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## DEFERRING CLARITY: QUALIFIED IMMUNITY OF FEDERAL OFFICIALS FROM SUITS FILED BY AMERICAN CITIZENS ALLEGING TORTURE

*Chelsea Anne Perdue\**

### I. INTRODUCTION

The Supreme Court has stated that a “state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”<sup>1</sup> In the post-9/11 security chaos, a novel legal issue burgeoned into a mass intra-agency debate, as the government began detaining persons with little to no evidentiary basis for arrest.<sup>2</sup> From the heart of this debate sprung a series of conflicting cases in federal courts concerning whether American citizens allegedly tortured by the U.S. government have a right to sue federal officials for their mistreatment. Legal scholars have paid much attention to the presence of a *Bivens* claim in these cases.<sup>3</sup> This Comment analyzes the less-discussed, conflicting approaches the federal courts utilize in determining whether qualified immunity exempts federal officials from suit by American citizens who allege they have been tortured.

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<sup>1</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004).

<sup>2</sup> *Padilla v. Yoo*, 678 F.3d 748, 768 (9th Cir. 2012) (“There was at that time considerable debate, both in and out of government, over the definition of torture as applied to specific interrogation techniques.”).

<sup>3</sup> A *Bivens* claim is one in which a plaintiff requests a court imply a cause of action against a federal official for constitutional violations. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). For this claim to proceed, a court must determine that “(1) Congress has not already provided an exclusive statutory remedy; (2) there are no ‘special factors counselling hesitation in the absence of affirmative action by Congress’; and (3) there is no ‘explicit congressional declaration’ that money damages not be awarded.” *Hall v. Clinton*, 235 F.3d 202, 204 (4th Cir. 2000) (citing *Bivens*, 403 U.S. at 396–97).

Although few cases have developed, they derive from the post-9/11 debate on the definition of torture and provide fertile source for analysis. Federal courts have avoided the burden of defining torture for future applicants confronted by this situation by dismissing cases on the basis of qualified immunity. Though the scope of this Comment's analysis is limited to thirteen opinions spanning four cases, the issue is ripe for decision because federal courts are likely to face similar claims in the future of our national security-minded country. The federal courts and legislature have deferred to the executive branch's officers over the last five years, passing out qualified immunity to officials with valid criminal proceedings against them. The continued cry bemoans that there is no exact precedent on which to rely. This is no surprise given the perpetual grants of qualified immunity before cases can be heard on the merits. The Supreme Court, too, has balked at the issue, denying *certiorari* and dismissing these cases. This Comment's goal is to take the patches of brilliance from thirteen inconsistent and muddled cases and create a working, complete legal-analytical framework under which the issue should be discussed. Until the Supreme Court tackles the problem or the lower courts agree on the proper or operative analysis, all future cases of American citizens against federal officials for violent treatment will be doomed before they begin.

This Comment consists of four overarching components. Part II, provides a brief introduction to the legal foundation of qualified immunity, an expansive and complex realm of scholarly development. Part III, provides a comprehensive map of the four cases in question.<sup>4</sup> Part IV attempts to sew the scattered pieces of analysis into a comprehensive scheme, taking into consideration all collateral complications addressed in each opinion. Finally, Part V concludes, encouraging both the judicial and legislative branches to tackle the problem of federal officials' liability for criminal acts without fear of the executive branch. With the segments of qualified immunity analysis compiled in a cohesive structure, federal courts can meet the needs of American citizens allegedly subjected to maltreatment by federal officials.

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<sup>4</sup> Every lower court opinion is relevant to this topic because the appellate courts are most guilty of shirking the qualified immunity discussion altogether or giving it a cursory glance, hastily overturning or affirming the lower courts. The district courts have grappled more thoroughly with the complexities of the qualified immunity issue. The facts of the cases are also particularly relevant, considering much of the qualified immunity discussion will turn on the specific allegations of each case to determine whether there has been a violation of a clearly established right.

## II. QUALIFIED IMMUNITY

Qualified immunity is a doctrine that government officials invoke to avoid liability when acting within the scope of their discretionary function.<sup>5</sup> These defendants “generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of what a reasonable person would have known” at the time of action.<sup>6</sup> Liability exists only when a violation is “apparent,”<sup>7</sup> because government actors “cannot be required to predict how the courts will resolve legal issues.”<sup>8</sup>

Recently, the standard for qualified immunity analysis has shifted from a merits-first requirement to an approach granting increased discretion to federal courts.<sup>9</sup> The original standard required district courts to first determine whether “the facts alleged show the officer’s conduct violated a constitutional right.”<sup>10</sup> This prompted a discussion on the merits of the case, encouraging “the process for the law’s elaboration from case to case.”<sup>11</sup> Otherwise, courts would be tempted to “skip ahead” to the second prong, resulting in a speedier dismissal of the case.<sup>12</sup> The prior standard dictated that only after finding a constitutional violation could the court analyze the second prong: “whether the right was clearly established.”<sup>13</sup> If a court found that the facts alleged showed the officer’s conduct violated a constitutional right, and this constitutional right was clearly established at the time of the violation, then no qualified immunity would be granted to the official.<sup>14</sup> The Supreme Court warned that this analysis “must be taken

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<sup>5</sup> Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); DiMeglio v. Haines, 45 F.3d 790, 794 (4th Cir. 1995).

<sup>6</sup> *Id.*

<sup>7</sup> Anderson v. Creighton, 483 U.S. 635, 640 (1987).

<sup>8</sup> Francis v. Giacomelli, 588 F.3d 186, 196 (4th Cir. 2009); McVey v. Stacy, 157 F.3d 271, 277 (4th Cir. 1998).

<sup>9</sup> Pearson v. Callahan, 555 U.S. 223 (2009); Saucier v. Katz, 533 U.S. 194 (2001); Sarah L. Lochner, *Qualified Immunity, Constitutional Stagnation, and the Global War on Terror*, 105 Nw. U. L. REV. 829 (2011). Lochner analyzes the qualified immunity tests implemented by the Supreme Court and concludes that lower federal courts should continue to follow the merits-first test articulated in *Saucier*—especially in the context of the Global War on Terror. *Id.* The implementation of the Saucier test by the judge’s discretion will serve “not only a notice-giving purpose, but also a constitutional-updating purpose.” *Id.* at 868.

<sup>10</sup> *Katz*, 533 U.S. at 201.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

in the light of the specific context of the case, not as a broad general proposition . . . .”<sup>15</sup> The purpose of requiring this analysis is not only to determine whether qualified immunity is appropriate in the instance, but also to advance legal analysis of the issue.<sup>16</sup> Qualified immunity is designed to give “government officials breathing room to make reasonable but mistaken judgments about open legal questions.”<sup>17</sup>

In 2009, the Supreme Court modified the standard, giving lower courts discretion to choose which prong of the test to administer first and granting courts the ability to dismiss a case on qualified immunity without discussing the merits of the case, namely whether a constitutional right was violated given the alleged facts.<sup>18</sup> This decision effectively granted courts the power of exemption from complex and controversial issues without having to grapple with the underlying merits of the claim and the politically damning facts often accompanying it.<sup>19</sup> The purpose of the change was to relieve lower courts of the burden of expending judicial resources on “an essentially academic exercise.”<sup>20</sup> The Supreme Court continued, however, to encourage lower courts to analyze the constitutional claims before reaching the second prong of the test granting dismissal for qualified immunity.<sup>21</sup>

The doctrine of qualified immunity is far-reaching in both history and discussion. Since its inception, qualified immunity has branched into scholarly analyses ranging from Fourth Amendment excessive force claims and police misconduct<sup>22</sup> to Federal Wiretap Act claims,<sup>23</sup> judge and jury roles,<sup>24</sup> and general attempts to explain the intricacies

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<sup>15</sup> *Id.*

<sup>16</sup> *Katz*, 533 U.S. at 201.

<sup>17</sup> *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011).

<sup>18</sup> *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 237.

<sup>21</sup> *Id.* at 236.

<sup>22</sup> Karen Blum, *Qualified Immunity in the Fourth Amendment: A Practical Application of § 1983 As It Applies to Fourth Amendment Excessive Force Cases*, 21 *TOURO L. REV.* 571, 594 (2005); Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for A Police Officer's Use of Excessive Force*, 62 *TEMP. L. REV.* 61 (1989); Michael Potere, Note, *Who Will Watch the Watchmen?: Citizens Recording Police Conduct*, 106 *Nw. U. L. REV.* 273 (2012); Joann Rene Jenna Roth, Note, *Qualified Immunity: Private Rights of Action for Constitutional Police Violation Cases in Canada and the United States*, 4 *SW. J. L. & TRADE AM.* 245 (1997).

<sup>23</sup> Kathleen Lockard, Note, *Qualified Immunity as a Defense to Federal Wiretap Act Claims*, 68 *U. CHI. L. REV.* 1369 (2001).

<sup>24</sup> Henk J. Brands, Note, *Qualified Immunity and the Allocation of Decision-Making Functions Between Judge and Jury*, 90 *COLUM. L. REV.* 1045 (1990); Paul D. Watson,

of the doctrine.<sup>25</sup> The narrow scope of the most recent academic and judicial controversy asks when qualified immunity should be granted to dismiss cases against federal officials brought by American citizens claiming they were tortured and abused in detention. This controversy comes to light in four relevant instances: *Lebron v. Rumsfeld*,<sup>26</sup> *Padilla v. Yoo*,<sup>27</sup> *Doe v. Rumsfeld*,<sup>28</sup> and *Vance v. Rumsfeld*.<sup>29</sup>

### III. CASE DISSECTION

#### A. *Lebron v. Rumsfeld*<sup>30</sup>

##### 1. Case Facts

Jose Padilla, an American citizen, was arrested at O'Hare International Airport on May 8, 2002 and transferred to New York.<sup>31</sup> By June 9, 2002, President Bush had designated Padilla an enemy combatant through a directive to then-Secretary of Defense Donald Rumsfeld.<sup>32</sup> Padilla filed a writ of habeas corpus two days later.<sup>33</sup> He was then transferred to South Carolina where he was denied access to counsel and communication with family and underwent "extensive interrogation by government officials" until March 2004.<sup>34</sup>

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*Qualified Immunity: Should A Judge or Jury Decide Who Prevails in the Battle Between Government Efficiency and Constitutional Rights?*, 20 STETSON L. REV. 1035 (1991).

<sup>25</sup> Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229 (2006); Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477 (2011); Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187 (1993); Chaim Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155 (2005); John C. Williams, Note, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295 (2012).

<sup>26</sup> *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787 (D.S.C. 2011), *aff'd*, 670 F.3d 540 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012); *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012).

<sup>27</sup> *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009), *rev'd*, 678 F.3d 748 (9th Cir. 2012); *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012).

<sup>28</sup> *Doe v. Rumsfeld*, 800 F. Supp. 2d 94 (D.D.C. 2011), *rev'd*, 683 F.3d 390 (D.C. Cir. 2012); *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012); *Doe v. Rumsfeld*, No. 1:08-CV-1902, 2012 WL 3890944 (D.D.C. Sept. 7, 2012), *appeal dismissed*, No. 12-5400, 2013 WL 4711610 (D.C. Cir. July 15, 2013).

<sup>29</sup> *Vance v. Rumsfeld*, 653 F.3d 591 (7th Cir. 2011), *reh'g en banc granted, opinion vacated*, (Oct. 28, 2011), *on reh'g en banc*, 701 F.3d 193 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013); *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013).

<sup>30</sup> *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787 (D.S.C. 2011), *aff'd*, 670 F.3d 540 (4th Cir. 2012); *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012).

<sup>31</sup> *Rumsfeld*, 764 F. Supp. 2d at 790.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

Padilla's enemy combatant designation was based on reports that he was an Al Qaeda operative with possible plans to plant a dirty bomb at the capital.<sup>35</sup> There were also claims that Padilla discussed placing bombs at gas stations, train stations, and hotels.<sup>36</sup> Padilla was purported to have "significant knowledge" of the plans and personnel of Al Qaeda.<sup>37</sup>

In the complaint he filed in the District Court for the Southern District of New York ("the SDNY") in 2002,<sup>38</sup> Padilla alleged that he was a victim of "gross physical and psychological abuse," mirroring treatment designed for Guantanamo Bay detainees.<sup>39</sup> This abuse included threats of severe physical harm, threats to kill him, sleep adjustment, use of stress positions, manacled and shackling for hours on end, forced administration of psychotropic drugs, noxious fumes causing pain, loud noise, forced grooming, withholding of mattress, blankets, sheets, and pillows, shower suspension, constant surveillance including while using the toilet and shower, removal of religious items, and interference with religious observance.<sup>40</sup> The complaint also alleged Padilla was denied any contact with the outside world, including legal counsel, for twenty-one months.<sup>41</sup> In addition, Padilla was allegedly denied medical treatment for "serious and potentially life-threatening ailments, including chest pain and difficulty breathing, as well as for treatment of the chronic, extreme pain caused by being forced to endure stress positions."<sup>42</sup>

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<sup>35</sup> *Id.* at 798.

<sup>36</sup> *Id.*

<sup>37</sup> *Rumsfeld*, 764 F. Supp. 2d at 798.

<sup>38</sup> *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 596 (S.D.N.Y. 2002), *opinion adhered to on reconsideration sub nom. Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003).

<sup>39</sup> Third Amended Complaint ¶ 1, *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787 (D.S.C. 2011), *aff'd*, 670 F.3d 540 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012) (No. 207CV00410), 2008 WL 4331638.

<sup>40</sup> Third Amended Complaint, *supra* note 39, ¶ 81. An example of a threat against Padilla includes the threat to cut Padilla with a knife and subsequently pour alcohol in the wound. Third Amended Complaint, *supra* note 39, ¶ 81.

<sup>41</sup> Third Amended Complaint, *supra* note 39, ¶ 82.

<sup>42</sup> Third Amended Complaint, *supra* note 39, ¶ 101.

