FACTUAL BACKGROUND 817 (2006), available at http://www.sirc-csars.gc.ca/pdfs/cm_arar_bgv2-eng.pdf.

⁹⁸ COMM’N INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 24–25, available at http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf#53.

⁹⁹ *Arar*, 414 F. Supp. 2d at 253–54.

Immigration officials then deported him to Syria without informing his lawyers.¹⁰⁰ For ten months, Syrian authorities kept Arar in a “grave cell,” 6 feet long by 7 feet high and 3 feet wide, where he was exposed to dampness and cold, denied sanitary facilities, and given hardly edible food.¹⁰¹ In these conditions, Arar lost forty pounds.¹⁰² The cell was infested with rats and occasionally used as a toilet by stray cats.¹⁰³ His captors beat him with two-inch thick electric cables on his palms, hips, and lower back, as well as just using their fists.¹⁰⁴ They also allegedly confined him in a room where he could overhear the screams of other detainees being tortured.¹⁰⁵ According to the district court, the question whether Arar possessed substantive rights under the Due Process Clause was a close one.¹⁰⁶ The court, however, decided, on special factors grounds,¹⁰⁷ that national security and foreign policy considerations foreclosed Arar’s claims.¹⁰⁸ Though the U.S. government asserted the state secrets privilege,¹⁰⁹ it did not

¹⁰⁰ *Id.* at 254. Arar asserted one claim under the Torture Victims Protection Act and three claims under the U.S. Constitution. See Complaint and Demand for Jury Trial, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (No. cv-04-0249), available at http://ccrjustice.org/v2/legal/september_11th/docs/ArarComplaint.pdf.

¹⁰¹ *Id.* ¶ 58.

¹⁰² *Id.* ¶ 59.

¹⁰³ *Arar*, 414 F. Supp. 2d at 254.

¹⁰⁴ *Id.* at 255.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 279.

¹⁰⁷ *Id.* (“Assuming, without resolving, the existence of some substantive protection, Arar’s claims are foreclosed under an exception to the *Bivens* doctrine.”).

¹⁰⁸ Judge Trager also found that Arar’s rendition claims were foreclosed by special factors because Congress was better suited than the courts to fashion a remedy tailored to Arar’s circumstances. *Id.* at 281–83. Judge Trager relied on *Bush v. Lucas* for the proposition that “courts will refrain from extending a *Bivens* claim if doing so trammels upon matters best decided by coordinate branches of government.” 414 F. Supp. 2d 250, 279 (E.D.N.Y. 2006) (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983)).

¹⁰⁹ The U.S. government submitted a notice of filing and affidavits by Acting Attorney James B. Comey and Secretary of the Department of Homeland Security Tom Ridge formally asserted the privilege, and then moved to dismiss the case under Federal Rule of Civil Procedure 56. See Memorandum in Support of the United States’ Assertion of State Secrets Privilege, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2005) (No. 04-CV-249). It is curious that the U.S. government did not formally intervene in the case. Plaintiff’s attorney, Center for Constitutional Rights’ lawyer Maria LaHood, in a personal communication with the Author, noted that the complaint asked for injunctive relief, so the defendants were sued in their official capacity and thus the U.S. government was already de facto in the suit.

formally intervene in the case, and the state secrets issue was never reached by the court.¹¹⁰

The U.S. Court of Appeals for the Second Circuit affirmed the district court's opinion twice—once in a three-judge panel¹¹¹ and again en banc.¹¹² The en banc decision did not reach the qualified immunity defense or the state secrets privilege,¹¹³ but focused primarily on special factors and whether Arar had a viable *Bivens* claim in view of the national security interests at stake.¹¹⁴ Referring to the Supreme Court's injunction in *Malesko* that *Bivens* not be extended to new contexts, the majority first noted that “[c]ontext is not defined in the case law” and then elected to construe the term “as it is commonly used in law: to reflect a potentially recurring scenario that has similar legal and factual components.” Based on that definition, the court concluded that rendition was a “new context.”¹¹⁵ Judge Sack's dissent correctly noted that the majority could only reach this conclusion by severing the domestic facts in Arar's complaint from the international ones and then dismissing them as insufficiently pled.¹¹⁶

C. *Aliens Abroad*

The damages cases of aliens abroad can be grouped in two ways. First, geographically—those based on acts occurring in Guantánamo versus those based on acts occurring outside Guantánamo. Second, administratively—those involving the military versus those involving the Central Intelligence Agency.

