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**Sosa v. Alvarez-Machain** and Abu Ghraib—Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors

I. INTRODUCTION

The Abu Ghraib prison in central Baghdad has been called “one of the world’s most notorious prisons” because it is where Saddam Hussein’s regime tortured and executed countless Iraqi civilians. Unfortunately, it has also become notorious because of the abuse Iraqi prisoners received at the hands of U.S. military personnel and civilian contractors. Pictures of stripped prisoners forced into humiliating positions or threatened with dogs have become an all too familiar sight on the news and Internet.

Many of the soldiers and reservists involved in the abuses at Abu Ghraib have been reprimanded, a number have pleaded guilty to various crimes, and Specialist Charles A. Graner Jr., the alleged ringleader, was recently convicted by a court martial and sentenced to ten years in prison.

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3. The released photographs are collected and displayed on many websites. One of the most thorough websites posts the photographs at the following two URLs: http://www.thememoryhole.org/war/iraqis_tortured (last modified May 21, 2004); http://www.thememoryhole.org/war/iraqis_tortured/index2.htm (last modified May 21, 2004).


5. See John W. Gonzalez, *Prosecutions Wind Down at Fort Hood: No One Ranked Higher than Staff Sergeant Faces Charges in the Abu Ghraib Case*, HOUS. CHRON., Apr. 4, 2005, at B1 (collecting data on the all of the soldiers charged in connection with the abuse at Abu Ghraib).
for his participation in the abuse. All of this is certainly a necessary response to what happened at Abu Ghraib. Still, because court martial proceedings are essentially criminal in nature, they generally do not provide a civil remedy for victims. Not only would providing a civil remedy satisfy the victim’s interest in being compensated for a horrible wrong committed against him, but because winning the hearts and minds of the Iraqi people is essential to the success of the United States’ efforts in Iraq, providing a remedy for the victims of misconduct by U.S. personnel should be important to the United States. And given evidence


7. See ESTELA I. VELEZ-POLLACK, MILITARY COURTS-MARTIAL: AN OVERVIEW 3–5 (Cong. Research Service, Order Code RS21850, May 26, 2004) (describing the three types of courts martial and the potential punishments under each). Court martial jurisdiction can be exercised over “persons with or accompanying the military in the field during ‘times of war.’” Id. at 2 (citing UNIFORM CODE OF MILITARY JUSTICE, MANUAL FOR COURTS MARTIAL art. 2 (2002); 10 U.S.C. § 802 (2004)). Civil relief is never mentioned as a potential punishment under the various types of court martial. See id. However, in their capacity as criminal courts, courts martial can either order restitution or consider it as a mitigating factor in sentencing. See MANUAL FOR COURTS MARTIAL pt. IV, § XI, R. 97a, art. 134 (2002) (allowing a court to order restitution as a condition of parole); id. pt. II, chap. XI, R. 1105 (allowing consideration of restitution in sentencing); 53A A M. JUR. 2D Military and Civil Defense § 262 (2004).

8. “In accordance with Islamic principles to intentionally or negligently cause physical injury to another, or to cause him financial loss engages liability in reparation as prescribed in traditional authorities.” S.H. AMIN, The Legal System of Iraq, in MIDDLE EAST LEGAL SYSTEMS 188–90 (1985). According to Professor Amin, the Iraqi civil provision based on this maxim is “very wide and comprehensive[;] . . . it omit[s] any reference to the concepts of intention, culpa or fault. Accordingly, all personal injuries should be compensated for under Iraqi law whether they are caused intentionally, negligently or otherwise.” Id. at 189 (citing CIVIL CODE art. 202 (1951) (Iraq)). Therefore, even if it was not emphasized under Saddam Hussein’s regime, Iraqis have a historical and philosophical justification for expecting compensation from those who mistreat them.

9. See Brian Knowlton, Anger Grows over Iraqi Prisoners, INT’L HERALD TRIB., May 4, 2004, http://www.iht.com/articles/518107.html (quoting Iranian Foreign Minister Kamal Kharrazi, “If Americans are in Iraq to promote democracy, is this the way to do it?”); Press Release, Office of the Press Secretary, President Bush Welcomes Canadian Prime Minister Martin to White House (Apr. 30, 2004), at http://www.whitehouse.gov/news/releases/2004/04/20040430-2.html (Responding to the question “How are you going to win [the Iraqi people’s] hearts and minds with these sort of tactics?,” President Bush stated, “I shared a deep disgust that those prisoners were treated the way they were treated. Their treatment does not reflect the nature of the American people.”). As this Comment was going to press, the ACLU and Human Rights First filed a suit on behalf of several Iraqi and Afghani detainees against Defense Secretary Donald Rumsfeld and various other Defense Department officials for their supervisory role in the abuses in Iraq and Afghanistan. See Press Release, ACLU, ACLU and Human Rights First Sue Defense Secretary Rumsfeld over U.S.
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of similar abuses by U.S. military personnel and civilian contractors\textsuperscript{10} at other locations throughout Iraq, in Afghanistan, and at Guantanamo Bay,\textsuperscript{11} the availability of civil relief for similar victims should be an important part of the United States’ prosecution of the larger war on terror.

On the other hand, providing civil relief against U.S. soldiers or civilian contractors accompanying the military is also problematic. After all, the United States really is at war, and some damage and disruption are inevitable. This Comment will argue that the United States should provide relief for the victims of the Abu Ghraib prison scandal, and will discuss the potential avenues that should be available to the victims and the limitations on those theories. Specifically, it will discuss the Foreign Claims Act (FCA), a quasi-administrative remedy created by Congress to provide compensation for damage arising from the noncombat operations

\textsuperscript{10}Candiotti & Polk, supra note 6 (reporting that Specialist Graner testified that “his orders came from civilian contractors as well as military intelligence”).

\textsuperscript{11}See Neil A. Lewis, ACLU Presents Accusations of Serious Abuse of Iraqi Civilians, N.Y. TIMES, Jan. 25, 2005, at A10 (discussing some 4,000 pages of documents released by the Army that describe abuse at Adhamiya Palace in Baghdad by U.S. Special Forces, “as opposed to prison guards or interrogators” like those implicated in the Abu Ghrabi scandal); Neil A. Lewis & David Johnston, New F.B.I. Files Describe Abuse of Iraq Inmates, N.Y. TIMES, Dec. 20, 2004, at A5 (discussing documents describing participation by FBI agents in the abuse at Abu Ghrabi and documents relating to conduct at Guantanamo Bay that could also potentially amount to torture); Neil A. Lewis & Douglas Jehl, New Documents Show Prison Abuse in Afghanistan and Iraq, N.Y. TIMES, Feb. 18, 2005, at A11; Attorney General John Ashcroft, Prepared Remarks (June 17, 2004), at http://www.newsobserver.com/front/story/1343133p-7466153c.html (last modified June 20, 2004) (discussing criminal indictments filed against civilian contractors for conduct in Afghanistan); Press Release, ACLU, Detainee Coerced into Dropping Charges of Abuse Before Release (Feb. 18, 2005), at http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17515&c=206 (describing statement by Iraqi detainee who was threatened with indefinite detention if he did not waive his right to seek an investigation after being severely beaten by plainclothes military personnel, describing mock executions in Afghanistan, and documenting the intentional destruction of photographs to “avoid ‘another public outcry’”); BBC News, US Accused of Afghan Jail Deaths, at http://news.bbc.co.uk/2/hi/south_asia/4092073.stm (last modified Dec. 13, 2004). British soldiers have also been convicted by court martial for abusing Iraqi civilian contractors. BBC News, Two Soldiers Guilty of Iraq Abuse, at http://news.bbc.co.uk/2/hi/uk_news/4290435.stm (last modified Feb. 23, 2005). This Comment will only discuss the availability of relief to the victims at Abu Ghrabi, but its analysis should apply to these other situations as well.
of the United States military operating in foreign countries. Because there is anecdotal evidence suggesting that the FCA is often inadequate, and because the soldiers and contractors are immune under Iraqi law, it will also discuss remedies potentially available under U.S. law, including the Federal Tort Claims Act, the Alien Tort Statute, and the Bivens doctrine.

Any discussion of civil remedies under U.S. law for extraterritorial torts by U.S. government employees or their agents is significantly informed by the recent United States Supreme Court decision in Sosa v. Alvarez-Machain, a case arising out of the kidnapping of a Mexican doctor by bounty hunters employed by the Drug Enforcement Agency, and brought under the Federal Tort Claims Act (FTCA) and Alien Tort Statute (ATS). Not only did this decision specifically limit the availability of the FTCA and ATS to remedy extraterritorial tortious conduct, but in intriguing dicta, Justice Souter suggested that the ATS should not “supplant[] the actions under . . . 42 U.S.C. § 1983 and Bivens v. Six Unknown Fed. Narcotics Agents . . . that now provide damages remedies for . . . violations” of the federal constitution. Of the statutory theories presented in Sosa and the constitutional theories hinted at in Justice Souter’s opinion, the FTCA will not provide relief against the United States in its sovereign capacity, but the ATS and Bivens doctrine should provide a remedy against the individual soldiers and contractors who participated in the abuse.

Part II will discuss remedies available under U.S. law, including the Foreign Claims Act, tort suits against the government, constitutional tort suits against government agents, and the Alien Tort Statute, which provides a remedy for extraterritorial torts and is only available to aliens. Part III will introduce the Sosa decision and will discuss its ramifications on the remedies discussed in Part II for extraterritorial conduct by U.S. agents. Because Sosa does not rule out the option of constitutional tort suits against U.S. officers, Part IV will discuss United States v. Verdugo-
Urquidez, which held that aliens in foreign countries are not protected by the Fourth Amendment, and thus cast doubt on the availability of a Bivens remedy against U.S. agents who conduct arguably unlawful searches abroad.\textsuperscript{18} It will then argue that the Cruel and Unusual Punishment Clause is sufficiently different from the Fourth Amendment to justify a different result under the deterrent rationale of the Bivens doctrine. Part V returns to Abu Ghraib and considers how the theories discussed in Parts II and IV could be applied to suits by the Abu Ghraib victims against the various potential defendants.

II. CIVIL REMEDIES UNDER U.S. LAW—FOREIGN AND DOMESTIC RELIEF

The Iraqi Coalition Provisional Authority has immunized American soldiers and civilian contractors accompanying the military from prosecution under Iraqi civil or criminal law.\textsuperscript{19} However, the Order providing immunity under Iraqi law also provides that coalition personnel are still subject to the jurisdiction of their “Sending State.”\textsuperscript{20} Therefore, any remedies against U.S. personnel for the abuses at Abu Ghraib must come under U.S. law. In addition to analyzing the Foreign Claims Act, which provides claims commissions in Iraq (and other foreign countries), this Part will analyze the Federal Tort Claims Act, which allows suit against the United States; constitutional tort theories, which seek to hold a government employee or agent individually liable for unconstitutional conduct; and the Alien Tort Statute, which is only available to aliens.

\textbf{A. The Foreign Claims Act—Compensating Claims in a Foreign Country}

The Foreign Claims Act, which creates claims commissions in foreign countries where the military conducts substantial operations, is perhaps the most direct remedy for the victims of misconduct by U.S. soldiers. “The Foreign Claims Act provides for the settlement, and


\textsuperscript{19} Coalition Provisional Authority Order No. 17 (revised), supra note 13, § 2. While this immunity technically expired on June 30, 2004, most of the abuses at Abu Ghraib took place before that date. See Taguba Report, supra note 2; Department of the Army, Certification of Taguba Report (June 4, 2004), http://www.aclu.org/torturefoia/released/TR1.pdf.