## 2. Case History

Padilla filed his claim in the SDNY in 2002.<sup>43</sup> Judge and future Attorney General Michael Mukasey held that the President had inherent authority as Commander-in-Chief to detain citizens as enemy combatants.<sup>44</sup> He reasoned that Congress' Joint Resolution implicitly authorized this power.<sup>45</sup> Nonetheless, Judge Mukasey ordered the government to provide Padilla access to legal counsel.<sup>46</sup>

The Court of Appeals for the Second Circuit reversed, holding that the President does not have the authority to unilaterally designate American citizens as enemy combatants and that Congress did not implicitly authorize this presidential power.<sup>47</sup> On appeal, the Supreme Court vacated the district court judgment, arguing that New York did not have jurisdiction over the habeas corpus claim, because the petition must be filed where the detainee is physically present.<sup>48</sup> Thereafter, Padilla was permitted to file his petition in South Carolina.<sup>49</sup> The District Court for the District of South Carolina ordered Padilla's release on the grounds the President had no implicit authority to designate Padilla an enemy combatant, the cause of his indefinite detention.<sup>50</sup> The Court of Appeals for the Fourth Circuit ("the Fourth Circuit") reversed, holding that the President had the authority to detain Padilla indefinitely as an enemy combatant on American soil.<sup>51</sup>

Padilla petitioned for *certiorari* to the Supreme Court, and days before the government had to submit its brief, the government moved to vacate the Fourth Circuit's decision.<sup>52</sup> In return, the government requested that Padilla be transferred to the Southern District of

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<sup>43</sup> Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 596 (S.D.N.Y. 2002), *opinion adhered to on reconsideration sub nom.* Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y. 2003).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 604.

<sup>47</sup> Padilla v. Rumsfeld, 352 F.3d 695, 728–29 (2d Cir. 2003), *rev'd and remanded*, 542 U.S. 426 (2004).

<sup>48</sup> Rumsfeld v. Padilla, 542 U.S. 426, 451 (2004).

<sup>49</sup> *Id.*

<sup>50</sup> Padilla v. Hanft, 389 F. Supp. 2d 678, 690 (D.S.C. 2005), *rev'd*, 423 F.3d 386 (4th Cir. 2005).

<sup>51</sup> Padilla v. Hanft, 423 F.3d 386, 397 (4th Cir. 2005) ("The Congress of the United States, in the Authorization for Use of Military Force Joint Resolution, provided the President all powers necessary and appropriate to protect American citizens from terrorist acts by those who attacked the United States on September 11, 2001.").

<sup>52</sup> *Id.* at 583.



Florida to face criminal charges of conspiracy.<sup>53</sup> The Fourth Circuit denied the motion on the grounds the government was merely attempting to evade review by the Supreme Court.<sup>54</sup> The Supreme Court granted the request to transfer Padilla to civilian authorities in Florida based on separation of powers and mootness.<sup>55</sup> Padilla's criminal trial commenced in Miami on May 5, 2007.<sup>56</sup> The jury convicted Padilla on all counts, sentencing him to seventeen years and four months in prison.<sup>57</sup>

In 2007, Padilla brought a civil suit in the South Carolina District Court, alleging his designation as an enemy combatant violated federal statutory and constitutional rights.<sup>58</sup> The district court dismissed the complaint on all counts: the *Bivens* claim, the Religious Freedom Restoration Act ("RFRA") claim, and the claim of a constitutional violation as a result of his designation as an enemy combatant.<sup>59</sup> The defendants received qualified immunity as to the RFRA and constitutional violation arguments.<sup>60</sup> The Fourth Circuit affirmed the district court, addressing only the *Bivens* claim, the RFRA claim, and Padilla's lack of standing in the opinion.<sup>61</sup>

### 3. Case Description

At the onset of the action, Padilla named sixty-one defendants.<sup>62</sup> Over time, litigation whittled the number of defendants to seven.<sup>63</sup> These remaining defendants fall into three categories: the then-

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<sup>53</sup> *Id.* at 584.

<sup>54</sup> *Id.* at 584–87.

<sup>55</sup> *Padilla v. Hanft*, 547 U.S. 1062 (2006) ("That Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts, also counsels against addressing those claims when the course of legal proceedings has made them, at least for now, hypothetical.").

<sup>56</sup> *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787, 794 (D.S.C. 2011), *aff'd*, 670 F.3d 540 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 800, 805.

<sup>60</sup> *Id.*

<sup>61</sup> *Lebron v. Rumsfeld*, 670 F.3d 540, 556, 560–61 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012).

<sup>62</sup> *Id.* at 546.

<sup>63</sup> *Id.* Initial defendants include "Legal Professional Defendants" accused of "formulating the program of confinement and interrogation" and interfering with Padilla's right to counsel. Third Amended Complaint, *supra* note 39, ¶ 28. Initial defendants also consisted of "Medical Professional Defendants" who monitored Padilla's medical state during interrogation and covered their nametags to avoid identification. Third Amended Complaint, *supra* note 39, ¶¶ 29–30. Additionally, unidentified "Interrogator Defendants" and "Guard Defendants" were named at the onset of litigation. Third Amended Complaint, *supra* note 39, ¶¶ 31–32.

Secretary of Defense Leon Panetta, the former Naval Consolidated Brig Commanders, and high-ranking officials involved with policymaking.<sup>64</sup> Padilla sued Panetta in both his individual and official capacities, seeking declaratory relief and an injunction against designation as an enemy combatant.<sup>65</sup> Catherine Haft and Melanie Marr, former Naval Consolidated Brig Commanders, allegedly “implemented the unlawful regime devised and authorized by Senior Defense Policy Defendants.”<sup>66</sup> In addition, Padilla asserted that former Defense Department General Counsel William Haynes, former Director of the Defense Intelligence Agency Vice Admiral Lowell E. Jacoby, former Secretary of Defense Donald H. Rumsfeld, and former Deputy Secretary of Defense Paul Wolfowitz exhibited “extreme indifference to an obvious risk of serious harm” to Padilla, “conspired to bring about a regime of extreme and unlawful detention and interrogation” of enemy combatants, and “permitted the application of those unlawful policies” to U.S. citizens on U.S. soil.<sup>67</sup>

The district court found that qualified immunity applied to all defendants named in the action in all counts regarding designation and detention as an enemy combatant.<sup>68</sup> The court engaged in a two-part analysis of the qualified immunity question.<sup>69</sup> First, the court determined that Padilla’s designation as an enemy combatant did not violate any “clearly established Constitutional rights.”<sup>70</sup> Considering the case history, Judge Gergel determined that the “strikingly varying judicial decisions appear to be the very definition of unsettled law.”<sup>71</sup> Second, the court determined Padilla’s detention and designation as an enemy combatant did not violate any “clearly established” federal law: “To say the scope and nature of Padilla’s legal rights at that time were unsettled would be an understatement.”<sup>72</sup> The court reasoned that the Department of Justice “officially sanctioned” the techniques implemented against Padilla.<sup>73</sup> Additionally, the Department of Defense declared the government’s actions lawful.<sup>74</sup> Demonstrating

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<sup>64</sup> *Rumsfeld*, 670 F.3d at 546–47.

<sup>65</sup> *Id.* at 547.

<sup>66</sup> Third Amended Complaint, *supra* note 39, ¶ 7.

<sup>67</sup> Third Amended Complaint, *supra* note 39, ¶ 5.

<sup>68</sup> *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787, 805 (D.S.C. 2011), *aff’d*, 670 F.3d 540 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012).

<sup>69</sup> *Id.* at 803–04.

<sup>70</sup> *Id.* at 803.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 803–04.

<sup>73</sup> *Id.* at 803.

<sup>74</sup> *Rumsfeld*, 764 F. Supp. 2d at 803.

the lack of unanimity on the issue, the FBI and General Counsel of the Navy advised that the methods violated both American law and the Geneva Convention.<sup>75</sup> To compound conflicting opinions, “[n]o court had specifically and definitively addressed the rights of enemy combatants.”<sup>76</sup>

The Fourth Circuit affirmed the grant of summary judgment for all defendants.<sup>77</sup> They did not, however, address the qualified immunity claim deriving from Padilla’s treatment and designation as an enemy combatant.<sup>78</sup> Instead, they based the affirmation on the collateral *Bivens* claim,<sup>79</sup> qualified immunity from the RFRA claim,<sup>80</sup> and a lack of standing.<sup>81</sup> The United States Supreme Court denied the petition for writ of certiorari.<sup>82</sup>

### B. *Padilla v. Yoo*<sup>83</sup>

#### 1. Parties and Arguments

The facts of *Padilla v. Yoo* mirror those of *Lebron v. Rumsfeld*, discussed above. John Yoo, President Bush’s Deputy Attorney General in the Office of Legal Counsel at the time of Padilla’s designation as an enemy combatant, was the defendant named in this action.<sup>84</sup> Padilla’s complaint in this action alleged that Yoo was the “de facto head of war-on-terrorism legal issues,” considering the promulgation of his legal memoranda,<sup>85</sup> and that he “shaped government policy in his role as key member of a small, secretive, and highly influential group of senior administration officials known as the ‘War Council,’ which met regularly ‘to develop policy in the war on terrorism.’”<sup>86</sup>

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Lebron v. Rumsfeld*, 670 F.3d 540, 562 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012).

<sup>78</sup> *Id.* at 556 (“Because we conclude that Padilla’s *Bivens* action cannot be maintained, we need not reach the questions of whether the defendants are entitled to qualified immunity or whether Padilla has pleaded his claim with adequate specificity.”).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 560.

<sup>81</sup> *Id.* at 561–62.

<sup>82</sup> *Lebron v. Rumsfeld*, 132 S. Ct. 2751 (2012).

<sup>83</sup> *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009), *rev’d*, 678 F.3d 748 (9th Cir. 2012); *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012).

<sup>84</sup> *Yoo*, 633 F. Supp. 2d at 1030, 1014.

<sup>85</sup> First Amended Complaint ¶ 19, *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009), *rev’d*, 678 F.3d 748 (9th Cir. 2012) (No. 08-cv-00035-JSW), 2008 WL 2433172.

<sup>86</sup> First Amended Complaint, *supra* note 19, ¶ 15 (citing JOHN YOO, WAR BY OTHER MEANS (Atlantic Monthly Press 2006)).

The complaint sought a “judgment declaring that the acts alleged [t]herein [were] unlawful and violate[d] the Constitution and laws of the United States” and sought “[d]amages in the amount of one dollar.”<sup>87</sup> Padilla leveled tripartite arguments against Yoo.<sup>88</sup> First, that Yoo was personally involved in the decision to designate Padilla an enemy combatant in violation of U.S. law, because he personally reviewed the reports on Padilla.<sup>89</sup> Second, the policies Yoo prepared approved of the “decision to employ unlawfully harsh interrogation tactics”<sup>90</sup> which “proximately and foreseeably led to the abuses suffered.”<sup>91</sup> Finally, Yoo abused the power of his position as a lawyer by drafting memos with the intent to shape government policy designed to immunize officials and “evade all legal constraints.”<sup>92</sup> Additionally, Padilla alleged violations of the following constitutional and statutory rights: denial of access to counsel, denial of access to court, unconstitutional conditions of confinement, unconstitutional interrogations, denial of freedom of religion, denial of the right of information, denial of the right to association, unconstitutional military detention, denial of the right to be free from unreasonable seizures, and denial of due process.<sup>93</sup>

Defendant Yoo moved for dismissal of the action for failure to state a claim upon which relief could be granted.<sup>94</sup> Yoo advanced three arguments that Padilla failed to state a claim for money damages.<sup>95</sup> First, Yoo argued that the *Bivens* rule creating a private cause of action against federal officials in some circumstances did not apply.<sup>96</sup> Second, he argued that qualified immunity should be granted because “Plaintiffs have failed to establish that Defendant Yoo personally participated in any violation of Plaintiffs’ constitutional rights.”<sup>97</sup> Finally, Yoo contended that qualified immunity should be granted because “Plaintiffs have not alleged a violation of any constitutional

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<sup>87</sup> First Amended Complaint, *supra* note 85, ¶¶ 15, 19, 36, 38, 46.

<sup>88</sup> First Amended Complaint, *supra* note 85, ¶ 84.

<sup>89</sup> First Amended Complaint, *supra* note 85, ¶¶ 37, 38.

<sup>90</sup> First Amended Complaint, *supra* note 85, ¶ 27.

<sup>91</sup> First Amended Complaint, *supra* note 85, ¶ 46.

<sup>92</sup> First Amended Complaint, *supra* note 85, ¶¶ 3, 15.

<sup>93</sup> First Amended Complaint, *supra* note 85.

<sup>94</sup> Padilla v. Yoo, 633 F. Supp. 2d 1005, 1011 (N.D. Cal. 2009), *rev'd*, 678 F.3d 748 (9th Cir. 2012).

<sup>95</sup> Padilla v. Yoo, 678 F.3d 748, 754 (9th Cir. 2012).

<sup>96</sup> Defendant John Yoo’s Motion to Dismiss at 12–23, Padilla v. Yoo, 633 F. Supp. 2d 1005 (N.D. Cal. 2009), *rev'd*, 678 F.3d 748 (9th Cir. 2012) (No. C 08-00035 JSW), 2008 WL 941436 (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)).

<sup>97</sup> Defendant John Yoo’s Motion to Dismiss, *supra* note 96, at 26.

rights.”<sup>98</sup>

## 2. Case Description

The district court ruled in Padilla’s favor on both issues collateral to qualified immunity: the *Bivens* claim and the RFRA claim.<sup>99</sup> The court of appeals forwent discussion of *Bivens* and “resolve[d] all claims under qualified immunity.”<sup>100</sup>

The district court held that Yoo was not entitled to qualified immunity from suit.<sup>101</sup> The court separated the analysis into two parts: whether there was a claim stated for violation of constitutional rights and whether basic constitutional protections were clearly established.<sup>102</sup> Yoo argued that he was not personally responsible for any violation of Padilla’s constitutional rights.<sup>103</sup> The district court rebutted Yoo’s arguments by finding a causal link between Yoo’s actions and the constitutional violations allegedly suffered.<sup>104</sup> To find causation, “direct personal participation” was not required.<sup>105</sup> The court noted that an alternative causal link could be established if the actor “set[s] in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.”<sup>106</sup> The court found that several actions Yoo took were critical in creating a causal link between the defendant and the constitutional violation.<sup>107</sup> The court held that Yoo “participated directly in developing policy on the war on terror” by drafting memoranda laying the “legal groundwork” for designation of persons as enemy combatants.<sup>108</sup> He also “personally reviewed” the compiled documents assessing Padilla’s detention and wrote a legal opinion

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<sup>98</sup> Defendant John Yoo’s Motion to Dismiss, *supra* note 96, at 32.

<sup>99</sup> *Yoo*, 633 F. Supp. 2d at 1030, 1039.

<sup>100</sup> *Yoo*, 678 F.3d at 757.

<sup>101</sup> *Yoo*, 633 F. Supp. 2d at 1038.

<sup>102</sup> *Id.* at 1032, 1036.

<sup>103</sup> *Id.* at 1032. There are four main arguments to support Yoo’s claim. *Id.* First, that Yoo’s memoranda were just a fragment of the “complex mechanism employed by the President” that led to Padilla’s designation as an enemy combatant. *Id.* Second, the legal memoranda explicitly state, “Yoo was not expressing any view on the policy decisions” of the President. *Id.* Third, the memoranda (with only one exception) were designed to apply to those captured outside of the United States. *Id.* Finally, there are no facts that link Yoo with any specific treatment allegedly suffered. *Id.*

<sup>104</sup> *Id.* at 1034.

