Another Glance at Vance: Examining the Seventh Circuit's About-Face on Bivens Immunity and the Military

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ANOTHER GLANCE AT VANCE: EXAMINING THE SEVENTH CIRCUIT’S ABOUT-FACE ON BIVENS IMMUNITY AND THE MILITARY

ERIC MICHEL *


INTRODUCTION

The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government.¹

Donald Vance and Nathan Ertel are American citizens who worked as private defense contractors in Iraq beginning in 2005 after

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¹ Reid v. Covert, 354 U.S. 1, 5-6 (1957) (holding that the military could not constitutionally extend its court-martial jurisdiction to non-military civilians overseas).
the United States’ invasion.\(^2\) In April of 2006, they were detained by the United States military, based on suspicions they were helping their employer supply weapons to Iraqi insurgent groups.\(^3\) Vance and Ertel were, in fact, covertly working with the Federal Bureau of Investigation, voluntarily gathering information concerning the alleged misdeeds of their employer.\(^4\) Vance and Ertel alleged that during their detainment, they were subjected to “threats of violence and actual violence, sleep deprivation and alteration, extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, denial of needed medical care, yelling, prolonged solitary confinement, \textit{incommunicado} detention, falsified allegations and other psychologically-disruptive and injurious techniques.”\(^5\) After it was determined they posed no threat, Vance and Ertel were cleared for release; however, they were still held in solitary confinement by the military for another 18 and 52 days, respectively.\(^6\) Upon their return to the United States, the pair filed suit against then-Secretary of Defense Donald Rumsfeld and other military officials, alleging that the detainment and torture they experienced were violations of the United States Constitution. However, their sought remedy—money damages—was not authorized by any federal statute.\(^7\)

The Supreme Court has long held that federal courts have both the authority and the duty to craft judicial remedies to ensure that violations of federally protected rights are redressed, even in the absence of statutory authority to do so.\(^8\) These remedies—creations of federal common law—are referred to as \textit{Bivens} remedies, named after

\(^2\) Vance v. Rumsfeld, 701 F.3d 193, 195-96 (7th Cir. 2012) (en banc), \textit{cert. denied} No. 12-976, 2013 WL 488898 (U.S. June 10, 2013) [hereinafter “Vance III ’”].

\(^3\) \textit{Id.} at 196.

\(^4\) \textit{Id.}

\(^5\) \textit{Id.}

\(^6\) \textit{Id.}

\(^7\) \textit{Id.} at 198.

\(^8\) See Bell v. Hood, 327 U.S. 678 (1946) (“where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief”).
the Supreme Court decision from which they originated. Both the district court and a three-judge panel of the Seventh Circuit Court of Appeals determined that Vance and Ertel’s lawsuit could potentially allow for the awarding of money damages under Bivens. A comment previously published in this Seventh Circuit Review disagreed with these decisions. However, the case was reheard en banc by the full Seventh Circuit, and the lower court decisions were reversed and vacated. The en banc majority posed the question as “whether to create an extra-statutory right of action for damages against military personnel who mistreat detainees,” and determined that both Supreme Court precedent and respect for the military in matters of national security foreclosed a Bivens remedy in such circumstances. A petition for writ of certiorari was filed on February 5, 2013, but was denied on June 10, 2013.

This Note argues that the Seventh Circuit en banc decision dismissing Vance and Ertel’s complaint not only mischaracterized the relevant Bivens case law, but also abandoned the crucial role of the federal courts as guardians of constitutional rights in times of war. Part I of this Note details the underlying facts of Vance v. Rumsfeld as derived from the complaint—which the Seventh Circuit was obligated to accept as true—to fully demonstrate the egregiousness of the

11 See John Auchter, Big Boy Rules, or How I Learned to Stop Worrying and Love “Special Factors,” 7 SEVENTH CIRCUIT REV. 1 (2011), at http://www.kentlaw.edu/7cr/v7-1/auchter.pdf (arguing that Congress, not the courts, is the proper forum for determining whether Bivens remedies are available for plaintiffs whose constitutional rights are violated in a warzone).
12 Vance III, 701 F.3d at 205.
13 Id. at 198 (emphasis added).
14 Id. at 199-200.
16 Vance III, 701 F.3d at 196.

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alleged conduct. Part II summarizes the history and progression of \textit{Bivens} jurisprudence, placing particular emphasis on the cases involving allegations of misconduct by military officials. Part III returns to the \textit{Vance} litigation, summarizing all three opinions and their treatment of the applicability of \textit{Bivens}. Part IV then analyzes the \textit{en banc} majority opinion and argues the decision errs in three major respects: (1) the court improperly interpreted \textit{Bivens} precedent involving military plaintiffs to preclude Vance and Ertel’s claim despite their status as non-military civilians; (2) the court’s decision disregards the significance of qualified immunity, which already shelters government officials from suit so long as they execute their duties in good faith; and (3) the court was reluctant to scrutinize alleged violations of civil liberties during times of war, punting such scrutiny to other branches of government as a matter of “national security.” Such scrutiny is particularly crucial in situations such as \textit{Vance}, which involve “a right so basic as not to be tortured by our government.”\footnote{Id. at 211 (Hamilton, J. dissenting).}

I. THE FACTS

After the United States’ invasion of Iraq in 2004, Donald Vance, a Chicago native and veteran of the United States Navy, began working as a security consultant for Shield Group Security (“SGS”), an Iraqi security company in Baghdad.\footnote{Second Amended Complaint at 8-10, Vance I, 694 F.Supp.2d 957 (N.D. Ill. 2010) (No. 06-CV-06964) [hereinafter “Complaint”].} Nathan Ertel, a Virginia native, was also hired by SGS to work in Baghdad as a contract manager.\footnote{Id.} During their employment, Vance and Ertel observed allegedly corrupt payments “being made by SGS agents to certain Iraqi sheikhs.”\footnote{Id. at 11.} In October 2005, while in Chicago, Vance informed the FBI of the strange observed activities taking place at SGS, and upon his return to

\begin{footnotesize}
\item[17] Id. at 211 (Hamilton, J. dissenting).
\item[18] Second Amended Complaint at 8-10, Vance I, 694 F.Supp.2d 957 (N.D. Ill. 2010) (No. 06-CV-06964) [hereinafter “Complaint”].
\item[19] Id.
\item[20] Id. at 11.
\end{footnotesize}
Iraq began gathering such information as an informant for the FBI.\(^{21}\) Ertel assisted Vance in gathering this information.\(^{22}\) As their undercover efforts progressed, so did the number of observed improprieties, expanding to SGS’ “dealings with the Iraqi government, other companies and contractors, and the sheiks . . . as well as on high-level officials in the Iraqi government.”\(^{23}\) Notably, Vance and Ertel provided the FBI with information regarding their supervisor at SGS who was allegedly running a “Beer for Bullets” program, in which he would sell liquor to American soldiers in exchange for weapons and ammunition, which SGS would then sell for a profit.\(^{24}\) This practice led to SGS possessing an “unnecessary and alarming” stockpile of weapons.\(^{25}\) Vance became suspicious that SGS was supplying weapons to the United States’ enemies in Iraq.\(^{26}\)

Vance and Ertel alleged that on an unspecified date, a “high-ranking” SGS employee confiscated both men’s Common Access Cards, leading the two men to believe that their cover had been blown. These cards were their Department of Defense issued identification badges, which allowed them to freely move about the military compound and other United States properties in Iraq.\(^{27}\) This confiscation in effect trapped the two inside the SGS compound.\(^{28}\) Vance called their FBI contacts in the United States, who said they should consider themselves hostages and advised the two to barricade themselves inside their room with weapons until they could be rescued by the military.\(^{29}\) They were in fact rescued, upon which Vance and Ertel were transported to the United States Embassy.\(^{30}\)

\(^{21}\) Id. at 11-12.
\(^{22}\) Id. at 12.
\(^{23}\) Id.
\(^{24}\) Id. at 19-20.
\(^{25}\) Id. at 20.
\(^{26}\) Vance III, 701 F.3d 193, 196 (7th Cir. 2012).
\(^{27}\) Complaint, supra note 18, at 23.
\(^{28}\) Id. at 24.
\(^{29}\) Id. at 25.
\(^{30}\) Id. at 25.
questioned by United States officials, to whom they explained their status as FBI informants assisting in documenting the misdeeds of SGS.\(^\text{31}\)

