# *Boumediene* as a Constitutional Mandate: *Bivens* Actions at Guantánamo Bay

*by* IAN SAMSON*

## Introduction

This note argues that detainees held at Guantánamo Bay, Cuba, should be able to bring *Bivens* actions against individual federal officials for maltreatment. The argument is based on *Boumediene v. Bush*, which extended the Suspension Clause to Guantánamo Bay detainees held outside of de jure American territory but under de facto American control.[1] The reasoning underlying *Boumediene* makes it difficult to limit its reach to a narrow set of Constitutional guarantees. Instead, federal courts will likely read the case expansively. If so, detainees will enjoy access to a broader spectrum of constitutional rights, including the right to have federal courts hear *Bivens* suits against individuals involved in the maltreatment or torture of detainees while in American custody.

Such a development should not be viewed as a "win" for terrorists and a "loss" for America. *Bivens* actions for federal prisoners held in the United States forced the federal system to be more accountable to its citizens and more true to the ideals of the country. *Bivens* actions for detainees would again force the system to become more accountable, which would make detention more humane and internationally justifiable. I offer no judgment on the ability of detainees to win a *Bivens* action, or on any evidentiary problems that might hinder their chances. Instead, I argue that a rational application of *Boumediene* compels *Bivens* actions for detainees.

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1. Boumediene v. Bush, 553 U.S. 723; 128 S. Ct. 2229 (2008).

## I. Background on the War on Terror

The "War on Terror" began in earnest following the September 11 attacks carried out by a radical Islamic terrorist organization, Al Qaeda.[2] After those attacks, President George W. Bush addressed Congress on September 20, 2001, and assured lawmakers and the American people that the United States was committed to bringing those responsible to justice and preventing future attacks.[3] Previous administrations had warned of external threats years before, but the Bush administration began an intense campaign of investigating, capturing, and detaining suspects believed to be directly involved with terrorism or sympathetic to Al Qaeda and its mission.[4] The very fervor of the efforts left many in the world with the impression that the country was committed to a single-minded approach to non-Americans: you're either with us or against us.[5]

The legislative response to the newly coined "War on Terror" began almost immediately. On September 14, 2001, both houses of Congress passed an "Authorization for Use of Military Force."[6] President Bush signed the authorization on September 18, 2001.[7] This document allowed the President to:

> [U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[8]

Given this power, President Bush rounded up terrorism suspects, holding them at various sites around the globe, including the

2. For a general background and history of the 9/11 attacks see NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., 9/11 COMMISSION REPORT (2004), *available at* http://govinfo.library.unt.edu/911/report/index.htm.

3. President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140 (Sept. 20, 2001).

4. *Id.*

5. *Id.*

6. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF].

7. *Id.*

8. *Id.* at §2(a).

American naval base at Guantánamo Bay.[9] Over the course of the "War on Terror," a total of 759 detainees, all foreign nationals, have been held at Guantánamo.[10] Many of the detainees alleged that they were subjected to maltreatment, religious discrimination, and even torture.[11] During his presidential campaign, then-Senator Barack Obama promised to close Guantánamo and move its detainees to existing American prisons.[12] On January 21, 2009, President Obama issued an executive order to close Guantánamo.[13] However, as of January 2010, the prison at Guantánamo remains active.[14]

When the Bush Administration began detaining suspected terrorists, cases on their behalf began to make their way through the federal court system. In its first opinion on the subject, the United States Supreme Court held that the detention of enemy combatants was universally accepted as a necessary element of war, but that the administration would have to prove that each detainee was an "enemy combatant."[15] To comply, the administration decided it would hold a hearing for each detainee in front of a Combat Status Review Board, which would determine whether the detainee was an "enemy combatant."[16] In the meantime, though, several detainees (or their families) had filed habeas corpus petitions in the U.S. District Court for the District of Columbia in a case called *Rasul v. Bush*.[17]

9. These sites include Bagram Air Force Base in Afghanistan, domestic and international military prisons, secret CIA "black sites," and the infamous Guantanamo Bay naval base. *See* Jane Mayer, *The Black Sites: A Rare Look Inside the C.I.A.'s Secret Interrogation Program*, THE NEW YORKER, Aug. 13, 2007, *available at* http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer.

10. *See* OFFICE OF THE SEC'Y OF DEF. AND JOINT STAFF, *List of Individuals Detained by the Department of Defense at Guantanamo Bay, Cuba from January 2002 through May 15, 2006* (Dep't of Defense May 16, 2006), http://www.dod.mil/pubs/foi/detainees/detaineesFOIArelease15May2006.pdf [hereinafter *List of Guantanamo Detainees*].

11. *See* Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST, Jan. 14, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html; *'Religious Abuse' at Guantanamo*, BBC NEWS, Feb. 10, 2004, http://news.bbc.co.uk/2/hi/americas/4255559.stm.

12. *See* Mark Mazzetti & William Glaberson, *Obama Issues Directive to Shut Down Guantánamo*, N.Y. TIMES, Jan. 21, 2009, *available at* http://www.nytimes.com/2009/01/22/us/politics/22gitmo.html.

13. *Id.*

14. *See One Year Later, Guantanamo Still Open*, CBS NEWS (Jan. 22, 2010), http://www.cbsnews.com/stories/2010/01/22/politics/main6129494.shtml.

15. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (citing Ex parte Quirin, 317 U.S. 1, 28, 30 (1942)).

16. Boumediene v. Bush, 128 S. Ct. 2229, 2233 (2008).

17. Rasul v. Bush, 542 U.S. 466, 471–72 (2004).

The government argued in response that the Supreme Court's decision in *Johnson v. Eisentrager* foreclosed habeas corpus rights to extraterritorial detainees.[18] Both the District Court and the Court of Appeals agreed.[19] The Supreme Court reversed, holding that 28 U.S.C. § 2241 extended statutory habeas corpus rights to Guantánamo Bay detainees.[20]

As *Rasul* was pending in the courts, Congress passed the Detainee Treatment Act of 2005 ("DTA"), which amended 28 U.S.C. § 2241 to explicitly strip the federal courts of habeas corpus jurisdiction over Guantánamo Bay detainees and vested exclusive power of review of the Combat Status Review Tribunal Boards in the Court of Appeals for the D.C. Circuit.[21] Shortly thereafter, in *Hamdan v. Rumsfeld*, the Supreme Court held that the DTA did not apply retroactively to existing habeas corpus petitions, allowing those claims to move forward.[22]

Congress responded with the Military Commissions Act of 2006 ("MCA"), which forbade federal courts from entertaining *any* habeas corpus proceeding for a Guantánamo Bay detainee.[23] Unlike the DTA—which only erased statutory habeas corpus jurisdiction—the MCA sought suspension of all habeas corpus rights for such detainees.[24] Congress's intent was specific and broad; the MCA would eliminate both statutory and constitutional guarantees of habeas corpus to all detainees in United States custody, no matter where they were held.[25] This was a startling expansion of the suspension allowed in *Eisentrager*. That decision applied only to temporary military prisons existing on foreign soil and over which foreign sovereignty was still intact.[26] The MCA, on the other hand, affected constitutional rights in facilities over which the United States

18. *Id.* at 472–73; Johnson v. Eisentrager, 339 U.S. 763 (1950).

19. *See* Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd,* Al-Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).

20. *Rasul*, 542 U.S. at 473.

21. *Boumediene*, 128 S. Ct. at 2234; *see also* Pub. L. 109-148, 119 Stat. 2739 (2005).

22. Hamdan v. Rumsfeld, 548 U.S. 557, 576–77 (2006).

23. Military Commissions Act of 2006, 10 U.S.C. § 948a *et seq.* The Court noted in *Boumediene* that while four justices had invited Congress to set up a system for trying detainees by military commission, it did not invite them to suspend the writ of habeas corpus. *Boumediene*, 128 S. Ct at 2242.

24. *Boumediene*, 128 S. Ct. at 2242.

25. *Id.*

26. Johnson v. Eisentrager, 339 U.S. 763, 766 (1950).

enjoyed absolute control.[27] The showdown was set: would the Court allow Congress to suspend the Great Writ that broadly?

## II. A Change in Analysis: *Boumediene v. Bush*

In *Boumediene*, the Court faced the decision of whether the Constitution applied to the long-standing American base at Guantánamo Bay.[28] Justice Anthony Kennedy, writing for the majority, rejected the MCA and held that the constitutional guarantee of habeas corpus applied to Guantánamo Bay detainees.[29] Congress did not have the power to abolish or interfere with it.[30] The Court rejected both the government's reliance on *Eisentrager* and its insistence that the right to habeas corpus automatically ceased outside of the de jure sovereignty of the United States.[31] In the Court's eyes, even though Cuba technically retained de jure sovereignty, the constitutional guarantee of habeas corpus applied at Guantánamo Bay.[32]

Justice Kennedy's analysis began by looking at the original lease agreement between the United States and Cuba for Guantánamo Bay.[33] The agreement stipulated that Cuba would retain "ultimate sovereignty" while the United States possessed "complete jurisdiction and control."[34] Then Justice Kennedy turned to a subsequent 1934 agreement, which effectively eliminated Cuban sovereignty. Absent a new agreement between the parties, Cuban sovereignty was finished.[35] The 1934 agreement could have been the basis of a strong argument that de jure sovereignty had passed to the United States. Instead, basing his opinion on the long-standing tradition of judicial deference to political branches in deciding questions of sovereignty,

27. *See* 10 U.S.C. §§ 948-50; *Boumediene*, 128 S. Ct. at 2261–62.

