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BIG BOY RULES, OR HOW I LEARNED TO STOP WORRYING AND LOVE “SPECIAL FACTORS”

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INTRODUCTION

The American way of waging war has changed significantly in the past two decades. Following the Cold War, the military began to use private military firms, or PMFs, to support and supplant many of its functions.¹ The U.S. military’s 2003 invasion and occupation of Iraq was accompanied by another army, one of contractors, who would help stabilize and rebuild the country.² At their highest numbers, there were approximately 150,000 contractors in the Iraqi warzone, and approximately 30,000 of those were authorized to carry weapons and performed many quasi-military functions.³ The only distinction between them and their army counterparts was their placement outside of the chain-of-command. While they were nominally within the

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¹ Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 149 (2005).

² Jonathan Finer, Recent Developments, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT’L L. 259, 260 (2008).

³ *Id.*

chain-of-command because of the contracts they operated under, an individual contractor did not have to follow orders from a military official.⁴

The recently vacated Seventh Circuit case of *Vance v. Rumsfeld* arises from this setting.⁵ In that case, two American citizens working for an Iraqi PMF were detained by the U.S. military and subjected to sleep deprivation and repeated interrogations.⁶ They had reported on the illegal activities of the PMF which they worked for and were detained to determine if they were a “security threat.” After being released and returning to the United States, they filed suit against Donald Rumsfeld and other military officials, alleging that their Eighth Amendment constitutional rights had been violated and that they were entitled to a remedy of damages under *Bivens v. Six Unknown Named Agents*.⁷ Although *Bivens* remedies have been allowed for violation of a citizen’s Eighth Amendment rights while on U.S. soil⁸, no court had been presented with the question of whether U.S. citizens are entitled to a *Bivens* remedy when their Eighth Amendment rights are violated in a warzone.⁹

This Comment will argue that the Seventh Circuit’s reasoning in *Vance* failed to adequately address “special factors” that should preclude a *Bivens* remedy for security contractors working for Private Military Firms (PMFs). It will do so by examining the rise of PMFs; what laws they operate under; and how they were used in Iraq following Operation Iraqi Freedom. It will then chart the Supreme Court’s creation of implied rights of action under *Bivens* and their application to the military. It summarizes and analyzes the portion of the Seventh Circuit’s decision in *Vance*, which dealt with the *Bivens*

⁴ Dickinson, *supra* note 1, at 199–200.

⁵ *Vance v. Rumsfeld*, 653 F.3d 591, *reh’g en banc granted, opinion vacated*, Nos. 10-1687, 10-2442 (7th Cir. Oct. 28, 2011).

⁶ *Id.* at 594.

⁷ *Id.*; *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396 (1971).

⁸ *Wilkie v. Robbins*, 551 U.S. 537 (2007).

⁹ Other Federal Circuits have held that noncitizens are not entitled to a *Bivens* remedy for a violation of Eighth Amendment rights. *See, e.g., Ali v. Rumsfeld*, 649 F.3d 762, (D.C. Cir. 2011); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009).

special factors analysis and proposes alternative grounds for why the Seventh Circuit should have stayed its hand in creating a *Bivens* remedy.

I. THE RISE OF PRIVATE MILITARY FIRMS AND THEIR USE IN IRAQ

A. *The Rise of Private Military Firms*

Between the first and second Gulf Wars¹⁰, the U.S. military's use of private contractors has significantly increased. This is largely due to the Department of Defense determination that "[o]nly those functions that must be performed by DoD should be kept by DoD."¹¹ The Department of Defense divides its functions into three separate categories: those directly linked to warfighting; those indirectly linked to warfighting; and those not linked to warfighting.¹² The Department of Defense is willing to share all functions with the private sector. However, it has determined to aggressively privatize and outsource the second two categories.¹³ The Department of Defense's determination to privatize and outsource entire functions led to the ratio of contractors to troops to be approximately one to one hundred in the first Gulf War¹⁴ and one to ten in the second Gulf War.¹⁵ This led *The Economist* to dub the second Gulf War "the first privatised [sic] war."¹⁶

¹⁰ Officially known as The Persian Gulf War (August 2, 1990 – February 28, 1991) and the Iraq War (March 20, 2003 – December 31, 2011).

¹¹ Department of Defense, *2001 Quadrennial Defense Review Report*, Sept. 30, 2001, at 61, available at <http://www.dod.gov/pubs/qdr2001.pdf>.

¹² *Id.* at 61–62.

¹³ *Id.*

¹⁴ George Cahlink, *Army of Contractors*, GOV'T EXECUTIVE, Feb. 1, 2002, at 43, available at <http://www.govexec.com/features/0202/0202s5.htm>

¹⁵ Peter W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM J. TRANSNAT'L L. 521, 523 (2004).

¹⁶ *Military Industrial Complexities*, ECONOMIST, Mar. 29, 2003, at 56.