1. Guantánamo

i. *Rasul v. Myers*

The interests of four British men led to the filing of *Rasul v. Rumsfeld*.¹¹⁷ The plaintiffs alleged that while detained in Guantánamo

¹¹⁰ *Arar*, 414 F. Supp. 2d at 287 (explaining it was not necessary to reach the state secrets issue because the case could be decided on constitutional and statutory grounds).

¹¹¹ *Arar v. Ashcroft*, 532 F.3d 157, 162 (2d Cir. 2008), *aff'd en banc*, 585 F.3d 559 (2d Cir. 2009).

¹¹² *Arar*, 585 F.3d at 559.

¹¹³ *Id.* at 563.

¹¹⁴ *Id.* at 574.

¹¹⁵ *Id.* at 572; *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

¹¹⁶ *Id.* at 582–83 (J. Sack, concurring in part and dissenting in part).

¹¹⁷ 414 F. Supp. 2d 26 (D.D.C. 2006), *aff'd sub nom. Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008), *vacated*, 555 U.S. 1083 (2008), *aff'd in part, rev'd in part*, 563 F.3d 527

they were subjected to repeated beatings and anal probes, that they were deprived of sleep, shackled for hours, held incommunicado, injected with unknown substances, and, perhaps most grievously, harassed and humiliated as they attempted to practice their religion.¹¹⁸ They brought seven causes of action, including two under the U.S. Constitution (Fifth and the Eighth Amendments) and one under the Religious Freedom Restoration Act (RFRA).¹¹⁹

Thus far, *Rasul* plaintiffs have had the most success of all the 9/11 damages cases involving alien plaintiffs held outside U.S. sovereign territory. The reason for this success is that the RFRA explicitly provides for a private right of action¹²⁰ and by its terms is not geographically limited. While the plaintiffs' other claims suffered the usual fate of dismissal on territorial grounds,¹²¹ Judge Urbina of the U.S. District Court for the District of Columbia issued a separate opinion on the RFRA claim alone, finding the RFRA applied to Guantánamo Bay, that the plaintiffs had asserted a valid cause of action, and that the defendants did not have qualified immunity.¹²² The U.S. Court of Appeals for the D.C. Circuit read into the statute an implicit limitation on the rights established by the RFRA.¹²³ The subsequent unsuccessful appeals centered on the usual *Bivens* question, plus the question of whether the legislature intended to make the RFRA co-extensive with First Amendment rights or broader in scope.¹²⁴

(D.C. Cir. 2009). Three of the men had been plaintiffs in the original *Rasul v. Bush* habeas litigation in 2004. Compare Complaint, *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26 (D.D.C. 2004) (No. 04-CV-01864) [hereinafter Complaint, *Rasul I*] (plaintiffs include: Shafiq Rasul, Asif Iqbal, Rhuhel Ahmed, and Jamal Al-Harith), with Complaint, *Rasul v. Bush*, No. 02-299, (D.D.C. Apr. 21, 2005).

¹¹⁸ *Rasul*, 414 F. Supp. 2d at 28–29.

¹¹⁹ See Complaint, *Rasul I*, *supra* note 117.

¹²⁰ See *id.*; see also Religious Freedom Act, 42 U.S.C. § 2000b(b)(1) (2006); cf. *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (holding RFRA unconstitutional as applied to states).

¹²¹ *Rasul*, 414 F. Supp. 2d at 42–44.

¹²² *Rasul v. Rumsfeld*, 433 F. Supp. 2d 58, 67–71 (D.D.C. 2006), *rev'd sub nom.* *Rasul v. Myers*, 06-5209, 2008 U.S. App. LEXIS (D.C. Cir. Jan 11, 2008).

¹²³ *Rasul v. Myers*, 512 F.3d 644, 671 (D.C. Cir. 2008) (holding that RFRA extends only to the contours of the rights under First Amendment as established *before* the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990) and does not enlarge those rights), *vacated*, 555 U.S. 1083 (2008), *aff'd in part, rev'd in part*, 563 F.3d 527 (D.C. Cir. 2009).

