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U.S. TORTURE AS A TORT

*Richard Henry Seamon**

ABSTRACT

Now that the United States has used torture in the war on terrorism and the victims of this torture have begun to sue, it is useful to analyze the potential liability of the United States and its officials for torture under current domestic law. This Article conducts that analysis, and, based on it, assesses the adequacy of current law. The Article concludes that the United States and its officials have no more than minimal liability for torture under current law. The Article also concludes that current law is inadequate. It is inadequate because it is based on considerations of when the government should be liable for mere torts, and official torture is far removed from ordinary torts. The Article argues that, instead of being treated like a tort, torture should be treated like a civil rights and a human rights violation. Specifically, the United States should be liable for torture under at least the same circumstances as units of local government would be under the civil rights statute, 42 U.S.C. § 1983; and U.S. officials should be liable for torture under at least the same circumstances as state and local officials would be under § 1983, or as foreign officials would be under the Torture Victim Protection Act of 1991.

I. INTRODUCTION

Since 9/11, the United States has tortured people detained in the war on terrorism.¹ The victims of this torture have begun to sue.² This Article

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1. See MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* 1-49 (2004); SEYMOUR M. HERSH, *CHAIN OF COMMAND* 1-72 (2004); Article 15-6 Investigation of the 800th Military Police Brigade [hereinafter Taguba Report], reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 405, 416-17 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *TORTURE PAPERS*]; Final Report of the Independent Panel to Review Department of Defense Detention Operations (Aug. 2004) [hereinafter Schlesinger Report], reprinted in *TORTURE PAPERS, supra*, at 908, 914; Human Rights Watch, *Leadership Failure: Firsthand Accounts of Torture of Iraqi Detainees by the U.S. Army's 82nd Airborne Division* (Sept. 2005), available at <http://hrw.org/reports/2005/us0905/us0905.pdf>; Anthony R. Jones & George R. Fay, *Investigation of Intelligence Activities at Abu Ghraib* [hereinafter

Fay-Jones Report], *reprinted in* TORTURE PAPERS, *supra*, at 987, 989, 993-94, 1004-05, 1024-25, 1070-95; Report of the International Committee of the Red Cross (“ICRC”) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation (Feb. 2004) [hereinafter ICRC Report], *reprinted in* TORTURE PAPERS, *supra*, at 383, 390-401; *see also* Colum Lynch, *U.N. Draft Decries U.S. on Detainee Treatment*, WASH. POST, Feb. 14, 2006, at A9 (reporting that draft U.N. report says that U.S. treatment of prisoners at Guantánamo Bay detention center “in some cases constitutes a form of torture”). Based on the many reports of the torture of detainees, after this Article was accepted for publication, Congress enacted the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (Dec. 30, 2005). Section 1003 of the Act says, “No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.” *Id.* § 1003(a), 119 Stat. at 2739. The Act defines “cruel, inhuman, or degrading treatment or punishment” as

the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

Id. § 1003(d), 119 Stat. at 2740. The “Reservations, Declarations, and Understandings” to which the definition refers limit the definition of torture to conduct that violates the Fifth, Eighth, and Fourteenth Amendments. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 15-16 (1988), 1465 U.N.T.S. 113. The Detainee Treatment Act was included in two separate pieces of legislation: a supplemental appropriations bill enacted on December 30, 2005, and the Department of Defense Authorization bill enacted on January 6, 2006. *See* Detainee Treatment Act of 2005, Pub. L. 109-163, §§ 1401-1406, 119 Stat. at 3136, 3471-80; President’s Statement on Signing the National Defense Authorization Act for Fiscal Year 2006, 42 WEEKLY COMP. PRES. DOC. 23 (Jan. 6, 2006) (observing that provisions of the Detainee Treatment Act of 2005 included in the defense authorization bill are identical to those included in the previously enacted supplemental appropriations bill, except for a punctuation change in one provision and revisions in a second provision), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2006_presidential_documents&docid=pd16ja06_txt-3.pdf.

2. *See, e.g.*, *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 252-56 (E.D.N.Y. 2006) (alleging that the hypothetical events described *infra* Part I.C actually happened to a Syrian-born, Canadian engineer); Complaint for Declaratory Relief and Damages, *Ali v. Pappas*, No. 05CV00371, 2005 WL 732090 (D. Conn. Mar. 1, 2005) (suit brought by seven people detained in Iraq or Afghanistan alleging torture and other mistreatment by the former commander of military intelligence and military police in Iraq); Complaint for Declaratory Relief and Damages, *Ali v. Rumsfeld*, No. 05C 1201, 2005 WL 922428 (N.D. Ill. Mar. 1, 2005) (same suit brought against the Secretary of Defense); Complaint for Declaratory Relief and Damages, *Ali v. Janis*, No. 9:05cv654-23, 2005 WL 918561 (D.S.C. Mar. 1, 2005) (same suit brought against the former commander of U.S. military forces in Iraq); Complaint for

discusses when the United States and its officials can be held civilly liable for torture under current law. The Article also discusses the adequacy of current law for assessing liability in this setting and suggests improvements.

To put human faces on this discussion, this Article focuses on claims arising from the following three scenarios of U.S.-sanctioned torture, all of which are based on actual reports.

A. *Scenario One (Abu Ghraib)*

The U.S. military has detained a U.S. citizen of Iranian descent, Ali, at the Abu Ghraib prison in Iraq.³ U.S. officials reasonably believe that Ali has killed members of the U.S. military force in Iraq and has information about other Iraqi insurgents. The military police guarding Ali have instructions from military intelligence officers on site to “loosen him up.”⁴ Several guards use this “loosen him up” instruction as an excuse to brutalize Ali in ways that they know violate military regulations and the Uniform Code of

Declaratory Relief and Damages, *Ali v. Sanchez*, No. M-05-065, 2005 WL 918783 (S.D. Tex. Mar. 1, 2005) (same suit brought against the former commander of the Coalition Joint Task Force-7, the U.S.-led military coalition in Iraq); Complaint, *Rasul v. Rumsfeld*, No. 04CV01864, 2004 WL 2878175, (D.D.C. Oct. 27, 2004) (suit brought by citizens of the United Kingdom alleging torture and other mistreatment during detainment by the United States and allied forces in Afghanistan); *see also* Complaint, *Al Rawi v. Titan Corp.*, No. 04CV 1143 R, 2004 WL 1380538 (S.D. Cal. June 9, 2004) (class action alleging the torture of detainees in Iraq by private security companies under contract with the United States). The question of how to define torture, though important, is beyond the scope of this Article because the definition usually does not matter for purposes of assessing the liability of the United States and its officials for the U.S.-sanctioned use of significant physical and psychological force against an individual. *See generally* Torture Victim Protection Act of 1991 (“TVPA”), Pub. L. No. 102-256, § 3(b), 106 Stat. 73, 73 (1992) (codified at 28 U.S.C. § 1350 note (2000)) (defining “torture” for the purposes of the TVPA); 2 COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 3357-58 (1971) [hereinafter OXFORD ENGLISH DICTIONARY] (defining “torture”); Fionnuala Ní Aoláin, *The European Convention on Human Rights and Its Prohibition on Torture*, in TORTURE: A COLLECTION 213, 213-27 (Sanford Levinson ed., 2004) (discussing the definition of torture under the European Convention on Human Rights).

3. *See* Josh White, *5 Americans Held by U.S. Forces in Iraq Fighting*, WASH. POST, July 7, 2005, at A15 (reporting that U.S. citizens suspected of insurgent activities in Iraq were being held at Abu Ghraib and other Iraqi sites).

4. *See* Taguba Report, *supra* note 1, at 418 (finding credible a statement by a member of the military police that military intelligence officers instructed Abu Ghraib guards to “[l]oosen this guy [i.e., a detainee] up for us”).

Military Justice.⁵ For example, the guards have repeatedly beaten Ali with a broom handle; sodomized him with a chemical light stick; and forced him to masturbate another male inmate in front of a female guard, who videotaped the incident.⁶

B. Scenario Two (GTMO)

U.S. officials have captured an Afghan citizen, Ghuljaan, in Afghanistan and are detaining him at the U.S. Naval Base at Guantánamo Bay, Cuba (“GTMO”). U.S. officials reasonably believe that Ghuljaan is an al Qaeda member involved in the 9/11 terrorist attacks on the United States and has valuable information about its leaders. The officials assigned to interrogate Ghuljaan (“GTMO interrogators”) use methods that they reasonably believe are specifically authorized by the Secretary of Defense. For example, the GTMO interrogators put Ghuljaan in a cell where the lights are always on and there is a constant loud, hissing sound; they question him for twenty hours at a time; keep him naked for days at a time; and “waterboard” him by strapping him to a board and then dunking him under water to make him believe he is drowning.⁷

5. *See id.*

6. *See id.* at 484-85 (finding credible reports of actual physical abuse identical to those described in the above text).

7. *See* Affidavit of David Hicks, *Rasul v. Bush*, CV: 02-0299 (D.D.C. filed Aug. 5, 2004), available at <http://www.smh.com.au/news/World/David-Hicks-affidavit/2004/12/10/1102625527396.html> (providing allegations by a GTMO detainee that include beatings, sleep deprivation, and the use of strobe lights); DANNER, *supra* note 1, at 34-36 (discussing allegations of waterboarding); ICRC Report, *supra* note 1, at 392-93 (reporting detainees’ allegations of being exposed to loud noise or music and constant light, being forced to stand for long periods, and being kept naked for days at a time); Memorandum from Jerald Phifer, Dir., J2, Dep’t of Def., to Gen. James T. Hill, Commander, Joint Task Force 170 (Oct. 11, 2002) (requesting approval to use various interrogation procedures at GTMO including, among “Category II techniques,” “[t]he use of stress positions (like standing), for a maximum of four hours,” “[t]he use of 20 hour interrogations,” and “[r]emoval of clothing”), *reprinted in* TORTURE PAPERS, *supra* note 1, at 227, 227-28; Memorandum from William J. Haynes II, Gen. Counsel, Dep’t of Def., to Donald Rumsfeld, Sec’y of Def. (Nov. 27, 2002) [hereinafter Nov. 27 Action Memo] (indicating the Secretary of Defense’s approval of Category II techniques), *reprinted in* TORTURE PAPERS, *supra* note 1, at 237, 237. *But cf.* Memorandum from Donald Rumsfeld, Sec’y of Def., to James T. Hill, Commander, U.S. S. Command (Apr. 16, 2003) [hereinafter Apr. 16 Memo] (authorizing a more limited set of interrogation techniques, which do not expressly include prolonged standing, twenty-hour interrogations, or the removal of clothing), *reprinted in* TORTURE PAPERS, *supra* note 1, at 360, 360-61.

C. *Scenario Three (Syrian Rendition)*

Officials of the Central Intelligence Agency (“CIA”) have detained a Syrian-born resident of Canada, Sami, whom they reasonably suspect of being a terrorist.⁸ Soon after arresting Sami in New York City, the CIA officials send Sami to Syria for interrogation in accordance with an “extraordinary rendition” program developed by the CIA and approved by the White House. As the CIA officials know will happen, Syrian officials subject Sami to months of brutal interrogation. For example, they repeatedly whip his hands with two-inch-thick electrical cable; inject him with disorienting drugs; and keep him in a windowless, underground cell.

Reflecting the range of real cases, the preceding scenarios differ in the citizenship of the victim, the identity of the torturers, and the location and other circumstances of the torture. As we will see, under current law, these differences matter and, indeed, raise many important, unsettled issues of governmental and official tort liability. The upshot, however, is that under current law liability is minimal. Torture victims can sue the United States under the Federal Tort Claims Act (“FTCA”),⁹ but the United States probably will escape FTCA liability in all three scenarios. Torture victims can sue U.S. officials under the “constitutional tort” theory of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics Agency*.¹⁰ Officials will probably escape *Bivens* liability, however, except for deliberately malicious, obviously illegal conduct. Furthermore, most officials will be effectively judgment proof. In short, the availability of civil remedies for U.S. torture under current law is razor-thin.

8. See *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 252-56 (E.D.N.Y. 2006) (describing facts alleged in the case on which Scenario Three is based); Bruce Zagaris, *Canada Protests Deportation of Canadian Citizen to Syria*, 20 INT’L ENFORCEMENT L. REP. 10, 10-12 (2004) (discussing the *Arar* case); Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14 & 21, 2005, at 106 (same); see also HERSH, *supra* note 1, at 53-56 (describing other cases of extraordinary rendition); *U.S. Operated Secret “Dark Prison” in Kabul*, HUMAN RIGHTS WATCH, Dec. 19, 2005, <http://hrw.org/english/docs/2005/12/19/afghan12319.htm> (reporting on a “dark prison” in Afghanistan apparently run by the CIA at which suspected terrorists were tortured).

9. 28 U.S.C. §§ 1346(b), 2671-2680 (2000).

10. 403 U.S. 388 (1971).

Current law must change in order for the United States to keep its promise not to torture people.¹¹ The law must change in both its conception of U.S. torture and in the extent to which it provides civil remedies for U.S. torture. Current law misconceives U.S. torture as a mere tort, a private wrong committed by one individual upon another. That misconception makes current law almost useless in producing remedies for torture victims—not because it was designed to deny remedies for this wrong—but because it was not designed with this wrong in mind. The victims of U.S. torture should not be denied civil remedies merely because existing law does not contemplate that the United States or its officials will ever engage in torture. This Article proposes that torture should be treated as a civil rights and a human rights violation, rather than as a tort. Under that conception, at a minimum, the United States should be civilly liable to torture victims under circumstances when, under current law, a city or county would be civilly liable under the civil rights statute, 42 U.S.C. § 1983; likewise, U.S. officials should be liable for torture when state or local officials would be under § 1983 or, alternatively, when foreign officials would be under the Torture Victim Protection Act of 1991.

This Article's descriptive and prescriptive exploration of the relevant law proceeds in three parts. Part II briefly describes relevant aspects of sovereign and official immunity. This description makes clear that torture claims against the United States must be analyzed separately from torture claims against U.S. officials. Part III analyzes torture claims against the United States, and Part IV analyzes torture claims against U.S. officials. Each part focuses, though not exclusively, on claims that would arise from the three scenarios previously described. Parts III and IV also address the adequacy of the current law and suggest improvements.¹²

11. See, e.g., Elisabeth Bumiller et al., *Bush Says Iraqis Will Want G.I.'s to Stay to Help*, N.Y. TIMES, Jan. 28, 2005, at A1 (“Torture is never acceptable . . . , nor do we hand over people to countries that do torture.” (quoting President George W. Bush in an interview)); President George W. Bush, Statement on the U.N. International Day in Support of Victims of Torture, June 26, 2004 (“America stands against and will not tolerate torture.”), available at <http://www.whitehouse.gov/news/releases/2004/06/20040626-19.html>.

12. There is little case law or commentary examining the liability of the United States and its officials for torture under current U.S. law. See Scott J. Borrowman, *Sosa v. Alvarez-Machain and Abu-Ghraib—Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 BYU L. REV. 371; cf. Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions,”* 119-20

II. BACKGROUND ON SOVEREIGN AND OFFICIAL IMMUNITY

In general, a private person cannot sue the United States without its consent.¹³ Private suits against the United States to which it has not consented are barred by sovereign immunity.¹⁴ Although many criticize the doctrine of sovereign immunity, the U.S. Supreme Court still recognizes it.¹⁵ Indeed, the Court has implied that the doctrine has constitutional roots, which presumably immunizes it from judicial abrogation.¹⁶

Sovereign immunity has limits. One might think that, as a matter of fairness and logic, a limit would exist to allow suits against the United States for unconstitutional conduct. Not so.¹⁷ Indeed, the United States has often avoided liability for its unconstitutional conduct. For example, it has successfully claimed sovereign immunity from claims based on its internment of Japanese-Americans during World War II¹⁸ and its experimenting with LSD (lysergic acid diethylamide) on unknowing human

(New York: ABCNY & NYU School of Law, 2004) [hereinafter *Torture by Proxy*] (discussing possible civil liability of officials involved in U.S. renditions).

13. See, e.g., *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." (internal quotation marks omitted) (quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994))).

14. See generally RICHARD H. FALLON ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 944-72 (5th ed. 2003).

15. See, e.g., *Orff v. United States*, 125 S. Ct. 2606, 2609-11 (2005) (holding that a suit against the United States was barred by sovereign immunity).

16. See FALLON ET AL., *supra* note 14, at 944-47.

17. See *Owen v. City of Independence*, 445 U.S. 622, 670 n.12 (1980) (Powell, J., dissenting) ("Ironically, the . . . Federal Government[] cannot be held liable for constitutional deprivations. The Federal Government has not waived its sovereign immunity against such claims . . ."); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) ("However desirable a direct remedy against the Government [for unconstitutional conduct] might be as a substitute for individual official liability, the sovereign still remains immune to suit."):

18. See *Hohri v. United States*, 782 F.2d 227, 245-46 (D.C. Cir. 1986) (holding that common law tort claims were barred by sovereign immunity because plaintiffs did not satisfy the administrative filing requirement that was a condition on the waiver of sovereign immunity created by the FTCA), *vacated by* 482 U.S. 64 (1987).

subjects.¹⁹ The United States has committed many other sins under the cloak of sovereign immunity.²⁰

Thus, even if the torture described in our scenarios violates the victims' constitutional rights and even if the United States is responsible for those violations, that does not mean the victims can sue the United States for money damages. To the contrary, their suits will be barred, unless the United States has consented to them. Implicit in this conclusion, however, are two limitations on the doctrine of sovereign immunity, each of which offers hope to the torture victims in our scenarios.

First, the United States has consented to many types of suits by enacting statutes that waive sovereign immunity.²¹ Part III of this Article discusses the FTCA,²² which is the only federal statute that might function to waive the United States' sovereign immunity from torture claims.²³ The victims in our three scenarios can sue the United States for money damages if the FTCA waives sovereign immunity from their claims.

Second, although sovereign immunity bars a suit that names the United States as a defendant, it does not bar a suit that names a U.S. official as a defendant and that seeks money damages out of that official's own pocket.²⁴

19. See *Stanley v. CIA*, 639 F.2d 1146, 1149-53 (5th Cir. 1981) (holding that sovereign immunity barred a claim alleging U.S. officials had administered LSD to plaintiff, without his knowledge, while he was in the military).

20. See, e.g., *Lombard v. United States*, 690 F.2d 215, 216-26 (D.C. Cir. 1992) (barring constitutional claims against the United States that alleged the deliberate exposure of a service member to radiation); *Ascot Dinner Theatre, Ltd. v. Small Bus. Admin.*, 887 F.2d 1024, 1031 (10th Cir. 1989) (barring a First Amendment claim against a federal agency).

21. See 14 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3656, at 424 (3d ed. 1998) ("In a series of federal statutes, enacted over many years, Congress successively has widened the exceptions to the doctrine of sovereign immunity and broadened the consent of the United States to be sued.").

22. 28 U.S.C. §§ 1346(b), 2671-2680 (2000).

23. See *infra* Part III.A-D.1.

24. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 686 (1949) (stating that, if "wrongful actions" of a federal official "are such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him"), *superseded by statute*, Quiet Title Act of 1972, Pub. L. No. 92-562, 86 Stat. 1176 (1972) (codified at 28 U.S.C. § 2409a), *as recognized in* *Block v. North Dakota*, 461 U.S. 273 (1983); see also *Alden v. Maine*, 527 U.S. 706, 756 (1999) ("[S]overeign immunity . . . bars suits against States but not lesser entities."); *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985) (explaining that official immunity defenses are available to an official sued in his or

A suit against an official that seeks to hold that official personally liable in damages is called a “personal capacity” or an “individual capacity” suit.²⁵ Sovereign immunity does not bar individual capacity suits against government officials, even when the suits are based on official conduct.²⁶

Although sovereign immunity does not bar individual capacity suits, those suits do face two other obstacles. The first obstacle is stating a cause of action.²⁷ No federal statute or federal common law doctrine creates a cause of action specifically for torture by U.S. officials.²⁸ Indeed the only basis for most torture suits against U.S. officials is the *Bivens* doctrine, a judicially created doctrine that authorizes some individual capacity suits for “constitutional torts.”²⁹ A second obstacle is the doctrine of official immunity.³⁰ Official immunity protects officials from suits for money

her *individual* capacity, but the defense of sovereign immunity is available only when an official is sued in his or her *official* capacity).

25. See *Graham*, 473 U.S. at 166-67 (explaining differences between personal capacity suits and official capacity suits).

26. See *id.* at 165 (“Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law.”).

27. See, e.g., *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (distinguishing the issue of stating a cause of action against an official from the issue of whether the official can assert an immunity defense against that cause of action).

28. The United States is a party to several international agreements banning torture, but these agreements do not waive U.S. sovereign immunity. See *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968-69 (4th Cir. 1992) (holding the Hague Convention did not waive sovereign immunity); *Jama v. INS*, 22 F. Supp. 2d 353, 364-65 (D.N.J. 1998) (holding the International Covenant on Civil and Political Rights, in combination with the Alien Tort Statute, did not waive sovereign immunity), *aff’d sub nom. DaSilva v. Esmor Corr. Servs., Inc.*, Nos. 03-3095, 03-4435, 03-3096, 03-3348, 05-4007, 2006 U.S. App. LEXIS 2182 (3d Cir. Jan. 27, 2006); cf. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989) (stating that a foreign sovereign does not waive its immunity from suit in U.S. courts “by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States”).

29. See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 73 (2001) (referring to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics Agency* as creating “an implied constitutional tort remedy”); see also *infra* Part IV.C (discussing the availability of a *Bivens* action for U.S. torture).

30. See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397-98 (1971) (reserving the issue of whether officials “were immune from liability by virtue of their official position” after recognizing a cause of action against those officials for violations of the Fourth Amendment); see also *infra* Part IV.D (discussing whether official immunity will bar *Bivens* claims for U.S.-sanctioned torture).

damages out of their own pocket when claims are based on their official conduct.³¹ Of relevance here, federal officials can claim *absolute* official immunity from state tort claims³² and *qualified* official immunity from *Bivens* claims.³³ Whether or not those immunity defenses will succeed is explored in Part IV.

As adumbrated in this part of the Article and elaborated below, existing law treats claims for torture against the United States distinctly from claims for torture against U.S. officials. Claims against both sets of defendants, however, are treated as tort claims. The words “torture” and “tort” do have overlapping etymologies, and torture does fall within the definition of a tort.³⁴ The problem is that tort law addresses types of wrong that differ dramatically from official torture.

III. TORTURE CLAIMS AGAINST THE UNITED STATES

Sovereign immunity will bar claims against the United States arising from the three scenarios described in Part I unless the torture victims in those scenarios establish that the government has waived immunity from their claims. The only statute that arguably does so is the FTCA.³⁵ Analysis of our scenarios—and more generally of torture claims against the United States—under the FTCA must focus on (1) the extent to which the FTCA makes the United States liable for the conduct of individuals and (2) the scope of several exceptions to FTCA liability. Those issues are examined in Part III.A-B below.

31. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982) (recognizing the defense of qualified immunity).

32. See, e.g., *United States v. Smith*, 499 U.S. 160, 163-64 (1991) (discussing the enactment of the Westfall Act, 28 U.S.C. § 2679(b) (2000), which gives federal officials absolute immunity from most non-federal tort claims); see also *infra* Part IV.B (discussing non-federal tort claims for U.S. torture).

33. See, e.g., *Carlson v. Green*, 446 U.S. 14, 19 (1980) (stating that prison officials sued in a *Bivens* action would have qualified immunity); see also *infra* Part IV.D.

34. See 2 OXFORD ENGLISH DICTIONARY, *supra* note 2, at 3357 (defining “tort” and “torture”).

35. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680.

A. Individual Conduct for Which the United States Is Liable Under the FTCA

The FTCA generally authorizes people to sue the United States for money damages for certain personal injuries. To be cognizable under the FTCA, the personal injuries must be caused by the

negligent or wrongful act or omission of any employee of the Government while acting within the scope of his [or her] office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.³⁶

Under the passage quoted above, an FTCA plaintiff must plead and prove: (1) a negligent or wrongful act or omission, (2) committed by a government employee, (3) who was acting within the scope of employment. The plaintiff must also establish that the United States, if a private person, would be liable to the plaintiff under the law of the place where the act or omission occurred.

Congress enacted the FTCA to make the United States liable for “garden-variety torts” by its employees, such as negligence while driving government cars.³⁷ Reflecting that homely purpose, the FTCA does not

36. *Id.* § 1346(b)(1) (giving federal district courts “exclusive jurisdiction of civil actions on claims against the United States, for money damages,” for property damages, and for personal injuries caused by acts described in the quoted text accompanying this footnote); *see also* *FDIC v. Meyer*, 510 U.S. 471, 476-77 (1994) (discussing whether a claim was “cognizable under” § 1346(b)). Although § 1346 is, on its face, just a grant of jurisdiction, it is actually the “principal provision” of the FTCA. *Smith v. United States*, 507 U.S. 197, 201 (1993) (internal quotation marks omitted) (quoting *Richards v. United States*, 369 U.S. 1, 6 (1962)); *see also* 28 U.S.C. § 2672 (authorizing agency heads to settle FTCA claims). Relevant to the claims of the torture victims in the GTMO and Syrian rendition scenarios, aliens (as well as citizens) can sue under the FTCA. *See, e.g., Araujo v. United States*, 301 F. Supp. 2d 1095, 1098-102 (N.D. Cal. 2004) (holding the United States liable to an alien under the FTCA for wrongful detention).

37. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 706 n.4 (2004) (“The FTCA was passed with precisely these kinds of garden-variety torts in mind. . . . ‘With the expansion of governmental activities in recent years, it becomes especially important to grant to private individuals the right to sue the Government in respect to such torts as negligence in the operation of vehicles.’” (quoting S. REP. NO. 79-1400, at 31 (1946))); *see also* *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 426 (1995) (stating that the purpose of the FTCA’s exclusivity provision, 28 U.S.C. § 2679(b)(1), was to “protect Federal employees from personal liability for *common law torts* committed within the scope of their employment”

create a national tort law tailored to assessing U.S. government liability. The FTCA does define one important term: “employee of the government.”³⁸ On other issues of liability, however, the FTCA incorporates the tort law governing “private persons” in the place where the act or omission occurred, typically one of the fifty states.³⁹ This includes the critical determinations of whether a government employee’s act was “negligent or wrongful” and whether the act was within the scope of employment.⁴⁰ Because the United States’ liability rests on local tort law governing private persons, a claim that a government employee acted unconstitutionally is not cognizable under the FTCA; the Constitution is not a local tort law for private persons.⁴¹

To analyze our scenarios under the FTCA, let us assume that the conduct described in those scenarios involves “wrongful acts.”⁴² This assumption reflects that, in most if not all jurisdictions, torture constitutes the intentional torts of assault and battery when committed by private persons.⁴³ The victims in those scenarios still must prove, first, that the acts were committed by

(emphasis added) (internal quotation marks omitted) (quoting Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 2(b), 102 Stat. 4363, 4564 (1988)); *Feres v. United States*, 340 U.S. 135, 139-40 (1950) (describing the impetus for the FTCA: “As the Federal Government expanded its activities, its agents caused a multiplying number of remediless wrongs—wrongs which would have been actionable if inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government.”).