\textsuperscript{20} Coalition Provisional Authority Order No. 17, supra note 13, § 2(3).
payment up to $100,000, of a claim against the United States,” brought
by a resident of a foreign country, “where the damage, loss, personal
injury, or death occurs outside the United States . . . and is caused by, or
is otherwise incident to [the] noncombat activities of” the United States
military.21 It was enacted “[t]o promote and to maintain friendly
relations through the prompt settlement of meritorious claims.”22 The
term “noncombat activity” is therefore defined broadly and includes any
“activity, other than combat, war or armed conflict, that is particularly
military in character and has little parallel in the civilian community.”23

To further the goal of promoting friendly relations, procedures under
the FCA are designed to be flexible.24 The Secretary of each department
(Navy, Army, Air Force) “appoint[s] claims commissions, composed of
commissioned officers, . . . to settle and pay claims ‘under such
regulations as the secretary concerned may prescribe.’”25 There is no
need for the foreign citizen to come to the United States and sue—claims
commissions are usually established where the military has a significant
presence, and claims officers have full authority to settle claims up to the
full $100,000 allowed by statute.26

However, anecdotal evidence suggests that many Iraqis injured
through the negligent or even criminal conduct of U.S. soldiers are not
compensated for their injuries.27 Victims face a maze of procedures and

22. 10 U.S.C. § 2734(a). The FCA does include a two year limitations period. See § 2734(b).
23. 32 C.F.R. § 842.41(c) (2004).
24. David P. Stephenson, An Introduction to the Payment of Claims Under the Foreign and
25. Id. at 193 (citing 10 U.S.C. § 2734(a) (1990)). For example, “[i]n the Air Force, those
regulations appear in chapter 8 of the Air Force Regulation 112-1.” Id.
2004) ("Army Lt. Col. Charlotte Herring said the Army, which handles civil claims for all three
service branches in Iraq, has given out $8.2 million by June 2003 and budgeted $10 million in fiscal
year 2005 to help Iraqis deal with losses suffered because of war."), at http://www.civicworldwide.org/compensation/compensation-army-102404.htm; department of Defense,
27. See, e.g., Occupation Watch Center in Baghdad & National Association for the Defense
of Human Rights in Iraq, Joint Report on Civilian Casualties and Claims Related to U.S. Military
Operations, at http://www.civicworldwide.org/pdfs/compensationreport.pdf (last visited Mar. 22,
2005); Occupation Watch Center & National Association of the Defense of Human Rights in Iraq,
Report on Civilian Deaths and Human Rights Violations by US Army and Uselessness of Claims
120 cases for compensation with the military, none of which have received compensation.
Occupation Watch has filed 20 and logged more than 80, none of which have received
policies that keep many of them from ever presenting their claims for
consideration. According to one Iraqi translator and claims processing
assistant, “[o]nly [thirty] to [forty] percent get compensation.”29 While
this low rate of compensation may reflect legitimate decisions by claims
officers, it may also reflect budget constraints, military policy, an
unwillingness to consider meritorious claims, or other nonmerit based
considerations.30

The FCA includes a provision that “no claim may be paid under this
section unless the amount tendered is accepted by the claimant in full
satisfaction.”31 By implication, Congress realized that FCA claimants
could potentially seek relief through other avenues, including suit.32 So,
if Iraqis with meritorious but uncompensated claims could sue, what
remedies would be available to them? Furthermore, what remedies would
be available against the civilian contractors alleged to have participated
in the abuse?33 After all, while the FCA potentially provides relief for
damages caused by U.S. military personnel (limited by the combat
activities and the full satisfaction provisions), it does not make the
federal government an indemnitor for civilian contractors.34 The next
Subpart will discuss the sorts of remedies usually available in U.S. courts
for plaintiffs suing the government or its agents.
B. Relief in U.S. Courts

There are a number of theories under which plaintiffs injured by government agents or activities can obtain redress in U.S. courts. The Federal Tort Claims Act (FTCA) provides a remedy directly against the federal government for most claims of negligence by government employees. The FTCA does not provide a remedy for claimants asserting a violation of constitutional rights by federal agents, often referred to as constitutional torts. However, statutory and judicially created remedies allow suit against individual government agents for constitutional torts. This Subpart will therefore discuss the FTCA and the Bivens doctrine, both of which specifically relate to suits against the federal government and its officers.

1. The Federal Tort Claims Act

In 1946 Congress enacted the FTCA as a broad waiver of the federal government’s sovereign immunity and made the United States liable “in the same manner and to the same extent as a private individual under like circumstances.”\(^{35}\) It provides a comprehensive remedy against the United States for tort claims resulting from the negligent or wrongful acts or omissions of federal employees acting within the scope of their employment or office.\(^{36}\)

However, Congress imposed a number of limitations on that waiver.\(^{37}\) For example, even though the United States is generally liable “to the same extent as a private individual,” it cannot be held liable for punitive damages or prejudgment interest.\(^{38}\) The FTCA also bars a suit against the government unless the claim is first presented to, and denied by, the appropriate federal agency.\(^{39}\) Even when a case goes to trial, a jury is not available.\(^{40}\)

In addition to these general limitations, 28 U.S.C. § 2680 lists a number of specific cases excluded from this waiver of sovereign


\(^{36}\) It also conferred exclusive jurisdiction for such actions on the federal district courts. See 35A AM. JUR. 2D Federal Tort Claims Act § 1 (2004).

\(^{37}\) Id. (citing Stubbs v. United States, 620 F.2d 775, 779 (10th Cir. 1980) (“Congress may impose conditions upon a waiver of the Government’s immunity from suit. Moreover such limitations and conditions must be strictly observed and exceptions thereto are not to be implied.” (internal citations omitted))).


\(^{39}\) Id. § 2675.

\(^{40}\) Id. § 2402.
immunity. When one of these exclusions applies, the district court is without jurisdiction to hear the case.\textsuperscript{41} The most important exclusions include the discretionary function exclusion, which applies when injury results from a policy decision by an official charged with discretion;\textsuperscript{42} the Postal Service exclusion for the Postal Service’s negligence in delivering the mails;\textsuperscript{43} and the exclusion for “[a]ny claim arising in a foreign country.”\textsuperscript{44} The FTCA also excludes most intentional torts, such as battery, assault, defamation, or malicious prosecution.\textsuperscript{45} However, this section was amended in 1974 to allow liability for intentional torts committed by “investigative or law enforcement officers of the United States Government” to be asserted against the government.\textsuperscript{46}

Another important limitation on the FTCA is that the United States cannot be held liable for constitutional torts committed by its employees.\textsuperscript{47} This limitation is largely based on the fact that while the FTCA provides a waiver of sovereign immunity, the underlying cause of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{41} E.g., 35A AM. JUR. 2D Federal Tort Claims Act \S\ 33 (2004).
\item \textsuperscript{42} 28 U.S.C. \S\ 2680(a) (providing that the FTCA’s waiver of sovereign immunity does not apply to “[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused”) (emphasis added)). The “discretionary function” exception has proven ambiguous. See generally, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 621–24 n.30 (4th ed. 2003).
\item \textsuperscript{43} 28 U.S.C. \S\ 2680(b).
\item \textsuperscript{44} \textit{Id.} \S\ 2680(k); \textit{see infra} Part III.B.2.a.
\item \textsuperscript{45} The FTCA excludes assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. \textit{See} 28 U.S.C. \S\ 2680(b).
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} In the Westfall Act, Congress effectively provided absolute immunity for federal employees in negligence suits by requiring that the United States be substituted as the party defendant upon certification by the Attorney General, or his designee, that the employee was acting within the scope of his employment. 28 U.S.C. \S\ 2679(d) (2004). Once the United States is substituted as the party defendant, the case is converted into an FTCA action and must comply with the administrative exhaustion and other requirements of FTCA suits. \textit{See} 28 U.S.C. \S\ 2679(b)(1). However, the Westfall Act specifically provides that this protection “does not extend . . . to a civil action against an employee of the [Federal] Government . . . brought for a violation of the Constitution of the United States.” \S\ 2679(b)(2). Courts have consistently held that the Westfall Act does not “supplant” \textit{Bivens}, and many see it as implicitly ratifying it. \textit{See} Apampa v. Layng, 157 F.3d 1103, 1104 (7th Cir. 1998); Haas v. Schalow, No. 98-1777, 1998 U.S. App. LEXIS 32654, at *5–6 (7th Cir. Dec. 23, 1998) (“Although the United States may be substituted for a federal employee accused of committing a tort within the scope of his employment under the Westfall Act, 28 U.S.C. \S\ 2679(b), the Act does not apply to an action against an employee which is brought for a violation of the Constitution.”).
action typically must be based on state law, and violations of the federal constitution are uniquely federal in character. In other words, while the vast majority of suits for alleged government misconduct are brought under the FTCA, suits for constitutional violations must be brought against the officer individually.

2. Constitutional torts

The term “constitutional tort” refers to suits brought against government agents for violating the Constitution, and these suits are based, in part, on the theory that someone acting in the name of the government, even unconstitutionally, “possesses a far greater capacity for harm than an individual . . . exercising no authority other than his own.” Because this Comment seeks to explore potential theories of recovery for victims of torts committed outside the territory of the United States, it is important to first understand the operation of these theories within the United States.

Because the Fourteenth Amendment has incorporated most of the Bill of Rights against the states and their officials, both federal and state officials are obligated to respect federal constitutional commands. But while the substantive restraints on both state and federal government actors are largely the same, the methods of enforcing rights against those actors are quite different. Constitutional tort suits against state actors are typically brought under 42 U.S.C. § 1983, which provides a broad remedy for constitutional violations. However, § 1983 does not apply to federal officers. The Supreme Court, though, in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, created a similar remedy against federal agents. Because states generally do not

51. See, e.g., Tennessee v. Lane, 124 S. Ct. 1978, 2011 (2004) (“[T]he incorporation doctrine . . . holds that the Fourteenth Amendment incorporates and applies against the States the Bill of Rights . . . .”).
52. See infra Part II.B.2.a.
53. Russell v. United States Dept. of the Army, 191 F.3d 1016, 1019 (9th Cir. 1999).
54. 403 U.S. 388 (1971). There is some congressional and scholarly support for creating a statutory right of action against federal officers or agents. See, e.g., Michael B. Hedrick, Note, New Life for a Good Idea: Revitalizing Efforts To Replace the Bivens Action with a Statutory Waiver of the Sovereign Immunity of the United States for Constitutional Tort Suits, 71 GEO. WASH. L. REV. 1055 (2003). Mr. Hedrick’s article collects and analyzes a number of valuable sources. I disagree
act internationally, and because most international operations are
conducted under federal law—including under the so-called dormant
foreign relations power reserved to the Executive Branch—this Subpart
will focus on the Bivens doctrine. It will, however, first briefly discuss 42

a. 42 U.S.C. § 1983. Section 1983 is perhaps the most important of
the civil rights statutes. It provides the following:

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

In short, § 1983 provides a remedy against state officers for
violations of federal law. In Monroe v. Pape, the Supreme Court
extended § 1983 liability to those actions that would have also been
unlawful under state law, holding that the fact that state law also makes
the conduct illegal “is no barrier to . . . suit in the federal court.” By
holding that § 1983 is available even where there is a remedy under state

with his conclusion that the United States, rather than the individual officers, should be liable for
constitutional torts. Id. at 1065–67. As discussed infra regarding Malesko, one of the purposes of the
Bivens remedy is the deterrent effect of personal liability. Infra Part II.B.1. Substituting the United
States for such violations would likely resolve a number of problems with immunity, see infra notes
98–103 and accompanying text, but making individual officers—the targets of the Bivens remedy—
immune to suits for their own intentional deprivations of constitutional rights, seems shortsighted. It
is better to deter violations than merely designate who shall pay. There is also the apparent
Congressional ratification (or at least acquiescence) of Bivens in the Westfall Act. See supra note 47.