B. The Laws Under Which Private Military Firms Operate

PMFs operate in the areas between the laws of their home nation, the nation where they are operating, and the international sphere.¹⁷ For American citizens working for PMFs, this includes: contract law, the Military Extraterritorial Jurisdiction Act (“MEJA”), and the Uniform Code of Military Justice (“UCMJ”).¹⁸ For the purposes of this Comment, only the UCMJ will be examined. In Iraq, contractors fell into a “legal loophole” that placed them outside the typical “gray area” in which they operate, so Congress enacted the John Warner National Defense Authorization Act for Fiscal Year 2007, which amended 10 U.S.C. § 802(a)(10).¹⁹ The amendment expanded the UCMJ to cover civilians “accompanying the force” during “contingency operation[s].”²⁰ Although the Supreme Court case of *Reid v. Covert*,²¹ held that subjecting civilian spouses to UCMJ jurisdiction was unconstitutional, a careful and in-depth analysis of the amendment concluded that courts would find it constitutional.²² All American citizens working for a PMF in Iraq are therefore subject to the UCMJ.²³

C. The Use Of Private Military Firms In Iraq

Contractors supporting the military in Iraq can be placed into one of three groups: those that provide support; those that provide

¹⁷ Cara-Ann M. Hamaguchi, Recent Developments, *Between War and Peace: Exploring the Constitutionality of Subjecting Private Civilian Contractors to the Uniform Code of Military Justice During “Contingency Operations,”* 86 N.C. L. REV. 1047, 1048 (2008).

¹⁸ See generally Charles Tiefer, *No More Nisour Squares: Legal Control of Private Security Contractors in Iraq and After*, 88 OR. L. REV. 745 (2009).

¹⁹ Hamaguchi, *supra* note 17, at 1048–50.

²⁰ 10 U.S.C. § 802(a)(10) (2000), amended by Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2007).

²¹ *Reid v. Covert*, 354 U.S. 1, 5 (1957).

²² Hamaguchi, *supra* note 17, at 1064–66.

²³ *Id.* at 1050.

consulting; and the “military provider firms” that are authorized to carry arms and perform quasi-military roles.²⁴ At their highest levels, there were approximately 30,000 armed security contractors who protected convoys, state officials and diplomats, Army Corps of Engineers units, and military compounds.²⁵ Therefore, they performed almost all normal duties of a military combat unit while being outside the military chain-of-command. While the PMF employing the contractors may have been limited because of contract law principles, the contractors themselves did not have to follow orders from a military official.²⁶

II – IMPLIED RIGHTS OF ACTION UNDER THE CONSTITUTION

A. *Bivens v. Six Unknown Named Agents*

In *Bivens v. Six Unknown Named Agents*, the United States Supreme Court held that an individual is entitled to a private cause of action when federal officials violate a constitutional right, even if no statute explicitly created such a cause of action.²⁷ The *Bivens* Court noted that “where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant necessary relief.”²⁸ Having determined that courts could create a remedy in such circumstances, it stated that, “damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”²⁹ The *Bivens* Court therefore allowed the suit against the federal agents to proceed under the theory that the cause of action could be implied from the face of the Fourth Amendment.³⁰ The *Bivens* Court did not address whether “special

²⁴ Tiefer, *supra* note 18, at 753.

²⁵ Finer, *supra* note 2, at 260.

²⁶ See Tiefer, *supra* note 18, at 761.

²⁷ *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396 (1971)

²⁸ *Id.* at 392 (Internal citation omitted).

²⁹ *Id.* at 395.

³⁰ *Id.* at 397.

factors” or an alternative remedy required restraint in the absence of Congressional action on the issue.³¹ As such, it reserved answering those questions for later cases.³²

1. *Bush v. Lucas*

In *Bush v. Lucas*, the United States Supreme Court held that a *Bivens* remedy does not exist when an alternative process will protect a constitutional liberty interest.³³ The *Bush* Court grappled with the question of whether civil service employees could bring an action for damages when the employees’ rights were violated by their superiors.³⁴ The *Bush* Court noted that “[t]he question is not what remedy the court should provide for a wrong that would otherwise go unredressed” because civil service employees were already entitled to a comprehensive set of remedies.³⁵ Instead, the main issue before the court was “whether an elaborate remedial system . . . should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.”³⁶ Because the issue before it implicated a complex, existing regulatory structure, the *Bush* Court held that Congress was in a “far better position than a court” to determine whether a “new species of litigation” should be permitted.³⁷ Although the *Bush* Court couched its decision in terms of whether “special factors” preclude creation of a new remedy, the holding in *Bush* was interpreted in subsequent Supreme Court cases to mean that when an alternative, existing process for protecting a liberty interest

³¹ *Id.* at 396.

³² *Carlson v. Green*, 446 U.S. 14 (1980); *Bush v. Lucas*, 462 U.S. 367 (1983); *Wilkie v. Robbins*, 551 U.S. 537 (2007). These cases will be discussed further *infra*.

³³ *Bush*, 462 U.S. at 390.

³⁴ *Id.* at 368.

³⁵ *Id.* at 388.

³⁶ *Id.*

³⁷ *Id.* at 389.

exists, courts should refrain from providing a new remedy in damages.³⁸

2. *Wilkie v. Robbins*

In *Wilkie v. Robbins*, the United States Supreme Court held that certain “special factors” can preclude the creation of a remedy in damages for a federal official’s violation of a constitutionally protected liberty interest.³⁹ The *Wilkie* Court considered whether a *Bivens* remedy should be allowed in a case where federal officials violated a landowner’s property rights.⁴⁰ In *Wilkie*, the Court found that “the forums of defense and redress . . . are a patchwork;” and that “[i]t would be hard to infer that Congress expected the judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens*” supported creation of a new claim.⁴¹ Because no adequate alternative remedy existed in this case, the Court moved to the second step of the *Bivens* test and examined whether any “special factors” precluded a new remedy in damages.⁴² The government’s argument that it was difficult to define limits “to legitimate zeal on the public’s behalf” ultimately won the Court over.⁴³ The *Wilkie* Court reasoned that when government employees “push too hard for the Government’s benefit,” Congress was the best institution to provide a remedy because it could “tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government’s employees.”⁴⁴ Justice Thomas wrote a concurrence, which Justice Scalia joined, that reiterated their position that “*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of

³⁸ *Wilkie*, 551 U.S. at 550.