38. See 28 U.S.C. § 2671.

39. *Id.* §§ 1346, 2679; see also *Alvarez-Machain*, 542 U.S. at 707 (discussing legislative history indicating that Congress excluded claims arising in a foreign country from the scope of the FTCA because it wanted the United States’ liability assessed under state tort law, not foreign tort law).

40. 1 LESTER S. JAYSON & ROBERT C. LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* § 8.02 (2005) (noting that state law governs scope-of-employment determinations); *id.* § 9.09 (noting that state law determines whether a plaintiff has stated a cause of action).

41. *Meyer*, 510 U.S. at 478 (“[T]he United States simply has not rendered itself liable under § 1346(b) for constitutional tort claims.”); *Johnson v. Sawyer*, 47 F.3d 716, 727 (5th Cir. 1995) (“Thus, even a violation of the United States Constitution, actionable under *Bivens*, is not within the FTCA unless the complained of conduct is actionable under the local law of the state where it occurred.” (footnote omitted)), *vacated*, 120 F.3d 1307 (5th Cir. 1997); see also *United States v. Olson*, 126 S. Ct. 510 (2005) (holding that FTCA liability cannot rest on the fact that state law would impose liability on a governmental entity).

42. See 28 U.S.C. §§ 1346(b)(1), 2672.

43. Intentional torts qualify as wrongful conduct under the FTCA. See, e.g., *Leleux v. United States*, 178 F.3d 750, 755 (5th Cir. 1999) (finding sexual battery actionable under the FTCA); *Duffy v. United States*, 966 F.2d 307, 313 (7th Cir. 1992) (rejecting the argument that intentional torts do not fall within the FTCA).

government employees and, second, that those employees were acting within the scope of their employment.⁴⁴ These two requirements will bar FTCA claims for some of the conduct described in our scenarios.

1. Employees of the Government

The Abu Ghraib and GTMO scenarios involve only U.S. officials.⁴⁵ The Syrian rendition scenario involves both U.S. and Syrian officials.⁴⁶

The U.S. government is potentially liable under the FTCA for the U.S. officials' conduct because they are all "employees of the government."⁴⁷ The FTCA defines that term to cover nearly all federal employees in the civilian and military sectors.⁴⁸

In contrast, it is not clear whether the Syrian officials in the Syrian rendition scenario are "employees of the government." The FTCA defines "employee of the government" to include not only "officers or employees of any federal agency" but also "persons acting on behalf of a federal agency in an official capacity."⁴⁹ The Syrian officials arguably are acting "on behalf of" a federal agency—namely, the CIA—when they torture Sami. After all, the CIA apparently designed its rendition policy to use Syrian officials as instruments of torture. But even if Syrian officials act "on behalf of" the CIA, they probably are not doing so "in an official capacity."⁵⁰ The CIA presumably would disclaim the Syrians' conduct. Indeed, the whole point of the rendition is to avoid having the torture attributed to the United States. For that reason, it is debatable whether the Syrian officials are acting "in an official capacity," as required for them to be "employees of the U.S.

44. See 28 U.S.C. §§ 1346(b)(1), 2672.

45. See *supra* Part I.A-B.

46. See *supra* Part I.C.

47. Section 2671 says in relevant part:

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard [under some circumstances], and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization [with some exceptions].

28 U.S.C. § 2671.

48. See *id.*

49. *Id.*

50. *Id.*

government” whose conduct can subject the United States to liability under the FTCA.⁵¹

This conclusion gains support from the FTCA provision that defines “federal agency.”⁵² “Employees of the government” include “officers or employees of any federal agency,” and the term “federal agency” is defined to exclude “any contractor with the United States.”⁵³ In the Syrian rendition scenario, Syria in effect acts as a government contractor when its officials torture Sami.⁵⁴ The Syrian officials thus are employees of a government contractor. By excluding government contractors from the FTCA’s definition of “federal agency,” Congress probably intended to preclude employees of government contractors from being treated as “employees of the government” under the FTCA.⁵⁵ To carry out that intent, a court would probably hold that the Syrian officials in the Syrian rendition scenario are not

51. *See id.*; *see also* *Logue v. United States*, 412 U.S. 521, 530-31 (1973) (finding “some support” in legislative history for the government’s argument that the phrase “acting on behalf of” was designed for “special situations such as the ‘dollar-a-year’ man who is in the service of the Government without pay, or an employee of another employer who is placed under direct supervision of a federal agency pursuant to contract or other arrangement”).

52. *See* 28 U.S.C. § 2671.

53. Section 2671 provides in relevant part:

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term “Federal agency” includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

Id.

54. *See, e.g.*, *Autery v. United States*, 424 F.3d 944, 956-59 (9th Cir. 2005) (holding that FTCA claims based on companies’ improper responses to a wildfire were barred because the companies were independent contractors, and not employees, of the United States).

55. *See Logue*, 412 U.S. at 530-32 (rejecting the argument that county employees were “acting on behalf of” the federal government “in an official capacity” and could therefore be treated as federal employees, when those employees held a federal prisoner in county jail under a contract between the federal government and the county); *see also* *Leone v. United States*, 910 F.2d 46, 50-51 (2d Cir. 1990) (refusing to interpret the phrase “acting on behalf of” as covering private physicians who were designated by the Federal Aviation Administration as aviation medical examiners and who were found by the court to be government contractors); *Cannon v. United States*, 645 F.2d 1128, 1141 n.50 (D.C. Cir. 1981) (refusing to hold that District of Columbia prison officials with custody of federal prisoners fell within the meaning of “acting on behalf of” in the absence of “special circumstances” demonstrating detailed federal supervision of federal prisoners in non-federal prisons).

employees of the government whose conduct could subject the United States to liability under the FTCA.⁵⁶

2. Scope of Office or Employment

Not all negligent or wrongful acts by “employees of the government” expose the United States to liability under the FTCA. The employee must have been acting “within the scope of his [or her] office or employment.”⁵⁷ The process for determining whether a government employee was acting within the scope of employment can be complicated. Even so, the U.S. officials in the GTMO scenario and the Syrian rendition scenario plainly acted within the scope of employment. A harder question is whether the officials in the Abu Ghraib scenario acted within the scope of employment.

Scope-of-employment determinations can be complicated because both federal courts and the Attorney General may be involved in the determinations. If the plaintiff initially sues a federal employee—and not the United States—the Attorney General decides whether the employee whose conduct gave rise to the suit was acting within the scope of employment; the Attorney General then certifies that determination to the court in which the case is pending.⁵⁸ The Attorney General’s determination is subject to judicial review.⁵⁹ In contrast, when the plaintiff initially sues the United States (rather than officials), the Attorney General does not make a scope-of-employment certification.⁶⁰ Instead, the court decides the issue by itself, and

56. Although the United States probably cannot be sued under the FTCA for the Syrian officials’ conduct in the Syrian rendition scenario, the United States might be sued under the FTCA for the conduct of the U.S. officials who turn Sami over to Syria. *See Logue*, 412 U.S. at 532-33 (holding in an FTCA case that the court of appeals erred in failing to consider whether a federal marshal was negligent in failing to arrange for constant surveillance of a suicidal prisoner held in a county jail under contract with the federal government); *see also* *United States v. Muniz*, 374 U.S. 150, 151-66 (1963) (holding that federal prisoners could sue federal prison officials under the FTCA); *cf.* *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (stating in a constitutional tort action against state officials: “If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.”).

57. 28 U.S.C. § 1346(b)(1); *see also id.* § 2672.

58. *Id.* § 2679(d)(1); *see also* 28 C.F.R. §§ 15.1-15.4 (2005) (providing procedures by the Department of Justice for making scope-of-employment determinations).

59. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 423-37 (1995); *Primeaux v. United States*, 181 F.3d 876, 878 n.2 (8th Cir. 1999).

60. *See Primeaux*, 181 F.3d at 878 n.2.

courts traditionally have based their decision on the law of the state in which the alleged tort occurred.⁶¹ When there is no such state, courts apply the *Restatement (Second) of Agency*.⁶²

To clear away this underbrush, let us assume that the plaintiffs in our scenarios initially sue the United States and that the court alone makes the scope of employment determination by applying *Restatement* principles.

The U.S. officials in the Syrian rendition scenario, we are told, followed CIA policy.⁶³ If so, plainly they were acting within the scope of their

61. See, e.g., *Hatahley v. United States*, 351 U.S. 173, 180-81 (1956) (applying Utah law in an FTCA case to determine whether federal officials acted within the scope of their employment). It is debatable whether courts should consult state law, at least when the employees are members of the Armed Forces. The FTCA says that, for members of the Armed Forces, “[a]cting within the scope of his office or employment . . . means acting in line of duty.” 28 U.S.C. § 2671 (internal quotation marks omitted). It would seem that federal law alone should determine whether someone is “acting in line of duty” for purposes of the FTCA. Nonetheless, the U.S. Supreme Court held in *Williams v. United States (Williams II)*, 350 U.S. 857 (1955), that “the California doctrine of respondeat superior” governed, *id.* at 857, in an FTCA case in which a drunken soldier on a recreational drive injured a civilian, and it was disputed whether the soldier was acting “in line of duty” at the time of the accident, see *Williams v. United States (Williams I)*, 215 F.2d 800, 806-08 (9th Cir. 1954), *vacated*, 350 U.S. 857 (1955). *Williams II* was a two-sentence, per curiam decision by the Court. 50 U.S. at 857. Nonetheless, lower courts have understood *Williams II* to establish that state law governs scope-of-employment determinations under the FTCA. See, e.g., *Devlin v. United States*, 352 F.3d 525, 533 (2d Cir. 2003) (“[*Williams*] disposed of the contention that the phrase ‘acting within the scope of his office or employment’ was to be interpreted as a matter of federal law.” (alteration in original) (quoting *O’Toole v. United States*, 284 F.2d 792, 795 (2d Cir. 1960))). The *Williams* cases pre-date the legislation that authorizes the Attorney General, in tort suits against federal employees, to certify whether the suit involved conduct within the scope of employment. See *Federal Employees Liability Reform and Tort Compensation Act of 1988*, Pub. L. No. 100-694, §§ 5-6, 102 Stat. 4563, 4564-65 (1988). It is possible that this legislation, known as the Westfall Act, effectively overrules *Williams II*, at least for cases in which the Attorney General has authority to make the certification. See *Gutierrez de Martinez*, 515 U.S. at 435 (stating that the issue in an FTCA case of “[w]hether the employee was acting within the scope of his federal employment is a significant federal question” (emphasis added)); *Primeaux*, 181 F.3d at 878 n.2 (noting, but reserving, the issue of whether the Westfall Act, as interpreted in *Gutierrez de Martinez*, alters the principle attributed to *Williams II* that state law governs scope-of-employment determinations in FTCA cases); cf. *Aversa v. United States*, 99 F.3d 1200, 1208-09 (1st Cir. 1996) (holding that *Gutierrez de Martinez* did not alter the *Williams II* principle).

62. JAYSON & LONGSTRETH, *supra* note 40, § 9.07.

63. See *supra* Part I.C.

employment.⁶⁴ That is true even if they were, at the same time, acting tortiously or illegally.⁶⁵

The U.S. interrogators in the GTMO scenario, we are told, reasonably believed they were using interrogation methods authorized by the Department of Defense. This is enough to find that they were acting within the scope of employment. Even if their conduct was actually unauthorized, it can still be within the scope of their employment.⁶⁶ What matters is that the interrogators acted at least in part to benefit their employer.⁶⁷

It is harder to say whether the military police guards in the Abu Ghraib scenario acted within the scope of their employment.⁶⁸ The description of this scenario implies that they acted solely to gratify their sadistic urges. If they did indeed act solely for personal gratification, they acted outside the scope of their employment.⁶⁹ That is because, to act within the scope of employment, an employee must act at least partly to benefit the employer.⁷⁰ The Abu Ghraib guards might assert, however, that they were acting at least partly to benefit their employer, for they acted on instructions to “loosen up” the prisoner. In general, conduct motivated by such a “dual purpose” may fall within the scope of employment.⁷¹ The conduct in the Abu Ghraib scenario still fell outside the scope of employment—even if the guards acted

64. See RESTATEMENT (SECOND) OF AGENCY § 228(1) (1958) (“Conduct of a servant is within the scope of employment if . . . [among other factors, it] is of the kind he is employed to perform.”).

65. See *id.* § 231 (“An act may be within the scope of employment although consciously criminal or tortious.”).

66. See *id.* § 230 (“An act, although forbidden, or done in a forbidden manner, may be within the scope of employment.”); see also, e.g., *Hatahley v. United States*, 351 U.S. 173, 180-81 (1956) (applying Utah law in an FTCA case to hold that federal officials were acting within the scope of their employment when they seized plaintiffs’ horses, even though the officials’ conduct violated federal statutes and therefore exceeded their actual authority; stating: “There is an area, albeit a narrow one, in which a government agent, like a private agent, can act beyond his actual authority and yet within the scope of his employment.”).

67. See RESTATEMENT (SECOND) OF AGENCY, *supra* note 64, § 228(1)(c) (providing that to be within the scope of employment, conduct must be “actuated, at least in part, by a purpose to serve the master”).

68. See *supra* text accompanying note 4.

69. See RESTATEMENT (SECOND) OF AGENCY, *supra* note 64, § 235 (“An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.”).

70. See *id.*

71. See *id.* § 236 (“Conduct may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person.”).

partly to benefit their employer—if it involved an unforeseeable, “clearly inappropriate” crime.⁷² Thus, the government may well avoid FTCA liability by proving—as it has actually asserted—that the Abu Ghraib abuse involved egregious, unforeseeable conduct by a “few bad apples.”⁷³

In sum, the United States cannot be liable under the FTCA for the conduct in the Abu Ghraib scenario if that conduct was outside the scope of the guards’ employment. The United States might be liable under the FTCA for the conduct by U.S. officials in the GTMO and Syrian rendition scenarios. The United States’ potential liability in those two scenarios arises because the scenarios involved conduct by government employees within the scope of employment. The United States can still avoid liability in those two scenarios, however, if it shows that they fell within one of the FTCA’s exceptions.

B. FTCA Exceptions

The FTCA generally waives the United States’ sovereign immunity from claims arising from torts committed by government employees while acting within the scope of their employment. That general waiver, however, is limited by thirteen exceptions. Several of those exceptions could bar some or all of the claims arising from the scenarios.

1. The Combatant Activities Exception

The FTCA does not apply to—and thus does not authorize a suit against the United States for—“[a]ny claim arising out of the combatant activities of

72. See *id.* § 231 cmt. a; see also H.R. REP. NO. 100-700, at 5 (1988) (“If an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable.”), reprinted in 1988 U.S.C.C.A.N. 5945, 5949; cf. *Attallah v. United States*, 955 F.2d 776, 780-82 (1st Cir. 1992) (holding that U.S. customs agents who robbed and killed a courier entering Puerto Rico were not acting within the scope of their employment for FTCA purposes).

73. See President George W. Bush, Remarks by the President on Iraq and the War on Terror, Address Delivered at United States Army War College, Carlisle, Pennsylvania (May 24, 2004), available at <http://www.whitehouse.gov/news/releases/2004/05/20040524-10.html> (stating that Abu Ghraib prison “became a symbol of disgraceful conduct by a few American troops who dishonored our country and disregarded our values”); see also DANNER, *supra* note 1, at 27 (describing this as the “‘few bad apples’ argument”).

the military or naval forces . . . during time of war.”⁷⁴ This “combatant activities” exception probably applies during the current war on terrorism, even though Congress has not declared it a war.⁷⁵ The toughest question is whether the detention and interrogation of terrorist suspects are “combatant activities.”⁷⁶

The answer depends partly on how closely conduct must be related to battlefield violence for that conduct to qualify as “combatant activity.”⁷⁷ The United States has argued with some success that the detention of suspected combatants lies at the core of combat.⁷⁸ The United States would no doubt further argue that, like the detention of combatants, the *interrogation* of those

74. 28 U.S.C. § 2680(j) (2000).

75. *See, e.g.*, *Koochi v. United States*, 976 F.2d 1328, 1333-35 (9th Cir. 1992) (applying the exception during the conflict commonly known as the “tanker war” between the United States and Iran, even though it was not a declared war); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1492-95 (C.D. Cal. 1993) (applying the exception, by analogy, to claims against a government contractor that arose during the undeclared Persian Gulf War); *Vogelaar v. United States*, 665 F. Supp. 1295, 1302 (E.D. Mich. 1987) (applying the exception to claims that arose during the undeclared Vietnam War).

76. *See* 28 U.S.C. § 2680(j).

77. *Cf. Koochi*, 976 F.2d at 1333 n.5 (finding claims involved “combatant activities” because they concerned “the tracking, identification, and destruction of unidentified aircraft that appear[ed] to pose a threat to [a] warship’s safety”); *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948) (“[C]ombatant activities’ . . . include not only physical violence, but activities both necessary to and in direct connection with actual hostilities.”) (holding the exception did not apply to claims based on damage done by U.S. vessels that had finished their wartime activities and were homeward bound); *Bentzlin*, 833 F. Supp. at 1489 (applying the exception, by analogy, to bar claims against a government contractor based on its manufacture of the missiles that killed service members); *Vogelaar*, 665 F. Supp. at 1302 (applying the exception to bar claims related to the identification of a service member killed in the Vietnam War); *In re “Agent Orange” Prod. Liab. Litig.*, 580 F. Supp. 1242, 1255 (E.D.N.Y. 1984) (declining, at that stage of the litigation, to hold that the exception barred claims based on, among other conduct, the government’s inadequate labeling of Agent Orange, a defoliant used in the Vietnam War); *Skeels v. United States*, 72 F. Supp. 372, 374 (W.D. La. 1947) (holding “combatant activities” did not include “mere practice or training activities, even in time of war” and that the exception therefore did not bar an FTCA claim based on military airplanes killing a civilian during training in the Gulf of Mexico); Note, *The Federal Tort Claims Act*, 56 *YALE L.J.* 534, 548-49 & n.99 (1947) (discussing the genesis and possible meaning of “combatant activities”).

78. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (stating, in reference to the President’s statutory authority to detain Hamdi, that “the capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war’” (alteration in original) (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942))).

combatants for military intelligence is close enough to actual combat to constitute “combatant activities” by the interrogators. Alternatively, or additionally, the United States might argue that the interrogations arise from the “combatant activities” of the *detainees*, since their involvement in combat led to their detention and interrogation. These arguments would have particular force in the Abu Ghraib scenario, because the Abu Ghraib prison lies in an area of active combat.⁷⁹

The “detention and interrogation equals combatant activities” argument has less force in the GTMO scenario. Although U.S. officials captured the torture victim in that scenario (Ghuljaan) in a place where combat was occurring (Afghanistan), his place of detention (GTMO) lies far from any battlefield.⁸⁰ In addition, the United States exercises control tantamount to sovereignty over GTMO.⁸¹ The government might still argue that the interrogation of GTMO detainees, like Ghuljaan, who were captured on the battlefield arise from those detainees’ combatant activities. But this argument seems to be a stretch considering GTMO’s remoteness from the battlefield and the United States’ uncontested control over GTMO.

Finally, the Syrian rendition scenario is least likely of the three to fall within the combatant activities exception. U.S. officials arrested Sami in New York City, not on the battlefield. They believe he is a terrorist but have no evidence that he engaged in combatant activities.⁸² Furthermore, the U.S. officials who arranged for his rendition are CIA officials, and therefore may not belong to the “military or naval forces.”⁸³ Thus, although Sami’s rendition may be associated with fighting the war on terrorism, it probably does not fall within the FTCA’s exception for cases arising from combatant activities.

79. See Schlesinger Report, *supra* note 1, at 937 (noting that Abu Ghraib was “smack in the middle of a combat environment”).

80. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (finding that the “theater of war” concept could not be stretched to enable the President to rely on his Commander-in-Chief power to seize domestic steel mills).

81. See *Rasul v. Bush*, 542 U.S. 466, 480 (2004) (relying on United States’ “complete jurisdiction and control” over GTMO in holding that detainees there could sue under the federal habeas statute).

82. Cf. *Rumsfeld v. Padilla*, 542 U.S. 426, 430-31 (2004) (addressing the habeas claim of a person whom U.S. officials arrested in Chicago and detained in the United States as an “enemy combatant”).

83. 28 U.S.C. § 2680(j) (2000) (excepting claims arising from combatant activities “of the military or naval forces” in wartime).

In sum, only the Abu Ghraib scenario stands a good chance of falling within the combatant activities exception.

2. The Foreign Country Exception

The FTCA does not apply to “any claim arising in a foreign country.”⁸⁴ This foreign country exception will bar claims arising from the Abu Ghraib scenario and some claims arising from the Syrian rendition scenario. Whether it would bar claims arising from the GTMO scenario is unclear.

The foreign country exception was interpreted broadly in the Supreme Court’s recent decision in *Sosa v. Alvarez-Machain*.⁸⁵ In *Alvarez-Machain*, a Mexican national sued the United States for having him kidnapped from Mexico in order to prosecute him in the United States.⁸⁶ The Court held that the foreign country exception barred his FTCA claims against the United States because his abduction—and hence his injury—happened in Mexico.⁸⁷ It did not matter that the abduction was authorized by officials in the United States.⁸⁸ For purposes of the foreign country exception, the Court held, an action arises where the injury occurs, even if the tortious conduct occurred elsewhere.⁸⁹ This holding rejected the “headquarters exception” to the foreign country exception that had developed in some lower courts.⁹⁰ That exception permitted FTCA liability for tortious conduct that occurred overseas if it were approved by officials at some “headquarters” in the United States.⁹¹

Under *Alvarez-Machain*, the foreign country exception would immunize the United States for the torture that occurred at Abu Ghraib. Because the torture occurred in a foreign country, a claim based on that torture arose in a foreign country and falls within the exception. It does not matter whether the torture was authorized in Washington, D.C. Furthermore, Iraq qualifies as a foreign country even if, at the time of the injuries, it lacked a recognized

84. See 28 U.S.C. § 2680(k).

85. 542 U.S. 692 (2004).

86. *Id.* at 698-99.

87. *Id.* at 703-12.

88. *Id.*

89. See *id.* at 712 (“[T]he FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.”).

90. See *id.* at 700-13.

91. See *id.*

government.⁹² Finally, the injuries at Abu Ghraib occurred in a foreign country even though they occurred inside a U.S.-controlled facility in Iraq.⁹³

As interpreted in *Alvarez-Machain*, the foreign country exception also bars claims for conduct in the Syrian rendition scenario that occurred in Syria. As true of the Abu Ghraib scenario, it does not matter in the Syrian rendition scenario that the extraordinary rendition program is devised in Washington, D.C. Under *Alvarez-Machain*, claims for the torture itself arose in Syria because that is where the injury occurred.⁹⁴ In effect, the foreign country exception, as interpreted in *Alvarez-Machain*, allows the United States to outsource to other countries the job of torturing suspected terrorists.⁹⁵

True, the foreign country exception does not protect the United States from FTCA liability for actions by U.S. officials in the United States that led up to the rendition, including Sami's arrest in New York. This will not be much comfort to Sami if U.S. officials have probable cause to detain him, however, because in that event his detention probably is not tortious.⁹⁶ Sami may, however, be able to claim that U.S. officials acted tortiously after they detained him by arranging for him to be handed him over to foreign officials who, they knew, would torture him.⁹⁷

92. See *Smith v. United States*, 507 U.S. 197, 199, 204-05 (holding the foreign country exception barred an FTCA claim arising in Antarctica, even though it had no recognized government or civil law).

93. See *United States v. Spelar*, 338 U.S. 217, 219-22 (1949) (holding the foreign country exception barred a claim arising from an injury occurring at a Newfoundland, Canada, air base located on land that the United States held under a ninety-nine year lease from Great Britain).

94. 542 U.S. at 702-10.

95. See Mayer, *supra* note 8, at 107-08.

96. Cf. *Alvarez-Machain*, 542 U.S. 703-12 (treating plaintiff's FTCA claim for false arrest as arising in Mexico because, once he was brought into the United States, the United States then had cause and authority to continue his detention).

97. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 194-200 (1989) (finding that the Due Process Clause generally does not require the government to protect citizens against private violence, but it does create duties toward people whose liberty the government has restricted); *United States v. Price*, 383 U.S. 787, 794-96 (1966) (holding that private persons acted under color of law when, in coordination with local law enforcement officers, they beat to death civil rights workers who had traveled to Philadelphia, Mississippi); *Lefall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 530-32 (5th Cir. 1994) (discussing case law that recognizes constitutional claims against state entities for creating a situation in which plaintiff was exposed to danger at the hands of private actors).

It is unclear whether the foreign country exception would bar claims in the GTMO scenario. The torture occurred—and, under *Alvarez-Machain*, FTCA claims based upon the torture arose—at GTMO. Although GTMO is in Cuba, it may not constitute “a foreign country” because of the United States’ control over it.⁹⁸

3. 28 U.S.C. § 2680(a): The “Discretionary Function Exception”

Section 2680(a) of title 28 states that the FTCA does not apply to

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.⁹⁹

Section 2680(a) is often called the “discretionary function exception,”¹⁰⁰ and this Article will follow that convention when referring to subsection (a) as a whole. Section 2680(a) actually contains two exceptions, however, only the second of which involves discretionary functions.¹⁰¹ The first part of the provision, which will hereinafter be referred to as the “due care clause,” protects the government from certain suits based on an employee’s execution of a statute or regulation.¹⁰² The second part, which will hereinafter be referred to as the “discretionary function clause,” protects the government

98. See, e.g., *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) (“Guantanamo Bay is in every practical respect a United States territory . . .”). *But cf.* *Cuban Am. Bar Ass’n v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995) (holding that GTMO is not a U.S. territory for purposes of statutes relied upon in that case by Cuban and Haitian immigrants temporarily detained there); *Bird v. United States*, 923 F. Supp. 338, 340-43 (D. Conn. 1996) (holding that the foreign country exception barred an FTCA action alleging medical malpractice at the Naval Medical Facility at GTMO).