28. Throughout the life of the Republic, the boundaries of the Constitution's reach have changed with new realities. *See generally* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996); Kermit Roosevelt III, *Guantanamo and the Conflict of Laws:* Rasul *and Beyond*, 153 U. PA. L. REV. 2017, 2042–59 (2005).

29. *Boumediene*, 128 S. Ct. at 2274.

30. *Id.*

31. *Id.* at 2257–58.

32. *Id.* at 2261–62.

33. *Id.* at 2251.

34. *Id.* at 2252 (citing Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 23, 1903, T.S. No. 418).

35. *Boumediene*, 128 S. Ct. at 2252 (citing Treaty Defining Relations with Cuba, U.S.-Cuba, art. III, May 29, 1934, 48 Stat. 1683, T.S. No. 866).

Justice Kennedy ratified the government's contention that Cuba still retained a technical, de jure sovereignty over Guantánamo.[36]

That was not the end of the analysis, however. Justice Kennedy flatly rejected the government's premise that "*de jure* sovereignty is the touchstone of habeas corpus jurisdiction."[37] The distinction that mattered, he wrote, was between de jure sovereignty and plenary control.[38] Skeptical of the overall usefulness of "sovereignty" as the determinative factor, he noted that there were two different conceptions of sovereignty—"legal" and "colloquial."[39] Colloquial sovereignty is the common sense, dictionary usage—an "exercise of dominion or power."[40] Legal sovereignty, on the other hand, is a more narrowly drawn conception, referring to a "claim of right."[41] Determining which conception of sovereignty was in play was important, Justice Kennedy maintained, because while the judiciary defers to political branches on questions of legal sovereignty, it does not defer when the question is the practical one of colloquial sovereignty—who is exercising dominion of power in a given setting.[42] Therefore, forced to defer to the legislature and executive on "legal" sovereignty, the Court had to agree that the United States was not the de jure sovereign of Guantánamo.[43] But, the Court did not have to defer on the "obvious and uncontested fact" that the United States enjoyed de facto control of the base under sovereignty's colloquial definition.[44] Thus, the outcome would depend on the choice between a rote application of de jure sovereignty or a more nuanced approach to determine the actual status of the detention center at issue.

Justice Kennedy began that task by examining previous decisions that "undermine[d] the government's argument that, at least as applied to noncitizens, *the Constitution* necessarily stops where de

36. *Boumediene*, 128 S. Ct. at 2252 (quoting Vermilya-Brown Co., Inc. v. Connell, 335 U.S. 377, 389 (1947) ("[D]etermination of sovereignty over an area is for the legislative and executive departments")).

37. *Boumediene*, 128 S. Ct. at 2253.

38. *Id.* at 2252–53.

39. *Id.* at 2252.

40. *Id.* at 2252 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 2406 (2d ed.1934) ("sovereignty," definition 3)).

41. *Boumediene*, 128 S. Ct. at 2252 (citing 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 206, cmt. b, p. 94 (1986)).

42. *Boumediene*, 128 S. Ct. at 2252.

43. *Id.* at 2253.

44. *Id.*

jure sovereignty ends."[45] This was not a question that could be answered by a direct appeal to the Framers' intent. The opinion notes that even though the Framers had predicted that the Nation would expand and add new territory, the document itself is silent on how it should be applied extraterritorially.[46]

Prior to the twentieth century, it was customary for Congress to extend constitutional protections beyond state boundaries by statute.[47] The issue of what the Constitution meant with respect to extraterritorial application arose at the turn of the twentieth century, when the famous *Insular Cases* addressed the question of whether the Constitution applied to United States territories in the absence of a Congressional statute saying it did.[48] The *Insular Cases* split the baby, determining that the Constitution applied independently in territories destined for statehood. In those territories no statute was necessary, as constitutional application was not "contingent upon legislative grace."[49] In territories not bound for statehood, however, it applied only partially.[50] The *Insular Cases* alone could not answer Justice Kennedy's question. The United States had never intended Guantánamo Bay to achieve statehood (acquiring it for use as a military facility in the Caribbean Sea),[51] but the Court had recognized in *Balzac v. Porto Rico* that the government was required to provide "guaranties of certain fundamental personal rights declared in the Constitution" even in those territories not destined for statehood.[52]

45. *Id.* (emphasis added).

46. *Id.*; *see generally* Neuman, *supra* note 28.

47. *Boumediene*, 128 S. Ct. at 2253; *see also* Christian Burnett, *Untied States: American Expansion and Territorial Deannexation,* 72 U. CHI. L. REV. 797, 825–27 (2005).

48. *See* De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Hawaii v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904) ("*Insular Cases*").

49. *Id.*

50. *Boumediene*, 128 S. Ct. at 2254 (quoting *Dorr*, 195 U.S. at 143 ("Until Congress shall see fit to incorporate territory ceded by treaty into the United States . . . the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation") and *Downes*, 182 U.S. at 293 (White, J., concurring) ("[T]he determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States")).

51. *See Boumediene*, 128 S. Ct. at 2251–52 (citing Lease of Lands for Coaling and Naval Stations, *supra* note 34).

52. Balzac v. People of Porto Rico, 258 U.S. 298, 312 (1922).

Justice Kennedy's analysis in *Boumediene* was also strongly influenced by *Reid v. Covert*, a case in which the Court fragmented sharply over the meaning of the *Insular Cases*.[53] *Reid* concerned spouses of American servicemen stationed overseas who had been tried and convicted by court-martial for murdering their husbands.[54] Writing for the plurality, Justice Hugo Black determined that the wives' American citizenship guaranteed them constitutional rights related to criminal trials and reversed the convictions.[55] Justice John Marshall Harlan, writing for himself in a concurrence, read the *Insular Cases* as evaluating the "particular circumstances, the practical necessities, and the possible alternatives which Congress had before it," and whether extraterritorial application of relevant constitutional rights would be "impracticable and anomalous" based on the circumstances of each case.[56] Justice Harlan's approach rejected reliance on rigid formalism alone in favor of a functional, case-by-case approach for extraterritorial application.[57]

In his concurrence in *United States v. Verdugo-Urquidez*, Justice Kennedy adopted Justice Harlan's "impracticable and anomalous" test from *Reid* in discussing extraterritorial application of the Fourth Amendment. At issue were claims for alleged Fourth Amendment violations against a Mexican citizen by American agents operating within Mexico.[58] A majority of the Court, led by Chief Justice William Rehnquist, held that the Fourth Amendment did not apply to the agents' activities.[59] Using Justice Harlan's formula, Justice Kennedy concurred in denying those claims.[60] Justice Kennedy's adoption of the "impracticable and anomalous" test in *Verdugo-Urquidez* foreshadowed his abandonment of rigid, formulaic rules to the more functional, case-by-case approach for extraterritorial application of the Constitution that he applied in *Boumediene.*[61]

Another case on the extraterritorial reach of the Constitution discussed in *Reid* was *In re Ross*.[62] The *Ross* Court held that a non-

53. Reid v. Covert, 354 U.S. 1 (1957).
54. *Id.* at 3.
55. *Id.* at 40.
56. *Id.* at 75–76 (Harlan, J., concurring).
57. *Id.*
58. United States v. Verdugo-Urquidez, 494 U.S. 259, 262 (1990).
59. *Id.* at 274–75.
60. *Id.* at 277–78 (Kennedy, J., concurring).
61. *Boumediene*, 128 S. Ct. at 2257–58.
62. *In re* Ross, 140 U.S. 453 (1891).

citizen was entitled to the full spectrum of constitutional rights because he had enlisted as a seaman on an American ship.[63] Despite that finding, the *Ross* Court eventually determined that the seaman was not entitled to Fifth or Sixth Amendment rights during a trial for a maritime crime.[64] In *Boumediene*, Justice Kennedy carefully traced the dispute among the Justices in *Reid* concerning the continued vitality of *Ross.* The *Reid* plurality, led by Justice Black, would have overruled *Ross,* meaning that the circumstances in a given case would have no bearing on the extraterritorial application of constitutional protections to trials by overseas American institutions.[65] Instead, the *Reid* plurality would have made citizenship the determinative factor for extraterritorial application.[66] But the *Reid* plurality did not have the votes to overrule *Ross* because Justices Harlan and Frankfurter would not go along.[67] Justice Harlan's concurring opinion therefore focused on analyzing the differences in practical circumstances that led to the opposite results in *Reid* and *Ross*.[68] Just as he did before, Justice Kennedy followed this reasoning in *Verdugo-Urquidez*, noting that *Ross* had not been overruled and that extraterritorial application of the Constitution was contingent upon more than mere citizenship.[69]

As a result, as one commentator has noted, Justice Kennedy approaches any question of extraterritorial application of constitutional provisions by asking Justice Harlan's question in *Reid*—whether such an application would be "impracticable and anomalous."[70] Justice Kennedy's concurrence in *Verdugo-Urquidez* made his adoption of Justice Harlan's approach very clear. It also informed his reading of *Eisentrager,* the case to which the *Boumediene* opinion turned next.[71]

63. *Id.* at 479.