<sup>105</sup> *Id.* at 1032–33 (quoting *Johnson v. Duffy*, 588 F.2d 740, 743–44 (9th Cir. 1978)).

<sup>106</sup> *Yoo*, 633 F. Supp. 2d at 1032–33.

<sup>107</sup> *Id.* at 1033–34.

<sup>108</sup> *Id.* at 1033.

based on the review.<sup>109</sup> Attorney General Ashcroft relied on Yoo's legal opinion when recommending to the President that Padilla be detained.<sup>110</sup> Yoo specifically advised federal officials that "military detention of an American citizen seized on American soil was lawful" because the "Fourth Amendment had no application to domestic military operations in [that] context."<sup>111</sup> Additionally, after a War Council meeting concerning the legal justification of interrogation techniques including waterboarding and mock burials, Yoo promulgated a renowned memorandum defining torture as causing pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."<sup>112</sup>

Given Yoo's approval of these techniques and his knowledge of Padilla's detention, the court held that it was foreseeable these techniques—alleged to violate constitutional rights—would be inflicted on Padilla as a direct result of Yoo's actions.<sup>113</sup> The district court found a violation of the constitutional right to access courts<sup>114</sup> and the Eighth Amendment prohibition against cruel and unusual punishment.<sup>115</sup> On the other hand, the court found no violation of the Fifth Amendment.<sup>116</sup> Finally, the district court concluded its analysis by holding that the constitutional rights afforded Padilla were clearly established at the time of the violation.<sup>117</sup>

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<sup>109</sup> *Id.* (citing JOHN YOO, WAR BY OTHER MEANS (Atlantic Monthly Press 2006)).

<sup>110</sup> *Yoo*, 633 F. Supp 2d at 1033.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1033–34. Jay Bybee and John Yoo composed the infamous memorandum, commonly referred to as one of the Torture Memos. Along with the definition of torture that sparked a nationwide scholastic response, the memoranda advised the executive branch that the Geneva Convention did not apply to detainees captured in the war on terror. JAY BYBEE, MEMORANDUM FOR ALBERTO R. GONZALES, COUNSEL TO THE PRESIDENT, RE: STANDARDS OF CONDUCT FOR INTERROGATION UNDER 18 U.S.C. §§ 2340–2340A 1 (2002), *available at* [http://dspace.wrlc.org/doc/bitstream/2041/70964/00355\\_020801\\_001display.pdf](http://dspace.wrlc.org/doc/bitstream/2041/70964/00355_020801_001display.pdf); JOHN YOO AND ROBERT J. DELAHUNTY, MEMORANDUM FOR WILLIAM J. HAYNES II, GENERAL COUNSEL, DEPARTMENT OF DEFENSE, RE: APPLICATION OF TREATIES AND LAWS TO AL QUAEDA AND TALIBAN DETAINEES (2002), *available at* <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>.

<sup>113</sup> *Yoo*, 633 F. Supp. 2d at 1034.

<sup>114</sup> *Id.* at 1035.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1036.

<sup>117</sup> *Id.* at 1039.

This analysis mirrored that of the court when evaluating the substantive constitutional rights of Padilla.<sup>118</sup> The district court first noted that the facts of the complaint “clearly violate the rights afforded to citizens held in the prison context.”<sup>119</sup> Then, the court declared “unpersuasive” the defendant’s argument that there is no precedent for affording such a high level of constitutional rights to American enemy combatants detained on American soil.<sup>120</sup> The court reasoned that as long as authority indicated that “‘the disputed right existed, even if no case had specifically so declared,’ the Defendants would be on notice of the right.”<sup>121</sup> In this case, there was notice because “federal officials were cognizant of the basic fundamental civil rights afforded to detainees under the United States Constitution.”<sup>122</sup>

After the defendants’ appeal, the Ninth Circuit Court of Appeals (“the Ninth Circuit”) held Yoo was entitled to qualified immunity, because at the time of Padilla’s detention, American citizens had no clearly established right protecting them from the treatment Padilla underwent.<sup>123</sup> In addition, the court reasoned Yoo was not on notice that his conduct violated the law.<sup>124</sup> Although the treatment “appear[ed] to have been a violation of his constitutional rights” as prohibited by the Supreme Court in *Hamdi v. Rumsfeld*,<sup>125</sup> the court of appeals found *Hamdi* inapplicable.<sup>126</sup> Additionally, the court of appeals

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<sup>118</sup> *Id.* at 1036.

<sup>119</sup> *Yoo*, 633 F. Supp. 2d at 1036.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1036–37 (citing *Hydrick v. Hunter*, 500 F.3d 978, 989 (9th Cir.2007)); see *infra* Part IV.B.3.ii.

<sup>122</sup> *Yoo*, 633 F. Supp. 2d at 1037. The court argues that Supreme Court precedent would have afforded a federal official such as Yoo notice that his actions violated Padilla’s constitutional rights. *Id.* The first opinion referenced holds that denial of medicine can constitute suffering “inconsistent with contemporary standards of decency as manifested in modern legislation” that requires care for prisoners. *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976). In addition, the district court considers the Supreme Court holding that “persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions are designed to punish.” *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982).

<sup>123</sup> *Padilla v. Yoo*, 678 F.3d 748, 748, 761, 768 (9th Cir. 2012).

<sup>124</sup> *Id.* at 768.

<sup>125</sup> *Id.* at 761.

<sup>126</sup> *Id.* The court of appeals’ reasoning in finding *Hamdi* inapplicable centered around three arguments. *Id.* First, that *Hamdi* was decided in 2004, after Yoo’s alleged actions spanning his years in office from 2001 to 2003. *Id.* Consequently, Yoo had no notice of the holding in *Hamdi* applicable to enemy combatants. *Yoo*, 678 F.3d at 761. Second, “it remain[ed] murky” whether enemy combatants were afforded the same protection from constitutional violations that prisoners were. *Id.* Finally, the court of appeals reasoned that although *Hamdi* extended the protection of due process to enemy combatants, the Supreme Court suggested the rights may not parallel those

held that in light of Supreme Court precedent found in *Ex parte Quirin*, a federal official “could have had some reason to believe that Padilla’s harsh treatment fell within constitutional bounds.”<sup>127</sup>

Although the court mentioned that Padilla’s detention “could have been helpful to the United States in staving off further terrorist attacks,” it renounced the sentiment by a hasty claim: “We express no opinion as to whether those allegations were true, or whether, even if true, they justified the extreme conditions of confinement to which Padilla says he was subjected.”<sup>128</sup> The court maintained that Padilla was not “just another detainee,” and it was not reasonably apparent that Padilla was entitled to the constitutional safeguards of an accused criminal or prisoner.<sup>129</sup>

The Ninth Circuit also held that although “officials can still be on notice that their conduct violates established law even in novel factual circumstances,” that was not the case in this instance.<sup>130</sup> Although torture of American citizens is unconstitutional “beyond debate,”<sup>131</sup> the issue of whether, from 2001 to 2003, the actions leveled against Padilla, “however appalling,” were torture was subject to debate.<sup>132</sup>

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granted to other kinds of detainees. *Id.* Since the Supreme Court in *Hamdi* stated that enemy combatants’ rights “may be tailored” to each circumstance, the government had flexibility in bestowing rights. *Id.* (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004)).

<sup>127</sup> *Yoo*, 678 F.3d at 762. *Ex parte Quirin* involved a U.S. citizen detained as an enemy combatant and tried by a military commission. *Ex parte Quirin*, 317 U.S. 1, 24 (1942), *modified sub nom.* U.S. *ex rel.* *Quirin v. Cox*, 63 S. Ct. 22 (1942). The Supreme Court held the detainee was not entitled to a trial by jury and grand jury presentment in light of the historic practice of trying enemy combatants in military court. *Id.* at 38–44. The detainee’s American citizenship was immaterial. *Id.* at 37–38, 44–45.

<sup>128</sup> *Yoo*, 678 F.3d at 762. The court briefly references Supreme Court precedent describing “[i]ncommunicado detention for months on end” as an “unlawful procedure [ ] to extract information.” *Id.* (citing *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting)).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). An exaggerated illustration of the application of the rule would be that welfare officials are not statutorily prohibited from selling children into slavery, but that does not mean they would be immune should they do so. *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990).

<sup>131</sup> *Yoo*, 678 F.3d at 763.

<sup>132</sup> *Id.* at 767–68.



*C. Doe v. Rumsfeld*<sup>133</sup>

## 1. Case Facts

Plaintiff, John Doe, worked for a defense contractor in Iraq as a translator after retiring from the United States Army.<sup>134</sup> Doe worked for the United States Marine Corps Human Exploitation Team, successfully obtaining Iraqi Sheikh Abd Al-Sattar Abu Risha's Sheikh's support on behalf of the United States.<sup>135</sup> While Doe was preparing for annual leave scheduled for November 5, 2005, the Navy Criminal Investigative Service questioned Doe for several hours after transporting him to an airbase in Anbar.<sup>136</sup> Doe refused to answer any questions after being denied an attorney.<sup>137</sup> Consequently, he was blindfolded, kicked, and an officer threatened to shoot Doe should he attempt escape.<sup>138</sup> Doe's questioners then flew him thirty minutes away and placed him in the custody of the Marine Corps, who promptly strip-searched Doe and placed him in isolation.<sup>139</sup> After seventy-two hours of isolation, Doe was once more hooded and transported to Camp Cropper, a military facility for "high value" detainees near Baghdad.<sup>140</sup> Doe spent three months in isolation before being moved to cell housing with alleged Al Qaeda members.<sup>141</sup> Doe's military affiliation was publicized to the inmates and, as a result, he was attacked on multiple occasions.<sup>142</sup> The complaint states that Doe "lived in constant fear for his life."<sup>143</sup> During this time, the guards also assaulted and choked Doe.<sup>144</sup> In addition, the guards subjected Doe to psychological duress, preventing Doe from sleeping by keeping the lights on, playing heavy metal music at "intolerably loud volumes," and banging on the cell door when Doe appeared to be sleeping.<sup>145</sup>

<sup>133</sup> Doe v. Rumsfeld, 800 F. Supp. 2d 94 (D.D.C. 2011), *rev'd*, 683 F.3d 390 (D.C. Cir. 2012); Doe v. Rumsfeld, 683 F.3d 390 (D.C. Cir. 2012); Doe v. Rumsfeld, No. 12-5400, 2013 WL 4711610 (D.C. Cir. July 15, 2013).

<sup>134</sup> Complaint at ¶ 4, Doe v. Rumsfeld, 800 F. Supp. 2d 94 (D.D.C. 2011), *rev'd*, 683 F.3d 390 (D.C. Cir. 2012) (No. 1:08-cv-01902), 2008 WL 7182131.

<sup>135</sup> Complaint, *supra* note 134, ¶ 4.

<sup>136</sup> Complaint, *supra* note 134, ¶ 56.

<sup>137</sup> Complaint, *supra* note 134, ¶ 60.

<sup>138</sup> Complaint, *supra* note 134, ¶¶ 65, 66.

<sup>139</sup> Complaint, *supra* note 134, ¶¶ 67, 68.

<sup>140</sup> Complaint, *supra* note 134, ¶ 73.

<sup>141</sup> Complaint, *supra* note 134, ¶¶ 83, 84.

<sup>142</sup> Complaint, *supra* note 134, ¶ 86.

<sup>143</sup> Complaint, *supra* note 134, ¶ 89.

<sup>144</sup> Complaint, *supra* note 134, ¶ 82.

<sup>145</sup> Complaint, *supra* note 134, ¶ 78.

Doe's first status hearing took place on December 22, 2005.<sup>146</sup> The hearing's purpose was to determine whether Doe should retain his designation as "security internee," be released as an "innocent civilian," or further detained as an "enemy combatant."<sup>147</sup> Doe's requests for an attorney or a member of his team to serve as a witness were denied, and his custodians told him that the only evidence he could present was evidence "reasonably available" to him in the camp.<sup>148</sup> During the hearing, Doe could not view evidence against him, hear testimony, or cross-examine testimony brought against him.<sup>149</sup> After a "very short" hearing, the Status Board determined Doe was a threat and authorized his continued detention.<sup>150</sup> Doe spent the next six months in captivity before receiving notice of a second Status Hearing in July 2006.<sup>151</sup> Once again, his custodians denied his requests for an attorney, limited his presentation of evidence to that "reasonably available" to him at Camp Cropper, and denied the ability to present evidence from the Human Exploitation Team.<sup>152</sup> This hearing lasted "much longer than the first" and included inquiry into Doe's treatment and "what he would do if he were released from the Camp."<sup>153</sup> Doe was finally released in August 2006 after being blindfolded and told he was being transferred.<sup>154</sup>

## 2. Case Description

The district court began its analysis by establishing that Doe had no implied or express private right of action under the Detainee Treatment Act of 2005.<sup>155</sup> In addition, the court dismissed without prejudice Doe's allegation of denial of the right to travel, with the opportunity to amend his complaint upon remand.<sup>156</sup> The government's motion for a more definite statement in regards to Doe's allegation of interference with his right to travel was denied.<sup>157</sup> Also, the court held there were "no special factors to preclude a *Bivens*

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<sup>146</sup> Complaint, *supra* note 134, ¶ 99.

<sup>147</sup> Complaint, *supra* note 134, ¶ 96.

<sup>148</sup> Complaint, *supra* note 134, ¶¶ 97, 98.

<sup>149</sup> Complaint, *supra* note 134, ¶ 100.

<sup>150</sup> Complaint, *supra* note 134, ¶ 101.

<sup>151</sup> Complaint, *supra* note 134, ¶¶ 102, 103.

<sup>152</sup> Complaint, *supra* note 134, ¶ 104.

<sup>153</sup> Complaint, *supra* note 134, ¶ 106.

<sup>154</sup> Complaint, *supra* note 134, ¶¶ 116–18.

<sup>155</sup> *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 104 (D.D.C. 2011), *rev'd*, 683 F.3d 390 (D.C. Cir. 2012).

<sup>156</sup> *Id.* at 125.