³⁹ *Id.* at 562.

⁴⁰ *Id.* at 549.

⁴¹ *Id.* at 554.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 562.

action,” and that “*Bivens* and its progeny should be limited ‘to the precise circumstances that they involved.’”⁴⁵

3. *Carlson v. Green*

In *Carlson v. Green*, the United States Supreme Court held that a *Bivens* remedy for damages was available under the Eighth Amendment.⁴⁶ In *Carlson*, an executrix brought a claim against federal prison officials for causing her son’s death.⁴⁷ The executrix pleaded a violation of the Eighth Amendment’s prohibition of cruel and unusual punishment under *Bivens*.⁴⁸ Because this was the first *Bivens* action brought under the Eighth Amendment, the Supreme Court analyzed whether any special factors counseled hesitation or if an alternative remedy existed for this type of constitutional violation.⁴⁹ The Supreme Court found that no special factors existed and even if allowing a *Bivens* action to proceed against prison officials, qualified immunity would ensure that they were not “inhibit[ed]” in performing their function.⁵⁰ Next, the Supreme Court examined whether the Federal Tort Claims Act (“FTCA”) provided a sufficient alternative remedy.⁵¹ It concluded that the FTCA was not an alternative remedy because the congressional comments for the FTCA amendment indicated that Congress felt that *Bivens* and the FTCA were “parallel, complementary causes of action.”⁵² Because the two remedies were not meant to be mutually exclusive, and because *Bivens* remedies can be more effective when government officials violate a constitutionally-protected liberty interests, the Supreme Court concluded that a *Bivens*

⁴⁵ *Id.* at 568 (citing *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 75 (2001)) (Thomas, J., concurring).

⁴⁶ *Carlson v. Green*, 446 U.S. 14, 23 (1980).

⁴⁷ *Id.* at 16.

⁴⁸ *Id.* at 17.

⁴⁹ *Id.* at 18–19.

⁵⁰ *Id.* at 19.

⁵¹ *Id.*

⁵² *Id.* at 19–20.

remedy should exist when government officials violate an individual's Eighth Amendment rights.⁵³

4. United States v. Stanley

In *United States v. Stanley*, the United States Supreme Court held that a *Bivens* remedy is not available for injuries arising out of or in the course of military service activity.⁵⁴ In *Stanley*, a serviceman was secretly given lysergic acid diethylamide ("LSD") because the military wanted to understand its effects on humans.⁵⁵ After being administered the drug, he underwent drastic personality changes that caused his discharge from the military and the dissolution of his marriage.⁵⁶ After he learned that he was secretly administered the drug, he brought a claim against various military officials under the FTCA and *Bivens*.⁵⁷ Although the Supreme Court had previously decided under *Chappell v. Wallace*⁵⁸ that enlisted personnel cannot bring a *Bivens* claim against superior officers, it had not decided whether all *Bivens* claims brought by military personnel are barred.⁵⁹ The Supreme Court held that military personnel cannot bring *Bivens* claims for injuries "that 'arise out of or are in the course of activity incident to service.'"⁶⁰ It reached this holding by reasoning that because claims brought by military personnel under the FTCA are barred when they arise out of or are incident to service, any claims under *Bivens* must likewise be precluded.⁶¹

⁵³ *Id.* at 20–23.

⁵⁴ *United States v. Stanley*, 483 U.S. 669, 684 (1987).

⁵⁵ *Id.* at 671.

⁵⁶ *Id.*

⁵⁷ *Id.* at 672.

⁵⁸ *Chappell v. Wallace*, 462 U.S. 296 (1983).

⁵⁹ *Stanley*, 483 U.S. at 676.

⁶⁰ *Id.* at 684 (citing *Feres v. United States*, 340 U.S. 135, 146 (1950)).

⁶¹ *Stanley*, 483 U.S. at 684.

III . VANCE V. RUMSFELD

A. *Factual Background*

Vance v. Rumsfeld arose from the alleged torture of two American citizens working for a PMF in Iraq.⁶² Donald Vance and Nathan Ertel traveled to Iraq in 2005 to work for the PMF, Shield Group Security (“SGS”).⁶³ While performing their duties for SGS, they witnessed several actions that they believed to be illegal by SGS employees.⁶⁴ During a visit to Chicago, Vance contacted the FBI and reported what he had observed.⁶⁵ He was assigned an FBI contact who requested that Vance continue to report on the suspicious activities of SGS employees.⁶⁶ Vance did so and was put in contact with a U.S. official in Iraq.⁶⁷ The official requested copies of certain documents on SGS’s computers, which Vance provided.⁶⁸ SGS became suspicious of Vance and Ertel’s actions and on April 14, 2006, armed SGS employees confiscated the men’s access cards.⁶⁹ Being effectively trapped in the “Red Zone,”⁷⁰ Vance and Ertel contacted two U.S. officials to be rescued.⁷¹ They barricaded themselves in a room within the SGS compound and were eventually rescued by U.S. forces.⁷²

⁶² *Vance v. Rumsfeld* (“*Vance I*”), 694 F. Supp. 2d 957, 959 (N.D. Ill. 2010).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ The “Red Zone” refers to designated unsafe areas in Iraq. In Baghdad, there is a small “Green Zone” which houses a high security Multi-National Force-1 (“MNF-1”) Compound. All parts of Baghdad outside of this compound are considered part of the “Red Zone.”