After their questioning and a few hours of sleep, Vance and Ertel were suddenly awoken by armed guards, placed under arrest, and taken to an unknown United States military compound in Iraq (believed to be Camp Prosperity), where they were placed in a cage, strip-searched, and given jumpsuits.\(^\text{32}\) They remained there for approximately two days, where they were held in separate, perpetually lit solitary confinement cells and fed twice per day.\(^\text{33}\) After two days they were shackled, blindfolded, and transported to Camp Cropper, where they were again placed in solitary confinement in cold, cramped cells that had “bugs and feces” on the walls.\(^\text{34}\) The lights were always on, and the cells were filled with music “at intolerably-loud volume;” if they fell asleep they were awoken by guards.\(^\text{35}\) They were “often denied food and water completely, sometimes for an entire day.”\(^\text{36}\) They were also denied treatment for basic medical care and hygiene.\(^\text{37}\) For example, Vance continually requested aid for a severe toothache; the tooth was eventually pulled in a “hurriedly and covertly” performed procedure in which Vance was denied painkillers or antibiotics.\(^\text{38}\)

For a week, Vance and Ertel were not allowed to go outdoors at any time; guards “constantly threatened” the use of “excessive force” if they did not “immediately and correctly comply with every instruction given them.”\(^\text{39}\) They were also not allowed any contact

\(^{31}\) Id. at 25-26.
^{32}\ Id. at 28.
^{33}\ Id. at 28-29.
^{34}\ Id. at 29.
^{35}\ Id. at 30.
^{36}\ Id.
^{37}\ Id.
^{38}\ Id. at 30-31.
^{39}\ Id. at 31.
with the outside world for several weeks.\textsuperscript{40} While at Camp Cropper they were continually interrogated regarding their knowledge of the inner-workings of SGS, and were repeatedly threatened that they would “never be allowed to leave” if they did not properly comply.\textsuperscript{41} At all times they were denied legal counsel.\textsuperscript{42}

Eventually both Vance and Ertel were informed there would be a proceeding before a “Detainee Status Board” to determine their status as either “enemy combatants,” “security internees,” or “innocent civilians.”\textsuperscript{43} Shortly thereafter, they were told they had been initially classified as “security internees” because of their “work for a business entity that possessed one or more large weapons caches on its premises and may be involved in possible distribution of these weapons to insurgent/terrorist groups”—precisely the activities the two had been reporting to the FBI.\textsuperscript{44} Both Vance and Ertel were provided with an opportunity to defend themselves of such accusations before the Detainee Status Board, albeit without access to requested evidence; the right to counsel; the right to call witnesses, including each other; the right to see the evidence against them; the right to remain silent; or the right to cross-examine adverse witnesses.\textsuperscript{45} At the end of the proceedings, both were returned to solitary confinement to await the Board’s findings.\textsuperscript{46}

After about one month following the hearing, Ertel’s release was authorized, though his actual release occurred eighteen days later.\textsuperscript{47} He was put on a bus to the Baghdad airport without any necessary documentation to leave Iraq.\textsuperscript{48} He was only able to leave after encountering a friend at the airport who arranged his departure through

\begin{footnotes}
\item[40] Id. at 32.
\item[41] Id. at 33-35.
\item[42] Id. at 33.
\item[43] Id. at 35.
\item[44] Id. at 35-36.
\item[45] Id. at 38.
\item[46] Id. at 42.
\item[47] Id.
\item[48] Id.
\end{footnotes}
the U.S. Air Force. Vance was held for an additional two months after Ertel's release, and his interrogations continued. He too was eventually dropped off at the Baghdad airport without any documentation to return to the United States. He eventually secured a flight home on his own.

Neither man was ever formally charged by the military with any wrongdoing.

II. THE LAW: *BIVENS* AND IMPLIED CONSTITUTIONAL RIGHTS

Upon their return to the United States, Vance and Ertel sued former Secretary of Defense Donald Rumsfeld in his individual capacity, as well as a number of unidentified defendants at Camp Cropper whose identities were unknown, seeking money damages. However, there is no federal statute that provides a remedy of money damages for the alleged conduct. While Congress has passed legislation that authorizes federal courts to grant monetary relief for violations of constitutional rights by state and local officials (commonly referred to by its placement in the U.S. Code as “Section 1983”), there is no analogous statutory provision that allows such suits against federal officers. The origins of Section 1983 date back to Reconstruction, providing a private enforcement mechanism to vindicate many of the newly guaranteed rights granted by the Civil

49 Id.
50 Id.
51 Id. at 43.
52 Id.
53 Id.
54 Vance II, 653 F.3d 591, 598, fn. 4 (7th Cir. 2011).
55 Vance III, 701 F.3d 193, 198 (7th Cir. 2012).
56 *See* 42 U.S.C. § 1983 (2006) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[,]”).
War Amendments and civil rights acts.\textsuperscript{57} Section 1983 was “an important part of the basic alteration in our federal system wrought in the Reconstruction era . . . [that clearly established] the role of the Federal Government as a guarantor of basic federal rights against state power[.]”\textsuperscript{58} Congress’ decision not to include federal officials within the scope of Section 1983 raises numerous questions about the respective roles of the legislature and the courts when such private remedies are sought.\textsuperscript{59}

With that said, federal courts have in the past found it proper to create causes of action and award relief even in the absence of explicit statutory authority. For example, the Supreme Court has previously held that courts may imply private rights from federal statutes if such rights are necessary to accomplish Congressional intent, although the Court in recent decades has admittedly retreated from this approach.\textsuperscript{60} Additionally, in the context of constitutional violations, federal courts


\textsuperscript{60}The Court first adopted a broad approach embracing implied rights of action if such a right would be “necessary to make effective the congressional purpose” of the statute. See J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (implying a private cause of action under § 14(a) of the Securities Exchange Act of 1934). The Court would later mandate a more detailed inquiry into Congressional intent before implying a private right of action by creating a restrictive four-factor test. See Cort v. Ash, 422 U.S. 66, 78 (1975). But even with this new restrictive test in place, the Court still found a private cause of action when necessary to effectuate a statute’s objective. See Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) (creating a private right of action under Title IX of the Educational Amendments of 1972). The modern approach, however, is that private rights of action may be implied only if there is affirmative evidence that Congress intended to create such a right of action and private remedy. See Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001). While the modern standard is more demanding, it has not entirely eliminated courts’ ability to imply rights of action under federal statutes. The desirability of the Court’s shift has also created passionate debate amongst legal scholars. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 400 (5th ed. 2007); see also FALLON, JR., supra note 59, at 705-08 (documenting the Court’s shift in this area).
have long held in favor of the ability to provide injunctive relief against federal officials who may commit future violations. In this manner the Constitution acts as a shield, protecting the litigant against future deprivations of his or her rights before they even occur. But what of using the Constitution instead as a sword, arming the litigant with a post-deprivation weapon to avenge violations after they occur? As the old adage says, sometimes the best defense is a good offense.

The ability of federal courts to provide litigants with a sword—money damages—for infringements of constitutional rights was not contemplated by the Supreme Court until 1946. In Bell v. Hood, the plaintiff sought $3000 in monetary damages against the FBI for alleged unconstitutional arrests and searches in violation of the Fourth and Fifth Amendments. Although no particular statute authorized the suit, the Court held that federal subject matter jurisdiction existed because the case “arose under” the Constitution. The Court left the lower court to determine if the plaintiff had pleaded a valid cause of action under federal law. It would take another twenty-five years, in its landmark Bivens decision, for the Court to return to the issue of whether “a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct.”

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61 CHEMERINSKY, supra note 60, at 606 (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) (denying injunctive relief against the head of the federal War Assets Administration but acknowledging such relief is available against a federal officer who acts outside the scope of constitutional authority or delegated statutory authority)).


63 Id. at 685.

64 Id. On remand, the district court dismissed, finding no cause of action.


66 Id. at 389.
A. Bivens v. Six Unknown Named Agents

In November of 1965, federal agents entered the apartment of Webster Bivens and arrested him in front of his wife and children for alleged narcotics violations. The federal agents did so without a warrant and allegedly utilized excessive force in making the arrest. Bivens sought damages from each of the officers, alleging that the arrest violated the Fourth Amendment’s prohibition against unreasonable searches and seizures; however, his complaint was dismissed by the district court for a failure to state a claim, as no federal statute authorized suit against the federal officers for their conduct.

