

U.S. Torture as a Tort

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ABSTRACT

Now that the United States has used torture in the "war on terrorism" and the victims of this torture have begun to sue, it is useful to analyze the potential liability of the U.S. and its officials for torture under current domestic law. This article conducts that analysis, and, based on it, assesses the adequacy of current law. The article concludes that the U.S. and its officials have no more than minimal liability for torture under current law. The article also concludes that current law is inadequate. It is inadequate not only because it seldom produces a remedy for the victims of U.S. torture but also because it misconceives official torture as a tort. Official torture is a wrong committed collectively by governmental officials upon a class targeted for subjugation. In contrast, the paradigmatic tort is a private wrong committed by one individual against another. The article argues that, in lieu of the current tort-based regime, the U.S. and its officials should be liable for torture under at least the same circumstances as municipalities can be held liable for their officials' violation of federal rights under 42 U.S.C. § 1983; and that U.S. officials should be liable for torture under at least the same circumstances as state and local officials are under § 1983, or as foreign officials are under the Torture Victim Protection Act of 1991.

INTRODUCTION

Since 9/11, the United States has tortured people detained in the war on terrorism.¹

The victims of this torture have begun to sue.² This article discusses when the U.S. and its

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¹ See generally MARK DANNER, TORTURE AND TRUTH 1-49 (2004); SEYMOUR M. HERSH, CHAIN OF COMMAND 1-72 (2004); Report of the International Committee of the Red Cross on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment, and Interrogation [hereafter cited as Red Cross Report] (Feb. 2004), in THE TORTURE PAPERS 390-401 (Karen J. Greenberg & Joshua L. Dratel eds. 2005); Article 15-6 Investigation of the 800th Military Police Brigade (popularly known as "The Taguba Report"), in TORTURE PAPERS, *supra*, at 416-17; Final Report of the Independent Panel to Review DoD Detention Operations (popularly known as "The Schlesinger Report"), in TORTURE PAPERS, *supra*, at 914; Lieutenant General Anthony R. Jones & Major General George R. Fay, Investigation of Intelligence Activities at Abu Ghraib [Fay-Jones Report], in TORTURE PAPERS, *supra*, at 989, 993-94, 1004-05, 1024-25, and 1070-95.

² See Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14 & 21, 2005, at 106 (reporting that events described in text below as scenario 3 happened to Canadian engineer born in Syria starting in September 2002 and are the basis of a pending lawsuit), available at http://www.newyorker.com/printables/fact/050214fa_fact6. The question of how to define torture, though important, is beyond the scope of this article because the definition usually does not matter for purposes of assessing the liability of the U.S. and its officials for the U.S.-sanctioned use of significant physical and psychological force against an individual. See generally Torture Victim Protection Act of 1991 [hereafter cited as TVPA], Pub. L. No. 102-256, § 3(b), 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 Note) (defining torture for purposes of that Act); Fionnuala Ní Aoláin, *The European Convention on Human Rights and Its Prohibition on Torture* (discussing definition of torture under European Convention on Human Rights), in TORTURE: A COLLECTION 213-227 (Sanford Levinson ed. 2004); II COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 3357 (1971) (definition of "torture").

officials can be held civilly liable for torture under current law. The article also discusses the adequacy of current law for assessing liability in this setting.

To put human faces on this discussion, the article focuses on claims arising from these three scenarios of U.S.-sanctioned torture:

Scenario 1: The U.S. military has detained an Iranian-born U.S. citizen, *IA*, at the Abu Ghraib prison in Iraq. U.S. officials reasonably believe that *IA* has killed members of the U.S. military force in Iraq and has information about other Iraqi insurgents. The military police guarding *IA* have instructions from military intelligence officers on site to “loosen him up.” Several guards use this “loosen him up” instruction as an excuse to brutalize *IA* in ways that they know violate military regulations and the Uniform Code of Military Justice. For example, the guards have repeatedly beaten *IA* with a broom handle; sodomized him with a chemical light stick; and forced him to masturbate another male inmate in front of a female guard, who photographed the incident.

Scenario 1 will be called the “Abu Ghraib scenario.”³

Scenario 2: U.S. officials have captured an Afghan citizen, *Af*, in Afghanistan and are detaining him at the U.S. Naval Base at Guantánamo Bay, Cuba (GTMO). U.S. officials reasonably believe that *Af* is an al Qaeda member involved in the 9/11 terrorist attacks on the United States and has valuable information about its leaders. The officials assigned to interrogate *AF* (the “GTMO interrogators”) use methods that they reasonably believe are specifically authorized by the Secretary of Defense. For example, the GTMO interrogators put him in a cell where the lights are always on and there is a constant, loud,

³ See Taguba Report, *supra* note __, at 295 (finding credible a statement by a member of the military police that military intelligence officers instructed Abu Ghraib guards to “[l]oosen this guy [i.e., a detainee] up for us”); *id.* at 292-293 (finding credible reports of actual physical abuse identical to the hypothetical scenario described in text at this note); Josh White, *5 Americans Held by U.S. Forces in Iraq Fighting*, WASHINGTON POST, July 7, 2005, at A15 (reporting that U.S. citizens suspected of insurgent activities in Iraq were being held at Abu Ghraib and other Iraqi sites).

hissing sound; question him for 20 hours at a time; keep him naked for days at a time; and “waterboarded” him by strapping him to a board and then dunking him under water to make him believe he is drowning.

Scenario 2 will be called the “GTMO scenario.”⁴

Scenario 3: Officials of the Central Intelligence Agency (“CIA”) have detained a Syrian born resident of Canada, SyC, whom they reasonably suspect of being a terrorist. Soon after arresting SyC in New York City, the CIA officials send him to Syria for interrogation as required by an “extraordinary rendition” program developed by the CIA and approved by the White House. As the CIA officials know will happen, Syrian officials subject SyC to months of brutal interrogation. For example, they repeatedly whip his hands with two-inch-thick electrical cable; inject him with disorienting drugs; and keep him in a windowless, underground cell.

Scenario 3 will be called the “Syrian rendition scenario.”⁵

These scenarios are based on events that have been alleged to have actually occurred.

Reflecting the range of real cases, the scenarios differ in the citizenship of the victim, the identity of the torturers, and the location and other circumstances of the torture.

⁴ See Affidavit of David Hicks (Aug. 5, 2004) (affidavit of Guantánamo detainee alleging beatings, sleep deprivation, and use of strobe lights), submitted in *Rasul v. Bush*, CV: 02-0299 (D.D.C. filed Mar. 12, 2002), available at <http://www.smh.com.au/news/World/David-Hicks-affidavit/2004/12/10/1102625527396.html>; Red Cross Report, *supra* note __, at 392-93 (reporting detainees' allegations of being exposed to loud noise or music and constant light, being forced to stand for long periods, and being kept naked for days at a time); DANNER, *supra* note __, at 34-36 (discussing allegations of waterboarding); See Memorandum for Commander, Joint Task Force 170, Guantánamo Bay, Cuba, from Jerald Phifer (Oct. 11, 2002) (requesting approval to use various interrogation procedures at GTMO including, among “Category II techniques,” “[t]he use of stress positions (like standing), for a maximum of four hours,” “[t]he use of 20 hour interrogations,” and “[r]emoval of clothing”), in TORTURE PAPERS, *supra* note __, at 227-28; Action Memo for Secretary of Defense from William J. Haynes II, General Counsel, Department of Defense Nov. 27, 2002), in TORTURE PAPERS, *supra* note __, at 237 (Nov. 27, 2002) (indicating Secretary of Defense’s approval of Category II techniques); *but cf.* Memorandum for the Commander, US Southern Command, from Secretary of Defense (Apr. 16, 2003), in TORTURE PAPERS, *supra* note __, at 360-61 (authorizing more limited set of interrogation techniques, which does not expressly include prolonged standing, 20-hour interrogations, or removal of clothing).

⁵ See Mayer, *supra* note __; Bruce Zagaris, *Canada Protests Deportation of Canadian Citizen to Syria*, 20 No. 1 INT’L ENFORCEMENT L. REP 10 (Jan. 2004) (discussing case on which scenario 3 is based); see *also* HERSH, *supra* note __, at 53-56 (describing other cases of extraordinary rendition).

As we will see, under current law these differences matter and, indeed, raise many important, unsettled issues of governmental and official tort liability. The upshot, however, is that under current law liability is minimal. Torture victims can sue the U.S. under the Federal Tort Claims Act (FTCA),⁶ but the U.S. probably will escape FTCA liability in all three scenarios. Torture victims can sue U.S. officials under the “constitutional tort” theory of *Bivens*.⁷ Officials will probably escape *Bivens* liability, however, except for deliberately malicious, obviously illegal conduct. Furthermore, most officials will be effectively judgment proof. In short, the availability of civil remedies for U.S. torture under current law is razor-thin.

Current law must change for the U.S. to keep its promise not to torture people.⁸ The law must change both in both its conception of U.S. torture and in the extent to which it provides civil remedies for U.S. torture. Current law misconceives U.S. torture as a mere tort, a private wrong committed by one individual upon another. That misconception is what makes analysis of torture claims under current law tortuous and almost useless in producing remedies for torture victims. The victims of U.S. torture should not be denied civil remedies merely because existing law is so inadequate for identifying when official liability is appropriate. This article proposes that, at a minimum, the United States should be civilly liable to torture victims under circumstances when, under current law, a city or county would be civilly liable to the victims of police brutality; U.S. officials should be liable not only for clear violations of constitutional rights (as they are under current law) but also for clear violations of federal statutory and regulatory violations (as are state and local officials – but not federal officials – under current law).

This article’s descriptive and prescriptive exploration of the relevant law proceeds in three parts. Part I briefly describes relevant aspects of sovereign and official immunity. This

⁶ 28 U.S.C. §§ 1346(b), 2671-2680.

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

⁸ See, e.g., President’s Statement on the U.N. International Day in Support of Victims of Torture (June 26, 2004) (“America stands against and will not tolerate torture.”), available at <http://www.whitehouse.gov/news/releases/2004/06/20040626-19.html>; Elisabeth Bumiller et al., *Bush Says Iraqis Will Want G.I.’s to Stay to Help*, N.Y. TIMES, Jan. 28, 2005, at A1 (statement of President George W. Bush in an interview: “Torture is never acceptable ... nor do we hand over people to countries that do torture.”).

description makes clear why that torture claims against the U.S. must be analyzed separately from torture claims against U.S. officials. Part II analyzes torture claims against the U.S., and Part III analyzes torture claims against U.S. officials. Each part focuses, though not exclusively, on claims that would arise from the three scenarios described above. Parts II and III also address the adequacy of current law.⁹

I. BACKGROUND ON SOVEREIGN AND OFFICIAL IMMUNITY

In general, a private person cannot sue the United States without its consent.¹⁰ Private suits against the United States to which it has not consented are barred by sovereign immunity.¹¹ Although many criticize the doctrine of sovereign immunity, the U.S. Supreme Court still recognizes it.¹² Indeed, the Court has implied that the doctrine has constitutional roots, which presumably immunizes it from judicial abrogation.¹³

Sovereign immunity has limits. You might think, as a matter of fairness and logic, that one limit would exist to allow suits against the U.S. for unconstitutional conduct. Not so.¹⁴ Indeed, the United States has often avoided liability for its unconstitutional conduct. For example, it has successfully claimed sovereign immunity from claims based on its internment of

⁹There is little case law, and no commentary of which this author is aware, examining the liability of the U.S. and its officials for torture under current U.S. law. *Cf.* Association of the Bar of the City of New York, Comm. On Int'l Human Rights, and The Center for Human Rights and Global Justice, NYU Law School, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* 119-20 (2004) (discussing possible civil liability of officials involved in U.S. renditions).

¹⁰ *See, e.g.*, *Department of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999).

¹¹ *See generally* RICHARD H. FALLON ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 944-72 (5th ed. 2003) [hereafter cited as *HART & WECHSLER'S FEDERAL COURTS*].

¹² *See e.g.*, *Orff v. United States*, 125 S. Ct. 2606, 2609-11 (2005) (holding that suit against federal government was barred by sovereign immunity).

¹³ *See* *HART & WECHSLER'S FEDERAL COURTS*, *supra* note ___, at 944-47.

¹⁴ *See, e.g.*, *Owen v. City of Independence*, 445 U.S. 622, 670 n.12 (1980) (Powell, J., dissenting) ("Ironically, the ... Federal Government[] cannot be held liable for constitutional violations. The Federal Government has not waived its sovereign immunity against such claims."); *Bivens*, 403 U.S. at 410 (Harlan, J., concurring) ("However desirable a direct remedy against the Government [for unconstitutional conduct] might be as a substitute for individual official liability, the sovereign still remains immune to suit.").

Japanese Americans during World War II and its experimenting with LSD on unknowing human subjects.¹⁵ The U.S. has committed many other sins under the cloak of sovereign immunity.¹⁶

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

First, the United States has consented to many types of suits by enacting statutes that waive sovereign immunity.¹⁷ Part II of this article discusses the only federal statute that might waive the U.S.'s sovereign immunity from torture claims.¹⁸ That statute is the Federal Tort Claims Act (FTCA).¹⁹ The victims in our three scenarios can sue the U.S. for money damages if the FTCA waives sovereign immunity from their claims.

Second, although sovereign immunity bars a suit that names the United States as a defendant, it does not bar a suit that names a U.S. official as a defendant and that seeks money damages out of that official's own pocket.²⁰ A suit against an official that seeks to hold that

¹⁵ *Hohri v. United States*, 782 F.2d 227, 245-46 (D.C. Cir. 1986) (holding that common law tort claims against United States for Japanese internment were barred by sovereign immunity because plaintiffs did not satisfy the administrative filing requirement that was a condition on the waiver of sovereign immunity created by the Federal Tort Claims Act), *aff'd in part and rev'd in part on other grounds*, 782 F.2d 227 (D.C. Cir. 1986), *vacated and remanded*, 482 U.S. 64 (1987); *Stanley v. Central Intelligence Agency*, 639 F.2d 1146, 1149-53 (5th Cir. 1981) (holding that United States had sovereign immunity from claims based on U.S. officials' administration of LSD to plaintiff, without his knowledge, while he was in the military).

¹⁶ *See, e.g., Ascot Dinner Theatre, Ltd. v. Small Business Admin.*, 887 F.2d 1024, 1031 (10th Cir. 1989) (sovereign immunity barred First Amendment claim against federal agency); *Lombard v. United States*, 690 F.2d 215, 216-26 (D.C. Cir. 1992) (sovereign immunity barred constitutional claims against the United States arising from its deliberately exposing service member to radiation).

¹⁷ *See* 14 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3656, at 424 (3rd ed. 1998) ("In a series of federal statutes enacted over many years, Congress successively has widened the exceptions to the doctrine of sovereign immunity and broadened the consent of the United States to be sued.").

¹⁸ *See infra* notes ___-___ and accompanying text.

¹⁹ 28 U.S.C. §§ 1346(b), 2671-2680.

²⁰ *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 686 (1949) (stating that, if "wrongful actions" of federal official "are such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court

official personally liable in damages is called an “individual capacity” or (interchangeably) a “personal capacity” suit.²¹ Sovereign immunity does not bar individual capacity suits against government officials, even when the suits are based on official conduct.²²

Although sovereign immunity does not bar individual capacity suits, those suits do face two other obstacles. The first obstacle is stating a cause of action.²³ No federal statute or federal common law doctrine creates a cause of action specifically for torture by U.S. officials.²⁴ Indeed, as discussed in Part III, the only basis for most torture suits against U.S. officials is the *Bivens* doctrine, a judicially created doctrine that authorizes some individual capacity suits for “constitutional torts.”²⁵ A second obstacle is the doctrine of official immunity.²⁶ Official immunity protects officials from suits for money damages out of their own pocket asserting claims based on their official conduct.²⁷ Of relevance here, federal officials can claim *absolute*

from taking jurisdiction over a suit against him”); see also *Alden v. Maine*, 527 U.S. 706, 756 (1999) (“[S]overeign immunity ... bars suits against States but not lesser entities.”); *Kentucky v. Graham*, 473 U.S. 159, 166-167 (1985) (explaining that official immunity defenses are available to official sued in his or her individual capacity, but defense of sovereign immunity is available only when official is sued in his or her official capacity).

²¹ See *Graham*, 473 U.S. at 166-67 (explaining differences between personal capacity suits and official capacity suits).

²² See *id.* at 165 (“Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law.”).

²³ See, e.g., *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (distinguishing the issue of stating a cause of action against an official from the issue of whether the official can assert an immunity defense against that cause of action).

²⁴ The U.S. is a party to several international agreements banning torture, but these agreements do not waive U.S. sovereign immunity. See *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968-69 (4th Cir. 1992) (holding that Hague Convention did not waive sovereign immunity); *Jama v. INS*, 22 F. Supp. 2d 353, 364-54 (D.N.J. 1998) (holding that International Covenant on Civil and Political Rights, in combination with Alien Tort Statute, did not waive sovereign immunity); cf. *Argentine Republic v. Amerasia Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989) (a foreign sovereign does not waive its immunity from suit in U.S. courts “by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts of even the availability of a cause of action in the United States”).

²⁵ See, e.g., *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 73 (2001) (referring to *Bivens* as creating “an implied constitutional tort remedy”); see also notes ___ - ___ and accompanying text (discussing availability of *Bivens* action for U.S. torture).

²⁶ See, e.g., *Bivens*, 403 U.S. at 397-98 (after recognizing cause of action against officials for violations of Fourth Amendment, Court reserves the issue of whether the officials “were immune from liability by virtue of their official position”).

²⁷ See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982) (recognizing defense of qualified immunity).

official immunity from state tort claims²⁸ and *qualified* official immunity from *Bivens* claims.²⁹ Whether those immunity defenses will succeed is explored in Part III.³⁰

As adumbrated in this part of the article and elaborated below, existing law treats claims for torture against the U.S. and its officials as tort claims. The words “torture” and “tort” do have overlapping etymologies, and torture does fall within the definition of a tort.³¹ The problem is that tort law addresses types of wrong that differ dramatically from official torture.

II. TORTURE CLAIMS AGAINST THE UNITED STATES

As discussed in Part I, sovereign immunity will bar claims against the United States arising from the three scenarios described in the introduction unless the torture victims in those scenarios establish that the government has waived immunity from their claims. The only statute that arguably does so is the Federal Tort Claims Act (FTCA).³² Analysis of our scenarios – and more generally of torture claims against the U.S. – under the FTCA must focus on (1) the extent to which the FTCA makes the U.S. liable for the conduct of individuals and (2) the scope of several exceptions to FTCA liability. Those issues are discussed below in Sections A and B.

A. Individual Conduct for which the U.S. Is Liable Under the FTCA

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

negligent or wrongful act or omission of any employee of the Government while acting within the scope of his [or her] office or employment, under circumstances

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

²⁹ See, e.g., *Carlson v. Green*, 446 U.S. 14, 19 (1980) (stating that prison officials sued in *Bivens* action would have qualified immunity); see also *infra* notes ___-___.

³⁰ See *infra* notes ___-___ and accompanying text.

³¹ See II COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 3357 (1971) (definitions of “tort” and “torture”).

³² 28 U.S.C. §§ 1346(b), 2671-2680.

where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.³³

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

Congress enacted the FTCA to make the United States liable for “garden-variety torts” by its employees, such as negligence while driving government cars.³⁴ Reflecting that homely purpose, the FTCA does not create a national tort law tailored to assessing U.S. government liability. The FTCA does define one important term: “[e]mployee of the government.”³⁵ On other issues of liability, however, the FTCA incorporates the tort law governing “private persons” in the place where the act or omission occurred, typically one of the fifty states.³⁶ This includes the critical determinations of whether a government employee's act was “negligent or

³³ *Id.* § 1346(b)(1) (giving federal district courts “exclusive jurisdiction of civil actions or claims against the United States, for money damages” for property damages and personal injuries caused by acts described in the quoted text accompanying this note); *see also* FDIC v. Meyer, 510 U.S. 471, 476-77 (1994) (discussing whether a claim was “cognizable under” § 1346(b)). Although Section 1346 is, on its face, just a grant of jurisdiction, it actually is “[t]he principal provision of the FTCA.” *Smith v. United States*, 507 U.S. 197, 201 (1993) (quoting *Richards v. United States*, 369 U.S. 1, 6 (1962)); *see also id.* § 2672 (authorizing agency heads to settle FTCA claims). Relevant to the claims of the torture victims in the GTMO and Syrian rendition scenarios, aliens (as well as citizens) can sue under the FTCA. *See, e.g., Araujo v. United States*, 301 F. Supp. 2d 1095, 1098-1102 (N.D. Cal. 2005) (holding that United States was liable to alien under FTCA for wrongful detention).

³⁴ *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2751 (2004) (describing FTCA as designed to make U.S. liable for “garden-variety torts” and quoting legislative history stating that, “[w]ith the expansion of governmental activities in recent years, it becomes especially important to grant to private individuals the right to sue the Government in respect to such torts as negligence in the operation of vehicles”); *see also* *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 426 (1995) (quoting legislative history stating that purpose of FTCA’s exclusivity provision, 28 U.S.C. § 2679(b)(1), was to “protect Federal employees from personal liability for *common law torts* committed within the scope of their employment”) (emphasis added); *Feres v. United States*, 340 U.S. 135, 139-40 (1950) (describing impetus for FTCA as follows: “As the Federal Government expanded its activities, its agents caused a multiplying number of remediless wrongs--wrongs which would have been actionable if inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government.”).

³⁵ 28 U.S.C. § 2671.

³⁶ 28 U.S.C. §§ 1346 & 2679; *see Alvarez-Machain*, 124 S. Ct. at 2751-52 (discussing legislative history indicating that Congress excluded claims arising in a foreign country from scope of FTCA because it wanted United States’ liability assessed under state tort law, not foreign tort law).

wrongful" and whether the act was within the scope of employment.³⁷ Because the U.S.'s liability rests on local tort law governing private persons, a claim that a government employee acted unconstitutionally is not cognizable under the FTCA; the Constitution is not a local tort law for private persons.³⁸

To analyze our scenarios under the FTCA, let us assume that the conduct described in those scenarios involves "wrongful act[s]."³⁹ This assumption reflects that in most, if not all, jurisdictions torture constitutes the intentional torts of assault and battery when committed by private persons.⁴⁰ The victims in those scenarios still must prove, first, that the acts were committed by government employees and, second, that those employees were acting within the scope of their employment.⁴¹ These two requirements will bar FTCA claims for some of the conduct described in our scenarios.