64. *Id.* at 464.

65. *Boumediene*, 128 S. Ct. at 2256 (citing Reid v. Covert, 354 U.S. 1, 11–12 (1957)).

66. *Reid*, 354 U.S. at 11–12.

67. *See id.* at 50 (Frankfurter, J., concurring) (citing *Ross* as reinforcing the "power of Congress to 'make all needful Rules and Regulations'" for the Territories. *Ross*, 140 U.S. at 453).

68. *Reid*, 354 U.S. at 75 (Harlan, J., concurring).

69. United States v. Verdugo-Urquidez, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring).

70. Jeffrey Kahn, *Zoya's Standing Problem, Or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673, 712 (2010) (discussing extraterritorial application of the Takings Clause).

71. *See Verdugo-Urquidez*, 494 U.S. at 276–77 (Kennedy, J., concurring); Boumediene v. Bush, 128 S. Ct. 2229, 2257–58 (2008).

*Eisentrager* was the case on which the government's argument in *Boumediene* primarily relied.[72] The *Eisentrager* Court had refused to extend habeas corpus to German POWs held at Landsberg Prison in Germany.[73] In *Boumediene,* the government argued that *Eisentrager* was a simple application of formalistic reasoning—because the prisoners were noncitizens held outside the de jure sovereignty of the United States, the Constitution and habeas corpus did not apply.[74] Justice Kennedy, however, characterized the reasoning in *Eisentrager* as an analysis of circumstances ("balanc[ing] the constraints of military occupation with constitutional necessities") rather than a strictly formalistic approach to extraterritorial constitutional application.[75] By casting *Eisentrager* in those terms, Justice Kennedy made it clear that his adoption of Justice Harlan's "impracticable and anomalous" test from *Reid* in his *Verdugo-Urquidez* opinion was not a one-time expediency.[76] To Justice Kennedy, analysis of the circumstances is a necessary part of deciding the extraterritorial reach of Constitutional rights.

The *Boumediene* opinion rejected the government's interpretation of *Eisentrager* on three distinct grounds.[77] First, the government's reading of a particular passage of *Eisentrager* as establishing a formalistic, de jure sovereignty-based test was inconsistent with Justice Kennedy's earlier holding in the decision that de jure sovereignty did not end the analysis.[78] Second, Justice Kennedy supported that conclusion by noting that the *Eisentrager* opinion's own discussion of the practical barriers to habeas corpus for inmates at Landsberg Prison in Germany indicated that the Court was not resting its decision solely on the lack of the United States' de jure sovereignty over the prison.[79] Indeed, the *Eisentrager* opinion used "territorial sovereignty" only twice, suggesting that de jure sovereignty was not a bright-line rule, but merely one of the factors in

72. *Boumediene*, 128 S. Ct. at 2257.

73. Johnson v. Eisentrager, 339 U.S. 763, 779 (1950).

74. *Boumediene*, 128 S. Ct. at 2257 (quoting *Eisentrager*, 339 U.S. at 778 ("[A]t no relevant time were within any territory over which the United States is sovereign, and [that] the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.").

75. *Boumediene*, 128 S. Ct. at 2257 (citing *Eisentrager*, 339 U.S. at 769–79).

76. Reid v. Covert, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring); *Verdugo-Urquidez*, 494 U.S. at 276–77 (Kennedy, J., concurring); *see also* Kahn, *supra* note 70.

77. *Boumediene*, 128 S. Ct. at 2257.

78. *Id.* (citing *Eisentrager*, 339 U.S. at 781).

79. *Boumediene*, 128 S. Ct. at 2257–58.

the analysis.[80] Finally, acceptance of the government's reading of *Eisentrager* would undermine the "functional approach to questions of extraterritoriality" illustrated in the *Insular Cases* and *Reid*.[81] Just as the authors of those earlier cases had done, Justice Kennedy rejected a bright-line, formalistic rule in favor of a functional test for extraterritorial application of the Constitution.[82]

In a final flourish, Justice Kennedy reasoned that allowing the political branches to define the limits of habeas corpus jurisdiction by delimiting United States de jure sovereignty defied traditional separation-of-powers notions and directly undercut the purposes of habeas corpus.[83] Justice Kennedy stressed that this reasoning did not depart from existing law, because Supreme Court precedent clearly held that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[84] With four other justices joining Justice Kennedy's opinion in *Boumediene*, it appears that Justice Harlan's "impracticable and anomalous" test currently controls the analysis.

## III. The Circumstances of Webster Bivens

In the early morning hours of November 26, 1965, agents from the Federal Bureau of Narcotics entered Webster Bivens's New York City apartment and arrested him for narcotics violations.[85] The agents had no warrant to arrest Bivens or to search his apartment.[86] In the course of the arrest, they handcuffed Bivens in front of his wife and children, threatened to arrest his entire family, and extensively searched his apartment.[87] Once Bivens arrived at the federal courthouse in Brooklyn, he was interrogated, booked, and subjected to a strip search.[88]

Unlike cases in which accusations of police misconduct are raised to defeat a criminal complaint, Bivens filed suit against the agents as *individuals,* alleging that they had violated his federal constitutional

80. *Id.* (citing *Eisentrager*, 339 U.S. at 778, 780).
81. *Boumediene*, 128 S. Ct. at 2258.
82. *Id.* at 2257–58.
83. *Id.* at 2258.
84. *Id.*
85. Bivens v. Six Unknown Agents, 403 U.S. 388, 389 (1971).
86. *Id.* at 390.
87. *Id.* at 389.
88. *Id.*

rights.[89] Ultimately, five agents were served with the complaint.[90] The agents urged the Court to dismiss Bivens's claim for want of jurisdiction, arguing that while Bivens might have a remedy for their behavior, he could only obtain it through state tort law in state courts.[91]

When the case reached the Supreme Court, Justice William Brennan forcefully rejected this jurisdictional argument, arguing that the agents' view of the Fourth Amendment would limit it to a defense tactic in state tort law actions—excusing their tortious conduct if federal agents could prove the conduct was a "valid exercise of federal power."[92] Justice Brennan held it was more—an affirmative grant of right to individual citizens.[93] Furthermore, he distinguished Bivens's case, which involved government agents acting under color of federal law, from a tort action between two ordinary citizens.[94] Because of their status as federal officials, the agents possessed great power that did not disappear once abused.[95] Indeed, Justice Brennan argued, unconstitutional abuses of government power presented a far more dangerous threat to individual citizens than did traditional tortfeasors.[96] He analyzed the previous case law and concluded that state tort remedies were designed with ordinary citizens in mind, not authority-wielding federal agents.[97] Thus, it was clear that a state remedy could not adequately protect Bivens—there had to be a federal remedy, and a federal forum to enforce it.[98]

To provide one, Justice Brennan drew upon the Court's historical sense that damages are the "ordinary remedy for an

89. *Id.* at 390. Specifically, Bivens plead that the invasion of his rights caused him great embarrassment, humiliation and mental anguish as a result of the agents conduct. The Court characterized this claim as one essentially made for arrest without sufficient probable cause. *See id.* at 389.

90. *Id.* at 390 n.2.

91. *Id.* at 390–91.

92. *Id.*

93. *Id.*

94. *Id.* at 391–92.

95. *Id.* at 392 ("[The agents] ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used.").

96. *Id.* at 392 (citing United States v. Classic, 313 U.S. 299, 326 (1941); Amos v. United States, 255 U.S. 313, 317 (1921)).

97. *Bivens*, 403 U.S. 392–95.

98. *Id.* at 396.

invasion of personal interests in liberty."[99] While noting that the Fourth Amendment did not specifically include a remedial scheme for money damages, Justice Brennan relied on the principle that federal courts had discretion to use any remedy to "make good the wrong done" from violations of federal rights.[100] In other words, violation of a federal legal right required a federal remedy.[101]

In a part of the opinion that would later threaten to consume its central holding, Justice Brennan limited the reach of future *Bivens* remedies by enumerating several "special factors counseling hesitation in the absence of affirmative action by Congress [to provide for a statutory cause of action]."[102] The special factors he named—federal fiscal policy, the government-soldier relationship, and congressional employment—originated in prior cases and demonstrated those arenas in which the Court had traditionally deferred to Congressional judgment.[103] Justice Brennan defined "federal fiscal policy" by reference to the discreet question presented in *United States v. Standard Oil Co. of California*.[104] In *Standard Oil*, the Court refused to create a private remedy to allow the United States to recover a soldier's medical expenses resulting from the negligence of the defendant.[105] The *Standard Oil* Court withheld "creative touch" to fashion a remedy in a "field properly within Congress' control and as to a matter concerning which it has seen fit to take no action."[106] In other words, judicial interference with "federal fiscal policy" can be seen as seizing the Congressional prerogative to spend and replacing it with court-mandated initiatives not contemplated by the legislature. Similarly, Justice Brennan distinguished Bivens's remedy from *Wheeldin v. Wheeler*, in which the Court refused to interfere with Congressional abuse of power that was outside the scope of discretion, but not unconstitutional.[107]

Justice Brennan explained the reach of the "special factors" analysis by differentiating between areas exclusively within

99. *Id.* at 395–96. Brennan noted that the Court had allowed similar suits before. *See generally* Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927); Swafford v. Templeton, 185 U.S. 487 (1902); Wiley v. Sinkler, 179 U.S. 58 (1900).