In reversing the dismissal of the complaint, the Bivens court reiterated its holding from Bell v. Hood that “where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.” Although no particular statutory provision allowed relief, the Court nonetheless proclaimed that awarding damages “should hardly seem a surprising proposition,” because “[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”

However, the Court did articulate two situations in which implying a non-statutory cause of action would be inappropriate, although neither applied in the Bivens case. First, where “special factors counseling hesitation in the absence of affirmative action by Congress” were present, the Court stated it would refuse to create a non-statutory remedy. Additionally, the Court stated where there is an “equally effective [remedy] in the view of Congress” to aggrieve a wronged plaintiff, implying a non-statutory cause of action would also

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67 Id.
68 Id.
69 Id. at 389-90.
70 Id. at 392 (quoting Bell v. Hood, 327 U.S. at 684).
71 Bivens, 403 U.S. at 395.
72 Id. at 396.
be improper. The Court, however, did not elaborate what would constitute either “special factors” or an “equally effective” alternative remedy.

_Bivens_ has been controversial since its inception because it gives the federal courts the power to create federal causes of action, a role that is typically thought to be reserved solely to the legislative branch. Dissenting in _Bivens_, Chief Justice Burger stated:

We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not.

Other dissenters in subsequent _Bivens_ actions have similarly argued that the judicial branch undermines the constitutional system each time it creates a damages remedy without legislative authorization. Proponents of this view often argue that courts are inherently powerless to create such remedies—a formalist view of separation of powers—or that courts simply should not foray into the legislative domain and make their own policy decisions—a prudential concern. But if a guaranteed constitutional right has been violated

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73  _Id._ at 397.
74  _Id._ at 411-12 (1971) (Berger, C.J., dissenting).
75  _See_ Carlson _v._ Green, 446 U.S. 14, 40 (1980) (Rehnquist, J., dissenting) (“it is obvious that when Congress has wished to authorize federal courts to grant damages relief, it has known how to do so and has done so expressly”); Corr. Serv. Corp. _v._ Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., dissenting) (“_Bivens_ is a relic of heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition.”).
76  Susan Bandes, _Reinventing Bivens: The Self-Executing Constitution_, 68 S. Cal. L. Rev. 289, 312 (1995); _see also_ _e.g._, Auchter, _supra_ note 11, at 24-27 (arguing that _Vance II_ was incorrectly decided because Congress should be the one to fashion remedies for violations of constitutional rights in a warzone).
with no available legislative remedy, an overly formalistic view risks missing the “forest” of the document’s promise of individual liberty amongst the “trees” of its literal text.\footnote{77}{Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1525 (1991).}

One of [the Constitution’s] important objects is the designation of rights. . . [T]he judiciary is clearly discernible as the primary means through which these rights may be enforced. . . Unless such rights are to become merely precatory, [litigants with] no effective means other than the judiciary to enforce these rights[] must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.\footnote{78}{Davis v. Passman, 442 U.S. 228, 241-42 (1979) (allowing a Bivens action brought by a former congressional staff member alleging she had been fired on the basis of sex in violation of the Fifth Amendment).}

Since *Marbury v. Madison*, the American constitutional structure has required that federal courts allow “every individual to claim the protection of the laws, whenever he receives an injury.”\footnote{79}{Marbury v. Madison, 5 U.S. 137, 163 (1803).} Enforcement of constitutional rights cannot be dependent on the affirmative assent of the political branches of government, for “the Constitution is meant to circumscribe the power of government where it threatens to encroach on individuals.”\footnote{80}{Bandes, supra note 76, at 292.} If that were not the case, the Constitution’s system of checks and balances amongst its coexisting three branches would be eviscerated. When viewed in this manner, *Bivens* does not offend separation of powers: it reinforces it.

B. Carlson v. Green

Nine years after *Bivens*, the Court held in *Carlson v. Green* that a *Bivens* remedy was appropriate for a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment, even
though the Federal Tort Claims Act ("FTCA") created a parallel remedy. In *Carlson*, a mother had sued federal prison officials on behalf of her deceased son, alleging he had died from personal injuries while in the prison. In allowing her to proceed with her *Bivens* action, the majority opinion unequivocally stated that, "victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." 

*Carlson* was an important *Bivens* decision in two respects. First, the decision expanded *Bivens* liability to allegations of prisoner abuse. Second, the *Carlson* Court articulated several reasons why *Bivens* was an effective avenue for remedying certain constitutional violations. Although the FTCA provided an alternative remedy against the United States generally, the Court found the FTCA to be a "counterpart" to individual *Bivens* liability, and not preemptive. The greater deterrent effect of personal liability, the possibility of punitive damages, and the option for a jury trial, were all found to be justifications for extending *Bivens* protection for victims of prison abuse.

C. Chappell v. Wallace

The Supreme Court first considered *Bivens* liability in the military context in *Chappell v. Wallace*, in which five black Navy servicemen sued several of their superior officers, alleging intentional acts of unconstitutional racial discrimination. The Ninth Circuit had authorized the award of damages based on *Bivens*, but the Court reversed in a unanimous decision. In doing so, the Court cited *Feres*...
v. United States, which had previously addressed the question of “whether soldiers could maintain tort suits [under the FTCA] against the government for injuries arising out of their military service.” While the FTCA’s language was broad enough to permit such recovery, Feres held that “the peculiar and special relationship of the soldier to his superiors” precluded such an award. Put another way, the Feres Court held that civilian courts should not award FTCA damages to members of the military without explicit congressional authorization to do so.

Although the Chappell Court acknowledged that the question of Bivens liability was distinct from the question of FTCA liability in Feres, the Court still relied heavily on Feres’ analysis to determine whether a “special factor” that precluded a Bivens remedy was present. The Court ultimately held that, based on the “unique disciplinary structure of the military establishment,” as well as Congress’ establishment of an internal military system for review of complaints and grievances, it would be “inappropriate to provide enlisted military personnel a Bivens-type remedy against their superior officers.”

D. United States v. Stanley

Chappell created confusion in the lower courts as to whether all Bivens suits arising out of military service were barred or just suits involving an officer-subordinate relationship. In United States v. Stanley, the Court addressed this confusion, expressly precluding all Bivens suits “arising out of or in the course of activity incident to

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89 Chappell, 462 U.S. at 299.
90 Id. (internal citations omitted).
91 Id.; see also id. at 304 (“Here, as in Feres, we must be concerned with the disruption of the peculiar and special relationship of the soldier to his superiors’ that might result if the soldier were allowed to hale his superiors into court.”) (internal punctuation and citations omitted).
92 Id. at 304.
93 CHEMERINSKY, supra note 60, at 621.
In *Stanley*, a former Army sergeant plaintiff had been secretly administered doses of LSD without his knowledge or consent. He filed suit under the FTCA, but his complaint was dismissed as barred by the aforementioned *Feres* doctrine. However, the lower court ruled the plaintiff could still seek damages under *Bivens*. The Court reversed, reiterating that “uninvited intrusion by the judiciary” into military affairs is inappropriate. The Court clarified that the “special factor counseling hesitation” articulated in *Chappell* was not limited to the military officer-subordinate context. Rather, the “special factor” was as extensive as the one articulated in *Feres*, where the Court held that the FTCA does not apply to “injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.” Thus, because the *Stanley* plaintiff’s injury was one that had occurred in the course of activity incident to service, no *Bivens* remedy was available.

### E. Current Status of Bivens

The Court in the last several decades has “consistently refused to expand, and indeed has substantially limited, the availability of *Bivens* suits.” For example, in *Correctional Services Corp. v. Malesko*, a *Bivens* case denying recovery against a private corporation operating in conjunction with the federal Bureau of Prisons, then Chief Justice Rehnquist stated:

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95 *Id.* at 671.
96 *Id.* at 672.
97 *Id.*
98 *Id.* at 683.
100 *Stanley*, 483 U.S. at 683-84.
101 CHEMERINSKY, *supra* note 60, at 613.
Since [Carlson v. Green] we have consistently refused to extend Bivens liability to any new context or new category of defendants. . . . In 30 years of Bivens jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer’s unconstitutional conduct. Where such circumstances are not present, we have consistently rejected invitations to extend Bivens[].