⁷¹ *Id.*

⁷² *Id.*

Following their rescue, they were taken to the U.S. Embassy and had all of their belongings seized.⁷³ At the Embassy they were questioned by an FBI agent and U.S. Air Force Intelligence personnel.⁷⁴ During the questioning, both men told the officials about their government contacts in the United States and Iraq.⁷⁵ Following their interviews, they were allowed to sleep for a few hours and were awakened suddenly by armed guards who arrested them and took them to Camp Prosperity.⁷⁶ Their arrest and detention was a result of being labeled as “security internees” affiliated with SGS.⁷⁷

Two days later they were transferred to Camp Cropper and subjected to repeated interrogation by military personnel.⁷⁸ After several days at Camp Cropper, they were taken before a Detainee Status Board on April 26, 2006, to determine their legal status.⁷⁹ On May 17, 2006, Major General John Gardner authorized Ertel’s release.⁸⁰ On July 20, 2006, Vance was permitted to leave Camp Cropper several days after Major General Gardner authorized his release.⁸¹ Following their release, the men brought a *Bivens* claim against the U.S. Secretary of Defense, Donald Rumsfeld.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 960.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ The opinion only states that the Detainee Status Board officially acknowledged that Ertel was an innocent civilian, there is nothing on the Board’s findings on Vance. *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

B. District Court's Decision

1. Alternative Remedies Analysis⁸²

Judge Wayne Andersen, writing for the District Court for the Northern District of Illinois, analyzed whether Rumsfeld's motion to dismiss Vance and Ertel's claims should be granted.⁸³ Judge Andersen's opinion gave only cursory treatment to whether alternative remedies were available to the men.⁸⁴ This was largely due to Rumsfeld's concession "that the [Detainee Treatment Act ("DTA")] does not apply to the facts of th[e] case and does not provide a remedy to vindicate . . . constitutional rights."⁸⁵ Judge Andersen relied on the Supreme Court's language in *Davis v. Passman* to conclude that the absence of an alternative remedy strongly supports the creation of a *Bivens* remedy because constitutional rights can become "precatory" without an enforcement mechanism.⁸⁶ Having concluded that there was no alternative remedy and that there was "strong support" for creating a remedy, he moved onto the special factors analysis.⁸⁷

2. "Special Factors" Analysis

Judge Andersen began his analysis of whether special factors precluded the creation of a *Bivens* remedy by rejecting Rumsfeld's argument that a remedy should not be extended in this case because they have become "generally disfavored" by the courts.⁸⁸ He reasoned that although the Supreme Court has been unwilling to create many

⁸² This Comment will only address the District Court and Seventh Circuit's *Bivens* analysis, so the other aspects of those opinions will not be summarized or analyzed.

⁸³ *Id.*

⁸⁴ *Id.* at 972.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

new remedies under *Bivens*, this move “[did] not remove the availability of a *Bivens* remedy to federal courts tasked with adjudicating distinct constitutional violations.”⁸⁹

Judge Andersen then addressed the three special factors that Rumsfeld argued should preclude the creation of a *Bivens* remedy.⁹⁰ These factors included: separation of powers; misuse of the courts as a weapon to interfere with the war effort; and other serious adverse consequences for national defense.⁹¹ Judge Andersen reasoned that Vance and Ertel’s claims did not require significant oversight or military governance.⁹² He agreed that courts should still defer to the military because judges do not have the experience or expertise to control the military.⁹³ Because the court was merely being asked whether it could provide a remedy for harms that had already occurred during a period of war, Judge Andersen concluded that allowing a *Bivens* remedy would not “infringe ‘on the core role of the military.’”⁹⁴

Another factor that Judge Andersen found important was that the plaintiffs were both American citizens at the time of their detention and alleged torture.⁹⁵ These two points were of importance because the case that Rumsfeld primarily relied upon, *In re Iraq and Afghanistan Detainees Litigation*, did not create a *Bivens* remedy because of the litigants’ status as non-citizens.⁹⁶ That case also addressed the importance of isolating the military official from claims that “call him to account in his own civil courts and divert his efforts . . . from the military offensive abroad.”⁹⁷ Although Judge Andersen did

⁸⁹ *Id.* at 973.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 973–74.

⁹³ *Id.* at 973.

⁹⁴ *Id.* at 974 (citing *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1027–28).

⁹⁵ *Vance I*, 694 F. Supp. 2d at 973–74.

⁹⁶ *Id.* at 974.

⁹⁷ *Id.* (citing *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 105 (2007)).

agree that claimants such as those in the *In re Iraq* litigation should generally not have access to the courts, he determined that high-ranking officials should not have a “blank check” in using their war powers to violate the constitutional liberties of American citizens.⁹⁸

C. Seventh Circuit’s Decision

1. Majority’s Alternative Remedies Analysis

Judge Hamilton, writing for the majority, agreed with Judge Andersen in the District Court that there was no alternative remedy available to Vance and Ertel.⁹⁹ Although Rumsfeld conceded that there was no alternative remedy in the District Court, the issue was raised in an *amicus* brief filed by former Department of Defense officials.¹⁰⁰ They argued that Vance and Ertel were not entitled to a remedy under *Bivens* because the plaintiffs could have taken advantage of the Geneva Conventions, the Coalition of Provisional Authority Memorandum # 3, or the Uniform Code of Military Justice.¹⁰¹ The *amici* argued that Vance and Ertel had an alternative remedy because those laws provided them with an avenue to complain about their treatment.¹⁰²

Judge Hamilton rejected the *amici*’s argument for three reasons.¹⁰³ First, he reasoned that the alternative remedy would be insufficient because of the nature of the plaintiffs’ claims—that those at the top of the chain of command were responsible for the violation of their constitutional rights.¹⁰⁴ Second, he reasoned that the ability to complain would at best stop the violation, but it would not provide any

⁹⁸ *Vance I*, 694 F. Supp. 2d at 974.