56. Wilson v. Garcia, 471 U.S. 261, 266–67 (1985) (Section 1983 is the “most important, and
ubiquitous, civil rights statute.”).
58. See Maine v. Thiboutot, 448 U.S. 1 (1980), for the proposition that there can be § 1983
liability for violations of the Social Security Act. By so holding, the Court extended § 1983 liability
to even federal laws not enacted under the Fourteenth Amendment. Now § 1983 is available for
nearly all federal laws that provide enforceable individual rights of action, see Gonzaga Univ. v.
unless Congress has intended to provide an alternative remedy, see Middlesex County Sewerage
59. 365 U.S. 167, 183 (1961). While various parts of Monroe have been called into question
in later decisions, its holding that state officers can be sued under § 1983 for any federal
constitutional violation is still good law. See CHEMERINSKY, supra note 42 at 475–78.
law, the Supreme Court made § 1983 an attractive option where state law may impose procedural obstacles, such as a notice or exhaustion requirement, to suits against government agents.

In certain circumstances, § 1983 also provides a remedy against private persons who act under color of state law. 60 A private individual can be liable under § 1983 if “he is a willful participant in joint activity with the State or its agents” 61 or if he exercises a function typically reserved to the states, such as providing private police or security services. 62 For example, in Johnson v. Larabida Children’s Hospital, the Seventh Circuit held that a

private party will be deemed to have acted under “color of state law” when the state either (1) “effectively directs or controls the actions of the private party such that the state can be held responsible for the private party’s decision”; or (2) “delegates a public function to a private entity.” 63

Section 1983 is important in civil rights litigation both because it is broad and because it is statutory. As discussed below, because it is judge-made, not only is Bivens subject to frequent criticism, it is also subject to frequent judicial tinkering not applied to § 1983. 64

b. Bivens. Section 1983 does not address violations of federal law by federal officers or others acting under color of federal law. 65 In part to cure the inequity of providing relief for victims of constitutional violations by state but not federal officers, the Supreme Court, in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, created a cause of action against federal agents in their individual capacity for such violations. 66

60. See Johnson v. Larabida Children’s Hosp., 372 F.3d 894, 896 (7th Cir. 2004) (“While generally employed against government officers, the language of § 1983 authorizes its use against private individuals who exercise government power; that is, those individuals who act ‘under color of state law.’”).
62. Id.
63. 372 F.3d at 896 (quoting Payton v. Rush-Presbyterian-St. Luke’s Med. Ctr., 184 F.3d 623, 628 (7th Cir. 1999)).
64. See infra notes 76–97 and accompanying text.
65. Russell v. United States Dept. of the Army, 191 F.3d 1016, 1019 (9th Cir. 1999); see also Gibson v. United States, 781 F.2d 1334, 1343 (9th Cir. 1986) (“Federal officers acting under federal authority are immune from suit under section 1983.”).
66. 403 U.S. 388 (1971). Quoting Marbury v. Madison for the proposition that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of
In *Bivens*, federal drug officers conducted an unconstitutional search and seizure. Despite the fact that the Fourth Amendment does not specifically provide an individual right of action to persons subjected to unauthorized searches, the Court has concluded that "a violation of the [Fourth] Amendment is 'fully accomplished' at the time of an unreasonable governmental intrusion." Because "the Fourth Amendment operates as a limitation upon the exercise of federal power," and because subsequent remedies such as exclusion of evidence would not put the injured party in the position he would have been in but for the intrusion, the remedy for that constitutional violation "is damages or nothing." Furthermore, while exclusion of evidence may annoy federal law enforcement officers, the Court concluded that neither exclusion nor state tort actions for trespass would provide a sufficient deterrent to prevent violations of the Fourth Amendment. Therefore, the Court held that someone injured by unconstitutional conduct by a federal agent could assert a claim for damages directly under the Fourth Amendment.

In addition to Fourth Amendment violations, the Supreme Court has recognized a *Bivens* remedy for violations of the Fifth Amendment’s Due Process Clause and the Eighth Amendment’s Cruel and Unusual Punishment Clause. The Court has also "accepted the general existence of [Bivens] causes of action for violations of the First Amendment," and lower federal courts have allowed *Bivens* suits for violations of the Ninth and Fourteenth Amendments.

the laws, whenever he receives an injury," the Court further concluded that providing no remedy at all was unacceptable. *Id.* at 397 (quoting 5 U.S. 137, 163 (1803)).

67. *Id.* at 397. Not only were the search and arrest conducted without a warrant, the agents allegedly used unnecessary force. *Id.* at 389.

68. See U.S. CONST. amend. IV; see also infra notes 192–94 and accompanying text.


70. *Bivens*, 403 U.S. at 392; *id.* at 410 (Harlan, J., concurring).


72. *Bivens*, 403 U.S. at 395–97. The *Bivens* Court also justified a damages remedy on the traditional availability of damages for violations of privacy interests. *Id.*

73. Malesko, 534 U.S. at 67 (citing Carlson v. Green, 446 U.S. 14 (1980); Davis v. Passman, 442 U.S. 228 (1979)).


75. See CHEMERINSKY, supra note 42, at 593 nn.31–36 (collecting sources). Lower court decisions have been more explicit in accepting *Bivens* suits for First Amendment and for other types of constitutional torts. See generally *id.* at 587–610 for a thorough overview of the *Bivens* doctrine.
Because the *Bivens* remedy is implied by the Constitution, the Supreme Court has “responded cautiously to suggestions that *Bivens* remedies be extended into new contexts” and has routinely limited the scope of the remedy. For example, in *FDIC v. Meyer*, the Supreme Court unanimously held that *Bivens* relief is unavailable against a federal agency, even if the employees of that agency could potentially have been liable.77 Furthermore, *Bivens* relief is unavailable if “Congress has provided an alternative remedy which it explicitly declare[s] to be a substitute for recovery directly under the Constitution and [which] is viewed as equally effective.”78 Finally, the creation of a cause of action under *Bivens* is inappropriate where there are “special factors counseling hesitation in the absence of affirmative action by Congress.”79

The *Bivens* remedy is also problematic because the Supreme Court has justified it on two different theories. As will become clearer after discussing *United States v. Verdugo-Urquidez*,80 the Supreme Court has justified this creation of a constitutional/common-law cause of action on the theory that to do so is necessary to vindicate the deprivation of a constitutional right,81 and to deter government officers from acting unconstitutionally.82 In most cases, these different rationales overlap, but in the discussion of Abu Ghraib, the deterrence rationale applies but the vindication rationale does not. The Supreme Court’s most recent major decision on *Bivens*, *Correctional Services Corporation v. Malesko*,83 is important for this Comment’s analysis of remedies for the Abu Ghraib victims because it forcefully articulates the deterrence rationale.84

79. *Bivens*, 403 U.S. at 396. There are some courts that have seen the Westfall Act as Congressional ratification of the *Bivens* doctrine. See supra note 47.
80. 494 U.S. 259 (1990); see infra Part IV.
81. See, e.g., *Bivens*, 403 U.S. at 399 (Harlan, J., concurring) (“[A] traditional judicial remedy such as damages is appropriate to *the vindication of the personal interests* protected by the Fourth Amendment.” (emphasis added)); id. at 407–08 (“[A]ccording . . . compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct.”); see also, e.g., Davis v. Passman, 442 U.S. 228, 243–44 (1979).
82. See, e.g., Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 69 (2001); *Bivens*, 403 U.S. at 392 (“[T]he Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the States in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen.”).
84. Id. at 72.
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(1) Malesko: Bivens, private actors, and the deterrence rationale. The Supreme Court’s 2001 decision in Correctional Services Corporation v. Malesko limited the availability of a Bivens remedy in cases against private actors (government contractors) brought under a respondeat superior theory.85 In Malesko, a federal inmate was enrolled in a halfway house operated by Correctional Services Corporation (CSC), a private corporation under contract with the Federal Bureau of Prisons.86 During his imprisonment, the inmate was diagnosed with a heart condition and was permitted to use the elevator to reach his fifth-floor room, despite a policy that required inmates “residing below the sixth floor to use the staircase rather than the elevator to travel from the first-floor lobby to their rooms.”87 Despite his exemption, a CSC employee required the inmate to take the stairs.88 While doing so, he suffered a heart attack, fell, and was injured.89

The inmate sued both the employee who had required him to use the stairs and CSC under a respondeat superior theory of liability. Relying on the Supreme Court’s unanimous decision in FDIC v. Meyer,90 which held that Bivens relief is unavailable against federal agencies, the district court dismissed his complaint against CSC.91 Additionally, it dismissed the complaint against the employee as barred by the statute of limitations.92

The Supreme Court agreed with the district court’s conclusion that Bivens does not support respondeat superior liability.93 “[T]he purpose of Bivens is to deter the officer,” not his employer.94 The Court reasoned that “if a corporate defendant [such as CSC] is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury.”95 By characterizing the purpose of Bivens as a deterrence, the Court easily concluded that the threat of suit against either the government or a private employer is

85. Id. at 70–71.
86. Id. at 63–64.
87. Id. at 64.
88. Id.
89. Id.
91. Malesko, 534 U.S. at 65.
92. Id.
93. Id. at 71.
94. Id. at 69 (quoting Meyer, 510 U.S. at 485).
95. Id. at 71 (citing TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 464 (1993) (plurality)).
“insufficient to deter the unconstitutional acts of individuals,” and that “[w]ith respect to the alleged constitutional deprivation, [the plaintiff’s] only remedy lies against the individual.”

(2) Qualified immunity. Recognizing that Bivens is a potentially broad doctrine against individuals accused of violating the Constitution does not mean that federal officers are automatically liable for constitutional torts. Rather, they enjoy the broad protection of the qualified immunity doctrine. In Hope v. Pelzer, the Supreme Court held that a government employee accused of violating the Constitution “may nevertheless be shielded from liability for civil damages if [his] actions did not violate ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’” Because the “clearly established test is met [only] if ‘in the light of pre-existing law the unlawfulness [is] apparent,’” honest mistakes by government employees are protected. In fact, qualified immunity has been held to protect “all but the plainly incompetent or those who knowingly violate the law.”

96. Id. at 68.
97. Id. at 72. The Supreme Court did note that CSC could potentially be subject to respondeat superior liability under regular tort theories. Id. at 72–73. Justice Scalia, concurring in Malesko, said he does not believe Bivens should be extended to any new contexts. “Bivens is a relic of the 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.” Id. at 75 (Scalia, J., concurring). Justice Stevens, writing for himself and three other justices, strongly disagreed. He argued that “[t]he violation was committed by a federal agent[,] a private corporation employed by the Bureau of Prisons[,]” and he criticized the majority for allowing state tort law to act as a replacement for federal constitutional protections infringed by that agent. Id. at 76–80 (Stevens, J., dissenting); see also Chemerinsky, supra note 42, at 610 n.122. Chemerinsky compiles several pre-Malesko cases that came to conflicting results as to whether a Bivens remedy was appropriate against private actors. See id.
100. Galvin v. Hay, 374 F.3d 739, 745 (9th Cir. 2004) (alteration in original) (quoting Hope v. Pelzer, 536 U.S. 730, 739 (2002)).
101. Malley v. Briggs, 475 U.S. 335, 341 (1986). But see Hope, 536 U.S. at 730. Hope is an important decision because it is one of the few recent Supreme Court cases to strike down a qualified immunity defense. See id. at 746–47. The plaintiff in Hope brought suit under § 1983 after prison guards placed him in leg irons, removed his shirt, and handcuffed him to a hitching post for seven hours in the summer sun with little water and no bathroom breaks. Id. at 734–35. Justice Stevens held that even though the use of a hitching post had not been ruled unconstitutional, the conduct was
Moreover, “[q]ualified immunity is ‘an entitlement not to stand trial or face the other burdens of litigation.’ The privilege is ‘an immunity from suit’ rather than a mere defense to liability’” and should be raised early in the proceedings. Therefore, qualified immunity is a powerful shield available to federal government defendants (but not civilian contractors) who are sued under Bivens.