99. 28 U.S.C. § 2680(a) (2000).

100. See, e.g., *United States v. Gaubert*, 499 U.S. 315, 322 (1991).

101. E.g., *Dalehite v. United States*, 346 U.S. 15, 32-33 (1953) (“It will be noted . . . that there are two phrases describing the excepted acts of government employees.”); see also *Hatahley v. United States*, 351 U.S. 173, 181 (1956) (separately discussing the two portions of § 2680(a)).

102. See *Gaubert*, 499 U.S. at 322.

from certain suits based on an employee's exercise of a discretionary function.¹⁰³

The two clauses in § 2680(a) operate somewhat like mirror images. The first limits suits based on a government employee's simply carrying out statutory or regulatory duties; the second limits suits based on a government employee's conduct that, in the absence of controlling statutes or regulations, involves discretion. Because of their distinctness, the two clauses will be discussed separately below.

a. Due Care Clause

The due care clause bars FTCA actions based on an employee's exercise of "due care" in the execution of a statute or regulation, "whether or not such statute or regulation be valid."¹⁰⁴ The two quoted phrases reflect Congress's intent to bar suits that seek money damages, not for an employee's lack of due care in discharging statutory or regulatory duties, but for the employee's competent discharge of statutory or regulatory duties. In other words, Congress did not want FTCA tort suits to be used as vehicles for judicially challenging the validity of statutes or regulations.¹⁰⁵ Consistent with that intention, the due care clause bars FTCA suits based on official conduct that is specifically authorized or required by a statute or regulation.¹⁰⁶ In contrast, if an FTCA suit is based upon official conduct that is not dictated by a statute or regulation but instead involves the exercise of discretion, then the due care

103. *See id.*

104. 28 U.S.C. § 2680(a).

105. *E.g., Dalehite*, 346 U.S. at 33 (stating the due care clause "bars tests by tort action of the legality of statutes and regulations").

106. *See Crumpton v. Stone*, 59 F.3d 1400, 1403 (D.C. Cir. 1995). According to the *Crumpton* court, the due care clause applies if a "'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow[]' . . . as long as the employee has exercised due care in following the dictates of the statute or regulation." *Id.* (emphasis added) (quoting *Gaubert*, 499 U.S. at 322); *cf. Staton v. United States*, 685 F.2d 117, 120-21 (4th Cir. 1982) (holding that the due care clause would bar a claim against a national park ranger who shot dogs pursuant to regulation, as long as he was exercising due care, even though the regulation left rangers with discretion during situations such as that in the case).

clause generally will not apply.¹⁰⁷ Such a suit may be barred, however, by the discretionary function clause.¹⁰⁸

To apply the due care clause to the torture scenarios in Part I, we must first ask whether the U.S. officials in those scenarios were executing a “statute or regulation.”¹⁰⁹ It does not appear that any statute specifically authorizes or compels the officials’ conduct. Each scenario does, however, involve an executive directive. The military police guards in the Abu Ghraib scenario tortured Ali under an instruction from military intelligence officers to “loosen him up.”¹¹⁰ The GTMO interrogators tortured Ghuljaan under a directive from the Secretary of Defense authorizing certain interrogation methods.¹¹¹ CIA officials rendered Sami to Syria under an extraordinary rendition program approved by the White House.¹¹² If none of these directives was a “regulation,” then the due care clause will not bar FTCA claims based on the officials’ conduct.

It is not clear which, if any, of these directives is a “regulation.”¹¹³ The FTCA does not define the term, and there is little case law on the subject.¹¹⁴

107. See *Crumpton*, 59 F.3d at 1404-06 (holding that the due care clause did not apply because no statute or regulation limited the Army’s discretion to disclose records).

108. See *infra* notes 126-55 and accompanying text.

109. 28 U.S.C. § 2680(a).

110. See *supra* text accompanying note 4.

111. See *supra* Part I.B.

112. See *supra* Part I.C.

113. 28 U.S.C. § 2680(a).

114. Dictionaries contemporaneous with the FTCA’s enactment in 1946 shed little light on the subject. See, e.g., BLACK’S LAW DICTIONARY 1451 (4th ed. 1951); MAX RADIN, RADIN LAW DICTIONARY 290 (Lawrence G. Greene ed., 1955). To the extent that the term “regulation” is defined broadly to include informal official prescriptions, the due care clause would create greater tension between the United States’ liability under the FTCA and the liability of local governments under 42 U.S.C. § 1983. A local government can be held civilly liable when someone acting on its behalf violates federal rights in the course of executing “any [local] statute, regulation, custom, or usage,” whether or not exercising due care. 42 U.S.C. § 1983 (2000). In contrast, the United States cannot be held civilly liable when an employee (using due care) commits a tort in executing a “statute or regulation.” 28 U.S.C. § 2680(a). It is not clear why local governments should be liable for their officials’ execution of local laws and policies when the United States can use the due care clause to escape liability for federal officials’ execution of federal law and policies. See FALLON ET AL., *supra* note 14, at 1090-91.

The term may refer to what the federal Administrative Procedure Act calls “substantive rules.”¹¹⁵

On that assumption, of the three directives, the “loosen him up” instruction in the Abu Ghraib scenario is least likely to qualify as a “regulation.”¹¹⁶ It is the least formal and least detailed of the three directives.¹¹⁷ It came from officials who were presumably fairly low in the chain of command and therefore may have lacked authority to issue regulations (as distinguished from having authority to issue orders).¹¹⁸ And, unlike most regulations, the “loosen him up” instruction did not have broad applicability; it concerned a specific, identified detainee.¹¹⁹

By comparison, the Secretary of Defense’s directive to GTMO interrogators and the CIA’s extraordinary rendition program governing the Syrian rendition scenario are more likely to be “regulations” within the meaning of the due care clause.¹²⁰ On the one hand, neither directive is called a “regulation,” and neither is apparently subject to the rule-making procedures of the Administrative Procedure Act.¹²¹ On the other hand, the directives come from officials at the highest levels of the executive branch, who no doubt intend them to be binding. The Secretary of Defense’s

115. 5 U.S.C. §§ 552(a)(1)(D), 553(d)(1), 558(b) (2000); *see, e.g.*, *Lincoln v. Vigil*, 508 U.S. 182, 195-96 (1993) (discussing the distinction between substantive rules and other types of rules); *Dupree v. United States*, 247 F.2d 819, 822-25 (3d Cir. 1957) (rejecting an FTCA claim based on implementation of substantive regulations, even though those regulations had been held invalid in separate litigation).

116. 28 U.S.C. § 2680(a).

117. *See Crumpton v. Stone*, 59 F.3d 1400, 1404-05 (D.C. Cir. 1995) (noting that an army pamphlet was not “a definitive statement of Army policy” and therefore did not limit the Army’s discretion for purposes of analysis under due care clause and discretionary function clause of FTCA).

118. *See* 5 U.S.C. § 558(b) (“A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.”); *see also* JOHN H. REESE & RICHARD H. SEAMON, *ADMINISTRATIVE LAW: PRINCIPLES AND PRACTICE* 517-18 (2d ed. 2003) (discussing the history and purpose of § 558(b)).

119. Although the Administrative Procedure Act defines “rule” to mean an agency statement of either “general or particular applicability,” 5 U.S.C. § 551(4), most rules have general applicability. *See, e.g.*, *Natural Res. Def. Council v. EPA*, 966 F.2d 1292, 1309 (9th Cir. 1992).

120. 28 U.S.C. § 2680(a).

121. *See* 5 U.S.C. § 553(a)(1) (exempting from rule-making requirements prescribed in that section rules involving “a military or foreign affairs function of the United States”).

directive, in particular, appears to have been issued through the formal chain of command.¹²²

If officials in the GTMO scenario and the Syrian rendition scenario are executing “regulations,” claims against them based on their conduct can still avoid the “due care” clause if the officials did not “exercis[e] due care.”¹²³ As between the two scenarios, the GTMO scenario is the more likely to involve a lack of due care. That is because the Secretary of Defense’s directive (the public version, at least) gave GTMO interrogators much discretion. The directive described authorized interrogation methods using only evocative names such as “fear up harsh,” and broad descriptions, such as (in the case of “fear up harsh”), “[s]ignificantly increasing the fear level in a detainee.”¹²⁴ This left officials with so much discretion that, in reality, it led interrogators in at least one case to kill a detainee.¹²⁵ Focusing on this discretion in the GTMO scenario, Ghuljaan can argue that his FTCA action does not challenge the validity of the Secretary of Defense’s directive but, instead, the way his interrogators chose to implement the directive. In short, he can argue that they did not exercise due care, as required for their conduct to be protected by the due care clause.

It will be harder for Sami, the victim in the Syrian rendition scenario, to argue lack of due care. In his case, it is the extraordinary rendition program itself that caused him to be rendered to a country that tortured him. He therefore cannot argue that his torture resulted from the way in which the program is implemented in his particular circumstances. Because his FTCA action seems to challenge the validity of the rendition program itself, rather than a lack of due care in its implementation, the due care clause will probably bar his action if the program is considered a “regulation” within the meaning of the due care clause.

122. See *supra* note 7.

123. 28 U.S.C. § 2680(a).

124. Apr. 16 Memo, *supra* note 7, at 361. *But cf.* Tim Golden, *Abuse Cases Open Command Issues at Army Prison*, N.Y. TIMES, Aug. 8, 2005, at A1 (“[A] former guard charged with maiming and assault said that he and other reservist military policemen were specifically instructed at Bagram how to deliver the type of blows that killed the two detainees, and that the strikes were commonly used when prisoners resisted being hooded or shackled.”).

125. See Josh White, *Documents Tell of Brutal Improvisation by GIs*, WASH. POST, Aug. 3, 2005, at A1 (reporting that U.S. interrogators in Iraq, using the “fear up” method, killed an Iraqi general by stuffing him in a sleeping bag, wrapping his bagged figure in electrical cord, and beating him to death).

b. Discretionary Function Clause

Torture victims asserting FTCA claims may avoid the due care clause only to have their claims barred by the discretionary function clause.¹²⁶ Analysis of torture claims under the discretionary function clause raises difficult issues at each of three steps: (i) identifying what conduct the claims are “based upon”; (ii) determining whether that conduct is discretionary; and (iii) if so, determining whether the conduct involves the kind of discretion that the discretionary function clause protects.

i. What Conduct FTCA Claims for U.S. Torture Will Be “Based Upon”

The discretionary function clause bars FTCA claims that are “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or any employee of the Government.”¹²⁷ Thus, to determine whether the clause bars a claim, a court must first determine what conduct that claim is “based upon.” That determination can be difficult when an FTCA claimant’s injuries stem, not from the *single act* of a government employee, but from a *course* of government conduct.¹²⁸ The injurious course of conduct may include some acts that involve the exercise of a discretionary function and other acts that do not. In that situation, the determination of which act the claim is “based upon” can control the outcome of the case.

Our torture scenarios illustrate the “based upon” issue. For example, assume that the Secretary of Defense exercises a discretionary function when he authorizes the interrogation techniques used in the GTMO scenario. Also assume, however, that the GTMO interrogators who tortured Ghuljaan were not exercising a discretionary function when they applied those techniques (because, say, the application does not involve the kind of public-policy-based discretion that, as discussed below, the discretionary function clause protects).¹²⁹ When Ghuljaan sues under the FTCA, he can plausibly argue that his claim is “based upon” the unprotected conduct of his interrogators. The United States can just as plausibly respond that his claim is really “based

126. See 28 U.S.C. § 2680(a); see also text accompanying note 99.

127. 28 U.S.C. § 2680(a).

128. Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. DAVIS L. REV. 691, 695, 715-17 (1997).

129. See *id.* at 754-55.

upon” the Secretary of Defense’s decision. If Ghuljaan’s argument prevails, the discretionary function clause will not bar the action. If the United States’ argument prevails, the clause will bar the action. The “based upon” issue can determine the lawsuit.

Little case law or commentary addresses the “based upon” issue, as I have discussed in a prior article.¹³⁰ Under the approach proposed in that article, an FTCA claim is presumptively “based upon” the injurious government conduct that, the plaintiff alleges, was negligent or wrongful and proximately caused his or her injuries.¹³¹ This approach permits a plaintiff to avoid the discretionary function clause by basing his or her FTCA claim upon conduct by officials who are not themselves exercising a discretionary function but are implementing a policy that did involve the exercise of a discretionary function.¹³² To prevail in that situation, however, the plaintiff must prove that the implementation of the policy, as distinguished from its formulation, was negligent or wrongful. Thus, under my proposed approach, the plaintiff cannot prove that the implementation of a policy was negligent or wrongful by using evidence, or making arguments to the effect, that the policy itself was negligent or wrongful. In effect, the antecedent policy must be conclusively presumed valid if its formulation involved the exercise of a discretionary function.¹³³

This approach will probably limit, but not altogether bar, an FTCA claim arising from the GTMO scenario. Ghuljaan, the victim in the GTMO scenario, can sue the United States under the FTCA for the way that GTMO interrogators implemented the Secretary of Defense’s directive on interrogation methods. Specifically, Ghuljaan can argue that the interrogators acted negligently or wrongfully in implementing the directive because (we are assuming for now) they were not exercising a discretionary function. To prove negligent or wrongful implementation, however, Ghuljaan cannot argue, or present evidence, that the directive itself is negligent or wrongful, because (we are assuming for now) in formulating the directive the Secretary exercises a discretionary function. Essentially, under my proposed approach, Ghuljaan is limited to arguing that, judged by a reasonable person standard,

130. *See id.* at 696-97.

131. *Id.* at 720 (reading Supreme Court precedent to imply that “[a] claim is presumptively based upon the government conduct that the plaintiff alleges was wrongful and proximately caused the injuries”).

132. *Id.* at 754.

133. *Id.* at 754-55.

the individual interrogators went too far in their use of the authorized, vaguely worded (and assumed to be valid) interrogation methods.

My approach to the “based upon” issue will probably bar the FTCA claim arising from the Syrian rendition scenario. Assume that CIA and White House officials exercised a discretionary function in formulating the extraordinary rendition program. Also assume that the officials who rendered Sami to Syria for torture were not exercising a discretionary function (because, say, they were carrying out merely ministerial functions). The discretionary function clause would bar an FTCA action by Sami claiming that the program itself is negligent or wrongful and has proximately caused his injuries. In theory, the clause would not bar an action claiming that the officials’ *implementation* of the program was negligent or wrongful and proximately caused Sami’s injury. It probably would be impossible, however, for Sami to prove that his injuries arose from the negligent or wrongful *implementation* of the plan, rather than from the plan itself, the validity of which must be taken as a given in order for Sami to avoid having his claim barred by the discretionary function clause. Thus, he would avoid the potential bar posed by the discretionary function clause only by limiting his claim to one that would not succeed on the merits.

My approach to the “based upon” issue probably would not bar the FTCA claim arising from the Abu Ghraib scenario. This is true even if we make the debatable assumption that military officials exercised a discretionary function when they instructed the guards to “loosen up” Ali. Ali can still sue under the FTCA claiming that the guards acted negligently or wrongfully by using that instruction as an excuse to torture him if, as Ali might establish, the guards’ sadistic actions did not involve the type of discretion that the discretionary function clause protects.¹³⁴

ii. Whether the Conduct Is Discretionary

Once a court identifies what conduct an FTCA action is “based upon,” the court can then proceed to the second step of analysis under the discretionary function clause. At the second step, the court must determine whether the conduct was discretionary. To be discretionary, a government employee’s conduct must involve “choice.”¹³⁵ Conduct cannot be discretionary if it violates a federal statute, regulation, or agency guidelines,

134. See *infra* Part III.B.3.b.iii.

135. *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

because an employee has no choice but to obey the law.¹³⁶ Thus, the discretionary function exception will not bar claims arising from the Abu Ghraib scenario, which, we are told, violates federal statutes and regulations.¹³⁷ Similarly, if the conduct of the interrogators in the GTMO

136. *Id.* at 542-43 (holding that the discretionary function clause did not bar an FTCA claim alleging that agency officials violated statutes and regulations governing the licensing of vaccinations); *see also* *United States v. Gaubert*, 499 U.S. 315, 324-25 (1999) (noting discretion may be established expressly or implicitly by “statute, regulation, or agency guidelines”).

137. *See supra* note 5 and accompanying text. A federal statute imposes criminal liability on “[w]ho[m]ever outside the United States commits or attempts to commit torture.” 18 U.S.C. § 2340A (2000). This anti-torture statute contains no exceptions excusing, for example, official torture of suspected terrorists. *Cf. Nuru v. Gonzales*, 404 F.3d 1207, 1221-22 (9th Cir. 2005) (rejecting an immigration judge’s view that torture of an asylum applicant was justified because it occurred in a combat zone). The Justice Department has nonetheless argued that the anti-torture statute incorporates common-law defenses that allow some U.S. torture of suspected terrorists. Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, at 39-46 (Aug. 1, 2002) [hereinafter *Torture Memo*]. The same memorandum also suggests that the statute would be unconstitutional if construed to constrain the President’s conduct of the war against terrorism. *See id.* at 31-39. Those views have drawn criticism, *see, e.g.*, Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT’L L. 641, 646 (2005) (calling the *Torture Memo* “perhaps the most clearly erroneous legal opinion I have ever read”), and the Justice Department withdrew the *Torture Memo*, perhaps in response to that criticism, *see* Memorandum from Daniel Levin, Acting Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to James B. Comey, Deputy Attorney Gen., U.S. Dep’t of Justice, at 2 (Dec. 30, 2004), but the *Torture Memo* nonetheless raised important issues about the reach of the anti-torture statute that the courts have not yet addressed. Until recently, the government also argued that the anti-torture statute did not apply to conduct at GTMO because it was not “outside the United States” within the meaning of the statute. *See* Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Apr. 4, 2003) [hereinafter *Working Group Report*], *reprinted in* TORTURE PAPERS, *supra* note 1, at 286, 291. Congress enacted a law in late 2004 to make the anti-torture statute applicable at federal installations such as GTMO and Abu Ghraib. The 2004 law defines the “United States,” for purposes of the anti-torture statute, to exclude those places. Those places are therefore “outside the United States” and conduct occurring there is subject to the anti-torture statute. Pub. L. No. 108-375, § 1089, 118 Stat. 1811, 2067 (2004) (“‘United States’ means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.”). In addition, as this Article went to print, Congress banned “cruel, inhuman, or degrading treatment or punishment” of detainees in the Detainee Treatment Act of 2005. Pub. L. 109-148, § 1003(a), 119 Stat. 2680, 2739 (Dec. 30, 2005) (reproduced in relevant part *supra* note 1). In addition to the 1994 anti-torture statute and the 2005 Detainee Treatment

scenario violates federal law, regulations, or agency guidelines, the discretionary function clause will not bar claims based on the interrogators' conduct. In that event, the discretionary function clause will not shield the GTMO interrogators' conduct even though they, unlike the Abu Ghraib guards, believe they are obeying the law.¹³⁸ Likewise, the exception will not cover the U.S. officials who arrange for Sami's extraordinary rendition if that conduct violates federal statutes or regulations, even though it followed CIA policy.¹³⁹ Officials have no discretion to violate statutes or regulations.

It is unclear whether the discretionary function clause bars claims for torture that does not violate any statute, regulation, or agency policy but does violate the Constitution. Some courts have held that, because government employees have no discretion to violate the Constitution, the discretionary function clause does not bar suits alleging unconstitutional conduct.¹⁴⁰ The

Act, many other federal statutes and military directives may restrict U.S. officials' use of physical and psychological force against detainees. *See* Nov. 27 Action Memo, *supra* note 7, at 253-55 (summarizing relevant federal statutes); Working Group Report, *supra*, at 290-302, 325-30 (summarizing relevant federal statutes and Uniform Code of Military Justice provisions); Fay-Jones Report, *supra* note 1, at 1033-34 (summarizing relevant military directives); Charge Sheet for Charles A. Graner, Jr., *available at* <http://news.www.findlaw.com/hdocs/docs/iraq/graner51404chrg.html> (last visited Jan. 26, 2006) (charging a participant in the Abu Ghraib prison abuses with violations of five articles of the Uniform Code of Military Justice).

138. *Cf. Gaubert*, 499 U.S. at 325 (stating that the focus of determining whether an official's discretion involves the type of discretion that the discretionary function exception protects "is not on the agent's subjective intent in exercising the discretion").

139. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2822 (1998) (codified at 8 U.S.C. § 1231 note (2000)) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture."); *see also Torture by Proxy*, *supra* note 12, at 118 (discussing the legality of extraordinary rendition); Jimmy Gurule, *Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad*, 17 HASTINGS INT'L & COMP. L. REV. 457, 470-89 (1994) (same).

140. *See Galvin v. Hay*, 374 F.3d 739, 758 (9th Cir. 2004) (rejecting the government's reliance on the discretionary function clause because the court had already held that officials violated the Constitution, noting "federal officials do not possess discretion to violate constitutional rights" (citation and internal quotation marks omitted)); *Nurse v. United States*, 226 F.3d 996, 1002 n.3 (9th Cir. 2000) ("We hold . . . that the Constitution can limit the discretion of federal officials such that the FTCA's discretionary function exception does not apply."); *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) ("[W]e have not hesitated to conclude that [law enforcement activity] does not fall within the discretionary function of [28 U.S.C.] § 2680(a) when governmental agents exceed the scope of their

D.C. Circuit has held, to the contrary, that the discretionary function clause can shield the United States from FTCA liability for unconstitutional conduct.¹⁴¹ FTCA claims for torture may force a resolution of this important circuit split.¹⁴²

For now, it suffices to emphasize that—counterintuitive as it may be—under current law governing FTCA claims, officials may have discretion to torture suspected terrorists. If so, the question becomes whether it is the kind of discretion that Congress intended the FTCA’s discretionary function clause to protect.

iii. Whether Conduct Involves Protected Discretion

The discretionary function clause does not protect all discretionary conduct; rather, it protects only discretionary decisions that are “susceptible to [public] policy analysis”¹⁴³—meaning decisions that, by their nature, call

authority as designated by statute or the Constitution.”); *see also* U.S. Fid. & Guar. Co. v. United States, 837 F.2d 116, 120 (3d Cir. 1988) (stating, in dicta, that “conduct cannot be discretionary if it violates the Constitution, a statute, or an applicable regulation”); *Pooler v. United States*, 787 F.2d 868, 871 (3d Cir. 1986) (stating, in dicta, that “if the [plaintiff’s] complaints were that agents of the government in the course of an investigation had violated constitutional rights or federal statutes, the outcome would be different since federal officials do not possess discretion to commit such violations”).

141. *See Gray v. Bell*, 712 F.2d 490, 507-16 (D.C. Cir. 1983) (relying on the discretionary function clause to uphold dismissal of FTCA claims by the former FBI Director based upon assertedly unconstitutional conduct by the Attorney General and other federal officials in connection with prosecution of the former FBI Director); *see also Moore v. Valder*, 65 F.3d 189, 196-97 (D.C. Cir. 1995) (relying on *Gray* to hold that the discretionary function clause barred FTCA claims alleging that a federal prosecutor and postal inspectors “pressured witnesses into incriminating [plaintiff], concealed and distorted exculpatory evidence to create a false impression of what he knew about the fraud schemes and withheld material exculpatory information from him after the grand jury returned an indictment,” which was also the basis for plaintiff’s constitutional tort claims against those same officials in their individual capacities).

142. Another unsettled question is whether conduct can be discretionary even if it violates international law. The D.C. Circuit has held that conduct that violates international law can be discretionary. *See Macharia v. United States*, 334 F.3d 61, 63-68 (D.C. Cir. 2003) (relying on the discretionary function clause to dismiss FTCA claims asserting inadequate security at the Kenyan Embassy, which was bombed by al Qaeda, and alleging that the security failures violated international law).

143. *See Gaubert*, 499 U.S. at 325.

for the making of "political, social, and economic judgments."¹⁴⁴ This limitation reflects Congress's intention "to prevent judicial 'second-guessing' of . . . administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."¹⁴⁵ The determination whether a decision involves the kind of discretion that Congress intended to protect is objective.¹⁴⁶ "The focus of the inquiry is not on the [official's] subjective intent in exercising the discretion . . . but on the nature of the actions taken and on whether they are susceptible to policy analysis."¹⁴⁷

The Court's decisions illustrate the type of discretion protected by the discretionary function clause. In one case, the Court interpreted the clause to bar claims based on a federal agency's supervision of an ailing savings and loan institution.¹⁴⁸ The Court determined that the agency acted to protect the institution's depositors and shareholders and to preserve public trust in the savings and loan industry.¹⁴⁹ Thus, the agency's decision was grounded in public and economic policy. In another case, the Court interpreted the clause to bar claims based on the frequency and thoroughness of Federal Aviation Administration ("FAA") inspections of aircraft.¹⁵⁰ The Court determined that the inspection program reflected the FAA's attempt to "accommodate[] the goal of air transportation safety and the reality of finite agency resources."¹⁵¹ In a third case, the Court held that the exception barred claims based on government specifications for manufacturing fertilizer for shipment to Europe as part of the war-recovery plan.¹⁵² The decision to establish the program was grounded in foreign policy, and the challenged details of its implementation reflected considerations of public safety and "practicability."¹⁵³ In all of these cases, the challenged government conduct involved the exercise of discretion that, by its nature, lent itself to consideration of social, economic, or political policy and that, therefore, fell within the discretionary function clause of the FTCA.

144. *United States v. S.A. Empresa de Viacao Rio Grandense (Varig Airlines)*, 467 U.S. 797, 820 (1984).

145. *Id.* at 814.

146. *See Gaubert*, 499 U.S. at 325.

147. *See id.* at 325.

148. *See id.* at 327-34.

149. *See id.* at 331-33.

150. *Varig Airlines*, 467 U.S. at 814-20.

151. *Id.* at 820.

152. *Dalehite v. United States*, 346 U.S. 15, 37-43 (1953).

153. *See id.* at 42.