¹²⁴ *Id.* at 669.

ii. *Al-Zahrani v. Rumsfeld*

The plaintiffs in *Al-Zahrani v. Rumsfeld* were the families of two of the three detainees who allegedly committed suicide, simultaneously, in Guantánamo on July 10, 2006.¹²⁵ In early 2009, the plaintiffs filed a damages suit against the U.S. government, twenty-four named defendants, including Donald Rumsfeld, and one hundred unnamed military, civilian, and medical personnel.¹²⁶ The plaintiffs' allegations included being presumed to be enemy combatants, being denied the right to an attorney, and being prevented from viewing the evidence against them,¹²⁷ in addition to being subjected to extreme confinement and "specific methods and acts of physical and psychological torture," including sleep deprivation, full-body cavity searches, beatings, verbal abuse, religious abuse—including mandatory shaving and desecration of the Qur'an—and various other abuses.¹²⁸ As is the case with so many other Guantánamo detainees, neither of the plaintiffs' decedents was ever charged.¹²⁹

In dismissing the case, the U.S. District Court for the District of Columbia cited *Rasul v. Myers*¹³⁰ as precedent foreclosing plaintiffs' *Bivens* claims.¹³¹

2. Beyond Guantánamo

i. *El-Masri v. Tenet*

Khaled El-Masri is a German national who was abducted while vacationing in Macedonia.¹³² Initially taken into custody in Macedonia, he was stripped, drugged, hooded, eventually flown to Afghanistan,¹³³ detained in a bleak prison known as the "Salt Pit"; there, he was periodically interrogated and asked to confess his relationship to Al Qaeda.¹³⁴ During his incarceration, El-Masri protested his detention with a hunger strike; despite being fed

¹²⁵ *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 106 (D.D.C. 2010).

¹²⁶ *Id.* at 107.

¹²⁷ *Id.* at 106.

¹²⁸ *Id.*

¹²⁹ *Id.* at 107.

¹³⁰ *Id.* at 112.

¹³¹ *Al-Zahrani*, 684 F. Supp. 2d at 112.

¹³² *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532 (E.D. Va. 2006), *aff'd* 479 F.3d 296 (4th Cir. 2007).

¹³³ *Id.* at 533–34.

¹³⁴ *Id.*

forcibly, he lost sixty pounds.¹³⁵ CIA Director George Tenet and National Security Advisor Condoleeza Rice were advised that El-Masri's passport was authentic and that the CIA had detained the wrong man.¹³⁶ In late May, El-Masri was flown to Albania, released on a hill in the middle of the night, and left to make his way back to Germany.¹³⁷ El-Masri's complaint, filed in the District Court for the Eastern District of Virginia, alleged both constitutional and international law violations.¹³⁸ The United States immediately filed a statement of interest and asserted a formal claim of state secrets privilege, eventually intervening in the case and filing a motion to dismiss.¹³⁹ The court granted the motion to dismiss—not without a few regretful words—based on the state secrets privilege.¹⁴⁰ A three-judge panel of the Fourth Circuit decided the case on similar grounds,¹⁴¹ and the Supreme Court denied certiorari.¹⁴² Appeals to the U.S. Congress were similarly unavailing.

Though an innocent man at the time of his arrest, El-Masri later suffered from the physical and emotional trauma that he had endured and was subsequently hospitalized in a psychiatric institution following his arrest on suspicion of arson.¹⁴³

ii. *In re Iraq and Afghanistan Detainees*

In a case involving detainees held in military detention in Afghanistan and Abu Ghraib in Iraq, plaintiffs brought constitutional claims against Rumsfeld and other military officials alleging due process violations, and cruel and unusual punishment.¹⁴⁴ Reflecting a general pattern, the abuses alleged to have occurred at military bases in Iraq and Afghanistan are generally even more appalling than those

¹³⁵ *Id.*

¹³⁶ *Id.* at 534.

¹³⁷ *Id.*

¹³⁸ *El-Masri*, 437 F. Supp. 2d at 534–35.

¹³⁹ *Id.* at 535.

¹⁴⁰ *Id.* at 530. All this occurred before any discovery had taken place.

¹⁴¹ *El-Masri v. United States*, 479 F.3d 296, 296 (4th Cir. 2007).

¹⁴² *El-Masri v. United States*, 552 U.S. 947 (2007).

¹⁴³ Margaret Satterthwaite, *The Story of El-Masri v. Tenet: Human Rights and Humanitarian Law in the 'War on Terror,'* in HUMAN RIGHTS ADVOCACY STORIES 535, 573 (Deena R. Hurwitz, et al. eds. 2009).

¹⁴⁴ *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 91 (D.D.C. 2007), *aff'd sub nom.* *Ali v. Rumsfeld*, No. 07-5178 (D.C. Cir. June 21, 2011); *see also id.* at 103–08 (holding special factors counsel hesitation because military affairs, foreign relations, and national security are constitutionally committed to the political branches).