100. *Bivens*, 403 U.S. at 396 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

101. *See* Marbury v. Madison, 1 Cranch 137, 147 (1803).

102. *Bivens*, 403 U.S. at 396.

103. *Id.*

104. United States v. Standard Oil Co. of Cal., 332 U.S. 301 (1947).

105. *Id.* at 316.

106. *Id.* at 316–17.

107. Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963).

Congressional control and fields that do not require express Congressional action.[108] He underscored that constitutional protections like the Fourth Amendment are self-executing and do not require an affirmative grant from Congress to be effective.[109] Instead, Justice Brennan asked only whether Bivens was entitled to a "remedial mechanism normally available in the federal courts" upon a showing of constitutional violations.[110] Satisfied that Bivens had made this showing, Justice Brennan allowed him a federal remedy.[111]

## IV. After *Bivens*: A New Meaning for Special Factors

Following *Bivens*, the Court dealt with several suits seeking to expand private rights of action beyond the Fourth Amendment. According to Stephen Vladeck, the modern Court addresses two questions when confronted with a potential expansion of private rights of action in the wake of *Bivens*: Whether any "special factors counseling hesitancy" are present, and whether Congress has created an alternative remedial scheme in lieu of a *Bivens* action.[112] Early on, the Court routinely recognized expansion of *Bivens* beyond the Fourth Amendment by taking what James Pfander characterized as a "matter of fact" approach to the two relevant inquiries.[113] Along with the expansion, Vladeck argues, came a new limiting force on *Bivens* actions: Justice Brennan's "special factors" began to be used as an absolute bar to a federal remedy, not just as factors that would "counsel hesitancy."[114]

It was not long before the Court was openly acknowledging that it "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts."[115] Indeed, the Court seemed to become focused on congressionally created remedial schemes and refused to

108. *Bivens*, 403 U.S. at 397.

109. *Id.*

110. *Id.* (citing J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964); Jacobs v. United States, 290 U.S. 13, 16 (1933)).

111. *Bivens*, 403 U.S. at 397.

112. Stephen J. Vladeck, *National Security and Bivens After Iqbal*, 14 LEWIS & CLARK L. REV. 255, 261–62 (2010).

113. *Id.* at 263 (citing James E. Pfander, *The Story of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, FEDERAL COURTS STORIES 275, 295–96 (Vicki C. Jackson & Judith Resnik eds., 2010)).

114. Vladeck, *supra* note 112, at 263 (citing Carlson v. Green, 446 U.S. 14, 16–18 (1980) (expanding *Bivens* to Eighth Amendment protections against cruel and unusual punishment)).

115. Schweiker v. Chilicky, 487 U.S. 412, 421 (1988).

infer *Bivens* actions that might compete with Congress's statutory decisions. *Bush v. Lucas* illustrates the change.[116] There, the Court declined to infer a *Bivens* remedy for a federal employee claiming employment discrimination in violation of the First Amendment.[117] Instead, the Court upheld an imperfect remedial scheme, reasoning that "Congress is in a better position" than the courts to include a *Bivens* remedy for government employees if it wanted one.[118] Similarly, in *Schweiker v. Chilickly*, the Court refused to recognize a federal remedy for discharged Social Security beneficiaries, reasoning that Congress's intricate remedial scheme foreclosed a *Bivens* action by adequately protecting the aggrieved beneficiaries' rights.[119]

The Court did not limit its deference to direct Congressional action. In *Chappell v. Wallace*, several enlisted men alleged that their superior officers violated their constitutional rights by engaging in racial discrimination.[120] Asked to recognize a new *Bivens* remedy, the Court refused, reasoning that military judgments such as training, recruitment and control of the force were "subject *always* to civilian control of the Legislative and Executive Branches."[121] Congress's indirect control of military policies was a special factor that counseled hesitancy in expanding *Bivens* to intra-military relationships.[122] Similarly, in *United States v. Stanley*, the Court extended *Chappell* beyond the relationships between officers and soldiers and applied it to deny a remedy to an officer suing the United States government for using him as a laboratory animal.[123] The *Stanley* plaintiff was an officer who alleged that he had been secretly administered LSD as part of an experiment, thereby violating his constitutional rights.[124] Despite the outrageous nature of the military's conduct, the Court denied the plaintiff a remedy, holding that *Bivens* remedies are not available for "injuries that 'arise out of or are in the course of activity incident to service.'"[125] As a practical matter, after *Stanley* there are

116. Bush v. Lucas, 462 U.S. 367, 390 (1983).

117. *Id.*

118. *Id.*

119. *Schweiker*, 487 U.S. at 429.

120. Chappell v. Wallace, 462 U.S. 296, 302 (1983).

121. *Id.* at 302 (emphasis in original) (citing Gilligan v. Morgan, 413 U.S. 1, 10 (1973)).

122. *Chappell*, 462 U.S. 301.

123. United States v. Stanley, 483 U.S. 669, 681–84 (1987).

124. *Id.* at 671–72.

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

no *Bivens* remedies in the military context because of the Court's near-total deference to the government-soldier relationship.[126]

The cases through *Stanley* concerned arenas in which the Court could reasonably infer from the existence of a detailed remedial scheme that "Congress expected the Judiciary to stay its *Bivens* hand" or arenas that were clearly occupied by the political branches.[127] In *Wilkie v. Robbins*, Justice David Souter analyzed "*Bivens* step two," testing the applicability of *Bivens* to arenas that lacked an express Congressional remedial scheme or stood outside of those fields traditionally reserved for the political branches.[128] According to Vladeck, *Wilkie* cemented the Court's use of the "special factors" analysis and represented the "high-water mark of the Court's retrenchment from *Bivens*" which had begun in the 1980s.[129] *Wilkie* involved a *Bivens* claim against Bureau of Land Management officials for alleged harassment and intimidation during the Bureau's negotiations for an easement over the plaintiff's property.[130] The Court refused to infer a *Bivens* remedy after deciding that the plaintiff's individual claims could be settled through a patchwork system of state tort laws and administrative remedies.[131] Fearful of an "onslaught of *Bivens* actions," the Court signaled that it would defer to Congressional legislative judgment and recognize new *Bivens* claims sparingly.[132] *Wilkie* thus pushed Justice Brennan's "special factors" analysis to new heights and expanded the reach of the doctrine to include areas—like state tort law—that are not within Congress's exclusive control.[133] Instead, "special factors" under *Wilkie* became a rubric of self-fulfilling prophecy. After *Wilkie* it appeared that judicial economy, separation of powers, or anything else that the Court could call a "special factor" was enough to deny a *Bivens* remedy.[134]

Read correctly, though, *Wilkie* did not completely shut the door on the possibility of new *Bivens*-based actions. Instead, *Wilkie* urged the District Courts to "weigh reasons for and against the creation of a

126. Bivens v. Six Unknown Agents, 403 U.S. 388, 396 (1971).

127. Wilkie v. Robbins, 551 U.S. 537, 554 (2007).

128. *Id.*

129. Vladeck, *supra* note 112, at 266.

130. *Wilkie*, 551 U.S. at 541.

131. *Id.* at 561–62.

132. *Id.* at 562.

133. *See* Vladeck, *supra* note 112, at 266.

134. *Id.*

new cause of action, the way common law judges have always done."[135] Though disfavored, *Bivens* was still good law, and courts were left with the discretion to infer a remedy in situations where one had not existed before.[136]

## V. Are the 'War on Terror' Cases a Place for a *Bivens* Remedy?

Thus, there are three relevant inquires to determine whether to apply *Bivens* to a constitutional claim made by a "War on Terror" detainee. First, the allegations of the complaint must have occurred within the reach of constitutional protections. Second, if the Constitution applies, any *Bivens* remedy must not be preempted by a pre-existing Congressional remedial scheme or any other special factor. Finally, officials must not be entitled to qualified immunity for their actions. This paper does not discuss every possible constitutional injury that could give rise to a *Bivens* claim. I have limited the analysis to one of the most likely such claims—maltreatment of a detainee by guards—that implicates violations of the Fifth and Eighth Amendments.

### A. Step One – The Constitution Applies to Guantánamo Bay

The degree of the Constitution's application at Guantánamo Bay is the first step of the *Bivens* analysis. In *Boumediene*, the Court recognized that Guantánamo was de facto American territory, thereby guaranteeing at least habeas corpus rights to detainees.[137] The Court rejected the government's reliance upon the distinction between de jure and de facto sovereignty as an improper dichotomy for the purposes of extraterritorial application of the Constitution.[138] Furthermore, the Court highlighted that the Founders, expecting the Nation to acquire new territory, intended for the Constitution to be a fluid document that would expand along with growing boundaries and changing times.[139] Beyond those arguments for full application, Justice Kennedy's reliance upon Justice Harlan's "impracticable and anomalous" standard from *Reid* strongly suggests that this analysis

135. *Wilkie*, 551 U.S. at 554 (citing Bush v. Lucas, 462 U.S. 367, 378 (1983)).

136. *Willkie*, 551 U.S. at 554.

137. Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008).

138. *Id.* at 2252.