⁹⁹ *Vance v. Rumsfeld* (“Vance II”), 653 F.3d 591, 614 (2011).

¹⁰⁰ *Id.* at 613.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 613–14.

sanctions against the officials who caused the violation.¹⁰⁵ Finally, he concluded that the remedy was illusory at best because Vance and Ertel had complained, but the Camp Cropper commander informed them “there was nothing he could do about their treatment.”¹⁰⁶ Judge Hamilton also compared the remedy raised by the *amici* to the two remedies the Supreme Court found sufficient in *Schwiker* and *Bush*.¹⁰⁷ He found that both of those cases involved “elaborate and comprehensive” remedies providing “meaningful safeguards” and that there was no similar system for American citizens who claimed they were tortured in a war zone by government officials.¹⁰⁸ Having concluded that there was no remedy available to Vance and Ertel, Judge Hamilton proceeded to the second step of the *Bivens* analysis.

2. Majority’s “Special Factors” Analysis

Judge Hamilton began the special factors analysis by noting that Vance and Ertel were asserting a relatively narrow claim whereas Rumsfeld was arguing for the immunity of every military official in a war zone.¹⁰⁹ He found great importance in the fact that Vance and Ertel’s claim did not challenge military policy; it merely requested a remedy in damages for the violation that had already occurred.¹¹⁰ After his initial comparison between the scope and nature of the claim and defense, he analyzed the precedent supporting Vance and Ertel’s claim.¹¹¹ First, he noted that it is “well established” that prisoners can seek a remedy in damages under *Bivens* if they have their rights violated by government officials.¹¹² Next, he noted that it is also “well established” that American citizens can seek a remedy in damages

¹⁰⁵ *Id.* at 614.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 615.

¹¹² *Id.* at 615–16.

under *Bivens* if their rights are violated by military personnel.¹¹³ He also found that the Constitution's restrictions apply in any location where government officials act and that their powers are not "absolute and unlimited" merely because they act outside of U.S. borders.¹¹⁴ Finally, he concluded that a claim could proceed against Rumsfeld because although Cabinet members and other high-ranking officials in the Executive Branch are entitled to qualified immunity, they do not have absolute immunity from constitutional claims.¹¹⁵

After considering the precedent supporting Vance and Ertel's claim, Judge Hamilton addressed the two special factors raised by Rumsfeld: First, that the courts should refrain from interfering in military affairs and matters of national security; and second, that congressional action indicates that detainees should not be afforded a remedy under *Bivens*.¹¹⁶ Because Vance and Ertel were merely challenging the violation of their rights and were not mounting a broad challenge to military policy, Judge Hamilton found that the first special factor was not a reason to preclude a *Bivens* remedy.¹¹⁷ He concluded that the judiciary would not interfere with military decision-making by allowing a *Bivens* remedy here because any claims like those of Vance and Ertel would be heard "well after the fact" and that they were "grave" and "rare."¹¹⁸ He reasoned that although litigation concerning matters of national security and military policy necessarily implicates classified and other sensitive information, "judicial intrusion into matters of national security" does not exist where the law provides various privileges to protect state secrets.¹¹⁹ Judge Hamilton buttressed his conclusion that the adjudication of such claims does not threaten separation of powers through *Boumediene v.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 617.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 618, 622.

¹¹⁷ *Id.* at 618.

¹¹⁸ *Id.*

¹¹⁹ *Id.* (citing *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008)).

Bush and Hamdi v. Rumsfeld.¹²⁰ Because the Supreme Court found that the three branches of government should play “complementary roles” in the realm of national security, he concluded that it was appropriate for the judiciary to involve itself in matters of national security in order to safeguard Constitutional rights like the ones at issue in *Vance*.¹²¹ The final point Judge Hamilton addressed under the first special factor was the distinction between citizens and non-citizens.¹²² Judge Hamilton distinguished the nature of the claim in *Vance* from the cases raised by *Rumsfeld* where other Federal Circuit courts denied a *Bivens* remedy to non-citizens.¹²³ The concern about non-citizens using the courts to interfere in matters of national security was the driving reason why the other Circuits denied a *Bivens* remedy in those cases, and Judge Hamilton found that they were sufficiently different from the claim in *Vance* because of the “grave breach of our most basic social compact.”¹²⁴ Because allowing a *Bivens* remedy would at worst cause slight interference in military affairs and national security, Judge Hamilton determined that this special factor should not bar *Vance* and *Ertel*’s claim.¹²⁵

The next special factor that Judge Hamilton addressed was whether congressional action indicated that it did not intend to afford detainees a remedy under *Bivens*.¹²⁶ *Rumsfeld* argued that

¹²⁰ *Vance II*, 653 F.3d at 619; *Boumediene v. Bush*, 552 U.S. 723 (2008) (holding that enemy combatants held in Guantanamo are entitled to habeas corpus review and that the Military Commissions Act of 2006 was an unconstitutional suspension of the right to habeas corpus); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (O’Connor, J., plurality) (holding that Congress authorized the detention of enemy combatants but that due process required that combatants have a meaningful opportunity to challenge their status and that the government must provide notice of the charges and an opportunity for the combatant to be heard, although the normal procedural protections of a trial need not be imposed on the government)

¹²¹ *Id.*

¹²² *Id.* at 619–20.