3. Relief only available to aliens—the Alien Tort Statute

While it may seem odd that there would be a statute allowing suits by aliens but not by citizens, this is precisely what the Alien Tort Statute (ATS) does. The ATS provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Judge Friendly described the ATS as a “legal Lohengrin; . . . no one seems to know whence it came.” After the Second Circuit’s decision in Filartiga v. Pena-Irala, holding that the ATS permitted citizens of Paraguay to sue another citizen of Paraguay for torture that occurred there, the ATS has been used by a number of courts as grounds for hearing a broad range of cases alleging human rights violations. The Supreme Court’s decision in Sosa v. Alvarez-Machain

so egregious that the defendants had “fair warning” from similar cases that their conduct was inappropriate. Id. at 741.


103. See Chemerinsky, supra note 42, at 539–40 (citing Wyatt, 504 U.S. at 168–69).

104. 28 U.S.C. § 1350 (2004). This statute is also referred to by many courts and commentators as the Alien Tort Claims Act or ATCA. See, e.g., Tachiona v. United States, 386 F.3d 205, 208 (2d Cir. 2004). Because the Supreme Court in Sosa v. Alvarez-Machain refers to the statute as the Alien Tort Statute, 124 S. Ct. 2739, 2746 (2004), this Comment will do the same.


107. 630 F.2d 876, 890 (2d Cir. 1980).

carefully considered the ATS and its proper scope, and it will be discussed in detail in Part III, infra.

The ATS also includes the Torture Victim Protection Act (TVPA), which was enacted in 1992 to amend the ATS in the wake of Filartiga and is largely seen as ratifying Filartiga’s result. In Sosa, the Supreme Court described the enactment of the TVPA as a specific extension of judicial application of the ATS to provide relief for torture committed abroad. The TVPA creates a private right of action for any individual or his estate subjected to either an extrajudicial killing or torture committed “under actual or apparent authority, or color of law, of any foreign nation.”

While the ATS is not available to U.S. citizens, it nevertheless offers intriguing options to the victims of abuse at Abu Ghraib that may not be available under the more traditional FTCA suits against the federal government itself or constitutional tort suits (§ 1983 and Bivens) against government agents. Because the contours of a cause of action under the ATS will now depend on the Supreme Court’s interpretation of that statute in Sosa, the next Part will detail both the factual and procedural history of the Sosa decision and its analysis of the ATS.

III. Sosa v. Alvarez-Machain—The Most Recent Supreme Court Decision on Domestic Liability for International Conduct

As mentioned above, because American soldiers and contractors have beenimmunized against prosecution under Iraqi law, if the Abu Ghraib victims should choose to assert liability against their abusers, they must do so under U.S. law. The Supreme Court’s 2004 decision in Sosa v. Alvarez-Machain will play an important role in evaluating what theories of recovery should be available to them because Sosa involved a suit by an alien for conduct occurring in a foreign country. In Sosa, a Mexican doctor, who had been forcibly abducted from his office in

111. Sosa, 124 S. Ct. at 2765.
112. 28 U.S.C. § 1350 note, § 2(a) (emphasis added). Because the TVPA, unlike the ATS, provides a cause of action for any individual, it provides a cause of action for U.S. citizens subjected to torture. The TVPA also includes an exhaustion requirement in favor of local tribunals and a ten-year statute of limitations. Id. § 2(b)-(c).
113. Coalition Provisional Authority Order No. 17 (revised), supra note 13, § 2; see also supra notes 13 & 19–20 and accompanying text.
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Guadalajara and prosecuted for his alleged role in the torture-murder of a DEA agent, sued civilly after the criminal case against him was dismissed.114 Because the Supreme Court’s ruling on the doctor’s various theories will control future suits on those theories, this Part will discuss the Sosa decision and the Supreme Court’s holdings on the FTCA and ATS. It will also discuss the possibility of Bivens suits, which the doctor pleaded but did not press on appeal, and which the Supreme Court intimated would be available.

A. The Factual and Procedural History of Alvarez-Machain’s Criminal Prosecution

The decision in Sosa v. Alvarez-Machain was nearly twenty years in the making. In February 1985, Enrique Camarena-Salazar, a Drug Enforcement Agency (DEA) officer, “was kidnapped outside the American consulate in Guadalajara, Mexico.”115 Approximately one month later, his “mutilated body was found about sixty miles outside of Guadalajara along with the body of his Mexican pilot.”116 A tape recording made by his kidnappers indicated that Agent Camarena was interrogated, tortured, and then murdered.117

Based on that recording, eye-witness testimony, and other evidence, the DEA concluded that Dr. Humberto Alvarez-Machain had kept Agent Camarena alive during the interrogation and participated in his torture.118 After the DEA’s negotiations with Mexican government officials to have Alvarez-Machain extradited to the United States were unsuccessful, the DEA hired a number of Mexican bounty hunters, including Jose Francisco Sosa, to abduct Alvarez-Machain and bring him to the United

114. Sosa, 124 S. Ct. at 2746–47.
116. Id. at 602.
118. See Sosa, 124 S. Ct. at 2746; Hearing Before the Subcomm. on Criminal Justice Oversight (May 16, 2000) (statement of William E. Ledwith, Chief, Office of International Operations, Drug Enforcement Administration) (testifying that the tapes implicating the various defendants were seized by the Mexican military and turned over to the DEA), http://www.fas.org/irp/congress/2000_hr/ct051600_01.htm (last visited Mar. 23, 2005).
States. Pursuant to a plan apparently approved by the DEA, on April 2, 1990, five or six Mexican agents abducted Alvarez-Machain from his obstetrics office in Guadalajara at gunpoint. Alvarez-Machain testified that he was taken to a house where he was subjected to various abuses and, after waiting for several hours, was flown to El Paso, Texas. In El Paso, DEA agents took custody of Alvarez-Machain and transported him to Los Angeles.

Over the strenuous objections of the Mexican government, which considered the abduction a violation of the U.S./Mexico extradition treaty, Alvarez-Machain was brought before the District Court for the Central District of California. The district court agreed with Mexico and ordered Alvarez-Machain’s return to Mexico. The Ninth Circuit affirmed, citing its then-recent decision in United States v. Verdugo-Urquidez that the forcible abduction of Mexican citizens violated the U.S./Mexico Extradition Treaty and that the United States was required by the treaty to repatriate the suspects.

The Supreme Court reversed and remanded, holding that “to infer from this [Extradition] Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice.” In broad language, the Court held that “the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court’s jurisdiction by reason of a ‘forcible abduction.’” On remand, the district court granted Alvarez-Machain’s motion for acquittal.

119. Caro-Quintero, 745 F. Supp. at 602–03. Not only did the DEA pay for the abduction, it brought a number of the abductors and their families to the United States. Id. at 603–04.
120. Id. at 603.
121. Id.
122. Id.
123. Alvarez-Machain v. United States, 266 F.3d 1045, 1048–49 (9th Cir. 2001). The federal grand jury that indicted Alvarez-Machain sat in Los Angeles. Id. at 1049.
125. Id. at 614.
126. United States v. Alvarez-Machain, 946 F.2d 1466, 1467 (9th Cir. 1991) (citing United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991)). Verdugo-Urquidez involved another one of the alleged participants in the Camarena murder. 939 F.2d at 1343.
127. United States v. Alvarez-Machain, 504 U.S. 655 (1992). It is somewhat odd that the Supreme Court granted certiorari in Alvarez-Machain rather than Verdugo-Urquidez because the Ninth Circuit’s Alvarez-Machain decision was based almost entirely on Verdugo-Urquidez.
128. Id. at 668–69.
129. Id. at 661 (quoting Frisbie v. Collins, 342 U.S. 519, 522 (1952)). Justice Stevens, joined by Justices Blackmun and O’Connor, vigorously dissented. He concluded that the extradition treaty
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B. Alvarez-Machain’s Civil Suit

1. The district and circuit courts

After the criminal proceedings against Alvarez-Machain were terminated, he returned to Mexico and initiated a civil suit against the United States under the FTCA for a number of alleged torts, against the DEA officers under Bivens for violations of the Fourth Amendment, and against the Mexican bounty hunters under Bivens and the ATS for abducting him in violation of the law of nations. The district court granted summary judgment for the DEA agents and bounty hunters on the Bivens claims, finding that because a federal grand jury had indicted Alvarez-Machain and because a federal judge had issued a warrant for his arrest, any seizure was reasonable and therefore not

provided the sole method for obtaining jurisdiction over a citizen of a contracting nation. Id. at 673–74 (Stevens, J., dissenting) (citing Verdugo-Urquidez, 939 F.2d at 1351).

130. The Ninth Circuit concluded on remand that no norms of customary international law prohibited federal court jurisdiction and remanded to the district court for trial. See United States v. Alvarez-Machain, 971 F.2d 310, 311 (9th Cir. 1992). The district court granted Alvarez-Machain’s motion for a judgment of acquittal. Sosa, 124 S. Ct. at 2746. The acquittal was apparently based, at least in part, on the government’s failure to arraign Alvarez-Machain before a magistrate promptly after entry to the United States and failure to turn over potentially exculpatory evidence. See Alvarez-Machain v. United States, 107 F.3d 696, 699 (9th Cir. 1996). However, the evidence was apparently strong enough for Judge Goodwin to conclude that Alvarez-Machain “was present at the house where Camarena was held.” Alvarez-Machain v. United States, 266 F.3d 1035, 1048 (9th Cir. 2001).

There is also some suggestion that the district court excluded evidence implicating Alvarez-Machain, despite the Supreme Court’s decision in Verdugo-Urquidez that the Fourth Amendment does not protect noncitizens outside of the United States. 494 U.S. 259, 275 (1990); see also infra notes 193–95 and accompanying text.


132. Id. Alvarez-Machain originally asserted a Bivens claim under the Fourth, Fifth, and Eighth Amendments but did not challenge the district court’s conclusion that the Fifth and Eighth Amendments did not apply to the facts of the case. See Alvarez-Machain v. United States, No. CV 93-4072 SVW (SHx), 1999 U.S. Dist. LEXIS 23304, at *18 (C.D. Cal. Mar. 18, 1999). While it is not entirely clear why the court made its Eighth Amendment finding, it was likely based on the testimony of a Dr. Meza (also referred to as Mesa), who examined Alvarez-Machain on his entry into the United States and concluded that there was “no sign of mistreatment or abuse” and that, at the time, Alvarez-Machain did not complain of any mistreatment by his kidnappers. Caro-Quintero, 745 F. Supp. at 604. Therefore, the only Bivens claim remaining by the time of summary judgment (and subsequently presented to the Ninth Circuit) was for the alleged Fourth Amendment violation.

133. Sosa, 124 S. Ct. at 2747. Alvarez-Machain asserted claims under both the ATS and TVPA, but for reasons not entirely clear, he did not pursue the TVPA claims. See Alvarez-Machain v. United States, 331 F.3d 604, 610 n.2 (9th Cir. 2003).
violative of the Fourth Amendment. It granted summary judgment to the United States on a number of the FTCA claims, but finding that the law enforcement exception applied, it refused to grant summary judgment on the counts alleging intentional torts by federal officers. The court granted summary judgment in favor of Alvarez-Machain against the Mexican citizens on those claims brought under the ATS and even awarded $25,000 on the abduction claim.

On appeal, both a panel and the en banc Ninth Circuit affirmed the availability of the ATS as a remedy against Sosa and the other individual defendants on the abduction and arbitrary detention claims. Specifically, the en banc majority held that the ATS “not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation” of a “specific, universal, and obligatory” norm of international law. Based on various international documents, the Ninth Circuit concluded that the norms against abduction and arbitrary detention were sufficiently specific, universal, and obligatory to support liability under the ATS.