<sup>157</sup> *Id.* at 126.

remedy for Doe's alleged constitutional claims, and because there were no alternative remedies available for the due process violations of which Doe complained, the court concluded that Doe could assert a cause of action under *Bivens*.<sup>158</sup>

The district court divided its analysis of qualified immunity into three parts: (1) substantive due process,<sup>159</sup> (2) procedural due process,<sup>160</sup> and (3) access to courts.<sup>161</sup> The court led the discussion with causation, because liability under *Bivens* relies on the perpetrator being "personally involved in the illegal conduct."<sup>162</sup> Under this heading, the court immediately dismissed Doe's procedural due process and access to court claims.<sup>163</sup> The decision on both counts centered on the flawed argument that because Rumsfeld "had final say over the continued detention or release of detainees," he inferentially had control over the procedural rights of detainees.<sup>164</sup>

The court found, however, that Doe's complaint pleaded facts sufficient to allege Rumsfeld's personal involvement in the alleged breach of substantive due process rights.<sup>165</sup> Doe established causation through specific instances of Rumsfeld's approval of interrogation techniques, continued involvement in modifying and enhancing interrogation techniques, and through Rumsfeld's dispatch of Major General Miller, in charge of Guantanamo Bay at the time, to the camp Doe was held at with instructions to "gitmo-ize" it.<sup>166</sup>

The district court then went through the test for qualified immunity, determining first that "Doe had a constitutional right to be free from conduct and conditions of confinement that shock the conscience."<sup>167</sup> It reasoned "that such right was clearly established at

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<sup>158</sup> *Id.* at 111.

<sup>159</sup> *Id.* at 115–21.

<sup>160</sup> *Id.* at 121.

<sup>161</sup> *Rumsfeld*, 800 F. Supp. 2d at 121.

<sup>162</sup> *Simpkins v. D.C. Gov't*, 108 F.3d 366, 369 (D.C. Cir. 1997).

<sup>163</sup> *Rumsfeld*, 800 F. Supp. 2d at 114, 115.

<sup>164</sup> *Id.* at 114. The quote derives from the analysis of the procedural due process portion of the opinion. *Id.* In the section on the access to courts, the district court similarly stated that Doe alleged that "Rumsfeld controlled the decision to release detainees." *Id.* at 115.

<sup>165</sup> *Id.* at 114 ("At this early stage of proceedings in this case, Doe's allegations sufficiently support his claim that Rumsfeld was involved in the substantive due process violations related to the conditions of confinement and interrogation at Camp Cropper. He has alleged with adequate specificity that Rumsfeld knew of, ordered, and approved the alleged constitutionally deficient interrogation methods and detention conditions employed in Iraq.").

<sup>166</sup> *Id.* at 113–14.

<sup>167</sup> *Rumsfeld*, 800 F. Supp. 2d at 115.

the time of Rumsfeld's conduct," and finally "that Doe ha[d] pleaded factual allegations sufficient to support a claim that Rumsfeld's conduct violated this clearly-established right."<sup>168</sup> Rumsfeld's qualified immunity defense failed in regards to the substantive due process violations.<sup>169</sup> Constitutional violation turned on the district court's decision to "consider[] the cumulative impact" of the constitutional violations alleged.<sup>170</sup> The court considered two proposed theories of liability, intent to injure and deliberate indifference, and held that Doe satisfied both.<sup>171</sup> Doe sufficiently alleged that Rumsfeld's intent to harm rose to a "conscience-shocking level" on the grounds that Rumsfeld merely asserted there was a legitimate government interest in Doe's detention without evidentiary support.<sup>172</sup> The court additionally reasoned that the question should be taken up at a later "stage of litigation when the Court can properly consider such evidence."<sup>173</sup> The district court also held that Doe's complaint sufficiently alleged Rumsfeld's deliberate indifference to Doe's substantive due process rights.<sup>174</sup> Though Rumsfeld argued these actions intended to "restore order or security" in the "dangerous and volatile conditions in Iraq," the court dismissed those arguments on the ground there was no evidence Doe's detention was an attempt to "quell violence or restore order within Camp Cropper."<sup>175</sup>

Finally, the court faced Rumsfeld's claim that the violated constitutional rights were not clearly established at the time to the extent that no reasonable official in Rumsfeld's position would have known the conduct was unconstitutional.<sup>176</sup> The district court dismissed Rumsfeld's contentions on the grounds the constitutional rights of American citizens abroad were clearly established at the time of the violation.<sup>177</sup> In addition, the court reasoned that judicial precedent established the rights of pretrial detainees.<sup>178</sup> The court

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 116.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 116–17 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)).

<sup>173</sup> *Rumsfeld*, 800 F. Supp. 2d at 117.

<sup>174</sup> *Id.* at 119.

<sup>175</sup> *Id.* at 118.

<sup>176</sup> *Id.* at 119. Rumsfeld's claim is grounded on the contention that no court had held that an American citizen possessed constitutional rights on a foreign battlefield when detained by the American military. *Id.* at 120.

<sup>177</sup> *Id.* at 119.

<sup>178</sup> *Rumsfeld*, 800 F. Supp. 2d at 119. The Court referenced a Supreme Court opinion holding that "pretrial detainees, who have not been convicted of any crimes, retain *at least* those constitutional rights that we have held are enjoyed by convicted

explained that there is nothing distinctive about the camp at which Doe was held to justify an exemption to his clearly established constitutional rights abroad.<sup>179</sup> Also, the shock the conscience standard and its legal foundation in relation to both unconstitutional conduct and conditions of confinement were clearly established at the time of the alleged violations.<sup>180</sup> The district court's thorough analysis led to the final holding that Rumsfeld was not entitled to qualified immunity, because a reasonable official in his position would have known the actions violated the Constitution.<sup>181</sup>

The court of appeals, finding that there was no *Bivens* remedy available to Doe, forewent an analysis of Rumsfeld's qualified immunity defense.<sup>182</sup> On remand, the district court only dealt with the claim of interference with the right to travel, where it "reluctantly" held in the defendants' favor.<sup>183</sup> Adding finality to the case, the court of appeals dismissed Doe's appeal in July 2013.<sup>184</sup>

#### D. *Vance v. Rumsfeld*<sup>185</sup>

##### 1. Case Facts

Two American citizens, Donald Vance and Nathan Ertel, alleged that in 2006, they were detained unlawfully in a military compound in Iraq and subjected to interrogations via "physically and mentally

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prisoners." *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 545 (1979)).

<sup>179</sup> *Rumsfeld*, 800 F. Supp. 2d at 120.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 121.

<sup>182</sup> *Doe v. Rumsfeld*, 683 F.3d 390, 397 (D.C. Cir. 2012) ("Because we have determined that Doe may not bring a *Bivens* action against Secretary Rumsfeld, we need not consider Secretary Rumsfeld's qualified immunity defense to such an action.").

<sup>183</sup> *Doe v. Rumsfeld*, No. 1:08-CV-1902, 2012 WL 3890944 (D.D.C. Sept. 7, 2012), *appeal dismissed*, No. 12-5400, 2013 WL 4711610 (D.C. Cir. July 15, 2013). In this brief opinion, the district court blatantly expressed sympathy for Doe and reluctance to find in favor of the defendants. *Id.* The court indicated exasperation with both the attitude of the government and the lack of resources available to Doe. *Id.* They asserted that Doe "might have accepted an apology from our government, had it ever offered one. But it didn't." *Id.* They were compelled to rule in favor of defendants "in spite of Doe's appalling (and, candidly, embarrassing) allegations" and urged him to "consider the Department of Homeland Security's Traveler Redress Inquiry Program, through which, for better or worse, he can get 'final agency action.'" *Id.*

<sup>184</sup> *Doe v. Rumsfeld*, No. 12-5400, 2013 WL 4711610 (D.C. Cir. July 15, 2013).

<sup>185</sup> *Vance v. Rumsfeld*, No. 06 C 6964, 2009 WL 2252258 (N.D. Ill. July 29, 2009), *rev'd*, 653 F.3d 591 (7th Cir. 2011), *on reh'g en banc*, 701 F.3d 193 (7th Cir. 2012), *rev'd*, 701 F.3d 193 (7th Cir. 2012); *Vance v. Rumsfeld*, 653 F.3d 591 (7th Cir. 2011), *reh'g en banc granted, opinion vacated*, (Oct. 28, 2011), *on reh'g en banc*, 701 F.3d 193 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013).

coercive tactics . . . reserved for terrorists.”<sup>186</sup> Vance, a Navy veteran, and Ertel, a government contracting employee, acted as employees of a military contractor in Iraq, Shield Security Group (“SGS”).<sup>187</sup> Plaintiffs witnessed other agents pay Iraqi leaders, and they suspected illegal activities were taking place.<sup>188</sup> Vance reported the activity to the FBI regularly, eventually uncovering evidence of the group’s protection of enemy Iraqi arms dealers and leaders.<sup>189</sup> In addition, the “[p]laintiffs came to learn that SGS . . . was amassing and selling weapons for profit.”<sup>190</sup>

Ertel resigned on April 1, 2009, and the next day he and Vance were denied access to move freely around the compound: “They were trapped.”<sup>191</sup> Military personnel came to seize them and their belongings containing the evidence gathered against SGS, including laptops, cameras, and cell phones.<sup>192</sup> Plaintiffs were classified “security internees,” enabling interrogators to “detain Plaintiffs indefinitely without due process or access to an attorney.”<sup>193</sup>

Once transferred to Camp Prosperity, plaintiffs were strip-searched and placed in a cage before being transferred to 24-hour solitary confinement.<sup>194</sup> After a short stay at Camp Prosperity, they spent the remainder of their detention in solitary confinement at Camp Cropper, Baghdad.<sup>195</sup> Feces lined the walls of their cells, which were kept “extremely cold” with the lights perpetually left on.<sup>196</sup> The prison attempted to deprive detainees of all sleep by blasting heavy metal music and banging on the cell doors when guards noticed a prisoner nodding off.<sup>197</sup> Plaintiffs were repeatedly denied water, food, clothing, and medical care.<sup>198</sup> In addition, “guards would also torment

<sup>186</sup> Amended Complaint ¶¶ 1–3, *Vance v. Rumsfeld*, No. 06 C 6964, 2009 WL 2252258 (N.D. Ill. July 29, 2009), *rev’d*, 653 F.3d 591 (7th Cir. 2011), *on reh’g en banc*, 701 F.3d 193 (7th Cir. 2012), *rev’d*, 701 F.3d 193 (7th Cir. 2012) (No. 06 C 6964), 2007 WL 928914.

<sup>187</sup> Amended Complaint, *supra* note 186, ¶¶ 30, 32, 41, 44–45.

<sup>188</sup> Amended Complaint, *supra* note 186, ¶¶ 49–50.

<sup>189</sup> Amended Complaint, *supra* note 186, ¶¶ 51–53, 67, 71–72, 79–81, 87–89, 96, 101, 105.

<sup>190</sup> Amended Complaint, *supra* note 186, ¶ 111.

<sup>191</sup> Amended Complaint, *supra* note 186, ¶¶ 124, 127–28, 130.

<sup>192</sup> Amended Complaint, *supra* note 186, ¶¶ 138–39.

<sup>193</sup> Amended Complaint, *supra* note 186, ¶ 145.

<sup>194</sup> Amended Complaint, *supra* note 186, ¶¶ 152, 154. Plaintiffs were permitted to use the bathroom twice per day and slept on a thin mat over concrete. Amended Complaint, *supra* note 186, ¶ 154.

<sup>195</sup> Amended Complaint, *supra* note 186, ¶ 157.

<sup>196</sup> Amended Complaint, *supra* note 186, ¶¶ 159–60.

<sup>197</sup> Amended Complaint, *supra* note 186, ¶ 162.

<sup>198</sup> Amended Complaint, *supra* note 186, ¶¶ 163–166. After a tooth of Ertel’s

Plaintiffs, apparently trying to keep them off-balance mentally.”<sup>199</sup> They were continually subjected to assault and threats of further assault.<sup>200</sup> Plaintiffs were denied phone calls, access to counsel, and requests for clergy multiple times.<sup>201</sup> During this time, they were regularly interrogated on non sequitur topics, one of which concerned what they planned to do if they were released and whether they would pursue legal action or write a book.<sup>202</sup>

Around April 20, 2006, the plaintiffs received a letter from the Detainee Status Board stating a hearing regarding their status would be held April 23, 2006 at the earliest.<sup>203</sup> The letter stated that they would not be provided access to counsel and could present only evidence “reasonably available” to them from prison at Camp Cropper.<sup>204</sup> Each plaintiff requested his laptop and cell phone to prove he was providing intelligence to the American government regarding SGS’s illegal activities.<sup>205</sup> This evidence was withheld.<sup>206</sup> Plaintiffs were denied their requests to have others present and could not review or hear evidence against them.<sup>207</sup> In the meantime, “neither Mr. Vance’s nor Mr. Ertel’s family or friends knew of their detention despite vigorous efforts to contact United States officials to determine the Plaintiffs’ whereabouts.”<sup>208</sup>

Ertel was classified an innocent civilian on May 17, 2006, one month after the Detainee Status Board had his hearing.<sup>209</sup> He was not released for another 18 days.<sup>210</sup> Vance was detained an additional two months, and was not declared an innocent civilian until July 20, 2006.<sup>211</sup> At this time, he was dropped at the Baghdad International Airport to “fend for himself without the documentation needed to return to the

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became infected from denial of basic medical care, he had it hurriedly yanked out. Amended Complaint, *supra* note 186, ¶ 166. Afterwards, guards confiscated all antibiotics and painkillers, so the hole became infected and filled with puss. Amended Complaint, *supra* note 186, ¶ 167. No further medical care was administered for it. Amended Complaint, *supra* note 186, ¶ 167.

<sup>199</sup> Amended Complaint, *supra* note 186, ¶ 169.

<sup>200</sup> Amended Complaint, *supra* note 186, ¶¶ 170–71.

<sup>201</sup> Amended Complaint, *supra* note 186, ¶¶ 175–77, 179.

<sup>202</sup> Amended Complaint, *supra* note 186, ¶¶ 178–89.

<sup>203</sup> Amended Complaint, *supra* note 186, ¶¶ 190–91.

<sup>204</sup> Amended Complaint, *supra* note 186, ¶¶ 190–91.

<sup>205</sup> Amended Complaint, *supra* note 186, ¶ 194.

<sup>206</sup> Amended Complaint, *supra* note 186, ¶ 195.

<sup>207</sup> Amended Complaint, *supra* note 186, ¶¶ 200–01.

<sup>208</sup> Amended Complaint, *supra* note 186, ¶ 204.

<sup>209</sup> Amended Complaint, *supra* note 186, ¶ 208.

<sup>210</sup> Amended Complaint, *supra* note 186, ¶ 209.

<sup>211</sup> Amended Complaint, *supra* note 186, ¶¶ 210–11.