1. "Employee[s] of the government"

The Abu Ghraib and GTMO scenarios involve only U.S. officials.⁴² The Syrian rendition scenario involves both U.S. and Syrian officials.⁴³ The U.S. government is potentially liable under the FTCA for all of the U.S. officials' conduct because they are all "[e]mployee[s] of the government."⁴⁴ The FTCA defines that term to cover nearly all federal employees in the civilian and military sectors.⁴⁵

³⁷ JAYSON & LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* 8.02 (noting that state law governs scope-of-employment determinations); *id.* § 9.09 (stating that state law determines whether the plaintiff has stated a cause of action).

³⁸ *Meyer*, 510 U.S. at 478 ("[T]he United States simply has not rendered itself liable under § 1346(b) for constitutional tort claims."); *Johnson v. Sawyer*, 47 F.3d 716, 727 (5th Cir. 1995) ("Thus, even a violation of the United States Constitution, actionable under *Bivens*, is not within the FTCA unless the complained of conduct is actionable under the local law of the state where it occurred.") (footnote omitted).

³⁹ 28 U.S.C. §§ 1346(b)(1) & 2672.

⁴⁰ Intentional torts qualify as wrongful conduct under the FTCA. *See, e.g., Leleux v. United States*, 178 F.3d 750, 755 (5th Cir. 1999) (sexual battery); *Duffy v. United States*, 966 F.2d 307, 313 (7th Cir. 1992) (rejecting the argument that intentional torts do not fall within FTCA).

⁴¹ *See* 28 U.S.C. §§ 1346(b)(1) & 2672.

⁴² *See supra* text accompanying notes ___ and ___.

⁴³ *See supra* text accompanying note ___.

⁴⁴ 28 U.S.C. § 2671 says in relevant part:

In contrast, it is not clear whether the Syrian officials in the Syrian rendition scenario are “[e]mployee[s] of the Government.” The FTCA defines “[e]mployee of the government” to include not only “officers or employees of any federal agency” but also “persons acting on behalf of a federal agency in an official capacity.”⁴⁶ The Syrian officials arguably are acting “on behalf of” a federal agency – namely, the CIA – when they torture *SyC*. After all, the CIA apparently designed its rendition policy to use Syrian officials as instruments of torture. But even if Syrian officials act “on behalf of” the CIA, they probably are not doing so “in an official capacity.”⁴⁷ The CIA presumably would disclaim the Syrians’ conduct. Indeed, the whole point of the rendition is to avoid having the torture attributed to the United States. For that reason, it is doubtful that the Syrian officials were acting “in an official capacity,” as required for them to be “[e]mployee[s] of the [U.S.] government” whose conduct can subject the United States to liability under the FTCA.⁴⁸

This conclusion gains support from the FTCA provision that defines “[f]ederal agency.”⁴⁹ “Employee[s] of the government” include “officers or employees of any federal agency,” and “federal agency” is defined to exclude “any contractor with the United States.”⁵⁰

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

⁴⁵ *See id.*

⁴⁶ *Id.* § 2671(1).

⁴⁷ *Id.*

⁴⁸ *Id.* § 2671; *see also* *Logue v. United States*, 412 U.S. 521, 530-31 (1973) (finding “some support” in legislative history for government’s argument that the “acting on behalf of” phrase was designed for “special situations such as the ‘dollar-a-year’ man who is in the service of the Government without pay, or any employee of another employer who is placed under direct supervision of a federal agency pursuant to contract or other arrangement”).

⁴⁹ *See* 28 U.S.C. § 2671 (defining “Federal agency”).

⁵⁰ *Id.*:

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

In the Syrian rendition scenario, Syria in effect acts as a government contractor when its officials torture SyC.⁵¹ The Syrian officials thus are employees of a government contractor. By excluding government contractors from the FTCA's definition of "[f]ederal agency," Congress probably intended to preclude employees of government contractors from being treated as "[e]mployee[s] of the government" under the FTCA.⁵² To carry out that intent, a court would probably hold that the Syrian officials in the Syrian rendition scenario are not "[e]mployee[s] of the government" whose conduct could subject the United States to liability under the FTCA.⁵³

2. Scope of Office or Employment

Not all negligent or wrongful acts by "[e]mployee[s] of the government" expose the United States to suit under the FTCA. The employee must have been acting "within the scope of his [or her] office or employment."⁵⁴ The process for determining whether a government employee was acting within the scope of employment can be complicated. Even so, the U.S. officials in the GTMO scenario and the Syrian rendition scenario plainly act within the scope of employment. A harder question is whether the military police in the Abu Ghraib scenario do so.

⁵¹ See, e.g., *Means v. United States*, 176 F.3d 1376, 1379 (11th Cir. 1999) (county officials were not acting on behalf of federal government when they executed federal arrest warrant and federal search warrant at suspect's home).

⁵² See *Logue*, 412 U.S. at 530-32 (rejecting the argument that county employees were "acting on behalf of" the federal government "in an official capacity," and could therefore be treated as federal employees, when they held a federal prisoner in county jail under a contract between the federal government and the county); see also *Leone v. United States*, 910 F.2d 46, 50-51 (2nd Cir. 1990) (refusing to interpret "acting on behalf of" provision to cover private physicians who were designated by the Federal Aviation Administration as aviation medical examiners and who were found by the court to be government contractors); *Cannon v. United States*, 645 F.2d 1128, 1141 n.50 (D.C. Cir. 1981) (refusing to hold that District of Columbia prison officials with custody of federal prisoners fell within "acting on behalf of" provision in the absence of "special circumstances" demonstrating detailed federal supervision of federal prisoners in non-federal prisons).

⁵³ 28 U.S.C. § 2671. Although the U.S. cannot be sued under the FTCA for the Syrian officials' conduct in the Syrian rendition scenario, the U.S. might be sued under the FTCA for the conduct of the U.S. officials who turn SyC over to Syria. See *Logue*, 412 U.S. at 532-33 (holding in FTCA case that court of appeals erred in failing to consider whether federal marshal was negligent in failing to arrange for constant surveillance of suicidal prisoner held in a county jail under contract with the federal government); see also *United States v. Muniz*, 374 U.S. 150, 151-66 (1963) (holding that federal prisoners could sue federal prison officials under FTCA); cf. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (stating in a constitutional tort action against state officials: "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.").

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

Both federal courts and the Attorney General may play a role in determining whether a government employee was acting within the scope of employment for FTCA purposes. If the plaintiff initially sues a federal employee – and not the United States – the Attorney General decides whether the employee whose conduct gave rise to the suit was acting within the scope of employment; the Attorney General then certifies that determination to the court in which the case is pending.⁵⁵ The Attorney General's determination is subject to judicial review.⁵⁶ In contrast, when the plaintiff sues the United States (rather than officials) at the outset, the Attorney General does not make a scope of employment certification.⁵⁷ Instead, the court decides the issue by itself, and courts traditionally have based their decision on the law of the state in which the alleged tort occurred.⁵⁸ When there is no such state, courts apply the Restatement (Second) of Agency.⁵⁹

⁵⁵ *Id.* § 2679(d)(1); *see also* 28 C.F.R. §§ 15.1-15.4 (Department of Justice procedures for making scope of employment determinations).

⁵⁶ *Gutierrez de Martinez*, 515 U.S. at 423-37; *Primeaux v. United States*, 181 F.3d 876, 878 n.2 (8th Cir. 1999).

⁵⁷ *See Primeaux*, 181 F.3d at 878 n.2.

⁵⁸ *Hatahley v. United States*, 351 U.S. 173, 180-81 (1956) (applying Utah law in FTCA case to determine whether federal officials acted within scope of their employment). It is debatable whether courts should consult state law, at least when the employees are members of the armed forces. The FTCA says that, for members of the armed forces, “‘Acting within the scope of his office or employment’ ... means acting in the line of duty.” 28 U.S.C. § 2671. It would seem that federal law alone should determine whether someone is “acting in the line of duty” for purposes of the FTCA. Nonetheless, the U.S. Supreme Court held in *Williams v. United States*, 350 U.S. 857 (1955), that “the California doctrine of respondeat superior” governed an FTCA case in which a drunken soldier on a recreational drive injured a civilian and there was a dispute about whether the soldier was acting “in the line of duty” at the time of the accident. *See Williams v. United States*, 215 F.2d 800, 806-08 (9th Cir. 1954), *vacated*, 350 U.S. 857 (1955). *Williams* was a two-sentence, per curiam decision by the Court. *See* 350 U.S. at 857. Nonetheless, lower courts have understood *Williams* to establish that state law governs scope-of-employment determinations under the FTCA. *Williams* pre-dated the legislation that authorizes the Attorney General, in tort suits against federal employees, to certify whether the suit involved conduct within the scope of employment. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, §§ 5-6, 102 Stat. 4564. It is possible that this legislation, known as the Westfall Act, effectively overrules *Williams*, at least for cases in which the Attorney General has authority to make the certification. *See Gutierrez de Martinez*, 515 U.S. at 435 (plurality opinion) (stating that the issue in an FTCA case of “[w]hether the employee was acting within the scope of his federal employment is a significant *federal* question”) (emphasis added); *Primeaux*, 181 F.3d at 878 n.2 (noting, but reserving, the issue of whether the Westfall Act, as interpreted in *Gutierrez de Martinez*, alters the principle, attributed to *Williams*, that state law governs scope-of-employment determinations in FTCA cases); *cf. Aversa v. United States*, 99 F.3d 1200, 1208-09 (1st Cir. 1999) (holding that *Gutierrez de Martinez* did not alter the *Williams* principle).

⁵⁹ JAYSON AND LONGSTRETH, *supra* note ___, § 9.07.

To clear away this underbrush, let us assume that the plaintiffs in our scenarios sue the United States directly and that the court applies Restatement principles.

The U.S. officials in the Syrian rendition scenario, we are told, simply followed CIA policy.⁶⁰ If so, they plainly act within the scope of their employment. That is true even if they are, at the same time, acting tortiously or illegally.⁶¹

The U.S. interrogators in the GTMO scenario, we are told, reasonably believe they are using interrogation methods authorized by the Department of Defense. This is enough to find that they act within the scope of employment. Even if their conduct is actually unauthorized, it can still be within the scope of their employment.⁶² What matters is that the interrogators act at least in part to benefit their employer.⁶³

It is harder to say whether the military police guards in the Abu Ghraib scenario act within the scope of their employment.⁶⁴ The description of this scenario implies that they act solely to gratify their sadistic urges. If so, they act outside the scope of their employment.⁶⁵ That is because, to act within the scope of employment, an employee must act at least partly to benefit the employer.⁶⁶

The Abu Ghraib guards might assert they are acting at least partly to benefit their employer, for they act on instructions to “loosen up” the prisoner. In general, conduct motivated

⁶⁰ See *supra* text accompanying note ___.

⁶¹ See RESTATEMENT (SECOND) OF AGENCY § 231 (“An act may be within the scope of employment although consciously criminal or tortious.”).

⁶² See *id.* § 230 (“An act, although forbidden, or done in a forbidden manner, may be within the scope of employment.”); see also, e.g., *Hatahley v. United States*, 351 U.S. 173, 180-81 (1956) (applying Utah law in FTCA case to hold that federal officials were acting within the scope of their employment when they seized plaintiffs’ horses, even though the officials’ conduct violated federal statutes and therefore exceeded their actual authority; stating that “[t]here is an area, albeit a narrow one, in which a government agent, like a private agent, can act beyond his actual authority and yet within the scope of his employment”).

⁶³ See RESTATEMENT (SECOND) OF AGENCY § 228(1)(c) (to be within the scope of employment, conduct must be “actuated, at least in part, by a purpose to serve the master”).

⁶⁴ See *supra* text accompanying note ___.

⁶⁵ See RESTATEMENT (SECOND) OF AGENCY § 235 (“An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.”).

⁶⁶ See *id.*

by such a “dual purpose” may fall within the scope of employment.⁶⁷ The conduct in the Abu Ghraib scenario still falls outside the scope of employment – even if the guards act partly to benefit their employer – if it involves an unforeseeable, “clearly inappropriate” crime.⁶⁸ Thus, the government may well avoid FTCA liability by proving – as it has actually asserted – that the Abu Ghraib abuse involved unforeseeable conduct by a “few bad apples.”⁶⁹

In sum, the U.S. cannot be sued under the FTCA for the conduct in the Abu Ghraib scenario if that conduct is outside the scope of the guards' employment. The U.S. might be suable under the FTCA for the conduct by U.S. officials in the GTMO and Syrian rendition scenarios. The U.S.'s exposure to suit in those two scenarios arises because they involve conduct by government employees within the scope of their employment. The U.S. can still avoid liability in those two scenarios, however, if it shows that they fall within one of the FTCA's exceptions discussed in the next section.

B. FTCA Exceptions

The FTCA generally waives the U.S.'s sovereign immunity from claims arising from torts committed by government employees while acting within the scope of their employment. That general waiver is limited by several exceptions. Several of those exceptions could bar some or all of the claims arising from our scenarios.

1. The Combatant Activities Exception

⁶⁷ See *id.* § 236 (“Conduct may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person.”).

⁶⁸ See *id.* § 231 Comment a; see also H.R. REP. NO. 100-700, at 5 (1988) (legislative history of Westfall Act (see *supra* note __) stating: “If an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable.”); cf. *Attallah v. United States*, 955 F.2d 776, 780-82 (1st Cir. 1992) (U.S. customs agents who robbed and killed courier entering Puerto Rico were not acting within the scope of their employment for FTCA purposes).

⁶⁹ See President George W. Bush, *Remarks by the President on Iraq and the War on Terror*, Address delivered at U.S. Army War College, Carlisle, Pennsylvania (May 24, 2004) (stating that Abu Ghraib prison “became a symbol of disgraceful conduct by a few American troops who dishonored our country and disregarded our values”), available at <http://www.whitehouse.gov/news/releases/2004/05/20040524-10.html>; DANNER, *supra* note __, at 27 (describing this as the “‘few bad apples’ argument”).

The FTCA does not apply to – and thus does not authorize a suit against the U.S. for – “[a]ny claim arising out of the combatant activities of the military or naval forces ... during time of war.”⁷⁰ This “combatant activities” exception probably applies during the current war on terrorism, even though Congress has not declared it a war.⁷¹ The toughest question is whether the detention and interrogation of terrorist suspects are “combatant activities.”⁷²

The answer depends partly on how related to battlefield violence conduct must be to qualify as “combatant activity.”⁷³ The U.S. has argued with some success that the detention of suspected combatants lies at the core of combat.⁷⁴ The U.S. would argue that, like the detention of combatants, the *interrogation* of those combatants for military intelligence is close enough to actual combat to constitute “combatant activities” by the interrogators. Alternatively, or additionally, the U.S. might argue that the interrogations arise from the “combatant activities”

⁷⁰ 28 U.S.C. § 2680(j).

⁷¹ See, e.g., *Koohi v. United States*, 976 F.2d 1328, 1333-35 (9th Cir. 1992) (holding that combatant activities exception applied during conflict between U.S. and Iran commonly known as the “tanker war,” though it was not a declared war); *Bentzlin v. Hughes Aircraft*, 833 F. Supp. 1486, 1492-95 (C.D. Cal. 1993) (applying combatant activities exception, by analogy, to claims against government contractor arising during undeclared Persian Gulf War); *Vogelaar v. United States*, 665 F. Supp. 1295, 1302 (E.D. Mich. 1987) (applying combatant activities exception to claims arising during undeclared Vietnam War).

⁷² 28 U.S.C. § 2680(j).

⁷³ Cf. *Koohi*, 976 F.2d at 1333 n.5 (claims in that case involved “combatant activities” because they concerned “the tracking, identification, and destruction of unidentified aircraft that appear to pose a threat to [a] warship’s safety”); *Johnson v. United States*, 170 F.2d 767, 769-70 (9th Cir. 1948) (stating that “combatant activities” include “not only physical violence, but activities both necessary to and in direct connection with actual hostilities”; holding that exception did not apply to claims based on damage done by U.S. vessels that had finished their wartime activities and were homeward bound); *Bentzlin*, 833 F. Supp. at 1487 (applying combatant activities exception, by analogy, to bar claims against government contractor based on its manufacture of the missiles that killed service members); *Vogelaar*, 665 F. Supp. at 1302 (applying combatant activities exception to bar claims related to identification of remains of service member killed in Vietnam War); *In re Agent Orange Prod. Liability Litigation*, 580 F. Supp. 1242, 1255 (E.D.N.Y. 1984) (declining at that stage of the litigation to hold that combatant activities exception barred claims based on, among other conduct, government’s inadequate labeling of Agent Orange, a defoliant used in Vietnam War); *Skeels v. United States*, 72 F. Supp. 372, 374 (W.D. La. 1947) (holding that “combatant activities” did not include “mere practice or training activities, even in time of war” and that the exception therefore did not bar FTCA claim based on military airplanes killing civilian while planes trained in Gulf of Mexico); Note, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 548-49 & n.99 (1947) (discussing genesis and possible meaning of “combatant activities”).

⁷⁴ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 2640 (2004) (in holding that President had statutory authority to detain Hamdi, Court says, “The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’”) (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

of the *detainees*, since their involvement in combat led to their detention and interrogation. These arguments would have particular force in the Abu Ghraib scenario, because the Abu Ghraib prison lies in an area of active combat.⁷⁵

The “detention and interrogation = combatant activities” argument has less force in the GTMO scenario. Although U.S. officials capture the torture victim in that scenario (*Af*) in a place where combat is occurring (Afghanistan), his place of detention (GTMO) lies far from any battlefield.⁷⁶ For another thing, the United States exercises control tantamount to sovereignty over GTMO.⁷⁷ The government might still argue that the detention of GTMO detainees, like *Af*, who were captured on the battlefield arises from those detainees’ combatant activities. But this argument seems a stretch considering GTMO’s remoteness from the battlefield and the U.S.’s uncontested control over GTMO.

Finally, the Syrian rendition scenario is least likely of the three to fall within the combatant activities exception. U.S. officials arrest *SyC* in New York City, not on the battlefield. They believe he is a terrorist but have no evidence that he engaged in combatant activities.⁷⁸ Furthermore, the U.S. officials who arrange for his rendition are CIA officials, and therefore may not belong to the “military or naval forces.”⁷⁹ Thus, although *SyC*’s rendition may be associated with fighting the war on terrorism, it probably does not fall within the FTCA’s exception for cases arising from combatant activities.

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

⁷⁵ See Schlesinger Report, *supra* note ___, at 937 (noting that Abu Ghraib was “smack in the middle of a combat environment”).

⁷⁶ *Cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“theater of war” concept could not be stretched to enable President to rely on his Commander-in-Chief power to seize domestic steel mills).

⁷⁷ See *Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004) (relying on U.S.’s “complete jurisdiction and control” over GTMO in holding that detainees there could sue under the federal habeas statute).

⁷⁸ *Cf.* *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715 (2004) (addressing habeas claim of person whom U.S. officials arrested in Chicago and detained in U.S. as “enemy combatant”).

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

2. The Foreign Country Exception

The FTCA does not apply to “[a]ny claim arising in a foreign country.”⁸⁰ This foreign country exception will bar claims arising from the Abu Ghraib scenario and some claims arising from the Syrian rendition scenario. Whether it would bar claims arising from the GTMO scenario is unclear.

The foreign country exception was interpreted broadly in the Supreme Court’s recent decision in *Sosa v. Alvarez-Machain*.⁸¹ In *Alvarez-Machain*, a Mexican national sued the United States for having him kidnapped from Mexico for prosecution in the United States.⁸² The Court held that the foreign country exception barred the FTCA claims against the U.S. because the abduction – and hence the plaintiff’s injury – happened in Mexico.⁸³ It did not matter that the abduction was authorized by officials in the United States.⁸⁴ For purposes of the foreign country exception, the Court held, an action arises where the injury occurs, even if the tortious conduct occurred elsewhere.⁸⁵

Under *Alvarez-Machain*, the foreign country exception immunizes the United States for the torture that occurred at Abu Ghraib. It does not matter whether, at the time of the injuries, Iraq had a recognized government; it was still a foreign country, even if not a foreign sovereign.⁸⁶ Nor would it matter that the injuries occurred at a U.S. controlled facility inside Iraq.⁸⁷

⁸⁰ 28 U.S.C. § 2680(k).

⁸¹ 124 S. Ct. 2739 (2004).

⁸² *Id.* at 2746-47.

⁸³ *Id.* at 2749-54.

⁸⁴ *Id.*

⁸⁵ *See id.* at 2754 (“[T]he FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.”).

⁸⁶ *See Smith*, 507 U.S. at 198-205 (foreign country exception barred FTCA claim arising in Antarctica, even though it had no recognized government or civil law).

⁸⁷ *See United States v. Spelar*, 338 U.S. 217, 219-22 (1949) (foreign country exception barred claim arising from injury at air base in Newfoundland located on land that U.S. held under 99-year lease from Great Britain).

As interpreted in *Alvarez-Machain*, the foreign-country exception also bars claims for conduct in the Syrian rendition scenario that occurred in Syria. It does not matter that the extraordinary rendition program is hatched in Washington, D.C. Under *Alvarez-Machain*, claims for the torture itself arise in Syria because that is where the injury occurs.⁸⁸ In effect, the foreign country exception, as interpreted in *Alvarez-Machain*, allows the United States to outsource to other countries the job of torturing suspected terrorists.⁸⁹ True, the foreign country exception does not protect the U.S. from FTCA liability for actions by U.S. officials in the United States that led up to the rendition, including SyC's arrest in New York. This will not be much comfort to SyC if U.S. officials had probable cause to detain him, because in that event his detention probably was not tortious.⁹⁰ SyC may, however, be able to claim that U.S. officials act tortiously when they hand him over to foreign officials who, they know, will torture him.⁹¹

It is unclear whether the foreign country exception will bar claims in the GTMO scenario. The torture occurs – and, under *Alvarez-Machain*, FTCA claims based upon the torture arise -- at the U.S. Naval Base at Guantánamo Bay (GTMO). Although GTMO is in Cuba, it may not be “a foreign country” because of the U.S.’s control over it.⁹²

⁸⁸ See *Alvarez-Machain*, 124 S. Ct. at 2749-54.

⁸⁹ See generally Jane Mayer, *supra* note __ (article entitled “Outsourcing Torture”).