This precedent strongly suggests that the formulation of the policies that have led to the torture of suspected terrorists involves the kind of discretion that the discretionary function clause protects. The policies are “susceptible to” considerations of public safety, foreign intelligence needs, military strategy, and foreign relations. Specifically, the policies reflect the judgment that traditional interrogation methods sometimes fail to extract from suspected terrorists information that is necessary to protect the public against terrorist attacks and to prosecute the war on international terrorism. The judgments also reflect (or should reflect) consideration of the United States’ obligations under international law and its foreign policy. The resulting interrogation policies may be bad policies, but they are still protected by the discretionary function clause. The exception applies to exercises of discretion that are susceptible to public policy analysis “whether or not the discretion involved be abused.”¹⁵⁴

If U.S. officials did exercise discretionary functions in formulating policies that led to the torture of suspected terrorists, the discretionary function clause will limit the victims of that torture to claims asserting that lower-level officials acted negligently or wrongfully in implementing those policies. The discretionary function clause will bar even those claims if a court determines that implementation decisions are susceptible to public policy considerations. That determination is not far-fetched. For example, the military police guards authorized to use the “fear up harsh” interrogation method at Abu Ghraib have discretion in choosing particular techniques for “[s]ignificantly increasing the fear level in a detainee.”¹⁵⁵ In choosing a technique, a reasonable guard might very well consider factors such as the likelihood that the detainee has information the disclosure of which is necessary to protect human lives and the likely public reaction if details of a highly coercive interrogation become public. If so, the guard herself is exercising a discretionary function and a claim based upon her conduct will therefore be barred by the discretionary function clause.

c. Summary of Analysis Under 28 U.S.C. § 2680(a)

Analysis of our scenarios under the “discretionary function exception” in 28 U.S.C. § 2680(a) raises many important and unresolved issues involving the meaning of each of the two clauses in that provision. The “due care”

154. 28 U.S.C. § 2680(a) (2000).

155. Apr. 16 Memo, *supra* note 7, at 361.

clause may well bar claims arising from the GTMO and Syrian rendition scenarios if the torture in those scenarios entailed the execution of “regulations” by officials using “due care.” Alternatively, the “discretionary function” clause might bar claims arising from the GTMO and Syrian rendition scenarios. This depends on, among other issues, (1) whether the torture in those two scenarios violates any federal statutes or regulations; (2) whether the discretionary function clause applies to conduct that violates the Constitution; and (3) if so, whether the torture in the two scenarios violates the Constitution. Neither the “due care” clause nor the “discretionary function” clause will likely bar FTCA claims arising from the Abu Ghraib scenario, because the officials in that case probably were not executing any statute or regulation; even if they were executing a “regulation,” they arguably did not exercise “due care”; and, assuming their conduct was discretionary, it may not have involved the kind of discretion that the discretionary function exception was designed to protect.¹⁵⁶

4. The Intentional Tort Exception

The intentional tort exception says that, in general, the FTCA does not apply to “[a]ny claim arising out of assault, battery, false imprisonment, [or] false arrest.”¹⁵⁷ This restriction on the FTCA’s scope is qualified, however, by what is called the “law enforcement proviso,” which states: “*Provided, [t]hat, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising . . . out of assault, battery, false imprisonment, [or] false arrest . . .*”¹⁵⁸ The law enforcement proviso creates an exception to the intentional tort exception. In other words, the intentional tort exception does not bar FTCA claims for intentional torts that fall within the law enforcement proviso. For example, the proviso lets

156. As discussed in previous sections, however, FTCA claims arising from the Abu Ghraib scenario will be barred because of the foreign country exception and, in addition, might be barred because the conduct in that scenario was not within the officials’ scope of employment. *See supra* notes 68-73 and accompanying text (explaining that the United States might not be liable under the FTCA for torture by Abu Ghraib guards because the guards might have acted outside the scope of their employment); *see also supra* notes 84-93 and accompanying text (explaining that, even if claims arising from Abu Ghraib scenario are cognizable under the FTCA, those claims will be barred by the FTCA’s foreign country exception).

157. 28 U.S.C. § 2680(h).

158. *Id.*

victims of brutality by federal law enforcement officers sue the United States under the FTCA for money damages payable out of the Treasury without having the claim barred by the intentional torts exception.¹⁵⁹ More generally, the proviso prevents the intentional torts exception from barring claims for the wrongful conduct of law enforcement officials.

Consistent with our earlier assumption,¹⁶⁰ let us assume the torture in our scenarios constitutes “assault” and “battery” within the meaning of the intentional tort exception. On that assumption, analysis of our scenarios proceeds in two steps. First we must determine whether the officials who inflicted the torture are “investigative or law enforcement officers of the United States Government.”¹⁶¹ If not, FTCA claims against the United States based on their commission of assault and battery will be barred by the intentional tort exception. If, on the other hand, the officials who inflicted the torture *are* “investigative or law enforcement officers of the United States Government,”¹⁶² the intentional tort exception will not bar those FTCA claims, because they will fall within the law enforcement proviso. A second question will then arise. The second question is whether a case that falls within the law enforcement proviso—though not barred by the intentional tort exception—can still be barred by other FTCA exceptions, such as the combatant activities exception, the foreign country exception, or the discretionary function exception.

The FTCA defines “investigative or law enforcement officers” to mean “any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of federal law.”¹⁶³ Thus, the United States can use the intentional tort exception to avoid FTCA liability for torture by having it done by people who lack law

159. See *Carlson v. Green*, 446 U.S. 14, 19-20 (1980) (holding that the availability of remedy under the FTCA for deliberate indifference to the medical needs of a federal prisoner did not prevent recovery under *Bivens* for same conduct, and stating that the enactment of law enforcement proviso shows that “Congress views FTCA and *Bivens* as parallel, complementary causes of action”); see also S. REP. NO. 93-588, at 3 (1973) (stating that law enforcement proviso “should be viewed as a counterpart to the *Bivens* case and its progeny [sic], in that it waives the defense of sovereign immunity so as to make the [g]overnment independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual [g]overnment officials involved)”).

160. See *supra* notes 42-44 and accompanying text.

161. 28 U.S.C. § 2680(h).

162. *Id.*

163. *Id.*

enforcement powers. This may not be hard for the United States to do. For instance, some of the military police who tortured Ali in the Abu Ghraib scenario may have lacked law enforcement powers.¹⁶⁴ Furthermore, the CIA officials in the Syrian rendition scenario almost certainly lack law enforcement powers.¹⁶⁵ If these officials are not law enforcement officials, their intentionally tortious conduct toward Ali and Sami cannot trigger FTCA liability because it falls within the intentional tort exception.

Because of the law enforcement proviso, however, the intentional tort exception will not bar an FTCA suit for assault and battery by officials who have law enforcement powers. Suppose, for example, that the interrogators in the GTMO scenario had arrest powers. In that event, the intentional tort exception will not bar an FTCA suit against the United States for their assault and battery of Ghuljaan. The scenario would fall within the law enforcement proviso. A separate question would then arise: Can a case that falls within the law enforcement proviso—and that therefore is not barred by the intentional tort exception—be barred by other FTCA exceptions, such as the combatant activities exception, the foreign country exception, or the discretionary function exceptions?¹⁶⁶

This issue divides the federal courts of appeals as it pertains to the relationship between the law enforcement proviso and the discretionary function exception. The Fifth Circuit has held that claims that fall within the law enforcement proviso cannot be barred by the FTCA's discretionary function exception.¹⁶⁷ The D.C. Circuit and the Fourth Circuit have held, to

164. See 10 U.S.C. § 807(b) (2000) (authorizing “[a]ny person authorized under regulations governing the armed forces to apprehend persons subject to [the Uniform Code of Military Justice] or to trial thereunder [based] upon reasonable belief that an offense has been committed and that the person apprehended committed it”); 32 C.F.R. § 637.10 (2005) (authorizing military police investigators and Army civilian detectives/investigators “to make apprehensions in accordance with Article 7 [of the] Uniform Code of Military Justice”).

165. See 50 U.S.C. § 403-3(d)(1) (2000) (“[T]he [Central Intelligence] Agency shall have no police, subpoena, or law enforcement powers or internal security functions.”).

166. See *supra* notes 74-156 (discussing the combatant activities exception, foreign country exception, and discretionary function exceptions).

167. See *Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987) (holding the FTCA's discretionary function clause does not bar cases within the law enforcement proviso); see also *Wright v. United States*, 719 F.2d 1032, 1035-36 (9th Cir. 1983) (interpreting the FTCA exception for assessment or collection of taxes narrowly in order to prevent it from barring an FTCA action that fell within the law enforcement proviso). *But cf.* *Gasho v. United States*, 39 F.3d 1420, 1434-35 (9th Cir. 1994) (reading *Wright* narrowly and apparently siding with contrary precedent of *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983)).

the contrary, that claims that fall within the law enforcement proviso *can* be barred by the discretionary function exception.¹⁶⁸ The reasoning of the courts on both sides of the issue could extend to exceptions other than the discretionary function exception, such as the foreign country exception and the combatant activities exception.¹⁶⁹

Because this issue concerns the scope of the intentional tort exception, the issue has great importance for FTCA claims for torture, which will invariably “aris[e] out of assault, battery, false imprisonment, [or] false arrest”¹⁷⁰ and therefore implicate the exception. Under the Fifth Circuit’s view, it appears that FTCA claims involving torture by law enforcement officials acting within the scope of their employment can never be defeated by any of the FTCA’s exceptions. Under the contrary view of other circuits, those claims can be defeated by one of the other exceptions, at least three of which—the combatant activities exception, the foreign country exception, and the discretionary function exception—will bar many torture claims under the FTCA.

C. Summary of United States’ Liability Under Current Law

The FTCA is the only statute under which the United States might be held civilly liable for U.S.-sanctioned torture. The word “might” in the previous sentence needs emphasis. In practice, the United States will avoid FTCA liability entirely for most U.S.-sanctioned torture, as becomes clear when the scenarios described in Part I are analyzed under the FTCA. Specifically, FTCA claims arising from the Abu Ghraib scenario will fail because, among other reasons, they arise in a foreign country. FTCA claims arising from the GTMO scenario will fail if they are found to arise in a foreign country or to be based upon the acts or omissions of officials who have exercised due care in executing regulations or upon the exercise of a discretionary function. Some FTCA claims arising from the Syrian rendition scenario will fail because they arise in a foreign country or because they

168. See *Gray*, 712 F.2d at 507-08 (rejecting plaintiff’s argument that the discretionary function clause cannot apply to suits that fall within the law enforcement proviso); see also *Medina v. United States*, 259 F.3d 220, 224-26 (4th Cir. 2001) (siding with *Gray*); cf. *Pooler v. United States*, 787 F.2d 868, 872 (3d Cir. 1986) (reserving this issue).

169. See *Welch v. United States*, 409 F.3d 646, 651-52 (4th Cir. 2005) (relying on *Medina* to hold that due care clause can bar claims that fall within law enforcement proviso), cert. denied, 2006 U.S. LEXIS 1843 (Feb. 27, 2006).

170. 28 U.S.C. § 2680(h) (2000).

involve acts or omissions by people who are not U.S. government employees. Other FTCA claims arising from the Syrian rendition scenario will likely fail because they fall within the “due care” or the “discretionary function” clause of the discretionary function exception or within the intentional tort exception. In short, FTCA claims for U.S.-sanctioned torture face a set of obstacles that collectively will bar most FTCA claims.

D. Adequacy of FTCA Actions for U.S.-Sanctioned Torture

Neither the FTCA in particular nor tort law in general is adequate for the adjudication of claims against the United States for U.S.-sanctioned torture.

1. The Inadequacy of the FTCA as a Vehicle for Remediating U.S.-Sanctioned Torture

Part III.C establishes that the FTCA generally does not provide a remedy against the United States for U.S.-sanctioned torture. This does not reflect a congressional judgment that the United States should not be liable for U.S.-sanctioned torture. Rather, it simply reflects that the FTCA was not designed with torture in mind.

The FTCA—in both its general rule of liability and its exceptions—reflects Congress’s intention to make the United States liable for the “garden-variety” torts of its employees, such as the negligent operation of government vehicles.¹⁷¹ Although Congress regarded government liability for the routine torts of federal employees as generally desirable, Congress created numerous exceptions where, in its estimation, the important governmental interests in avoiding liability outweighed the interest in providing a remedy to the victims of these routine torts.¹⁷² The point is that this weighing was done with garden variety torts in mind, not U.S.-sanctioned torture. It is one thing to say that a governmental interest is strong enough to justify denying relief for an employee’s ordinary, on-the-job negligence. That same governmental interest is not necessarily strong enough to justify denying relief for an employee who tortures another person in the

171. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 707 n.4 (2004).

172. *See Kosak v. United States*, 465 U.S. 848, 858 (1984) (“The three objectives most often mentioned in the legislative history as rationales for the enumerated exceptions are: ensuring that certain governmental activities not be disrupted by the threat of damages suits; avoiding exposure of the United States to liability for excessive or fraudulent claims; and not extending the coverage of the Act to suits for which adequate remedies were already available.” (internal quotation marks omitted)).

reasonable belief that the torture is authorized—indeed mandated—by higher level U.S. officials. In short, applying the FTCA to United States claims for U.S.-sanctioned torture rests on misconceiving such torture as merely another garden-variety tort. The fact that remedies for such torture are seldom available under the FTCA reflects only that Congress did not design the FTCA with torture in mind; it does not necessarily reflect Congress's judgment that remedies for torture are inappropriate.

Congress amended the FTCA in 1974 by adding the law enforcement proviso to the intentional torts exception, which makes the United States liable in some cases of police brutality.¹⁷³ The law enforcement proviso, however, is inadequate to address torture claims comprehensively for two reasons. First, as discussed above, current law does not settle the relationship between the law enforcement proviso and other FTCA exceptions.¹⁷⁴ For example, can an FTCA claim for an FBI agent's assault upon a suspected terrorist be barred if it occurs in a foreign country? It is not the mere existence of a circuit split on this issue that demonstrates the inadequacy of the law enforcement proviso. Rather, the issue reflects the distinct possibility that little congressional thought went into the proviso.¹⁷⁵ The proviso is, after all, just a proviso.¹⁷⁶ It should not bear the weight of grave and complex matters such as claims of torture arising from the war on terrorism.¹⁷⁷

Second, the subject that Congress designed the law enforcement proviso to address—intentional torts by law enforcement officials—differs from the torture of suspected international terrorists in ways that matter under the

173. See 28 U.S.C. § 2680(h); see also *supra* notes 158-59 and accompanying text.

174. See *supra* notes 166-69 and accompanying text.

175. See *Sutton v. United States*, 819 F.2d 1289, 1295-96 (5th Cir. 1987) (explaining that the law enforcement proviso was added as a “non-germane amendment” to legislation in the House of Representatives and accordingly got little attention there but did receive consideration by a senate committee); Jack Boger, Mark Gitenstein & Paul Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. L. REV. 497, 520 (1976) (“Because of a perhaps hasty decision to draft this [law enforcement proviso] . . . several key assumptions of the new amendment’s drafters almost certainly lack foundation.”).

176. See S. REP. NO. 93-588, at 4 (1973) (describing the proviso as “a minimal first step in providing a remedy against the Federal Government for innocent victims of Federal law enforcement abuses”); see also Boger, Gitenstein & Verkuil, *supra* note 175, at 516 (“[T]he narrow parameters of [the law enforcement proviso] . . . meant that the drafters did not direct attention to the peculiar idiosyncrasies of the Federal Tort Claims Act.”).

177. See *Sutton*, 819 F.2d at 1295 n.11 (explaining that “[t]he primary motivation” for the proviso was two “no-knock” raids by federal and state narcotics agents on houses of innocent people).

FTCA and that would matter to Congress today. In isolation, the law enforcement proviso seems to authorize FTCA claims based on intentional torts by law enforcement officials. Other FTCA provisions, however, bar claims arising from certain combatant activities and claims arising in foreign countries.¹⁷⁸ Those provisions at the very least raise the question whether official conduct committed in the international war on terrorism should be treated like ordinary federal law enforcement conduct. The question becomes all the more pressing in light of post-9/11 legislation that treats the United States' response to international terrorism more like a war than a law-enforcement problem.¹⁷⁹

2. The Inadequacy of Tort Law as a Remedy for Torture

The inability of the FTCA to handle torture claims does not reflect any fault in the statute or shortsightedness by the FTCA's drafters. Rather, U.S.-sanctioned torture differs fundamentally from a "garden-variety" tort for which the FTCA was designed. We can identify at least four differences.

The first difference concerns the locus of fault and whether it is episodic or recurring. Traditional types of torts, such as intentional torts, are typically episodic wrongs committed by one private individual against another private individual. Accordingly, traditional tort law rests on a highly atomistic concept of fault and injury. It bases liability on a particularized determination that an identified defendant breached his or her duty to an identified plaintiff and proximately caused specified injuries. This atomistic conception does not fit official torture, which is typically systematic and systemic. Furthermore, torts do not by their nature arise from an imbalance in power. Official torture, in contrast, is made possible by laws empowering the government lawfully to detain people, employing officials (guards, etc.) whose conduct toward detainees would be unlawful if it occurred outside that setting. Although no governments expressly sanction torture, a bureaucratic culture can spawn torture through action and inaction by many difficult-to-identify people over a long period of time.¹⁸⁰ If torture is treated as a tort, it

178. See 28 U.S.C. § 2680(j)-(k).

179. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

180. See Susan Bandes, *The Negative Constitution: A Critique*, 88 U. MICH. J.L. REFORM 2271, 2323 (1990) ("[G]overnmental choices, however harmful, are more often made by the interaction of several people acting in good faith than by a single malevolent person . . ."); see also Jane Mayer, *A Deadly Interrogation*, NEW YORKER, Nov. 14, 2005, at 47 (quoting the former general counsel of the CIA as stating that the Abu Ghraib abuse "has its

seems reasonable to impose liability on the individual torturer. If torture is instead treated as an institutional failure, it makes more sense to impose liability on the enterprise.

The second difference between tort and torture concerns the scope and nature of the harm. Because official torture often occurs as an extension (or perversion) of law-enforcement activities, it can in practice become indistinguishable from other legitimate forms of governance.¹⁸¹ For that reason, torture, unlike ordinary torts, spreads its harm beyond the individual torturer and torture victim to the society that employs the torturer and to those who share the characteristic or engage in the same conduct that leads the victim to be targeted for torture. This difference implies that tort law is inadequate not only in its focus on identifying individual tortfeasors to bear liability but also in treating the tortfeasor's duty as running only to a single, identified defendant. More fundamentally, tort law treats the occurrence of torts as inevitable albeit unfortunate—"Torts happen"—and as events that ordinarily necessitate no punishment, only a compensatory wealth transfer. Torture should not be treated as routine or as an act that can be adequately remedied by a compensatory monetary payment.¹⁸²

The third difference between tort and torture concerns the source and nature of the respective legal restrictions on them. Tort law is predominantly local and judge-made.¹⁸³ In contrast, the laws on torture are both universal

roots at the top"); Jane Mayer, *The Memo*, NEW YORKER, Feb. 27, 2006, at 32, 33 (describing a memorandum by Alberto J. Mora, then-General Counsel of the Navy, showing that "almost from the start of the Administration's war on terror the White House, the Justice Department, and the Department of Defense, intent upon having greater flexibility, charted a legally questionable course" in dealing with treatment of those detained in the war on terror).

181. See ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 56-59 (1985) (explaining that torture is designed to translate or transform individual human suffering into "an emblem of the regime's strength").

182. See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1718-38 (2005) (arguing that prohibition on torture is "archetypal"); cf. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392-93 (1971) (contrasting remedies for Fourth Amendment violations from remedies for state torts); *Monroe v. Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring) ("[D]eprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.").

183. See Ronald W. Eades, *Attempts to Federalize and Codify Tort Law*, 36 TORT & INS. L.J. 1, 2 & n.9 (2000) (praising the "ability of tort law to grow and change with the times" and tracing this ability to "two important factors: tort law is court-created common law, and tort law is local law.").

and uniform in the sense that virtually all countries prohibit torture rather than regulating it. Furthermore, these laws are not predominantly judicially created. They are legislative and administrative, befitting the need to prevent torture—as distinguished from “remedying” it after it occurs—through broadly applicable rules—as distinguished from adjudicatory pronouncements—that are implemented by regulations, policy guidance, and training throughout large bureaucracies—as distinguished from the after-the-fact execution of monetary judgments against individuals found responsible for torture. Using tort law to remedy torture is like using nuisance law to handle the generation and disposal of hazardous wastes. In each situation, the problem is simply much bigger and badder than the problems for which the law was designed.¹⁸⁴

E. A Proposed Reform of the Law on Torture Claims Against the United States

For the reasons discussed in Part III.D, the law governing torture claims against the United States should be tied to something other than the local tort law for “a private person.”¹⁸⁵ Torture should be treated for what it is: a civil rights and a human rights violation. Specifically, I propose that the United States should be liable for torture at least under the same circumstances that local governments (e.g., cities and counties) would be under the civil rights statute, 42 U.S.C. § 1983. Section 1983 states, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

184. Congress recognized the international character of the prohibition on torture when it created a civil remedy against certain foreign sovereigns whose officials engage in torture. 28 U.S.C. § 1605(a)(7) (2000). The provision, added in 1996, waived foreign sovereign immunity from certain torture claims. *See* 142 CONG. REC. S3463-64 (daily ed. Apr. 17, 1996) (statement of Rep. Brown) (stating, in regard to a proposed bill that would waive foreign sovereign immunity for claims of torture against officials of countries designated as state sponsors of terrorism: “The international community . . . does not recognize the right of any state to commit acts of torture, extrajudicial killing, aircraft sabotage, or hostage taking. Sovereign immunity is an act of trust among nations of good faith. When a terrorist state harbors or supports known terrorists, or injures or kills American citizens, it destroys that trust and should not be allowed to avoid the accusations of those it harms.”).

185. 28 U.S.C. § 1346(b)(1) (2000).

immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress¹⁸⁶

I propose a federal statute that could take one of two forms. The broader form would be identical to § 1983 except that it would apply to persons acting under color of *federal* law, rather than *state* (or territorial or D.C.) law.¹⁸⁷ A narrower version would create a cause of action against any person acting under color of federal law who “subjects, or causes to be subjected,” another person to “torture,” a term that would be defined—either in the same statute or by reference to one of the existing statutory definitions of the term.¹⁸⁸

To understand these proposals for a federal analogue to § 1983 requires an understanding of how § 1983 applies to units of local government. To begin with, I propose that the United States’ liability be tied to that of local governments, rather than states, under § 1983 because states cannot be held liable under § 1983; the U.S. Supreme Court has held that states are not “persons” within the meaning of the statute.¹⁸⁹ I believe that the United States should be civilly liable for at least some torture inflicted by people acting under color of federal law. That belief rests on the view, expressed above, that torture typically results from systemic problems; it is seldom the sole result of “a few bad apples.”¹⁹⁰ It is therefore fair for the system to bear responsibility for the torture. Awards of money judgments in civil actions are

186. 42 U.S.C. § 1983 (2000).

187. In its broad form, my proposed legislation would state:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of the United States, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In its narrower form, my proposed legislation would be identical to the broad form except to substitute the word “torture” for the phrase “the deprivation of any rights, privileges, or immunities secured by the constitution and laws.” Cf. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1512-19 (1987) (arguing that states should enact “converse-1983” statutes exposing federal agents to civil liability for constitutional violations).

188. See TVPA, Pub. L. No. 102-256, § 3(b), 106 Stat. 73, 73 (1992) (codified at 28 U.S.C. § 1350 note (2000)).

189. See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989).

190. See *supra* note 180 and accompanying text.

an appropriate way to hold the government responsible for torture. They compensate torture victims (to the extent their injuries are compensable). They symbolically represent the United States' acknowledgment of responsibility, as determined by an independent judiciary. And, the threat of civil liability may encourage the government to adopt measures to prevent torture by its officials.¹⁹¹

A federal analog of § 1983 could be used to hold the United States liable for torture by those acting on its behalf even though no federal law or official policy expressly condones torture. As the Supreme Court has interpreted § 1983, a local government can be held liable for violation of federal rights if it has an unwritten "custom" or "policy" that causes the violation.¹⁹² The victim of the violation can establish a causal link between the custom or policy and the harm by showing that those responsible for the custom or policy were "deliberately indifferent" to the risk that the custom or policy would lead to the violation.¹⁹³ This principle has obvious potential application to the torture that has occurred at places such as Abu Ghraib. There is a strong argument that those who made the policy expressed in the torture memorandum and subsidiary policies (concerning, for example, the training and assignment of those who guarded detainees) were deliberately indifferent to the risk that those policies would lead to the torture of detainees.¹⁹⁴

More generally, tying U.S. liability for U.S.-sanctioned torture to a statute modeled on § 1983, as it applies to local governments, would improve current law in three ways. First, even under the current, fairly restrictive interpretation of § 1983, a federal analog would make the United States itself liable for at least some of the torture committed on its behalf. Second, a federal analog of § 1983 would shift the standard of liability away from private tort law—which for reasons discussed above is inadequate—to one based on violation of rights arising from the U.S. Constitution and federal statutes (and perhaps federal regulations, as well). There already exist many federal constitutional doctrines and federal statutes limiting the inhumane

191. See *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from . . . depriv[ing] individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.").

192. See *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 403 (1997).

193. See *id.* at 407.

194. Cf. *City of Canton v. Harris*, 489 U.S. 378, 392 (1989) (holding that municipality could be liable under § 1983 for its failure to train its police officers). The torture memo is discussed *supra* note 137.

treatment of detainees.¹⁹⁵ The statutes and regulations can provide a particularly useful standard for assessing civil liability. After all, many of the statutes and regulations will be more specific than the constitutional provisions bearing on torture (e.g., “cruel and unusual punishment”), and federal officials can reasonably be expected to know them. Third, a federal analog to § 1983 would give courts remedial powers that they do not have in tort actions. Section 1983 authorizes not only “action[s] at law,” but also “suit[s] in equity or other proper proceeding[s] for redress.”¹⁹⁶ Section 1983 thus empowers courts to grant injunctive and other equitable relief in appropriate cases.¹⁹⁷ By allowing the courts to do more than grant money damages, § 1983 can help prevent a situation in which the government could freely engage in torture as long as it was willing to pay after the fact.

In proposing a federal analog of § 1983 to deal with U.S.-sanctioned torture, I accept the case law that—severely and unjustifiably, according to many commentators—limits its utility in remedying civil rights violations by local government.¹⁹⁸ That is not because I agree with all of that case law, but

195. See *supra* note 137.

196. 42 U.S.C. § 1983 (2000).

197. See, e.g., *Mitchum v. Foster*, 407 U.S. 225, 242-43 (1972) (holding that federal courts can grant injunctive relief under § 1983, notwithstanding the Anti-Injunction Act, 28 U.S.C. § 2283 (2000), because § 1983 falls within the Act’s exception authorizing injunctions against state court proceedings if “expressly authorized by Act of Congress”); see also *Moor v. Alameda County*, 411 U.S. 693, 723 (1979) (Douglas, J., dissenting) (stating that even under precedent, later overruled, which held that municipalities are not “persons” within meaning of § 1983, “[c]ertainly a residuum of power seems available in § 1983 to enjoin such bizarre conduct as the offering to the police of classes in torture”).