¹²³ *Id.*

¹²⁴ *Id.* at 622.

¹²⁵ *Id.*

¹²⁶ *Id.*

congressional intent on the issue precluded creation of a remedy because Congress did not create a private cause of action in various statutes controlling the treatment of detainees.¹²⁷ Judge Hamilton rejected that argument and cited numerous statutes which authorized and regulated private causes of action against government officials accused of torturing non-citizens.¹²⁸ He determined that accepting Rumsfeld's argument would create an "anomalous result" because it would allow Rumsfeld to be sued in a foreign country for torturing an American citizen, if that country prohibited torture, but not in the United States.¹²⁹ Judge Hamilton reasoned that the Torture Victim Protection Act, upon which Vance and Ertel relied, showed that Congress "[s]urely . . . would rather have such claims against U.S. officials heard in U.S. courts," and that it was appropriate to allow a *Bivens* remedy in *Vance*.¹³⁰

3. Dissent's "Special Factors" Analysis

Judge Manion, writing in dissent, provided five reasons why he disagreed with the majority on whether a *Bivens* remedy should be created in this case.¹³¹ He began by noting that it was "understandable" why the majority thought there "*must* be a remedy" in the present case.¹³² He was not unsympathetic toward Vance and Ertel's claim, and he agreed that the allegations, if true, had significant constitutional implications.¹³³ His disagreement centered on whether the Seventh Circuit *should* extend a remedy in the face of the Supreme Court's warning that Congress is the appropriate body to create new remedies.¹³⁴ He noted that the other circuits which were presented

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 623.

¹³⁰ *Id.* at 624.

¹³¹ *Id.* at 629.

¹³² *Id.* at 628.

¹³³ *Id.*

¹³⁴ *Id.*

with the question of whether a *Bivens* remedy should be created for allegations of constitutional violations had answered in the negative.¹³⁵ Because of the consensus amongst the circuits which had addressed the question, he concluded that it was Congress's role to create any remedy.¹³⁶

Judge Manion determined that the special factors analysis was more "straightforward" than what the majority made it out to be because of the agreement in the two circuits which had addressed the question.¹³⁷ He reasoned that it was a "commonsense understanding" for courts to exhibit restraint when interfering in military and national security affairs and that the Seventh Circuit went against that understanding by creating a remedy in the face of lacking Supreme Court precedent on the matter.¹³⁸

Judge Manion next turned to the precedent that the majority cited and noted that the special factors present in the cases they relied upon did not include the "legitimate special factors of national security and military policy."¹³⁹ He determined that the precedent relied upon by the majority only dealt with whether a *Bivens* remedy could be brought for violations that occurred within the United States.¹⁴⁰ Because of the nature of actions taken by a governmental official in a war zone, he concluded that Congress, and not the courts, was the appropriate arbiter to establish the "'who,' 'what,' 'when,' 'where,' 'why,' and 'how much'" of a private right of action.¹⁴¹

Judge Manion then concluded that the difficulties inherent in judicial review of military action were significantly greater than those stated by the majority.¹⁴² The majority relied upon the state secret privilege to conclude that any confidential matters would be protected

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 629.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 630.

but Judge Manion determined that the privilege required “significant judicial intrusion” into military and national security policy.¹⁴³ Again, he reasoned that Congress was best placed to balance such concerns, especially because of the way in which the existence of a civil remedy could affect the split-second decisions required on a battlefield.¹⁴⁴

Next, he concluded that the majority was incorrect in distinguishing from the cases in other circuits on the sole fact that Vance and Ertel were American citizens.¹⁴⁵ He reasoned that their status was a minor factor compared to the three special factors relied upon by the other circuits: “national security interests, confidential information, and the risks posed by proceedings in open court.”¹⁴⁶ Because the decisions in those courts were based on similar special factors present in *Vance*, Judge Manion determined that Vance and Ertel’s status as American citizens was not in itself sufficient to depart from the other circuits’ decisions and establish a *Bivens* remedy.¹⁴⁷

Judge Manion’s fourth reason for disagreement was the majority’s reliance on Supreme Court habeas corpus cases that provided limited judicial oversight of military decision making.¹⁴⁸ He again reiterated his point that the Supreme Court cautioned judicial intervention when there are special factors.¹⁴⁹ He determined that the special factors present in *Vance* were sufficient to counsel hesitation and required Congress to decide the question of whether a remedy should be created.¹⁵⁰

Judge Manion’s final point cautioned against the far reaching nature of the majority’s decision.¹⁵¹ He noted that there was an “enormous number” of contractors working for PMFs and that the

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 631.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 632.

creation of a *Bivens* remedy for these individuals would open a “Pandora’s Box” of claims.¹⁵² Because of the differences between military detention and domestic prisons, Judge Manion foresaw “potentially thousands” of claims arising from the detention of American civilians working for PMFs in a war zone.¹⁵³ He therefore determined that it was inappropriate for the court to extend a *Bivens* remedy without any guidance from Congress.¹⁵⁴