⁹⁰ Cf. *Alvarez-Machain*, 124 S. Ct. at 2748 (treating plaintiff’s FTCA claim for false arrest as arising in Mexico because, once he was brought into the United States, U.S. had cause and authority to continue his detention).

⁹¹ See *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 195-96, 200 (1989) (Due Process Clause generally does not require government to protect citizens against private violence, but it does create duties toward people whose liberty the government has restricted); *United States v. Price*, 383 U.S. 787, 794-96 (1966) (holding that private persons acted under color of law when, in coordination with local law enforcement officers, they beat to death civil rights workers who had traveled to Philadelphia, Mississippi); *Leffall v. Dallas Independent School Dist.*, 28 F.3d 521, 530-32 (5th Cir. 1994) (discussing case law recognizing constitutional claims against state entities for creating situation in which plaintiff was exposed to danger at hands of private actors).

⁹² See, e.g., *Rasul*, 124 S. Ct. at 2700 (Kennedy, J., concurring) (“Guantanamo Bay is in every practical respect a United States territory[.]”). *But cf.* *Cuban American Bar Association v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995) (holding that GTMO is not U.S. territory for purposes of statutes relied upon by Cuban and Haitian immigrants temporarily detained there); *Bird v. United States*, 923 F. Supp. 338, 340-43 (D. Conn. 1996) (holding that FTCA’s “foreign country” exception barred FTCA action alleging medical malpractice at Naval Medical Facility at Guantánamo Bay).

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

Section 2680(a) of Title 28 says that the FTCA does not apply to

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.⁹³

Section 2680(a) is often called the “discretionary function exception,” and this article will follow that convention.⁹⁴ Section 2680(a) actually contains two exceptions, however, only the second of which involves discretionary functions.⁹⁵ The first part of the provision, which will hereafter be referred to as the “due care clause,” protects the government from suits based on an employee’s execution of a statute or regulation. The second part, which will hereafter be referred to as the “discretionary function clause,” protects the government from suits based on an employee’s exercise of a discretionary function.

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

a. Due Care Clause

The due care clause bars FTCA actions that are based on an employee’s exercising “due care” in the execution of a statute or regulation, “whether or not such statute or regulation be valid.”⁹⁶ The two quoted phrases reflect Congress’s intent to bar suits that sought money damages, not for an employee’s negligent discharge of regulatory or statutory duties, but for the

⁹³ 28 U.S.C. § 2680(a).

⁹⁴ *See, e.g.,* *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (referring to entirety of 28 U.S.C. § 2680(a) as “the ‘discretionary function’ exception”).

⁹⁵ *E.g.,* *Dalehite v. United States*, 346 U.S. 15, 33 (1953) (“It will be noted ... that there are two phrases describing the excepted acts of government employees.”); *see, e.g.,* *Hatahley v. United States*, 351 U.S. 173, 181 (1956) (separately discussing the two portions of 28 U.S.C. § 2680(a)).

⁹⁶ 28 U.S.C. § 2680(a).

employee's *faithful* discharge of those duties. Congress did not want FTCA tort suits to be used as vehicles for challenging the validity of statutes or regulations.⁹⁷ Consistent with that intention, the due care clause bars FTCA suits based on official conduct that is specifically authorized or required by a statute or regulation.⁹⁸ In contrast, if an FTCA suit is based upon official conduct that is not dictated by a statute or regulation but instead involves the exercise of discretion, the due care clause may not apply.⁹⁹ (Such a suit may be barred, however, by the discretionary function clause.¹⁰⁰)

To apply the due care clause to the torture scenarios under discussion here, we must first ask whether the U.S. officials in those scenarios are executing a "statute or regulation."¹⁰¹ It does not appear that any statute specifically authorizes or compels the officials' conduct. Each scenario does, however, involve an executive directive. The military police guards in the Abu Ghraib scenario torture *IA* under an instruction from military intelligence officers to "loosen him up."¹⁰² The GTMO interrogators torture *Af* under a directive from the Secretary of Defense authorizing certain interrogation methods.¹⁰³ CIA officials render *SyC* to Syria under an extraordinary rendition program approved by the White House.¹⁰⁴ If none of these directives is a "regulation," the due care clause does not bar FTCA claims based on these officials' conduct.

⁹⁷ *E.g.*, *Dalehite*, 346 U.S. at 33 (due care clause "bars tests by tort action of the legality of statutes and regulations").

⁹⁸ *Crumpton v. Stone*, 59 F.3d 1400, 1403 (D.C. Cir. 1995) (due care clause applies if "a federal statute, regulation, or policy *specifically prescribes* a course of action for an employee to follow ... as long as the employee has exercised due care in following the dictates of the statute or regulation") (emphasis added); *cf.* *Staton v. United States*, 685 F.2d 117, 120-21 (4th Cir. 1982) (holding that due care clause would bar claim against national park ranger who shot dogs pursuant to regulation, as long as ranger was exercising due care, even though regulation left rangers with discretion in the situation confronting the ranger in that case).

⁹⁹ *See Crumpton*, 59 F.3d at 1404-06 (holding that due care clause did not apply because no statute or regulation limited Army's discretion to disclose records).

¹⁰⁰ *See infra* notes ___-___ and accompanying text.

¹⁰¹ 28 U.S.C. § 2680(a).

¹⁰² *See supra* text accompanying note ___.

¹⁰³ *See supra* text accompanying note ___.

¹⁰⁴ *See supra* text accompanying note ___.

It is not clear which, if any, of these directives is a “regulation.” The FTCA does not define the term, and there is little case law on the subject.¹⁰⁵

Of the three directives, however, the “loosen him up” instruction in the Abu Ghraib scenario is least likely to qualify as a regulation. It is the least formal and least detailed of the three.¹⁰⁶ It comes from officials who are presumably fairly low in the chain of command and therefore may lack authority to issue regulations (as distinguished from orders).¹⁰⁷ And, unlike most regulations, the “loosen him up” instruction does not have broad applicability; it is directed solely to a handful of military police guards.¹⁰⁸

By comparison, the Secretary of Defense’s directive to GTMO interrogators and the CIA’s extraordinary rendition program governing the Syrian rendition scenario are more likely to be “regulation[s]” within the meaning of the due care clause.¹⁰⁹ On the one hand, neither directive is called a “regulation,” and neither is apparently subject to the rulemaking procedures of the Administrative Procedure Act.¹¹⁰ On the other hand, the directives come from officials at the highest levels of the executive branch, who no doubt intend them to be binding. The Secretary of Defense’s directive, in particular, appears to have been issued through the formal chain of command.¹¹¹

¹⁰⁵ Dictionaries contemporaneous with the FTCA’s enactment in 1946 shed little light on the subject. *See, e.g.*, BLACK’S LAW DICTIONARY 1451 (Henry Campbell Black 4th ed. 1951); MAX RADIN, LAW DICTIONARY 291 (Lawrence G. Greene ed. 1955).

¹⁰⁶ *See Crumpton*, 59 F.3d at 1404-05 (Army pamphlet was not “a definitive statement of Army policy” and therefore did not limit Army’s discretion for purposes of analysis under due care clause and discretionary function clause of FTCA).

¹⁰⁷ *See* 5 U.S.C. § 558(b) (“A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.”); *see also* JOHN H. REESE AND RICHARD H. SEAMON, ADMINISTRATIVE LAW: PRINCIPLES AND PRACTICE 517-18 (2nd ed. 2003) (discussing history and purpose of § 558(b)).

¹⁰⁸ Although the Administrative Procedure Act defines “rule” to mean an agency statement of either “general or particular applicability,” 5 U.S.C. § 551(4), most rules have general applicability. *See, e.g.*, *Natural Resources Def. Council v. United States EPA*, 966 F.2d 1292, 1309 (9th Cir. 1992).

¹⁰⁹ 28 U.S.C. § 2680(a).

¹¹⁰ *See* 5 U.S.C. § 553(a)(1) (exempting from rulemaking requirements prescribed in that section rules involving “a military or foreign affairs function of the United States”).

¹¹¹ *See supra* note ____.

If officials in the GTMO scenario and the Syrian rendition scenario are executing “regulations,” claims based on their conduct can still avoid the “due care” clause by asserting that the officials did not “exercis[e] due care.”¹¹² As between the two scenarios, the GTMO scenario is the more likely to involve a lack of due care. That is because the Secretary of Defense’s directive (the public version, at least) gave GTMO interrogators much discretion. The directive describes authorized interrogation methods using only evocative names such as “fear up harsh,” and broad descriptions, such as (in the case of “fear up harsh”): “Significantly increasing the fear level in a detainee.”¹¹³ This left officials with so much discretion that, in reality, it led interrogators in at least one case to kill a detainee.¹¹⁴ Focusing on this discretion In the GTMO scenario, *Af* can argue that his FTCA action does not challenge the validity of the Secretary of Defense’s directive but, instead, the way his interrogators chose to implement the directive. In short, he can argue that they failed did not “exercise[e] due care,” as required for their conduct to be protected by the due care clause.

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

b. Discretionary Function Clause

¹¹² 28 U.S.C. § 2680(a).

¹¹³ Memorandum for the Commander, US Southern Command, from Secretary of Defense (Apr. 16, 2003), in *TORTURE PAPERS*, *supra* note __, at 361; *but cf.* Tim Golden, *Abuse Cases Open Command Issues at Army Prison*, N.Y. TIMES, Aug. 8, 2005, at A1 (“[A] former guard charged with maiming and assault said that he and other reservist military policemen were specifically instructed at Bagram how to deliver the type of blows that killed the two detainees, and that the strikes were commonly used when prisoners resisted being hooded or shackled.”).

¹¹⁴ See Josh White, *Documents Tell of Brutal Improvisation by GIs*, WASH. POST, Aug. 3, 2005, at A01 (reporting that U.S. interrogators in Iraq, using the “fear up” method, killed an Iraqi general by stuffing him in a sleeping bag, wrapping his bagged figure in electrical cord, and beating him to death).

Torture victims asserting FTCA claims may avoid the due care clause only to have their claims barred by the discretionary function clause.¹¹⁵ Analysis of torture claims under the discretionary function clause raises difficult issues at each of three steps: (i) identifying what conduct the claims are “based upon”; (ii) determining whether that conduct is discretionary; and (iii) if so, determining whether the conduct involves the kind of discretion that the discretionary function clause protects.

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

The discretionary function clause bars FTCA claims that are “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or any employee of the Government.”¹¹⁶ Thus, to determine whether the clause bars a claim, a court must first determine what conduct that claim is “based upon.” That determination can be hard to make when an FTCA claimant’s injuries stem, not from the *single act* of a government employee, but from a *course* of government conduct.¹¹⁷ The injurious course of conduct may include some acts that involve the exercise of a discretionary function and other acts that do not. In that situation, the determination of which act the claim is “based upon” can control the outcome of the case.

Our torture scenarios illustrate the “based upon” issue. For example, assume that the Secretary of Defense exercised a discretionary function when he authorized the interrogation techniques used in the GTMO scenario. Also assume, however, that the GTMO interrogators who tortured *Af* were not exercising a discretionary function (because, say, it does not involve the kind of public-policy-informed discretion that, as discussed below, the discretionary function clause protects¹¹⁸). When *Af* sues under the FTCA, he can plausibly argue that his claim is “based upon” the unprotected conduct of his interrogators. The United States can just as

¹¹⁵ See 28 U.S.C. § 2680(a) (reproduced in relevant part *supra* in text accompanying note ___).

¹¹⁶ *Id.* § 2680(a).

¹¹⁷ Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. Davis L. Rev. 691, 695, 715-17 (1997).

¹¹⁸ See *infra* notes ___ - ___ and accompanying text.

plausibly respond that his claim is really “based upon” the Secretary of Defense’s decision. If *Af*’s argument prevails, the discretionary function clause will not bar the action. If the U.S.’s argument prevails, the clause will bar the action. The “based upon” issue can determine the lawsuit.

Little case law or commentary addresses the “based upon” issue, as this author has discussed in a prior article.¹¹⁹ Under the approach proposed in that article, an FTCA claim is presumptively “based upon” the injurious government conduct that, the plaintiff alleges, was negligent or wrongful and proximately caused his or her injuries.¹²⁰ This approach permits a plaintiff to avoid the discretionary function clause by basing his or her FTCA claim upon conduct by officials who are not themselves exercising a discretionary function but are implementing a policy that did involve the exercise of a discretionary function.¹²¹ To prevail in that situation, however, the plaintiff must prove that the implementation of the policy, as distinguished from its formulation, was negligent or wrongful. Thus, under the author's proposed approach, the plaintiff cannot prove that the implementation of a policy was negligent or wrongful by using evidence, or make arguments to the effect that, the policy itself was negligent or wrongful. In effect, the antecedent policy must be conclusively presumed valid if the formulation of the policy involved the exercise of a discretionary function.¹²²

This approach will probably limit, but not altogether bar, an FTCA claim arising from the GTMO scenario. *Af*, the victim in the GTMO scenario, can sue the United States under the FTCA for the way that GTMO interrogators implemented the Secretary of Defense’s directive on interrogation methods. Specifically, *Af* can argue that the interrogators have acted negligently or wrongfully in implementing the directive because (we are assuming for now) they are not exercising a discretionary function. To prove negligent or wrongful implementation, however, *Af*

¹¹⁹ See *id.* at 696-97.

¹²⁰ *Id.* at 721 (reading Supreme Court precedent to imply that “[a] claim is presumptively based upon the government conduct that the plaintiff alleges was wrongful and proximately caused the injuries”).

¹²¹ *Id.* at 754.

¹²² *Id.* at 754-55.

cannot argue, or present evidence, that the directive itself is negligent or wrongful, because (we are assuming for now) in formulating the directive the Secretary exercises a discretionary function. Essentially, under the approach that the author has proposed, *Af* is limited to arguing that, judged by a reasonable person standard, the individual interrogators go too far in their use of the authorized (and assumed to be valid) interrogation methods.

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

The author's approach to the "based upon" issue probably will not bar the FTCA claim arising from the Abu Ghraib scenario. This is true even if we make the debatable assumption that military officials exercise a discretionary function when they instruct the guards to "loosen up" *IA*. *IA* can still sue under the FTCA claiming that the guards act negligently or wrongfully by using that instruction as an excuse to torture him if, as *IA* can probably establish, the guards' actions do not involve the type of discretion that the discretionary function clause protects.¹²³

ii. Whether the Conduct Is Discretionary

¹²³ See *infra* notes ___ - ___ and accompanying text.

Once a court identifies what conduct an FTCA action is “based upon,” the court can then proceed to the second step of analysis under the discretionary function clause. At the second step, the court must determine whether the conduct involved discretion. To be “discretionary,” a government employee’s conduct must involve “choice.”¹²⁴ Conduct cannot be discretionary if it violates a federal statute, regulation, or agency guidelines, because an employee has no choice but to obey the law.¹²⁵ Thus, the discretionary function exception will not bar claims arising from the Abu Ghraib scenario, which we are told, violates federal statutes and regulations.¹²⁶ Similarly, if the conduct of the interrogators in the GTMO scenario violates

¹²⁴ *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

¹²⁵ *Berkovitz*, 486 U.S. at 542-43 (holding that discretionary function clause did not bar FTCA claim alleging that agency officials violated statutes and regulations governing licensing of vaccinations); see also *United States v. Gaubert*, 499 U.S. 315, 324 (1999) (discretion may be established expressly or implicitly by “statute, regulation, or agency guidelines”).

¹²⁶ A federal statute imposes criminal liability on “[w]hoever outside the United States commits or attempts to commit torture.” See 18 U.S.C. § 2340A. This anti-torture statute contains no exceptions excusing, for example, official torture of suspected terrorists. *Cf. Nuru v. Gonzales*, 404 F.3d 1207, 1221-22 (9th Cir. 2005) (rejecting immigration judge’s view that torture of asylum applicant was justified because it occurred in combat zone). The Justice Department has nonetheless argued that the anti-torture statute incorporates common-law defenses that allows some U.S. torture of suspected terrorists. Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, for Alberto R. Gonzales, Counsel to the President at 39-46 (August 1, 2002) [hereafter cited as Torture Memo]. The same memo also suggests that the statute would be unconstitutional if construed to constrain the President’s conduct of the war against terrorism. *Id.* at 31-39. Those views have drawn criticism, see, e.g., Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT’L L. 641, 646 (2005) (calling Torture Memo “perhaps the most clearly erroneous legal opinion I have ever read”), but the courts have not yet addressed the issues raised by the Torture Memo. Until recently, the government also argued that the anti-torture statute did not apply to conduct at the Naval Base at Guantánamo Bay because it was not “outside the United States” within the meaning of the statute. See Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Apr. 4, 2003) [hereafter cited as Working Group Report], in TORTURE PAPERS, *supra* note ___, at 291. Congress enacted a law in late 2004 to make the anti-torture statute applicable at federal installations such as Guantánamo and Abu Ghraib. The law defines the “United States,” for purposes of the torture statute, to exclude those places. Those places are therefore “outside the United States” and conduct occurring there is subject to the anti-torture statute. Pub. L. No. 108-375, § 1089, 118 Stat. 1811, 2067 (“‘United States’ means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.”). In addition to the anti-torture statute, many other federal statutes and military directives may restrict U.S. officials’ use of physical and psychological force against detainees. See Memorandum from William J. Haynes II, General Counsel, Department of Defense, to Secretary of Defense re Counter-Resistance Techniques (Nov. 27, 2002), in TORTURE PAPERS, *supra* note ___, at 253-55 (summarizing relevant federal statutes); Working Group Report, *supra* note ___, at 290-302 & 325-330 (summarizing relevant federal statutes and UCMJ provisions); Lieutenant General Anthony R. Jones & Major General George R. Fay, Investigation of Intelligence Activities at Abu Ghraib [Fay-Jones Report], in TORTURE PAPERS, *supra* note ___, at 1033-34 (summarizing relevant military directives); Charge Sheet for Charles A. Graner, Jr.

federal law, regulations, or agency guidelines, the discretionary function clause will not bar claims based on the interrogators' conduct. In that event, the discretionary exception clause will not shield the GTMO interrogators' conduct even though they, unlike the Abu Ghraib guards, believe they are obeying the law.¹²⁷ Likewise, the exception will not cover the U.S. officials who arrange for SyC's extraordinary rendition if that conduct violates federal statutes or regulations, even though it follows CIA policy.¹²⁸

It is unclear whether the discretionary function clause bars claims for torture that does not violate any statute, regulation, or agency policy but does violate the Constitution. Some courts have held that, because government employees have no discretion to violate the Constitution, the discretionary function clause does not bar suits alleging unconstitutional conduct.¹²⁹ The D.C. Circuit has held, to the contrary, that the discretionary function clause can shield the United States from FTCA liability for unconstitutional conduct.¹³⁰ FTCA claims for torture may force a resolution of this important circuit split.¹³¹

(charging participant in Abu Ghraib prison abuses with violations of five articles of UCMJ), *available at* <http://www.findlaw.com/hdocs/iraq/>.

¹²⁷ *Cf. Gaubert*, 499 U.S. at 325 (stating that focus of determining whether an official's discretion involves the type of discretion that the discretionary function exception protects "is not on the agent's subjective intent in exercising the discretion").

¹²⁸ See Omnibus Consolidated and Emergency Supplemental Appropriates Act, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture.") (codified at 8 U.S.C. § 1231 Note); see also, e.g., Jimmy Gurule, *Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad*, 17 HASTINGS INT'L & COMP. L. REV. 457, 470-89 (1994) (discussing legality of extraordinary rendition); *Torture by Proxy*, *supra* note __, at 20-118 (same).

¹²⁹ See *Galvin v. Hay*, 374 F.3d 739, 758 (9th Cir. 2004) (rejecting government's reliance on discretionary function clause because court had already held that officials violated the Constitution and "[f]ederal officials do not possess discretion to violate constitutional rights") (internal quotation marks and citation omitted); *Nurse v. United States*, 226 F.3d 996, 1002 n.3 (9th Cir. 2000) ("We hold ... that the Constitution can limit the discretion of federal officials such that the FTCA's discretionary function exception does not apply."); *Sutton*, 819 F.2d at 1293 ("[W]e have not hesitated to conclude that [law enforcement activity] does not fall within the discretionary function of [28 U.S.C.] § 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution."); see also *U.S. Fidelity & Guar. Co. v. United States*, 837 F.2d 116, 120 (3rd Cir. 1988) (stating in dicta: "[C]onduct cannot be discretionary if it violates the Constitution, a statute, or an applicable regulation."); *Pooler v. United States*, 787 F.2d 868 (3rd Cir. 1986) (stating in dicta: "[I]f the [plaintiff's] complaints were that agents of the government in the course of an investigation had violated constitutional rights or federal statutes, the outcome would be different since federal officials do not possess discretion to commit such violations.").

¹³⁰ See *Gray*, 712 F.2d at 507-16 (relying on discretionary function clause to uphold dismissal of FTCA claims by former FBI Director based upon assertedly unconstitutional conduct by Attorney General and

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

iii. Whether Conduct Involves Protected Discretion

The discretionary function clause protects only discretionary decisions that are “susceptible to” public policy analysis¹³² – meaning decisions that, by their nature, call for the making of “political, social, and economic judgments.”¹³³ This limitation reflects Congress’s intention to “prevent judicial ‘second-guessing of ... administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.’”¹³⁴ The determination whether a decision involves the kind of discretion that Congress intended to protect is objective.¹³⁵ “The focus of the inquiry is not on the [official’s] subjective intent in exercising the discretion ..., but on the nature of the actions taken and on whether they are susceptible to policy analysis.”¹³⁶

The Court’s decisions illustrate the type of discretion protected by the discretionary function clause. In one case, the Court interpreted the clause to bar claims based on a federal agency’s supervision of an ailing savings and loan institution.¹³⁷ The Court determined that the

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

¹³¹ Another unsettled question is whether conduct can be discretionary if it violates international law. The D.C. Circuit has answered “no.” *See* Macharia v. United States, 334 F.3d 61, 64-68 (D.C. Cir. 2003) (relying on discretionary function clause to dismiss FTCA claims asserting inadequate security at Kenyan embassy bombed by al Qaeda and alleging that the security failures violated international law).

¹³² *See Gaubert*, 499 U.S. at 325.

¹³³ *United States v. S.A. Empresa de Viacao Rio Grandense (Varig Airlines)*, 467 U.S. 797, 820 (1984).

¹³⁴ *Id.* at 814.

¹³⁵ *See Gaubert*, 499 U.S. at 325.

¹³⁶ *See id.* at 325.