198. Indeed, one significant strand of criticism faults the Court for relying too heavily on tort law in construing § 1983. See Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1720 (1989) (arguing that “the Court, by using tort rhetoric, is attempting to marginalize § 1983 and to make it less protective of [F]ourteenth [A]mendment rights”); see also David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2196-228 (2005) (arguing that current doctrines of municipal liability under § 1983 rest on a misunderstanding of the common law background against which § 1983 was enacted); Susan Bandes, *Not Enough Blame to Go Around: Reflections on Requiring Purposeful Government Conduct*, 68 BROOK. L. REV. 1195, 1209 (2003) (stating that “[m]unicipal liability jurisprudence [under § 1983] relies on . . . misleading models . . . [such as] tort models that erase the difference between private wrongs and constitutional harm”); Mark R. Brown, *The Failure of Fault Under § 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503, 1506 (1999) (broadly criticizing fault-based regimes for assessing state and local governmental liability for constitutional wrongs); Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987

because I seek a proposal that treats the federal government comparably to local government and that, based on the principle of comparable treatment, may be politically feasible. The principle of equal treatment strongly argues in favor of holding the United States liable for torture under the same circumstances that a city or a county can be held liable for police brutality. Most people know that police brutality can, in some instances, amount to torture, and many would agree that, at least in some circumstances, the government that employs the offending officer(s) should be held responsible. It is hard to argue, even in this post-9/11 world, that the United States should escape liability in similar circumstances. For that reason, I believe that a federal analog to § 1983, at least one limited to violations of a federally defined right to be free of torture, would be politically feasible and would represent a significant improvement in existing law.

My proposal to create civil remedies against the United States for U.S.-sanctioned torture comparable to remedies against local government for police brutality leaves many hard questions. The hard questions arise under § 1983 as currently interpreted.¹⁹⁹ The main idea behind the proposal is to provide an example of a way that the law applicable to torture claims can take a more useful direction than the current law. Under the current regime, remedies for torture are almost nonexistent because it was designed with mere torts, not torture, in mind.

IV. TORTURE CLAIMS AGAINST U.S. OFFICIALS

As discussed in Part III, sovereign immunity will bar nearly all civil claims against the United States for U.S.-sanctioned torture.²⁰⁰ Sovereign immunity does not, however, bar claims for money damages against the U.S.

SUP. CT. REV. 249, 300 (concluding that “[t]he rules presently governing the imposition of municipal liability in constitutional tort cases are hopelessly flawed”); Symposium, *Section 1983 Municipal Liability in Civil Rights Litigation*, 48 DEPAUL L. REV. 619 (1999); Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 661 (1997) (arguing that “torts is a distraction” in constructing a useful model for constitutional litigation); cf. Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983’s Asymmetry*, 140 U. PA. L. REV. 755, 760 (1992) (“We suggest borrowing from contemporary tort law to flesh out . . . [§ 1983]’s most basic standard of liability and defense.”).

199. Perhaps the most important and difficult of those questions is whether the Court has properly rejected local government liability based on respondeat superior. See FALLON ET AL., *supra* note 14, at 1090-91.

200. See *supra* Part III.

officials who commit torture in our scenarios.²⁰¹ Rather, plaintiffs suing officials face two other challenges: stating a cause of action and overcoming the defense of official immunity.²⁰² This Part discusses three possible sources for a cause of action for torture victims: the Alien Tort Statute, non-federal tort law, and constitutional tort claims under the *Bivens* doctrine. Discussion of those potential sources for a cause of action focuses on the torture scenarios described in Part I. As that focus illustrates, torture victims generally will be able to assert viable causes of action, if at all, only under the *Bivens* doctrine. Furthermore, most *Bivens* claims by torture victims will fail because of limitations on constitutional rights or limits on the scope of the *Bivens* remedy. The upshot is that there is only a small residue of situations in which an official who committed torture can be held personally liable: namely, low-level rogue officials who will often be judgment-proof. This Part assesses the adequacy of current law governing the liability of U.S. officials who torture suspected terrorists and suggests improvements.

A. *The Alien Tort Statute*

Two of the torture victims in our scenarios are not U.S. citizens: Ghuljaan and Sami, the victims in the GTMO and Syrian rendition scenarios. As aliens, they might consider suing the responsible officials under the Alien Tort Statute (“ATS”). The ATS authorizes aliens to bring tort suits in federal court for certain violations of international law, stating: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁰³

The Supreme Court recently construed the ATS in *Sosa v. Alvarez-Machain*.²⁰⁴ The Court held that the ATS authorizes federal courts to adjudicate tort claims for some violations of universally accepted and clearly defined principles of international law.²⁰⁵ The Court named torture as an example of such a violation.²⁰⁶ The Court’s decision in *Alvarez-Machain*

201. See *supra* notes 24-26 and accompanying text; see also *infra* Part IV.A.1 (discussing whether officials have sovereign immunity from suits under the Alien Tort Statute).

202. See *supra* notes 27-33 and accompanying text.

203. 28 U.S.C. § 1350 (2000).

204. 542 U.S. 692 (2004); see also *supra* notes 85-91 and accompanying text.

205. *Id.* at 732.

206. *Id.* at 728 (citing the TVPA as providing a “clear mandate” to federal courts from Congress to adjudicate claims of torture); *id.* at 732 (citing with apparent approval the holding

means that the ATS may support some claims for U.S.-sanctioned torture.²⁰⁷ However, ATS claims cannot be asserted against the United States or against U.S. officials for conduct within the scope of their employment. Those claims will fail because of a combination of sovereign immunity and the exclusivity provision of the FTCA. To the extent that the ATS gives aliens a monetary cause of action for U.S.-sanctioned torture, it does so only for claims against officials for conduct outside the scope of their employment and for claims against defendants other than the United States or its officials.

1. Sovereign Immunity as a Bar to ATS Claims

To begin with, aliens cannot use the ATS to assert torture claims directly against the United States. The ATS does not waive the sovereign immunity of the United States.²⁰⁸

in *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980), that prohibition on torture was a sufficiently universal and clearly defined norm of international law to be recognized as a cause of action under the ATS); *id.* at 738 n.29 (citing with apparent approval *Filártiga*'s description of prohibition of torture as a "norm of international law"); *id.* at 762 (Breyer, J., concurring in part and concurring in judgment) (including torture in a "subset" of behavior that is "universally condemned" by international law and that "universal jurisdiction exists to prosecute").

207. The plaintiff in *Alvarez-Machain* initially asserted a claim of torture, but he dropped that claim by the time his case reached the Supreme Court. *Id.* at 699 (majority opinion). In the Supreme Court, he alleged only that United States and Mexican officials violated international law by abducting him from Mexico and bringing him to the United States for federal prosecution. Petition for Writ of Certiorari at 3, *United States v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-458) (noting the decision of the district court to reject as not credible plaintiff's allegations of torture). The Court held that his allegation of abduction did not state a claim under the ATS because it did not establish a violation of a clearly defined norm of international law. *Alvarez-Machain*, 542 U.S. 733-34. The Court's discussion of torture was therefore arguably dicta. Its status as dicta is important because it leaves open a plausible argument that the ATS does not, after all, provide a broad cause of action for torture claims. In fact, the Seventh Circuit recently held that the later-enacted TVPA partially supersedes the ATS. *See Enahoro v. Abubakar*, 408 F.3d 877, 886 (7th Cir. 2005) (holding that plaintiffs could not pursue torture claims under the ATS and requiring them instead to pursue such claims under the TVPA).

208. *See, e.g., Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 887 (D.C. Cir. 1992) (dismissing on sovereign immunity grounds ATS claims against the United States asserted by Panamanian businesses based on the failure of the United States to prevent property damage caused by rioting and looting after its invasion of Panama); *Goldstar (Panama), S.A. v. United States*, 967 F.2d 965, 967-69 (4th Cir. 1992) (same); *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1091-92 (D.C. Cir. 1980) (dismissing on

The D.C. Circuit has held that sovereign immunity bars not only ATS claims against the United States, but also ATS claims against U.S. officials. The D.C. Circuit held in *Sanchez-Espinoza v. Reagan* that sovereign immunity barred ATS claims against U.S. officials who had armed the Nicaraguan Contras.²⁰⁹ Then-Judge Scalia wrote the opinion for the court dismissing the claims on sovereign immunity grounds. The court construed the ATS to allow suits against U.S. officials only “in their official, as opposed to their personal, capacities—*i.e.*, to the extent that [plaintiffs] are seeking to hold them to account for, or to prevent them from implementing in the future, *actions of the United States.*”²¹⁰ The court concluded that official capacity suits under the ATS must be barred by sovereign immunity, even though they are brought against officials, rather than against the United States.²¹¹ In the court’s view, “[i]t would make a mockery of the doctrine of sovereign immunity if federal courts were authorized to sanction or enjoin, by judgments nominally against present or former Executive officers, actions that are, concededly and as a jurisdictional necessity, official actions of the United States.”²¹² The D.C. Circuit’s view, in sum, was that the ATS allows suits against U.S. officials only in their official capacities and that official capacity suits are invariably barred by sovereign immunity. On this view, the ATS is useless for suing U.S. officials.

Sanchez-Espinoza may no longer be good law in its definition of official capacity suits. In the later case of *Hafer v. Melo*, the U.S. Supreme Court held that sovereign immunity does not bar a suit against an official for official conduct when the suit seeks money damages out of the official’s own pocket.²¹³ The Court explained that, when a suit seeks to hold an official personally liable in money damages, the suit is brought against the official in the official’s “personal capacity,” even if the suit is based on official conduct.²¹⁴ Sovereign immunity does not bar these personal capacity suits; it bars only “official capacity” suits, in which the plaintiff seeks money from

sovereign immunity grounds an ATS claim for the Coast Guard’s refusal to allow a vessel with a Polish master and officers to enter the port of Norfolk, Virginia).

209. 770 F.2d 202, 204, 207 (D.C. Cir. 1985).

210. *Id.* at 207.

211. *Id.*

212. *Id.* (emphasis omitted).

213. 502 U.S. 21, 25-27 (1991).

214. *Id.* at 25 (“Personal-capacity suits . . . seek to impose individual liability upon a government officer for actions taken under color of state law.”).

government coffers or equitable relief affecting government operations.²¹⁵ Although *Hafer* concerns the applicability of sovereign immunity to suits against state officials, its reasoning probably applies to cases that, like *Sanchez-Espinoza*, involve the applicability of the sovereign immunity to suits against federal officials.²¹⁶ If so, the plaintiffs in *Sanchez-Espinoza* were bringing individual capacity claims under the ATS to the extent that they sought damages out of the defendant officials' own pockets.²¹⁷ Under *Hafer*, sovereign immunity did not bar those claims, and *Sanchez-Espinoza* was therefore wrongly decided.²¹⁸

In light of *Hafer v. Melo* and notwithstanding *Sanchez-Espinoza*, sovereign immunity probably will not prevent the alien torture victims in our

215. *Id.* at 27; see *Land v. Dollar*, 330 U.S. 731, 738 (1947) (stating that a suit "is one against the sovereign" when the judgment sought "would expend itself on the public treasury or domain, or interfere with the public administration").

216. The Court often applies precedent involving the immunities of states and their officials to cases involving the immunities of the United States and its officials, and vice versa. See, e.g., *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 451 (2004) (relying on a case involving the sovereign immunity of the United States, *The Davis*, 77 U.S. (10 Wall.) 15 (1869), in a case involving state sovereign immunity); *Alden v. Maine*, 527 U.S. 706, 749-50 (1999) (relying on the immunity of the United States from private civil actions in federal courts to justify holding that states are immune from private civil action in their respective state courts); *Butz v. Economou*, 438 U.S. 478, 500 (1978) (stating that, "in the absence of congressional direction to the contrary," federal officials should have no greater immunity from liability for constitutional torts than state officials have); see also Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 173-74 & n.91 (1998) (providing additional cases); Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1090 & n.115 (2001).

217. See *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 205 & n.1, 207 (D.C. Cir. 1985) (stating that plaintiffs sued most of the official defendants in both their individual and their official capacities, but treating all monetary claims under the ATS as "official capacity" claims).

218. See *Jama v. INS*, 22 F. Supp. 2d 353, 365 (D.N.J. 1998) (citing *Hafer*, and rejecting defendants' reliance on *Sanchez-Espinoza* in holding that sovereign immunity did not bar ATS claims against Immigration and Naturalization Service officials in their individual capacity), *aff'd sub nom.* *DaSilva v. Esmor Corr. Servs., Inc.*, Nos. 03-3095, 03-4435, 03-3096, 03-3348, 05-4007, 2006 U.S. App. LEXIS 2182 (3d Cir. Jan. 27, 2006); cf. *Al Odah v. United States*, 321 F.3d 1134, 1149 (D.C. Cir. 2003) (Randolph, J., concurring) (citing *Sanchez-Espinoza*, among other cases, to support the conclusion that sovereign immunity barred non-monetary claims brought under the ATS by Guantánamo detainees against the United States and U.S. officials), *rev'd sub nom.* *Rasul v. Bush*, 542 U.S. 466 (2004).

scenarios, Ghuljaan and Sami, from suing U.S. officials under the ATS seeking money damages out of those officials' pockets. Another possible obstacle confronts them, however: the exclusivity provision of the FTCA.

2. The FTCA's Exclusivity Provision as a Bar to ATS Claims

The FTCA generally authorizes people to sue the United States for money damages arising from the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his [or her] office or employment."²¹⁹ In addition to creating this remedy against the United States, however, the FTCA generally bars remedies against individual government employees for the same conduct. The FTCA states as a general rule:

The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his [or her] office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee.²²⁰

This provision creates a general rule under which, if it is possible for a person to sue the United States under the FTCA for a federal employee's misconduct, that person cannot sue the employee for that same misconduct; claims against the employee are generally excluded. This general rule of exclusivity is subject to two exceptions. It "does not extend or apply" to "a civil action against an employee of the Government—(A) which is brought for a violation of the Constitution of the United States; or (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized."²²¹ These exceptions preserve suits against government employees for constitutional violations and certain statutory violations.

The FTCA's exclusivity provision requires a two-step analysis of any claim against a federal employee or other person acting under color of

219. 28 U.S.C. § 1346(b)(1) (2000); *see also id.* §§ 2672, 2679(b)(1).

220. *Id.* § 2679(b)(1).

221. *Id.* § 2679(b)(2).

federal law. The first step asks whether the claim falls within the general rule of exclusivity. If not, then the claim is not barred by that rule. On the other hand, if a claim does fall within the general rule of exclusivity, then the claim will be barred unless a court determines, at the second step, that the claim is preserved by either the constitutional or statutory exception to the general rule of exclusivity. These two steps become clearer when they are applied to the claims of Ghuljaan and Sami, the two alien plaintiffs in our scenarios.

Both Ghuljaan's claim against the GTMO interrogators and Sami's claims against the CIA officials who arrange his rendition to Syria fall within the FTCA's general rule of exclusivity. The FTCA's exclusivity provision generally bars a claim for (1) a negligent or wrongful act or omission; (2) by a government employee; (3) acting "within the scope of [the employee's] office or employment."²²² We have assumed that the official conduct in all of the scenarios is "wrongful."²²³ All of the U.S. officials are government employees.²²⁴ Finally, the GTMO interrogators and the CIA officials acted within the scope of their employment when they tortured Ghuljaan and arranged for Sami's extradition.²²⁵ Thus, the FTCA's general rule of exclusivity will bar Ghuljaan's and Sami's ATS claims against the U.S. officials unless the claims fall within one or both of the exceptions to the general rule of exclusivity.

The ATS claims do not fall within either exception. The ATS authorizes suits "for a tort only, committed in violation of the law of nations or a treaty of the United States."²²⁶ Thus, ATS suits are for violations of international law or U.S. treaties, not for violations of the Constitution. They therefore do not fall within the exception for an action "brought for a violation of the Constitution of the United States."²²⁷ Nor is an ATS claim "brought for a violation of a statute of the United States."²²⁸ Although the ATS is a statute, an ATS claim does not assert any violation of that or any other federal statute; instead, an ATS claim must assert a violation of international law or a treaty.²²⁹ Because the ATS does not itself independently proscribe any

222. *Id.* § 2679(b)(1).

223. *See supra* notes 42-43 and accompanying text.

224. *See supra* Part III.A.1.

225. *See supra* Part III.A.2.

226. 28 U.S.C. § 1350 (2000).

227. 28 U.S.C. § 2679(b)(2)(A).

228. *Id.* § 2679(b)(2)(B).

229. *See id.* § 1350.

conduct, courts have held that ATS actions do not fall within the exception for statutory violations.²³⁰ Since Ghuljaan's and Sami's ATS claims do not fall within either exception, they are barred by the FTCA's general rule of exclusivity.²³¹

Although their ATS claims against U.S. officials are barred, Ghuljaan and Sami can state a cause of action for their torture against the United States under the FTCA. After all, their injuries stem from the

wrongful act . . . of . . . employee[s] of the Government while acting within the scope of [their] office or employment, under circumstances where[, Ghuljaan and Sami would claim,] the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.²³²

It might therefore seem like the FTCA's rule of exclusivity just forces a tradeoff: although it prevents a torture victim from suing the individual officer under the ATS, the victim can sue the United States under the FTCA. But the tradeoff is largely illusory. Most torture victims who can state claims

230. See *Alvarez-Machain v. United States*, 331 F.3d 604, 631-32 (9th Cir. 2003) (en banc) (adopting the vacated panel's decision that exception to the FTCA's exclusivity provision for certain statutory violations did not apply to the ATS claim), *rev'd on other grounds sub nom.* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Jama v. INS*, 343 F. Supp. 2d 338, 355 (D.N.J. 2004) (holding that ATS suits do not fall within the exception to the FTCA exclusivity provision for suits alleging statutory violations), *aff'd sub nom.* *DaSilva v. Esmor Corr. Servs., Inc.*, Nos. 03-3095, 03-4435, 03-3096, 03-3348, 05-4007, 2006 U.S. App. LEXIS 2182 (3d Cir. Jan. 27, 2006); *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 266-67 (D.D.C. 2004) (same); see also *Adras v. Nelson*, 917 F.2d 1552, 1553, 1557 & n.4 (11th Cir. 1990) (citing the FTCA's exclusivity provision in a case in which aliens originally asserted ATS claims but later conceded that their claims against federal officials were based solely on the FTCA and the doctrine of *Bivens*).

231. A report on the extraordinary rendition of suspected terrorists states that U.S. officials involved in extraordinary rendition might be liable under the ATS. See *Torture by Proxy*, *supra* note 12, at 120-21 (referring to the ATS as the "Alien Tort Claims Act" or "ATCA"). The report fails to recognize that ATS claims are barred by the FTCA's exclusivity provision, as does a recent essay and a comment on ATS claims against the United States and its officials. See generally Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 105 (2005) (discussing ATS claims arising from U.S. detentions in the war against terrorism without mentioning the FTCA's exclusivity provision); Borrowman, *supra* note 12, at 374, 399-400 (arguing that the ATS "should provide a remedy against the individual soldiers . . . who participated in the abuse" at Abu Ghraib).

232. 28 U.S.C. § 1346(b)(1).

cognizable under the FTCA will be barred from recovering by one of the FTCA's exceptions. In particular, Ghuljaan's FTCA claims will be barred by the foreign country exception; Sami's may be barred in part by the foreign country exception and in part by the discretionary-function or intentional tort exception. This illustrates a cruel feature of the FTCA's exclusivity provision: it bars a claim against a federal employee even when an FTCA action against the United States for the same conduct is barred by one of the FTCA's exceptions, such as the intentional torts exception or the foreign country exceptions.²³³ In other words, the FTCA generally provides the exclusive remedy for official misconduct even when it provides no remedy at all! As a result, Sami and Ali will not be able to sue the officers responsible for their torture under the ATS or the United States under the FTCA.

3. Summary

Sovereign immunity combines with the FTCA's exclusivity provision to bar ATS claims for money damages against the United States and its officials for torture inflicted within the scope of their employment. To the extent that the ATS gives aliens a monetary cause of action for torture, it does so only for claims against (1) federal employees who, in inflicting torture, act outside the scope of their employment or (2) others who inflict torture with U.S. connivance, but not as employees of the U.S. government.²³⁴

B. Non-Federal Tort Claims

So far, discussion has assumed that the suits arising from our scenarios will be brought in federal court and assert federal causes of action. Now we examine that assumption. Suppose, for example, that one of the guards who tortured Ali at Abu Ghraib prison returns to her home in West Virginia and that Ali tracks her down there. Further suppose Ali sues the former guard in a West Virginia state court, asserting common law tort claims. This action may

233. See *Smith v. United States*, 499 U.S. 160, 165-75 (1991) (holding that the FTCA's exclusivity provision barred a medical malpractice claim against a military doctor even though an FTCA claim against the United States for the doctor's malpractice was barred by the FTCA's foreign country exception).

234. The plaintiff in *Alvarez-Machain* relied on the ATS to sue a Mexican who participated with U.S. officials in the plaintiff's abduction from Mexico. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004). The Court held that, although the ATS authorizes federal courts to hear civil actions for some violations of international law, the plaintiff in that case did not state a cause of action cognizable under the ATS. See *id.* at 730-38.

raise difficult choice of law questions, such as whether the suit is governed by West Virginia's tort law, Iraq's tort law, or that of some other jurisdiction.²³⁵ But assuming that choice can be made, what, if anything, would bar a non-federal tort claim? The answer is that most, but not all, non-federal tort claims will be precluded by the FTCA's exclusivity provision, the same provision that bars most ATS claims against U.S. officials.²³⁶

The FTCA generally provides the exclusive remedy "for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his [or her] office or employment."²³⁷ The only exceptions to this general rule of exclusivity are for claims against the employee based on violations of the U.S. Constitution and certain statutory violations. All other claims against a federal employee for wrongful acts committed within the scope of his or her employment, including claims based on state or foreign tort law, are excluded.²³⁸

The FTCA does not bar non-federal tort claims that are *not* cognizable under the FTCA. For example, to be cognizable under the FTCA, a claim must be based on conduct of a government employee acting within the scope of his or her employment.²³⁹ Thus, the FTCA does not bar claims against a federal employee for conduct *outside* the scope of his or her employment.²⁴⁰

235. See generally Steven C. Welsh, *Iraq Transition, Interim Constitution, and Human Rights: Legal Standards Governing Treatment of Iraqi Detainees by Iraqi Security Forces During U.S. Occupation*, CENTER FOR DEF. INFO., Jan. 31, 2005, <http://www.cdi.org/news/law/iraq-law-detainees.cfm> (discussing law governing the treatment of detainees in Iraq).

236. See *supra* notes 219-33 and accompanying text.

237. 28 U.S.C. § 2679(b)(1).

238. See, e.g., *Salmon v. Schwarz*, 948 F.2d 1131, 1141 (10th Cir. 1991) (holding that the FTCA precluded state tort claims against FBI agents); *Willis v. Skaff*, 414 S.E.2d 450, 452 (W. Va. 1992) (holding that the FTCA preempted a state-court suit under state law by a National Guard member for injuries suffered when he was struck by a National Guard vehicle); cf. *Matsushita Elec. Co. v. Zeigler*, 158 F.3d 1167, 1169-70 (11th Cir. 1998) (holding that the FTCA's exclusivity provision eliminated a federal common law negligence claim against a customs inspector who damaged equipment during an inspection).

239. See *supra* note 36 and accompanying text.

240. See *Brennan v. Fatata*, 359 N.Y.S.2d 91, 92 (1974) ("It is implicit [in the FTCA] that . . . if the Attorney General does not certify [that the defendants' challenged conduct was] in the scope of federal employment, the state action continues against the defendants personally."); H.R. REP. NO. 100-700, at 6 (1988), reprinted in 1988 U.S.C.C.A.N. 5945, 5950 ("The 'exclusive remedy' provision [enacted as 28 U.S.C. § 2679(b)] is intended to substitute the United States as the solely permissible defendant in all common law tort actions against

Therefore, the Abu Ghraib guard who returns to West Virginia can be sued in a state court there on non-federal tort grounds if, as may be the case, she was acting outside the scope of employment when she tortured Ali.²⁴¹ In that event, the guard's conduct is not cognizable under the FTCA. Accordingly, the FTCA's exclusivity provision does not bar an action against her based on that conduct.

In addition to conduct by a federal employee outside the scope of employment, another type of conduct that is not cognizable under the FTCA is conduct by people who are not "employee[s] of the government" within the meaning of the FTCA.²⁴² The Syrian officials who torture Sami in the Syrian rendition scenario are probably not "employee[s] of the government."²⁴³ This means that Sami cannot sue the United States for their conduct under the FTCA. Because Sami's claim against the Syrian officials is not cognizable under the FTCA, the FTCA's exclusivity provision will not bar Sami from suing those officials. A separate question is whether Sami can find a viable legal theory for suing the Syrian officials; in any event, his claim against them will not be barred by the FTCA's exclusivity provision.²⁴⁴

Federal employees *who acted in the scope of employment.*" (emphasis added)), *quoted in* Smith v. United States, 499 U.S. 160, 167 n.9 (1991); *see also* Kassaw v. Minor, 717 So. 2d 382, 384-85 (Ala. Civ. App. 1998) (refusing to dismiss a state-court tort action against a student who was paid by federal work-study funds to clean a community college's physics department because receipt of federal work-study funds did not make the student a federal employee); Garabedian v. Skochko, 283 Cal. Rptr. 802, 806 (Ct. App. 1991) (permitting a real estate agent to bring a state court action for a state law tort against the manager of property owned by the U.S. Department of Housing and Urban Development after the federal court determined that the manager was not a federal employee); AccuBanc Mortgage Co. v. Drummonds, 938 S.W.2d 135, 140-41 (Tex. App. 1996) (permitting a former officer of a mortgage banking company to sue the company in state court for state law claims arising from his firing because the board of directors of the company had dual role as employees of a federal entity, the Resolution Trust Corporation, and as employees of a private company).

241. *See supra* notes 68-73 and accompanying text.

242. 28 U.S.C. § 2671 (2000). *See generally supra* notes 45-56 and accompanying text.

243. *See supra* notes 49-56 and accompanying text.