139. *Id.* at 2253.

will be used to decide the question of extraterritorial constitutional applicability at Guantánamo.[140]

Under that standard, applying the Bill of Rights to Guantánamo detainees would be neither impracticable nor anomalous. First of all, Guantánamo is a far different place than the inarguably Mexican territory where Justice Kennedy found that the "conditions and considerations" did not support the application of the Fourth Amendment to an extraterritorial arrest in his *Verdugo-Urquidez* concurrence.[141] In *Verdugo-Urquidez*, Justice Kennedy relied on the fact that the United States enjoyed neither de facto nor de jure sovereignty over Mexico, where the arrest occurred.[142] His majority opinion in *Boumediene* demonstrates clearly, however, that Justice Kennedy views the American naval base at Guantánamo Bay differently.[143]

Furthermore, the central holding of *Boumediene* is that there were not "impracticable or anomalous" complications in allowing detainees access to the Great Writ.[144] Indeed, Justice Kennedy relied on the exclusively American character of the naval base at Guantánamo as grounding for the extraterritorial application.[145] This analysis reverses the result reached in *Verdugo-Urquidez*. There, where Mexican authorities were sovereign and Mexican law was in full force and effect, applying the Fourth Amendment to United States government activities in Mexico would be an impractical and anomalous attempt to impose an external and foreign law to another's sovereign territory.[146] Both the impracticality and anomalous nature of doing so is illustrated by the fact that *all* of the activities of the United States' agents in *Verdugo-Urquidez* could have been circumscribed by *Mexican* law if the sovereign power had so intended.[147] Accordingly, applying substantive constitutional standards to an area governed by an entirely different set of laws made little sense to Justice Kennedy.[148] At Guantánamo, however,

140. *See id.* at 2256; *see also* Kahn, *supra* note 70, at 712.

141. United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

142. *Id.*

143. *Boumediene*, 128 S. Ct. at 2252–53.

144. *Id.* at 2258.

145. *Id.* at 2262.

146. *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring).

147. *Id.*

148. *Id.*

Cuban law does not control American activity, and Cuba does not possess any actual authority over the base, a fact conceded by the government in *Boumediene*.[149]

Thus, applying the Bill of Rights to Guantánamo Bay would not be "impracticable or anomalous." Unlike the Fourth Amendment problem presented in *Verdugo-Urquidez*, American government officials are not bound by foreign law when operating at Guantánamo Bay. Instead, as in *Boumediene*, any application of the Bill of Rights to Guantánamo would only impose American constitutional law upon Americans and American prisoners at an installation that is within the de facto sovereignty of the United States.[150] Just like the application of habeas corpus, application of the Bill of Rights is neither impracticable nor anomalous. Instead, under the functional extraterritorial application test promulgated by Justice Kennedy in *Verdugo-Urquidez* and *Boumediene*, the Constitution and its guarantees should apply to Guantánamo Bay.

The D.C. Circuit views the application of *Boumediene* to *Bivens* actions differently. In *Rasul v. Myers*, the court held that *Boumediene* invalidated only a discrete portion of the MCA relating to habeas corpus applicability and retained the statute's other restrictions on detainee constitutional rights and judicial access.[151] Essentially, the court distinguished *Boumediene* on the grounds that the opinion only discussed the application of habeas corpus to the detention of detainees, not to "the content of the law that governs petitioners' detention."[152] A more recent decision in *Al-Zahrani v. Rumsfeld* relied on *Rasul II* to deny a *Bivens* claim to a former Guantánamo detainee, reasoning that *Boumediene*'s silence on the issue of detainee conditions or treatment meant that the Court intended *Boumediene* to apply only to constitutional claims concerning improper detention.[153] As the definitive opinion on *Boumediene* in the D.C. Circuit, *Rasul II* interprets *Boumediene* as allowing only a sliver of constitutional sunlight to reach Guantánamo, while maintaining the blackout of other substantive constitutional rights.[154]

149. *Boumediene*, 128 S. Ct. at 2252.

150. *Id.*

151. Rasul v. Myers, 563 F.3d 527, 529–30 (D.C. Cir. 2009).

152. *Id.* at 529 (citing *Boumediene*, 128 S. Ct. at 2277).

153. Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 112 (D.D.C. 2010) (citing *Rasul II*, 563 F.3d at 529–30).

154. *See Rasul*, 563 F.3d at 529–30.

Those interpretations seem to run contrary to the way in which the *Boumediene* Court discussed its decision. It did not hold that habeas corpus was the only exportable right, but instead simply declined discussion of the broader issue because its holding that Congress's habeas corpus substitute—the DTA review process—was a constitutionally inadequate substitution for habeas corpus rendered the point moot.[155] The Court noted that "in view of our holding [that the DTA is a constitutionally deficient substitute for habeas corpus] we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement."[156] The most plausible reading of the *Boumediene* Court's language is: When Congress enacts a remedial scheme that purports to be the substitute for a constitutional guarantee—like habeas corpus—that substitute must offer a constitutionally acceptable minimum scope of protection.[157] Therefore, because the Court clearly found that habeas corpus applies at Guantánamo Bay, the Congressional substitute was inadequate due to its constitutional deficiencies.[158] Justice Kennedy highlights several constitutional problems with Congress's alternative habeas corpus scheme contained in the DTA: The inability of detainees to present exculpatory evidence, the lack of a complete record for appellate review, and the overall presumption in favor of the government at the expense of the detainees.[159] These infirmities compelled the Court to invalidate the DTA process and the relevant section of the MCA as applied to habeas corpus proceedings.[160]

The court in *Al-Zahrani* argues that Justice Kennedy's decision to not discuss the application of habeas corpus to conditions of detention requires an inference that section seven of the MCA still should apply to such cases.[161] However, it is clear that Justice Kennedy declines a lengthy discussion of detainee treatment *because he has already decided the issue*. This was not an "unwillingness to discuss the issue," but an unwillingness to beat a dead horse.[162]

155. *Boumediene*, 128 S. Ct. at 2274.

156. *Id.*

157. *See id.* at 2272–74.

158. *Id.* at 2262, 2274.

159. *Id.*

160. *Id.*

161. Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 109 (D.D.C. 2010) (citing *Boumediene*, 128 S. Ct. at 2274).

162. *Id.* at 109.

The court in *Rasul II* also bases its interpretation of *Boumediene* partially upon what the opinion did not address, arguing that "the Court stressed that its decision 'does not address the *content of the law* that governs petitioners' detention.'"[163] Based on these words, the court decided that *Boumediene* "disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause."[164] Yet, the court in *Rasul II* ignores the subsequent sentence in *Boumediene*: "[t]hat is a matter yet to be determined."[165] In other words, the Court, without a *Bivens* claim or any other constitutional question beside the extraterritorial application of habeas corpus before it, properly decided only the question presented by the facts of *Boumediene*.[166] The D.C. Circuit misinterprets the refusal to create a rule in dicta as a rule itself: no part of the Constitution, save habeas corpus, applies to Guantánamo Bay.[167]

Curiously, the D.C. Circuit cites both *Eisentrager* and *Verdugo-Urquidez* in support of its contention that *Boumediene* did not work any change in the extraterritorial application of the Constitution with respect to Guantánamo Bay.[168] In *Boumediene*, though, the Court expressly placed Guantánamo Bay outside of the *Eisentrager* analysis because, unlike the Landsberg Prison in Allied-occupied Germany, the United States was the de facto sovereign of Guantánamo Bay.[169] *Verdugo-Urquidez* offers even less support for the D.C. Circuit's opinion, as all of the relevant government action occurred solely in Mexico.[170] If there is one thing that *Boumediene* made clear, it is that the Court views Guantánamo as something quite different from a German prison or a part of Mexico. Otherwise, Justice Kennedy would not have spent considerable time carefully distinguishing Guantánamo's status from the earlier precedents.[171]

That fact guts the D.C. Circuit's argument that inferring a *Bivens* remedy for Guantánamo would implicitly overrule the Supreme

163. Rasul v. Myers, 563 F.3d 527, 529 (D.C. Cir. 2009) (emphasis added) (citing *Boumediene*, 128 S. Ct. at 2277).

164. *Rasul*, 563 F.3d at 529.

165. *Boumediene*, 128 S. Ct. at 2277.

166. *Id.*

167. *Rasul*, 563 F.3d at 529–30.

168. *Id.*

169. *Boumediene*, 128 S. Ct. at 2257–58.

170. United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

171. *See Boumediene*, 128 S. Ct. at 2252–62.

Court's precedents in *Eisentrager* and *Verdugo-Urquidez*, something it is powerless to do.[172] But an override of Supreme Court precedent is not necessary. *Boumediene* did not overrule *Eisentrager* or *Verdugo-Urquidez* either; those cases still enjoy precedential value.[173] However, *neither applies to the situation present at Guantánamo.* If they did, *Boumediene* would have come out differently, and there would not be a guarantee of habeas corpus at Guantánamo. Clearly this was not *Boumediene*'s holding. The *Boumediene* Court stated that even in the closer of the two, the "situation in *Eisentrager* was far different."[174] Thus, the Court has carefully distinguished Guantánamo Bay *as an area* from the earlier fact patterns.[175]

Viewed correctly, *Boumediene* provided a new analytical rubric for issues pertaining to Guantánamo Bay, different from the existing *Eisentrager* and *Verdugo-Urquidez* framework.[176] The special status of Guantánamo as a sovereign gray area made it unique and required the Court merely to distinguish—not overturn—prior precedent on its way to the decision to apply habeas corpus in Guantánamo.[177] As a result, the D.C. Circuit's claim that its inability to overrule *Eisentrager* or *Verdugo-Urquidez* precludes it from inferring a *Bivens* remedy is a straw man. Nothing need be overruled; the D.C. Circuit need only follow *Boumediene*.