United States.”<sup>212</sup> In total, Ertel was held in solitary confinement and interrogated for forty days, and Vance was held for nearly one hundred days without any criminal charges against them.<sup>213</sup>

Plaintiffs brought suit against Secretary of Defense Rumsfeld in his individual capacity, the unidentified individual defendants who subjected them to interrogations, and the United States for the return of their personal property.<sup>214</sup>

## 2. Case History

In 2009, a district court ruled only on the seizure of property question, holding that the plaintiffs properly pleaded and survived a motion to dismiss.<sup>215</sup> Simultaneously, there was an action pending in the district court addressing the claims of cruel and inhumane treatment, requiring analysis of a *Bivens* cause of action, qualified immunity, procedural due process, and denial of access to courts.<sup>216</sup> Although this court dismissed the plaintiffs’ counts alleging procedural due process<sup>217</sup> and denial of access to courts,<sup>218</sup> it held the plaintiffs presented a cause of action under *Bivens*<sup>219</sup> and that Rumsfeld was not entitled to qualified immunity.<sup>220</sup>

Rumsfeld’s personal involvement in the inhumane treatment, and thus causation, was established using evidence identical to that presented by the plaintiff in *Doe v. Rumsfeld*.<sup>221</sup> The court next moved to the initial stage of the qualified immunity test of whether plaintiffs’ treatment violated a constitutional right.<sup>222</sup> The court concluded the

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<sup>212</sup> Amended Complaint, *supra* note 186, ¶ 211.

<sup>213</sup> Amended Complaint, *supra* note 186, ¶ 213.

<sup>214</sup> *Vance v. Rumsfeld*, 653 F.3d 591, 598 (7th Cir. 2011), *reh’g en banc granted, opinion vacated* (Oct. 28, 2011), *on reh’g en banc*, 701 F.3d 193 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013).

<sup>215</sup> *Vance v. Rumsfeld*, No. 06 C 6964, 2009 WL 2252258 (N.D. Ill. July 29, 2009), *rev’d*, 653 F.3d 591 (7th Cir. 2011), *on reh’g en banc*, 701 F.3d 193 (7th Cir. 2012), *rev’d*, 701 F.3d 193 (7th Cir. 2012).

<sup>216</sup> *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 961, 975, 977 (N.D. Ill. 2010), *aff’d*, 653 F.3d 591 (7th Cir. 2011), *on reh’g en banc*, 701 F.3d 193 (7th Cir. 2012), *rev’d*, 701 F.3d 193 (7th Cir. 2012).

<sup>217</sup> *Id.* at 977.

<sup>218</sup> *Id.* at 978.

<sup>219</sup> *Id.* at 975.

<sup>220</sup> *Id.* at 971.

<sup>221</sup> *Id.* at 962–64. Evidence includes Rumsfeld’s approval of enhanced interrogation techniques, continued research into interrogation with the Working Group, and assignment of MG Miller of Guantanamo Bay to the camp to “gitmo-ize” it. *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 113–14 (D.D.C. 2011), *rev’d*, 683 F.3d 390 (D.C. Cir. 2012).

<sup>222</sup> *Rumsfeld*, 694 F. Supp. 2d at 966.



conditions alleged were sufficient to lead a court to “plausibly determine that the conditions of confinement were torturous.”<sup>223</sup> Finally, the district court found the final part of the qualified immunity test, whether the constitutional right was clearly established at the time of the violation, favored the plaintiffs.<sup>224</sup> The district court found most persuasive plaintiffs’ argument that the Constitution applies to American citizens in full force whether inside or outside the nation’s borders: “[T]he right of American citizens to be free from torture is a well-established part of our constitutional fabric . . . .”<sup>225</sup> In addition, though Rumsfeld’s position was not “uncomplicated by the pulls of competing obligations,” he had ample “opportunity to reflect on the material and constitutional consequences of his alleged actions.”<sup>226</sup> The district court claimed that the holding does not second-guess military officials, but instead “represents a recognition that federal officials may not strip citizens of well-settled constitutional protections against mistreatment simply because they are located in a tumultuous foreign setting.”<sup>227</sup>

Though the court of appeals reversed the earlier decision to permit the plaintiffs’ claim for personal property to continue,<sup>228</sup> it affirmed the district court’s holding for the plaintiffs in regards to finding personal involvement of Rumsfeld in the abuse,<sup>229</sup> Rumsfeld’s lack of qualified immunity,<sup>230</sup> and the plaintiffs’ cause of action under *Bivens*.<sup>231</sup> The court of appeals launched into its analysis of qualified immunity, finding there “can be no doubt” that the alleged treatment violated constitutional rights of Americans, “even in a war zone.”<sup>232</sup> Addressing defendants’ claims that the allegations were “vague, cursory, and conclusory,” the court of appeals listed specific examples

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<sup>223</sup> *Id.* at 967.

<sup>224</sup> *Id.* at 971.

<sup>225</sup> *Id.* at 969–70.

<sup>226</sup> *Id.* at 971 (citing *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998)).

<sup>227</sup> *Id.*

<sup>228</sup> *Vance v. Rumsfeld*, 653 F.3d 591, 627 (7th Cir. 2011), *reh’g en banc granted, opinion vacated* (Oct. 28, 2011), *on reh’g en banc*, 701 F.3d 193 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013).

<sup>229</sup> *Id.* at 603. Note the slight disparity in conclusions between the district court and court of appeals. The court of appeals found “the plaintiffs’ pleadings, if true, have sufficiently alleged not only Secretary Rumsfeld’s personal responsibility in creating the policies that led to the plaintiffs’ treatment but also deliberate indifference by Secretary Rumsfeld in failing to act to stop the torture of these detainees despite actual knowledge of reports of detainee abuse.” *Id.* at 600.

<sup>230</sup> *Id.* at 611.

<sup>231</sup> *Id.* at 626.

<sup>232</sup> *Id.* at 606–07.

of the defendants' standard for pleading being too demanding.<sup>233</sup> Next, the court extended the protections of the Eighth Amendment beyond convicted prisoners and to pretrial detainees.<sup>234</sup> It analogized the conditions of Vance's treatment to the permitted treatment of convicted prisoners and concluded it "would have no trouble acknowledging that his well-plead allegation" would describe a constitutional violation.<sup>235</sup> In addition, the court cited two pieces of legislation that should have placed Rumsfeld on notice: the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 and the Detainee Treatment Act.<sup>236</sup> Finally, the court dismissed the defendants' argument that courts have repeatedly "struggled, and continue to struggle, with the precise constitutional contours applicable to the detention of individuals . . . seized in a foreign war zone."<sup>237</sup> The court based this refutation on the argument's weakness in citing "only cases involving procedural due process claims."<sup>238</sup> In conclusion, the court of appeals denied Rumsfeld's qualified immunity defense, authorizing the claim to proceed.<sup>239</sup>

#### IV. PIECING TOGETHER THE OPTIMAL STANDARD

Though each court engaged in seemingly endless variants of analysis, in part to be blamed on the Supreme Court's decision in *Pearson*, a cohesive approach can be derived, enabling courts to test qualified immunity in these instances with ease.<sup>240</sup> The *Pearson* case no longer requires, but merely encourages, the merit-first method to determining qualified immunity.<sup>241</sup> For the sake of completeness, this Comment's legal analysis framework will include the fully permitted,

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<sup>233</sup> *Id.* at 607–08. First, defendants argued plaintiffs provided no "factual context, no elaboration, no comparisons" beyond claiming the cell was "extremely cold." *Id.* at 607. The court of appeals dismissed the defendants' argument, stating it was "satisfied" with the description. *Id.* Second, defendants attacked the plaintiffs' complaint for not including the issue of whether they asked for a blanket or warm clothing and were denied. *Id.* at 608. The court of appeals again stated the specific statement of what plaintiffs were given, "a single jumpsuit and a thin plastic mat," was sufficient. *Id.* The court also dismissed defendants' argument that the plaintiffs did not describe how long they were deprived of sleep, only that they were. *Id.*

<sup>234</sup> *Rumsfeld*, 653 F.3d at 607–08.

<sup>235</sup> *Id.* at 609.

<sup>236</sup> *Id.* at 610.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* The defendant relied on recent Supreme Court cases: *Munaf v. Geren*, 553 U.S. 674 (2008); *Boumediene v. Bush*, 553 U.S. 723 (2008); and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *Rumsfeld*, 653 F.3d at 610.

<sup>239</sup> *Id.* at 611.

<sup>240</sup> *Pearson v. Callahan*, 555 U.S. 223 (2009).

<sup>241</sup> *Id.* at 236.

though not required, test. It will lay out the optimum analysis derived from the cases outlined above. This test will be formatted to provide a framework from which future cases may derive a complete skeleton of the test, piecing together the patchwork segments of the lower federal courts.

The test, to be described in more detail below, will consist of three questions: (1) Is there a right to be free from the harm alleged, whether it is designation, detention, or treatment as an enemy combatant?; (2) Was that right clearly established at the time of harm?; and (3) Has the plaintiff pled facts sufficient to support a finding that the right was violated?

A. *Is there a right to be free from the harm alleged, whether designation, detention, or treatment as an enemy combatant?*

In light of all cases considered, there appears to be a general consensus that Americans retain a right to be free from the treatment each plaintiff underwent. Two courts approached this consideration by briefly cycling through possible constitutional violations posed by the plaintiff in the complaint. The three rights mentioned include the Eighth Amendment right to be free from cruel and unusual punishment, the Sixth Amendment right to access the courts, and the Fifth Amendment right to be free from self-incrimination.<sup>242</sup>

The most persuasive of the rights alleged is that of the Eighth Amendment right to be free from cruel and unusual punishment. The district court's opinion in *Padilla v. Yoo* utilized a comparison between the rights of enemy combatants and those of prisoners.<sup>243</sup> In persuasive precedent, the Ninth Circuit acknowledged the Supreme Court's declaration that due process rights of detainees were "at least as great as the Eighth Amendment protections available to a convicted prisoner" and that the Eighth Amendment also "provide[s] a minimum standard of care for determining [detainee] rights."<sup>244</sup> In addition, the Supreme Court has reasoned that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions are designed to punish."<sup>245</sup> The Seventh Circuit Court of Appeals ("the Seventh Circuit") also found that the Eighth

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<sup>242</sup> U.S. CONST. amend. VIII; U.S. CONST. amend. VI; U.S. CONST. amend. V.

<sup>243</sup> *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1035 (N.D. Cal. 2009), *rev'd*, 678 F.3d 748 (9th Cir. 2012).

<sup>244</sup> *Id.* (quoting *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1120 (9th Cir. 2003) (emphasis in original) (internal citations omitted)).

<sup>245</sup> *Id.* (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982)).

Amendment right to be free from cruel and unusual punishment applied to the plaintiffs in *Vance v. Rumsfeld*.<sup>246</sup> The court first waded through precedent extending this right, beginning with the Supreme Court's 1979 declaration that "[d]ue process requires that a pretrial detainee not be punished."<sup>247</sup> In addition, the Supreme Court issued a complementary statement that "[w]here the state seeks to impose punishment without [an adjudication of guilt], the pertinent constitutional guarantee is the Due Process Clause."<sup>248</sup> With the final point that "we have consistently said" that pretrial detainee constitutional protections are "at least as great as the Eighth Amendment protections available to a convicted prisoner," the Court declared that it "[is] confident that the Framers meant to forbid abusive treatment of uncharged and unconvicted detainees where the same abusive treatment of a convicted prisoner would be prohibited."<sup>249</sup> The court of appeals gave great weight to the Supreme Court's conclusion that "[p]risoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."<sup>250</sup> In addition, the court cited the Supreme Court's conclusion that the Eighth Amendment "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . against which we must evaluate penal measures."<sup>251</sup> In summary, the Eighth Amendment provides ample protection to enemy combatants, in light of the general consensus that the rights of convicted prisoners establish the *floor* of Constitutional protection for detainees.

One of the three courts that addressed this issue—the district court in *Padilla v. Yoo*—concluded that the plaintiffs' Sixth Amendment right to access the courts was violated.<sup>252</sup> The court founded its reasoning in a series of precedent. To begin the analysis, the court equated the rights of convicted prisoners with those of the

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<sup>246</sup> *Vance v. Rumsfeld*, 653 F.3d 591, 609 (7th Cir. 2011), *reh'g en banc granted, vacated* (Oct. 28, 2011), *on reh'g en banc*, 701 F.3d 193 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013).

<sup>247</sup> *Id.* at 607 n.10 (quoting *Bell v. Wolfish*, 441 U.S. 520, 537 n.16 (1979)).

<sup>248</sup> *Id.* (quoting *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977)).

<sup>249</sup> *Id.* (quoting *Washington v. LaPorte Cnty. Sheriff's Dep't*, 306 F.3d 515, 517 (7th Cir. 2002)).

<sup>250</sup> *Id.* at 608 (quoting *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011)).

<sup>251</sup> *Id.* at 609 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

<sup>252</sup> *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1034–35 (N.D. Cal. 2009), *rev'd*, 678 F.3d 748 (9th Cir. 2012).

enemy combatants; since convicted prisoners have the constitutional right to access the courts, enemy combatants should be afforded an equivalent right.<sup>253</sup> The prisoner's "right of access to the courts includes contact visitation with his counsel."<sup>254</sup> Then, the court pulled from a case holding that an enemy combatant defendant "unquestionably has the right to access to counsel in connection with the proceedings."<sup>255</sup> The district court in *Doe v. Rumsfeld* held that the right of access to courts was not violated, implying this right should be evaluated beside other constitutional claims in this portion of the test.<sup>256</sup> On the other hand, the Seventh Circuit held there was no right of this type.<sup>257</sup> In conclusion, the right to access courts qualifies for analysis, depending on whether the jurisdiction equates convicted prisoner rights with those of enemy combatants.

Finally, the only court to address the Fifth Amendment right to avoid subjection to self-incrimination—the district court in *Padilla v. Yoo*—rejected the argument that this right applied to plaintiffs in these cases.<sup>258</sup> The court reasoned that the Fifth Amendment is only applicable "when the accused is compelled to make a Testimonial Communication that is incriminating."<sup>259</sup> It takes more than mere compulsive questioning to violate the Self-Incrimination Clause.<sup>260</sup> It is probable in future cases with like facts that the Fifth Amendment Self-Incrimination Clause will not be relevant to analysis of rights violated.

The district court in *Doe v. Rumsfeld* held that the alleged actions violated the Due Process Clause's "shock the conscience" standard.<sup>261</sup> The Supreme Court has long utilized the shock the conscience standard against federal officials to punish acts that offend "basic notions of human dignity and a civilized system of justice."<sup>262</sup> The Supreme Court has held abuse in "interrogation techniques, either in isolation or as applied to the unique characteristics of a particular

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<sup>253</sup> *Id.* at 1034 (quoting *Lewis v. Casey*, 518 U.S. 343, 350 (1996)).