244. Sami may have a cause of action against the Syrian officials under the TVPA. The TVPA states in relevant part: "An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual." Pub. L. No. 102-256, § 2(a), 106 Stat. 73, 73 (1992) (codified at 28 U.S.C. § 1350 note (2000)). Although the TVPA may create a cause of action, Sami may have trouble finding a U.S. court that can assert personal jurisdiction over the Syrian officials who tortured him. *See, e.g., In re Terrorist Attacks on Sept., 11, 2001*, 349 F. Supp. 2d 765, 812-18, 820-21 (S.D.N.Y. 2005) (dismissing for lack of personal jurisdiction

Although the FTCA's exclusivity provision will not bar a non-federal tort claim by Sami against the Syrian officials who tortured him, the FTCA's exclusivity provision does bar his claims against the U.S. officials who handed him over to the Syrian official, and it also bars non-federal tort claims against the U.S. officials involved in the GTMO scenario. The U.S. officials in both scenarios are government employees and were acting within the scope of their employment.²⁴⁵ Non-federal tort claims against them are therefore cognizable under the FTCA and barred by its exclusivity provision.

In sum, non-federal tort law may create a civil remedy against officials for U.S.-sanctioned torture if the torture is not cognizable in an FTCA claim against the United States. As a practical matter, this means that claims based on non-federal tort law, like claims based on the ATS, may lie against (1) federal employees who, in inflicting torture, act outside the scope of their employment and (2) others who inflict torture with U.S. connivance, but not as employees of the U.S. government.

C. Constitutional Tort Claims

The FTCA's exclusivity provision will bar most torture claims against U.S. officials predicated on the Alien Tort Statute or non-federal tort law. Indeed, the FTCA's exclusivity provision preserves only one basis for most torture claims against U.S. officials—actions “brought for a violation of the Constitution of the United States.”²⁴⁶ This allows “constitutional tort” claims against federal employees.²⁴⁷

claims under the TVPA and other statutes against several defendants allegedly involved in the 9/11 attacks). A second obstacle to a TVPA suit against the Syrian officials is that some courts have held that foreign officials can claim foreign sovereign immunity from TVPA actions. See *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101-06 (9th Cir. 1990) (discussing case law and holding that an individual defendant had foreign sovereign immunity from claims asserted in that case). *But see Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005) (holding that an individual defendant could not claim foreign sovereign immunity).

245. See *supra* text accompanying notes 45-48, 63-67.

246. 28 U.S.C. § 2679(b)(2)(A).

247. See, e.g., *Carlson v. Green*, 446 U.S. 14, 19-20 (1980) (discussing the purpose of the provision in the FTCA's exclusivity provision that allows claims for constitutional violations); H.R. REP. NO. 100-700, at 6 (1988), *reprinted in* 1988 U.S.C.A.N. 5945, 5950 (“[T]he courts have identified [constitutional torts] as a more serious intrusion of the rights of an individual that merits special attention. Consequently, [the proposed legislation generally making the FTCA remedy exclusive] would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights.”).

The legal basis for constitutional tort claims against federal officials is *Bivens v. Six Unknown Named Federal Narcotics Agents*.²⁴⁸ In *Bivens*, the Court recognized a federal cause of action for money damages against the federal agents who violated the plaintiff's Fourth Amendment rights.²⁴⁹ In later cases, the Court recognized *Bivens* claims for violations of the Fifth Amendment's Due Process Clause²⁵⁰ and the Eighth Amendment's Cruel and Unusual Punishment Clause.²⁵¹ The Court has made clear, however, that it will not recognize *Bivens* claims for all constitutional violations in all circumstances. To the contrary, the Court in *Bivens* held that a constitutional tort claim "may be defeated . . . in two situations."²⁵² The first is "when defendants demonstrate special factors counselling hesitation in the absence of affirmative action by Congress."²⁵³ The second is "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."²⁵⁴ In short, the predicate for a constitutional tort claim under *Bivens* is a constitutional violation; however, even if a constitutional violation exists, a court may not recognize a *Bivens* action for one of the two reasons articulated in *Bivens*.

The torture victims in our scenarios may have trouble identifying a constitutional violation and avoiding the "special factors" limitation on the *Bivens* cause of action.

1. Constitutional Violations

Torture potentially violates the same constitutional provisions for which the Court has recognized *Bivens* claims: the Fourth Amendment, the Fifth Amendment Due Process Clause, and the Eighth Amendment Cruel and Unusual Punishment Clause. Torture could violate the Fourth Amendment if

248. 403 U.S. 388 (1971).

249. *See id.* at 391-97.

250. *See Davis v. Passman*, 442 U.S. 228, 234-49 (1979) (recognizing a cause of action for an alleged violation the equal protection component of the Fifth Amendment brought against a former member of Congress who, while in Congress, fired plaintiff from his staff because she was a woman).

251. *See Carlson*, 446 U.S. at 16-24 (recognizing a cause of action against federal prison officials for their deliberate indifference to decedent's serious medical needs while in prison).

252. *Id.* at 18 (citing *Bivens*, 403 U.S. at 396).

253. *Id.* (internal quotation marks omitted) (quoting *Bivens*, 403 U.S. at 396).

254. *Id.* at 18-19 (internal quotation marks omitted) (quoting *Bivens*, 403 U.S. at 397).

it constituted “excessive force” and were used by government agents in connection with detention or interrogation of detainees.²⁵⁵ Torture could violate the substantive component of the Due Process Clause if it “shocked the conscience” and were used in situations not governed by the Fourth Amendment’s ban on excessive force or the Eighth Amendment’s ban on cruel and unusual punishment.²⁵⁶ Finally, torture could violate the Eighth Amendment if it were “cruel and unusual” and inflicted as part of an official punishment.²⁵⁷

These constitutional provisions have limits, however, that may prevent them from applying in some of our scenarios. The Court has held that the Fourth Amendment does not apply to the search and seizure of property that belongs to a non-resident alien and is located in a foreign country.²⁵⁸ The Court based that holding on reasoning that could prevent aliens from relying on the Fourth Amendment to assert claims of excessive force based on

255. See *Bivens*, 403 U.S. at 389-90 (noting plaintiff’s allegations that agents violated the Fourth Amendment through an unwarranted search, an arrest without probable cause, and the use of excessive force to make the search and arrest); see also *Graham v. Connor*, 490 U.S. 386, 394-95 (1989) (holding that the Fourth Amendment, rather than substantive due process, governs claims that law enforcement officials used excessive force during an arrest or other seizure of a person).

256. See *County of Sacramento v. Lewis*, 523 U.S. 833, 841-48 (1998) (holding that substantive due process, rather than the Fourth Amendment, governed a claim arising from a high-speed police pursuit of suspects that ended in death); see also *Chavez v. Martinez*, 538 U.S. 760, 774 (2003) (Thomas, J., joined by Rehnquist, C.J. and Scalia, J.) (reviewing challenged police conduct under the “shocks the conscience” standard of substantive due process case law); *id.* at 796 (Kennedy J., concurring in part and dissenting in part) (“[I]t seems to me a simple enough matter to say that use of torture or its equivalent in an attempt to induce a statement violates an individual’s fundamental right to liberty of the person.”).

257. See *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) (“[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment].”), *quoted in Hudson v. McMillian*, 503 U.S. 1, 9 (1992). The Eighth Amendment’s ban on cruel and unusual punishment would not apply directly to a detainee until the detainee has been convicted or, perhaps, otherwise adjudicated to be deserving of punishment. See *Bell v. Wolfish*, 441 U.S. 520, 536 n.16 (1979) (holding that conditions for holding pretrial detainees were properly analyzed under the Due Process Clause rather than the Eighth Amendment’s Cruel and Unusual Punishment Clause, because “‘Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions’” (quoting *Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40 (1977))).

258. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264-75 (1990).

official conduct that occurs outside the United States.²⁵⁹ In addition to limiting the Fourth Amendment, the Court has held that the Fifth Amendment “does not confer a right of personal security” upon certain “enemy aliens.”²⁶⁰ More broadly, the Court has said in dicta, “Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.”²⁶¹ The dicta would foreclose claims under the Eighth Amendment as well as those under the Fourth and Fifth Amendments. In general, the Court has refused to extend constitutional protection to aliens overseas.²⁶²

This refusal could defeat some constitutional tort claims in the GTMO scenario, which involves an Afghan citizen captured in Afghanistan and detained on a U.S. naval base in Cuba. Ghuljaan’s situation resembles that of the German “enemy aliens” who were captured, tried, and imprisoned outside the United States and to whom the Court denied Fifth Amendment protection in *Johnson v. Eisentrager*.²⁶³ Ghuljaan can distinguish his situation using several arguments, however, including the argument that GTMO is not outside the United States.²⁶⁴ Ghuljaan will certainly have to do so to recover from his captors under the constitutional tort doctrine of *Bivens*.

259. See *id.* at 264-75 (finding evidence that the term “people” in the Fourth Amendment does not include aliens without a substantial connection to the United States).

260. *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950); see also *Verdugo-Urquidez*, 494 U.S. at 269 (describing *Eisentrager* as “reject[ing] the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States”).

261. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). This dicta may have been undermined by later federal statutes that expressly apply outside the United States, including, apparently, to non-citizens. See *Verdugo-Urquidez*, 494 U.S. at 1068-69 (Brennan, J., dissenting); see also 1 VED P. NANDA & DAVID K. PANSIES, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 5.3, at 202-03 (2004).

262. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”); see also *Miller v. Albright*, 523 U.S. 420, 451 (1998) (O’Connor, J., concurring in the judgment) (“[I]t is unclear whether an alien may assert constitutional objections when he or she is outside the territory of the United States.”).

263. See *Eisentrager*, 339 U.S. at 777.

264. See *In re Guantánamo Detainee Case*, 355 F. Supp. 2d 443, 453-64 (D.D.C. 2005) (holding that Guantánamo detainees have the right to due process); see also *Rasul v. Bush* 542 U.S. 466, 476 (2004) (holding that the petitioners had a statutory right to bring habeas challenge and finding that they “differ from the *Eisentrager* detainees in important respects,” including being imprisoned at GTMO, which is “territory over which the United States exercises exclusive jurisdiction and control”); see also *supra* note 137 (discussing 2004 legislation making an anti-torture statute applicable to GTMO).

Uncertainty about the extra-territorial reach of the Constitution would also complicate constitutional tort claims by Sami, the alien torture victim in the Syrian rendition scenario. U.S. officials arrested Sami in New York. His presence in the United States gives him a connection to this country that neither Ghuljaan nor the German soldiers in *Eisentrager* had.²⁶⁵ It is unclear, however, whether his presence in the United States, standing alone, gave him a “substantial” enough connection with the United States to claim constitutional rights.²⁶⁶

Further complicating Sami’s constitutional tort claim under *Bivens* is that the torture was inflicted by Syrian officials, not by U.S. officials. In general, the Constitution does not restrain foreign officials.²⁶⁷ Sami may argue that Syrian officials should be held to constitutional standards because they were acting as a cat’s paw for U.S. officials.²⁶⁸ In addition, or alternatively, Sami may argue that U.S. officials violated the Constitution by handing him over to Syria for torture.²⁶⁹ Those arguments raise important and highly unsettled issues that may have to be resolved in litigating constitutional tort claims for U.S.-sanctioned torture.

2. Special Factors Counseling Hesitation

Related to, but distinct from, the extra-territorial reach of the Constitution is the extra-territorial reach of the *Bivens* cause of action. The Court has said that “*Bivens* action[s] might be unavailable” to aliens for

265. Cf. *Verdugo-Urquidez*, 494 U.S. at 271 (holding that a Mexican citizen did not have any “substantial connection with” the United States so as to give him Fourth Amendment rights because, at the time of the challenged search in Mexico, he had been in the United States only a few days and had been brought into the United States involuntarily).

266. See *id.* at 271-72 (finding it unnecessary to decide “[t]he extent to which [an alien] might claim the protection of the Fourth Amendment if the duration of his stay in the United States were to be prolonged” beyond a few days); cf. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”), quoted in *Zadvydas*, 533 U.S. at 693; *Ex parte Quirin*, 317 U.S. 1, 24-25 (1942) (reviewing the constitutional claims of unlawful combatants captured on U.S. soil).

267. See, e.g., *United States v. Toscanino*, 500 F.2d 267, 280 n.9 (2d Cir. 1974).

268. Cf. *United States v. Balsys*, 524 U.S. 666, 698-700 (1998) (stating that cooperation between domestic and foreign officials could become so strong that a person could invoke the Fifth Amendment privilege against compelled self-incrimination based on fear of potential foreign prosecution).

269. See *supra* note 97 and accompanying text.

constitutional violations in foreign countries.²⁷⁰ The Court explained that the foreign location and the identity of the *Bivens* claimant may be “special factors counselling hesitation” in recognizing a *Bivens* claim.²⁷¹ The Court might be particularly reluctant to recognize a *Bivens* claim when doing so would require judicial review of the executive branch’s conduct of foreign affairs and military strategy, as may be true of torture claims arising from the war on terrorism.²⁷² Another factor arguably counseling hesitation is that Congress has enacted legislation authorizing private suits by the victims of official torture, but only when the torture is inflicted under color of a foreign country’s law, and not when it is inflicted under color of U.S. law.²⁷³ The

270. *Verdugo-Urquidez*, 494 U.S. at 274.

271. *Id.* (internal quotation marks omitted) (citing *Chappell v. Wallace* 462 U.S. 296, 298 (1983)); *see also id.* at 292 (Brennan, J., dissenting) (stating that extra-territorial application of the Fourth Amendment would not materially impair America’s conduct of foreign affairs because of the Court’s recognition that “there may be certain situations in which the offensive use of constitutional rights should be limited,” and citing the discussion of “special factors” that would preclude recognition of a *Bivens* claim).

272. *See Arar v. Ashcroft*, 414 F. Supp. 2d 250, 279-83 (E.D.N.Y. 2006) (finding “compelling” the argument that the “special factors” exception barred a *Bivens* claim by a torture victim whom defendant United States rendered to Syria for torture); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208-09 (D.C. Cir. 1985) (refusing to recognize *Bivens* claims by citizens and residents of Nicaragua arising out of U.S. officials’ aid to “Contras,” and stating that “the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad”); *see also United States v. Stanley*, 483 U.S. 669, 678-84 (1987) (holding that “special factors counselling hesitation” required refusal to recognize *Bivens* actions for injuries to members of armed services that “‘arise out of or are in the course of activity incident to service’” (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950))); *Van Tu v. Koster*, 364 F.3d 1196, 1197-98 (10th Cir.) (stating that availability of a *Bivens* remedy was “questionable” in an action by representatives of the victims and survivors of the My Lai Massacre during the Vietnam War), *cert. denied*, 543 U.S. 874 (2004).

273. The TVPA states: “An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual.” Pub. L. No. 102-256, § 2(a), 106 Stat. 73, 73 (1992) (codified at 28 U.S.C. § 1350 note (2000)). The TVPA’s legislative history contains no evidence that, in creating this remedy for foreign torture, Congress intended to foreclose remedies available to the victims of U.S. torture. Instead, the legislative history indicates that Congress wanted to extend to U.S. citizens the civil remedy for foreign torture that had already been determined by some courts to be available to aliens suing under the Alien Tort Statute. *See, e.g.*, 137 CONG. REC. H11, 244-45 (daily ed. Nov. 25, 1991) (statement of Rep. Mazzoli) (bill later enacted as the TVPA would “clarif[y] existing law to make explicit that victims of torture can bring a Federal civil cause of action against their torturer” and would “expand[] existing law by providing U.S. citizens the right to obtain civil redress for torture”);

possibility that the Court would refuse to allow *Bivens* claims by alien victims of U.S. torture is all the more likely considering the Court's general disinclination in the last twenty-five years to extend *Bivens*.²⁷⁴

3. Application of Limits on Constitutional Rights and on the *Bivens* Remedy to Torture Scenarios

The potential limits on constitutional rights and on the *Bivens* cause of action are most likely to prevent claims arising from the GTMO scenario, because the GTMO scenario involves an alien victim of torture that, depending on GTMO's status, may be found to have occurred on foreign soil.²⁷⁵ As for the Abu Ghraib scenario, Ali's status as a U.S. citizen may entitle him to the full measure of constitutional rights.²⁷⁶ The tough question in his case will be whether a *Bivens* remedy is available for violations of those rights, given the context of a foreign military operation in which the violations occurred.²⁷⁷ Finally, in the Syrian rendition scenario, Sami, though an alien, probably can assert a *Bivens* action against the CIA officials and other officials involved in his arrest in New York and his rendition to

S. REP. NO. 102-249, at 5 (1991) (“[W]hile the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.”). Without evidence that Congress intended to limit other remedies, the TVPA's creation of a civil remedy for foreign torture probably should not weigh against recognizing a *Bivens* remedy for U.S. torture. *See Davis v. Passman*, 442 U.S. 228, 247 (1979) (holding that Congress's exclusion of congressional employees from a statute authorizing federal employees to sue the federal government for employment discrimination did not weigh against allowing congressional employees to sue under *Bivens*); *cf. Schweiker v. Chilicky*, 487 U.S. 412, 421-29 (1988) (holding that a *Bivens* remedy was not available for due process violations by officials administering a disability benefits program under title II of the Social Security Act, and finding the existence of meaningful statutory remedies against the United States for improper disability determinations was a “special factor counselling hesitation” in recognition of a *Bivens* remedy).

274. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (“Since [*Carlson v. Green*, 446 U.S. 14 (1980)] we have consistently refused to extend *Bivens* liability to any new context or new category of defendants.”).

275. *See Sanchez-Espinoza*, 770 F.2d at 209; *see also Harbury v. Deutch*, 233 F.3d 596, 602-04 (D.C. Cir. 2000) (holding that the Fifth Amendment did not protect a Guatemalan citizen allegedly tortured and killed by the Guatemalan military at the instance of the CIA), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002).

276. *See Reid v. Covert*, 354 U.S. 1, 5 (1957) (plurality opinion) (“[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights.”).

277. *See supra* notes 270-73 and accompanying text.

Syria.²⁷⁸ Even while on U.S. soil, however, his constitutional rights may be watered down compared to those of a U.S. citizen.²⁷⁹ Furthermore, Sami's constitutional rights, as well as the availability of a *Bivens* remedy, may end altogether when he left U.S. hands and the U.S. shore.

D. Official Immunity

So far, the discussion of civil remedies against U.S. officials for torture has concluded that *Bivens* provides the only potentially viable cause of action for most claims. A successful *Bivens* claim depends on the torture victim establishing a constitutional violation, and, even if the victim proves such a violation, the court still may not allow a *Bivens* remedy because of "special factors counselling hesitation."²⁸⁰ Beyond the hurdles of establishing a constitutional violation and the availability of a *Bivens* remedy for that violation, there lies a third hurdle: most officials sued under *Bivens* for unconstitutional torture will have qualified immunity.

1. Official Immunity in General

Whereas *sovereign* immunity can bar suits naming the government as a defendant, *official* immunity can bar suits that name government officials as defendants and seek money damages out of the officials' own pockets. Official immunity takes two forms: absolute immunity and qualified immunity.²⁸¹ Absolute immunity protects an official from suit regardless of

278. See *Humphries v. Various Fed. U.S. INS Employees*, 164 F.3d 936, 948 (5th Cir. 1999) ("In general, . . . a United States district court may consider the merits of a *Bivens* action for money damages, asserted by a nonresident alien who is present in this country; against federal government officials." (citation omitted)).

279. See *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. . . . [T]hey become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization."); cf. *Demore v. Kim*, 538 U.S. 510, 543-47 (2003) (Souter, J., concurring) (explaining that rights of lawful permanent resident aliens approach those of full citizenship).

280. E.g., *Carlson v. Green*, 446 U.S. 14, 18 (1980).

281. See *Buckley v. Fitzsimmons*, 509 U.S. 259, 268-69 (1993) (discussing both forms of official immunity); *Forrester v. White*, 484 U.S. 219, 223-24 (1988) (same).

how malicious and illegal the official's conduct might be.²⁸² Qualified immunity is narrower. The officials involved in our scenarios could claim only qualified immunity from *Bivens* claims.²⁸³

The leading modern case on qualified immunity is *Harlow v. Fitzgerald*.²⁸⁴ The Court in *Harlow* described qualified immunity as follows: “[O]fficials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²⁸⁵ *Harlow*'s objective, “reasonable person” standard replaced the Court's earlier standard, which conditioned immunity on both the objective reasonableness of an official's conduct and the subjective good faith of the official.²⁸⁶

As described in *Harlow*, qualified immunity has two elements. One concerns the official conduct on which the lawsuit is based; the other concerns the right that the official has supposedly violated. The conduct must involve an official's exercise of a “discretionary function,” as distinguished from a “ministerial task.”²⁸⁷ This discretionary function element limits immunity to government decision-making that is not cut-and-dried and therefore could be distorted by the fear of litigation and liability.²⁸⁸ The

282. See, e.g., *Stump v. Sparkman*, 435 U.S. 349, 359-64 (1978) (holding that a judge had absolute immunity from action challenging his order, which authorized the sterilization of a fifteen-year-old girl without her knowledge based on the ex parte application of her parents).

283. See *Butz v. Economou*, 438 U.S. 478, 508 (1978) (“[Q]ualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations. . .”).

284. 457 U.S. 800 (1982).

285. *Id.* at 818.

286. See *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (“[*Harlow*] completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action.”).

287. *Harlow*, 457 U.S. at 816 (stating that “[i]mmunity generally is available only to officials performing discretionary functions,” as distinguished from “‘ministerial’ tasks”).

288. See *id.* at 814 (noting that suits against officials create “the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties” (alteration in original) (internal quotation marks omitted) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949))); see also *Buckley v. Fitzsimmons*, 509 U.S. 259, 284 (1993) (referring to the “distortive effects of potential liability” in discussing justification for absolute official immunity); *Westfall v. Erwin*, 484 U.S. 292, 297 (1988) (stating, in regard to absolute official immunity: “It is only when officials exercise decisionmaking discretion that potential liability may shackle the

second element of the *Harlow* standard requires that the right supposedly violated by the defendant official must be a “clearly established” right of which a reasonable person would have known.²⁸⁹ This second, “clearly established” element ensures that “the officer had fair notice that her conduct was unlawful.”²⁹⁰

a. The “Discretionary Function” Element of the *Harlow* Test

The Supreme Court still mentions the first element of the *Harlow* standard, stating that qualified immunity protects only “government officials performing discretionary functions.”²⁹¹ Even so, since *Harlow*, the “discretionary function” element has almost never restricted the scope of

fearless, vigorous, and effective administration of policies of government.” (internal quotation marks omitted) (quoting *Barr v. Matteo*, 360 U.S. 564, 571 (1959))).

289. *Harlow*, 457 U.S. at 818.

290. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004); *see also Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (“[Q]ualified immunity operates ‘to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.’” (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001))). In the newly enacted Detainee Treatment Act of 2005, Congress has included the following immunity provision:

In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent’s engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.

Pub. L. No. 109-148, § 1004(a), 119 Stat. 2680, 2740 (Dec. 30, 2005). This immunity provision appears generally to be narrower than the immunity conferred by *Harlow*. It therefore may not significantly affect the analysis offered in this section of the Article.

291. *E.g.*, *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Harlow*, 457 U.S. at 818).

qualified immunity.²⁹² Perhaps this is partly because the Court has not required, as a precondition of qualified immunity, that discretionary decisions be susceptible to considerations of public policy.²⁹³ In this respect, the discretionary function element of the *Harlow* standard is easier for official conduct to satisfy than it is for official conduct to satisfy the discretionary function exception to the FTCA.²⁹⁴ Official conduct satisfies the discretionary function element of *Harlow* if it involves any choice and is not purely “ministerial.”²⁹⁵

In addition, the Court interpreted the discretionary-ministerial distinction in *Davis v. Scherer*²⁹⁶ so that it precludes immunity in only a subset of cases involving ministerial acts. Under *Davis*, the discretionary function element of *Harlow* precludes immunity only when a statute or other binding law prescribes a precise course of conduct for an official.²⁹⁷ Furthermore, an

292. See, e.g., *Sellers v. Baer*, 28 F.3d 895, 902 (8th Cir. 1994) (“[W]e note our belief that the ministerial-duty exception to the qualified immunity defense is dead letter.”); *McIntosh v. Weinberger*, 810 F.2d 1411, 1432 (8th Cir. 1987) (“[T]he plaintiffs have cited, and we can find, no recent case other than that before us in which a court has rejected qualified immunity simply because the official in question was performing a ministerial duty.”); see also *Varrone v. Bilotti*, 123 F.3d 75, 82 (2d Cir. 1997) (“The continued validity of the ministerial-discretionary function distinction in determining qualified immunity has been questioned.”); *Horta v. Sullivan*, 4 F.3d 2, 11 (1st Cir. 1993) (“[I]n spite of [*Harlow*’s] reference to discretionary functions, it has never since been clear exactly what role, if any, this concept is supposed to play in applying qualified immunity.”); cf. *Harbert Int’l, Inc. v. James*, 157 F.3d 1271, 1281-84 (11th Cir. 1998) (stating that qualified immunity is not available “[w]hen a government official goes completely outside the scope of his discretionary authority”; for in that situation “he ceases to act as a government official and instead acts on his own behalf”); *In re Allen* 106 F.3d 582, 593-98 (4th Cir. 1997) (declaring that the “discretionary function” limitation of the qualified immunity doctrine prevents the defense of qualified immunity by an official who acts “totally beyond the scope of his authority,” and finding that, because of that limitation, defendant official could not claim qualified immunity).

293. See, e.g., *Horta*, 4 F.3d at 12 (concluding that the defendant officer’s conduct was discretionary because police guidelines for high-speed pursuits required interpretation).

294. See *supra* notes 143-47 and accompanying text.

295. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) (stating that “[i]mmunity generally is available only to officials performing discretionary functions,” as distinguished from “‘ministerial’ tasks”).

296. 468 U.S. 183 (1984).

297. *Id.* at 196 n.14; see, e.g., *Eddy v. V.I. Water & Power Auth.*, 256 F.3d 204, 210-11 (3d Cir. 2001) (finding that the supposed personnel policy of compelling employees to work under unsafe conditions did not prescribe the precise course of conduct for defendant officials, whose conduct was therefore discretionary for qualified immunity purposes); *Trotter v. Watkins*, 869 F.2d 1312, 1314 (9th Cir. 1989) (concluding that officials’ conduct was

official can have qualified immunity even for conduct that violates a statute or other binding law, unless that violation itself is the basis for the *Bivens* claim.²⁹⁸

Because of its importance to analysis of torture claims, the *Davis* case deserves some description. In *Davis*, a former employee of state government sued the official who fired him, alleging that the firing violated the Due Process Clause.²⁹⁹ The former employee argued that the official was not exercising a discretionary function, and therefore could not claim qualified immunity, because he violated procedural regulations when he fired the plaintiff.³⁰⁰ The Court found two flaws in this argument. First, plaintiff was suing for a due process violation, not a regulatory violation.³⁰¹ The Court explained that “breach of a legal duty created by the personnel regulation would forfeit official immunity only if that breach itself gave rise to the [plaintiff’s] cause of action for damages.”³⁰² Second, the regulations were not detailed enough to make the defendant official’s conduct nondiscretionary. The Court noted, “A law that fails to specify the precise action that the official must take in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused.”³⁰³

Because under *Davis* the discretionary function element of the *Harlow* standard does not much limit the availability of a qualified immunity

discretionary because “[n]o law or regulation precisely specific[d]” how they were to act in the situation that gave rise to plaintiff’s claim).