Nor is there any principled basis on which to restrict *Boumediene*'s approach to extraterritorial constitutional analysis for Guantánamo to habeas corpus.[178] Though the Court dealt only with habeas corpus in *Boumediene*, the Court's reasoning concerning de facto and de jure sovereignty applies equally well to other portions of the Constitution. Indeed, Justice Kennedy's analysis relies on extraterritorial application of various constitutional provisions, implying that the extraterritorial application of the Constitution is not limited to particular provisions.[179] At bottom, under *Boumediene,*

172. *Rasul*, 563 F3d. at 529 (citing Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)).

173. *See Boumediene*, 128 S. Ct. at 2257–58 (citing *Eisentrager* and *Verdugo-Urquidez* with approval).

174. *Boumediene*, 128 S. Ct. at 2261.

175. *Id.* at 2252–62.

176. *Id.*

177. *Id.*

178. *Id.* at 2262.

179. *Id.* at 2254–62.

Guantánamo should not be analyzed as foreign soil, but as an area within the de facto sovereignty of the United States.

### B. Step Two – National Security Is Not a 'Special Factor' That Blocks *Bivens* Actions by Guantánamo Detainees

Although *Wilkie* shows reluctance by the recent Court to expand *Bivens*, even the *Wilkie* Court endorsed a "common law" balancing test between "reasons for and against the creation of a new cause of action."[180] In *Padilla v. Yoo*, Judge Jeffrey White of the Northern District of California employed the *Wilkie* balancing test and found that a former terrorism detainee could pursue a *Bivens* action against former Bush Administration attorney John Yoo.[181] The plaintiff was an American citizen and suffered the alleged constitutional violations while detained in a navy brig in South Carolina.[182] There was no issue in the case about extraterritorial application of the Constitution, as constitutional protections clearly apply to an American in South Carolina. But the case does illustrate an issue that affects both Guantánamo detainees and Mr. Padilla—how "national security" is to be assessed as a special factor in inferring a *Bivens* remedy for a suspected "War on Terror" detainee.

Judge White began his analysis by noting that "special factors counseling hesitancy 'relate not to the merits of the particular remedy, but to the question of who should decide whether such a remedy should be provided.'"[183] Judge White interpreted this as meaning that in some areas (either constitutionally compelled or, in some cases, not), courts defer to the political branches to construct their own remedial schemes.[184] Acknowledging the modern Court's tendency to limit expansion of *Bivens*, Judge White distinguished the present case from those in which the Court declined a new *Bivens* remedy.[185]

180. Wilkie v. Robbins, 551 U.S. 537, 554 (2007) (citing Bush v. Lucas, 462 U.S. 367, 378 (1983)).

181. Padilla v. Yoo, 633 F. Supp. 2d 1005, 1019 (N.D. Cal. 2009).

182. *Id.* at 1013.

183. *Id.* at 1022 (citing Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208 (D.C. Cir. 1985) (quoting *Lucas*, 462 U.S. at 380)).

184. *Padilla*, 633 F. Supp. 2d at 1022 (citing *In re* Iraq and Afghanistan Detainees Litigation, 479 F. Supp. 2d 85, 103 (D.D.C. 2007) (quoting Chappell v. Wallace, 462 U.S. 296, 304 (1983))).

185. *Padilla*, 633 F. Supp. 2d at 1023 (citing Schweiker v. Chilicky, 487 U.S. 412, 421 (1988)).

Unlike *Lucas*, Congress does not occupy the relevant field and did not create a "complex system" to redress grievances for "War on Terror" detainees.[186] Similarly, unlike *Schweiker*, the plaintiff in *Padilla* lacked any "elaborate administrative remedies" for his grievance.[187] Judge White also distinguished the present case from the military context provided by *Chappell* and *Stanley*, arguing that, unlike those cases, a *Bivens* remedy for detainees presented "no danger of intrusion upon the unique disciplinary structure of the military establishment."[188] Finally, Judge White distinguished *Padilla* from *In re Iraq and Afghanistan Detainees Litigation*.[189] In *In re Iraq*, the District Court for the District of Columbia denied *Bivens* claims to foreign citizens suing for deprivation of constitutional rights in Iraq and Afghanistan.[190] The *In re Iraq* court determined that allowing *Bivens* claims for enemy aliens detained on foreign soil would undermine the United States military mission and weaken the Nation's ability to fight an effective war.[191] Judge White distinguished the case, noting that the plaintiff in *Padilla* was a citizen detained within Untied States sovereignty.[192]

Unlike the plaintiff in *Padilla*, all of the Guantánamo detainees who could bring *Bivens* claims are foreign nationals.[193] Despite this, *In re Iraq* is still distinguishable. The thrust of the D.C. District Court's holding in *In re Iraq* was the *combination* of the foreign character of the plaintiffs plus the territory where they were detained being under foreign control and sovereignty.[194] The *In re Iraq* court cited *Eisentrager* and *Verdugo-Urquidez* to support its contention that non-resident aliens are not afforded constitutional protection, but it also cited *Zadvydas v. Davis,* recognizing that the application of the Constitution is contingent upon location.[195] The *Zadvydas* Court declared that "certain constitutional protections available to *persons* inside the United States are unavailable to aliens outside of our

186. *Id.* (citing *Lucas*, 462 U.S. at 389).

187. *Id.* at 1024 (citing *Schweiker*, 487 U.S. at 423).

188. *Padilla*, 633 F. Supp. 2d at 1025.

189. *Id.* at 1024–25.

190. *In re* Iraq and Afghanistan Detainees Litigation, 479 F. Supp. 2d 85, 103 (D.D.C. 2007).

191. *Id.* at 105–06 (citing Johnson v. Eisentrager, 339 U.S. 763, 774 (1950)).

192. *Padilla*, 633 F. Supp. 2d at 1025.

193. *See* List of Guantanamo Detainees, *supra* note 10.

194. *In re Iraq*, 479 F. Supp. 2d at 95.

195. *Id.* at 98 (citing Zadvydas v. Davis, 533 U.S. 678, 693 (2001)).

geographic borders," implying that non-citizens within these boundaries receive some degree of constitutional protections.[196] Or, as the *In re Iraq* court interpreted *Zadvydas*, the Constitution does "not extend to nonresident aliens outside the territorial boundaries of the United States," signaling that the D.C. Circuit recognizes a degree of constitutional-applicability to nonresident aliens within constitutional boundaries.[197]

Measured against *Boumediene's* analysis distinguishing Guantánamo from *Eisentrager* and *Verdugo-Urquidez,* recasting "territorial boundaries" as "de jure and de facto sovereignty," and rejecting formalistic sovereignty tests in favor of a functional policy for determining actual American power over the base, *In re Iraq* is distinguishable from *Bivens* actions brought by Guantánamo detainees. *Boumediene* answered the question of territorial application by carefully examining Guantánamo's legal status before extending habeas corpus rights.[198] Thus, *Boumediene* renders the holding of *In re Iraq* moot as applied to Guantánamo detainees. Just as Guantánamo was not a temporary prison camp in Germany, nor in Mexico and subject to Mexican law and sovereignty, it is not a prison in Iraq or Afghanistan. By redefining the status of Guantánamo for purposes of extraterritorial application of the Constitution, the Supreme Court has distinguished its detainees from those in the prior cases. Thus, Guantánamo detainees' access to *Bivens* remedies appears closer to Mr. Padilla's than to the German POWs of *Eisentrager*, the Mexican citizen injured in Mexico of *Verdugo-Lopez*, or suspected terrorists and enemy combatants held in Iraq or Afghanistan.

Having distinguished the controlling precedent regarding administrative or congressionally compelled special factors, Judge White addressed Yoo's arguments that relevant substantive law counseled hesitation. Specifically, Yoo grounded this argument in the Authorization for Use of Military Force ("AUMF"), the constitutional delegation of military procedure to political branches, a "national security" exception, and foreign relation concerns.[199] After considering each argument, Judge White rejected Yoo's arguments and allowed the plaintiff a *Bivens* remedy.[200]

196. *Zadvydas*, 533 U.S. at 693 (emphasis added).

197. *In re Iraq*, 479 F. Supp. 2d at 98.

198. *Id.* at 99.

199. Padilla v. Yoo, 633 F. Supp. 2d 1005, 1025–30 (N.D. Cal. 2009).

200. *Id.* at 1030.