In its 2007 decision of Wilkie v. Robbins, the Court cautioned that Bivens is not an “automatic entitlement” to non-statutory damages; rather, the application of Bivens must “represent a judgment about the best way to implement a constitutional guarantee.” Most recently, in Minneci v. Pollard, the Court held that a Bivens action brought against the employees of a privately operated federal prison was impermissible because state tort law provided an adequate alternative remedy. In a concurring opinion, Justices Scalia and Thomas characterized Bivens as “a relic of heady days in which this Court assumed common-law powers to create causes of action by constitutional implication.” But despite this increased hesitancy to apply the doctrine in new settings, Bivens has never been overruled.

III. THE LITIGATION

Upon their return to the United States, Vance and Ertel sued former Secretary of Defense Donald Rumsfeld in his individual capacity, as well as a number of unidentified defendants at Camp

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103 Id. at 68-70.
104 Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (denying a Bivens remedy to a rancher who alleged he was intimidated and harassed by the government into granting an easement).
106 Id. at 626 (Scalia, J., concurring) (quoting Corr. Serv. Corp., 534 U.S. at 75) (internal punctuation omitted).
Cropper whose identities were then unknown. Rumsfeld responded with a motion to dismiss for failure to state a claim.

A. Vance I – The District Court

In determining whether to grant former Secretary Rumsfeld’s motion to dismiss, Judge Wayne Anderson of the Northern District of Illinois first confronted the question of whether Rumsfeld was entitled to qualified immunity, which would extinguish the right to seek a remedy under Bivens. This analysis required a two-step inquiry: (1) “whether the facts alleged show that the official’s conduct violated a constitutional right,” and if so, (2) whether that right was “clearly established” at the time of the alleged conduct. After lengthy examination, Judge Anderson answered both in the affirmative and denied Rumsfeld’s qualified immunity defense. Judge Anderson found the plaintiffs had sufficiently alleged conduct that cumulatively was enough to “shock the conscience of those belonging to a civilized system of justice.” Judge Anderson also found that relevant precedent had established that “American citizens do not forfeit their core constitutional rights when they leave the United States, even when their destination is a foreign war zone,” and concluded it was “recognized that federal officials may not strip citizens of well-settled constitutional protections against mistreatment simply because they are located in a tumultuous foreign setting.”

After determining the defendants did not possess qualified immunity, Judge Anderson next conducted a Bivens analysis to

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107 Vance II, 653 F.3d 591, 598, fn. 4 (7th Cir. 2011).
109 Id. at 966 (citing Saucier v. Katz, 533 U.S. 194, 200-01 (2001)).
111 Id. at 966 (quoting Rochin v. California, 342 U.S. 165, 174 (1952)) (internal punctuation omitted).
112 Vance I, 694 F.Supp.2d at 970.
113 Id. at 971.
determine whether that remedy was available.\textsuperscript{114} In his analysis, Judge Anderson gave little attention to whether adequate alternative remedies existed, as both sides had apparently agreed that the only arguably applicable federal statute under the alleged facts (the Detainee Treatment Act) provided no remedy.\textsuperscript{115} Judge Anderson found the absence of an alternative remedy “strong support” for the application of \textit{Bivens}, for “litigants who allege that their own constitutional rights have been violated, who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.”\textsuperscript{116}

As to whether any “special factors counseled hesitation,” Judge Anderson analyzed three arguments offered by Rumsfeld: “separation of powers, misuse of the courts as a weapon to interfere with the war effort, and other serious adverse consequences for national defense.”\textsuperscript{117} Judge Anderson proclaimed that “a state of war is not a blank check . . . when it comes to the rights of the American citizens, and therefore, it does not infringe on the core role of the military for the courts to exercise their-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.”\textsuperscript{118} Rather, “[w]hen an American citizen sets out well-pled allegations of torturous behavior by executive officials abroad,” courts have a duty to examine the individual circumstances rather than issue blanket protection, which would risk “condens[ing] power into a single branch of government.”\textsuperscript{119} Therefore, finding there were no “special factors counseling hesitation” precluding a \textit{Bivens} remedy, Judge Anderson denied Rumsfeld’s motion to dismiss.\textsuperscript{120}

\begin{itemize}
  \item \textsuperscript{114} \textit{Id.}
  \item \textsuperscript{115} \textit{Id. at 972.}
  \item \textsuperscript{116} \textit{Id.} (quoting \textit{Davis v. Passman}, 442 U.S. 228, 242 (1979)).
  \item \textsuperscript{117} \textit{Id. at 973.}
  \item \textsuperscript{118} \textit{Id. at 974} (citing \textit{Hamdi v. Rumsfeld}, 542 U.S. 507, 535 (2004)) (internal quotations omitted).
  \item \textsuperscript{119} \textit{Id. at 975} (quoting \textit{Hamdi}, 542 U.S. at 535-36).
  \item \textsuperscript{120} \textit{Id.}
\end{itemize}
Also of note in Judge Anderson’s opinion was the rejection of Rumsfeld’s argument that the Supreme Court’s consistent refusal to extend *Bivens* in “any new context or category of defendants” was itself a reason to dismiss.\(^{121}\) While Judge Anderson acknowledged there had been an increased hesitancy to apply *Bivens*, he believed “it can hardly be said [that the Court has] adopted a steadfast rule against” the application of *Bivens* by “federal courts tasked with adjudicating distinct constitutional violations.”\(^ {122}\)

### B. Vance II – The Seventh Circuit Panel

On appeal, a three-member panel of the Seventh Circuit affirmed Judge Anderson’s decision, finding that “a *Bivens* remedy should be available to civilian U.S. citizens in a war zone, at least for claims of torture or worse,” and that Vance and Ertel had adequately pled such a claim against Rumsfeld, who was not entitled to qualified immunity.\(^ {123}\) Notably, regarding Rumsfeld’s personal responsibility, the majority panel found not only that the “plaintiffs have sufficiently alleged that Secretary Rumsfeld acted deliberately in authorizing interrogation techniques that amount to torture,” but also went further than Judge Anderson and found that Vance and Ertel sufficiently pled facts showing “deliberate indifference” by Rumsfeld in failing to stop the torture despite actual knowledge of the unconstitutional abuse.\(^ {124}\) Qualified immunity was denied because, for much the same reasons articulated by Judge Anderson, “a reasonable official in Secretary Rumsfeld’s position in 2006 would have realized that the right of a United States citizen to be free from torture at the hands of one’s own

\(^{121}\) *Id.* at 972.

\(^{122}\) *Id.*

\(^{123}\) Vance II, 653 F.3d 591, 598-99 (7th Cir. 2012).

\(^{124}\) *Id.* at 600; see also *id.* at 601-04 (detailing the Complaint’s allegations that Secretary Rumsfeld “devised,” “authorized,” “directed,” and “supervised” policies that permitted the use of unlawful torture in Iraq and ignored “specific direction from Congress” and “took no action” to stop such policies).
government was a ‘clearly established’ constitutional right and that the techniques alleged by plaintiffs add up to torture.”

As to the appropriateness of a *Bivens* remedy, the majority began by asserting that there would be “no doubt that if a federal official, even a military officer, tortured a prisoner in the United States, the tortured prisoner could sue for damages under *Bivens*.” As to whether any special factors counseled hesitation, the majority first noted that Rumsfeld’s asserted immunity would effectively immunize all military personnel in a war zone from civil liability for acts of “deliberate torture and even cold-blooded murder of civilian U.S. citizens,” an immunity the court characterized as “truly unprecedented.” In questioning the appropriateness of this expansive immunity, the majority explicitly rejected the applicability of *Chappell* and *Stanley*, finding it was “well established under *Bivens* that civilians may sue military personnel who violate their constitutional rights.” As to the constitutional implications of the alleged violations occurring in a war zone on foreign soil, the majority stated that even outside our nation’s borders the United States’ powers are still subject to constitutional restrictions, and “when civilian U.S. citizens leave the United States, they take with them their constitutional rights that protect them from their own government.”