298. *Davis*, 468 U.S. at 196 n.14; *Sellers v. Baer*, 28 F.3d 895, 902 (8th Cir. 1994) (holding that defendant officials’ conduct was discretionary, even if it violated regulations governing the handling of unruly fair-goers, because plaintiffs did not base their claim on a regulatory violation); *Horta*, 4 F.3d at 12 (concluding that official’s conduct was discretionary, even if it violated police guidelines for high-speed chases, because plaintiff’s claim was based on the Fourth Amendment, not on breach of the guidelines); *Gagne v. City of Galveston*, 805 F.2d 558, 559-60 (5th Cir. 1986) (finding a police officer’s conduct was discretionary, even if it violated a department rule requiring the removal of an arrestee’s belt before being put in jail, because plaintiff’s claim, which arose from the arrestee’s suicide using the belt, was not based on a violation of the department rule, but on the Constitution).

299. *See Davis*, 468 U.S. at 185-87.

300. *See id.* at 196 n.14.

301. *See id.* at 187. The plaintiff in *Davis* sued under 42 U.S.C. § 1983 (2000), which creates a cause of action against state officials who violate the plaintiffs’ federal rights. *See id.* The plaintiff could not use the defendant’s violation of his rights under the personnel regulation as a basis for a § 1983 claim because the personnel regulation was a provision of state law, not federal law. *See id.* at 188, 189 n.6.

302. *Id.* at 196 n.14.

303. *Id.*

defense, most case law focuses on the second element, which requires a court to determine whether a defendant's conduct violates "clearly established" rights of which a reasonable person would have known.³⁰⁴

b. The "Clearly Established" Element of the *Harlow* Test

If a defendant's conduct violates "clearly established" rights of which a reasonable person would have known, the official does not have immunity from personal liability for the conduct. Under this second, "clearly established" element, a federal court initially must decide whether the official conduct challenged as a constitutional tort violates the plaintiff's constitutional rights at all.³⁰⁵ If so, the court must then decide if those rights are clearly established. The latter step requires an understanding of how constitutional rights come to be "clearly established."

The Supreme Court has made its decisions and those of the lower federal courts the primary sources of "clearly established" rights. Of course, the text of the Constitution initially establishes constitutional rights, and the text is sometimes enough, standing alone, to determine that an official has violated "clearly established" rights.³⁰⁶ Often, however, constitutional text alone speaks with "majestic simplicity"³⁰⁷ of broad, vague concepts such as "due process."³⁰⁸ The Court has held that qualified immunity analysis ordinarily demands greater specificity:

[T]he right . . . must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be

304. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

305. *See, e.g., Brouse v. Haugen*, 543 U.S. 194, 196 (2004) ("When confronted with a claim of qualified immunity, a court must ask first the following question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" (internal quotation marks omitted) (quoting *Saucer v. Katz*, 533 U.S. 194, 201 (2001))).

306. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (explaining that "general statements of the law are not inherently incapable of giving fair and clear warning" to officials that their conduct is unlawful (internal quotation marks omitted) (quoting *United States v. Lanier*, 520 U.S. 259, 270 (1997))); *see also Lassiter v. Ala. A & M Univ.*, 28 F.3d 1146, 1150 n.4 (11th Cir. 1994) ("[O]ccasionally the words of a federal statute or federal constitutional provision will be specific enough to establish the law applicable to particular circumstances clearly and to overcome qualified immunity even in the absence of case law.").

307. *Davis v. Passman*, 442 U.S. 228, 241 (1979).

308. *See Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.³⁰⁹

The Court looks primarily to its own decisions to determine clearly established constitutional law.³¹⁰ It looks, as well, to decisions of federal courts of appeals and state courts.³¹¹ Thus, for example, in a case asserting constitutional tort claims against a police officer in Idaho, the Court would consider decisions of the U.S. Court of Appeals for the Ninth Circuit, which encompasses Idaho, as well as Idaho state appellate court decisions.³¹² The Court may also consider decisions by other federal circuits and other state courts even though they would not bind Idaho officials.³¹³

In addition to court decisions, political branch decisions can bear on whether a constitutional right is a clearly established one of which a reasonable official should have known. Legislation ordinarily gets a presumption of constitutionality.³¹⁴ Thus, when a statute or ordinance authorizes an official's conduct, it is presumptively reasonable for that official to believe that his or her conduct does not violate clearly established

309. *Id.* at 640 (citations omitted).

310. *See, e.g.,* *Groh v. Ramirez*, 540 U.S. 551, 556 (2004) (“No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional.”).

311. *See, e.g., Hope*, 536 U.S. at 741-44 (relying on precedent of the Eleventh Circuit and its predecessor, the former Fifth Circuit, to reject a qualified immunity claim by Alabama officials); *United States v. Lanier*, 520 U.S. 259, 269 (1997) (observing that the Court has “referred to decisions of the Courts of Appeals when enquiring whether a right was ‘clearly established’” for qualified immunity purposes); *see also Elder v. Holloway*, 510 U.S. 510, 513-16 (1994) (holding that the district court in the Ninth Circuit had to evaluate the claim of qualified immunity in light of relevant Ninth Circuit precedent even though the precedent was not cited in plaintiff’s brief).

312. *See Elder*, 510 U.S. at 513-16; *Sweeney v. Ada County*, 119 F.3d 1385, 1391 (9th Cir. 1997) (discussing a decision of the Idaho Court of Appeals in analyzing qualified immunity).

313. *See Brosseau v. Haugen*, 543 U.S. 194, 200-01 (2004) (examining decisions by Sixth, Seventh, and Eighth Circuits in a case from the Ninth Circuit).

314. *See, e.g., Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 462 (1988) (noting that social and economic legislation of the states gets a presumption of constitutionality).

constitutional rights.³¹⁵ The presumption is rebuttable, however, meaning that an officer cannot reasonably rely on a patently unconstitutional statute.³¹⁶ The Court has treated executive directives somewhat like statutes and ordinances. The Court has held that executive policies and orders may support the reasonableness of an official's conduct if the conduct comports with the orders and policies and if there is no case law on point.³¹⁷ Lower courts have gone farther, holding that officials have qualified immunity for

315. See, e.g., *Pierson v. Ray*, 386 U.S. 547, 555-57 (1967) (holding that law enforcement officers had qualified immunity "for acting under a statute that [the officer] reasonably believed to be valid but that was later held unconstitutional on its face or as applied"); *Roska v. Peterson*, 328 F.3d 1230, 1252 (10th Cir. 2003) ("[T]he existence of a statute or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional." (internal quotation marks omitted) (quoting *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994))); *Connecticut v. Crotty*, 346 F.3d 84, 102 (2d Cir. 2003) (considering "particularly persuasive" the fact that "the challenged conduct involved enforcement of a presumptively valid statute" in finding that officials had qualified immunity); *Grossman*, 33 F.3d at 1209-10 (holding that an officer had qualified immunity when he relied on a city ordinance to arrest plaintiff for demonstrating in a park without a permit, and stating: "[W]hen a city council has duly enacted an ordinance, police officers on the street are ordinarily entitled to rely on the assumption that the council members have considered the views of legal counsel and concluded that the ordinance is a valid and constitutional exercise of authority."); *Malachowski v. City of Keene*, 787 F.2d 704, 714 (1st Cir. 1986) (holding that an officer had qualified immunity for arresting plaintiffs' daughter under state statutory provisions that were not "illegitimate on their face").

316. See, e.g., *Grossman*, 33 F.3d at 1209 ("[A]s historical events such as the Holocaust and the My Lai massacre demonstrate, individuals cannot always be held immune for the results of their official conduct simply because they were enforcing policies or orders promulgated by those with superior authority. When a statute authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity.").

317. See *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (stating that the Marshals Service policy authorizing defendant officials' conduct was "important" to the Court's conclusion that those officials had qualified immunity, because "the state of the law . . . was at best undeveloped"); see also *Hope v. Pelzer*, 536 U.S. 730, 744-45 (2002) (stating that the advice by the U.S. Department of Justice to Alabama that condemned Alabama's use of the "hitching post" to punish prisoners "buttressed" the Court's conclusion that Alabama officials violated a clearly established law and therefore could not claim qualified immunity); *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980) ("[L]aw enforcement officers should not be held personally liable for monetary damages because they have followed the policy or instructions of their superiors [when conducting a search], where the controlling law had not been authoritatively decided by the Supreme Court [or other relevant courts], where the officers have acted in good faith, and where the searches were conducted in a reasonable manner.").

following executive policies or orders that they reasonably believe are lawful.³¹⁸ By the same token, the lower courts have made clear that officials cannot get qualified immunity merely by establishing that they were “just following orders.”³¹⁹ Qualified immunity doctrine thus contains no “Nuremberg defense” that would let officials rely on plainly unconstitutional legislation or executive directives.³²⁰ On the other hand, if legislation or an

318. *Brent v. Ashley*, 247 F.3d 1294, 1305-06 (11th Cir. 2001) (holding that low-level officers involved in a strip search had qualified immunity when they “acted at the order of a superior and the record reflects no reason why any of them should question the validity of that order”); *Chew v. Gates*, 27 F.3d 1432, 1449 (9th Cir. 1994) (relying “principally on the fact that the policy . . . was a longstanding official policy, which was well-known and similar to the policies employed in many police departments throughout the nation, none of which had been judicially questioned” in holding that officers had qualified immunity from constitutional claims based on their acting under a police department policy for use of police dogs in making arrests); *Dodd v. City of Norwich*, 827 F.2d 1, 4 (2d Cir. 1987) (holding that on remand the district court should consider “whether [defendant police officer] is entitled to a qualified good faith immunity based on his following the policy and training of the police department in keeping his gun unholstered while attempting to place handcuffs on [the boy]” in an action under 42 U.S.C. § 1983 and state tort law against the police officer by the mother of a sixteen-year-old boy who was shot after trying to grab the police officer’s gun while the officer was arresting him); *Sullivan v. Town of Salem*, 805 F.2d 81, 87 (2d Cir. 1986) (finding that zoning officials would have qualified immunity from a builder’s claim if they “were simply implementing an established policy of the town” and reasonably relied on the policy); *Landrum v. Moats*, 576 F.2d 1320, 1323, 1328 & n.16 (8th Cir. 1978) (holding that police officers sued under 42 U.S.C. § 1983 for their use of deadly force were entitled to rely on provisions in a police manual authorizing their conduct, even though those provisions were later held to violate state law). *But cf.* *Cal. Att’ys for Criminal Justice v. Butts*, 195 F.3d 1039, 1049-50 (9th Cir. 1999) (holding that it was not objectively reasonable for officers to rely on training materials on how to interrogate suspects who had invoked their *Miranda* rights).

319. *Roska v. Peterson*, 328 F.3d 1230, 1252 (10th Cir. 2003) (stating that “an officer’s reliance on an authorizing statute does not render the conduct per se reasonable” for qualified immunity purposes); *Collins v. Jordan*, 110 F.3d 1363, 1377-78 (9th Cir. 1997) (finding that officers could not reasonably rely on an emergency order to the extent it conflicted with longstanding state law, which reflected First Amendment constraints, authorizing police to disperse assemblies “only when they constitute a clear and present danger”).

320. *See O’Rourke v. Hayes*, 378 F.3d 1201, 1210 n.5 (11th Cir. 2004) (“[S]ince World War II, the ‘just following orders’ defense has not occupied a respected position in our jurisprudence, and officers in such cases may be held liable under § 1983 if there is ‘a reason why any of them should question the validity of that order.’” (quoting *Brent v. Ashley*, 247 F.3d 1294, 1306 (11th Cir. 2001))); *see also* Sheldon Nahmod, *From the Courtroom to the Street: Court Orders and Section 1983*, 29 HASTINGS CONST. L.Q. 613, 635-36 (2002) (arguing that a Nuremberg-type defense would not defeat the liability of a police officer for

executive directive is not obviously invalid and authorizes or compels an official to act as he or she did, it is harder to conclude that the official “should have known” the action violated “clearly established” rights.

2. Application of Qualified Immunity Doctrine to the Torture Scenarios

a. The “Discretionary Function” Element of the *Harlow* Test

The discretionary function element of the *Harlow* standard probably will not deprive any of the U.S. officials in our scenarios of qualified immunity.

The military police guards in the Abu Ghraib scenario were exercising discretion, for purposes of the *Harlow* standard, when they tortured Ali to “loosen him up” for interrogation. That is because the “loosen him up” instruction did not prescribe a precise course of conduct for the guards. To the contrary, it allowed “brutal improvisation.”³²¹ It does not matter for qualified immunity analysis, as distinguished from FTCA analysis, that this improvisation may not be susceptible to public policy considerations.³²² Nor, under *Davis v. Scherer*, does it matter that this improvisation “violat[ed] the clear command[s]” of statutes and regulations, because the violation of statutes and regulations cannot be the basis for a constitutional tort claim under *Bivens*.³²³

A similar analysis applies to the GTMO scenario. The GTMO interrogators used interrogation methods that they reasonably believed the

complying with a judge’s order to shoot a lawyer). Sometimes, however, an officer’s reliance on an unconstitutional statute, ordinance, order or policy may negate the state of mind required to establish a constitutional violation. For example, the court in *Menotti v. City of Seattle* rejected a First Amendment claim against an officer who took away a protestor’s sign because the officer’s actions were merely to enforce an ordinance, later held unconstitutional, and were not “motivated by opposition to [the protestor’s] political beliefs or . . . a desire to chill [the protestor’s] speech.” See 409 F.3d 1113, 1153-55 (9th Cir. 2005).

321. See White, *supra* note 125, at A1; see also DANNER, *supra* note 1, at 8 (“[W]hen Specialist Sabrina Harman was asked about the [Abu Ghraib] prisoner who was placed on a box with electric wires attached to his fingers, toes, and penis, in an image now famous throughout the world, she replied that ‘her job was to keep detainees awake.’”); HERSH, *supra* note 1, at 34 (reporting on a military captain who refused instructions from military intelligence officers to keep detainees awake around the clock, explaining: “[M]y soldiers don’t know how to do it. And when you ask an eighteen-year-old kid to keep someone awake, and he doesn’t know how to do it, he’s going to get creative.”).

322. See *supra* text accompanying notes 143-47.

323. *Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984).

Secretary of Defense had authorized.³²⁴ Judging from actual public records, it does not appear that the interrogation methods actually authorized by Secretary of Defense Donald Rumsfeld for use at GTMO prescribed a precise course for the interrogators to follow. Instead, public documents from the Defense Department gave authorized interrogation methods only evocative names such as “fear up harsh” and described them in broad terms, such as, in the case of “fear up”: “Significantly increasing the fear level in a detainee.”³²⁵ Maybe it was unreasonable, as well as unlawful under applicable statutes and regulations, for GTMO interrogators to believe that their authority to use the “fear up harsh” method included measures that amounted to torture and that, in one case, caused death.³²⁶ Yet the unreasonableness of their belief and the illegality of their conduct do not make that conduct nondiscretionary for purposes of qualified immunity analysis. If those factors have any relevance, it is to the second step of *Harlow* analysis, which asks whether they violated “clearly established” constitutional rights of which a reasonable officer would have known. Specifically, if a reasonable officer should have known that the statutes and the regulations that she was violating were designed to safeguard constitutional rights, then the constitutional rights that were violated in the course of violating the statutes and the regulations might be “clearly established,” partly by the very existence of the statutes and the regulations.³²⁷

Of the three scenarios, the Syrian rendition scenario is the least likely to involve a discretionary function for purposes of the *Harlow* standard. Whether the conduct in that scenario is discretionary depends on whether both the decision to render Sami to Syria and the details of his rendition are made by high-level officials, leaving only essentially ministerial tasks for the officials who actually arranged for Sami’s rendition. Sami could shape his argument to maximize the chance that a court would find the officials’ conduct ministerial. To do that, Sami should emphasize that the rendition policy on its face violated the Constitution, regardless of how it was implemented by the minions who put Sami on the plane from New York to Damascus. Given that emphasis, a court might hold that the officials were not exercising discretionary functions and therefore could not claim qualified

324. See *supra* text accompanying note 7.

325. Apr. 16 Memo, *supra* note 7, at 361; see *supra* text accompanying note 155.

326. See generally White, *supra* note 125 (reporting that two Army soldiers involved in the sleeping bag killing were being prosecuted).

327. See *infra* notes 355-56 and accompanying text.

immunity. Those officials' best bet would then be to argue for derivative qualified immunity.³²⁸ Under the theory of derivative qualified immunity, officials are immune from liability for implementing a policy if that policy, though unconstitutional, did not violate clearly established constitutional rights.³²⁹ The Supreme Court has not yet addressed the validity of derivative qualified immunity.³³⁰

b. The "Clearly Established" Element of the *Harlow* Test

As discussed in the subsection above, for purposes of the *Harlow* test, the torture in our scenarios probably involves, directly or derivatively, the exercise of discretionary functions. If so, then the officials responsible for the torture will have qualified immunity from *Bivens* claims unless they violated "clearly established" constitutional rights of which a reasonable official would have known. Clarity is a tricky concept in this setting. It is unclear whether official torture is always unconstitutional; it depends partly on how you define "torture."³³¹ On the other hand, some instances of official torture may be clearly unconstitutional. The tough question is whether a particular instance, such as those described in our scenarios, falls into the "clearly established" arena.

As discussed above, torture potentially violates the Fourth, Fifth, and Eighth Amendments.³³² The standards for identifying those violations ask, respectively, whether physical or psychological force is "excessive,"³³³ "shocks the conscience,"³³⁴ or is "cruel and unusual."³³⁵ Although these

328. See *Varrone v. Bilotti*, 123 F.3d 75, 82 (2d Cir. 1997) (holding that, even if police officers performed only a ministerial function in conducting a strip search, "they still have qualified immunity for carrying out the order, not facially invalid, issued by a superior officer who is protected by qualified immunity").

329. See *id.* at 81-82.

330. Cf. *Harlow v. Fitzgerald*, 457 U.S. 800, 810-11 (1982) (rejecting an argument that presidential aides are entitled to derivative absolute immunity).

331. See, e.g., Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 326 (2004) (stating in a discussion of torture claims that contours of the Fourth Amendment and Due Process Clause are "unclear"); Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 207 (2003-2004) (stating that, in contrast to torture undertaken to get evidence for a prosecution, "[w]hether torture undertaken solely to obtain information to prevent an imminent terrorist attack violates the Constitution . . . is not as clear").

332. See *supra* notes 255-57 and accompanying text; *infra* note 336.

333. See, e.g., *Graham v. Connor*, 490 U.S. 386, 394-97 (1989).

334. See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 846-50 (1998).

standards differ in important ways,³³⁶ each standard typically requires judgments about whether a particular instance of physical or psychological force departs from the norm and from what is necessary in light of a legitimate justification, if any, for the conduct. Specifically, the Court bases excessive force determinations on, among other factors, whether the challenged conduct departs from usual government practices and whether it is justified by the need to prevent an individual from harming government officials or the public.³³⁷ The Court determines whether conduct is conscience-shocking by considering, among other factors, whether it is “egregious,” which is often true when it is “intended to injure in some way unjustifiable by any government interest.”³³⁸ Finally, the Court determines whether punishment is “cruel and unusual” by assessing, among other factors, its prevalence as an authorized method of punishment³³⁹ and whether

335. U.S. CONST. amend. VIII.

336. Specifically, Fourth Amendment excessive force determinations entail an objective, “reasonable law enforcement officer” determination, whereas Eighth Amendment “cruel and unusual punishment” determinations consider an official’s subjective state of mind. *See Graham*, 490 U.S. at 396-99. In addition, as applied to the official use of physical and psychological force, the protections of the Fourth Amendment, substantive due process, and the Eighth Amendment’s Cruel and Unusual Punishment Clause differ in when and to whom they apply. Roughly speaking, the Due Process Clause’s substantive component restricts official force against a person who has not been detained or who has been detained but is not being interrogated and has not received a formal punishment; the Fourth Amendment’s ban on excessive force applies to the arrest and detention of a person who has not yet been formally punished; and the Eighth Amendment applies to the treatment of someone who has received a formal punishment. *See Lewis*, 523 U.S. at 842-43; *Graham*, 490 U.S. at 392 n.6; *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16 (1979); *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977).

337. *Graham*, 490 U.S. at 396 (stating that courts analyzing excessive force claims under the Fourth Amendment should consider, among other factors, “whether the suspect poses an immediate threat to the safety of the officers or others”); *Tennessee v. Garner*, 471 U.S. 1, 13-19 (1985) (considering policies of major police departments in determining when the Fourth Amendment allows the use of deadly force).

338. *Chavez v. Martinez*, 538 U.S. 760, 774-75 (2003) (plurality opinion); *see Lewis*, 523 U.S. at 846 (stating that government action may be so arbitrary to violate substantive due process when it involves the exercise of power “without any reasonable justification in the service of a legitimate governmental objective” and that “only the most egregious” official conduct can be said to be “arbitrary in the constitutional sense” (internal quotation marks omitted) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992))).

339. *See, e.g., Roper v. Simmons*, 125 S. Ct. 1183, 1194 (2005) (holding that the execution of individuals who were younger than eighteen years old at the time of their crime

it is justified by a legitimate purpose or is, instead, “unnecessary and . . . totally without penological justification.”³⁴⁰ In sum, the three constitutional provisions are similar in restricting the official use of extreme and unjustified physical and psychological force.

Even at this level of generality, the Abu Ghraib torture probably violated clearly established rights. The Abu Ghraib guards acted solely for their own sadistic purposes when they tortured Ali. They used the “loosen him up” instruction as a pretext for indulging their sadistic streak.³⁴¹ Thus, their conduct had no legitimate justification. Furthermore, the conduct was extreme in its departure from standard interrogation methods.³⁴² For these

violates the Eighth Amendment, based partly on the fact that “[a] majority of States have rejected the imposition of the death penalty on juvenile offenders under 18”).

340. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *see also id.* at 347 (explaining that denial of medical care to prisoners can constitute cruel and unusual punishment “because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose”).

341. *See supra* note 69 and accompanying text.

342. Until December 2002, the interrogation methods authorized for detainees in the war on terrorism were the standard interrogation methods set forth in the U.S. Army’s Field Manual 34-52. Sean D. Murphy, *Executive Branch Memoranda on Status and Permissible Treatment of Detainees*, 98 AM. J. INT’L L. 820, 824 & n.44 (2004); *see also* U.S. Dep’t of the Army, the Navy, the Air Force, and the Marine Corps, Army Regulation 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees 3-4 (1997), *available at* <http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf> (providing procedures for the “[o]peration of prisoner of war internment facilities”). In October 2002, however, officials at GTMO asked officials in Washington to authorize “counter-resistant” interrogation techniques over and above “current interrogation methods.” Memorandum from General James T. Hill, U.S. Commander, Dep’t of Def. to the Chairman of the Joint Chiefs of Staff, Washington, D.C. (Oct. 25, 2002), *reprinted in* TORTURE PAPERS, *supra* note 1, at 223. This led to expanded interrogation methods for use at GTMO. *See* Nov. 27 Action Memo, *supra* note 7, at 237 (indicating the Secretary of Defense’s approval of “Category II” techniques); Apr. 16 Memo, *supra* note 7, at 360-61 (authorizing a more limited set of interrogation techniques). Interrogation methods used at GTMO eventually migrated to Abu Ghraib and other U.S. prisons in Iraq and Afghanistan. *See* Schlesinger Report, *supra* note 1, at 941. Apparently in response to public outcry at the abuses at Abu Ghraib and elsewhere, in November 2005 the Department of Defense issued a directive stating it to be “DoD policy that . . . [a]ll captured or detained personnel shall be treated humanely, and all intelligence interrogations, debriefings, or tactical questioning to gain intelligence from captured or detained personnel shall be conducted humanely, in accordance with applicable law and policy,” including “the law of war, relevant international law, [and] U.S. law.” Department of Defense Directive No. 3115.09, § 3.1 (Nov. 3, 2005), *available at* http://www.fas.org/irp/doddir/dod/d3115_09.pdf. In addition, the new Detainee Treatment Act of 2005 prohibits “any treatment or technique of interrogation not authorized

reasons, it probably not only violated Ali's constitutional rights, but, indeed, constituted a clear violation of those rights. No reasonable officer can believe it is constitutional to brutalize a detainee for the officer's own enjoyment.³⁴³

The other scenarios present closer cases. Unlike the Abu Ghraib torture, the torture in the GTMO and Syrian rendition scenarios has a purpose that is generally legitimate: to get information for fighting the war on terrorism.³⁴⁴ Whether that purpose ever justifies torture lies at the heart of torture's constitutionality under the relevant constitutional standards, which, as discussed above, take into account the justification for official use of

by and listed in the United States Army Field Manual on Intelligence Interrogation." Pub. L. No. 109-148, § 1002(a), 119 Stat. 2680, 2739 (Dec. 30, 2005).