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that allegedly occurred at Guantánamo.¹⁴⁵ One plaintiff alleged that U.S. military personnel hung him to the ceiling upside-down with a chain and proceeded to pushing and slapping him until he lost consciousness.¹⁴⁶ Another alleged that he was stripped and photographed, subjected to cavity probes, dehydrated, and subjected to threats of being drowned.¹⁴⁷ A third was severely beaten, stabbed, burned, locked in severe confinement, dragged, menaced by a dog, denied food and drink, and threatened with death.¹⁴⁸

The district court began its analysis with the threshold question of whether the plaintiffs were protected by the Constitution and quickly concluded that their claims were foreclosed by *Eisentrager* and *Verdugo-Urquidez*.¹⁴⁹ The plaintiffs argued that they were entitled to “fundamental rights” under the Constitution in territories subject to the control of the United States in accordance with the *Insular Cases*.¹⁵⁰ Even though the court found that the plaintiffs were unable to assert any rights under the Constitution, the court went on to examine the special factors that might counsel hesitation in rejecting plaintiffs’ *Bivens* claim on a second, separation-of-powers ground.¹⁵¹ The case reached the Court of Appeals for the District of Columbia as *Ali v. Rumsfeld*.¹⁵² On the appeal, the plaintiffs argued that in *Boumediene* the Court had “adopted a flexible approach that leaves open the possibility of the extraterritorial application of constitutional provisions other than the Suspension Clause;”¹⁵³ but the D.C. Court of Appeals, while casting doubt on that proposition, chose to analyze the case under the *Pearson* rule and dismissed it on qualified immunity grounds, with special factors as an alternative basis.¹⁵⁴

¹⁴⁵ See CENTER FOR CONSTITUTIONAL RIGHTS, REPORT ON TORTURE AND CRUEL, INHUMAN AND DEGRADING TREATMENT AT GUANTÁNAMO BAY, CUBA 17, 24 (2006), available at http://ccrjustice.org/files/Report_ReportOnTorture.pdf.

¹⁴⁶ *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d at 88–89.

¹⁴⁷ *Id.* at 89.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 98.

¹⁵⁰ *Id.* at 99.

¹⁵¹ *Id.* at 107 (citing the “hazard of such multi-various pronouncements combined with the constitutional commitment of military and foreign affairs to the political branches”).

¹⁵² *Ali v. Rumsfeld*, No. 07-5178, (D.C. Cir. June 21, 2011).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

IV. ANALYSIS

Although the heuristic is not absolutely perfect, the outcomes in these cases largely reflect the pre-*Boumediene* territorial Constitution, which ends at the “water’s edge.” The biggest differentiator is the location of the site of injury in combination with the citizenship status of the plaintiffs. The most successful cases have been by U.S. citizens and U.S. resident aliens detained within the territorial United States;¹⁵⁵ the least successful, by aliens detained outside the territorial United States.¹⁵⁶

Damage awards have resulted in those cases in which the plaintiffs were on U.S. territory when the injuries occurred. Al-Kidd and Iqbal settled their claims against lower-level officials,¹⁵⁷ even though their claims against cabinet-level officials were ultimately dismissed.¹⁵⁸ Iqbal’s co-plaintiff Elmaghraby also settled his claims.¹⁵⁹ Although one of Padilla’s damages cases was dismissed at the district court level in South Carolina, his Ninth Circuit appeal is still going forward, and he has appeals available to him in the South Carolina case.¹⁶⁰

Arar is an apparent exception to the territorial rule; he was initially taken into custody while physically present in the United States, yet his case failed at every stage.¹⁶¹ As Judge Sack noted in dissent, the majority artificially divided the complaint into domestic claims that did not involve torture and foreign claims that did.¹⁶²

¹⁵⁵ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1937 (2009); *Al-Kidd v. Ashcroft*, 580 F.3d 949, 949 (9th Cir. 2009), *cert. granted* 131 S. Ct. 415 (2010), *rev’d* 131 S. Ct. 2074 (2011).