125 *Id.* at 611.
126 *Id.*
127 *Id.* at 613. The majority did briefly address whether an alternative remedy existed for the plaintiffs—which Rumsfeld had conceded at the trial level was not the case—because it received an *amicus* brief from former Department of Defense officials offering alternatives for relief such as internal military detainee complaint procedures, the Geneva Conventions, or the Uniform Code of Military Justice. *Id.* at 613. The majority found none of the proposed alternative remedies sufficiently meaningful in the *Bivens* context. *Id.*
128 *Id.* at 615.
129 *Id.* at 616, fn. 17.
130 *Id.* at 616.
131 *Id.* at 617 (quoting Boumediene v. Bush, 553 U.S. 723, 765 (2008)).
132 *Id.* at 616 (citing Reid v. Covert, 354 U.S. 1 (1957)).
With these considerations in mind, the majority rejected the two special factors proffered by Rumsfeld. First, Rumsfeld argued that courts should not interfere with military decision-making out of respect for the Executive’s constitutional role in such matters.\(^\text{133}\) However, the majority believed the plaintiffs were simply seeking redress for individual wrongs, not seeking an inappropriately broad challenge to military policy through the courts.\(^\text{134}\) Additionally, the majority believed its role in reviewing statutory and constitutional claims of torture by the executive reinforced the separation of powers doctrine rather than undermined it, protecting against unchecked abuse of authority by one branch of government.\(^\text{135}\) Secondly, Rumsfeld argued that because Congress had passed legislation regarding detainee treatment without providing a statutory private right of action, it did not intend for such a right to exist and thus \textit{Bivens} remedies were inappropriate.\(^\text{136}\) The majority rejected this argument on the basis that \textit{Bivens} is a well-known legal doctrine that Congress assuredly was aware might apply when enacting such legislation, and thus taking no steps to foreclose \textit{Bivens} remedies actually supported their application.\(^\text{137}\) The majority concluded its \textit{Bivens} discussion as follows:

If we were to accept the defendant’s invitation to recognize the broad and unprecedented immunity they seek, then the judicial branch—which is charged with enforcing constitutional rights—would be leaving our citizens defenseless to serious abuse or worse by another branch of their own government. . . . Relying solely on the military to police its own treatment of civilians . . . would amount to an

\(^{133}\) \textit{Id.} at 618.

\(^{134}\) \textit{Id.}

\(^{135}\) \textit{Id.} at 619.

\(^{136}\) \textit{Id.} at 619.

\(^{137}\) \textit{Id.} at 622.
extraordinary abdication of our government’s checks and balances that preserve Americans’ liberty.\textsuperscript{138}

\textit{C. Vance III – The En Banc Reversal}

Rumsfeld was then granted a rehearing \textit{en banc}, which vacated the panel opinion.\textsuperscript{139} At the outset, the \textit{en banc} majority noted that the Supreme Court “has not created another \textit{[Bivens action]} during the last 32 years—though it has reversed more than a dozen appellate decisions that had created new actions for damages.”\textsuperscript{140} Operating under the assumption that \textit{Bivens} was generally disfavored, the majority stated the Supreme Court had “never created or even favorably mentioned the possibility of non-statutory right of action for damages against military personnel . . . [and had] never created or even favorably mentioned a nonstatutory right of action for damages on account of conduct that occurred outside the borders of the United States.”\textsuperscript{141}

Unlike the panel opinion, the \textit{en banc} majority found the \textit{Chappell} and \textit{Stanley} decisions relevant in that their “principal point was the civilian courts should not interfere with the military chain of command . . . without statutory authority.”\textsuperscript{142} The majority expressed the belief that the judiciary’s inexperience in the area of military discipline meant that the executive branch and Congress were best suited to weigh the “essential tradeoffs” and make the difficult decisions regarding the appropriateness of damages awards against soldiers and their superiors.\textsuperscript{143} The majority then noted that Congress had recently enacted or amended several statutes affecting the interests and rights of military detainees, none of which provided for personal

\begin{flushleft}
\textsuperscript{138} \textit{Id.} at 625-26.
\textsuperscript{139} Vance III, 701 F.3d 193, 197 (7th Cir. 2012).
\textsuperscript{140} \textit{Id.} at 198.
\textsuperscript{141} \textit{Id.} at 198-99.
\textsuperscript{142} \textit{Id.} at 199.
\textsuperscript{143} \textit{Id.} at 200.
\end{flushleft}
damages remedies against military personnel or their superiors. While the relief provided by these statutes is both capped and discretionary—and thus not a full substitute for a Bivens remedy—the majority believed it signaled Congressional intent to provide compensatory relief for claims against military personnel from the public treasury rather than private pockets.

After quickly dispensing with the civilian status of the plaintiffs as irrelevant, the majority then proceeded to find Vance and Ertel’s status as American citizens immaterial as well, stating that the Court “has never suggested that citizenship matters to a claim under Bivens.” After holding that “the choice of remedies for military misconduct belongs to Congress and the President rather than the judicial branch”—thus granting the blanket immunity expressly repudiated by the vacated panel opinion as “truly unprecedented”—the court proceeded to unnecessarily determine Rumsfeld could not have been held liable anyway, as the Supreme Court decision of Ashcroft v. Iqbal made clear that Cabinet officials are not vicariously liable for the actions of their subordinates if they only possess “mere knowledge” of such actions.

144 Id. at 200-01.
145 Id. at 201.
146 Id. at 199 (“Plaintiffs say that [Chappell and Stanley] are irrelevant because [Vance and Ertel] were not soldiers. That is not so clear. They were security contractors in a war zone, performing much of the same role as soldiers. . . . But we need not decide whether civilians doing security work in combat zones are soldiers by another name, because Chappell and Stanley did not entirely depend on the relation between the soldier and the superior officer.”)
147 Id. at 203.
148 Id.
149 Vance II, 653 F.3d 591, 615 (7th Circuit 2012).
150 Vance III, 701 F.3d at 203 (citing Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009)). Rather, the majority asserted, Vance and Ertel would have been required to plead that “Rumsfeld knew of a substantial risk to security contractors’ employees, and ignored that risk because he wanted plaintiffs (or similarly situated persons) to be harmed,” an allegation the majority acknowledged as implausible. Vance III, 701 F.3d at 204.
Judge Wood concurred in the judgment (believing that Rumsfeld was entitled to qualified immunity), but disagreed with the majority’s blanket immunity for the military personnel “who actually committed these heinous acts.”

Judges Hamilton, Rovner, and Williams each dissented, parts of which will be addressed in conjunction with Part IV below. A petition for writ of certiorari was filed with the Supreme Court on February 8, 2013, but was denied on June 10, 2013.

IV. Analysis

The en banc decision was incorrect in three major respects. First, the majority improperly interpreted two major Supreme Court decisions involving Bivens in the military context to exempt all military personnel from Bivens liability to civilian plaintiffs, an “extraordinary result” that “the Court would not have casually embraced” without being more explicit. Second, the majority failed to appreciate how the existing doctrine of qualified immunity already alleviates one of the primary concerns used to justify granting absolute immunity. Third, the majority neglected its necessary role as guardians of constitutional liberties—particularly in times of war—by deferring scrutiny of the necessity of such dreadful acts to other branches of government.