The Ninth Circuit affirmed the law enforcement exception ruling and reversed the grant of summary judgment in favor of the United States on the other FTCA claims. It concluded that the foreign country exception—which provides that the FTCA’s waiver of sovereign immunity does not apply to “[a]ny claim arising in a foreign country”—did not bar Alvarez-Machain’s suit because of the

135. Including those claims for kidnapping, cruel and degrading treatment, and negligent hiring. Id. at *27–*28, *30–*34.
136. Id. at *39–*40. As discussed supra at note 46 and accompanying text, the intentional tort exception allows the assertion of liability against the United States for conduct taken by law enforcement officers. 28 U.S.C. § 2680(h) (2004).
139. Alvarez-Machain v. United States, 266 F.3d 1045, 1064 (9th Cir. 2001) (panel); Alvarez-Machain v. United States, 331 F.3d 604, 620–21 (9th Cir. 2003) (en banc).
140. Alvarez-Machain, 331 F.3d at 612 (quoting In re Estate of Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)).
141. Id. at 621 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702, cmt. h; International Covenant on Civil and Political Rights, 999 U.N.T.S. art. 9(1) (Dec. 16, 1966) (ratified June 8, 1992) (“No one shall be subjected to arbitrary arrest or detention.”)).
142. Id. at 639–40.
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“headquarters doctrine.” The headquarters doctrine allowed a foreign plaintiff to assert FTCA liability against the United States for conduct or injuries occurring in a foreign country if government officers acting within the United States directed the conduct that led to that injury. It was based on the premise that the act of arranging or directing tortious conduct should create liability regardless of where the harm was realized. The United States Supreme Court granted certiorari to review the Ninth Circuit’s conclusions on the ATS and FTCA, but particularly to address its holding on the headquarters doctrine.

2. The Supreme Court

a. The FTCA. All nine U.S. Supreme Court justices agreed to reverse the Ninth Circuit on the FTCA foreign country exception. Justice Souter’s opinion for the Court specifically rejected the headquarters doctrine: “We . . . hold that the FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.” Because the FTCA incorporates the substantive law of the state where the act or omission occurs, and because of the prevalence of the lex loci delicti rule at the time the FTCA was enacted, the Court concluded that the foreign country exception was designed to avoid the application of foreign law against the United States in its sovereign capacity based solely on where an injury was felt.

144. Alvarez-Machain, 331 F.3d at 638–39.
145. Id.
146. Id.
147. Sosa, 124 S. Ct. at 2746.
148. Id. at 2754.
149. Id. at 2750–51. The Court explained lex loci delicti by reference to the RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 379 (1934), which determines liability based on “the law of the place of wrong.” Thus, Justice Souter concluded, “[f]or a plaintiff injured in a foreign country . . . the presumptive choice in American courts under the traditional rule would have been to apply foreign law to determine the tortfeasor’s liability.” Sosa, 124 S. Ct. at 2751.
150. 28 U.S.C. § 2680(k).
151. Sosa, 124 S. Ct. at 2751. “The amended version, which was enacted into law and constitutes the current text of the foreign country exception . . . codified Congress’s ‘unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power.’” Id. at 2752 (alteration in original) (quoting United States v. Spelar, 338 U.S. 217, 221 (1949)). Justice Ginsburg, writing for herself and Justice Breyer, would have applied a “last significant act or omission” rule rather than lex loci delicti, which would have made Mexico, not California, the source of relevant tort law. Id. at 2781–82 (Ginsburg, J., concurring). In either event, by holding that the law of the place of injury applies, this choice of law analysis effectively precludes the Abu Ghraib detainees
b. The ATS. The Supreme Court limited the availability of a cause of action under the ATS more narrowly than the Ninth Circuit had. The Court unanimously held that while the ATS is technically only jurisdictional, “at the time of enactment, the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”\textsuperscript{152} It further found that this limited category contained at least three torts mentioned by Blackstone: “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”\textsuperscript{153}

The Court split, though, over whether additional, more-recent principles of international law could be incorporated into the “law of nations” actionable under the ATS. A six justice majority concluded that “no development in the two centuries from the enactment of [the ATS] to the birth of the modern line of cases . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law.”\textsuperscript{154} While the majority was hesitant to extend federal common law,\textsuperscript{155} especially in situations involving international law (which is primarily the province of the executive),\textsuperscript{156} it did not rule out new causes of action under the ATS. As grounds for continuing to recognize the possibility of new causes of action under the ATS, the majority relied on the fact that “[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”\textsuperscript{157}

\textsuperscript{152} Sosa, 124 S. Ct. at 2754.

\textsuperscript{153} Id. at 2756 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *68). Blackstone also included the slave trade among those torts that violated international law. 4 WILLIAM BLACKSTONE, COMMENTARIES *68.

\textsuperscript{154} Sosa, 124 S. Ct. at 2761. Those concurring with Justice Souter’s opinion were Justices Stevens, O’Connor, Kennedy, Ginsburg, and Breyer. See id. at 2764.

\textsuperscript{155} Id. at 2762. The Court specifically cited Malesko for the proposition that the “decision to create a private right of action is one better left to legislative judgment in the great majority of cases.” Id. at 2762–63; see also supra Part II.B.2.b.

\textsuperscript{156} Id. at 2763.

\textsuperscript{157} Id. at 2764 (citing Sabbatino v. Banco Nacional de Cuba, 376 U.S. 398, 423 (1964); The Paquete Habana, 175 U.S. 677, 700 (1900); Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (holding that “‘international disputes implicating . . . our relations with foreign nations’ are one of the ‘narrow areas’ in which ‘federal common law’ continues to exist’)). Therefore, the majority was unwilling to conclude that the ATS is limited to just Blackstone’s three torts.
As to the question of how courts are to determine when a violation of international law can be remedied under the ATS, the majority generally accepted the “specific, universal, and obligatory” norm of international law rule employed by the Ninth Circuit. Although the majority held that an action must be clearly defined as violating customary international law to justify allowing a cause of action under the ATS, it also held that other factors should be considered. Among the other factors mentioned were treaties, statements by the political branches, “the customs and usages of civilized nations,” and the work of scholars.

Under this standard, the majority found that any prohibition on arbitrary detentions was not sufficiently clearly defined so as to create a right to sue under the ATS. Justice Souter further posited that finding arbitrary detention actionable under the ATS would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment, supplanting the actions under . . . 42 U.S.C. § 1983 and Bivens v. Six Unknown Fed. Narcotics Agents . . . that now provide damages remedies for such violations.

This is important dicta. While it forcefully closes the door to recovery by Alvarez-Machain against Sosa and the other defendants under the ATS, by referring to Bivens in the same paragraph as a

158. Alvarez-Machain v. United States, 331 F.3d 604, 612 (2003) (quoting In re Estate of Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)).


160. Id. (quoting The Paquete Habana, 175 U.S. at 700).

161. Id. at 2789 (“[A] single illegal detention of less than a day . . . violates no norm of customary international law so well defined as to support the creation of a federal remedy.”).

162. Id. at 2768–69 (emphasis added).

163. It is dicta because Alvarez-Machain had abandoned the Bivens claim by the time his case reached the Supreme Court. Alvarez-Machain, 331 F.3d at 610 n.2 (“The constitutional claims under Bivens . . . are no longer at issue.”).

164. The Court unanimously agreed that Alvarez-Machain could not recover under the ATS. See Sosa, 124 S. Ct. at 2746 (“We hold that [Alvarez-Machain] is not entitled to a remedy under either the FTCA or the ATS.”). Justice Souter and the majority concluded that violations of the law of nations other than arbitrary detention could possibly support liability under the ATS, id. at 2764, and Justice Scalia would not allow any new liability under the ATS, id. at 2776 (Scalia, J., concurring). While it is still unclear whether Alvarez-Machain actually participated in Agent Camarena’s death, see supra note 130, if he is guilty, he has at least been barred from recovering civil damages. Cf. Beck v. W. Coast Life Ins. Co., 241 P.2d 544, 545 (Cal. 1952) (“[I]t would be unconscionable to allow [someone] to profit from his own wrong.”). But if he is actually innocent, as
discussion of extraterritorial searches, it juxtaposes extraterritorial conduct and constitutional liability and suggests that *Bivens* may be applicable to violations of the Fourth Amendment *outside* the United States. Because the ATS is available only to aliens, it would be illogical to suggest that § 1983 and *Bivens* could be supplanted by a cause of action under the ATS if aliens could not use § 1983 or *Bivens* to seek a remedy for violations of the Fourth Amendment. And by suggesting that allowing a cause of action under the ATS for arbitrary detention committed outside the United States would supplant *Bivens*, the majority indicates that *Bivens* can be extended to extraterritorial conduct. In other words, if aliens could not sue for extraterritorial constitutional violations, there would have been no need to suggest that the ATS could supplant § 1983 and *Bivens*, and the majority’s statement that § 1983 and *Bivens* “now provide damages remedies for such violations” would make no sense. Thus, the clear implication of this statement is that aliens injured by extraterritorial unconstitutional conduct can, in certain situations, seek a remedy on a constitutional tort theory.

Justice Breyer, who had joined Justice Souter’s opinion, concurred specially to state that he would permit courts to consider violations of international law under the ATS only if they fell within the limited set of torts that every nation would subject to universal criminal jurisdiction. As examples of this narrow subset, Justice Breyer listed “torture, genocide, crimes against humanity, and war crimes.” Because arbitrary detention is not criminally punishable in a majority of countries, Justice Breyer concluded that Alvarez-Machain’s ATS claim should fail.

suggested by the dismissal of the indictment, then the Supreme Court’s decisions holding that it is not only permissible to abduct someone in violation of a valid extradition treaty, United States v. Alvarez-Machain, 504 U.S. 655, 661 (1992) (discussing the criminal case against Alvarez-Machain), but that the victim of such an abduction cannot sue his abductors, *Sosa*, 124 S. Ct. at 2769, are disturbing. To repeat Justice Stevens’ dissent in Alvarez-Machain’s criminal case, “most courts throughout the civilized world—will be deeply disturbed by the ‘monstrous’ decision the Court announces today. For every nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character.” *Alvarez-Machain*, 504 U.S. at 687–88 (Stevens, J., dissenting).

165. *But see* United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990); *infra* Part IV.
166. *Sosa*, 124 S. Ct. at 2768.
167. *See id.* at 2745 (indicating Justice Breyer in the majority).
168. *Id.* at 2783 (Breyer, J., concurring).
169. *Id.*
170. *Id.*
The remaining three justices (Scalia, Rehnquist, and Thomas) agreed the ATS provided a cause of action for Blackstone’s three torts at the time of its enactment. However, Justice Scalia argued that courts should not be able to consider any other torts under the ATS, on the conclusion that whatever power federal courts had had to craft common law causes of action at the time the ATS was enacted had “been repudiated by Erie” and its progeny.

3. Suits for extraterritorial torts after Sosa

Because Sosa directly ruled on a suit by an alien asserting liability against the United States under the FTCA and its agents under the ATS, it is controlling precedent for any suit that the Abu Ghraib detainees may bring under either theory. The Court’s holding in Sosa that the foreign

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171. Id. at 2775 (Scalia, J., concurring).

172. Id. at 2773. Justice Scalia’s concurrence compares the ATS with Bivens, both of which involve judicially created causes of action. While he has criticized Bivens as being “a relic of the 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,” Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring), because Bivens seeks “to enforce a command of our own law[,] the United States Constitution,” Sosa, 124 S. Ct. at 2772 (Scalia, J., concurring), he is willing to recognize Bivens’s continued validity in a narrow subset of cases, Malesko, 534 U.S. at 75 (Scalia, J., concurring). He is not willing to do the same for the ATS. See Sosa, 124 S. Ct. at 2774 (Scalia, J., concurring).

The majority disagreed with Justice Scalia’s Erie conclusion. [The ATS] was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption. Further, our holding today is consistent with the division of responsibilities between federal and state courts after Erie, as a more expansive common law power related to 28 U.S.C. § 1331 [federal question jurisdiction] might not be.

Sosa, 124 S. Ct. at 2765 n.19.