<sup>254</sup> *Id.* (quoting *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990)).

<sup>255</sup> *Id.* at 1035 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004)).

<sup>256</sup> *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 121 (D.D.C. 2011), *rev'd*, 683 F.3d 390 (D.C. Cir. 2012).

<sup>257</sup> *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 977 (N.D. Ill. 2010), *aff'd*, 653 F.3d 591 (7th Cir. 2011), *on reh'g en banc*, 701 F.3d 193 (7th Cir. 2012), *rev'd*, 701 F.3d 193 (7th Cir. 2012).

<sup>258</sup> *Yoo*, 633 F. Supp. 2d at 1036 (quoting *Fisher v. United States*, 425 U.S. 391, 408 (1976)).

<sup>259</sup> *Id.* (quoting *Fisher v. United States*, 425 U.S. 391, 408 (1976)).

<sup>260</sup> *Id.* (quoting *Chavez v. Martinez*, 538 U.S. 760, 767 (2003)).

<sup>261</sup> *Rumsfeld*, 800 F. Supp. 2d at 115.

<sup>262</sup> *Id.* (citing *Rochin v. California*, 342 U.S. 165, 172–74 (1952)).

suspect” could violate the Due Process Clause.<sup>263</sup> The Court has also affirmed the perpetual need to “give protection against torture, physical or mental,” through the Due Process Clause.<sup>264</sup> In the case of *Doe v. Rumsfeld*, the plaintiff alleged multiple offenses that, taken individually, would arguably not shock the conscience.<sup>265</sup> The correct method of evaluation, however, is to “determine the cumulative impact of the conduct alleged.”<sup>266</sup> Two theories of liability are raised: intent to injure and deliberate indifference.<sup>267</sup> In the case of *Doe*, the conduct alleged violated both standards.<sup>268</sup> Intent to injure is “most likely to rise to the conscience-shocking level,” and the plaintiff sufficiently alleged this intent because of Rumsfeld’s extensive role in policy creation.<sup>269</sup> Note that the “mere assertion” of a legitimate government interest in detention is not sufficient to “void an otherwise properly pleaded constitutional claim.”<sup>270</sup> Deliberate indifference, rising between negligence and intent to injure, was met, because Doe was in the federal government’s custody when he suffered mistreatment.<sup>271</sup> The only exception to this standard has been found in times of emergency to restore order, but this exception does not apply to these cases.<sup>272</sup> The district court in *Vance v. Rumsfeld* addressed this issue, holding that for now the “plaintiffs have set forth the cumulative allegations necessary to state a claim of mistreatment.”<sup>273</sup> They maintained that the determination of whether the conduct violated the shock the conscience standard should be evaluated further along in the proceeding.<sup>274</sup> The determination of whether the conduct alleged

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<sup>263</sup> *Id.* (quoting *Miller v. Fenton*, 474 U.S. 104, 109 (1985)).

<sup>264</sup> *Id.* at 115–16 (quoting *Palko v. Connecticut*, 302 U.S. 319, 326 (1937)).

<sup>265</sup> *Id.* at 116 (“Here Doe alleges, *inter alia*, that he was detained incommunicado and often in solitary confinement. He also says he was exposed to extreme and prolonged cold and continuous light, blindfolded and hooded, subjected to sleep alteration and deprivation through exposure to light or blasting music, denied some food and water, and physically assaulted . . . . Doe says several ‘psychologically-disruptive tactics designed to induce compliance’ were used on him throughout his detention at Camp Cropper.”).

<sup>266</sup> *Id.*

<sup>267</sup> *Rumsfeld*, 800 F. Supp. 2d at 116.

<sup>268</sup> *Id.* at 116–17.

<sup>269</sup> *Id.* at 116 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)).

<sup>270</sup> *Id.* at 117.

<sup>271</sup> *Id.* at 118.

<sup>272</sup> *Id.* (citing *Cnty. of Sacramento*, 523 U.S. at 852–53).

<sup>273</sup> *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 967 (N.D. Ill. 2010), *aff’d*, 653 F.3d 591 (7th Cir. 2011), *on reh’g en banc*, 701 F.3d 193 (7th Cir. 2012), *rev’d*, 701 F.3d 193 (7th Cir. 2012).

<sup>274</sup> *Id.* (“While the evidence may ultimately show that neither the individual treatment methods nor their cumulative impact ‘shocks the conscience,’ that

shocks the conscience grants another avenue for plaintiffs in these cases to allege that harm occurred through designation or detention as an enemy combatant.

The courts made further comments striking down various defensive arguments. For example, the Seventh Circuit in *Vance v. Rumsfeld* stated that the setting of the violation, a war zone, made no impact on whether an American can claim a constitutional right to be free from torture.<sup>275</sup> The Ninth Circuit was clear that torture of American citizens, including outside the United States border, is unconstitutional without doubt.<sup>276</sup> Additionally, the district court in *Doe v. Rumsfeld* held that American citizens have the right to remain free from confinement that shocks the conscience.<sup>277</sup> Jurists considering the issue should keep these possible defenses and rebuttals in mind when evaluating the next comparable case. The subsequent phase of the inquiry, whether the right to be free from harm was clearly established at the time of injury, is the most complex consideration of the test.

*B. Was the right to be free from the harm clearly established at the time of the injury?*

The second phase of the test will determine whether there was a right to be free of the alleged harm at the time of injury. This will be divided into four considerations: (1) constitutional protections; (2) federal authority; (3) case law precedent; and (4) possible collateral complications.

1. Constitutional Protections

The right of an American to be free from the treatment detailed in each particular case is derived from two arguments. First, the Eighth Amendment right of convicted prisoners corresponds to enemy combatants, and second, the Constitution continues to protect Americans acting abroad: “The specific designation as an enemy combatant does not automatically eviscerate all of the constitutional protections afforded to a citizen of the United States.”<sup>278</sup>

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determination is not one we may properly make at this stage of the proceedings.”).

<sup>275</sup> *Vance v. Rumsfeld*, 653 F.3d 591, 606–07 (7th Cir. 2011), *reh’g en banc granted, opinion vacated* (Oct. 28, 2011), *on reh’g en banc*, 701 F.3d 193 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013).

<sup>276</sup> *Padilla v. Yoo*, 678 F.3d 748, 763 (9th Cir. 2012).

<sup>277</sup> *Rumsfeld*, 800 F. Supp. 2d at 115. The court later found that this right was both clearly established and violated. *Id.*

<sup>278</sup> *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1036 (N.D. Cal. 2009), *rev’d*, 678 F.3d 748 (9th Cir. 2012).

i. Enemy combatant constitutional protections mirror those of prisoners.

The complaints detailed in the sample of cases outline treatment that would “clearly violate the rights afforded to citizens held in the prison context.”<sup>279</sup> Though the legal framework for American enemy combatants was developing at the time of injury, “federal officials were cognizant of the basic fundamental civil rights afforded to detainees under the United States Constitution.”<sup>280</sup> For example, the Supreme Court has held that denial of medical treatment to prisoners violates the Constitution.<sup>281</sup> Further, the Court has also held that those who have not been convicted of a crime and are involuntarily committed are “entitled to more considerate treatment and conditions of confinement than criminals whose conditions are designed to punish.”<sup>282</sup> The clearly established law concerning the treatment of convicted prisoners provides a basis for determining that the law against mistreatment of American enemy combatants was clearly established at the time of injury.

The Ninth Circuit raised a counterargument that, since it was not clear the plaintiff was “just another detainee,” the notion that American enemy combatants were to be afforded the same protections as convicted prisoners was not clearly established.<sup>283</sup> The difference in status is evidenced, according to the court, by the conflicting purposes for detaining each type of detainee.<sup>284</sup> Criminals are detained to achieve “retribution, deterrence, incapacitation, and rehabilitation.”<sup>285</sup> On the other hand, President Bush declared in a June 9, 2002 memorandum to the Secretary of Defense that the purpose of detaining the plaintiff, Padilla, was to prevent aid from reaching Al Qaeda and to mine Padilla for intelligence.<sup>286</sup> The court referenced other circuit cases amenable to the idea that constricting access to the outside world could be a persuasive purpose for military detention of enemy combatants.<sup>287</sup> One holding found that detention could be necessary to limit the detainee’s access to communication with the

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<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 1037.

<sup>281</sup> *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976).

<sup>282</sup> *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982). This case is cited both by the district court in *Padilla v. Yoo* and *Doe v. Rumsfeld*. *Yoo*, 633 F. Supp. 2d at 1035; *Rumsfeld*, 800 F. Supp. 2d at 119.

<sup>283</sup> *Padilla v. Yoo*, 678 F.3d 748, 762 (9th Cir. 2012).

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 762 n.8 (citing *Graham v. Florida*, 130 S. Ct. 2011, 2028 (2010)).

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*



enemy.<sup>288</sup> Another found regulating religious observance could aid the government in obtaining control over the detainee for the purposes of enhanced interrogation success.<sup>289</sup> Though it is tempting to fall into this trap of abstraction and technicalities, this argument must fall under scrutiny due to the reality of the situation. Plaintiffs are American citizens with the inherent protections of the Constitution from the federal government. A foreign setting or perceived higher purpose cannot undermine centuries of clearly established liberties, including the right to live free from arbitrary detention and maltreatment, which could qualify as torture. After determining whether the detainees should be afforded the Constitutional protections of convicted prisoners, the next acknowledgment is that American constitutional rights abroad were clearly established at the time of injury.

- ii. American constitutional rights abroad were clearly established at the time of injury.

American citizens' constitutional right to be free from the injuries set forth in the cases above while in foreign countries was clearly established at the time of harm.<sup>290</sup> The district court in *Doe v. Rumsfeld* dismissed Rumsfeld's contention that no court had held an American citizen possesses constitutional rights on a foreign battlefield when detained by the American military.<sup>291</sup> Precedent enforced the concept that American citizens act abroad with the protection of the Constitution and that "the shield which the Bill of Rights and other parts of the Constitution provide to protect [a citizen's] life and liberty should not be stripped away just because he happens to be in another land."<sup>292</sup> The district court also took the time to distinguish a recent D.C. Circuit case holding the issue of whether the Fifth Amendment applied to aliens detained in Afghanistan and Iraq was not clearly established around the time of this violation, 2004.<sup>293</sup> The court distinguished the circumstances because the plaintiff was an alien, whereas Doe was an American citizen: "Clearly, a plaintiff's citizenship

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<sup>288</sup> *Id.* (citing *Padilla v. Hanft*, 423 F.3d 386, 395 (4th Cir. 2005)).

<sup>289</sup> *Yoo*, 678 F.3d at 762 n.8 (citing *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787, 805 (D.S.C. 2011)).

<sup>290</sup> *See Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 119 (D.D.C. 2011), *rev'd*, 683 F.3d 390 (D.C. Cir. 2012); *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 969–70 (N.D. Ill. 2010), *aff'd*, 653 F.3d 591 (7th Cir. 2011), *on reh'g en banc*, 701 F.3d 193 (7th Cir. 2012), *rev'd*, 701 F.3d 193 (7th Cir. 2012).

<sup>291</sup> *Rumsfeld*, 800 F. Supp. 2d at 120.

<sup>292</sup> *Id.* at 119 (quoting *Reid v. Covert*, 354 U.S. 1, 5–6 (1957)).

<sup>293</sup> *Id.* at 120–21 (citing *Ali v. Rumsfeld*, 649 F.3d 762, 770 (D.C. Cir. 2011)).

often goes a long way in determining the scope of available constitutional protections.”<sup>294</sup>

Similarly, the district court in *Vance v. Rumsfeld* began with reference to a case facing the question of whether the Fourth and Fifth Amendments apply to American citizens detained in foreign war zones: “[T]he Fourth and Fifth Amendments certainly protect U.S. citizens detained in the course of hostilities in Iraq.”<sup>295</sup> The court was also moved by the “oft-cited” Supreme Court plurality opinion of *Reid v. Covert*:

The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.<sup>296</sup>

In addition, the Second Circuit has stated “[t]hat the Bill of Rights has extraterritorial application to the conduct of federal agents directed at United States citizens is well settled.”<sup>297</sup> The court found recent D.C. Circuit cases involving aliens bringing suit for abuse while detained to be the most persuasive.<sup>298</sup> Though the court granted qualified immunity to the defendants in both instances, the decision to do so rested in great part on the nationality of the plaintiffs.<sup>299</sup> In *In re Iraq*, the “plaintiffs’ non-citizenship was the primary factor” in holding for the defendants.<sup>300</sup> Similarly, in *Rasul v. Myers*, the D.C. Circuit not only “relied on plaintiffs’ non-citizenship,” but also “reaffirmed that American citizens are in fact entitled to such protections.”<sup>301</sup>

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<sup>294</sup> *Id.* at 121 (quoting *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 969 (N.D. Ill. 2010), *aff’d*, 653 F.3d 591 (7th Cir. 2011), *on reh’g en banc*, 701 F.3d 193 (7th Cir. 2012), and *rev’d*, 701 F.3d 193 (7th Cir. 2012)).

<sup>295</sup> *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 969 (N.D. Ill. 2010), *aff’d*, 653 F.3d 591 (7th Cir. 2011), *on reh’g en banc*, 701 F.3d 193 (7th Cir. 2012), and *rev’d*, 701 F.3d 193 (7th Cir. 2012) (quoting *Kar v. Rumsfeld*, 580 F. Supp. 2d 80, 83 (D.D.C. 2008)).

<sup>296</sup> *Id.* (quoting *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (plurality opinion)).

<sup>297</sup> *Id.* (quoting *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974)).

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 970.

<sup>300</sup> *Id.* (citing *In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 108–09 (D.D.C. 2007)).

<sup>301</sup> *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 969 (N.D. Ill. 2010), *aff’d*, 653 F.3d 591 (7th Cir. 2011), *on reh’g en banc*, 701 F.3d 193 (7th Cir. 2012), and *rev’d*, 701 F.3d 193 (7th Cir. 2012) (citing *Rasul v. Myers*, 563 F.3d 527, 530–32 (D.C. Cir. 2009)).