A. Failure to Differentiate from Chappell and Stanley

The en banc majority opinion plays a game of misdirection with the Chappell and Stanley precedents. It does so by first stretching Chappell and Stanley as broadly as possible to help cast doubt on the plaintiffs’ claim, which then allows the majority to more easily dismiss the critical factual differences of Chappell and Stanley as irrelevant. The majority first introduces Chappell and Stanley as sweeping Supreme Court proclamations holding that it is inappropriate to create

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151 Vance III, 701 F.3d at 206 (Wood, J., concurring).
153 Vance III, 701 F.3d at 211 (Hamilton, J., dissenting).
non-statutory claims for damages against military personnel, using this characterization to create a presumption against the plaintiffs’ claims:

The Supreme Court has never created or even favorably mentioned the possibility of a non-statutory right of action for damages against military personnel, and it has twice held that it would be inappropriate to create such a claim for damages. [Chappell, Wallace.] . . . Yet plaintiffs propose a novel damages remedy against military personnel who acted in a foreign nation—and in a combat zone no less.154

However, the majority is then confronted with the actual, narrower holdings of Chappell and Stanley—that members of the military cannot recover from other members of the military under Bivens for incidents arising out of military service—and dismisses this critical factual difference in the case before it as irrelevant:

Chappell and Stanley hold that it is inappropriate for the judiciary to create a right of action that would permit a soldier to collect damages from a superior officer. Plaintiffs say that these decisions are irrelevant because they were not soldiers. That is not so clear. They were security contractors in a war zone, performing much the same role as soldiers. . . . But we need not decide whether civilians doing security work in combat zones are soldiers by another name, because Chappell and Stanley did not entirely depend on the relation between the soldier and the superior officer.155

The majority’s obfuscation of Chappell and Stanley is necessary because a correct reading of those two precedents clearly demonstrates they are not controlling. Aside from the obvious factual difference that, unlike Vance and Ertel, the Chappell and Stanley plaintiffs were military servicemen, the decisions in Chappell, Stanley, and Feres

154 Id. at 198-99.
155 Id. at 199 (emphasis added).
(upon which the *Chappell* and *Stanley* decisions heavily relied)\(^{156}\) are clearly concerned with civilian courts interfering with *intra-military discipline*. They are not blanket proclamations that “civilian courts should not interfere with the military chain of command,”\(^{157}\) regardless of the military or civilian status of the plaintiff.

In *Feres*, the Supreme Court held that the FTCA does not apply to “injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”\(^{158}\) The Court came to this conclusion by focusing on Congress’ enactment of compensation schemes for service members who are injured or killed, and the peculiar difficulties faced by soldiers who bring litigation outside of intra-military channels.\(^{159}\) The Court did not say or make any inference that civilian courts inappropriately interfering with military matters was a primary concern.

In *Chappell*, in which the Supreme Court specifically stated that *Feres* guided its analysis,\(^{160}\) the Court declared that, “no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.”\(^{161}\) It further elaborated that “[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields . . . but combat inevitably reflects the training that precedes combat[.]”\(^{162}\) Thus:

> [C]enturies of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the

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\(^{156}\) *See Chappell*, 462 U.S. at 299 (“[T]he Court’s analysis in *Feres* guides our analysis in this case.”); *Stanley*, 483 U.S. at 683-84 (reaffirming *Chappell* as “require[ing] abstention in the inferring of *Bivens* actions as extensive as the exception to the FTCA established by *Feres*[,]”).

\(^{157}\) *Vance III*, 701 F.3d at 199.

\(^{158}\) *Feres*, 340 U.S. at 146 (emphasis added).

\(^{159}\) *Id.* at 144-45.

\(^{160}\) *Chappell*, 462 U.S. at 299.

\(^{161}\) *Id.* at 300.

\(^{162}\) *Id.*
very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.163

A plain reading of Chappell shows that the Court was concerned with civilian courts improperly interfering with the command and disciplinary structure between enlisted military personnel and their superior officers. Yet the Vance majority fleetingly interprets this same passage in Chappell as a general observation that “military efficiency depends on a particular command structure, which civilian judges could mess up without appreciating what they were doing.”164 It avoids any mention that the Court was referring to interfering with the intra-military command structure.

The Vance majority also mischaracterizes the holding of Stanley in order fit Vance within its purview. In Stanley, the Supreme Court “reaffirm[ed] the reasoning of Chappell” and stated that Chappell’s holding—no Bivens recovery for injuries arising out of military service—“extend[s] beyond the situation in which an officer-subordinate relationship exists[.]”165 The Seventh Circuit viewed this statement as reason to extend Chappell’s bar on Bivens recovery to non-military civilians.166 However, when the Stanley Court made that statement, it was responding to the Stanley plaintiff’s argument that “the defendants in this case were not Stanley’s superior military officers . . . and that the chain-of-command concerns at the heart of Chappell . . . are not implicated.”167 Put another way, the plaintiff in Stanley unsuccessfully argued that Chappell was inapplicable because

163 Id. (emphasis added).
164 Vance III, 701 F.3d at 200.
165 Stanley, 483 U.S. at 683.
166 Vance III, 701 F.3d at 199 (“[W]e need not decide whether civilians doing security work in combat zones are soldiers by another name, because Chappell and Stanley did not entirely depend on the relation between the soldier and the superior officer.”)
167 Stanley, 483 U.S. at 679.

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the defendants were not his superior officers. The Supreme Court rejected this argument because *Feres*, upon which *Chappell* relied, “did not consider the officer-subordinate relationship crucial,” but rather was concerned with “injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.” When the *Stanley* court said *Chappell*’s holding “extends beyond the officer/subordinate context,” it clearly meant that a military plaintiff was still prohibited from suing persons other than a superior officer for injuries arising from military service. *Stanley* is entirely silent with regards to civilian plaintiffs.

Thus, while the Seventh Circuit read *Chappell* and *Stanley* as broadly precluding civilians from obtaining a *Bivens* remedy against the military, neither case involved such a claim, neither case articulates such a holding, and both cases’ reasoning relied on intra-military concerns. Furthermore, as Judge Hamilton and Judge Williams each pointed out in dissent, if the *Vance* majority were correct in its broad interpretation of *Chappell* and *Stanley*, the Supreme Court would have demonstrated such in *Saucier v. Katz*. In that case, the plaintiff was a non-military U.S. citizen who brought a *Bivens* claim for excessive force against a military police officer. The Court went through a lengthy analysis of whether the military officer was entitled to qualified immunity, but made no mention nor gave any inference that a civilian was precluded from bringing a *Bivens* action against the military under *Chappell* or *Stanley*. In fact, *Saucier* fails to even mention *Chappell* or *Stanley*. Although the qualified immunity analysis utilized in *Saucier* was eventually scrapped, *Saucier* is still

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168 *Id.* at 680.
169 *Feres*, 340 U.S. at 146 (emphasis added).
170 *Vance III*, 701 F.3d at 212-13.
171 *Id.* at 228, n. 2.
173 *Id.* at 198-99.
174 See *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (holding that courts may start with either prong of the two-step analysis used to determine qualified immunity, abandoning the mandatory sequential procedure adopted in *Saucier*); see also Section IV.B, *infra*, discussing qualified immunity.
an important decision that the *Vance* majority only mentions in a procedural context. Judge Hamilton’s dissent also brings attention to a Seventh Circuit decision from 2003 in which a civilian brought a *Bivens* claim against military officers for violating his Fourth and Fifth Amendment rights. The Seventh Circuit barred the plaintiff’s claim, but made no reference to *Chappell* or *Stanley* or military personnel’s general immunity from *Bivens* liability.

In sum, the Seventh Circuit had the opportunity to distinguish the facts before it in *Vance* from the Supreme Court’s *Chappell* and *Stanley* precedents—which “[s]cholars are virtually unanimous in strongly criticizing”—but instead stretched *Chappell* and *Stanley* to preclude relief for a class of plaintiffs not considered in either decision.

### B. Failure to Appreciate the Existing Significance of Qualified Immunity

The *en banc* majority expressed concern that the potential for *Bivens* liability could “divert[] Cabinet officers’ time from management of public affairs to the defense of their bank accounts.” However, the existing doctrine of qualified immunity—thoroughly analyzed by both the district court and appeals panel—already provides a proper balance to assuage the majority’s worry that the nation’s leaders will act to defend their bank accounts to the detriment

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175 See *Vance III*, 701 F.3d at 197 (citing to *Saucier* when determining the court is “authorized to address the merits” of Rumsfeld’s immunity defense).
176 *Id.* at 213 (Hamilton, J. dissenting) (citing Case v. Milewski, 327 F.3d 564 (7th Cir. 2003)).
177 Case, 327 F.3d at 568-69.
178 Chemerinsky, *supra* note 60, at 622, fn. 88.
179 *Vance III*, 701 F.3d at 202.
180 *Vance I*, 694 F.Supp.2d 957, 965-971 (N.D. Ill. 2010); *Vance II*, 653 F.3d 591, 605-11 (7th Cir. 2011).
of the nation’s security.\footnote{181} Even when a cause of action is recognized under \textit{Bivens}, defendants may still raise qualified immunity as an affirmative defense. Qualified immunity “balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”\footnote{182} Qualified immunity is a sizeable hurdle for \textit{Bivens} plaintiffs to clear.\footnote{183} The existence of qualified immunity in a \textit{Bivens} suit makes the Seventh Circuit’s granting of absolute immunity from \textit{Bivens} for the military even more puzzling, as federal officials who act in good faith executing their duties under the Constitution are already not subject to liability under \textit{Bivens}.