The AUMF allowed the President to "use all necessary and appropriate force" against the nations responsible for the September 11 terrorist attacks in order to "prevent any future acts of international terrorism against the United States."[201] Judge White conceded that the AUMF granted the President discretion to "formulate the response to terrorism against the United States."[202] At the same time, Judge White pointed out that this power is neither all-encompassing nor immune from judicial review.[203] The AUMF did not speak "specifically or definitively regarding the constitutional standards for the designation or treatment of enemy combatants," and it did not create any remedial scheme like the system analyzed in *Schweiker*.[204] Subject to judicial review, bereft of enabling language regarding constitutional standards, and lacking a remedial scheme, the AUMF did not function as a "special factor" that would counsel hesitancy for a *Bivens* action.[205]

The Constitution delegates war powers to the President and Congress.[206] Judge White recognized that "undoubtedly the 'Constitution recognizes that the core strategies of war making belong in the hands of those who are best positioned and most politically accountable for making them.'"[207] Judge White distinguished this indisputable power on the grounds that while preventing enemy combatants from returning to the battlefield was a "fundamental incident of war," there was no indication that the plaintiff's detention was intended to keep him from returning to the battlefield.[208] More importantly, Judge White identified the tension between the "core strategic matters of war making" and "possible constitutional trespass" on the rights of detained parties.[209] As the Supreme Court noted in *Hamdi*, the constitutional delegation of war powers does not provide the political branches with a "blank check" to override constitutional protections or restrict courts from exercising "their own time-honored and constitutionally mandated roles of reviewing and

201. AUMF, *supra* note 6.

202. *Padilla*, 633 F. Supp. 2d at 1026.

203. *Id.* (citing Hamdi v. Rumsfeld, 542 U.S. 507, 535–36 (2004) (holding that executive decisions made pursuant to the AUMF are reviewable by courts)).

204. *Padilla*, 633 F. Supp. 2d at 1026–27.

205. *Id.*

206. *See* U.S. Const. art. I, § 8; U.S. Const. art. II, § 2.

207. *Padilla*, 633 F. Supp. 2d at 1027 (quoting *Hamdi*, 542 U.S. at 531).

208. *Id.* (citing *Hamdi*, 542 U.S. at 519).

209. *Padilla*, 633 F. Supp. 2d at 1028 (citing *Hamdi*, 542 U.S. at 535).

resolving" constitutional claims.[210] Indeed, the constitutional delegation of war powers "assuredly envisions a role for all three branches when individual liberties are at stake."[211] The judiciary's role is to oversee the use of the war power, because even the importance of war cannot remove the "constitutional limitations safeguarding essential liberties."[212] Accordingly, Judge White rejected Yoo's argument that the constitutional delegation of war powers to the political branches removed the judiciary's ability to evaluate war-related constitutional claims.[213]

Yoo's next argument goes to the heart of the different approaches of *Padilla* and *Rasul II*: the use of "national security" or interference with foreign relations as special factors counseling hesitancy.[214] Essentially, Yoo argued that discovery of relevant materials would expose sensitive information that could potentially jeopardize national security and interfere with foreign relations.[215] Judge White dismissed these arguments for a variety of reasons, but focused primarily on the plaintiff's American citizenship and presence within the actual borders of the United States.[216] Though Judge White acknowledged the practical difficulties and potentially sensitive national security questions that might arise during discovery, he correctly characterized Yoo's national security argument as an individual attempting to take advantage of the "state secrets" evidentiary privilege.[217] If such a state secrets problem should "surface on behalf of the government," the court could address it during discovery rather than barring the case altogether.[218] In other words, Judge White would cross the evidentiary bridge when the occasion came, but this concern was not enough to keep the court from hearing the case.[219]

210. *Hamdi*, 542 U.S. at 535.

211. *Id.* at 536.

212. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934).

213. *Padilla*, 633 F. Supp. 2d at 1028.

214. *Id.*

215. *Id.* at 1028–29.

216. *Id.*

217. *Id.* at 1028.

218. *Id.* Judge White supported his reasoning in a footnote by citing the Ninth Circuit's decision in *Mohamed v. Jeppesen Dataplan, Inc.* 563 F.3d 992, 997 (9th Cir. 2009). However, the Ninth Circuit agreed to rehear the case *en banc*, with the final decision still pending. *See* Mohamed v. Jeppesen Dataplan, Inc., 586 F.3d 1108 (9th Cir. 2009).

219. *Padilla*, 633 F. Supp. 2d at 1028.

In *Rasul II*, the D.C. Circuit stated that its earlier decision in *Sanchez-Espinoza v. Reagan* compelled dismissal of the plaintiff's *Bivens* claim because of the "national security" special factor.[220] The plaintiffs in *Sanchez-Espinoza* were Nicaraguan nationals who brought claims against federal officials stemming from the United States' activities in support of Nicaraguan rebel groups.[221] The D.C. Circuit reasoned 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."[222] In other words, the D.C. Circuit refused to hold that American activities occurring outside of United States sovereignty—like in Nicaragua—were subject to the Constitution.[223] *Rasul II* found this language as controlling and dismissed the plaintiff's claims on that basis, reasoning that *Sanchez-Espinoza*'s applicability to Guantánamo was "unaffected by the Supreme Court's *Boumediene* decision."[224]

As outlined above, the D.C. Circuit's reasoning that *Boumediene* did not alter the sovereignty questions concerning Guantánamo is unconvincing, and its interpretation of *Sanchez-Espinoza* is no different, as it relies on a faulty interpretation of *Boumediene*. By recasting Guantánamo as de facto American territory, *Boumediene* placed the base within the same analytical framework as domestic sites to which all the cases agree the Constitution undoubtedly applies.[225] *Boumediene* did not expressly overrule *Sanchez-Espinoza*, but it certainly made it inapplicable to Guantánamo by holding that Guantánamo is functionally American territory, not foreign soil.[226] After *Boumediene*, *Rasul II*'s use of *Sanchez-Espinoza* as a "special factor" is without merit or support.

The Second Circuit's *en banc* decision in *Arar v. Ashcroft* is similarly distinguishable.[227] In *Arar*, the plaintiff, a dual-citizen of Canada and Syria, brought a *Bivens* action against several officials involved in an "extraordinary rendition" to send him to Syria, where

220. Rasul v. Myers, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (citing Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209 (D.C. Cir. 1985)).

221. *Sanchez-Espinoza*, 770 F.2d at 204.

222. *Id.* at 209.

223. *Id.*

224. *Rasul*, 563 F.3d at 532 n.5.

225. Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008).

226. *Id.*

227. Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc) (emphasis in original).

he was subsequently tortured by Syrian officials.[228] The Second Circuit denied a *Bivens* remedy, reasoning that the plaintiff's claim would "enmesh the courts" in determining the proper motivations for the "policy" of extraordinary rendition.[229] The court was similarly concerned with the complicated information-sharing agreements between the three involved governments (the United States, Syria and Canada), and the possibility of these arrangements becoming public record through the open court system.[230] Though the court noted that it could "consider state secrets and even reexamine judgments made in the foreign affairs context *when [it] must*," it declined to recognize a *Bivens* remedy for maltreatment of a foreign national abroad.[231]

As in *Padilla*, a hypothetical *Bivens* claim arising from a Guantánamo detainee does not present sensitive national security issues that concerned the Second Circuit in *Arar*. First, though all of the Guantánamo detainees are foreign nationals, any relevant constitutional violations have occurred in Guantánamo, an area over which the United States enjoys de facto sovereignty.[232] Second, the inter-governmental concerns that drove the Second Circuit's decision in *Arar* are not present for any *Bivens* action stemming from confinement at Guantánamo. Unlike *Arar*, where the plaintiff was transferred over to Syrian authorities, the detainees remained in American custody at an American-controlled prison camp. Finally, unlike the sensitive information the court sought to limit in *Arar*, the allegations in a hypothetical detainee's *Bivens* complaint have already been alleged in open court or the news media.[233] In any event, this problem is better addressed in the context of discovery, which is beyond this scope of this article.

Following Judge White's approach in *Padilla*, *Arar* and *Sanchez-Espinoza* should be limited to conduct occurring abroad, not on

228. *Id.* at 565–67.

229. *Id.* at 575.

230. *Id.* at 576–78.

231. *Id.* at 575 (citing Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209 (D.C. Cir. 1985)).

232. *See* List of Guantanamo Detainees, *supra* note 10; Boumediene v. Bush, 128 S. Ct. 2229, 2252–62 (2008).

233. *See generally* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1943–44 (2009); Padilla v. Yoo, 633 F. Supp. 2d 1005, 1013–14 (N.D. Cal. 2009); Rasul v. Myers, 563 F.3d 527, 528 (D.C. Cir. 2009). For publicly available information concerning allegations of detainee mistreatment at Guantánamo, *see* Center for Constitutional Rights, *Freedom of Information Act: Ghost Detention and Extraordinary Rendition Case*, http://ccrjustice.org/GhostFOIA.

sovereign American territory.[234] That result seems compelled after *Boumediene*. By not overruling its own earlier cases from which the *Arar* and *Sanchez-Espinoza* decisions derive, the Court was signaling clearly that Guantánamo was different and should be treated as American soil.[235] A claim that alleges violations by American officials at an American site to which the constitution applies is more analogous to the situation presented by *Padilla* than the situation presented by *Arar*. Thus, for hypothetical Guantánamo *Bivens* claims, Judge White's reasoning is illustrative and should be followed.