IV – ANALYSIS: PLAYING BY BIG BOY RULES

A. Opening Pandora’s Box: Vance’s Potential Impact on the Way America Conducts Foreign Policy

This comment agrees with Judge Manion that *Vance* opens a “Pandora’s Box” of potential claims.¹⁵⁵ At their highest levels in the Iraq War, there were approximately 150,000 contractors working for PMFs.¹⁵⁶ That number almost matches the highest level of troops – 166,300 in October 2007.¹⁵⁷ Judge Manion was correct in pointing out that the drastic difference between military detention and domestic prisons would be the basis for numerous claims, even if many contractors are former military personnel.¹⁵⁸ Although the contractors themselves may ultimately be innocent or even cooperating with the U.S. government, they should still be detained if they are connected with a PMF which is suspected of illegal activity or supporting enemy combatants. Judge Hamilton concluded that the narrow nature of *Vance* and *Ertel*’s claim did not mount a broad challenge to military

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Finer, supra note 2, at 260*

¹⁵⁷ CNN, *Chart: U.S. Troop Levels in Iraq*, available at <http://www.cnn.com/2011/10/21/world/meast/chart-us-troops-iraq/index.html> (Accessed Nov. 28,2011)

¹⁵⁸ *Vance II*, 653 F.3d at 632.

policy, but his conclusion failed to consider the impact that the *availability* of such a claim would have on military policy.¹⁵⁹ The American way of waging war has changed, and military officials now need to consider how and where to use PMFs. The availability of a *Bivens* claim for American citizens working as contractors is a distraction that will hinder the effectiveness of the U.S. military. Under the Majority's opinion, American military officials must now also consider whether they will violate citizen contractor's constitutional rights when making the split second decisions required in war.¹⁶⁰ *Vance* could become the basis for any future claims brought by citizen contractors, and those claims would have an undeniable impact on implementation and effectiveness of military policy.¹⁶¹

B. The Seventh Circuit's "Special Factors" Dispute

The majority and dissent's disagreement over whether special factors barred Vance and Ertel's claim seems to rest on which branch of the government should create a remedy for citizens detained and tortured in a warzone.¹⁶² The majority concluded that the courts were the appropriate forum because there were no special factors counseling restraint. The dissent, on the other hand, concluded that Congress was the appropriate forum because establish the "'who,' 'what,' 'when,' 'where,' 'why,' and 'how much'" of a private right of action.¹⁶³ This comment agrees that the dissent was correct in concluding that the special factors analysis was straightforward and that Congress is best placed to balance the concerns of protecting constitutional rights against national security and military policy. Although a further special factor will be addressed in the next section, the special factors raised by the majority and dissent lead to the conclusion that the court should have stayed its hand in *Vance*. Although the courts do have a place in

¹⁵⁹ *Id.* at 618.

¹⁶⁰ *See id.* at 631

¹⁶¹ *See id.* at 632

¹⁶² *See id.* at 629

¹⁶³ *Id.* at 629.

matters of national security, especially when Constitutional rights are at stake, the Supreme Court has consistently cautioned against extending *Bivens* remedies into any new context.¹⁶⁴ The majority ignored this caution, and the consensus of the other circuits who had already addressed the question of whether a *Bivens* remedy was available for the violation of constitutional rights in a warzone, when it extended a *Bivens* remedy in *Vance*.

C. Big Boy Rules:

The Problem with Focusing on Vance and Ertel's Status as Citizens

The majority's argument in *Vance* places great weight on Vance and Ertel's status as citizens and concludes that their claim should be allowed to proceed as a result.¹⁶⁵ Other circuits had already addressed whether *Bivens* claims should be allowed when non-citizens' rights were violated in Iraq, so the majority needed to distinguish from those cases.¹⁶⁶ The majority misrepresented the facts in *Vance*, however, when it concluded that Vance and Ertel were merely citizens. Under the law, they were civilians "accompanying the force" during "contingency operation[s]" in Iraq.¹⁶⁷ As such, they were subject to the UCMJ¹⁶⁸ and their status was more analogous to a member of the military. Because they are similarly situated to a member of the armed forces, they should either be classified as quasi-military personnel or be considered military personnel when bringing a *Bivens* claim. The Supreme Court has already established a special factor to consider when a *Bivens* claim is brought by a member of the armed forces,¹⁶⁹ and that factor should apply to quasi-military personnel because many

¹⁶⁴ See, e.g., *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

¹⁶⁵ See *Vance II*, 653 F.3d at 622.

¹⁶⁶ *Id.* (citing to *Ali v. Rumsfeld*, 649 F.3d 762, (D.C. Cir. 2011); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009)).

¹⁶⁷ 10 U.S.C. § 802(a)(10).

¹⁶⁸ See Hamaguchi, *supra* note 17, at 1064–66 for an explanation of why the statute will likely be found to be constitutional and subjects U.S. citizens to UCMJ jurisdiction when accompanying the force in a contingency operation.

¹⁶⁹ See *United States v. Stanley*, 483 U.S. 669, 684 (1987).

of the same concerns which prompted the creation of that factor apply to quasi-military personnel. There is significant legislative control¹⁷⁰ over the “rights, duties, and responsibilities”¹⁷¹ of PMFs and that control is the basis for either applying the *Stanley* special factor to quasi-military personnel or creating a new special factor for quasi-military personnel. Applying this factor would bar any *Bivens* claims which “‘arise out of or are in the course of activity incident to [quasi-military] service.’”¹⁷² If this special factor were applied to Vance and Ertel’s claim, it would be barred under *Bivens* because the injury—their detention and alleged torture—arose out of their service to SGS. If they had not been working for SGS, they would not have been detained and tortured along with the other SGS contractors. Although they were providing evidence to the U.S. government, the military was still justified in detaining them to determine if they were “security threats” because of SGS’s illegal activities.