¹³⁷ *See id.* at 327-34.

agency acted to protect the institution's depositors and shareholders and to preserve public trust in the savings and loan industry.¹³⁸ In another case, the Court interpreted the clause to bar claims based on the frequency and thoroughness of Federal Aviation Administration (FAA) inspections of aircraft.¹³⁹ The Court determined that the inspection program reflected the FAA's attempt to "accommodate[] the goal of air transportation safety and the reality of finite agency resources."¹⁴⁰ In a third case, the Court held that the exception barred claims based on government specifications for manufacturing fertilizer for shipment to Europe as part of the war-recovery plan.¹⁴¹ The decision to establish the program was grounded in foreign policy, and the challenged details of its implementation reflected considerations of public safety and "practicability."¹⁴²

This precedent strongly suggests that the formulation of the policies that have led to the torture of suspected terrorists involves the kind of discretion that the discretionary function clause protects. The policies are "susceptible to" considerations of public safety, foreign intelligence needs, military strategy, and foreign relations. Specifically, the policies reflect the judgment that traditional interrogation methods sometimes fail to extract from suspected terrorists information that is necessary to protect the public against terrorist attacks and to prosecute the war on international terrorism. The judgments also reflect (or should reflect) consideration of the U.S.'s obligations under international law and its foreign policy. The resulting interrogation policies may be bad policies, but they are still protected by the discretionary function clause. The exception applies to exercises of discretion that are susceptible to public policy analysis "whether or not the discretion involved be abused."¹⁴³

¹³⁸ *See id.* at 331-33.

¹³⁹ *Varig Airlines*, 467 U.S. at 814-20.

¹⁴⁰ *See id.* at 820.

¹⁴¹ *Dalehite*, 346 U.S. at 37-43.

¹⁴² *See id.* at 42.

¹⁴³ 28 U.S.C. § 2680(a).

If U.S. officials did exercise discretionary functions in formulating policies that led to the torture of suspected terrorists, the discretionary function clause will limit the victims of that torture to claims asserting that lower-level officials acted negligently or wrongfully in implementing those policies. The discretionary function clause will bar even those claims if a court determines that implementation decisions are susceptible to public policy considerations. That determination is not far fetched. For example, the military police guards authorized to use the “fear up harsh” interrogation method at Abu Ghraib have discretion in choosing particular techniques for “[s]ignificantly increasing the fear level in a detainee.”¹⁴⁴ In choosing a technique, a reasonable guard might very well consider factors such as the likelihood that the detainee has information the disclosure of which is necessary to protect human lives and the likely public reaction if details of a highly coercive interrogation become public. If so, the guard herself is exercising a discretionary function and a claim based upon her conduct will therefore be barred by the discretionary function clause.

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

Analysis of our scenarios under the “discretionary function exception” in 28 U.S.C. § 2680(a) raises many important and unresolved issues involving the meaning of each of the two clauses in that provision. The “due care” clause may well bar claims arising from the GTMO and Syrian rendition scenarios if the torture in those scenarios entailed the execution of “regulations” by officials using “due care.” Alternatively, the “discretionary function” clause might bar claims arising from the GTMO and Syrian rendition scenarios. This depends on, among other issues, (1) whether the torture in those two scenarios violates any federal statutes or regulations; (2) whether the discretionary function clause applies to conduct that violates the Constitution; and (3) if so, whether the torture in the two scenarios violates the Constitution. Neither the “due care” clause nor the “discretionary function” clause will likely bar FTCA claims

¹⁴⁴ Memorandum for the Commander, US Southern Command, from Secretary of Defense (Apr. 16, 2003), in TORTURE PAPERS, *supra* note ___, at 361.

arising from the Abu Ghraib scenario. (As discussed in previous sections, however, claims arising from the Abu Ghraib scenario will be barred for other reasons.)¹⁴⁵

4. The Intentional Tort Exception

The intentional tort exception says that, in general, the FTCA does not apply to “[a]ny claim arising out of assault, battery, false imprisonment, [or] false arrest.”¹⁴⁶ This restriction on the FTCA’s scope is qualified, however, by what is called the “law enforcement proviso”:

*Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising ... out of assault, battery, false imprisonment, [or] false arrest.*¹⁴⁷

The law enforcement proviso creates an exception to the intentional tort exception. In other words, the intentional tort exception does not bar FTCA claims for intentional torts that fall within the law enforcement proviso. Thus, for example, the proviso lets victims of abuse by federal law enforcement officers sue both the officers – for money damages payable out of their own pockets under the *Bivens* doctrine – and also the United States – for money damages payable out of the Treasury under the FTCA – without having the claims against the United States barred by the intentional torts exception.¹⁴⁸

Consistent with our earlier assumption,¹⁴⁹ let us assume the torture in our scenarios constitutes “assault” and “battery” within the meaning of the intentional tort exception. On that

¹⁴⁵ See *supra* notes ___-___ and accompanying text (explaining that U.S. might not be liable under FTCA for torture by Abu Ghraib guards because guards might have acted outside the scope of their employment); *supra* notes ___-___ and accompanying text (explaining that, even if claims arising from Abu Ghraib scenario are cognizable under FTCA, those claims will be barred by FTCA’s foreign country exception).

¹⁴⁶ 28 U.S.C. § 2680(h).

¹⁴⁷ *Id.*

¹⁴⁸ See *Carlson v. Green*, 446 U.S. 14, 19-20 (1980) (holding that availability of remedy under FTCA for deliberate indifference to medical needs of federal prisoner did not prevent recovery under *Bivens* for same conduct; stating that enactment of law enforcement proviso shows that “Congress views FTCA and *Bivens* as parallel, complementary causes of action”); S. REP. NO. 93-588, at 3 (1973) (stating that law enforcement proviso “should be viewed as a counterpart to the *Bivens* case and its progen[y], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved)”).

¹⁴⁹ See *supra* notes ___-___ and accompanying text.

assumption, analysis of our scenarios proceeds in two steps. First we must determine whether the officials who inflicted the torture are “investigative or law enforcement officers of the United States Government.”¹⁵⁰ If not, FTCA claims against the United States based on their commission of assault and battery will be barred by the intentional tort exception. If, on the other hand, the officials who inflicted the torture *are* “investigative or law enforcement officers of the United States Government,”¹⁵¹ the intentional tort exception will not bar those FTCA claims, because they will fall within the law enforcement proviso. A second question will then arise. The second question is whether a case that falls within the law enforcement proviso – though not barred by the intentional tort exception – can still be defeated by other FTCA exceptions, such as the combatant activities exception, the foreign country exception, or the discretionary function exception.

The FTCA defines “investigative or law enforcement officers” to mean “any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.”¹⁵² Thus, the United States can use the intentional tort exception to avoid FTCA liability for torture by having it done by people who lack law enforcement powers. This may not be hard for the U.S. to do. For instance, the military police who torture *IA* in the Abu Ghraib scenario may lack law enforcement powers.¹⁵³ Furthermore, the CIA officials in the Syrian rendition scenario almost certainly lack law enforcement powers.¹⁵⁴ If so, their assault and battery of *IA* and *SyC* cannot trigger FTCA liability because it falls within the intentional tort exception.

¹⁵⁰ 28 U.S.C. § 2680(h).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See 10 U.S.C. § 807(b) (authorizing “[a]ny person authorized under regulations governing the armed forces to apprehend persons subject to the [Uniform Code of Military Justice] or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it”); 32 C.F.R. § 637.10 (Army regulation authorizing military police investigators and Department of Army civilian detectives/investigators “to make apprehension in accordance with” the Uniform Code of Military Justice, Article 7).

¹⁵⁴ See 50 U.S.C. § 403-3(d)(1) (“[T]he [Central Intelligence] Agency shall have no police, subpoena, or law enforcement powers or internal security functions.”).

Because of the law enforcement proviso, however, the intentional tort exception will not bar an FTCA suit for assault and battery by officials who have law enforcement powers. Suppose, for example, that the interrogators in the GTMO scenario have arrest powers. In that event, the intentional tort exception will not bar an FTCA suit against the United States for their assault and battery of *Af*. The scenario would fall within the law enforcement proviso. A separate question would then arise: Can a case that falls within the law enforcement proviso – and that therefore is not barred by the intentional tort exception – be barred by other FTCA exceptions, such as the combatant activities exception, the foreign country exception, or the discretionary function exceptions?¹⁵⁵

This issue divides the federal court of appeals as it pertains to the relationship between the law enforcement proviso and the discretionary function exception. The Fifth Circuit has held that claims that fall within the law enforcement proviso cannot be barred by the FTCA's discretionary function exception.¹⁵⁶ The D.C. Circuit and the Fourth Circuit have held, to the contrary, that claims that fall within the law enforcement proviso can be barred by the discretionary function exception.¹⁵⁷ The reasoning of the courts on both sides of the issue could extend to exceptions other than the discretionary function exception, such as the foreign country exception and the combatant activities exception.¹⁵⁸

Because this issue concerns the scope of the intentional tort exception, the issue has great importance for FTCA claims for torture, which will invariably “aris[e] out of assault, battery,

¹⁵⁵ See *supra* notes ___-___ and accompanying text.

¹⁵⁶ *Sutton v. United States*, 819 F.2d 1289, 1291-1300 (5th Cir. 1987) (holding that FTCA's discretionary function clause does not bar cases within the law-enforcement proviso); see also *Wright v. United States*, 719 F.2d 1032, 1035-36 (9th Cir. 1983) (interpreting FTCA exception for assessment or collection of taxes narrowly in order to prevent it from barring an FTCA action that fell within the law enforcement proviso); *but cf.* *Gasho v. United States*, 39 F.3d 1420, 1434-35 (9th Cir. 1994) (reading *Wright* narrowly and apparently siding with contrary precedent of *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983)).

¹⁵⁷ See *Gray*, 712 F.2d at 507-08 (rejecting plaintiff's argument that discretionary function clause cannot apply to suits that fall within the law enforcement proviso); see also *Medina v. United States*, 259 F.3d 220, 224-26 (4th Cir. 2001) (siding with *Gray*); *cf.* *Pooler v. U.S.* 787 F.2d 868, 872 (3rd Cir. 1986) (reserving this issue).

¹⁵⁸ See *Welch*, 409 F.3d at 651-52 (relying on *Medina* to hold that due care clause can bar claims that fall within law enforcement proviso).

false imprisonment, [or] false arrest”¹⁵⁹ and therefore implicate the exception. Under the Fifth Circuit’s view, it appears that FTCA claims involving torture by law enforcement officials acting within the scope of their employment can never be defeated by any of the FTCA’s exceptions. Under the contrary view of other circuits, those claims can be defeated by one of the other exceptions, at least three of which – the combatant activities exception, the foreign country exception, and the discretionary function exception – will bar many torture claims.

C. Summary of United States’ Liability Under Current Law and Assessment of the Adequacy of Current Law

The FTCA is the only statute under which the United States might be held civilly liable for U.S.-sanctioned torture. The word “might” in that sentence needs emphasis. In practice, the United States will avoid FTCA liability entirely for most U.S.-sanctioned torture, as becomes clear when the scenarios described in this article’s introduction are analyzed under the FTCA. Specifically, FTCA claims arising from the Abu Ghraib scenario will fail because, among other reasons, they arise in a foreign country. FTCA claims arising from the GTMO scenario will fail if they are found to arise in a foreign country or to be based upon the acts or omissions of officials who have exercised due care in executing regulations or upon the exercise of a discretionary function. Some FTCA claims arising from the Syrian rendition scenario will fail because they arise in a foreign country or because they involve acts or omissions by people who are not U.S. government employees. Other FTCA claims arising from the Syrian rendition scenario will likely fail because they fall within the “due care” or the “discretionary function” clause of the discretionary function exception or within the intentional tort exception. In short, FTCA claims for U.S.-sanctioned torture face a phalanx of obstacles that makes analysis of those claims *tortuous*. That pun is deliberate; it highlights the symptom of the underlying problem. Analysis of U.S. torture claims under the FTCA is tortuous because Congress did not design the FTCA for that sort of claim.

¹⁵⁹ 28 U.S.C. § 2680(h).

As the Supreme Court has recognized, Congress designed the FTCA to make the United States liable for the “garden variety” torts of its employees, such as negligent driving.¹⁶⁰ As part of that design, Congress tied the United States’ liability in general to the liability of a “private person” under local tort law.¹⁶¹ Recognizing that the U.S. could not be treated exactly the same as a private person, however, Congress created exceptions to the general standard of liability to prevent tort actions from impairing certain governmental functions.¹⁶² The result is a statutory contraption that can make analysis of government conduct cumbersome when the conduct has no clearcut analog to private conduct.

FTCA analysis of torture claims is almost hopelessly twisted because official torture differs fundamentally from a “garden variety” tort. Torts are typically episodic wrongs committed by private individuals against other private individuals. Official torture, in contrast, is typically systematic and systemic. It often aims to subjugate a particular group; torture with that aim is a form of governance.¹⁶³ Thus, responsibility for official torture falls upon everyone in the chain of command that ends in the official who inflicts the torture (and, for that matter, upon the public who tolerates the torture). Moreover, the harm of torture falls not just on individual victims but on the society that tolerates it. The differences between tort and torture have produced differences in legal treatment. Among other differences, tort law is local; the prohibition on torture is universal. Congress recognized the international character of the prohibition on torture when it created a civil remedy against certain foreign sovereigns whose officials engage in torture.¹⁶⁴ This same recognition should shape the law governing torture claims against the

¹⁶⁰ *Alvarez-Machain*, 124 S. Ct. at 2751 & n.4.

¹⁶¹ 28 U.S.C. § 1346(b)(1).

¹⁶² *See id.* § 2680; *see also supra* notes ___ - ___ and accompanying text.

¹⁶³ *See* ELAINE SCARRY, *THE BODY IN PAIN* 56-59 (1985) (explaining that torture is designed to translate or transform individual human suffering into “an emblem of the regime’s strength”).

¹⁶⁴ *See* 142 CONG. REC. S3463-64 (daily ed. Apr. 17, 1996) (statement of Rep. Brown) (stating as follows in regard to proposed bill, which waived foreign sovereign immunity for claims by victims of torture by officials of countries designated as state sponsors of terrorism: “The international community ... does not recognize the right of any state to commit acts of torture, extrajudicial killing, aircraft sabotage, or hostage taking. Sovereign immunity is an act of trust among nations of good faith. When a terrorist state harbors or supports known terrorists, or injures or kills American citizens, it destroys that trust and should

United States by having that law tied to something other than the local tort law for "a private person."¹⁶⁵

The closest that Congress has come in the FTCA to addressing claims for torture is the law enforcement proviso, which makes the U.S. liable in some cases of police brutality.¹⁶⁶ The law enforcement proviso, however, is inadequate to address torture claims for two reasons. First, as discussed above, currently law does not settle the relationship between the law enforcement proviso and other FTCA exceptions.¹⁶⁷ For example, can an FTCA claim for an FBI agent's assault upon a suspected terrorist be barred if it occurs overseas? It is not the mere existence of a circuit split on this issue that demonstrates the inadequacy of the law enforcement proviso. Rather, the issue reflects the distinct possibility that little congressional thought went into the proviso.¹⁶⁸ The proviso is, after all, just a proviso.¹⁶⁹ It should not bear the weight of grave and complex matters such as claims of torture arising from the war on terrorism.¹⁷⁰

Second, the subject that Congress designed the law enforcement proviso to address – intentional torts by law enforcement officials – differs from the torture of suspected international terrorists in ways that matter under the FTCA and that would matter to Congress today. In isolation, the law enforcement proviso seems to authorize FTCA claims based on intentional

not be allowed to avoid the accusations of those it harms."); *see also* 28 U.S.C. § 1605(a)(7) (provision added in 1996 waiving foreign sovereign immunity from certain torture claims).

¹⁶⁵ 28 U.S.C. § 1346(b)(1).

¹⁶⁶ *Id.* § 2680(h); *see also supra* notes ___-___ and accompanying text.

¹⁶⁷ *See supra* notes ___-___ and accompanying text.

¹⁶⁸ *See Sutton*, 819 F.2d at 1295-96 (explaining that law enforcement proviso was added as a "non-germane amendment" to legislation in the House of Representatives and accordingly got little attention there but did receive consideration by a senate committee); Jack Boger, Mark Gitenstein & Paul Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C.L. REV. 497, 520 (1976) ("Because of a perhaps hasty decision to draft this [law enforcement proviso] ... several key assumptions of the new amendment's drafters almost certainly lack foundation.").

¹⁶⁹ *See* S. REP. NO. 93-588, at 4 (1973) (describing proviso as "a minimal first step in providing a remedy against the Federal Government for innocent victims of Federal law enforcement abuses"); *see also* Boger, Gitenstein & Verkuil, *supra* note ___, at 516 ("[T]he narrow parameters of [the law enforcement proviso] ... meant that the drafters did not direct attention to the peculiar idiosyncrasies of the Federal Tort Claims Act.").

¹⁷⁰ *See Sutton*, 819 F.2d at 1295 n.11 (explaining that "[t]he primary motivation" for the proviso was two "no-knock" raids by federal and state narcotics agents on houses of innocent people).

torts by law enforcement officials. Other FTCA provisions, however, bar claims arising from certain combatant activities and claims arising in foreign countries.¹⁷¹ Those provisions at the very least raise the question whether official conduct committed in the international war on terrorism should be treated like ordinary federal law enforcement conduct. The question becomes all the more pressing in light of post-9/11 legislation that treats the United States response to international terrorism more like a war than a law-enforcement problem.¹⁷²

Beyond identifying the inadequacy of existing law, this article offers a proposal for reform. A step in the right direction would be for the law to treat U.S.-sanctioned torture, not as a tort, but on a par with conduct for which units of local government, such as cities and counties, are liable under 42 U.S.C. § 1983. Under Section 1983, a city or county can be held liable for an employee's violation of federal rights when it has a "custom" or "policy" that causes the violation.¹⁷³ The victim of the violation can establish a causal link between the custom or policy and the harm by showing that those responsible for the custom or policy were "deliberately indifferent" to the risk that the custom or policy would lead to the violation.¹⁷⁴ Similarly, Congress should enact a law that would make the United States liable when the plaintiff proved that torture has been caused by a policy or custom and that those responsible for the policy or custom were deliberately indifferent to the risk that it would lead to torture. The law would define torture, perhaps using the definition in the current statute that creates a cause of action for the victims of torture inflicted under color of foreign law.¹⁷⁵ Such a law might, for example, make the United States liable for the conduct of officials who approved the use of

¹⁷¹ 28 U.S.C. § 2680(j) & (k).

¹⁷² See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

¹⁷³ See, e.g., *Board of County Comm'rs v. Brown*, 520 U.S. 397, 403 (1997). As the Supreme Court has interpreted Section 1983, whereas cities and counties can be held liable in money damages for the officials' violation of federal rights under Section 1983, states cannot. See *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989) (holding that a state is not a "person" within the meaning of Section 1983).

¹⁷⁴ See, e.g., *id.* at 407-08.

¹⁷⁵ See TVPA § 3(b), 28 U.S.C. § 1350 Note.

interrogation methods at Abu Ghraib by members of the military who had no training in the detention and interrogation of suspected terrorists.¹⁷⁶

The principle underlying this proposal is one of comparable treatment. The principle is that United States should be liable for torture committed by its officials under at least the same circumstances as a city would be liable for police brutality. This principle recognizes that torture differs from police brutality. The differences, however, do not justify allowing the United States to escape liability for torture more easily than can a city or county for police misconduct. The proposal also recognizes that the law governing local government liability under Section 1983 has its own shortcomings.¹⁷⁷ The proposal would improve the law at least modestly, however, by making the United States liable for torture in some situations in which it should be liable, but is not under current law, and does so based on a principle (of comparable treatment) that expands U.S. liability for torture in a way that may be politically feasible in the post-9/11 climate.

III. TORTURE CLAIMS AGAINST U.S. OFFICIALS

Sovereign immunity does not bar claims for money damages against the U.S. officials who committed torture in our scenarios.¹⁷⁸ Rather, plaintiffs suing officials face two other challenges: stating a cause of action and overcoming the defense of official immunity. This Part of the article discusses three possible sources of a cause of action for torture victims: the Alien Tort Statute (discussed in Section A), non-federal tort law (discussed in Section B), and constitutional tort claims under the *Bivens* doctrine (discussed in Section C). Discussion of those potential sources of a cause of action focuses on the torture scenarios described in the introduction to this article. As that focus illustrates, torture victims generally will be able to assert viable causes of action, if at all, only under the *Bivens* doctrine. Furthermore, as

¹⁷⁶ *Cf.*, e.g., *City of Canton v. Harris*, 489 U.S. 378, 385-92 (1989) (holding that municipality could be liable under 42 U.S.C. § 1983 for its failure to train its police officers).

¹⁷⁷ *See*, e.g., Mark R. Brown, *The Failure of Fault Under § 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503 (1999); Symposium, *Section 1983 Municipal Liability in Civil Rights Litigation*, 48 DEPAUL L. REV. 619 (1999); *see also* *Ciraolo v. City of New York*, 216 F.3d 236, 242-50 (2nd Cir. 2000) (Calabresi, J., concurring) (criticizing unavailability of punitive damages under § 1983).

¹⁷⁸ *See supra* notes ___-___ and accompanying text; *see also infra* notes ___-___ (discussing whether officials have sovereign immunity from suits under the Alien Tort Statute).

discussed in Section D, most *Bivens* claims by torture victims will fail because of official immunity. The upshot is that there is only a small residue of situations in which an official who committed torture can be held personally liable. Section E assesses the adequacy of current law governing the liability of U.S. officials who torture suspected terrorists.

A. The Alien Tort Statute

The victims of torture in our scenarios who are not U.S. citizens – namely *Af* and *SyC*, the victims in the GTMO and Syrian rendition scenarios – might consider suing the responsible officials under the Alien Tort Statute (ATS). The ATS authorizes aliens to bring tort suits in federal court for certain violations of international law:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.¹⁷⁹

The Supreme Court recently construed the ATS in *Sosa v. Alvarez-Machain*.¹⁸⁰ The Court in *Alvarez-Machain* held that the ATS authorizes courts to adjudicate tort claims for some violations of universally accepted and clearly defined principles of international law.¹⁸¹ The Court named torture as an example of such a violation.¹⁸² The Court's decision in *Alvarez-Machain* means that the ATS may support some claims for U.S.-sanctioned torture.¹⁸³ ATS

¹⁷⁹ 28 U.S.C. § 1350.