### C. Step Three – Federal Officials Should Not Be Entitled to Qualified Immunity for Maltreatment at Guantánamo

Qualified immunity serves to protect government officials from liability for civil damages "insofar as their conduct does not violate any clearly established statutory or constitutional rights of which a reasonable person would have known."[236] Qualified immunity balances the "need to hold public officials accountable when they exercise power irresponsibly" against the "need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[237] As part of the shielding function, qualified immunity protects an official from being sued rather than only as a defense to liability.[238] As Judge White points out in *Padilla*, courts should caution against "eviscerat[ing] the notice pleading standard" when deciding "far-reaching constitutional questions on a non-existent factual record" often contained within a motion to dismiss based on qualified immunity.[239]

In *Saucier v. Katz*, the Supreme Court established a rigid two-part analysis to determine the availability of qualified immunity in a *Bivens* action.[240] First, courts had to address whether the alleged facts showed that the government official had violated the plaintiff's constitutional rights.[241] If there was no constitutional violation, then the court need not even reach the question of qualified immunity, as

234. *Padilla*, 633 F. Supp. 2d at 1030.

235. *See Boumediene*, 128 S. Ct. at 2252–62.

236. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1976).

237. Pearson v. Callahan, 129 S. Ct. 808, 815 (2009).

238. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

239. *Padilla*, 633 F. Supp. 2d at 1031 (quoting Hydrick v. Hunter, 500 F.3d 978, 985 (9th Cir. 2007)).

240. Saucier v. Katz, 533 U.S. 194, 201 (2001).

241. *Id.*

the *Bivens* action was untenable.[242] If the court determined that there was a constitutional violation, then it would address "whether the right was clearly established."[243] If it is, then qualified immunity is not available. Under *Saucier*, a right is "clearly established" when the delimitations of the right are "sufficiently clear" that "a reasonable official would understand that what he is doing violates that right."[244] *Anderson v. Creighton* held that this conduct need not be held explicitly unlawful, but that its unlawfulness must be "apparent" in light of existing law.[245] According to the Ninth Circuit, *Anderson* does not create a requirement for officials to "predict[] the future course of constitutional law."[246]

Recently, in *Pearson v. Callahan*, the Supreme Court altered *Saucier* by allowing lower courts discretion to decide which portion of the analysis they would address first in light of the particular circumstances of the case.[247] Each claim must be pleaded within the pleading standard contained within the federal rules.[248] Pursuant to the pleading rules, the court will assume that the facts alleged therein are true.[249] For this hypothetical complaint, I assume that the detainee's complaint contains a claim for violation of the Fifth Amendment guarantee of due process for maltreatment while in involuntary confinement.

Because the Eighth Amendment only applies to "punishment" inflicted after a criminal conviction, the Fifth Amendment governs pre-conviction involuntary detainee mistreatment.[250] The scale of the protection, however, is similar, as the protections afforded to pre-conviction detainees must be "at least as great as the Eighth Amendment protections available to a convicted prisoner."[251] According to the Ninth Circuit, this standard establishes Eighth

242. *Id.*

243. *Id.* at 201.

244. *Id.* (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

245. *Anderson*, 483 U.S. at 640.

246. Ostlund v. Bobb, 825 F.2d 1371, 1374 (9th Cir. 1987).

247. Pearson v. Callahan, 129 S. Ct. 808, 818 (2009).

248. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953–54 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554–56 (2008)).

249. *Twombly*, 550 U.S. at 556.

250. *See generally* City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983); Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979).

251. *City of Revere*, 463 U.S. at 244.

Amendment precedent as a "minimum standard of care" for determining the rights of pre-conviction detainees.[252]

Thus, a *Bivens* complaint would have to allege that the pre-conviction detention at Guantánamo fell below a minimum Eighth Amendment standard of care guaranteed by the Due Process clause. In *Padilla*, the plaintiff's allegations that he was shackled in painful positions, deprived of sleep by excess noise or light, denied necessary medical care, and subjected to extreme psychological stress for the purpose of enhancing interrogation demonstrated a violation of his Due Process right to an Eighth Amendment minimum standard of care for pretrial detention.[253] Assuming that a hypothetical Guantánamo detainee claim would include much of the same material, it appears that it would allege facts sufficient to support a violation of the Due Process right to minimum treatment standards.

The question, then, is whether the constitutional right violated was well established with respect to Guantánamo detainees.[254] Even in cases of "novel factual circumstances," officials can still "be on notice that their conduct violates established law."[255] That the Due Process Clause would apply to foreign nationals held by the United States within United States sovereignty is not a crackpot theory; it was so held in *Hamdi*.[256] In *Padilla*, Judge White argued that "[t]he fact that a unique type or designation of a detainee has come into being does not obliterate the clearly established minimum protections for those held in detention."[257] It seems likely therefore, that while the plaintiff must define the right at the "appropriate level of specificity" (i.e., that the right applies to the status he occupied as a detainee) to defeat qualified immunity, he or she is not required to show that the defendant's conduct had been previously declared unconstitutional.[258]

While Judge White acknowledged that the law concerning the designation of a citizen as an "enemy combatant" was "developing at

252. Or. Advocacy Ctr. v. Mink, 322 F.3d 1101, 1120 (9th Cir. 2003); *see also Bell*, 441 U.S. at 535 n.16 (noting that Due Process requirements for pretrial detainees must meet Eighth Amendment standards); Burrell v. Hampshire County, 307 F.3d 1, 7 (1st Cir. 2002) (analyzing pretrial mistreatment claims under Eighth Amendment framework).

253. Padilla v. Yoo, 633 F. Supp. 2d 1005, 1035 (N.D. Cal. 2009).

254. *See* Saucier v. Katz, 533 U.S. 194, 202 (2001).

255. Hope v. Pelzer, 536 U.S. 730, 741 (2002).

256. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 531 (2004).

257. *Padilla*, 633 F. Supp. 2d at 1036.

258. *Id.* at 1036–37 (citing Wilson v. Layne, 526 U.S. 603, 615 (1999); Blueford v. Prunty, 108 F.3d 251, 254 (9th Cir. 1997)).

the time of the conduct alleged in the complaint," he reasoned that "federal officials were cognizant of the basic fundamental civil rights afforded to detainees under the United States Constitution."[259] In support, Judge White cited *Estelle v. Gamble* and *Youngberg v. Romero*, two Supreme Court cases that held that officials should be cognizant that involuntarily detained persons are entitled to medical care and constitutional protections similar to those afforded to convicted prisoners.[260]

Applying Judge White's reasoning from *Padilla*, though the law regarding detainees and their Due Process rights was also "developing at the time of the conduct alleged," federal officials still should have been on notice that excessive force, maltreatment, or other common Due Process violations were contrary to clearly established rights. United States courts have long found that maltreating prisoners or pretrial detainees is a clear violation of constitutional rights.[261] Maltreatment that is "totally without penological justification" violates the Eighth Amendment's protections for prisoners and Due Process guarantees for pretrial detainees.[262] Furthermore, international agreements to which the United States is a party—like the Geneva Convention—disclaim the use of torture or deliberate maltreatment against enemy combatants.[263] Those examples are persuasive support for the argument that deliberately mistreating pretrial detainees was either clearly established or reasonably predicted as forbidden by United States constitutional law and by the Geneva Convention's requirements. Though the United States has consistently argued that Guantánamo detainees do not fall within any of these categories, the government and its officials should not be able to play fast and loose with constitutional rights guaranteed to persons within United States sovereignty. Instead, these officials should be held accountable for their actions. Thus, courts should not allow federal officials responsible for maltreatment of Guantánamo detainees to claim

259. *Padilla*, 633 F. Supp. 2d at 1037.

260. Youngberg v. Romeo, 457 U.S. 307, 321–22 (1982); Estelle v. Gamble, 429 U.S. 97, 103–04 (1976).

261. *See generally* Hope v. Pelzer, 536 U.S. 730, 738 (2002); Whitey v. Albers, 475 U.S. 312, 319 (1986).

262. Rhodes v. Chapman, 452 U.S. 337, 346 (1981).

263. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

qualified immunity for their actions by arguing that detainees did not have clearly established constitutional rights.

## Conclusion

*Boumediene* did much more than extend the right of habeas corpus to Guantánamo detainees. Justice Kennedy's majority opinion eschewed the rigid formalism advanced by the government and instead examined whether the United States served as the de facto sovereign of Guantánamo. Finding that the United States indeed exercised this privilege, Justice Kennedy found that extension of habeas corpus rights to non-citizen detainees satisfied Justice Harlan's "impracticable and anomalous" test from *Reid v. Covert*. The same reasoning supports *Bivens* claims by detainees for substantive constitutional violations. As Guantánamo is a satellite entity within the de facto sovereignty of the United States, Americans officials there must abide by the Constitution. By the same token, those detained at the prison also may avail themselves of the Constitution's substantive protections. There is not an alternative remedial scheme for potential detainee claims. None of the special factor considerations established by previous precedent applies to the facts of a hypothetical claim. Government officials could infer that their actions were contrary to domestic and international law, thereby quashing their claims to qualified immunity. As long as a detainee could allege violations of a clearly established constitutional right, courts should allow a *Bivens* action to move forward.

Furthermore, though the holding in *Boumediene* is clearly limited to Guantánamo, the Court's adoption of the impracticable and anomalous test suggests that its reasoning may apply to other areas outside of the United States' de jure sovereignty. It is uncertain the extent to which the Court would apply this reasoning to other areas. What is clear, however, is that the Court clearly indicated that Guantánamo Bay was something different than the government thought it ought to be. At the very least, courts should accord the decision the weight and respect customarily afforded to the United States Supreme Court.