*D. A Proposed Solution:
Learning to Stop Worrying and Love “Special Factors”*

Judge Manion was correct in concluding that the courts should wait until Congress acts to create a remedy for violations of constitutional rights in a warzone.¹⁷³ This is because the American way of waging war has changed, but there are no laws that fully address this shift. Although Congress has passed laws that subject civilians assisting the military in contingency operations to UCMJ jurisdiction¹⁷⁴, it has not fully regulated PMFs. To do so, it must answer the “who,” “what,” “when,” “where,” “why,” and “how much” of a private right of action for U.S. citizens who’s rights are violated.

¹⁷⁰ See 10 U.S.C. § 802(a)(10); Tiefer, *supra* note 18, at 754–57

¹⁷¹ *Stanley*, 483 U.S. at 679.

¹⁷² *Id.* at 684 (citing *Feres v. United States*, 340 U.S. 135, 146(1950)).

¹⁷³ *Vance II*, 653 F.3d 591, 628 (2011).

¹⁷⁴ 10 U.S.C. § 802(a)(10)

To the question of “who,” Congress will have to address several different classes of individuals. The vast number¹⁷⁵ of contractors working for PMFs alone will likely make this a herculean task. Within this group, Congress will need to distinguish between the quasi-military personnel and those who merely provide support or consulting services.¹⁷⁶ In addition, there are those who merely report or provide humanitarian assistance. Congress will need to distinguish between these individuals and will have to weigh their rights against the functions they perform and the likelihood that their rights will be violated in a warzone. Congress will also need to address who can be held liable and what level of immunity that person has.

In answering “what,” Congress will have to determine what constitutes a violation of a citizen’s constitutional rights. As Judge Manion pointed out, there is a vast difference between military detention and imprisonment in domestic prisons.¹⁷⁷ All of the *Bivens* precedent of Eighth Amendment violations has focused on domestic prisons,¹⁷⁸ so Congress will need to set guidelines for what is and is not appropriate treatment for U.S. citizens held in military detention in a warzone. Again, careful attention must be paid to who is being held in detention. Congress will also need to establish guidelines for other constitutional rights because the Eighth Amendment is not the only right that will likely be violated in a warzone.

The question of “when” will require a careful weighing of interests because of the ever-changing nature of a warzone. If evidence of a constitutional violation is to be preserved, claims must be allowed to proceed relatively quickly. Although this may conflict with the effective implementation of military policy and strategy, when a violation is flagrant enough to state a claim, the victim of the violation must be allowed to move quickly enough to preserve evidence so that they can successfully raise their claim at a later date. The claim itself must be heard later, however, as any evidence which forms a basis of

¹⁷⁵ See *Finer*, *supra* note 2, at 260.

¹⁷⁶ See *Tiefer*, *supra* note 18, at 753.

¹⁷⁷ *Vance II*, 653 F.3d at 632.

¹⁷⁸ *Id.*

the claim may reveal current national security or military strategies. While the courts can use the state secrets privilege to protect sensitive information, the best protection is time because if the strategies are no longer relevant, their discovery will cause less harm to the military effort.

The best answer for “where” is the federal judiciary because, although the courts-martial are experienced with matters of military policy, courts-martial do not have the same wealth of experience in protecting constitutional rights. *Bivens* remedies have been litigated for forty years in the federal judiciary, so federal judges are no strangers to the contours of the doctrine. Congress should also consider establishing a tribunal, which could be situated in or near the warzone, to hear the preliminary aspects of a litigant’s claim and determine whether it should proceed.

The question of “why” is easily answered because of the changing way in which America wages war. There is a need to concretely define the various aspects of claims for violations of constitutional rights in a warzone, because once the courts have opened Pandora’s Box, they will struggle to define the contours of the rights in a warzone and the appropriate remedies. They will have to do so against the backdrop of sensitive information, national security, military policy, and different classes of plaintiffs, and likely will struggle until guidance is given by the Supreme Court. Congress can bypass this process by enacting legislations which clearly establishes the rights and remedies each class is entitled to and accommodates the current realities of the American way of waging war.

In answering “how much,” Congress will have to weigh how prevalent these claims will become against the severity of the violation. It will also have to account for the differences between treatment in military detention centers and domestic prisons. Because of the demands of war, military detention can be significantly harsher than domestic prisons. Congress should therefore limit or adjust damages because violations which would otherwise be serious in a domestic prison could be commonplace in military detention in a warzone. This would also allow the military to effectively implement its policies without large damage awards acting as a hindrance.

CONCLUSION

In its effort to establish a *Bivens* remedy because there “*must* be a remedy” when allegations as serious as torture are raised, the Seventh Circuit in *Vance* overstepped its bounds and answered a question best left to Congress.¹⁷⁹ The reasoning employed by the majority demonstrates how a focus on constitutional rights obscured the true issue of whether the court *should* create a remedy. The dissent was correct in concluding that courts are not the best forum to determine whether a remedy should exist for violations of constitutional rights in a warzone. Because matters of national security and military policy are best left to Congress, especially in light of the unique status of quasi-military personnel, it is the appropriate arbiter for creating a remedy. Therefore, Congress must act to define the “who,” “what,” “when,” “where,” “why,” and “how much” of a private right of action for U.S. citizens who’s rights are violated in a warzone. Once Congress has spoken on the issue, the federal judiciary will be able to fulfill its role of safeguarding citizens’ rights.

¹⁷⁹ *Vance II*, 653 F.3d at 628.