¹⁸⁰ 124 S. Ct. 2739 (2004).

¹⁸¹ See *id.* at 2754-70.

¹⁸² See *id.* at 2763 (citing TVPA as providing a “clear mandate” to federal courts from Congress to adjudicate claims of torture); *id.* at 2766 (citing with apparent approval holding in *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980), that prohibition on torture was sufficiently universal and clearly defined norm of international law to be recognized as a cause of action under the ATS); *id.* at 2769 n.29 (citing with apparent approval *Filartiga's* description of prohibition of torture as a “norm of international law”); *id.* at 2783 (including torture in a “subset” of behavior that is “universally condemned” by international law and that “universal jurisdiction exists to prosecute”).

¹⁸³ The plaintiff in *Alvarez-Machain* initially asserted a claim of torture, but he had dropped that claim by the time his case reached the Supreme Court. In that Court, he alleged only that United States and Mexican officials violated international law by abducting him from Mexico and bringing him to the United States for federal prosecution. 124 S. Ct. at 2746-47; Appendix to Petition for Writ of Certiorari, *United States v. Alvarez-Machain*, No. 03-485, at 226a-231a (decision of district court rejecting as not credible plaintiff's allegations of torture). The Court held that his allegation of abduction did not state a claim under the ATS because it did not establish a violation of a clearly defined norm of international law. See *Alvarez-Machain*, 124 S. Ct. at 2766-69. The Court's discussion of torture was therefore arguably dicta. Its status as dicta is important because it leaves open a plausible argument that the ATS does not, after all, provide a broad cause of action for torture claims. In fact, the Seventh Circuit has recently held that

claims cannot be asserted, however, against the U.S. or its officials. As discussed below, claims against those defendants will fail because of a combination of sovereign immunity and the exclusivity provision of the FTCA. To the extent that the ATS gives aliens a monetary cause of action for U.S.-sanctioned torture, it does so only for claims against defendants other than the United States or its officials.

1. Sovereign Immunity as a Bar to ATS Claims

To begin with, aliens cannot use the ATS to assert torture claims directly against the United States. The ATS does not waive the U.S.'s sovereign immunity.¹⁸⁴

The D.C. Circuit has held that sovereign immunity bars not only ATS claims against the United States but also ATS claims against U.S. officials. The D.C. Circuit held in *Sanchez-Espinoza v. Reagan* that sovereign immunity barred ATS claims against the U.S. officials who armed the Nicaraguan Contras.¹⁸⁵ Then-Judge Scalia wrote the opinion for the court dismissing the claims on sovereign immunity grounds. The court construed the ATS to allow suits against U.S. officials only “in their official, as opposed to their personal, capacities – i.e., to the extent that [plaintiffs] are seeking to hold them to account for, or to prevent them from implementing in the future, *actions of the United States*.”¹⁸⁶ The court concluded that official-capacity suits under the ATS must be barred by sovereign immunity even though they are brought against officials, rather than against the United States. In the court’s view, “[i]t would make a mockery of the doctrine of sovereign immunity if federal courts were authorized to sanction or enjoin, by judgments nominally against present or former Executive officers, actions

the later enacted TVPA partially supersedes the ATS. *See generally* *Enahoro v. Abubakar*, 408 F.3d 877, 883-86 (7th Cir. 2005) (holding that plaintiffs could not pursue torture claims under ATS; they were instead required to pursue such claims under the TVPA).

¹⁸⁴ *See, e.g., Goldstar*, 967 F.2d at 967-69 (dismissing on sovereign immunity grounds ATS claims against U.S. asserted by Panamanian businesses based on U.S.'s failure to prevent property damage caused by rioting and looting after U.S. invasion of Panama); *Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 887 (D.C. Cir. 1992) (same); *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980) (dismissing on sovereign immunity grounds ATS claim for Coast Guard's refusal to allow vessel with Polish master and officers to enter port of Norfolk, Virginia).

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

¹⁸⁶ *Id.* at 207.

that are, concededly and as a jurisdictional necessity, official actions of the United States.”¹⁸⁷ The D.C. Circuit’s view, in sum, was that the ATS allows only suits against U.S. officials in their official capacity, and official capacity suits are invariably barred by sovereign immunity. On this view, the ATS is useless for suing U.S. officials.

Sanchez-Espinoza may no longer be good law in its understanding of official capacity suits. In the later case of *Hafer v. Melo*, the U.S. Supreme Court held that sovereign immunity does not bar a suit against an official for official conduct when the suit seeks money damages out of the official’s own pocket.¹⁸⁸ The Court explained that, when a suit seeks to hold an official personally liable in money damages, the suit is brought against the official in the official’s “personal” capacity, even though the suit is based on official conduct.¹⁸⁹ Sovereign immunity does not bar these personal capacity suits; it bars only “official capacity” suits, in which the plaintiff seeks money from government coffers.¹⁹⁰ Although *Hafer* concerns the applicability of state sovereign immunity to suits against state officials, its reasoning probably applies to cases that, like *Sanchez-Espinoza*, involve the applicability of the United States’ sovereign immunity to suits against federal officials.¹⁹¹ If so, the plaintiffs in *Sanchez-Espinoza* were bringing an individual-capacity claims under the ATS to the extent that they sought damages out of the

¹⁸⁷ *Id.*

¹⁸⁸ 502 U.S. 21, 25-27 (1991).

¹⁸⁹ *See id.* at 25 (“Personal-capacity suits ... seek to impose individual liability upon a government officer for actions taken under color of state law.”).

¹⁹⁰ *See, e.g.,* Land v. Dollar, 330 U.S. 731, 738 (1947) (stating that a suit “is one against the sovereign” when the judgment sought “would expend itself on the public treasury”).

¹⁹¹ The Court often applies precedent involving the immunities of states and their officials to cases involving the immunities of the United States and its officials, and vice-versa. *See, e.g.,* Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 451 (2004) (relying on a case involving United States’ sovereign immunity, *The Davis*, 77 U.S. (10 Wall.) 15 (1869), in a case involving state sovereign immunity); Alden v. Maine, 527 U.S. 706, 749-50 (1999) (relying on United States’ immunity from private civil actions in federal courts to justify holding that States are immune from private civil action in their respective state courts); Butz v. Economou, 438 U.S. 478, 500-501 (1978) (stating that, “in the absence of congressional direction to the contrary,” federal officials should have no greater immunity from liability for constitutional torts than state officials have); *see also* Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1090 & n.15 (2001) (citing additional cases); Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILLANOVA L. REV. 155, 173-174 & n.91 (1998) (same).

defendant officials' own pockets.¹⁹² Under *Hafer*, sovereign immunity did not bar those claims.¹⁹³

In light of *Hafer v. Melo* – and notwithstanding *Sanchez-Espinoza* – sovereign immunity probably will not prevent the torture victims in our scenarios who are aliens (*Af* and *SyC*) from suing U.S. officials under the ATS seeking money damages out of those officials' pockets. Another possible obstacle confronts them, however: the exclusivity provision of the FTCA.

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

As we saw in Part III, the FTCA generally authorizes people to sue the United States for money damages arising from the “negligent or wrongful act or omission of any employee of the Government while acting within the scope of his [or her] office or employment.”¹⁹⁴ In addition to creating this remedy against the United States, however, the FTCA generally bars remedies against individual government employees. The FTCA states as a general rule:

The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee.¹⁹⁵

This general rule of exclusivity is subject to two exceptions. It “does not extend or apply” to:

a civil action against an employee of the Government --
 (A) which is brought for a violation of the Constitution of the United States; or

¹⁹² See *Sanchez-Espinoza*, 770 F.2d at 205 & n.1, 207 (stating that plaintiffs sued most of the official defendants in both their individual and their official capacities, but treating all of monetary claims under ATS as “official capacity” claims).

¹⁹³ See *Jama v. INS*, 22 F. Supp. 2d 353, 365 (D.N.J. 1998) (holding that sovereign immunity did not bar ATS claims against Immigration and Naturalization Service officials in their individual capacity, citing *Hafer* and rejecting defendants' reliance on *Sanchez-Espinoza*); cf. *Al Odah v. United States*, 321 F.3d 1134, 1149 (D.C. Cir. 2003) (Randolph, J., concurring) (citing *Sanchez-Espinoza*, among other cases, to support conclusion that sovereign immunity barred non-monetary claims brought against U.S. and U.S. officials under ATS by Guantánamo detainees), *reversed and remanded sub nom. Rasul v. Bush*, 124 S. Ct. 2686 (2004).

¹⁹⁴ 28 U.S.C. § 1346(b)(1); see also *id.* §§ 2672 & 2679(b)(1).

¹⁹⁵ *Id.* § 2679(b)(1).

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.¹⁹⁶

These exceptions preserve suits against government employees for constitutional violations and certain statutory violations.

The FTCA's exclusivity provision requires a two-step analysis of any claim against a federal employee or other person acting under color of federal law. The first step asks whether the claim falls within the general rule of exclusivity. If not, the claim is not barred by that rule. On the other hand, if a claim does fall within the general rule of exclusivity, the claim will be barred unless a court determines, at the second step, that the claim is preserved by either the constitutional or statutory exception to the general rule of exclusivity. These two steps become clearer when they are applied to *Af*'s and *SyC*'s ATS claims.

Both *Af*'s claim against the GTMO interrogators and *SyC*'s claims against the CIA officials who arrange his rendition to Syria fall within the FTCA's general rule of exclusivity. The FTCA's exclusivity provision generally bars a claim for (1) a negligent or wrongful act or omission; (2) by a government employee; (3) acting "within the scope of [the employee's] office or employment."¹⁹⁷ We have assumed that the official conduct in all of the scenarios is "wrongful."¹⁹⁸ As discussed above, all of the U.S. officials are government employees.¹⁹⁹ Finally, the GTMO interrogators and the CIA officials act within the scope of their employment when they torture *Af* and *SyC*.²⁰⁰ Thus, the FTCA's general rule of exclusivity will bar *Af*'s or *SyC*'s ATS claims against the officials who tortured them unless the claims fall within one or both of the exceptions to the general rule of exclusivity.

The ATS claims do not fall within either exception. The ATS authorizes suits "for a tort only, committed in violation of the law of nations or a treaty of the United States."²⁰¹ Thus,

¹⁹⁶ *Id.* § 2679(b)(2).

¹⁹⁷ *Id.* § 2679(b)(1), quoted *supra* text accompanying note ____.

¹⁹⁸ See *supra* notes ____-____ and accompanying text.

¹⁹⁹ See *supra* notes ____-____ and accompanying text.

²⁰⁰ See *supra* notes ____-____ and accompanying text.

²⁰¹ 28 U.S.C. § 1350; see, e.g., *Jama*, 343 F. Supp. 2d at 347.

ATS suits are for violations of international law or U.S. treaties, not for violations of the Constitution. They therefore do not fall within the exception for an action “brought for a violation of the Constitution of the United States.”²⁰² Nor is an ATS claim “brought for a violation of a statute of the United States.”²⁰³ Although the ATS is a statute, an ATS claim does not assert any violation of that or any other federal statute; instead, an ATS claim must assert a violation of international law or a treaty.²⁰⁴ Because the ATS does not itself independently proscribe any conduct, courts have held that ATS actions do not fall within the exception for statutory violations.²⁰⁵ Since *Af*'s and *SyC*'s ATS claims do not fall within either exception, they are barred by the FTCA's general rule of exclusivity.²⁰⁶

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

wrongful act ... of ... employee[s] of the Government while acting within the scope of [their] office or employment, under circumstances where[, *Af* and *SyC* would claim,] the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.²⁰⁷

It might therefore seem like the FTCA's rule of exclusivity just forces a tradeoff: A torture victim who cannot sue the individual officer under the ATS can sue the United States under the FTCA.

²⁰² 28 U.S.C. § 2679(b)(2)(A).

²⁰³ *Id.* § 2679(b)(2)(B).

²⁰⁴ See 28 U.S.C. § 1350 Note.

²⁰⁵ See *Alvarez-Machain v. United States*, 331 F.3d 604, 631-32 (9th Cir. 2003) (en banc) (adopting vacated panel decision's conclusion that exception to FTCA's exclusivity provision for certain statutory violations did not apply to ATS claim, see *Alvarez-Machain v. United States*, 266 F.3d 1045, 1053 (9th Cir. 2001)), *rev'd on other grounds sub nom.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Jama*, 343 F. Supp. 2d at 355 (holding that ATS suits do not fall within exception to FTCA exclusivity provision for suits alleging statutory violations); *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 266-67 (D.D.C. 2004) (same); see also *Adras v. Nelson*, 917 F.2d 1552, 1553, 1557 & n.4 (11th Cir. 1990) (citing FTCA's exclusivity provision in case in which aliens originally asserted ATS claims but later conceded that their claims against federal officials were based solely on FTCA and the doctrine of *Bivens*).

²⁰⁶ A report on the extraordinary rendition of suspected terrorists states that U.S. officials involved in extraordinary rendition might be liable under the ATS. See *Torture by Proxy*, *supra* note ___, at 120-21 (referring to the ATS as the "Alien Tort Claims Act" or "ATCA"). The report fails to recognize that ATS claims are barred by the FTCA's exclusivity provision.

²⁰⁷ 28 U.S.C. § 1346(b)(1).

But the tradeoff is illusory. Most torture victims who can state claims cognizable under the FTCA will be barred from recovering by one of the FTCA's exceptions. In particular, as discussed, *A*'s FTCA claims will be barred by the foreign country exception; *SyC*'s may be barred in part by the foreign country exception and in part by the discretionary-function or intentional tort exception. Here is the trick: The FTCA's exclusivity provision bars a claim that is cognizable under the FTCA even if the claim ends up being barred by one of the FTCA's exceptions.²⁰⁸ As a result, *SyC* and *IA* will not be able to sue the officers responsible for their torture under the ATS or the United States under the FTCA.

3. Summary

Sovereign immunity combines with the FTCA's exclusivity provision to bar ATS claims for money damages against the United States and its officials for torture inflicted within the scope of their employment. To the extent that the ATS gives aliens a monetary cause of action for torture, it does so only for claims against other types of defendants.²⁰⁹

B. Non-Federal Tort Claims

So far, discussion has assumed that the suits arising from our scenarios will be brought in federal court and assert federal causes of action. Now we examine that assumption. Suppose, for example, one of the guards who tortured *IA* at Abu Ghraib prison returns to her home in West Virginia and *IA* tracks her down there. Further suppose *IA* sues the former guard in a West Virginia state court asserting common-law tort claims. This action may raise difficult choice of law questions – such as whether the suit is governed West Virginia's tort law or Iraq's tort law (or that of some other jurisdiction).²¹⁰ But assuming that choice can be made, what, if

²⁰⁸ See *Smith*, 499 U.S. at 165-75 (holding that FTCA's exclusivity provision barred medical malpractice claim against military doctor even though an FTCA claim against the United States for the doctor's malpractice was barred by the FTCA's foreign country exception).

²⁰⁹ The plaintiff in *Alvarez-Machain* relied on the ATS to sue a Mexican who participated with U.S. officials in the plaintiff's abduction from Mexico. See *Alvarez-Machain*, 124 S. Ct. at 2746. The Court held that, although the ATS authorizes federal courts to hear civil actions for some violations of international law, the plaintiff in that case did not state a cause of action cognizable under the ATS. *Id.* at 2765-69.

²¹⁰ See generally Steven C. Welsh, *Iraqi Transition, Interim Constitution, and Human Rights: Legal Standards Governing Treatment of Iraqi Detainees by Iraqi Security Forces During U.S. Occupation* (Jan.

anything, would bar a non-federal tort claim? The answer is that most, but not all, non-federal tort claims will be precluded by the FTCA's exclusivity provision (the same provision that, as discussed above, bars ATS claims against the U.S. and its officials²¹¹).

As discussed in the last section, the FTCA generally provides the exclusive remedy "for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."²¹² The only exceptions to this general rule of exclusivity are for claims against the employee based on violations of the U.S. Constitution and certain statutory violations. All other claims against a federal employee for wrongful acts committed while acting within the scope of his or her employment -- including claims based on state or foreign tort law -- are excluded.²¹³

The FTCA does not bar non-federal tort claims that are *not* cognizable under the FTCA. For example, to be cognizable under the FTCA, a claim must be based on conduct of a government employee acting within the scope of his or her employment.²¹⁴ Thus, the FTCA does not bar claims against a federal employee for conduct *outside* the scope of his or her employment.²¹⁵ Therefore, the Abu Ghraib guard who returns to West Virginia can be sued in

31, 2005) (discussing law governing treatment of detainees in Iraq), *available at* <http://www.cdi.org/news/law/iraq-law-detainees.cfm>.

²¹¹ See *supra* notes ___-___ and accompanying text.

²¹² 28 U.S.C. § 2679(b)(1).

²¹³ See, e.g., *Salmon v. Schwarz*, 948 F.2d 1131, 1141 (1991) (holding that FTCA precluded state tort claims against FBI agents); *Willis v. Skaff*, 186 W. Va. 689, 691, 414 S.E. 2d 450, 452 (1992) (holding that FTCA preempted state-court suit under state law by National Guard member for injuries suffered when he was struck by National Guard vehicle); cf. *Matsushita Elec. Co. v. Zeigler*, 158 F.3d 1167, 1169-70 (11th Cir. 1998) (holding that FTCA's exclusivity provision eliminated federal common law negligence claim against customs inspector who damaged equipment during customs inspection).

²¹⁴ See *supra* notes ___-___ and accompanying text.

²¹⁵ See H.R. REP. NO. 100-700, at 6 (1988), *reprinted in* 1988 U.S. CODE CONG. & AD. NEWS 5945, 5950 ("The 'exclusive remedy' provision [enacted as 28 U.S.C. § 2679(b)] ... is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees *who acted in the scope of employment.*") (emphasis added) (quoted in *Smith*, 499 U.S. at 167 n.9); *Brennan v. Fatata*, 359 N.Y.S. 2d 91, 92 (Super. Ct. 1974) ("It is implicit [in the FTCA] that ... if the Attorney General does not certify [that the defendants' challenged conduct was] in the scope of federal employment, the state action continues against the defendants personally."); see also *Kasaw v. Minor*, 717 So. 2d 382, 384-85 (Ala. Civ. App. 1998) (refusing to dismiss state-court tort action against student who was paid by federal work-study funds to clean a community college's physics department; receipt of federal work-

a state court there on non-federal tort grounds if, as appears to be the case, she was acting outside the scope of employment when she tortured *Af*.²¹⁶ In that event, her conduct is not cognizable under the FTCA. Accordingly, the FTCA's exclusivity provision does not bar an action against her based on that conduct.

In addition to conduct by a federal employee outside the scope of employment, another type of conduct that is not cognizable under the FTCA is conduct by people who are not "employee[s] of the government" within the meaning of the FTCA.²¹⁷ As discussed above, the Syrian officials who torture SyC in the Syrian rendition scenario are probably not "employee[s] of the government."²¹⁸ This means that SyC cannot sue the United States for their conduct under the FTCA. Because SyC's claim is not cognizable under the FTCA, the FTCA's exclusivity provision will not bar SyC from suing the Syrian officials. Whether or not SyC can find a viable legal theory for suing the officials, his claim against them at least will not be barred by the FTCA's exclusivity provision.²¹⁹

study funds did not make the student a federal employee); *AccuBanc Mortgage Co. v. Drummonds*, 938 S.W. 2d 135, 140-41 (Tex. App. 1996) (former officer of mortgage banking company could sue the company in state court for state-law claims arising from his firing because board of directors of company had dual role as employees of federal entity, the Resolution Trust Corporation, and as employees of private company); *Garabedian v. Skochko*, 232 Cal. App. 3d 836, 844, 283 Cal. Rptr. 802, 806 (Cal. App. 5th Dist. 1991) (real estate agent could bring state-court action for state-law tort against manager of property owned by U.S. Department of Housing and Urban Development after federal court determined that the manager was not a federal employee).

²¹⁶ See *supra* notes ___-___ and accompanying text.

²¹⁷ 28 U.S.C. § 2671.

²¹⁸ See *supra* notes ___-___ and accompanying text..

²¹⁹ SyC may have a cause of action against the Syrian officials under the TVPA. The TVPA says in relevant part, "An individual who, under actual or apparent authority, or color of law, of any foreign nation – (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual." TVPA § 3(a)(1), 28 U.S.C. § 1350 Note. Although the TVPA may create a cause of action, SyC may have trouble finding a U.S. court that can assert personal jurisdiction over the Syrian officials who torture him. See, e.g., *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 812-18, 820-21 (S.D.N.Y. 2005) (dismissing for lack of personal jurisdiction claims under TVPA and other statutes against several defendants allegedly involved in 9/11 attacks). A second obstacle to a TVPA suit against the Syrian officials is that some courts have held that foreign officials can claim foreign sovereign immunity from TVPA actions. See *Chuidian v. Philippine National Bank*, 912 F.2d 1095, 1101-06 (9th Cir. 1990) (discussing case law and holding that individual defendant had foreign sovereign immunity from claims asserted in that case). *But see Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005) (holding that individual defendant could not claim foreign sovereign immunity).

Although the FTCA's exclusivity provision will not bar a claim by SyC against the officials who torture him, the FTCA's exclusivity provision does bar non-federal tort claims against the U.S. officials involved in the GTMO scenario and the Syrian rendition scenario. As discussed above, those officials are government employees and are acting within the scope of their employment when they commit the torture.²²⁰ Non-federal tort claims against them are therefore cognizable under the FTCA and barred by its exclusivity provision.

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

C. Constitutional Tort Claims

Sections A and B explain why the FTCA's exclusivity provision will bar most torture claims against U.S. officials predicated on the Alien Tort Statute or non-federal tort law. Indeed, the FTCA's exclusivity provision preserves only one basis for most torture claims against U.S. officials. The FTCA's exclusivity provision preserves actions "brought for a violation of the Constitution of the United States."²²¹ This allows "constitutional tort" claims against federal employees.²²²

The legal basis for constitutional tort claims is *Bivens v. Six Unknown Federal Narcotics Agents*.²²³ In *Bivens*, the Court recognized a federal cause of action for money damages

²²⁰ See *supra* notes ___-___ and accompanying text.

²²¹ 28 U.S.C. § 2679(b)(2)(A).

²²² See, e.g., *Carlson v. Green*, 446 U.S. 14, 19-20 (1980) (discussing purpose of the provision in the FTCA's exclusivity provision that allows claims for constitutional violations); H.R. Rep. 100-700, at 6 (1988) ("[T]he courts have identified [constitutional torts] as a more serious intrusion of the rights of an individual that merits special attention. Consequently, [the proposed legislation generally making the FTCA remedy exclusive] would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights.").