On the one hand, the majority’s decision simply ratifies the view that there was nothing magical about Blackstone’s torts, other than international consensus condemning them. See id. at 2755–56; see also 4 WILLIAM BLACKSTONE, COMMENTARIES *71 (“[P]iracy . . . is an offense against the universal law of society . . . .”). Accordingly, the majority’s conclusion that clearly defined violations of the law of nations should be actionable under the ATS is unremarkable. Sosa, 124 S. Ct. at 2766. On the other hand, Justice Scalia is right that Erie was “an avulsive change, wrought by ‘conceptual development in understanding common law . . . [and] accompanied by an] equally significant rethinking of the role of the federal courts in making it.’” Id. at 2773 (Scalia, J., concurring) (quoting the majority, id. at 2762). Because I am primarily concerned with the practical question of what causes of action would be available should the Abu Ghraib victims choose to sue their abusers in U.S. courts, I am more interested in Justice Souter’s majority opinion. A full analysis of the Erie and federal common law questions raised by Justice Scalia is beyond the scope of this Comment.
country exception categorically bars suits against the United States for injuries received in a foreign country will preclude the Abu Ghraib detainees from asserting liability against the United States in its sovereign capacity. However, the majority’s holding—that a violation of a sufficiently clearly defined norm of customary international law will allow the creation of a cause of action under the ATS—should be extended to torture, based on both domestic and international agreement that torture violates customary international law. And combined with Justice Breyer’s narrower position that modern international law allowing universal criminal jurisdiction over “torture, genocide, crimes against humanity, and war crimes” would permit a cause of action under the ATS for such conduct, there is a good argument that what happened at Abu Ghraib—if determined to be torture—should be covered by the ATS.

The potential availability of *Bivens* after *Sosa* is a harder question. As discussed above, the statement in Justice Souter’s majority opinion juxtaposing extraterritorial conduct and constitutional liability implies that *Bivens* is available for certain violations of the Constitution wherever they occur. But this conclusion needs to be analyzed in light of *United States v. Verdugo-Urquidez*, another Supreme Court case discussing (and limiting) the extraterritorial application of the United States Constitution.

IV. SPECIAL PROBLEMS IN THE EXTRATERRITORIAL APPLICATION OF U.S. CONSTITUTIONAL LAW: *VERDUGO-URQUIDEZ* AND THE EIGHTH AMENDMENT

Because any suits by the Abu Ghraib detainees would need to plead U.S. law, and because constitutional tort theories are one of the principal methods for holding government agents responsible for

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173. See infra Part V.B.1.

174. *Sosa*, 124 S. Ct. at 2783 (citing *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 404 & cmt. a (1986)).


176. See *Sosa*, 124 S. Ct. at 2768 (concluding that § 1983 and *Bivens* “now provide damages remedies” for extraterritorial seizures in violation of the Fourth Amendment).


178. Otherwise, both the soldiers and civilian contractors would be shielded by the immunity provided by Coalition Provisional Authority Order No. 17 (revised), *supra* note 13, § 2.
violations of the Constitution, whether a constitutional tort would lie for conduct occurring outside of the United States is an important consideration in evaluating the full range of options that would be available to the Abu Ghraib detainees.

This consideration raises a number of questions, including whether it is appropriate to apply domestic law, and particularly constitutional law, extraterritorially. There is a general presumption against the extraterritorial application of domestic law, but that presumption is subject to a number of qualifications. For purposes of analyzing any potential liability arising from the abuse at Abu Ghraib, the most important of these qualifications is the principle that the Constitution can bind the conduct of U.S. officers wherever they act. However, this principle is also subject to qualification and dispute.

Therefore, Subpart A will discuss United States v. Verdugo-Urquidez, which held that the Fourth Amendment does not protect aliens from searches conducted in foreign countries. Subpart B will discuss the differences between the Fourth and Eighth Amendments and will argue that these differences support the proposition that the Cruel and Unusual Punishment Clause limits the conduct of U.S. officers wherever they act. Therefore, violations of the Cruel and Unusual Punishment Clause should support a cause of action under Bivens wherever they are committed.

A. The Extraterritorial Application of U.S. Law—Verdugo-Urquidez and the Constitution

“‘It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”182 In United States v. Curtiss-Wright Export Corp., the Supreme Court held that “[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.”183 The Supreme Court’s decision in Verdugo-Urquidez is an important starting point in the constitutional analysis of potential remedies under U.S. law for the

179. See supra Part II.B.2.
183. 299 U.S. 304, 318 (1936).
Abu Ghraib victims because it considers the relationship between the commands of the Constitution and the conduct of federal officers extraterritorially.

In *Verdugo-Urquidez* the Supreme Court considered whether “the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country.” 184 The factual scenario is fairly straightforward: DEA agents believed that Rene Martin Verdugo-Urquidez, a Mexican citizen, was a drug smuggler and had participated in Agent Camarena’s murder. 185 Mexican police arrested Verdugo-Urquidez and transported him to California, where he was turned over to the U.S. Marshals. 186 DEA agents arranged a search of Verdugo-Urquidez’s property in Mexico, obtained permission from the Director General of the Mexican Federal Judicial Police, and then conducted the searches. 187

The district court suppressed the evidence seized in the searches. 188 The court held that because the searches and seizures had not been authorized by a warrant, they were unreasonable under the Fourth Amendment. 189 The Ninth Circuit affirmed, but the Supreme Court reversed, 190 holding that the Fourth Amendment does not protect nonresident aliens from unreasonable searches or seizures in foreign countries, and that there was therefore no need to rely on the reasonableness analysis employed by the district court. 191

The Supreme Court based its conclusion on the text of the Fourth Amendment, which protects “[t]he right of the people.” 192 “[T]he people” protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” 193 Because Verdugo-Urquidez was not a resident of

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185. *Id.* at 262; see also *supra* notes 115–18 and accompanying text.
187. *Id.*
188. *Id.* at 263.
189. *Id.*
190. *Id.* One Ninth Circuit judge dissented, concluding that the *Curtiss-Wright* decision barred extraterritorial application of the Constitution. *Id.* at 264 (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936)).
191. *Id.* at 274–75 (Stevens, J., concurring).
192. U.S. CONST. amend. IV (emphasis added).
the United States, the Court concluded that he was not included within “the people” protected by the Fourth Amendment.194

The Court distinguished cases addressing or protecting the constitutional rights of aliens by concluding that those cases “establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country.”195 Based on this principle, the Verdugo-Urquidez majority concluded that applying the Fourth Amendment extraterritorially would allow “aliens with no attachment to this country. . . . to bring [Bivens] actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries.”196 Even though it recognized that Bivens relief can be limited when there are “special factors counseling hesitation,”197 the possibility of suits by aliens “with no attachment to this country” seemed particularly troubling to the Court.198

Justice Kennedy, on the other hand, argued that “the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic.”199 He agreed that the Fourth

194. Id. at 274–75.
195. Id. at 271; see also Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”); Khalid v. Bush, Civil Case No. 1:04-1142 (RJL), Civil Case No. 1:04-1166 (RJL), 2005 U.S. Dist. LEXIS 749, at *24 (D.D.C. Jan. 19, 2005) (“In the final analysis, the lynchpin for extending constitutional protections beyond the citizenry to aliens was and remains ‘the alien’s presence within [the United States’] territorial jurisdiction.’” (citing Johnson v. Eisentrager, 339 U.S. 763, 771 (1950)). Zadvydas, Khalid and Eisentrager all involved requests to recognize a right to habeas corpus for aliens held by the United States. They could be distinguished on this ground from the discussion of Abu Ghraib, in which the victims would be seeking civil damages as opposed to habeas relief.
196. Verdugo-Urquidez, 494 U.S. at 274. While this statement may pose problems for victims of abuses by United States officials, the Abu Ghraib detainees could argue that they have at least a nominal “attachment to this country” because they are detained by American military police. See infra note 286 and accompanying text.
198. Verdugo-Urquidez, 494 U.S. at 274. Notably, the Court did not preclude the application of Bivens to cases brought by aliens. See id. In fact, it specifically left the question open. See id. At the very least, the Abu Ghraib detainees have some attachment to this country in that they were held under U.S. authority and abused by U.S. citizens exercising authority over them pursuant to U.S. policy.
199. Id. at 277 (Kennedy, J., concurring) (citing Reid v. Covert, 354 U.S. 1, 6 (1957) (plurality opinion)). Contra id. at 268–69 (Rehnquist, C.J., for the Court) (“[N]ot every constitutional provision applies to governmental activity even where the United States has sovereign power . . . or wherever the United States Government exercises its power.” (citing Balzac v. Porto Rico, 258 U.S. 298 (1922); Ocampo v. United States, 234 U.S. 91 (1914); Dorr v. United States, 195 U.S. 138 (1904))).
Amendment had not been violated because a number of factors—including “[t]he absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials”—justified the failure to apply the strict protections of the Fourth Amendment.200 He even agreed that the Court could properly distinguish between citizens and aliens.201 But he was unwilling to consider the proposition that officials acting under the authority of the Constitution can act unconstitutionally.

Given the history of our Nation’s concern over warrantless and unreasonable searches, . . . [t]he restrictions that the United States must observe . . . depend . . . on general principles of interpretation, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of “the people.”202

Thus, one of the principal differences between the majority and the concurrence in Verdugo-Urquidez is their view of whether the Constitution protects only citizens (and those aliens that have become part of the national community), or whether it limits the power of government to act. Under the majority’s approach, the Constitution protects citizens, and even arguably unconstitutional conduct by government actors does not give rise to a constitutional remedy if a citizen’s rights are not violated.203 Under Justice Kennedy’s approach, the Constitution regulates the conduct of government actors wherever they operate.204 This debate also informs an analysis of the Eighth Amendment—the constitutional provision most likely to support a Bivens remedy for the Abu Ghraib detainees—because the Eighth Amendment is subject to both constructions.

B. Two Views of the Eighth Amendment

There are important differences between the Eighth Amendment and the other provisions of the Bill of Rights. Unlike the First, Second, and

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200. Id. at 278 (Kennedy, J., concurring).
201. Id. at 275–76.
202. Id. at 276 (emphasis added).
203. In Verdugo-Urquidez the constitutional remedy was the exclusion of evidence in a criminal prosecution. Id. at 264. Any discussion of Bivens was therefore dicta.
204. Id. at 277 (Kennedy, J., concurring). Under this approach, Bivens relief ought to be available against U.S. officers for unconstitutional actions taken abroad.
Fourth Amendments, which protect “the people,”
and unlike the First Amendment, which is addressed to Congress,
the Eighth Amendment simply prohibits specified activities. The entire text of the Eighth Amendment provides, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

The first two prohibitions, the Excessive Bail and Excessive Fines Clauses, impose limitations on judicial processes similar to those imposed by the Fifth and Sixth Amendments. The Cruel and Unusual Punishment Clause, though, not only applies to the judicial process as a limitation on sentencing, but it also imposes limitations on how the government can treat prisoners.

If the Eighth Amendment regulates the treatment of prisoners within the United States (and it does), it should similarly regulate the treatment of prisoners held under U.S. authority outside of the United States. In other words, the Cruel and Unusual Punishment Clause

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205. U.S. CONST. amends. I, II & IV. Thus, the Eighth Amendment, unlike other provisions of the Bill of Rights, does not have the hook on which the Supreme Court hung its Verdugo-Urquidez analysis. Moreover, the Court in Verdugo-Urquidez never addressed the Eighth Amendment. See Verdugo-Urquidez, 494 U.S. at 259.

206. See U.S. CONST. amend. I (“Congress shall make no law . . . .”).

207. See U.S. CONST. amend. VIII.

208. Id.

209. U.S. CONST. amend. V (setting out the Grand Jury Indictment Clause, the Double Jeopardy Clause, the federal Due Process Clause, and the Takings Clause).

210. U.S. CONST. amend. VI (setting out the Speedy Trial Clause, the Confrontation Clause, and the Right to Counsel Clause).