If anything, modern qualified immunity jurisprudence already tilts in favor of protecting public officers from meritless litigation at the expense of ensuring actually injured plaintiffs receive compensation.\footnote{184} The qualified immunity doctrine protects government officials “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.”\footnote{185} That is, even if a government official violates someone’s constitutional rights, the official is liable for damages only if it would have been “clear to a reasonable officer that his conduct was unlawful in the situation he

\footnote{181} Judge Wood found this concern to be “disrespectful of both the dedication of those who serve in government and the serious interests that the plaintiffs are raising.” \textit{Vance III}, 701 F.3d at 193, 210 (Wood, J., concurring).
\footnote{182} Pearson v. Callahan, 555 U.S. 223, 231 (2009) (holding that police officers who conducted a warrantless search of the plaintiff’s home were entitled to qualified immunity from Section 1983 liability). Qualified immunity of federal officers is identical to the qualified immunity afforded to state and local officials under Section 1983. \textit{See} Harlow v. Fitzgerald, 457 U.S. 800, 809 (1982).
\footnote{183} CHEMERINSKY, supra note 60, at 606-07.
\footnote{184} \textit{Id.} at 548.
\footnote{185} \textit{Harlow}, 457 U.S. at 818.
confronted.”\textsuperscript{186} While there need not be a prior court decision precisely on point in order to place a government official “on notice” that his or her conduct violates clearly established law,\textsuperscript{187} if the government official still has some objectively reasonable justification that the specific act they undertook was not unconstitutional, he or she is entitled to qualified immunity.\textsuperscript{188}

This highly deferential qualified immunity doctrine already provides government officials who execute their duties in good faith with more than enough protection from \textit{Bivens} liability when it comes to matters of national security. For example, in \textit{Mitchell v. Forsyth}, Attorney General John Mitchell had authorized a warrantless wiretap of a member of an antiwar group he believed to be planning to detonate bombs in Washington, D.C. and possibly to kidnap National Security Advisor Henry Kissinger.\textsuperscript{189} After the wiretap had been placed, the Supreme Court issued a decision prohibiting the use of such warrantless wiretaps, even in cases involving domestic threats to national security.\textsuperscript{190} The \textit{Forsyth} Court nonetheless extended qualified immunity to Attorney General Mitchell for authorizing the warrantless wiretap because the legality of such conduct was “an open question” at

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\textsuperscript{186} Saucier v. Katz, 533 U.S. 194, 202 (2001) (holding that military police officer who arrested demonstrator protesting at a public event featuring Vice President Gore was entitled to qualified immunity from \textit{Bivens} liability).
\textsuperscript{187} Hope v. Pelzer, 536 U.S. 730, 741 (2002) (holding that prison guards who handcuffed an inmate to a hitching post for several hours without water or access to a bathroom were not entitled to qualified immunity from Section 1983 liability despite there being no cases with “materially similar” facts to put them “on notice” that their conduct was unconstitutional); \textit{but see} Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (holding that a lack of “on point” cases may aid in demonstrating that a government official’s conduct was not a “clearly established” constitutional violation).
\textsuperscript{188} Anderson v. Creighton, 483 U.S. 635, 639-41 (1987) (holding that an FBI agent who conducted a warrantless search of the plaintiff’s home was entitled to qualified immunity if a reasonable officer could have believed such a warrantless search to be lawful based on the information the FBI agent possessed at the time).
\end{flushleft}
the time it occurred, and the Court refused to determine qualified immunity on the basis of “hindsight-based reasoning.”\textsuperscript{191}

For a more recent example of the power of qualified immunity in the context of the War on Terror, one need only look at the Ninth Circuit’s decision in \textit{Padilla v. Yoo}\textsuperscript{192}. In that case, an American citizen detained as an enemy combatant after the 9/11 attacks alleged he was unconstitutionally tortured while in military detention.\textsuperscript{193} He sought civil damages from John Yoo, the Deputy Assistant Attorney General in the Department of Justice’s Office of Legal Counsel who allegedly drafted a series of memoranda that justified his unlawful treatment.\textsuperscript{194} The Supreme Court’s decision in \textit{Hamdi v. Rumsfeld}\textsuperscript{195} called into question the constitutionality of all these practices, but the decision was not issued until after all of Yoo’s memoranda.\textsuperscript{196} While there were certainly “clearly established” constitutional rights for prisoners subject to \textit{ordinary} criminal process at the time of Yoo’s memoranda, the Ninth Circuit held that because of Padilla’s unusual status of “enemy combatant” as designated by the President, a government

\begin{footnotesize}
\begin{enumerate}
\item Forsyth, 472 U.S. at 535.
\item Padilla v. Yoo, 678 F.3d 748 (9th Cir. 2012).
\item \textit{Id.} at 751. In a familiar set of allegations, Padilla claimed he suffered “gross physical and psychological abuse . . . including extreme isolation; interrogation under threat of torture, deportation and even death; prolonged sleep adjustment and sensory deprivation; exposure to extreme temperatures and noxious odors, denial of access to necessary medical and psychiatric care; substantial interference with his ability to practice his religion, and incommunicado detention for almost two years, without access to family, counsel or the courts. \textit{Id.} at 752.
\item \textit{Id.} For example, Yoo authored memoranda that stated “the Fourth Amendment had no application to domestic military operations”; that “restrictions outlined in the Fifth Amendment simply do not address actions the Executive takes in conducting a military campaign against the nation’s enemies”; that interrogation techniques are only considered torture if they cause damage rising “to the level of death, organ failure, or the permanent impairment of a significant body function”; that approved aggressive interrogation techniques not permitted by the military field manual; and approved the use of mind-altering drugs during interrogations. \textit{Id.} at 753.
\item \textit{Padilla}, 678 F.3d at 760-61.
\end{enumerate}
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official “could have had some reason to believe that Padilla’s harsh
treatment fell within constitutional bounds.”\textsuperscript{197} Additionally, even
though the Ninth Circuit found that “the unconstitutionality of
torturing a United States citizen was ‘beyond debate’ by 2001,”\textsuperscript{198} Yoo
was still entitled to qualified immunity because there was
“considerable debate” at the time as to whether the specific
interrogation techniques promoted by Yoo amounted to “torture.”\textsuperscript{199}
Thus, Yoo was entitled to qualified immunity on all claims.\textsuperscript{200}

If not already apparent, qualified immunity is a difficult obstacle
to surpass when seeking civil liability against a government official.
But that is by design; courts must balance the interest of insulating
public figures from frivolous lawsuits against the equally weighty
public interest in deterring unlawful conduct. Both the district court
and appeals panel in \textit{Vance} carefully evaluated this balance and
determined that Rumsfeld was not entitled to such immunity.\textsuperscript{201} Yet the
\textit{en banc} majority makes this inquiry—much less its conclusion—
irrelevant by providing absolute immunity for \textit{all} military personnel,
up to and including “those who actually committed these heinous
acts.”\textsuperscript{202}

\textbf{C. Failure to Appreciate the Historic Role of the Judiciary as a
Wartime Constitutional Guardian}

As an additional factor in its opinion, the \textit{en banc} majority quoted
the Supreme Court’s 1981 decision in \textit{Haig v. Agee}, in which the Court
stated that “[m]atters intimately related to . . . national security are
rarely proper subjects for judicial intervention.”\textsuperscript{203} Notwithstanding

\begin{itemize}
\item \textsuperscript{197} \textit{Id.} at 762.
\item \textsuperscript{198} \textit{Id.} at 763-64.
\item \textsuperscript{199} \textit{Id.} at 767-68.
\item \textsuperscript{200} \textit{Id.} at 768.
\item \textsuperscript{201} \textit{Vance I}, 694 F.Supp.2d 957, 965-971 (N.D. Ill. 2010); \textit{Vance II}, 653 F.3d
591, 605-11 (7th Cir. 2011).
\item \textsuperscript{202} \textit{Vance III}, 701 F.3d 193, 206 (7th Cir. 2012) (Wood, J., concurring).
\item \textsuperscript{203} \textit{Id.} at 200 (quoting \textit{Haig v. Agee}, 453 U.S. 280, 292 (1981)).
\end{itemize}
the glaring factual differences between the two cases—Phillip Agee was a former undercover CIA agent who was challenging the Secretary of State’s administrative decision to revoke his passport—

the Seventh Circuit’s acquiescence to Congress and the military command structure in Vance is a disappointing abdication. There is undoubtedly a delicate balance to be had when weighing civil liberties against matters of national security, especially in times of war. Such balancing has been a recurring theme in our nation’s history, from the Alien and Sedition Acts of 1798 to the War on Terror of the 21st century. However, when viewing this recurring theme in hindsight, it is clear that the United States “has had a long and unfortunate history of overreacting to the perceived dangers of wartime.” Federal courts should be wary of this long and unfortunate trend when balancing constitutionally guaranteed rights against claims of military necessity or national security, so as not to be found on the wrong side of history.