²²³ 403 U.S. 388 (1971).

against federal agents who violated the plaintiff's Fourth Amendment rights.²²⁴ In later cases, the Court recognized *Bivens* claims for violations of the Fifth Amendment's Due Process Clause²²⁵ and the Eighth Amendment's Cruel and Unusual Punishment Clause.²²⁶ The Court has made clear, however, that it will not recognize *Bivens* claims for all constitutional violations in all circumstances. To the contrary, the Court in *Bivens* said that a constitutional tort claim "may be defeated ... in two situations."²²⁷ The first is "when defendants demonstrate special factors counselling hesitation in the absence of affirmative action by Congress."²²⁸ The second is "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."²²⁹ In short, the predicate for a constitutional tort claim under *Bivens* is a constitutional violation; however, even if a constitutional violation exists, a court may not recognize a *Bivens* action for one of the two reasons articulated in *Bivens*.

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

1. Constitutional Violations

Torture potentially violates the same constitutional provisions for which the Court has recognized *Bivens* claims. Torture violates the Fourth Amendment when it constitutes "excessive force" and is used by government agents in connection with detention or interrogation of detainees.²³⁰ Torture violates the substantive component of the Due Process

²²⁴ *Bivens*, 403 U.S. at 391-97.

²²⁵ *Davis v. Passman*, 442 U.S. 228, 234-49 (1979) (recognizing cause of action against former member of U.S. Congress who, while in Congress, fired plaintiff from his staff because she was a woman, which, plaintiff asserted, violated the equal protection component of the Fifth Amendment).

²²⁶ *Carlson*, 446 U.S. at 16-17 & n.2, 19-24 (recognizing cause of action against federal prison officials under Eighth Amendment's Cruel and Unusual Punishment Clause for their deliberate indifference to decedent's serious medical needs while in prison).

²²⁷ *Id.* at 18 (internal quotation marks omitted).

²²⁸ *Id.* (internal quotation marks omitted); *Bivens*, 403 U.S. at 396.

²²⁹ *Carlson*, 446 U.S. at 18 (internal quotation marks omitted); *Bivens*, 403 U.S. at 397.

²³⁰ *See Bivens*, 403 U.S. at 389-90 (plaintiff alleged agents violated Fourth Amendment by unwarranted search, arrest without probable cause, and use of excessive force to make the search and arrest); *see also Graham v. Connor*, 490 U.S. 386, 394-95 (1989) (holding that Fourth Amendment, rather than

Clause when it “shocks the conscience” and is used in situations not governed by the Fourth Amendment’s ban on excessive force or the Eighth Amendment’s ban on cruel and unusual punishment.²³¹ Finally, torture violates the Eighth Amendment if it is “cruel and unusual” and inflicted as part of an official punishment.²³²

These constitutional provisions have limits, however, that may prevent them from applying in some of our scenarios. The Court has held that the Fourth Amendment does not apply to the search and seizure of property that belongs to a nonresident alien and is located in a foreign country.²³³ The Court has also held that the Fifth Amendment “does not confer a right of personal security” upon certain “enemy aliens.”²³⁴ More broadly, the Court has said in dicta, “Neither the Constitution nor the laws passed in pursuance of it have any force in foreign

substantive due process, governs claims that law enforcement officials used excessive force during arrest or other seizure of a person).

²³¹ See *County of Sacramento v. Lewis*, 523 U.S. 833, 841-48 (1998) (holding that substantive due process, rather than Fourth Amendment, governed claim arising from police high-speed pursuit of suspects that ended in death, and that substantive due process prohibits official conduct that “shocks the conscience”); see also *Chavez v. Martinez*, 538 U.S. 760, 774 (2003) (Thomas, J., joined by Rehnquist, C.J. and Scalia) (reviewing challenged police conduct under “shocks the conscience” standard of substantive due process case law); *id.* at 796 (Kennedy J., concurring in part and dissenting in part) (“[I]t seems to me a simple enough matter to say that use of torture or its equivalent in an attempt to induce a statement violates an individual’s fundamental right to liberty of the person.”).

²³² *Wilkerson v. Utah*, 99 U.S. 130, 136, (1879) (“[I]t is safe to affirm that punishments of torture ... and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment]”), quoted in *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). The Eighth Amendment’s ban on cruel and unusual punishment would not apply directly to a detainee until the detainee has been convicted or, perhaps, otherwise adjudicated to be deserving of punishment. See *Bell v. Wolfish*, 441 U.S. 520, 536 n.16 (1979) (holding that conditions for holding pretrial detainees were properly analyzed under Due Process Clause rather than Eighth Amendment’s Cruel and Unusual Punishment Clause, because “Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.”) (quoting *Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40 (1977)).

²³³ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264-75 (1990).

²³⁴ *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950); see also *Verdugo-Urquidez*, 494 U.S. at 269 (describing *Eisentrager* as “reject[ing] the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States”).

territory unless in respect of our own citizens.”²³⁵ In general, the Court has refused to extend constitutional protection to aliens overseas.²³⁶

This refusal could defeat some constitutional tort claims in the GTMO scenario, which involves an Afghan citizen captured in Afghanistan and detained on a U.S. naval base in Cuba. *Af*'s situation resembles that of the German “enemy aliens” who were captured, tried, and imprisoned outside the United States and to whom the Court denied Fifth Amendment protection in *Johnson v. Eisentrager*.²³⁷ *Af* can distinguish his situation on several grounds, however, including the ground that GTMO is not outside the United States.²³⁸ *Af* will certainly have to do so to recover from his captors under *Bivens*.

Uncertainty about the extraterritorial reach of the Constitution would also complicate *Bivens* claims by *SyC*, the alien torture victim in the Syrian rendition scenario. U.S. officials arrested *SyC* in New York. His presence in the U.S. gives him a connection to this country that neither *Af* nor the German soldiers in *Eisentrager* had.²³⁹ It is unclear, however, whether his

²³⁵ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). This dicta may be undermined by later federal statutes that expressly apply outside the United States, including, apparently, to non-citizens. See *Verdugo-Urquidez*, 494 U.S. at 1068-69 (Brennan, J., dissenting); see also, e.g., VED P. NANDA & DAVID K. PANSIES, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 5.3, at ____ (2004).

²³⁶ See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”); see also *Miller v. Albright*, 523 U.S. 420, 451 (1998) (O’Connor, J., concurring in the judgment) (“[I]t is unclear whether an alien may assert constitutional objections when he or she is outside the territory of the United States.”).

²³⁷ *Eisentrager*, 339 U.S. at 777 (describing petitioners as people who had: been found to be enemy aliens; never been or resided in the U.S.; been captured outside the U.S. and held outside the U.S. as prisoners of war; been tried and convicted by a military commission sitting outside the U.S. for offenses against the laws of war committed outside the U.S.; and been imprisoned at all times outside the U.S.).

²³⁸ See *In re Guantánamo Detainee Case*, 355 F. Supp. 2d 443, 453-64 (D.D. C. 2005) (holding that Guantánamo detainees have right to due process); see also *Rasul*, 124 S. Ct. at 2694 (in holding that petitioners in that case had statutory right to bring habeas challenge, Court finds that petitioners “differ from the *Eisentrager* detainees in important respects,” including being imprisoned at Guantánamo, which is “territory over which the United States exercises exclusive jurisdiction and control”); *supra* note ____ (discussing 2004 legislation making anti-torture statute applicable to Guantánamo Bay Naval Base).

²³⁹ *Cf. Verdugo-Urquidez*, 494 U.S. at 271 (holding that Mexican citizen did not have any “substantial connection with” U.S. so as to give him Fourth Amendment rights because, at the time of the challenged search in Mexico, he had been in the U.S. only a few days and had been brought into the U.S. involuntarily).

presence in the U.S., standing alone, gives him a “substantial” enough connection with the U.S. to claim constitutional rights.²⁴⁰

Further complicating SyC’s *Bivens* claim is that the torture was inflicted by Syrian officials, not by U.S. officials. In general, the Constitution does not restrain foreign officials.²⁴¹ SyC may argue that Syrian officials should be held to constitutional standards because they were acting as a cat’s paw for U.S. officials.²⁴² In addition, or alternatively, SyC may argue that U.S. officials violated the Constitution by handing him over to Syria for torture.²⁴³ Those arguments raise important and highly unsettled issues that may have to be resolved in litigating claims for U.S.-sanctioned torture.

2. Special Factors Counselling Hesitation

Related to, but distinct from, the extraterritorial reach of the Constitution is the extraterritorial reach of the *Bivens* cause of action. The Court has said that “*Bivens* actions might be unavailable” to aliens for constitutional violations in foreign countries.²⁴⁴ The Court explained that the foreign location and identity of the *Bivens* claimant may be “special factors counselling hesitation” in recognizing a *Bivens* claim.²⁴⁵ The Court might be particularly reluctant to recognize a *Bivens* claim when – as may be true of claims arising from the war on terrorism – it would require judicial review of the executive branch’s conduct of foreign affairs

²⁴⁰ See *id.* at 271-72 (finding it unnecessary to decide “[t]he extent to which [an alien] might claim the protection of the Fourth Amendment if the duration of his stay in the United States were to be prolonged” beyond a few days); *cf.* *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”), *quoted in Zadvydas*, 533 U.S. at 693.

²⁴¹ See, e.g., *United States v. Toscanino*, 500 F.2d 267, 280 n.9 (2nd Cir. 1974).

²⁴² *Cf.* *United States v. Balsys*, 524 U.S. 666, 698-700 (1998) (stating that cooperation between domestic and foreign officials could become so strong that a person could invoke the Fifth Amendment privilege against compelled self-incrimination based on fear of potential foreign prosecution).

²⁴³ See *supra* note ____.

²⁴⁴ *Verdugo-Urquidez*, 494 U.S. at 274.

²⁴⁵ See *Verdugo-Urquidez*, 494 U.S. at 274; see also *id.* at 292 (Brennan, J., dissenting) (stating that extraterritorial application of Fourth Amendment would not materially impair U.S.’s conduct of foreign affairs because of Court’s recognition that “there may be certain situations in which the offensive use of constitutional rights should be limited,” citing *Bivens*’ discussion of “special factors” that would preclude recognition of *Bivens* claims).

and military strategy.²⁴⁶ Another factor arguably counselling hesitation is that Congress has enacted legislation authorizing private suits by the victims of official torture but only when the torture is inflicted under color of a foreign country's law.²⁴⁷ The possibility that the Court would refuse to allow *Bivens* claims by alien victims of U.S. torture is all the more likely considering the Court's general disinclination in the last 25 years to extend *Bivens*.²⁴⁸

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

The potential limits on constitutional rights and on the *Bivens* cause of action are most likely to prevent claims arising from the GTMO scenario, because it involves an alien victim of

²⁴⁶ See *Sanchez-Espinoza*, 770 F.2d at 209 (refusing to recognize *Bivens* claims by citizens and residents of Nicaragua arising out of U.S. officials' aid to "Contras"; stating that "the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad"); see also *United States v. Stanley*, 483 U.S. 669, 678-84 (1987) (holding that "special factors counselling hesitation" required refusal to recognize *Bivens* actions for injuries to members of armed services that "arise out of or are in the course of activity incident to service"); *Van Tu v. Koster*, 364 F.3d 1196, 1198 (10th Cir. 2004) (stating that availability of *Bivens* remedy is "questionable" in action by representatives of victims and survivors of My Lai Massacre during Vietnam War).

²⁴⁷ The Torture Victim Protect Act (TVPA) says: "An individual who, under actual or apparent authority, or color of law, of any foreign nation – (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual." 28 U.S.C. § 1350 Note. The TVPA's legislative history contains no evidence that, in creating this remedy for foreign torture, Congress intended to foreclose other remedies available to the victims of U.S. torture. Instead, the legislative history indicates that Congress wanted to extend to U.S. citizens the civil remedy for foreign torture that had already been determined by some courts to be available to aliens suing under the Alien Tort Statute. See, e.g., 137 CONG. REC. H11244-45 (daily ed. Nov. 25, 1991) (statement of Rep. Mazzoli) (bill enacted as TVPA "clarifies existing law to make explicit that victims of torture can bring a Federal civil cause of action against their torturer" and "expands existing law by providing U.S. citizens the rights to obtain civil redress for torture"); S. REP. NO. 102-249, at 5 (1991) ("While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad."). Without evidence that Congress intended to limit other remedies, the TVPA's creation of a civil remedy for foreign torture probably should not weigh against recognizing a *Bivens* remedy for U.S. torture. See *Davis*, 442 U.S. at 247 (holding that Congress's exclusion of congressional employees from a statute authorizing federal employees to sue the federal government for employment discrimination did not weigh against allowing congressional employees to sue under *Bivens*); cf. *Schweicker v. Chilicky*, 487 U.S. 412, 421-29 (1988) (holding that *Bivens* remedy was not available for due process violations by officials administering disability benefits program under Title II of the Social Security Act; existence of meaningful statutory remedies against United States for improper disability determinations was a "special factor" counselling hesitation in recognition of a *Bivens* remedy).

²⁴⁸ See *Correctional Servs.*, 534 U.S. at 68 ("Since *Carlson*[v. *Green*, 446 U.S. 14 (1980)], we have consistently refused to extend *Bivens* liability to any new context or new category of defendants.").

torture that, depending on GTMO's status, may be found to have occurred on foreign soil.²⁴⁹ As for the Abu Ghraib scenario, *IA*'s status as a U.S. citizen may entitle him to the full measure of constitutional rights.²⁵⁰ The tough question in his case will be whether a *Bivens* remedy is available for violations of those rights, given the context – a foreign military operation – in which they occur.²⁵¹ Finally, in the Syrian rendition scenario, *SyC*, though an alien, probably can assert a *Bivens* action against the CIA officials and other officials involved in his arrest in New York and his rendition to Syria.²⁵² Even while on U.S. soil, however, his constitutional rights may be watered down compared to those of a U.S. citizen.²⁵³ Furthermore, *SyC*'s constitutional rights, as well as the availability of a *Bivens* remedy, may end altogether when he leaves U.S. hands and the U.S. shore.

D. Official Immunity

So far, the discussion of civil remedies against U.S. officials for torture has concluded that *Bivens* provides the only potentially viable cause of action; a successful *Bivens* claim depends on a torture victim's establishing a constitutional violation; and, even if the torture victim proves a constitutional violation, a court may not allow a *Bivens* remedy because of "special factors counselling hesitation."²⁵⁴ Beyond the hurdles of establishing a constitutional violation and the availability of a *Bivens* remedy for that violation lies a third hurdle, taken up in

²⁴⁹ See *Sanchez-Espinoza*, 770 F.2d at 209; see also *Harbury v. Deutch*, 233 F.3d 596, 602-04 (D.C. Cir. 2000) (holding that Fifth Amendment did not protect Guatemalan citizen allegedly tortured and killed by Guatemalan military at instance of CIA), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002) (rejecting constitutional claim asserted by widow of Guatemalan torture victim).

²⁵⁰ See *Reid v. Covert*, 354 U.S. 1, 5 (1957) (plurality opinion) ("[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights.").

²⁵¹ See *supra* notes ___-___ and accompanying text.

²⁵² See *Humphries v. Various Federal United States Immigration Service Employees*, 164 F.3d 936, 948 (5th Cir. 1999) ("In general, ... a United States district court may consider the merits of a *Bivens* action for money damages, asserted by a nonresident alien who is present in this country, against federal government officials.").

²⁵³ See *Eisentrager*, 339 U.S. at 770 ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. ... [T]hey become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization."); *cf. Demore v. Kim*, 538 U.S. 510, 543-47 (2003) (Souter, J., concurring) (explaining that rights of lawful permanent resident aliens approach those of full citizenship).

²⁵⁴ *E.g., Carlson*, 446 U.S. at 18.

this section: Most officials sued under *Bivens* for unconstitutional torture will have qualified immunity.

1. Official Immunity In General

Whereas *sovereign* immunity can bar suits naming the government as a defendant, *official* immunity can bar suits that name government officials as defendants and seek money damages out of the officials' own pockets. Official immunity takes two forms: absolute immunity and qualified immunity.²⁵⁵ Absolute immunity protects an official from suit regardless how malicious and illegal the official's conduct might be.²⁵⁶ Qualified immunity is narrower, as we will see in the next paragraph. The officials involved in our scenarios would qualify only for qualified immunity.²⁵⁷

The leading modern case on qualified immunity is *Harlow v. Fitzgerald*.²⁵⁸ The Court in *Harlow* described qualified immunity as follows: "[O]fficials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."²⁵⁹ *Harlow's* objective, "reasonable person" standard replaced the Court's earlier standard, which conditioned immunity on both the objective reasonableness of an official's conduct and the subjective good faith of the official.²⁶⁰

As described in *Harlow*, qualified immunity has two elements. One concerns the official conduct on which the lawsuit was based; the other concerns that right that the official has

²⁵⁵ See, e.g., *Buckley v. Fitzsimmons*, 509 U.S. 259, 268-69 (1993) (discussing two forms of official immunity); *Forrester v. White*, 484 U.S. 219, 223-24 (1988) (same).

²⁵⁶ See, e.g., *Stump v. Sparkman*, 435 U.S. 349, 359-64 (1978) (holding that judge had absolute immunity from action challenging his order authorizing sterilization of fifteen-year-old girl without her knowledge based on *ex parte* application of her parents).

²⁵⁷ See *Butz*, 438 U.S. at 508 ("[Q]ualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations.").

²⁵⁸ 457 U.S. 800 (1982).

²⁵⁹ *Id.* at 818.

²⁶⁰ See *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (*Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action.").

supposedly violated. The conduct must involve an official's exercise of a "discretionary function," as distinguished from a "ministerial task."²⁶¹ This discretionary function element limits immunity to government decision making that – because it is not cut and dried – could be distorted by the fear of litigation and liability.²⁶² The second element of the *Harlow* standard requires that the right that the defendant official has supposedly violated be a "clearly established" one of which a reasonable person would have known.²⁶³ This second, "clearly established" element ensures that "the officer had fair notice that her conduct was unlawful."²⁶⁴

a. The "Discretionary Function" Element of the *Harlow* Test

The Court still mentions the first element of the *Harlow* standard, stating that qualified immunity protects only "government officials performing discretionary functions."²⁶⁵ Even so, since *Harlow* the "discretionary function" element has almost never restricted the scope of qualified immunity.²⁶⁶ Perhaps this is partly because courts have not required, as a

²⁶¹ *Harlow*, 457 U.S. at 816 (stating that "[i]mmunity generally is available only to officials performing discretionary functions," as distinguished from "'ministerial' tasks").

²⁶² *Id.* at 814 (suits against officials create "the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties") (internal quotation marks omitted; bracketed text supplied by Court in *Harlow*); see also *Buckley*, 509 U.S. at 284 (referring to the "distortive effects of potential liability" in discussing justification for absolute official immunity); *Westfall v. Erwin*, 484 U.S. 292, 297 (1988) (stating in discussion of absolute official immunity: "It is only when officials exercise decisionmaking discretion that potential liability may shackle the fearless, vigorous, and effective administration of policies of the government.") (internal quotation marks omitted).

²⁶³ *Harlow*, 457 U.S. at 818.

²⁶⁴ *Brosseau v. Haugen*, 125 S. Ct. 596, 599 (2004); see also, e.g., *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) ("qualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'") (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

²⁶⁵ E.g., *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Harlow*, 457 U.S. at 818).

²⁶⁶ See, e.g., *Sellers v. Baer*, 28 F.3d 895, 902 (8th Cir. 1994) ("[W]e note our belief that the ministerial-duty exception to the qualified immunity defense is dead letter."); *McIntosh v. Weinberger*, 810 F.2d 1411, 1432 (8th Cir. 1987) ("[T]he plaintiffs have cited, and we can find, no recent case other than that before us in which a court has rejected qualified immunity simply because the official in question was performing a ministerial duty."); see also *Horta v. Sullivan*, 4 F.3d 2, 11 (1st Cir. 1993) ("[I]n spite of [*Harlow's*] reference to discretionary functions, it has never since been clear exactly what role, if any, this concept is supposed to play in applying qualified immunity."); *Varrone v. Bilotti*, 123 F.3d 75, 82 (2nd Cir. 1997) ("The continued validity of the ministerial-discretionary function distinction in determining qualified immunity has been questioned."); cf. *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1281-84 (11th Cir. 1998) (stating that qualified immunity is not available "[w]hen a government official goes completely outside the scope of his discretionary authority," for in that situation "he ceases to act as a government official and instead acts on his own behalf"); *In re Allen* 106 F.3d 582, 593-98 (4th Cir. 1997) (holding that "discretionary function" limitation of qualified immunity doctrine prevents defense of qualified immunity by official who acts "totally

precondition of qualified immunity, that discretionary decisions be susceptible to considerations of public policy.²⁶⁷ In this respect, the discretionary function element of the *Harlow* standard is easier for official conduct to satisfy than the discretionary function exception to the FTCA, discussed earlier.²⁶⁸ Official conduct satisfies the discretionary function element of *Harlow* if it involves any choice, and is not purely “ministerial.”²⁶⁹

In addition, the Court applied the discretionary function element very narrowly in *Davis v. Scherer*.²⁷⁰ Under *Davis*, the discretionary function element of *Harlow* precludes immunity only when a statute or other binding law prescribes a precise course of conduct for an official.²⁷¹ Furthermore, an official can have qualified immunity even for conduct that violates a statute or other binding law, unless that violation itself is the basis for the *Bivens* claim.²⁷²

Because of its importance to analysis of torture claims, the *Davis* case deserves some description. In *Davis*, a former employee of state government sued the official who fired him, alleging that the firing violated the Due Process Clause.²⁷³ The former employee argued that the official was not exercising a discretionary function because he violated procedural

beyond the scope of his authority” and that, because of that limitation, the defendant official in that case could not claim qualified immunity).

²⁶⁷ See, e.g., *Horta*, 4 F.3d at 12 (defendant officer’s conduct was discretionary because police guidelines for high-speed pursuits required interpretation).

²⁶⁸ See *supra* notes ___-___ and accompanying text.

²⁶⁹ *Harlow*, 457 U.S. at 816 (stating that “[i]mmunity generally is available only to officials performing discretionary functions,” as distinguished from “‘ministerial’ tasks”).

²⁷⁰ 468 U.S. 183 (1984).