214. Obviously this argument is based on a view that the Eighth Amendment both protects a U.S. citizen’s right to be free from cruel and unusual punishment and substantively limits the government’s conduct in the treatment of prisoners. One Law Review editor suggested that the Constitution, and the Bill of Rights in particular, is concerned with protecting the rights of “We the People,” not of aliens with no connection to the United States. While I realize that this view finds support in the majority opinion in Verdugo-Urquidez, I submit that providing no constitutional
should limit the conduct of U.S. agents whenever the United States acts in a penal or custodial capacity. Or, to return to the language of Justice Kennedy’s concurrence in Verdugo-Urquidez, because the Cruel and Unusual Punishment Clause does more than just protect an individual’s rights, “the Government [should be able to] act only as the Constitution authorizes, whether the actions in question are foreign or domestic.”

Because the Constitution would provide these limits on government actors, this approach would not violate the Curtiss-Wright maxim that “[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.” In other words, because the conduct of U.S. government actors is controlled by the Constitution, and because federal agents are either citizens or otherwise bound by the Constitution, extending a constitutional limitation on conduct by government agents to wherever they act would still be “in respect of our own citizens.”

This argument returns us to the question of whether the purpose of Bivens is to vindicate the violation of a right or to deter the violation of a constitutional command. If the purpose of the Constitution is to protect
the rights of citizens,218 and if aliens “with no attachment to this country”219 have no constitutional rights, then Bivens should not provide them a remedy even when U.S. officers act in a way that would violate the rights of a citizen.220 But if the Constitution limits and controls the conduct of government actors, and if the purpose of Bivens is to deter constitutionally unauthorized conduct,221 then Bivens should provide a remedy for anyone injured by unconstitutional conduct, regardless of where it occurs. As discussed above, Supreme Court precedent supports both views of Bivens.222

A fuller analysis of whether the Constitution protects the rights of “We the People,” whether it limits the government, or whether it protects rights by limiting the government is beyond the scope of this Comment.223 For present purposes it must suffice to argue that the potential for these different views of the Constitution prevents any of them from being dismissed out of hand. And if constitutionally unauthorized conduct by a government actor injures someone under that actor’s control, basic principles of equality224 militate in favor of providing a similar remedy under the law, regardless of the citizenship of the person injured.

V. PROVIDING A REMEDY TO THE VICTIMS OF ABUSE AT ABU GHRAIB

Whether violations of the Constitution create a Bivens cause of action regardless of the citizenship of the victim is, of course, only one of the questions presented in addressing potential civil liability arising out of the Abu Ghraib prisoner abuse scandal. This Part will discuss the various U.S. laws under which the victims could potentially sue,

218. As implied in the majority opinion in Verdugo-Urquidez, 494 U.S. at 265.
219. Id. at 274.
220. See id. at 273.
222. See Malesko, 534 U.S. at 69 (discussing how Bivens deters unconstitutional conduct); Verdugo-Urquidez, 494 U.S. at 274 (explaining that Bivens protects citizens); supra Part II.B.2.b.
224. But probably not the Equal Protection Clause.
including the FCA, FTCA, ATS, and Bivens, and will apply each of them to the potential defendants and to the particular circumstances of the war in Iraq.

The abuses at Abu Ghraib were first disclosed when Sergeant Joseph Darby passed a disc with the now infamous photographs of detainee abuse to his commanding officer. The military began an internal investigation, the results of which are detailed in the report compiled by Major General Antonio Taguba. The Taguba Report concludes that there is “incontrovertible evidence that . . . abuse did occur.” Among the instances of “intentional abuse of detainees by military police personnel” reported by Taguba were instances of physical violence, forced sexual degradation and assault, and intimidation by military dogs. Taguba characterized the conduct as criminal and concluded that both military personnel and civilian contractors were guilty of engaging in the abuse. There were also reports of at least two deaths from the abuse.

As discussed in the Introduction, many of the soldiers accused of participating in the abuse have pleaded guilty to various crimes, and Specialist Graner has been convicted and sentenced by a court martial. However, because courts martial maintain the distinction between criminal and civil proceedings, American court martial proceedings against the soldiers will likely not provide a civil remedy to the victims of abuse. And what of the civilian contractors who worked with the

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227. Id. at 16–17.


229. See Hersh, supra note 1. Unfortunately, there is mounting evidence that more deaths are also attributable to misconduct by government actors. See Morgan, supra note 2; Jehl & Schmitt, supra note 2.

230. See supra notes 4–6.


232. Except perhaps for restitution. See supra note 7. There would likely be a different result in other countries, which generally provide civil relief in a consolidated proceeding with the criminal prosecution. As Justice Breyer points out in his concurrence in Sosa, while there is international
soldiers? While they could probably be prosecuted criminally in the United States under either the War Crimes Act of 1996 or the Military Extraterritorial Jurisdiction Act (MEJA), neither of these options would provide a civil remedy to the victims.

The remainder of this section will discuss the potential methods of obtaining civil relief against each of the potential defendants. It concludes that the FCA is probably the most attractive option for the Abu Ghraib victims because the FCA provides recovery from the fiscally responsible United States without involving the foreign country exception to the FTCA. If the victims choose not to pursue remedies under the FCA, or if they choose to hold their abusers directly consensual regarding “torture, genocide, crimes against humanity, and war crimes,” “[t]hat consensus concerns criminal jurisdiction,” not civil jurisdiction. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2783 (2004) (Breyer, J., concurring). Even if “the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself,” the American system does not. Id. For example, the International Criminal Court (ICC) could likely have asserted both criminal and civil authority over the U.S. soldiers, and perhaps even the contractors, who participated in the abuse. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, 37 I.L.M. 999 (1998). Article 7 of the Rome Statute grants jurisdiction over those accused of “crimes against humanity,” including torture, rape, and other sexual abuse. Additionally, article 8 grants jurisdiction over war crimes, including torture. Article 77 allows for the imposition of prison sentences, and a fine or forfeiture.

Although the United States had signed the treaty on December 31, 2000, it withdrew from the ICC on May 6, 2002. See Press Statement, International Criminal Court: Letter to U.N. Secretary General Kofi Annan (May 6, 2002), at http://www.state.gov/rr/pa/prs/ps/2002/9968.htm. Therefore, the ICC is not really an issue. Nevertheless, even if the United States had not withdrawn from the treaty, if the soldiers involved in the abuse were subject to court martial proceedings, they could not then be prosecuted at the ICC. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 at art. 20(3) (providing that the ICC does not have jurisdiction to hear cases that have already been tried under domestic law).


234. 18 U.S.C. § 2441 (2004). The War Crimes Act allows prosecution of, and punishment for, “grave breaches of the Geneva Convention,” which prohibits torture, inhuman treatment, “outrages upon personal dignity,” and “humiliating and degrading treatment.” Geneva Convention, Aug. 12, 1949, art. 3, 6 U.S.T. 3516. There have been indictments filed against civilian contractors for violations of the War Crimes Act in Afghanistan. See Attorney General John Ashcroft, supra note 11. Even though there have not yet been indictments for civilian participation in the abuses at Abu Ghraib, if Afghanistan is an indicator, there may be, and this would be a welcome development. Section 2340A of 18 U.S.C. also provides that any U.S. national or anyone found in the United States who commits torture outside of the United States can be criminally prosecuted.

235. Pub. L. No. 106-523, 114 Stat. 2488 (2000). MEJA was enacted to “establish Federal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the Armed Forces.” Id. at prologue.
accountable for their injuries, they can potentially sue under either the ATS or Bivens. Because the Supreme Court in Sosa would allow a suit under the ATS for violations of clearly defined and widely accepted violations of international law, torture and other abuse like that at Abu Ghraib should fall within the ATS. Bivens is a harder question because the Supreme Court has justified Bivens as both vindicating the infringement of constitutional rights, and as deterring unconstitutional conduct by government agents. While the deterrent rationale applies, the vindication rationale does not. This Comment argues that the unique circumstances at issue in the Abu Ghraib scandal should allow a Bivens cause of action allowing the noncitizen victims to sue either the individual soldiers or the private contractors who participated in the abuse.

A. Remedies Against the United States in Its Sovereign Capacity

Of the potential defendants in any action arising from the abuses at Abu Ghraib, the United States in its sovereign capacity is likely most able to pay compensation. Normally, any claim against the United States for a tort must be pleaded under the Federal Tort Claims Act, but the Foreign Claims Act creates an administrative claims process for foreign plaintiffs that is not subject to FTCA procedures or limitations.

The FCA provides the most direct route to relief for foreign plaintiffs. Under the FCA, there is no need to travel to the United States or deal with American legal procedure. Plaintiffs can go to local claims commissions and potentially receive compensation from the U.S. Government up to the full $100,000 allowed by statute. These factors make the FCA an attractive option for the victims of Abu Ghraib. And even though the FCA provides that injuries arising from the combat activities of the military are not compensable, the definition of

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noncombat activities\textsuperscript{242} is sufficiently broad that it should include the operation of a prison that holds \textit{common criminals} alongside detainees suspected of “crimes against the coalition” and a “small number of suspected ‘high-value’ leaders of the insurgency.”\textsuperscript{243} However, there is evidence that many FCA claimants are denied any recovery at all or given only minimal compensation.\textsuperscript{244}

The other potential option for an action against the United States is the FTCA. However, the Supreme Court’s decision in \textit{Sosa v. Alvarez-Machain}\textsuperscript{245}—that “the FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred”\textsuperscript{245}—conclusively bars the assertion of liability against the United States in its sovereign capacity for torts committed extraterritorially.\textsuperscript{246} Therefore, the FCA is really the only option for recovering from the United States government.

\textbf{B. United States Soldiers in Their Individual Capacity}

Even though the United States is more able to pay compensation to the victims than other potential defendants, if the victims choose not to pursue claims under the FCA, their next option would be suing the individuals who abused them. Suing the soldiers who participated in the abuse directly and in their individual capacities provides a promising avenue for the Abu Ghraib victims. Not only can the victims raise colorable claims under both the ATS and \textit{Bivens}, but because Islam requires reparations for any physical injury, requiring their abusers to take responsibility would likely offer the victims some measure of personal satisfaction.\textsuperscript{247}

\textsuperscript{242} Noncombat activities include any “activity, other than combat, war or armed conflict, that is particularly military in character and has little parallel in the civilian community.” 32 C.F.R. § 842.41(c) (2004).

\textsuperscript{243} Hersch, supra note 1.

\textsuperscript{244} See supra notes 27–30 and accompanying text.


\textsuperscript{246} Had the conduct occurred within the United States, the FTCA might have allowed for liability against the United States based on the amendment allowing liability for intentional torts committed by law enforcement personnel. See 28 U.S.C. § 2680(h) (2004). Because the reservists were acting in a prison guard role, they were more like law enforcement officers than other soldiers. \textit{Sosa}’s language about the FTCA’s foreign country exception sweeps more broadly than this amendment though. See \textit{Sosa}, 124 S. Ct. at 2754.

\textsuperscript{247} Personal satisfaction, closure, and related ideas are obviously culture-dependent concepts. I suggest that the victims may gain some sense of satisfaction by recovering compensation from their abusers only because of Iraq’s cultural preference for providing relief to the victims of both intentional and unintentional wrongs. See AMIN, supra note 8, at 189.
1. The ATS and TVPA

Torture should be remediable under the ATS because the international consensus prohibiting it is clearly defined. In *Sosa*, the unanimous Supreme Court concluded that the ATS created a right of action for “the modest number of international law violations with a potential for personal liability” at common law, and Justice Souter’s majority opinion further concluded that “no development in the two centuries from the enactment of [the ATS] to the birth of the modern line of cases . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law.”

The majority’s standard for determining whether conduct would give rise to liability under the ATS turns on whether it violates clearly defined customary international and common law. Two of the primary considerations the Court would look to in analyzing this question are whether there are (1) treaties or (2) domestic legislative enactments addressing the purported international norm. Torture satisfies both considerations.

The United States has ratified the Covenant Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; the International Convention on Civil and Political Rights, which provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”; and the Universal Declaration of Human Rights, which contains the same prohibition against torture.

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248. *See Sosa*, 124 S. Ct. at 2766–67. Torture would also be actionable under Justice Breyer’s narrower view of the ATS as only allowing suits under those torts that are subjected to universal criminal jurisdiction. *See id.* at 2783 (Breyer, J., concurring) (citing *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 & cmt. a (1986)).