343. Analysis of the actual events at Abu Ghraib is more difficult than analysis of the Abu Ghraib scenario discussed in this Article because it is hard to read people's minds. Analysis of the actual abuse would depend on, among other issues, whether the guards really acted as they did in the belief that they were obeying the "loosen them up" instruction. If so, they might show that they did not violate clearly established rights of which a reasonable person would have known. From published reports, it appears that the guards were young, had received little or no training on how to be prison guards, and were subject to inconsistent commands from the regular military leaders and from military intelligence officials. *E.g.*, Schlesinger Report, *supra* note 1, at 934 (noting that "generally training [for Military Police Mission] was inadequate"); Josh White, *Dog Handler Found Guilty of Abu Ghraib Abuse*, WASH. POST, Mar. 22, 2006, at A8 (reporting on the testimony of Col. Thomas M. Pappas, top military intelligence official at Abu Ghraib, in which he admitted that he had not ensured dog handlers had adequate training to use them to control detainees); Josh White, *Former Abu Ghraib Guard Calls Top Brass Culpable for Abuse*, WASH. POST, Jan 23, 2006, at A3 (reporting the assertion of a former guard at Abu Ghraib that she had "received no training" in treatment of detainees). Furthermore, conditions at Abu Ghraib were exigent. The guards were grossly outnumbered by the detainees; the facility was in an active combat zone full of killing and maiming; and military leadership was inadequate. *See id.* at 928 (finding that "weak and ineffectual leadership . . . allowed the abuses at Abu Ghraib"); *see id.* at 937 (noting that the ratio of detainees to guards was 75:1 and the facility was "smack in the middle of a combat environment"). Add to those circumstances that many detainees were violent criminals and that some detainees were believed to have valuable military intelligence information. *See id.* at 940, 944 (discussing official pressure to produce actionable intelligence from the Abu Ghraib detainees and stating that the Abu Ghraib prison contained Iraqi criminals). In my view, unfortunately, it is hard under these circumstances to conclude that soldiers in their late teens and early twenties "should have known" that they were violating "clearly established" constitutional rights if they reasonably believed they were following orders.

344. *See* Russell A. Miller, *Before the Law: Military Investigations and Evidence at the Iraqi Special Tribunal*, 13 MICH. ST. J. INT'L L. 107, 132-33 (2005) (discussing the laws of war and the military regulations recognizing that detained combatants will be interrogated for military intelligence by the detaining authority).

psychological and physical force against individuals.³⁴⁵ The issue of whether torture is ever constitutional, in turn, naturally bears on whether the specific instances of torture in our three scenarios violate “clearly established” constitutional rights of which a reasonable person should have known. Torture that serves no legitimate purpose, such as in the Abu Ghraib scenario, may not only violate the Constitution, but also do so clearly. On the flip side, torture that serves a generally legitimate purpose, such as intelligence gathering, may be constitutional—or at least arguably constitutional—in some circumstances.

The objective of getting information to protect the public justifies some official pressure in police interrogations upon a person whom the police have probable cause to believe committed a crime.³⁴⁶ It is clearly established, however, that police torture of suspects violates the Constitution. That is the teaching of a long line of Supreme Court cases originating in the first half of the twentieth century with cases such as *Brown v. Mississippi*.³⁴⁷ Those cases involved the police use of extreme physical and psychological force, sometimes comparable to that of our scenarios, against suspects in custody. Supreme Court cases involving local police brutality are the most relevant precedent on the constitutionality of torture in the war on terrorism.

Whether those police cases “clearly establish” the law applicable to our torture scenarios, as well as to actual events in the war on terrorism, depends partly on whether one regards that war as a real war or, instead, a metaphorical one. In a real war, violence is a norm. In particular, courts give

345. See *supra* notes 332-40 and accompanying text; see also Sanford Levinson, *Torture in Iraq and the Rule of Law in America*, 133 DAEDALUS, Summer 2004, at 5, reprinted in *IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND* 180, 184 (Jeremy Brecher et al. eds., 2005) (discussing the maxim of a Nazi legal philosopher in constitutional-law terms as relevant to torture in the war on terrorism: “[E]very norm is subject to limitation when a compelling interest is successfully asserted, and it is hard to think of a more compelling interest than the prevention of violent death at the hands of a hostile group.”).

346. See, e.g., *United States v. Astello*, 241 F.3d 965, 967 (8th Cir. 2001) (“Obviously, interrogation of a suspect will involve some pressure because its purpose is to elicit a confession. In order to obtain the desired result, interrogators use a laundry list of tactics. Numerous cases have held that questioning tactics such as a raised voice, deception, or a sympathetic attitude on the part of the interrogator will not render a confession involuntary unless the overall impact of the interrogation caused the defendant’s will to be overborne.” (internal quotation marks and citation omitted) (quoting *Jennifer v. Smith*, 982 F.2d 329, 334 (8th Cir. 1993))).

347. See 297 U.S. 278, 280-87 (1936); see also *Miranda v. Arizona*, 384 U.S. 436, 446 n.6 (1966) (citing other cases in the *Brown* line).

the executive branch broad discretion to detain combatants.³⁴⁸ That discretion may extend to the government's determination of appropriate conditions of detention.³⁴⁹ Some argue, however, that the war on terrorism is more appropriately conceived of as a law-enforcement response to criminal acts.³⁵⁰ Under that conception, the *Brown* line of cases might not only establish the unconstitutionality of torturing detainees in the war on terrorism, but also do so clearly. Under the competing conception that considers the United States to be in an actual war, the *Brown* cases may establish unconstitutionality, but differ too much in their setting to do so clearly.

The GTMO and Syrian rendition scenarios differ from the Abu Ghraib scenario not only in involving the generally legitimate objective of gathering intelligence, but also in involving officials carrying out orders from high-level executive officials. The GTMO interrogators reasonably believe they are using interrogation methods authorized by the Secretary of Defense; the U.S. officials who render Sami to Syria are obeying CIA policy.³⁵¹ In reality, the Department of Defense policies and the CIA program had support from the Justice Department materials advocating a narrow definition of torture.³⁵² The Court has held that the existence of executive pronouncements authorizing an official's conduct can be an "important" factor supporting

348. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" (alteration in original) (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942))); *id.* at 531 (stating, in the course of discussing due process requirements for the government's classification of people as enemy combatants, that "[w]ithout doubt, our Constitution recognizes that core strategic matters of wargaming belong in the hands of those who are best positioned and most politically accountable for making them").

349. *Cf. Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (applying deferential standard of review to prison visitation regulations challenged on constitutional grounds).

350. *See, e.g., Kim Lane Scheppele, Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1023 (2004) ("[N]ations have a choice between thinking of terrorist attacks as large crimes (on the model of organized crime or other criminal conspiracies) or as small wars (on the model of insurgent attacks)."). *But cf. Arar v. Ashcroft*, 414 F. Supp. 2d 250, 274 (E.D.N.Y. 2006) ("[T]he question whether torture could be used to extract evidence for the purpose of prosecuting criminal conduct [is] a very different question from the [question] . . . whether substantive due process would erect a per se bar to coercive investigations, including torture, for the purpose of preventing a terrorist attack.").

351. *See supra* Part I.B-C.

352. *See Torture Memo, supra* note 137, at 2-13.

qualified immunity when the relevant law is otherwise “undeveloped.”³⁵³ Some lower courts hold that, even if some relevant case law exists, officials have qualified immunity when they rely on executive orders or policies that they reasonably believe are valid.³⁵⁴ This precedent supports claims of qualified immunity by the U.S. officials in the GTMO and Syrian rendition scenarios, considering the high-level executive-branch pronouncements that encouraged or authorized torture and the unsettled constitutionality of torture in its various definitions.

Despite such high-level pronouncements, of course, many federal statutes and military directives prohibit torture and other inhumane treatment of detainees.³⁵⁵ Thus, *Bivens* claims against the officials involved in our scenarios will require courts to determine whether the executive directives that the officials followed conflict with those statutes and regulations. If so, and if the officials should have realized the conflict and, in light of the conflict, should have known that their conduct would violate the detainees’ constitutional rights, then their reliance on the executive directive will do them no good in establishing qualified immunity.³⁵⁶ Another possibility, however, is that the executive pronouncements that seemed to condone torture prevented even reasonable soldiers from appreciating the clear unconstitutionality of torturing detainees.

3. Summary of *Bivens* Analysis of Torture Claims

Bivens claims for U.S. torture have three levels of complexity. First, the constitutionality of torture raises difficult questions under the Fourth, Fifth, and Eighth Amendments. A second level of complexity involves determining when, if ever, “special factors counselling hesitation” will bar a *Bivens* claim even when the torture violates the Constitution. The third level of complexity arises from qualified immunity defenses.

353. *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (stating that a Marshals Service policy authorizing defendant officials’ conduct was “important” to the Court’s conclusion that those officials had qualified immunity from constitutional tort claim, because “the state of the law . . . was at best undeveloped”).

354. *See supra* note 318 and accompanying text.

355. *See supra* note 137 (citing sources).

356. *See Groh v. Ramirez*, 540 U.S. 551, 564 (2004) (denying qualified immunity in part because internal guideline of Bureau of Alcohol, Tobacco, and Firearms “placed [defendant] on notice that he might be liable for executing a manifestly invalid warrant”).

E. Adequacy of Bivens Actions for U.S.-Sanctioned Torture

For reasons discussed in Part III.D, the FTCA provides a poor vehicle for handling torture claims against the United States.³⁵⁷ Likewise, the constitutional tort doctrine that has grown out of *Bivens* provides a poor vehicle for handling torture claims against U.S. officials.

The FTCA and *Bivens* share a fundamental problem: they require torture to be treated as a mere intentional tort.³⁵⁸ As limited by the defense of qualified immunity, *Bivens* is designed primarily to impose liability upon the rogue officer who violates someone's constitutional rights either deliberately or out of "plain[] incompetent[ce]," but not upon the competent and conscientious officer who violates constitutional rights in a reasonable attempt to follow orders.³⁵⁹ The idea is that the specter of tort liability in the latter situation could discourage competent and conscientious officials from doing their duty. The government's interest in officials doing their duty might justify denying a remedy for an individual official's tort, even a constitutional tort. But U.S.-sanctioned torture, as the reality-based scenarios analyzed in this Article illustrate, is typically more than just a tort conducted by an individual rogue official. U.S.-sanctioned torture reflects a failure and a perversion in the command structure. It is therefore willful blindness to treat such torture, as *Bivens* analysis would have it, as one errant official's tort.

Bivens suffers from additional flaws besides being designed primarily for the torts of rogue individual officers. These additional flaws do not just affect *Bivens* claims for torture, but they are particularly acute in this context and therefore warrant examination.

As a deterrent to U.S.-sanctioned torture, *Bivens* is underinclusive. To begin with, *Bivens* does not make officials liable for all violations of the law, only for violations of certain constitutional provisions.³⁶⁰ In addition, qualified immunity restricts *Bivens* liability to only clear constitutional violations. The constitutional rights of torture victims are not clear.³⁶¹ In their

357. See *supra* Part III.D.

358. See *supra* Part III.D.

359. *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (explaining that qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law").

360. See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.").

361. See *supra* notes 341-56 and accompanying text.

currently undeveloped state, constitutional rights do not do much good for torture victims. Torture victims would be better served by a doctrine that creates civil liability for officials' clear violations of statutes and regulations barring the mistreatment of detainees.

Even for clear constitutional violations, *Bivens* is underinclusive. At least two factors can defeat *Bivens* liability for clear constitutional violations. Both factors stem from *Bivens*'s focus on the conduct of the individual officials named as defendants. Each factor may operate strongly in *Bivens* claims for U.S. torture.

First, a *Bivens* defendant may be comparatively sympathetic in the eyes of the jury hearing the *Bivens* claim. *Bivens* liability usually rolls downhill, attaching, if at all, to the "street-level" officials who actually inflict the injury that gives rise to the *Bivens* suit.³⁶² Those officials may appear as scapegoats to the jury. Take, for example, a case for police brutality during an arrest. The victim may have just been arrested for a serious crime. The officer may have been acting under conditions of great stress, uncertainty, and danger. In addition, the officer may have been badly trained, poorly equipped, and overworked. None of these circumstances is the officer's fault. What is worse is that perhaps the officer's superiors tolerate and even encourage brutality toward arrestees. Under these circumstances, some juries may refuse to hold the *Bivens* defendant liable even for a clear-cut violation of constitutional rights, on the view that the arrestee deserved it or that, in any event, the officer's superiors are really to blame. The individual defendants' violations get excused by jury nullification.

The risk of nullification may be particularly great in cases involving the torture of suspected terrorists. This class of *Bivens* plaintiffs may be even less sympathetic than the typical victim of police brutality. On the flip side, the official who inflicts the torture may be perceived by the jury as acting under circumstances of even greater danger and uncertainty than the typical officer charged with police brutality. The jury may be even more willing than in a police brutality case to believe the official who tortured a suspected terrorist is a mere scapegoat for policies and problems higher up in the chain of command. For these reasons, the risk of jury nullification in *Bivens* suits for U.S. torture might be high.

The second factor limiting *Bivens* liability even for clear constitutional violations reflects that most *Bivens* actions do not get to a jury. They get

362. See Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 93 (1999) (observing that "the most frequent *Bivens* defendants" are "'street level' public officials").

resolved before trial, partly because of doctrines encouraging earlier resolution through devices such as summary judgment on an official's defense of qualified immunity.³⁶³ To rule on that defense, the court examines the individual officer's conduct. The court must determine whether that conduct violated the plaintiff's constitutional rights and whether the violation was one of which a reasonable officer in the defendant official's circumstances should have known. Because the analysis focuses on the individual officials named as defendants, a court may determine that no single official's conduct, standing alone, violated the Constitution or, at least, did so in a way that should have been clear to that official, even though the conduct of various officials, in the aggregate, did violate the plaintiff's constitutional rights.

A recent Supreme Court case illustrates the point. In *Hope v. Pelzer*, the Court reviewed a constitutional tort claim by an Alabama prisoner, Hope, who was twice handcuffed to a "hitching post" as punishment for misconduct.³⁶⁴ The second time, Hope spent seven hours on the post, standing shirtless in the sun; he got water to drink only once or twice and no bathroom breaks.³⁶⁵ Hope sued three prison guards, each of whom asserted qualified immunity.³⁶⁶ The Court held that, as alleged by Hope, the hitching post incidents violated Hope's clearly established rights under the Eighth Amendment.³⁶⁷ As Justice Thomas explained in dissent, however, "When one examines the alleged conduct of the prison guards who are parties to this action, as opposed to the alleged conduct of *other* guards, who are *not* parties to this action, [Hope's] case becomes far less compelling" than it is when one considers the prison officials' conduct in the aggregate.³⁶⁸ Two of the three guards named as defendants played no role in the second, more brutal hitching incident.³⁶⁹ The third guard named as a defendant was alleged to

363. See, e.g., *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996) (declaring that an official who seeks summary judgment on grounds of qualified immunity and has it denied by a trial court can take immediate interlocutory appeal, even if she has already so appealed a prior order, to the extent that the trial court's ruling turned on an issue of law); *Harlow v. Fitzgerald*, 457 U.S. 800, 814-18 (1982) (abandoning the subjective element of the Court's existing test for qualified immunity because it prevented early disposition of qualified immunity defenses).

364. 536 U.S. 728, 733-35 (2002).

365. *Id.* at 734-35.

366. *Id.* at 735.

367. *Id.* at 741.

368. *Id.* at 749 (Thomas, J., dissenting, joined by Rehnquist, C.J. and Scalia, J.).

369. *Id.* at 749-50.

have handcuffed Hope to the hitching post in the second incident, but not to have been responsible for his being shirtless in the sun for seven hours and being given little water and no bathroom breaks.³⁷⁰ Justice Thomas concluded, “Once one understands [Hope’s] specific allegations against [each of the defendant guards], the Eighth Amendment violation in this case is far from obvious.”³⁷¹ The majority did not disagree with Justice Thomas’s “thoughtful” analysis; instead, the majority simply observed that the Court had not taken the case to decide—and therefore left to be determined on remand—“the questions whether or to what extent the three named officers may be held responsible for the acts charged, if proved.”³⁷² Thus, the majority’s decision leaves open the possibility that none of the officials named as defendants will be found to have violated Hope’s clearly established rights even though a clear violation of Hope’s constitutional rights occurred at the collective hands of the Alabama prison system.

From *Hope* one can easily imagine a case in which a suspected terrorist suffers unconstitutional torture at the hands of many officials, no one of whom acted in a way that was clearly unconstitutional. A person may suffer torture through a combination of circumstances for which no one official is or can be proven to have been responsible. For example, separate officials may be responsible for conditions inside the detainee’s cell; the detainee’s meals; the detainee’s medical needs; and the detainee’s interrogations.³⁷³ Likewise, official responsibility for setting policy on each of these issues can be highly diffuse.³⁷⁴ One high-level official issues an order to “exploit

370. *Id.* at 750.

371. *Id.* at 751 (internal quotation marks omitted).

372. *Id.* at 746 (majority opinion); *see also* Brent v. Ashley, 247 F.3d 1294, 1306 (11th Cir. 2001) (examining the conduct of each of the six officials involved in a strip-search of plaintiff to determine whether any of the officials violated plaintiff’s clearly established constitutional rights, and holding that none of those officials did so).

373. To cite an actual example, Manadel al-Jamadi apparently died at Abu Ghraib prison because one set of CIA officials broke his ribs, and thereafter, other CIA officials handcuffed him in a position that would have made it hard for him to breathe, even if his ribs had not been broken. The combination caused him to die of “compromised respiration.” *See* Mayer, *supra* note 180, at 48-50.

374. *See* DANNER, *supra* note 1, at 10 (“We’ve now had fifteen of the highest-level officials involved in this entire operation [testify], from the secretary of defense to the generals in command, and nobody knew that anything was amiss, . . . nobody did anything amiss. We have a general acceptance of responsibility, but there’s no one to blame, except for the people at the very bottom of one prison.” (internal quotation marks omitted) (quoting Sen. Mark Drayton’s statement at a hearing before the Senate Armed Services Committee on May 18, 2004, into U.S. abuse of detainees in the war on terrorism)).

internees for actionable intelligence”; an official lower down the chain implements that order by issuing standard operating procedures for use at a particular facility; the procedures are vague enough that they are understood by still lower-level officials to allow the incidents depicted in the Abu Ghraib and GTMO scenarios described in Part I.³⁷⁵ Thus, the systemic nature of official torture makes it particularly difficult to hold any one official responsible under *Bivens*, with the possible exception of the most sadistic, low-level officials,³⁷⁶ and, to add insult to injury, these low-level officials will often be judgment proof.³⁷⁷

Bivens' focus on individual officials prevents it from being an effective deterrent to, or remedy for, unconstitutional conduct. This failing, though significant, should not obscure the more fundamental problem that the Constitution in its current state will not clearly identify—and therefore will not create *Bivens* liability for—all instances of official torture. If we want to retain *Bivens* or create some other system for holding individual officials personally liable for torture, we should at the very least not use the Constitution as the sole standard for liability.

F. A Proposed Reform of the Law on Torture Claims Against U.S. Officials

Under current law, U.S. officials can seldom be held civilly liable for torture. This would not be so bad if the United States itself could be held civilly liable for torture by its officials. In that event, the victims of torture could get a remedy; the United States would presumably have an incentive to

375. See DANNER, *supra* note 1, at 12 (quoting a classified memorandum in which Lieutenant General Ricardo Sanchez, overall commander in Iraq, instructed interrogators to work with military police guards to “manipulate an internee’s emotions and weaknesses” for interrogation purposes); *id.* at 43 (quoting an order to Major General Geoffrey Miller to “rapidly exploit [Abu Ghraib] internees for actionable intelligence”); Taguba Report, *supra* note 1, at 409 (finding that Major General Geoffrey Miller recommended that a set of guards at Abu Ghraib be trained to “set[] the conditions for the successful interrogation and exploitation of internees/detainees”).

376. See *supra* note 362 and accompanying text.

377. See S. REP. NO. 93-588, at 3-4 (1973) (stating in the legislative history of the FTCA’s law enforcement proviso that *Bivens* defendants are often effectively judgment proof). For example, one of the guards convicted of abusing prisoners at Abu Ghraib was earning less than \$2000 per month when charges against him were filed. See Charge Sheet for Charles A. Graner, Jr., Dec. 20, 2001, available at <http://news.findlaw.com/hdocs/docs/iraq/graner51404chrg.html> (charging a participant in the Abu Ghraib prison abuses with violations of four articles of the Uniform Code of Military Justice).

prevent its officials from committing torture,³⁷⁸ and the United States could prevent torture in a variety of ways, such as through training, disciplinary measures, and criminal prosecution. However, under current law the United States can almost never be held liable for torture by its officials.³⁷⁹ Furthermore, even under the legislative reform that I proposed earlier in this Article,³⁸⁰ the United States would often escape liability for torture by its officials.³⁸¹ Therefore, unless the law provides for U.S. officials themselves to be liable for torture, torture victims will often have no remedy for torture, and the threat of civil liability will not serve as much of a deterrent. In my view, two alternative legislative measures would improve the law on torture claims against U.S. officials.

First, Congress could enact legislation making U.S. officials personally liable for torture under the same circumstances as state or local officials would be under 42 U.S.C. § 1983.³⁸² There is one main justification for this proposal to use § 1983, rather than *Bivens*, to evaluate federal officials' liability for torture. *Bivens* creates a cause of action only for violations of certain constitutional provisions. In contrast, § 1983 creates a cause of action not only for violations of the Constitution, but also for violations of federal rights created by statute or regulation.³⁸³ The difference is relevant because, even when torture does not violate "clearly established" constitutional rights, it may clearly violate any number of federal statutes and regulations. For this reason, torture victims would benefit more from a civil remedy for violations of these statutes and regulations than for constitutional violations. By the

378. See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 16-19 (1983). *But cf.* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 362 (2000) (concluding that "there is little reason to believe that constitutional cost remedies [for example, constitutional torts] are useful tools for shaping governmental behavior," based on differences between the government and the private sector).

379. See *supra* Part III.

380. See *supra* note 187.

381. See *supra* note 198 and accompanying text.

382. This proposal parallels the proposal in *supra* note 187 to make the United States liable for torture by those acting on its behalf under the same circumstances as a local government would be under § 1983. See 42 U.S.C. § 1983 (2000); see also *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) ("Over the years Congress has considered the problem of state civil and criminal actions against federal officials many times. But no general statute making federal officers liable for acts committed 'under color,' but in violation, of their federal authority has been passed." (citation omitted)).

383. See *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980).

same token, it is arguably more reasonable to require federal officials to understand statutory and regulatory provisions governing the treatment of detainees than to understand the presently murky constitutional terrain. Furthermore, civil liability for violations of statutes and regulations proscribing torture could facilitate compliance with those statutes and regulations. Unfortunately, § 1983's promise as a remedy for violations of federal statutory and regulatory rights has not been fully realized because of interpretative complexity and restrictive Supreme Court precedent.³⁸⁴ At a minimum, however, the same remedial promise should be extended to the victims of U.S.-sanctioned torture as now extends to the victims of mistreatment by state and local officials.³⁸⁵ In my view, this is true because, as a matter of fairness, the federal government and its officials should not benefit from a double standard.

As an alternative to holding federal officials liable under the same circumstances as state and local officials would be under § 1983, Congress could amend existing legislation, the Torture Victim Protection Act of 1991 ("TVPA").³⁸⁶ Currently, the TVPA creates a cause of action for the victims of torture inflicted under color of foreign law.³⁸⁷ Congress could amend the TVPA to extend the cause of action to the victims of torture inflicted under color of *federal* law. Similar to the first alternative (which would use § 1983 as a model for the liability of federal officials), amending the TVPA to

384. See generally FALLON ET AL., *supra* note 14, at 1092-97. Federal officials would have the same immunity from § 1983 claims that they now have from *Bivens* claims. *Butz v. Economou*, 438 U.S. 478, 500-01 (1978) (stating that, "in the absence of congressional direction to the contrary," federal officials should have no greater immunity from liability for constitutional torts than state officials have).

385. The availability of a remedy for torture that violates federal statutory and regulatory rights would not only benefit the victims of the torture. It also could obviate constitutional tort claims for torture and the attendant risk that judicial analysis of such claims will distort constitutional law. Torture cases may be the paradigmatic "hard cases" that make bad constitutional law. Like death penalty cases, torture cases often involve horrific facts that can skew analysis. Unlike death penalty cases, however, torture cases can be hard to identify, because it is hard to define torture, and so torture case law will be harder to wall off than death penalty jurisprudence. Consequently, torture cases, even more than death penalty cases, may distort constitutional law in other settings. *Cf. Furman v. Georgia*, 408 U.S. 238, 368 (1972) (Douglas, J., in support of the judgment) ("[T]here is one conclusion about the penalty that is universally accepted—i.e., it tends to distort the course of the criminal law." (internal quotation marks omitted)).

386. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2000)).

387. *Id.* § 2(a), 106 Stat. at 73; see *supra* note 273.

extend it to U.S.-sanctioned torture is justified on grounds of comparable treatment. The first alternative treats federal officials comparably to state and local officials; the second treats them comparably to foreign officials.³⁸⁸ The principle of comparable treatment not only justifies these alternatives, but also may make them politically feasible, though far from perfect.

V. CONCLUSION

Current law treats U.S.-sanctioned torture as a tort. Thus, the victims of U.S.-sanctioned torture can sue the United States for money damages under the Federal Tort Claims Act and can sue U.S. officials for money damages under the “constitutional tort” doctrine of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics Agency*. Each route has two main problems. First, neither leads much of anywhere. The United States will avoid liability for most torture claims because of limits that the FTCA places on U.S. liability, and most officials will avoid liability for torture claims because of limits on the *Bivens* remedy. Second, the FTCA and *Bivens* doctrine are not only inadequate because they seldom yield any remedy for torture, but also because they misconceive torture as simply another tort. Put another way, neither the FTCA nor *Bivens* was designed for claims of U.S.-sanctioned torture. A better, though far from perfect, system would make the United States liable for money from torture under the same circumstances as units of local government are liable under 42 U.S.C. § 1983 and would make U.S. officials liable in money damages from torture under the same circumstances as either (1) state and local officials are liable under § 1983 or

388. The text’s reference to “foreign officials” means individuals who act “under actual or apparent authority, or color of law, of any foreign nation.” *Id.* § 2(a), 106 Stat. at 73. A report on extraordinary rendition states that U.S. officials involved in extraordinary rendition might be held liable under the TVPA on the theory that they acted “under color of foreign law.” *Torture by Proxy*, *supra* note 12, at 121 (referring to the TVPA as the “TPA”). It is doubtful that a U.S. official acting under color of federal law can, at the same time, be acting under color of foreign law, unless perhaps the official was a double agent. *See Arar v. Ashcroft*, 414 F. Supp. 2d 250, 264–66 (E.D.N.Y. 2006) (dismissing a TVPA claim against U.S. officials involved in extraditing plaintiff to Syria for torture, and holding that those officials did not act under color of foreign law, as required for TVPA liability); *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 267 (D.D.C. 2001) (holding that former National Security Advisor Henry Kissinger was not acting under color of foreign law for purposes of the TVPA when he planned a coup in Chile with the assistance of certain Chilean officials), *aff’d on other grounds*, 412 F.3d 190, 194–98 (D.C. Cir. 2005) (holding that claims were barred by the political question doctrine).

(2) foreign officials are liable under the Torture Victim Protection Act of 1991.