¹⁵⁶ See *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103 (D.D.C. 2010); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007), *aff’d sub nom. Ali v. Rumsfeld*, No. 07-5178, (D.C. Cir. June 21, 2011); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff’d*, 532 F.3d 157 (2d Cir. 2008), *aff’d en banc*, 585 F.3d 559 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010); *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26 (D.D.C. 2006), *aff’d sub nom. Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008), *vacated*, 555 U.S. 1083 (2008), *aff’d in part, rev’d in part*, 563 F.3d 527 (D.C. Cir. 2009); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532 (E.D. Va. 2006). Furthermore, this analysis must be qualified by noting that the cases discussed are at different procedural stages. Some have already reached the Supreme Court. One case, *Rasul v. Myers*, has reached the Supreme Court twice. See *Rasul v. Myers*, 130 S. Ct. 1013 (2009); *Rasul v. Myers*, 555 U.S. 1083 (2008).

¹⁵⁷ See discussion *supra* Part III.A.1 & Part III.B.1.

¹⁵⁸ See discussion *supra* Part III.A.1 & Part III.B.1.

¹⁵⁹ See *supra* note 91.

¹⁶⁰ See discussion *supra* Part III.A.2.

¹⁶¹ See discussion *supra* Part III.B.2.

¹⁶² *Arar v. Ashcroft*, 585 F.3d 559, 582–83 (2d Cir. 2009).

The cases of aliens abroad have failed to win any compensation or acknowledgement of wrong for the victim.¹⁶³ Indeed, the Supreme Court denied certiorari in *El-Masri*,¹⁶⁴ *Rasul*,¹⁶⁵ and *Arar*,¹⁶⁶ thus leaving in place a set of highly conservative decisions that appear to ratify, at least for the present, the new national security special factors doctrine that the lower courts seem to be fleshing out.¹⁶⁷

These outcomes neither reflect the degree of innocence of the plaintiffs, nor the extent of the injuries. While Al-Kidd appears to have been guilty of nothing more than too fervent an interest in Islam, Iqbal and his co-plaintiff were not in compliance with immigration laws. Jose Padilla had an extensive criminal history, including seventeen prior arrests, even before his alleged training with Al Qaeda.¹⁶⁸ Criminality is no justification for torture, but no principles of fairness can make sense of the results in these cases. *El-Masri* was a case of mistaken identity. *Arar* was detained on the basis of misleading information provided by the Canadian government, but a Canadian investigation into the matter did not find evidence that Canadian officials had played an active part in the decision to render him to Syria.¹⁶⁹ *Arar* received \$9.75 million in compensation

¹⁶³ See *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103 (D.D.C. 2010); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 91 (D.D.C. 2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff'd*, 532 F.3d 157 (2d Cir. 2008), *aff'd en banc*, 585 F.3d 559 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010); *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26 (D.D.C. 2006); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532 (E.D. Va. 2006).

¹⁶⁴ *El-Masri v. United States*, 128 S. Ct. 373 (2007).

¹⁶⁵ *Rasul v. Myers*, 130 S. Ct. 1013 (2009).

¹⁶⁶ *Arar v. Ashcroft*, 130 S. Ct. 3409 (2010).

¹⁶⁷ *Arar*, 585 F.3d 559; *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (noting as an alternative ground for dismissal that “[t]he danger of obstructing U.S. national security policy” is a special factor counseling courts to hesitate before creating a *Bivens* remedy). It is possible that the Court declined to hear these cases because it concluded that they would ultimately fail on the question of qualified immunity. Even if the Court were willing to affirm the constitutional rights of aliens abroad, it would be difficult to overcome the argument, under the *Pearson* rule, that these rights were not clearly established when they were allegedly violated.

¹⁶⁸ *United States v. Jayyousi*, 657 F.3d 1085, 1115–17 (11th Cir. 2011) (noting the government’s appeal regarding the downward departure from the Federal Sentencing Guidelines in Padilla’s case).

¹⁶⁹ COMM’N OF INQUIRY INTO THE ACTIONS OF CAN. OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHAR ARAR: ANALYSIS AND RECOMMENDATIONS 14, available at http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf.

and an apology from the *Canadian* government, but the United States has never admitted wrongdoing in his case.¹⁷⁰

These cases thus reflect a harsh rule. Citizens and U.S. resident aliens get damages from someone at some level.¹⁷¹ Aliens abroad—even though they may have suffered appalling deprivations of liberty and egregious affronts to their human dignity—get nothing.¹⁷²

V. CONCLUSION

In the world of damages, *Boumediene* changed little. The Supreme Court denied certiorari in *El-Masri* before issuing its opinion in *Boumediene* and denied certiorari in *Arar* afterwards. It granted certiorari in *Rasul* before *Boumediene* and denied certiorari afterwards. When it granted certiorari in *Rasul*, it merely vacated the D.C. Circuit's judgment and remanded for reconsideration in light of *Boumediene*.¹⁷³ The D.C. Circuit found little in *Boumediene* to reconsider and reinstated its judgment on a more limited basis. Nor is it evident that *Boumediene* has had much impact on other lower court decisions.