²⁷¹ *Davis*, 468 U.S. at 196 n.14; see also, e.g., *Eddy v. Virgin Islands Water & Power Auth.*, 256 F.3d 204, 210-11 (3d Cir. 2001) (supposed personnel policy of compelling employees to work under unsafe conditions did not prescribe precise course of conduct for defendant officials, whose conduct was therefore discretionary for qualified immunity purposes); *Trotter v. Watkins*, 869 F.2d 1312, 1314 (9th Cir. 1989) (officials’ conduct was discretionary because “[n]o law or regulation precisely specific[ed]” how they were to act in the situation that gave rise to plaintiff’s claim).

²⁷² *Davis*, 468 U.S. at 196 n.14; *Sellers*, 28 F.3d at 902 (holding that defendant officials’ conduct was discretionary, even if it violated regulations governing the handling of unruly fair goers, because plaintiffs did not base their claim on regulatory violation); *Horta*, 4 F.3d at 12 (official’s conduct was discretionary even if it violated police guidelines for high-speed chases, because plaintiff’s claim was based on Fourth Amendment, not on breach of the guidelines); *Gagne v. City of Galveston*, 805 F.2d 558, 559-60 (5th Cir. 1986) (police officer’s conduct was discretionary, even if it violated police department rule requiring removal of arrestee’s belt before being put in jail, because plaintiff’s claim arising from arrestee’s suicide using that belt was not based on violation of the department rule, but on the Constitution).

²⁷³ *Davis*, 468 U.S. at 185-87.

regulations when he fired the plaintiff.²⁷⁴ The Court found two flaws in this argument. First, plaintiff was suing for a due process violation, not a regulatory violation.²⁷⁵ The Court explained that “breach of a legal duty created by the personnel regulation would forfeit official immunity only if that breach itself gave rise to the [plaintiff’s] cause of action for damages.”²⁷⁶ Second, the regulations were not detailed enough to make the defendant official’s conduct nondiscretionary. The Court said, “A law that fails to specify the precise action that the official must take in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused.”²⁷⁷

Because under *Davis* the discretionary function element of the *Harlow* standard does not much limit the availability of a qualified immunity defense, most case law focuses on the second element.

b. The “Clearly Established” Element of the *Harlow* Test

The second element of *Harlow* requires a court to determine whether a defendant’s conduct violates “clearly established” rights of which a reasonable person would have known.²⁷⁸ If so, the official does not have immunity from personal liability for the conduct. Under this second, “clearly established” element, a federal court initially must decide whether the official conduct challenged as a constitutional tort violates the plaintiff’s constitutional rights at all.²⁷⁹ If so, the court must then decide if those rights are clearly established. The latter step requires an understanding of how constitutional rights come to be “clearly established.”

²⁷⁴ *See id.* at 196 n.14.

²⁷⁵ *See id.* at 187. The plaintiff sued under 42 U.S.C. § 1983, which creates a cause of action against state officials who violate the plaintiff’s federal rights. The plaintiff in *Davis* could not sue under Section 1983 for the defendant’s violation of his rights under the personnel regulation because that regulation was a provision of state law, not federal law. *See Davis*, 468 U.S. at 188 & n.6.

²⁷⁶ *Id.* at 196 n.14.

²⁷⁷ *Id.*

²⁷⁸ *Harlow*, 457 U.S. at 818.

²⁷⁹ *See, e.g., Brouseau v. Haugen*, 125 S. Ct. 596, 598 (2004) (“When confronted with a claim of qualified immunity, a court must ask first the following question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right?”) (internal quotation marks omitted).

The Supreme Court has made its own and other federal courts' decisions the primary sources of "clearly established" rights. Of course, the text of Constitution initially establishes constitutional rights, and the text is sometimes enough, standing alone, to determine that an official has violated "clearly established" rights.²⁸⁰ Often, however, constitutional text alone speaks with "majestic simplicity"²⁸¹ of broad, vague concepts such as "due process."²⁸² The Court has held that qualified immunity analysis ordinarily demands greater specificity:

[T]he right ... must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.²⁸³

The Court looks primarily to its own decisions to determine clearly established constitutional law.²⁸⁴ It looks, as well, to decisions of federal courts of appeals – and in some cases state court decisions – that decide appeals in the geographic location in which the challenged official conduct occurred.²⁸⁵ Thus, for example, in a case asserting constitutional tort claims against a police officer in Idaho, the Court would consider decisions of the U.S. Court of Appeals for the

²⁸⁰ See *Hope*, 536 U.S. at 741 (“[G]eneral statements of the law are not inherently incapable of giving fair and clear warning” to officials that their conduct is unlawful) (internal quotation marks omitted; bracketed material supplied by the Court in *Hope*); see also, e.g., *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1150 n.4 (11th Cir. 1994) (“[O]ccasionally the words of a federal statute or federal constitutional provision will be specific enough to establish the law applicable to particular circumstances clearly and to overcome qualified immunity even in the absence of case law.”).

²⁸¹ *Davis*, 442 U.S. at 241.

²⁸² *Anderson*, 483 U.S. at 639.

²⁸³ *Id.* at 640 (citations omitted).

²⁸⁴ See, e.g., *Groh v. Ramirez*, 540 U.S. 551, 565 (2004) (“No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional.”)

²⁸⁵ See, e.g., *Hope*, 536 U.S. at 741-44 (relying on precedent of Eleventh Circuit and its predecessor, the former Fifth Circuit, to reject qualified immunity claim by Alabama officials); *United States v. Lanier*, 520 U.S. 259, 269 (1997) (observing that Court has “referred to decisions of the Courts of Appeals when enquiring whether a right was ‘clearly established’” for qualified immunity purposes); see also *Elder v. Holloway*, 510 U.S. 510, 513-16 (1994) (holding that district court in Ninth Circuit had to evaluate claim of qualified immunity in light of relevant Ninth Circuit precedent even though the precedent was not cited in plaintiff’s brief).

Ninth Circuit, which encompasses Idaho, as well as Idaho state court appellate decisions.²⁸⁶ The Court may also consider decisions by other federal circuits and other state courts even though they would not bind Idaho officials.²⁸⁷

In addition to court decisions, decisions of the political branches can bear on whether a constitutional right is a clearly established one of which a reasonable official should have known. Legislation ordinarily gets a presumption of constitutionality.²⁸⁸ Thus, when a statute or ordinance authorizes an official's conduct, it is presumptively reasonable for that official to believe that his or her conduct does not violate clearly established constitutional rights.²⁸⁹ The presumption is rebuttable, however, meaning that an officer cannot reasonably rely on a patently unconstitutional statute.²⁹⁰ The Court has treated executive policies and orders somewhat like statutes and ordinances. The Court has held that executive policies and orders may support the reasonableness of an official's conduct if the conduct comports with the orders

²⁸⁶ See *Elder*, 510 U.S. at 513-16; *Sweaney v. Ada County*, 119 F.3d 1385, 1391 (9th Cir. 1997) (discussing decision of Idaho Court of Appeals in analyzing qualified immunity).

²⁸⁷ See *Brosseau*, 125 S. Ct. at 599-601 (examining decisions by Sixth, Seventh, and Eighth Circuits in case from the Ninth Circuit).

²⁸⁸ See, e.g., *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462 (1988) (social and economic legislation of the states gets a presumption of constitutionality).

²⁸⁹ See, e.g., *Pierson v. Ray*, 386 U.S. 547, 555-57 (1967) (holding that law enforcement officers had qualified immunity "for acting under a statute that [the officer] reasonably believed to be valid but that was later held unconstitutional on its face or as applied"); *Connecticut v. Crotty*, 346 F.3d 84, 102 (2d Cir. 2003) (in holding that officials had qualified immunity, court considers "particularly persuasive" the fact that "the challenged conduct involved enforcement of a presumptively valid statute"); *Roska v. Peterson*, 328 F.3d 1230, 1252 (10th Cir. 2003) ("[T]he existence of a statute or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional.") (quoting *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994)); *Grossman*, 33 F.3d at 1209-1210 (officer had qualified immunity when he relied on city ordinance to arrest plaintiff for demonstrating in a park without a permit; stating that, "when a city council has duly enacted an ordinance, police officers on the street are ordinarily entitled to rely on the assumption that the council members have considered the views of legal counsel and concluded that the ordinance is a valid and constitutional exercise of authority."); *Malachowski v. City of Keene*, 787 F.2d 704, 713-14 (1st Cir. 1986) (holding that officer had qualified immunity for arresting plaintiffs' daughter under state statutory provisions that were not "illegitimate on their face").

²⁹⁰ See, e.g., *Grossman*, 33 F.3d at 1209 ("[A]s historical events such as the Holocaust and the My Lai massacre demonstrate, individuals cannot always be held immune for the results of their official conduct simply because they were enforcing policies or orders promulgated by those with superior authority. When a statute authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity.").

and policies and there is no case law on point.²⁹¹ Lower courts have gone farther, holding that officials have qualified immunity for following executive policies or orders that they reasonably believe are lawful.²⁹² By the same token, the lower courts have made clear that officials cannot get qualified immunity merely by establishing that they were “just following orders.”²⁹³ Qualified immunity doctrine thus contains no “Nuremberg defense” that would let officials rely on plainly unconstitutional legislation or executive directives.²⁹⁴ On the other hand, if legislation or

²⁹¹ See *Wilson*, 526 U.S. at 617 (stating that Marshals Service policy authorizing defendant officials’ conduct was “important” to Court’s conclusion that those officials had qualified immunity, because “the state of the law ... was at best undeveloped”); see also *Hope*, 536 U.S. at 744-45 (stating that U.S. Department of Justice advice to Alabama condemning its use of the “hitching post” to punish prisoners “buttressed” the Court’s conclusion that Alabama officials violated clearly established law and therefore could not claim qualified immunity); *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980) (“[L]aw enforcement officers should not be held personally liable for monetary damages because they have followed the policy or instructions of their superiors [when conducting a search], where the controlling law had not been authoritatively decided by the Supreme Court [or other relevant courts], where the officers have acted in good faith, and where the searches were conducted in a reasonable manner”).

²⁹² *Brent v. Ashley*, 247 F.3d 1294, 1305-06 (11th Cir. 2001) (holding that low-level officers involved in strip search had qualified immunity when they “acted at the order of a superior and the record reflects no reason why any of them should question the validity of that order”); *Chew v. Gates*, 27 F.3d 1432, 1449 (9th Cir. 1994) (in holding that officers had qualified immunity from constitutional claims based on their acting under police department policy for use of police dogs in making arrests, court “rel[ies] principally on the fact that the policy ... was a longstanding official policy, which was well-known and similar to the policies employed in many police departments through the nation, none of which had been judicially questioned”); *Dodd v. City of Norwich*, 827 F.2d 1, 4 (2nd Cir. 1987) (action under 42 U.S.C. § 1983 and state tort law against police officer by mother of 16-year old boy who was shot after he tried to grab police officer’s gun while officer was arresting him; holding that on remand district court should consider “whether [the defendant police officer] was entitled to a qualified good faith immunity based on his following the policy and training of the police department in keeping his gun unholstered while attempting to place handcuffs on [the boy]”); *Sullivan v. Town of Salem*, 805 F.2d 81, 87 (2d Cir. 1986) (zoning officials would have qualified immunity from builder’s claim if they “were simply implementing the established policy of the town” and reasonably relied on the policy); *Landrum v. Moats*, 576 F.2d 1320, 1323, 1328-29 & n.16 (8th Cir. 1978) (pre-*Harlow* case holding that police officers sued under 42 U.S.C. § 1983 for their use of deadly force were entitled to rely on provisions in police manual authorizing their conduct, even though those provisions were later held to violate state law); cf. *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1049-50 (9th Cir. 1999) (holding that it was not objectively reasonable for officers to rely on training materials on how to interrogate suspects despite their invocation of *Miranda* rights).

²⁹³ *Roska v. Peterson*, 328 F.3d 1230, 1252 (10th Cir. 2003) (“an officer’s reliance on an authorizing statute does not render the conduct per se reasonable” for qualified immunity purposes); *Collins v. Jordan*, 110 F.3d 1363, 1377-78 (9th Cir. 1997) (officers could not reasonably rely on emergency order to the extent it conflicted with longstanding state law, which reflected First Amendment constraints, authorizing police to disperse assemblies only when they constitute a clear and present danger).

²⁹⁴ See *O’Rourke v. Hayes*, 378 F.3d 1201, 1210 n.5 (11th Cir. 2004) (“[S]ince World War II, the ‘just following orders’ defense has not occupied a respected position in our jurisprudence, and officers in such cases may be held liable ... if there is a reason why any of them should question the validity of that order.”) (internal quotation marks omitted). Sometimes, however, an officer’s reliance on an unconstitutional statute, ordinance, order or policy may negate the state of mind required to establish a

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

2. Application of Qualified Immunity Doctrine to the Torture Scenarios
 - a. The “Discretionary Function” Element of the *Harlow* Test

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

The military police guards in the Abu Ghraib scenario were exercising discretion when they tortured *IA* to “loosen him up” for interrogation. The “loosen him up” instruction that did not prescribe a precise course of conduct for the guards. To the contrary, it allowed “brutal improvisation.”²⁹⁵ It does not matter for qualified immunity analysis (as distinguished from FTCA analysis) that this improvisation may not be susceptible to public policy considerations.²⁹⁶ Nor, under *Davis v. Scherer*, does it matter that this improvisation “violat[ed] the clear command[s]” of statutes and regulations, because they are not the basis for a constitutional tort claim.²⁹⁷

A similar analysis applies to the GTMO scenario. The GTMO interrogators used interrogation methods that they reasonably believed the Secretary of Defense had authorized.²⁹⁸ Judging from actual public records, it does not appear that the interrogation

constitutional violation. For example, the court in *Menotti v. Seattle* rejected a First Amendment claim against an officer who arrested a protestor because the officer did so merely to enforce an ordinance (later held unconstitutional), and was not “motivated by opposition to [the plaintiff’s] political beliefs or ... a desire to chill [the plaintiff’s] speech.” 409 F.3d 1113, 1153-54 (9th Cir. 2005).

²⁹⁵ Josh White, *Documents Tell of Brutal Improvisation by GIs*, WASH. POST, Aug. 3, 2005, at A01; see also DANNER, *supra* note __, at 8 (“[W]hen Specialist Sabrina Harman was asked about the [Abu Ghraib] prisoner who was placed on a box with electric wires attached to his fingers, toes, and penis, in an image now famous throughout the world, she replied that ‘her job was to keep detainees awake,’”); HERSH, *supra* note __, at 34 (reporting on military captain who refused instructions from military intelligence officers to keep detainees awake around the clock, explaining: “[M]y soldiers don’t know how to do it. And when you ask an eighteen-year-old kid to keep someone awake, and he doesn’t know how to do it, he’s going to get creative.”).

²⁹⁶ See *supra* notes __-__ and accompanying text.

²⁹⁷ *Davis*, 468 U.S. at 194 n.12 (discussed *supra* notes __-__ and accompanying text).

²⁹⁸ See *supra* text accompanying note __.

methods authorized by Secretary of Defense Donald Rumsfeld for use at GTMO prescribed a precise course for interrogators to follow. Instead, as discussed above, public documents from the Defense Department gave authorized interrogation methods only evocative names such as “fear up harsh” and described them in broad terms, such as (in the case of “fear up”):

“Significantly increasing the fear level in a detainee.”²⁹⁹ Maybe it was unreasonable – it probably was unlawful under applicable statutes and regulations – for interrogators to believe that their authority to use the “fear up harsh” method included measures that amounted to torture and that, in one case, caused death.³⁰⁰ Yet the unreasonableness of their belief and the illegality of their conduct does not make that conduct nondiscretionary for purposes of qualified immunity analysis. If those factors have any relevance, it is to the second step of *Harlow* analysis, which asks whether they violated “clearly established” constitutional rights of which a reasonable officer would have known.³⁰¹

Of the three scenarios, the Syrian rendition scenario is the one most likely to involve nondiscretionary conduct. It depends on whether both the decision to render SyC to Syria and the details of his rendition are made by high-level officials, leaving only essentially ministerial tasks for the officials who actually arranged for SyC’s rendition. SyC could shape his argument to maximize the chance that a court would find the officials’ conduct ministerial. To do that, SyC should emphasize that the rendition policy on its face violates the Constitution, regardless of how it is implemented by the minions who put SyC on the plane from New York to Damascus. Given that emphasis, a court might hold that the officials were not exercising discretionary functions and therefore could not claim qualified immunity. Those officials’ best bet would then be to argue for derivative qualified immunity.³⁰² Under the theory of derivative qualified

²⁹⁹ Memorandum for the Commander, US Southern Command, from Secretary of Defense (Apr. 16, 2003), in TORTURE PAPERS, *supra* note __, at 361; *see also supra* notes __-__ and accompanying text.

³⁰⁰ *See White, supra* note __ (reporting that two Army soldiers involved in the sleeping bag killing described *supra* note __ are being prosecuted for it).

³⁰¹ *See infra* notes __-__ and accompanying text.

³⁰² *See Varrone v. Bilotti*, 123 F.3d 75, 82 (2nd Cir. 1997) (holding that, even if police officers performed only a ministerial function in conducting a strip search, “they still have qualified immunity for carrying out the order, not facially invalid, issued by a superior officer who is protected by qualified immunity”).

immunity, officials are immune for implementing a policy if the policy, though unconstitutional, did not violate clearly established constitutional rights.³⁰³ The Supreme Court has not addressed the validity of derivative qualified immunity.³⁰⁴

b. The “Clearly Established” Element of the *Harlow* Test

As discussed above, for purposes of the *Harlow* test the torture in our scenarios probably involves, directly or derivatively, the exercise of discretionary functions. If so, the officials responsible for the torture will have qualified immunity from *Bivens* claims unless they violated “clearly established” constitutional rights of which a reasonable official would have known. Clarity is a tricky concept in this setting. It is unclear whether official torture is always unconstitutional; it depends partly on how you define “torture.”³⁰⁵ On the other hand, some instances of official torture may be clearly unconstitutional. The tough question is whether a particular instance – such as those described in our scenarios – falls into “clearly established” arena.

As discussed above, torture potentially violates the Fourth Amendment, Fifth Amendment, and Eighth Amendment.³⁰⁶ The standards for identifying those violations ask, respectively, whether physical or psychological force is “excessive,”³⁰⁷ “shocks the conscience,”³⁰⁸ or is “cruel and unusual.”³⁰⁹ These standards differ in important ways.³¹⁰

³⁰³ See *Varrone*, 123 F.3d at 82.

³⁰⁴ Cf. *Harlow*, 457 U.S. at 810-11 (rejecting argument that Presidential aides are entitled to derivative absolute immunity).

³⁰⁵ See, e.g., Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT’L L. 263, 326 (2004) (stating in discussion of torture claims that contours of Fourth Amendment and Due Process Clause are “unclear”); Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 207 (2003-2004) (stating that, in contrast to torture undertaken to get evidence for a prosecution, “[w]hether torture undertaken solely to obtain information to prevent an imminent terrorist attack violates the Constitution ... is not as clear”).

³⁰⁶ See *supra* notes ___-___ and accompanying text.

³⁰⁷ See, e.g., *Graham*, 490 U.S. at 394-97.

³⁰⁸ See, e.g., *Lewis*, 523 U.S. at 846-47.

³⁰⁹ U.S. CONST. AMEND. VIII.

³¹⁰ Specifically, Fourth Amendment excessive-force determinations entail a “reasonable law enforcement officer,” objective determination, whereas Eighth Amendment “cruel and unusual punishment” determinations consider an official’s subjective state of mind. See *Graham*, 490 U.S. at 398-99. In addition, as applied to the official use of physical and psychological force, the protections of the Fourth Amendment, substantive due process, and the Eighth Amendment’s Cruel and Unusual

Even so, each standard typically requires judgments about whether a particular instance – e.g., of physical or psychological force – departs from the norm and from what is necessary in light of a legitimate justification (if any) for the conduct. Thus, the Court bases excessive-force determinations on, among other things, whether the challenged conduct departs from usual government practices and whether it is justified by the need to prevent an individual from harming government officials or the public.³¹¹ The Court determines whether conduct is conscience-shocking by considering, among other things, whether it is “egregious,” which is often true when it is “intended to injure in some way unjustifiable by any government interest.”³¹² Finally, the Court determines whether punishment is “cruel and unusual” by assessing, among other factors, its prevalence as an authorized method of punishment³¹³ and whether it is justified by a legitimate purpose or is, instead, “unnecessary and ... totally without penological justification.”³¹⁴ Thus, the three constitutional provisions put similar substantive restrictions – related to extremeness and justification – on the official use of physical and psychological force against individuals.

Punishment Clause differ in when and to whom they apply. Roughly speaking, the Due Process Clause’s substantive component restricts official force against a person who has not been detained or who has been detained but is not being interrogated and has not received a formal punishment; the Fourth Amendment’s ban on excessive force applies to the arrest and detention of a person who has not yet been formally punished; and the Eighth Amendment applies to the treatment of someone who has received a formal punishment. *See Lewis*, 523 U.S. at 842-43; *Graham*, 490 U.S. at 392 n.6; *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16 (1979); *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977).

³¹¹ *Tennessee v. Garner*, 471 U.S. 1, 13-19 (1985) (considering policies of major police departments in determining when Fourth Amendment allows use of deadly force); *Graham*, 490 U.S. at 396 (courts analyzing excessive force claims under Fourth Amendment should consider, among other factors, “whether the suspect poses an immediate threat to the safety of the officers or others”).

³¹² *Chavez*, 538 U.S. at 774-75 (plurality opinion); *see Lewis*, 523 U.S. at 846 (stating that government action may be so arbitrary to violate substantive due process when it involves the exercise of power “without any reasonable justification in the service of a legitimate governmental objective” and that “only the most egregious” official conduct can be said to be “arbitrary in the constitutional sense”).

³¹³ *See, e.g., Roper v. Simmons*, 125 S. Ct. 1183, 1194 (2005) (holding that execution of individuals who were younger than eighteen years old at time of crime violated Eighth Amendment, based partly on the fact that “[a] majority of States have rejected the imposition of the death penalty on juvenile offenders under 18”).

³¹⁴ *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *see also id.* at 347 (explaining that denial of medical care to prisoners can constitute cruel and unusual punishment “because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose”).