The Supreme Court was certainly on the wrong side of history regarding its treatment of Japanese-American citizens during World War II. In Hirabayashi v. United States, the Supreme Court upheld the constitutionality of a military order imposing a curfew on all citizens of Japanese ancestry on the west coast, stating:

Since the Constitution commits to the Executive and to Congress the exercise of the war power . . . it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger[.]. . . Where . . . the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of warmaking, it is not for any court to sit in review of the

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204 Haig, 453 U.S. at 285-86.
205 Act of July 14, 1798, ch. 74, 1 Stat. 596 (criminalizing certain criticism of government and public officials in the aftermath of the French Revolution).
wisdom of their action or substitute its judgment for theirs.\footnote{208}

A year later in the more well-known decision of \textit{Korematsu v. United States},\footnote{209} the Court upheld the constitutionality of a military order that compelled nearly 120,000 persons of Japanese descent to leave their homes for government detention camps.\footnote{210} In doing so, the Court stated:

\begin{quote}
[\textit{P}roperly constituted military authorities feared and invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and . . . because Congress, reposing its confidence in this time of war in our military leaders—as it inevitably must—determined they should have the power to do just this. . . . We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.\footnote{211}]\end{quote}

\textit{Hirabayashi} and \textit{Korematsu} have since been heavily derided, and also formally denounced by the President of the United States on two separate occasions.\footnote{212} These unfortunate decisions were creatures of the hysteria of war, with the Court in each case deferring to the
judgment of the “war-making” branches of government at the expense of our citizen’s constitutional values.

Beyond these “constitutional pariahs,”\textsuperscript{213} however, there are shining examples of the judiciary rejecting unchecked government wartime powers in the name of individual liberty. During the Vietnam era, for example, the Supreme Court unanimously rejected the Nixon administration’s claim that it could lawfully wiretap American citizens on American soil without complying with the Fourth Amendment:

Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. . . . The Fourth Amendment contemplates a prior judicial judgment, . . . [and] [t]his judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the difference branches and levels of Government. . . . We cannot accept the Government’s argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. . . . Although some added burden will be imposed upon the Attorney General, this inconvenience is justified in a free society to protect constitutional values.\textsuperscript{214}

Even in the more modern context of the “war on terror,” the Supreme Court has prominently sided with constitutionally guaranteed liberties for American citizens and rejected an expansive assertion of

\textsuperscript{213} Id. at 82.

wartime authority. In *Hamdi v. Rumsfeld*, the Supreme Court held that due process guaranteed citizens who were challenging their status as “enemy combatants” the right to receive notice of the basis for their classification and a fair opportunity to refute the classification before a neutral decision maker.\(^{215}\) Justice O’Connor, writing for the plurality, stated:

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. . . . We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. *Whatever power the United States Constitution envisions for the Executive in its exchanges with . . . enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.*\(^{216}\)

The above *Hamdi* dicta advocates a more thorough than deferential role for federal courts when balancing the deprivation of civil liberties against claims of executive war authority. By dismissing Vance and Ertel’s complaint, the Seventh Circuit neglected this responsibility.

It is worth noting that the Seventh Circuit is not alone in doing so. In reaching its decision in *Vance*, the majority at the outset noted that two other circuit courts of appeals—the Fourth Circuit and D.C. Circuit—had recently refused to “create a right of action for damages


\(^{216}\) Id. at 532-36 (emphasis added) (internal citations omitted).
against soldiers . . . who abusively interrogate or mistreat military prisoners[.]

However, the Seventh Circuit had ample opportunity to differentiate the facts of Vance from this nonbinding precedent.

For example, in Lebron v. Rumsfeld, the plaintiff was an American citizen seeking a judicial declaration that his designation as an “enemy combatant” was unconstitutional, an injunction prohibiting such future designation, and nominal damages. Unlike in Vance, the Lebron plaintiff was foremost attempting to use Bivens to influence military policy, as opposed to obtaining redress for the wrongful acts committed. Moreover, Lebron raised significantly greater constitutional questions—challenging the President’s ability to designate “enemy combatants” under Congress’ Authorization for Use of Military Force—that were not present in Vance.

In Doe v. Rumsfeld, the plaintiff seeking Bivens relief against the military was technically a civilian military contractor like Vance and Ertel, but was detailed to a United States Marine Corps team. The Doe plaintiff was eminently more “quasi-military” than Vance and Ertel; the Doe plaintiff actually accompanied military troops on the ground of the Iraqi-Syrian border, obtaining military intelligence and diagnosing potential threats, which arguably makes the reasoning behind Chappell and Stanley applicable when precluding Bivens. And, in Ali v. Rumsfeld, the plaintiffs seeking a Bivens remedy were Afghan and Iraqi citizens, raising unique constitutional challenges not

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217 Vance III, 701 F.3d 193, 195 (7th Cir. 2012) (citing Lebron v. Rumsfeld, 670 F.3d 540 (4th Cir. 2012); Doe v. Rumsfeld, 683 F.3d 390 (D.C.Cir. 2012); Ali v. Rumsfeld, 649 F.3d 762 (D.C.Cir. 2011)).
218 Lebron, 670 F.3d at 544.
220 Doe, 683 F.3d at 392.
221 See Vance III, 701 F.3d at 199; Auchter, supra note 11, at 23 (opining that Vance and Ertel were “much the same” as soldiers, or “analogous to a member of the military,” respectively).
222 Doe, 683 F.3d at 392.
present in Vance.\textsuperscript{224} In any event, none of these cases went so far as the Vance majority, which “in effect creates a new absolute immunity from Bivens liability for all members of the U.S. military.”\textsuperscript{225}

CONCLUSION

In Marbury v. Madison, Chief Justice John Marshall stated that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”\textsuperscript{226} In dismissing Vance and Ertel’s complaint at the pleading stage based on an imprecise reading of the relevant Supreme Court precedent, as well as an unfortunate willingness to defer to the war-making branches of government, the Seventh Circuit has left two American citizens who suffered cruel constitutional abuses at the hands of the military undefended. The court erred in vacating and reversing the well-reasoned district court and appeals panel decisions. While the Supreme Court has limited the availability of Bivens in new contexts in recent years,\textsuperscript{227} the doctrine has yet to be formally overruled. The Seventh Circuit’s expansive holding in Vance, which now shields “military mistreatment of civilians not only in Iraq but also in Illinois, Wisconsin, and Indiana,”\textsuperscript{228} is a disturbing jolt in the otherwise gradual descent of Bivens.

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\textsuperscript{224} See Vance III, 701 F.3d at 221 (Hamilton, J., dissenting) (“Other federal courts have faced difficult issues when alien enemy combatants have sought protection in civilian U.S. courts. . . . We do not need to decide those difficult issues in this case, which was brought not by members of al Qaeda or designated enemy combatants, but by U.S. citizens[.]”).
\textsuperscript{225} Id. (Hamilton, J., dissenting).
\textsuperscript{226} Marbury v. Madison, 5 U.S. 137, 163 (1803).
\textsuperscript{227} See supra Part II.E.
\textsuperscript{228} Vance III, 701 F.3d at 211 (Hamilton, J., dissenting).
\end{flushright}