The district court in *Vance v. Rumsfeld* held that the treatment of plaintiffs was especially reprehensible, because the decision to perpetuate the treatment was not made during any emergency requiring “split-second” decision-making.<sup>302</sup> This argument derives from a Supreme Court statement that behavior is particularly shocking when the decision-maker has had “time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations.”<sup>303</sup> The “tumultuous foreign setting” of the location did not counter the clearly established constitutional rights of American citizens abroad.<sup>304</sup>

Finally, the shock the conscience standard that the Supreme Court imposed on federal officials through the Due Process Clause was clearly established at the time of injury.<sup>305</sup> The cases “declaring unconstitutional conduct or conditions of confinement that shock the conscience” span nearly a century and grant notice to representatives of the federal government that interrogation techniques represent ground for liability.<sup>306</sup>

There are many possible avenues to conclude the constitutional protection of American citizens was clearly established at the time of harm. Beyond constitutional protections are federal statutory safeguards that are in place for American citizens and useful in evaluating whether the right to be free from the harm alleged was clearly established.

## 2. Federal Authority

Statutory grounds for maintaining the right of American plaintiffs to remain free from the detention and mistreatment described above were clearly established at the time of harm and fall within both the National Defense Authorization Act and the Detainee Treatment Act. The Seventh Circuit in *Vance v. Rumsfeld* supported this position.<sup>307</sup> The court specifically referenced the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, 10 U.S.C. § 801, stat. note §

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<sup>302</sup> *Id.* at 971 (citing *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998)).

<sup>303</sup> *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998).

<sup>304</sup> *Rumsfeld*, 694 F. Supp. 2d at 971.

<sup>305</sup> *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 115 (D.D.C. 2011), *rev'd*, 683 F.3d 390 (D.C. Cir. 2012); *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 967 (N.D. Ill. 2010), *aff'd*, 653 F.3d 591 (7th Cir. 2011), *on reh'g en banc*, 701 F.3d 193 (7th Cir. 2012), *rev'd*, 701 F.3d 193 (7th Cir. 2012).

<sup>306</sup> *Id.* at 120.

<sup>307</sup> *Vance v. Rumsfeld*, 653 F.3d 591, 610 (7th Cir. 2011), *reh'g en banc granted, opinion vacated* (2011), *on reh'g en banc*, 701 F.3d 193 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013).

1092, which affirms that U.S. military interrogation techniques are prohibited from violating the Constitution.<sup>308</sup> The Act also directs the Secretary of Defense to ensure military practices are “consistent with international obligations and laws of the United States.”<sup>309</sup> The Detainee Treatment Act, specifically 10 U.S.C. § 801, stat. note § 1002, explicitly limits authorized techniques to those expressly named in the Army Field Manual, a guide which did not contain authorization for the coercive techniques used on the plaintiffs.<sup>310</sup> These additional resources provide further grounds to prove the defendants named in the cases named above operated under the knowledge that their behavior was clearly established to be illegal.

The district court raised an opposing argument in *Lebron v. Rumsfeld*.<sup>311</sup> The court utilized the conflicting opinions in the branches of the federal government on the legality of the treatment of the plaintiff as grounds for proving that the illegality of the actions was not clearly established at the time of injury.<sup>312</sup> On one hand, the Office of Legal Counsel of the Department of Justice “officially sanctioned” the coercive techniques used against the plaintiff, concluding that they were lawful.<sup>313</sup> Additionally, the Department of Defense Working Group on detainee interrogations issued a lengthy report concluding that the interrogation techniques were lawful.<sup>314</sup> On the other hand, both the Federal Bureau of Investigation and the General Counsel of the Navy “vigorously challenged” these contentions, maintaining that the techniques violated both American and international law.<sup>315</sup> Although the court proposed that this variance in opinion within the executive branch served to clearly establish that this area is “the very definition of unsettled law,” this logic is unpersuasive.<sup>316</sup> Surely the legal opinions of agencies and the executive branch staff are persuasive, but to require unanimity among the politicized legal minds before a concept can be clearly established would foreclose all qualified immunity analysis. The court defended its hazy reasoning by following the pattern of other courts that have “also shown a marked reluctance to deny qualified immunity to officials in circumstances where they were required to balance competing interests of the citizen

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<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787, 803 (D.S.C. 2011).

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

and the government.”<sup>317</sup> The reluctance stems from the complaint that the required balancing is “subtle, difficult to apply and not yet well defined.”<sup>318</sup> It is little wonder that the standard continues to lack definition, considering the mass grants of qualified immunity. Continued avoidance of tackling the controversy, the merits of each case, and of developing the standard to be applied will only perpetuate the lack of guidance granted to lower courts. In addition to federal statutory authority grants of notice, judicial precedent affords further means of concluding that the rights of American citizens were clearly established at the time of injury.

### 3. Case Law Precedent

The case law utilized to hammer out arguments in these cases only serves to make a complex maze less maneuverable. The most cohesive manner by which to organize the information is to divide it into two sections: (1) a brief analysis of the three most discussed cases and (2) a discussion of whether extensive precedent is even necessary to claim that there is clearly established law on this point.

#### i. *Hamdi v. Rumsfeld*, *Ex parte Quirin*, and *Ashcroft v. al-Kidd*

Though entire law review articles could be written solely on these cases, this Comment would be remiss in not highlighting their structural positions in the legal-analytical framework, as they make appearances in many of the sample cases.

*Hamdi v. Rumsfeld* is referenced in *Padilla v. Yoo* at both the district court and appellate levels.<sup>319</sup> *Hamdi*, a 2004 Supreme Court case, held that a detained enemy combatant maintained a fundamental “right to be free from involuntary confinement by his own government without the due process of law.”<sup>320</sup> This right included the right to access counsel, notice as to the charges against him, and a fair opportunity to be heard.<sup>321</sup> The case was decided in 2004, which was too late to grant notice to any of the case samples, and thus proved insufficient grounds

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<sup>317</sup> *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787, 801 (D.S.C. 2011), *aff'd*, 670 F.3d 540 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012).

<sup>318</sup> *Id.* (quoting *DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995)).

<sup>319</sup> *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1037 (N.D. Cal. 2009), *rev'd*, 678 F.3d 748 (9th Cir. 2012); *Padilla v. Yoo*, 678 F.3d 748, 761 (9th Cir. 2012); *see Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>320</sup> *Rumsfeld*, 542 U.S. at 531.

<sup>321</sup> *Id.* at 533, 539. This case was not included in my case sample even though the plaintiff was an American detained as an enemy combatant because the court did not address the qualified immunity question.

to find that the right to be free from mistreatment was clearly established.<sup>322</sup> Additionally, the court of appeals in *Vance v. Rumsfeld* discounted the defendant's reliance on *Hamdi* to demonstrate the "struggle" with defining "the precise constitutional contours applicable to the detention of individuals—citizen and non-citizen alike—seized in a foreign war zone."<sup>323</sup> The court dismissed the importance of *Hamdi* on two grounds.<sup>324</sup> First, the case is one involving procedural due process, which is not relevant to the discussion.<sup>325</sup> Second, the case sheds "no useful light on how a reasonable federal official might have thought that the Constitution permitted him to torture, or to authorize the torture of, a civilian U.S. citizen."<sup>326</sup>

Similarly, *Ex parte Quirin*, a Supreme Court case from 1942, involved German agents claiming to be American citizens maintaining a right to trial by jury when detained as unlawful belligerents.<sup>327</sup> Citizenship was "immaterial," and "as an unlawful combatant he was subject to trial by military tribunal alongside the alien saboteurs."<sup>328</sup> The court of appeals in *Padilla v. Yoo* found that *Ex parte Quirin* suggested to defendants that enemy combatants are afforded less rights than prisoners.<sup>329</sup> Disregarding the year in which the German agents were detained as a time of patriotic fervor, the case is distinguishable from the sample cases above. The court never determined whether the agent was an American citizen or not, and the plaintiff was not subjected to maltreatment that could be described as torture. Though *Ex parte Quirin* is valuable to acknowledge, it has no significant part to play in this analysis.

Finally, the Supreme Court in *Ashcroft v. al-Kidd* granted qualified immunity to a former Attorney General after the alleged improper detention of the plaintiff.<sup>330</sup> The defendant authorized detention of multiple suspects, claiming the purpose of detention was to use the detainees as witnesses in a criminal trial.<sup>331</sup> The plaintiff alleged that

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<sup>322</sup> *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1037 n.4 (N.D. Cal. 2009), *rev'd*, 678 F.3d 748 (9th Cir. 2012); *Padilla v. Yoo*, 678 F.3d 748, 761 (9th Cir. 2012).

<sup>323</sup> *Vance v. Rumsfeld*, 653 F.3d 591, 610 (7th Cir. 2011), *reh'g en banc granted, opinion vacated* (Oct. 28, 2011), *on reh'g en banc*, 701 F.3d 193 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013).

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Ex parte Quirin*, 317 U.S. 1 (1942), *modified sub nom. U.S. ex rel. Quirin v. Cox*, 63 S. Ct. 22 (1942).

<sup>328</sup> *Padilla v. Yoo*, 678 F.3d 748, 758–59 (9th Cir. 2012).

<sup>329</sup> *Id.*

<sup>330</sup> *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011).

<sup>331</sup> *Id.* at 2077.

the authorization was intended to detain suspected terrorists against whom the federal government lacked sufficient evidence to charge with a crime.<sup>332</sup> The court of appeals in *Padilla v. Yoo* argued that the Supreme Court's grant of qualified immunity to the defendant affirmed that there was no clearly established right at the time of the alleged violations to be free from injury.<sup>333</sup> This argument is not convincing. The scope of the *Ashcroft* holding is quite narrow. First, the Court did not address claims that the Eighth Amendment violations were clearly established, because the plaintiff was not subjected to brutal treatment as were the plaintiffs here. The clearly established analysis was limited to Fourth Amendment violations.<sup>334</sup> Second, the holding is narrowly confined to material-witness warrants: "At the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness unconstitutional."<sup>335</sup> Though deceptively precedential at first glance, *Ashcroft v. al-Kidd* cannot be relied on as a means to find that American citizens do not have a clearly established right to be free from maltreatment upon detention as an enemy combatant.

The relevant judicial precedent above warrants consideration, but ultimately it sheds no affirmative light on the issue at bar: whether the right of American citizens to be free from mistreatment was clearly established at the time of injury. This has little impact on the cumulative analysis, considering it is likely that judicial precedent is not required in these cases.

## ii. Necessity of Judicial Precedent

Several courts relied on the argument that no court, in addressing the issue of qualified immunity, has specifically discussed the right of Americans to be free from maltreatment when designated as enemy combatants.<sup>336</sup> Given the nature of the violations alleged in these cases, however, "[t]his is not a case where the precise violation must have been previously held unlawful."<sup>337</sup> As the Seventh Circuit stated so

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<sup>332</sup> *Id.* at 2079.

<sup>333</sup> *Yoo*, 678 F.3d at 758–59.

<sup>334</sup> *Id.*

<sup>335</sup> *al-Kidd*, 131 S. Ct. at 2083.

<sup>336</sup> *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787, 803 (D.S.C. 2011), *aff'd*, 670 F.3d 540 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012); *see Yoo*, 678 F.3d at 761 ("[I]t remains murky whether an enemy combatant detainee may be subjected to conditions of confinement and methods of interrogation that would be unconstitutional if applied in the ordinary prison and criminal settings.").

<sup>337</sup> *Vance v. Rumsfeld*, 653 F.3d 591, 610 (7th Cir. 2011), *reh'g en banc granted*,

eloquently, “[w]here the constitutional violation is patently obvious and the contours of the right sufficiently clear, a controlling case on point is not needed to defeat a defense of qualified immunity.”<sup>338</sup> A comparable Seventh Circuit case requiring no direct precedent denied qualified immunity to officials who chained a prisoner for seven hours to a post in the sun.<sup>339</sup> Particularly compelling is the Ninth Circuit’s *Hydrick v. Hunter*, addressing the lack of clearly established precedent concerning psychiatric hospital conditions of confinement for sexual offenders.<sup>340</sup> The court held that though the law in the area was “still evolving,” the rights “afforded [convicted] prisoners set a floor for those that must be afforded [sexually violent predators].”<sup>341</sup> Because of the nature of the offenses, ranging from violence to squalid conditions, “surely it is clear that certain actions . . . transgress the boundary” between legal and illegal, regardless of specific judicial precedent.<sup>342</sup> The district court in *Doe v. Rumsfeld* similarly dismissed the need to find identical precedent, as “the Court need not require previous declarations that the constitutional right existed in identical factual circumstances.”<sup>343</sup> Additionally, the district court in *Vance v. Rumsfeld* acknowledged how important it is “that we not shirk from protecting against clear constitutional violations simply because the clear general right has not previously been enforced in the precise circumstances facing the court.”<sup>344</sup> The Supreme Court has similarly claimed that “[t]here has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages or liability.”<sup>345</sup> The principles apply easily to the situation at hand. In these cases, American citizens were detained by officials of the federal government and subjected to brutal treatment. The federal

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*opinion vacated* (Oct. 28, 2011), *on reh’g en banc*, 701 F.3d 193 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013).

<sup>338</sup> *Id.*

<sup>339</sup> *Id.* (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

<sup>340</sup> *Hydrick v. Hunter*, 500 F.3d 978 (9th Cir. 2004), *vacated*, *Hunter v Hydrick*, 566 U.S. 1256 (2009), *remanded to* 669 F.3d 937.

<sup>341</sup> *Id.* at 989.

<sup>342</sup> *Id.* at 990 n.8.

<sup>343</sup> *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 120 (D.D.C. 2011), *rev’d*, 683 F.3d 390 (D.C. Cir. 2012) (“Where preexisting law would dictate to a reasonable official that his conduct is unconstitutional, even if prior case law has not explicitly addressed identical circumstances, the unconstitutionality of that conduct may be found clearly established.”).

<sup>344</sup> *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 970 (N.D. Ill. 2010), *aff’d*, 653 F.3d 591 (7th Cir. 2011), *on reh’g en banc*, 701 F.3d 193 (7th Cir. 2012), *rev’d*, 701 F.3d 193 (7th Cir. 2012).

<sup>345</sup> *United States v. Lanier*, 520 U.S. 259, 271 (1997) (internal citations omitted).



government has been on notice since the country's inception that the nation belongs to its citizens and is not to be used as a cruel hand of oppression by the trusted elected officials. A final consideration remains: what is the impact of the tumultuous state of "torture" in national and international law?

#### 4. Collateral Complication: The Definition of Torture

One objection to finding that American citizens have the right to be free from the treatment described in the sample cases is that the definition of "torture" has been muddied and pulled between competing political interests. This Comment contends, however, that even without the title of "torture" to describe the alleged conduct, the legal foundation prohibiting such conduct was clearly established at the time. It offers a brief summary of the issues to provide the reader with a well-rounded concept of the facets of the legal-analytical framework provided.