Even at this level of generality, the Abu Ghraib torture probably violated clearly established rights. The Abu Ghraib guards acted solely for their own sadistic purposes when they tortured *IA*. They used the “loosen him up” instruction as a pretext for indulging their sadistic streak.³¹⁵ Thus, their conduct had no legitimate justification. Furthermore, the conduct was extreme in its departure from standard interrogation methods.³¹⁶ For these reasons, it probably not only violated *IA*’s constitutional rights but also did so clearly. No reasonable officer can believe it is constitutional to brutalize a detainee for the officer’s own enjoyment.³¹⁷

³¹⁵ See *supra* text accompanying note ____.

³¹⁶ Until December 2002, the interrogation methods authorized for detainees in the war on terrorism were the standard interrogation methods for the military set forth in the U.S. Army’s Field Manual 34-52. See Sean Murphy, *Executive Branch Memoranda on Status and Permissible Treatment of Detainees*, 98 AM. J. INT’L L. 820, 824 & nn. 43-44 (2004); see also Army Regulation 190-8, Military Police: Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, § 3-4 (“Operation of prisoner of war internment facilities”) (Oct. 1, 1997). In October 2002, however, officials at GTMO asked officials in Washington to authorize “counter-resistant” interrogation techniques over and above “current interrogation methods.” Memorandum for Chairman of the Joint Chiefs of Staff, Washington, D.C., from General James T. Hill, U.S. Southern Command, Department of Defense (Oct. 25, 2002), in TORTURE PAPERS, *supra* note ___, at 223. This led to expanded interrogation methods for use at GTMO. See Action Memo for Secretary of Defense from William J. Haynes Action Memo for Secretary of Defense from William J. Haynes II, General Counsel, Department of Defense Nov. 27, 2002), in TORTURE PAPERS, *supra* note ___, at 237 (Nov. 27, 2002) (indicating Secretary of Defense’s approval of “Category II” techniques); Memorandum for the Commander, US Southern Command, from Secretary of Defense (Apr. 16, 2003), in TORTURE PAPERS, *supra* note ___, at 360-61 (authorizing more limited set of interrogation techniques). Interrogation methods used at GTMO eventually migrated to Abu Ghraib and other U.S. prisons in Iraq and Afghanistan. See Schlesinger Report, *supra* note ___, at 941.

³¹⁷ Analysis of the actual events at Abu Ghraib is more difficult than analysis of the Abu Ghraib scenario described in the Introduction because it is hard to read people’s minds. Analysis of the actual abuse would depend on, among other issues, whether the guards really acted as they did in the belief that they were obeying the “loosen them up” instruction. If so, they might show that they did not violate clearly established rights of which a reasonable person would have known. From published reports, it appears that the guards were young, had received little or no training on how to be prison guards, and were subject to inconsistent commands from the regular military leaders and from military intelligence officials. Schlesinger Report, *supra*, at 934 (“generally training [for Military Police Mission] was inadequate”). Furthermore, conditions at Abu Ghraib were exigent. The guards were grossly outnumbered by the detainees; the facility was in an active combat zone full of killing and maiming; and military leadership was inadequate. Schlesinger Report, *supra* note ___, at 928 (finding that “weak and ineffectual leadership ... allowed the abuses at Abu Ghraib”); *id.* at 937 (ratio of detainees to guards was 75:1 and facility was “smack in the middle of a combat environment”). Add to those circumstances that many detainees were violent criminals and some detainees were believed to have valuable military intelligence information. See Schlesinger Report, *supra* note ___, at 940 & 944 (discussing official pressure to produce actionable intelligence from Abu Ghraib detainees and stating that Abu Ghraib prison contained Iraqi criminals). In my view, unfortunately, it is hard under these circumstances to conclude that soldiers in their late teens and early twenties “should have known” that they were violating “clearly established” constitutional rights.

The other scenarios present closer cases. Unlike the Abu Ghraib torture, the torture in the GTMO and Syrian rendition scenarios has a purpose that is generally legitimate: to get information for fighting the war on terrorism.³¹⁸ Whether that purpose ever justifies torture lies at the heart of torture's constitutionality under the relevant constitutional standards.³¹⁹ That issue naturally bears on whether the specific instances of torture in our three scenarios violates "clearly established" constitutional rights of which a reasonable person should have known. Torture that serves no legitimate purpose (such as the Abu Ghraib scenario torture) may not only violate the Constitution but also do so clearly. Torture that serves a generally legitimate purpose (such as intelligence gathering) may be constitutional in some circumstances, and, even when it violates the Constitution, it may not do so clearly.

The objective of getting information to protect the public justifies some official pressure in police interrogations upon a person who, the police have probable cause to believe, committed a crime.³²⁰ It is clearly established, however, that police torture of suspects violates the Constitution. That is the teaching of a long line of Supreme Court cases originating in the first half of the twentieth century with cases including *Brown v. Mississippi*.³²¹ Those cases involved the police use of extreme physical and psychological force – sometimes comparable to that of our scenarios – against suspects in custody. Supreme Court cases involving police

³¹⁸ See Russell A. Miller, *Before the Law" Military Investigations and evidence at the Iraqi Special Tribunal*, 13 Mich. St. J. Int'l L. 107, 132-36 (2005) (discussing laws of war and military regulations recognizing that detained combatants will be interrogated by the detaining authority).

³¹⁹ See *supra* notes ___ - ___ and accompanying text; see also Sanford Levinson, *Torture in Iraq & the Rule of Law in America*, Daedalus 7 (Summer 2004) (stating a maxim of Nazi legal philosopher in these constitutional-law terms as relevant to torture in war on terrorism: "[E]very norm is subject to limitation when a compelling interest is successfully asserted, and it is hard to think of a more compelling interest than the prevention of violent death at the hands of a hostile group.").

³²⁰ See, e.g., *United States v. Astello*, 241 F.3d 965, 967 (8th Cir. 2001) ("Obviously, interrogation of a suspect will involve some pressure because its purpose is to elicit a confession. In order to obtain the desired result, interrogators use a laundry list of tactics. Numerous cases have held that questioning tactics such as a raised voice, deception, or a sympathetic attitude on the part of the interrogator will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne.") (internal quotation marks and citations omitted).

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

practices are, by far, the most relevant precedent on the constitutionality of torture in the war on terrorism.

Whether those police cases “clearly establish” the law applicable to our torture scenarios – and to actual events in the war on terrorism – depends partly on whether one regards that war as a real war or, instead, a metaphorical one. In a real war, violence is a norm. Courts give the executive branch broad discretion to detain combatants. That discretion presumably extends to the conditions of detention. Some argue, however, that the war on terrorism is more appropriately conceived of as a law-enforcement response to criminal acts.³²² Under that conception, the *Brown* line of cases might not only establish the unconstitutionality of torturing detainees in the war on terrorism, but also do so clearly. Under the competing conception that considers the United States to be in an actual war, the *Brown* cases may establish unconstitutionality but differ too much in their setting to do so clearly.

The GTMO and Syrian rendition scenarios differ from the Abu Ghraib scenario not only in involving a generally legitimate objective (gathering intelligence) but also in involving officials carrying out orders. The GTMO interrogators reasonably believe they are using interrogation methods authorized by the Secretary of Defense; the U.S. officials who render *SyC* to Syria are obeying CIA policy.³²³ In reality, the Department of Defense policies and the CIA program got support from Justice Department material advocating a narrow definition of torture.³²⁴ As discussed above, the Court has held that the existence of executive policies authorizing an official’s conduct can be an “important” factor supporting qualified immunity when the relevant law is otherwise “undeveloped.”³²⁵ Some lower courts hold that, even if some relevant case

³²² See, e.g., Kim Lane Scheppelle, *Law in a Time of Emergency: States of Exception and the Temptations*, 6 U. PA. J. CONST. L. 1001, 1024 (2004) (“[N]ations have a choice between thinking of terrorist attacks as large crimes (on the model of organized crime or other criminal conspiracies) or as small wars (on the model of insurgent attacks.”)).

³²³ See *supra* text accompanying note ___ & ___.

³²⁴ See Torture Memo, *supra* note ___, at 2-13.

³²⁵ *Wilson*, 526 U.S. at 617 (stating that Marshals Service policy authorizing defendant officials’ conduct was “important” to Court’s conclusion that those officials had qualified immunity from constitutional tort claim, because “the state of the law ... was at best undeveloped”).

law exists, officials have qualified immunity when they rely on executive orders or policies that they reasonably believe are valid.³²⁶ This precedent supports claims of qualified immunity by the U.S. officials in the GTMO and Syrian rendition scenarios, considering the high-level executive-branch policies that encouraged torture.

Of course, many federal statutes and military directives prohibit torture and other inhumane treatment of detainees.³²⁷ Thus, *Bivens* claims against the officials involved in our scenarios will require courts to determine whether the executive directives that the officials follow conflict with those statutes and regulations. If so, and if the officials should realize the conflict -- and, in light of the conflict, should know that their conduct violates the detainees' constitutional rights -- their reliance on the executive directive will do them no good in establishing qualified immunity. Another possibility, however, is that the executive policies prevent even reasonable soldiers from appreciating the illegality of mistreating detainees.

3. Summary of *Bivens* Analysis of Torture Claims

Bivens claims for U.S. torture have three levels of complexity. First, the constitutionality of torture raises difficult questions under the Fourth, Fifth, and Eighth Amendments. A second level involves determining whether “special factors counselling hesitation” will bar a *Bivens* claim even when the torture violates the Constitution. The third level of complexity arises from qualified immunity defenses, resolution of which has a constitutional dimension – namely, whether any constitutional rights that have been violated were “clearly established” – and a non-constitutional dimension – namely, whether a reasonable officials should have known that he or she was violating clearly established constitutional rights considering the statutes, regulations, and executive directives applicable to the official’s conduct.

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

³²⁶ See *supra* note __ and accompanying text.

³²⁷ See *supra* note __ (citing sources).

As discussed in Part II, the FTCA provides a poor vehicle for handling torture claims against the United States.³²⁸ Likewise, *Bivens* provides a poor vehicle for handling torture claims against U.S. officials. The FTCA and *Bivens* share a fundamental problem: They both misconceive torture as a tort.³²⁹ *Bivens* suffers from additional flaws, which are discussed in this section. The flaws do not just affect *Bivens* claims for torture, but they are particularly acute in this context.

As a deterrent to U.S. sanctioned torture, *Bivens* is underinclusive. To begin with, *Bivens* does not make officials liable for all violations of the law, only for violations of certain Constitutional provisions.³³⁰ In addition, qualified immunity restricts *Bivens* liability to only clear constitutional violations. As discussed above, the constitutional rights of torture victims are not clear.³³¹ In their currently undeveloped state, constitutional rights do not do much good for torture victims. Torture victims would be better served by a doctrine that creates civil liability for officials' clear violations of statutes and regulations barring the mistreatment of detainees.

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

First, a *Bivens* defendant may be comparatively sympathetic in the eyes of the jury hearing the *Bivens* claim. *Bivens* liability usually rolls downhill, attaching, if at all, to the "street-level" officials who actually inflict the injury that gives rise to the *Bivens* suit.³³² Take, for example, a case for police brutality during an arrest. The victim may have just been arrested for a serious crime. The officer may have been acting under conditions of great stress, uncertainty,

³²⁸ See *supra* note __ (citing sources).

³²⁹ See *supra* notes __-__ and accompanying text.

³³⁰ See, e.g., *Correctional Servs. Corp.*, 534 U.S. at 70 ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.").

³³¹ See *supra* notes __-__ and accompanying text.

³³² See, e.g., Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials Individual Liability Under Bivens*, 88 GEO. L.J. 65, 93 (1999) (observing that "the most frequent *Bivens* defendants" are "'street level' public officials").

and danger. None of these circumstances is the officer's fault. In addition, the officer may have been badly trained, poorly equipped, overworked, and underpaid. None of those circumstances is the officer's fault. What is worse, perhaps the officer's superiors tolerate and even encourage brutality toward arrestees. Under these circumstances, some juries may refuse to hold the *Bivens* defendant liable even for a clear-cut violation of constitutional rights, on the view that the arrestee deserved it or that, in any event, the agent's superiors are really to blame. The individual defendants' violations get excused by jury nullification.

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

The second factor limiting *Bivens* liability even for clear constitutional violations reflects that most *Bivens* actions do not get to a jury. They get resolved before trial, partly because of doctrines encouraging earlier resolution through devices such as summary judgment on an official's defense of qualified immunity.³³³ To rule on that defense, the court examines the individual officer's conduct. The court must determine whether that conduct violated the plaintiff's constitutional rights and whether the violation was one of which a reasonable officer in the defendant official's circumstances should have known. Because the analysis focuses on the individual officials named as defendants, a court may determine that no one official's conduct,

³³³ See, e.g., *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996) (official who seeks summary judgment on grounds of qualified immunity and has it denied by trial court can take immediate interlocutory appeal, even if she has already so appealed a prior order); *Harlow*, 457 U.S. at 814-18 (abandoning subjective element of Court's existing test for qualified immunity because it prevented early disposition of qualified immunity defenses).

standing alone, violated the Constitution – or at least did so in a way that should have been clear to that official – even though the conduct of various officials, in the aggregate, did violate the plaintiff's constitutional rights.

A recent Supreme Court case illustrates the point. In *Hope v. Pelzer*, the Court reviewed a constitutional tort claim by an Alabama prisoner, Hope, who was twice handcuffed to a "hitching post" as punishment for misconduct.³³⁴ The second time, Hope spent seven hours on the post, standing shirtless in the sun; he got water to drink only once or twice and no bathroom breaks.³³⁵ Hope sued three prison guards, each of whom asserted qualified immunity.³³⁶ The Court held that, as alleged by Hope, the hitching post incidents violated Hope's clearly established rights under the Eighth Amendment.³³⁷ As Justice Thomas explained in dissent, however, "When one examines the alleged conduct of the prison guards who are parties to this action, as opposed to the alleged conduct of *other* guards, who are *not* parties to this action, [Hope's] case becomes far less compelling" than it is when one considers the prison officials' conduct in the aggregate.³³⁸ Two of the three guards named as defendants played no role in the second, more serious hitching incident.³³⁹ The third guard named as a defendant was alleged to have handcuffed Hope to the hitching post, but not to have been responsible for his being shirtless in the sun for seven hours and being given little water and no bathroom breaks.³⁴⁰ Justice Thomas concluded, "Once one understands [Hope's] specific allegations against [the defendant guards], the Eighth Amendment violation in this case is far from obvious."³⁴¹ The majority did not disagree with this "thoughtful" analysis because it had not taken the case to decide – and therefore it left to be determined on remand --

³³⁴ *Hope*, 536 U.S. at 733-35.

³³⁵ *Id.* at 734-35.

³³⁶ *Id.* at 735.

³³⁷ *Id.* at 741.

³³⁸ *Id.* at 749 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.).

³³⁹ *Id.* at 749-50.

³⁴⁰ *Id.* at 750.

³⁴¹ *Id.* at 751.

"the questions whether or to what extent the three named officers may be held responsible for the acts charged, if proved."³⁴² Thus, the majority's decision leaves open the possibility that none of the officials named as defendants will be found to have violated Hope's clearly established rights even though a clear violation of Hope's constitutional rights occurred at the collective hands of the Alabama prison system.

From *Hope* one can easily imagine a case in which a suspected terrorist suffers unconstitutional torture at the hands of many officials no one of which acted in a way that was clearly unconstitutional. A person may suffer torture through a combination of circumstances for which no one official is (or can be proven to have) responsibility. For example, separate officials may be responsible for conditions inside the detainee's cell; the detainee's meals; the detainee's medical needs; and the detainee's interrogations. Likewise, official responsibility for setting policy on each of these issues can be highly diffuse.³⁴³ One high-level official issues an order to "exploit internees for actionable intelligence"; an official lower down the chain implements that order by issuing standard operating procedures for use at a particular facility; the procedures are vague enough that they are understood by still lower-level officials to allow the incidents depicted in the Abu Ghraib and GTMO scenarios described in the Introduction.³⁴⁴ Thus, the systemic nature of official torture makes it particularly difficult to hold anyone

³⁴² *Id.* at 746; *see also Brent*, 247 F.3d at 1306 (examining conduct of each of the six officials involved in strip-searching plaintiff to determine whether any of the officials violated plaintiff's clearly established constitutional rights; holding that none of those officials did so).

³⁴³ *See DANNER, supra* note __, at 10 (quoting Sen. Mark Drayton's statement at hearing before Senate Armed Services Committee on May 18, 2004, into U.S. abuse of detainees in the war on terrorism) ("We've now had fifteen of the highest-level officials involved in this entire operation [testify], from the secretary of defense to the generals in command, and nobody knew that anything was amiss, nobody did anything amiss. We have a general acceptance of responsibility, but there's no one to blame, except for the people at the very bottom of one prison.").

³⁴⁴ *See DANNER, supra* note __, at 12 (quoting classified memo in which Lieutenant General Ricardo Sanchez, overall commander in Iraq, instructed interrogators to work with military police guards to "manipulate an internee's emotions and weaknesses" for interrogation purposes); *id.* at 43 (quoting order to Major General Geoffrey Miller to "rapidly exploit [Abu Ghraib] internees for actionable intelligence"); Taguba Report, *supra* note __, at 409 (finding that Major General Geoffrey Miller recommended a set of guards at Abu Ghraib be trained to "set[] the conditions for the successful interrogation and exploitation of internees/detainees"). at 43.

responsible under *Bivens*, with the possible exception of the most sadistic, low-level officials,³⁴⁵ and -- to add insult to injury -- they will often be judgment proof.³⁴⁶

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

Two alternative standards would improve current law. First, Congress could enact legislation making U.S. officials personally liable for torture under at least the same circumstances as a state or local official would be under Section 1983.³⁴⁷ Unlike *Bivens*, Section 1983 creates a cause of action not only for violations of the Constitution but also for violations of federal rights created by statute or regulation.³⁴⁸ The difference is relevant because, even when torture does not violate "clearly established" constitutional rights, it may clearly violate any number of federal statutes and regulations.³⁴⁹ Section 1983's promise as a remedy for violations of federal statutory and regulatory rights has not been fully realized because of interpretative complexity and restrictive Supreme Court precedent.³⁵⁰ At a minimum, however, the same remedial promise should be extended to the victims of U.S.-

³⁴⁵ See *supra* notes ___-___ and accompanying text.

³⁴⁶ See S. REP. NO. 93-588, at 3-4 (1973) (legislative history of FTCA's law enforcement proviso (see *supra* notes ___-___ and accompanying text) stating that *Bivens* defendants are often effectively judgment proof). For example, one of the guards convicted of abusing prisoners at Abu Ghraib was earning less than \$2000 per month when charges against him were filed. See Charge Sheet for Charles A. Graner, Jr. (charging participant in Abu Ghraib prison abuses with violations of five articles of UCMJ), available at <http://www.findlaw.com/hdocs/iraq/>.

³⁴⁷ 42 U.S.C. § 1983.

³⁴⁸ See *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980).

³⁴⁹ See *supra* note ___.

³⁵⁰ See *GENERALLY HART AND WECHSLER'S THE FEDERAL COURTS*, *supra* note ___, at 1092-97.

sanctioned torture as now extends to the victims of mistreatment by state and local officials.³⁵¹ Alternatively, Congress could amend existing legislation, the Torture Victim Protection Act of 1991.³⁵² Currently, the TVPA creates a cause of action for the victims of torture inflicted under color of foreign law.³⁵³ Congress could amend the TVPA to extend the cause of action to the victims of torture inflicted under color of *federal* law. Similar to the first alternative, amending the TVPA is justified on grounds of comparable treatment. The first alternative treats federal officials comparably to state and local officials; the second treats them comparably to foreign officials.³⁵⁴ The principle of comparable treatment not only justifies these alternatives but also may make them politically feasible (though far from perfect).

CONCLUSION

Current law treats U.S.-sanctioned torture as a tort. Thus, the victims of U.S.-sanctioned torture can sue the United States for money damages under the Federal Tort Claims Act and can sue U.S. officials for money damages under the “constitutional tort” doctrine of *Bivens*. Each route has two main problems. First, neither leads much of anywhere. The United States will avoid liability for most torture claims because of limits that the FTCA places on U.S. liability,

³⁵¹ The availability of a remedy for torture that violates federal statutory and regulatory rights would not only benefit the victims of the torture. It also could obviate constitutional tort claims for torture and the attendant risk that judicial analysis of such claims will distort constitutional law. Torture cases may be the paradigmatic “hard cases” that make bad constitutional law. Like death penalty cases, torture cases often involve horrific facts. Unlike death penalty cases, however, torture cases can be hard to identify – because it is hard to define torture – and so torture case law will be harder to wall off than death penalty jurisprudence. Consequently, torture cases even more than death penalty cases may distort constitutional law in other settings, *Cf. Furman v. Georgia*, 408 U.S. 238, 368 (1972) (Douglas, J., in support of the judgment) (“[T]here is one conclusion about the penalty that is universally accepted-i.e., it ‘tends to distort the course of the criminal law.’”) (internal quotation marks omitted).

³⁵² 28 U.S.C. § 1350 Note.

³⁵³ TVPA § 2(a)(1), 28 U.S.C. § 1350 Note; *see also supra* notes ___ (discussing TVPA).

³⁵⁴ The text’s reference to “foreign officials” means individuals who act “under actual or apparent authority, or color of law, of any foreign nation.” TVPA § 2(a)(1), 28 U.S.C. § 1350 Note. A report on extraordinary rendition states that U.S. officials involved in extraordinary rendition might be held liable under the TVPA on the theory that they acted “under color of foreign law.” *Torture by Proxy, supra* note ___, at 121 (referring to the TVPA as the “TPA”). It is doubtful that a U.S. official acting under color of federal law can, at the same time, be acting under color of foreign law, unless perhaps the official was a double agent. *See Schneider*, 310 F. Supp. 2d at 267 (holding that former National Security Advisor Henry Kissinger was not acting under color of foreign law for purposes of the TVPA when he planned a coup in Chile with the assistance of certain Chilean officials).

and most officials will avoid liability for torture claims because of limits on the *Bivens* remedy, including qualified immunity. Second, the FTCA and *Bivens* doctrine are not only inadequate because they seldom yield any remedy for torture. They are also inadequate because they misconceive torture as simply another tort. A better (though far from perfect) system would make the United States liable in money damages for torture under the same circumstances as units of local government are under 42 U.S.C. § 1983; and would make U.S. officials liable in money damages for torture under the same circumstances as either (1) state and local officials are under Section 1983, or (2) foreign officials are under the Torture Victim Protection Act of 1991.