To some extent, *Boumediene*'s failure to make an impact can be attributed to the intersection of qualified immunity with the underlying constitutional jurisprudence. Because most of the acts giving rise to the damages cases under discussion had occurred before June 2008, when *Boumediene* was decided, it could be concluded, that the right in question was not “clearly established” for

¹⁷⁰ Ian Austen, *Canada Will Pay \$9.75 Million to Man Sent to Syria and Tortured*, N.Y. TIMES, Jan. 26, 2007, A1. As early as 2003, Congress requested that the Department of Homeland Security Inspector General (DHS IG) undertake an investigation into Arar's case. For more than four years the final report was delayed, apparently by Department of Justice obstructions. Scott Horton, *The Missing IG Report on Maher Arar*, HARPER'S MAG. (Nov. 16, 2007), <http://harpers.org/archive/2007/11/hbc-90001676>. When the IG report was finally released, it was heavily redacted. Scott Horton, *More on Maher Arar*, HARPER'S MAG. (June 5, 2008), <http://harpers.org/archive/2008/06/hbc-90003043>. For a redacted version of the report, see *Final Copy for the Hill*, HARPER'S MAG., <http://harpers.org/media/pdf/OIG-08-18-FinalcopyfortheHill.pdf> (last visited Sept. 23, 2011).

¹⁷¹ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009).

¹⁷² See *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103 (D.D.C. 2010); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 91 (D.D.C. 2007), *aff'd sub nom.* Ali v. Rumsfeld, No. 07-5178, (D.C. Cir. June 21, 2011); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff'd*, 532 F.3d 157 (2d Cir. 2008), *aff'd en banc*, 585 F.3d 559 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010); *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26 (D.D.C. 2006); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532 (E.D. Va. 2006).

¹⁷³ *Rasul v. Meyers*, 555 U.S. 1083 (2008), *vacating* 512 F.3d 644.

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actions taking place outside U.S. sovereign territory. Since no court has held thus far that constitutional rights apply beyond Guantánamo, the impact of the qualified immunity defense is unlikely to change in the near future.

Ironically, however, *Boumediene* may end up changing the scope of qualified immunity with respect to U.S. citizens. Prior to *Boumediene*, it would have been difficult for a federal official to claim it was not “clearly established” that U.S. citizens are protected by the U.S. Constitution when they are abroad, at least to the same extent that they are protected by it on U.S. territory. *Boumediene* undermines that conclusion and throws the qualified immunity analysis into disarray because the reach of the Constitution now depends on the wisdom of a court determining that it is not “impractical and anomalous” to extend the protections of the Constitution to a U.S. citizen if that citizen is not within the sovereign territory of the United States. Citizenship would now seem to be only one among several of the “*Boumediene* factors.”

The situation now presents the reverse of the usual case in qualified immunity analyses. Not infrequently it happens that a court will immunize a federal official for a violation of a right that is clearly established at the time of the case but that was still in the process of evolving at the time the relevant acts took place. Thus U.S. courts have found that U.S. officials have qualified immunity for acts committed at Guantánamo before *Boumediene* was decided, because “[n]o reasonable government official would have been on notice that plaintiffs had any Fifth Amendment or Eighth Amendment rights” before the Supreme Court’s decision.¹⁷⁴ *Boumediene* causes the law relating to constitutional extraterritoriality as to citizens to regress, at least in theory, from being “clearly established” to “not clearly established.” In October 2011, the United States asked the Seventh Circuit to reconsider the lower court’s decision in *Vance v. Rumsfeld* because of the “exceptionally important question of whether a court, in the absence of legislative authority, may recognize a damages action against individual government officials regarding the detention and interrogation of military detainees in a foreign war zone.”¹⁷⁵ The appeal in *Vance* may be a harbinger.

¹⁷⁴ *Rasul v. Myers*, 563 F.3d 527, 530 (D.C. Cir. 2008), *cert. denied*, 130 S. Ct. 1013 (2009).

¹⁷⁵ Petition for Rehearing and Suggestion for Rehearing En Banc, at 1, *Vance v. Rumsfeld*, Civ. No. 09-16478 (7th Cir. Oct. 28, 2011).