Although it was clear from 2001 to 2003 that torture referred to "intentional infliction of severe pain or suffering, whether physical or mental," it was unclear what constituted severe pain and suffering.<sup>346</sup> The following sources of information were available at the time of the dates in question. First, the Eighth Amendment has historically protected American citizens from the infliction of "cruel and unusual punishments."<sup>347</sup> In 2002, the State Department issued a statement confirming that "[t]orture is prohibited by law throughout the United States."<sup>348</sup> In addition, it encouraged that "[n]o official of the Government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture."<sup>349</sup> There are "[n]o exceptional circumstances [that] may be invoked as a justification of torture."<sup>350</sup> An international agreement that the United States signed in 1988, the Convention against Torture, defined torture as "[a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him . . . or intimidating or coercing him . . ." <sup>351</sup> In addition, by 1994, a federal statute criminalizing torture abroad defined torture

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<sup>346</sup> Padilla v. Yoo, 678 F.3d 748, 764 (9th Cir. 2012).

<sup>347</sup> U.S. CONST. amend. VIII.

<sup>348</sup> Yoo, 678 F.3d at 763 n.10.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1.1, Apr. 18, 1988, 1465 U.N.T.S. 85, 23 I.L.M. 1027.

as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”<sup>352</sup> The Torture Victim Protection Act of 1991 defined torture as “any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted . . . .”<sup>353</sup> All of these sources were readily available to American lawmakers from 2001 to 2003.

In addition to American sources, other countries had legislation illuminating the meaning of “torture” for reference from 2001 to 2003.<sup>354</sup> The European Court of Human Rights’ leading decision on torture held that wall standing, subjection to noise, hooding, deprivation of drink and food, and deprivation of sleep did not constitute torture: “they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.”<sup>355</sup> The Israeli Supreme Court, however, found sleep deprivation, stress positions, hooding, violent shaking, and exposure to loud music to be against their law.<sup>356</sup> These two cases demonstrate the two foremost international sources of debate on the definition.

At the time of the defendant’s actions, there was also precedent in the Ninth Circuit in which defendants were found guilty of “torture.”<sup>357</sup> In a 2001 suit under the Convention against Torture, the plaintiff was severely beaten for a month while interrogated.<sup>358</sup> On one occasion, the plaintiff was tied, blindfolded, and burned with cigarettes for over one week.<sup>359</sup> In a 1996 suit under the Alien Tort Statute, torture of the plaintiff was found when he was blindfolded, beaten, threatened with electric shock, threatened with death, denied sleep, subject to waterboarding, and imprisoned in an unlit and hot cell for

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<sup>352</sup> 18 U.S.C. § 2340(1) (2004).

<sup>353</sup> Torture Victim Protection Act of 1991, Pub.L. No. 102–256, § 3(b), 106 Stat. 73 (1991) (codified at 28 U.S.C. § 1350 (1991)).

<sup>354</sup> *Yoo*, 678 F.3d at 764–65.

<sup>355</sup> *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 59, 80 (1978).

<sup>356</sup> HCJ 5100/94 Pub. Comm. Against Torture in Israel v. Israel 53(4) PD 817, 1482–85 [1999] (Isr.), reprinted in 38 I.L.M. 1471.

<sup>357</sup> *Padilla v. Yoo* 678 F.3d 748, 766 (9th Cir. 2012).

<sup>358</sup> *Al-Saher v. I.N.S.*, 268 F.3d 1143, 1145 (9th Cir. 2001), *amended by*, 355 F.3d 1140 (9th Cir. 2004).

<sup>359</sup> *Id.*

seven months.<sup>360</sup> These examples demonstrate sources of American judicial precedent discussing the definition of torture, thus granting elucidation to the contested word.

Once it is decided that the rights of Step One were clearly established at the time of harm, the final determination in Step Two is whether the alleged facts of the complaint are sufficient to support a claim in federal court.

*C. Did the plaintiffs plead factual allegations sufficient to support a claim that the clearly established right was violated?*

The final portion of analysis is broken into two possible considerations: causation and violation. Though some court analyses grouped causation analysis with the preceding *Bivens* evaluation, this Comment includes causation here as a means to prove violation, separating the two into categories simply for the sake of organization.

1. Causation

Federal officials are liable for the reasonably foreseeable consequences of their conduct when they have “crafted the policies for or authorized facially unconstitutional action.”<sup>361</sup> Causation analysis is broken into two parts: procedural due process and substantive due process.<sup>362</sup> The procedural due process hurdle is quite high in light of the facts of the cases, requiring evidence that defendants either “personally authorized” the acts or were “deliberately indifferent” to the treatment of plaintiffs.<sup>363</sup> In the case of *Doe v. Rumsfeld*, it was not enough that Rumsfeld had final say over whether to continue detention of plaintiffs and the ability to reform the Camp’s procedures.<sup>364</sup> Plaintiffs were required to plead facts to allege with particularity that Rumsfeld controlled the procedural rights of the detainees.<sup>365</sup> The district court in *Vance v. Rumsfeld* also held in favor of the defendant as far as the procedural due process claim went, holding that the facts alleged did not “go beyond a speculative level.”<sup>366</sup> Though procedural due process claims face little hope of survival,

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<sup>360</sup> *Hilao v. Estate of Marcos*, 103 F.3d 789, 790–91 (9th Cir. 1996).

<sup>361</sup> *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 113 (D.D.C. 2011), *rev’d*, 683 F.3d 390 (D.C. Cir. 2012).

<sup>362</sup> *Id.* at 113–14.

<sup>363</sup> *Id.* at 114.

<sup>364</sup> *Id.* at 114–15.

<sup>365</sup> *Id.*

<sup>366</sup> *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 977 (N.D. Ill. 2010), *aff’d*, 653 F.3d 591 (7th Cir. 2011), *on reh’g en banc*, 701 F.3d 193 (7th Cir. 2012), *rev’d*, 701 F.3d 193 (7th Cir. 2012).

substantive due process analysis is more forgiving to plaintiffs.

Substantive due process claims in the sample cases face greater success than the procedural due process claims. Case law on substantive due process supports the argument that those who give orders are personally liable for the effects of the conduct ordered.<sup>367</sup> Precedent includes a case in which plaintiffs enjoyed success after suing the head of the Department for Child and Family Services for creating policy that violated their constitutional rights.<sup>368</sup> Substantive due process does not require direct causation, only that the defendant set in motion acts she or he knows or should know will cause the harm.<sup>369</sup> For example, an assistant city attorney was found liable after drafting a letter denying a permit for a parade.<sup>370</sup> Liability was imposed despite the fact that senior city officials revised the letter and others approved and signed the denial.<sup>371</sup> The court found causation between the defendant's actions and the denial of constitutional rights, because there were not enough intervening factors.<sup>372</sup> The reasoning was grounded in the claim that the defendant's written opinion was a "substantial factor" in the overall denial of the permit.<sup>373</sup> Of further note is a case involving two Department of Homeland Security attorneys, held liable for advising customs agents that they could refuse to release confiscated property.<sup>374</sup> The reasoning was grounded in the argument that the unconstitutional seizures were foreseeable as a result of the advice.<sup>375</sup> Judicial precedent has successfully applied the principle that those who order the denial of constitutional rights could be held liable for the actions of their subordinates.

The causation between the defendants and the harm that served as the basis for the substantive due process claim is widely accepted as an element to be proven in the case samples through sufficient facts to show that defendants "knew of, ordered, and approved the alleged constitutionally deficient interrogation methods and detention

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<sup>367</sup> *Id.* at 962.

<sup>368</sup> *Id.* (citing *Doyle v. Camelot Care Ctrs., Inc.*, 305 F.3d 603, 614–15 (7th Cir. 2002)); *see also* *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995).

<sup>369</sup> *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1032–33 (N.D. Cal. 2009), *rev'd*, 678 F.3d 748 (9th Cir. 2012).

<sup>370</sup> *Lippoldt v. Cole*, 468 F.3d 1204, 1220 (10th Cir. 2006).

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Anoushiravani v. Fishel*, No. CV 04-212-MO, 2004 WL 1630240, at \*5 (D. Or. July 19, 2004).

<sup>375</sup> *Id.*

conditions.”<sup>376</sup> The factors supporting this view in *Doe v. Rumsfeld* include defendant’s personal approval of enhanced interrogation techniques, the deployment of Major General Miller to “gitmo-ize” the Camp, and memorandums and groups created for the purpose of evaluating enhanced interrogation techniques.<sup>377</sup> Nearly identical considerations influenced both the court of appeals and district court in *Vance v. Rumsfeld* to hold that there were sufficient facts alleged to support the claim that Rumsfeld was “personally involved in the unconstitutional treatment.”<sup>378</sup> The district court in *Padilla v. Yoo* similarly found that the defendant, Yoo, caused the violation of the plaintiff’s rights.<sup>379</sup> Relevant facts indicating foreseeable injury included Yoo’s participation in the development of policy, his work laying the legal framework for the designation of enemy combatants, his personal review of the plaintiff’s file, and his legal advice that federal officials could detain Americans because the Fourth Amendment would not apply.<sup>380</sup>

In utilizing relevant analysis to establish that there was causation between defendant’s actions and the harm suffered by plaintiffs, the foundation of the legal-analytical framework determining that there was a violation of rights is concluded. Causation in conjunction with a defendant’s proven violation of rights signifies that a plaintiff has pleaded with enough particularity to support a claim.

## 2. Violation

This final step is much more forgiving to the plaintiff than those discussed above. This stage simply requires a closer look into the facts alleged in the complaint to determine whether they are sufficiently particularized to support a holding that the defendant’s actions violated the clearly established right. In the case of *Padilla v. Yoo* in the district court, the treatment alleged was deemed to violate the Eighth Amendment and the right of access to the courts.<sup>381</sup> The persuasive

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<sup>376</sup> *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 114 (D.D.C. 2011), *rev’d*, 683 F.3d 390 (D.C. Cir. 2012).

<sup>377</sup> *Id.* at 113–14.

<sup>378</sup> *Vance v. Rumsfeld*, 653 F.3d 591, 603–05 (7th Cir. 2011), *reh’g en banc granted, opinion vacated* (Oct. 28, 2011), *on reh’g en banc*, 701 F.3d 193 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013); *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 962 (N.D. Ill. 2010), *aff’d*, 653 F.3d 591 (7th Cir. 2011), *on reh’g en banc*, 701 F.3d 193 (7th Cir. 2012), *rev’d*, 701 F.3d 193 (7th Cir. 2012).

<sup>379</sup> *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1034 (N.D. Cal. 2009), *rev’d*, 678 F.3d 748 (9th Cir. 2012); *Padilla v. Yoo*, 678 F.3d 748, 761 (9th Cir. 2012).

<sup>380</sup> *Id.* at 1033–34.

<sup>381</sup> *Id.* at 1034–35.

allegations in the complaint included shackling, loud noises at all hours, psychological stress, and impermissible denial of medical care.<sup>382</sup> The district court in *Doe v. Rumsfeld* held that “Doe has pleaded factual allegations sufficient to support a claim that Rumsfeld’s conduct violated [the] clearly-established right” to be free from actions that shock the conscience.<sup>383</sup> This is evidenced by the claims of extreme exposure to cold and light, being hooded, and the deprivation of sleep, water, and food.<sup>384</sup> The court of appeals in *Vance v. Rumsfeld* made it clear that an argument that the treatment did not violate a constitutional right “would be futile.”<sup>385</sup> Additionally, it held that the defendant’s claims that the complaint was vague were “not persuasive,” reasoning that phrases such as “extreme cold” were specific enough to meet the pleading requirements.<sup>386</sup> The district court in *Vance v. Rumsfeld* found that the description of the complaint merited an assumption that the “conditions of confinement were torturous,” a violation of the shock the conscience standard.<sup>387</sup> The cases not mentioned either did not reach this stage of analysis because of a finding that the right to be free from the treatment was not clearly established or were decided solely on the grounds of *Bivens*. If a defendant is found to have violated a clearly established right, the claim may proceed, and the court must grapple with the merits of the plaintiff’s case.

#### V. CONCLUSION

The Supreme Court has held that a “state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”<sup>388</sup> When an American citizen has not been charged, held captive by the federal government, and subjected to treatment reserved for detainees in Guantanamo Bay, it is the duty of the opposing branches of government to take a stand on the nation’s behalf. When the judiciary, the ultimate symbol of justice and equity,

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<sup>382</sup> *Id.* at 1035.

<sup>383</sup> *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 115 (D.D.C. 2011), *rev’d*, 683 F.3d 390 (D.C. Cir. 2012).

<sup>384</sup> *Id.* at 116.

<sup>385</sup> *Vance v. Rumsfeld*, 653 F.3d 591, 607 (7th Cir. 2011), *reh’g en banc granted, opinion vacated* (Oct. 28, 2011), *on reh’g en banc*, 701 F.3d 193 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013).

<sup>386</sup> *Id.* at 607–08.

<sup>387</sup> *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 967 (N.D. Ill. 2010), *aff’d*, 653 F.3d 591 (7th Cir. 2011), *on reh’g en banc*, 701 F.3d 193 (7th Cir. 2012), *rev’d*, 701 F.3d 193 (7th Cir. 2012).

<sup>388</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004).

bows its hallowed head in deference to the executive branch, the country has suffered a loss. The interplay between the American citizen's constitutional rights and the executive's right to protect the nation from danger is meant to be a balance, not a perpetually tilted scale.

The remedy is grounded in the country's legislative and judicial branches. The legislature, "fully aware of the body of litigation arising out of the detention of persons following September 11, 2001, has not seen fit to fashion a statutory cause of action to provide for a remedy of money damages under these circumstances."<sup>389</sup> In addition, every final decision stemming from the four cases resulted in the haphazard grant of qualified immunity, usually as a side note to *Bivens* analysis. With the legislative and judicial branches balking at the opportunity to provide answers to the country concerning the horrendous allegations, the executive's blank check has effectively been written.

This nation deserves, after over a decade of war and scandal, to lay claim to a clear, fair, and just legal-analytical framework for these claims. The standard set forth above, thorough and an attempt at clarity, sews together the scattershot arguments, complaints, and analyses littered through thirteen different opinions. Remember that denying qualified immunity to the defendant is not equivalent to holding in favor of the plaintiff. This is just the first step in permitting the parties to obtain evidence through discovery and litigate the merits of their cases before a judge, a right guaranteed by the Constitution. Designation as an enemy combatant "does not automatically eviscerate all of the constitutional protections afforded to a citizen of the United States," and defendants' shield of qualified immunity should not deter courts from detailed and thorough analysis.<sup>390</sup>

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<sup>389</sup> *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787, 799 (D.S.C. 2011), *aff'd*, 670 F.3d 540 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012).

<sup>390</sup> *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1036 (N.D. Cal. 2009), *rev'd*, 678 F.3d 748 (9th Cir. 2012).