249. *Id.* at 2761. Again, these violations included “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *Id.* at 2756 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *68*).

250. *Id.* at 2761. Those concurring with Justice Souter’s opinion were Justices Stevens, O’Connor, Kennedy, Ginsburg, and Breyer. *See id.* at 2764.


252. *Id.* (quoting The *Paquete Habana*, 175 U.S. 677, 700 (1900)).


Civil Remedies for Victims of Extraterritorial Torts

Not only do these treaties potentially permit suits for torture under the provision of the ATS allowing suit for a tort “committed in violation of . . . a treaty of the United States,”256 but the Sosa majority cited treaties as one of the most authoritative expressions of the law of nations.257

Moreover, in ratifying the Convention Against Torture, the Senate attached an Understanding indicating that Congress interprets torture as any act “intended to inflict severe physical or mental pain or suffering,” threatening to inflict severe physical pain or suffering, or “other procedures calculated to disrupt profoundly the senses or the personality.”258 This definition would be useful for courts in evaluating whether the abuse at Abu Ghraib amounted to legal torture.259

In addition to considering treaties, the Sosa majority allows consideration of domestic statutes as evidence of customary international law.260 The Torture Victim Protection Act, which was specifically enacted as part of the ATS, provides a clear statement that the United States considers itself bound to uphold the international consensus against torture.261 Congress specifically enacted the TVPA to “carry out the obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.”262

Thus, the United States has both entered treaties prohibiting torture and enacted domestic legislation providing “a civil action for recovery of damages from an individual who engages in torture.”263 This should satisfy a court that the customary international law norm prohibiting

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258. Understanding on the Convention Against Torture, supra note 253, at II(1)(a).
259. This determination would have to be made on an individualized basis as to each plaintiff.
260. Sosa, 124 S. Ct. at 2766 (citing The Paquete Habana, 175 U.S. at 700).
262. Id. § 1350 note, preamble (2004). The TVPA also defines torture in many of the same terms as the Understanding on the Convention Against Torture. Compare id. § 3, with Understanding on the Convention Against Torture, supra note 253.
torture is sufficiently clearly defined in the United States so as to justify creating a cause of action under the ATS.\textsuperscript{264} The Abu Ghraib detainees would need to argue that the ATS covers torture, rather than simply suing directly under the TVPA, because of some unfortunate wording in the TVPA. In providing a private right of action against a torturer, the TVPA provides that “[a]n individual who, under actual or apparent authority or color of law[ ] of any foreign nation,” subjects someone to torture shall be liable in a civil action in the United States.\textsuperscript{265} The “of any foreign nation” language could present a problem because U.S. soldiers operate under U.S. law.\textsuperscript{266} While U.S. military law prohibits torture, the statutory remedy for such a violation is imposed by court martial and not a private right of action for the victim.\textsuperscript{267} If a court were to apply the statute’s language strictly, it would likely conclude that U.S. soldiers cannot be liable under the TVPA.

While this result is ironic, it could actually bolster potential arguments by the Abu Ghraib victims that they should be able to sue under the ATS. If Congress is willing to subject defendants with no connection to the United States to liability for torture (despite the presumption against the extraterritorial application of U.S. law),\textsuperscript{268} subjecting American defendants to liability for torture should certainly be permissible.

2. Bivens

As discussed above, whether \textit{Bivens} should be available to remedy extraterritorial torts is a more difficult question than whether the ATS should provide a cause of action for torture. There are two distinct concerns with the \textit{Bivens} remedy that make this question difficult. First, there are two different ways of justifying the creation of a \textit{Bivens} remedy, either as vindicating the deprivation of a constitutional right,\textsuperscript{269}

\begin{itemize}
\item \textsuperscript{264} See \textit{Sosa}, 124 S. Ct. at 2766. Even Justice Breyer’s narrower view—that creating a private right of action under the ATS is justified only for those international law norms deemed so important that states would subject them to universal criminal jurisdiction—would allow a cause of action for torture. See \textit{id.} at 2783 (Breyer, J., concurring).
\item \textsuperscript{265} 28 U.S.C. § 1350 note § 2 (emphasis added).
\item \textsuperscript{266} 10 U.S.C. §§ 802, 818 (2004) (providing that members of the military are subject to federal military law). Not only are soldiers subject to the U.S. military command structure, but any violations of military law are tried by a court martial. \textit{id.} § 818; see also \textit{Buchwalter, supra} note 110.
\item \textsuperscript{267} See 10 U.S.C. § 893 (2004).
\end{itemize}
or as deterring unconstitutional conduct by U.S. government agents. Second, courts avoid extending the scope of Bivens if there are “special factors counseling hesitation.” However, neither of these concerns should preclude the creation of a Bivens remedy for the abuse at Abu Ghraib.

a. Vindication and deterrence. The Supreme Court has justified Bivens as both a remedy for the violation of constitutional rights, and as a deterrent of unlawful conduct by government actors. The Supreme Court has also explicitly extended Bivens to violations of the Cruel and Unusual Punishment Clause (and since that clause regulates prisoner treatment, it is the most relevant constitutional provision to the events at Abu Ghraib). Because the Abu Ghraib detainees are neither American citizens nor within American territorial jurisdiction they probably do not have a constitutional right to be free from cruel and unusual punishment. But because the soldiers are U.S. government agents, the deterrence rationale of Bivens should apply against them.

In this context, the tension between the different underlying rationales for Bivens is clear. If the vindication rationale has priority, the fact that the detainees are not U.S. citizens would be determinative, regardless of the soldiers’ culpability. And if the deterrence rationale has priority, victims without constitutional rights could recover against U.S. government agents under a constitutional tort theory. In other words, the

272. See, e.g., Verdugo-Urquidez, 494 U.S. at 274 (implying that Bivens should not be available to noncitizens with no connection to the United States).
273. See, e.g., Malesko, 534 U.S. at 69.
274. See, e.g., Hope v. Pelzer, 536 U.S. 730, 741 (2002); see also discussion supra notes 73, 101 & 212.
275. See Verdugo-Urquidez, 494 U.S. at 265; Khalid v. Bush, Civil Case No. 1:04-1142 (RJL), Civil Case No. 1:04-1166 (RJL), 2005 U.S. Dist. LEXIS 749, at *24 (D.D.C. Jan. 19, 2005) (“In the final analysis, the lynchpin for extending constitutional protections beyond the citizenry to aliens was and remains ‘the alien’s presence within [the United States’] territorial jurisdiction.’” (quoting Johnson v. Eisentrager, 339 U.S. 763, 771 (1950))). Even if they do not enjoy a constitutional right to be free from cruel and unusual punishment, they should enjoy this freedom as a human right. See Universal Declaration of Human Rights, supra note 255. The deprivation of human rights, though, does not create Bivens liability.
276. See Malesko, 534 U.S. at 68 (“[T]he threat of suit against the United States [is] insufficient to deter the unconstitutional acts of individuals.”); id. at 69 (“[T]he purpose of Bivens is to deter the officer.”) (quoting FDIC v. Meyer, 510 U.S. 471, 485 (1994)).
two rationales appear to be mutually exclusive in this situation. If the victims are allowed to recover under *Bivens* despite not being citizens, then the vindication rationale, and Justice Rehnquist’s discussion of the Constitution-as-social-contract in *Verdugo-Urquidez*,277 would be vitiated. And if soldiers are able to abuse people with impunity, simply because their victims are not U.S. citizens or aliens within the territorial jurisdiction of the United States,278 the deterrence rationale would be reduced to an inquiry about who the victim is, rather than about what the officer did and whether that action was constitutionally appropriate.

Neither of these alternatives is completely satisfactory. Still, there are three reasons that *Bivens* relief should be available to the Abu Ghraib victims. First, Justice Souter’s opinion for the majority in *Sosa* presumes that *Bivens* is available to remedy extraterritorial constitutional torts.279 In concluding that the ATS should not provide a cause of action for arbitrary detention, Justice Souter stated that allowing a claim under the ATS would “supplant[] the actions under . . . 42 U.S.C. § 1983 and *Bivens . . . that now provide damages remedies*” for unconstitutional seizures of aliens.280 This statement indicates that a majority of the Court believes that in certain circumstances *Bivens* is available to aliens injured abroad.281 Saying that *Bivens* should be unavailable to the Abu Ghraib victims simply because they are aliens would be inconsistent with the majority opinion in *Sosa*.282

277. See *Verdugo-Urquidez*, 494 U.S. at 265, 274 (holding that the Fourth Amendment protects “[t]he right of the people,” which “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community”).

278. See id. at 265; see also supra note 195 and accompanying text.

279. See *Sosa*, 124 S. Ct. at 2768.

280. Id. (emphasis added); see supra notes 162–66 and accompanying text.

281. The *Sosa* majority’s statement is perhaps inconsistent with the dicta in *Verdugo-Urquidez* that expressed discomfort at the possibility of *Bivens* being available to “aliens with no attachment to this country” for extraterritorial violations of the Fourth Amendment’s Search Clause. *Verdugo-Urquidez*, 494 U.S. at 274. The references to *Bivens* in both opinions are dicta: the statement in *Sosa* is dictum because it was not essential to the conclusion that the ATS was unavailable to remedy arbitrary detention, *Sosa*, 124 S. Ct. at 2768; the statement in *Verdugo-Urquidez* is dictum because that case was a criminal case that (obviously) did not involve any questions of civil liability, *Verdugo-Urquidez*, 494 U.S. at 261. However, there need not be a war of dicta because the *Verdugo-Urquidez* Court limited its concerns to the facts of the case—“[u]nder these circumstances, the Fourth Amendment has no application.” Id. at 275. Furthermore, the *Verdugo-Urquidez* Court did not rule out the availability of *Bivens* relief. Id. at 274. Rather, it expressed concern about the chilling effect extending *Bivens* to extraterritorial searches would have on law enforcement. Id.

282. I say “simply” because it is reasonable to assume that the conduct at Abu Ghraib would create *Bivens* liability if committed in the United States. See Hope v. Pelzer, 536 U.S. 730, 734–35,
Second, any suits by the Abu Ghraib prisoners would arise under the Cruel and Unusual Punishment Clause, which broadly regulates government treatment of prisoners. Because the Eighth Amendment does not include the same textual limitation on its protection as the Fourth Amendment, the Court’s conclusion in Verdugo-Urquidez about the Fourth Amendment and “the people” should not govern questions involving the Cruel and Unusual Punishment Clause. And because the Cruel and Unusual Punishment Clause broadly regulates the conduct of government officers, it is “in respect of our own citizens” and should not be barred by the presumption of territorial limitation on domestic law in Curtiss-Wright. Furthermore, because the prisoners at Abu Ghraib were under American authority and control at the time, it would not be unreasonable to require government officers to treat them in a manner similar to that which applies to prisoners (including aliens) held domestically. Rather, this would apply the Eighth Amendment equally to government agents regardless of where they act.

Third, the conduct at issue in the Abu Ghraib scandal would very likely give rise to Bivens liability if committed against a U.S. citizen or alien held in the territorial jurisdiction of the United States. In Hope v. Pelzer, the Supreme Court held that hitching a prisoner to a post for an extended time without bathroom breaks was unconstitutionally cruel and unusual punishment because there was no valid penological or safety interest in restraining him that way. While there are obviously factual differences between Hope, other cruel and unusual punishment cases, and Abu Ghraib, the Abu Ghraib victims could certainly assert that there was no legitimate penological interest in stripping them, in forcing them into humiliating positions, or in the other types of abuse. If the conduct

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739 (2002).
283. See U.S. CONST. amend. VIII; Hope, 536 U.S. at 739; supra Part IV.B.
284. U.S. CONST. amend. IV; Verdugo-Urquidez, 494 U.S. at 274–75.
285. 299 U.S. at 318; see also supra notes 216–17 and accompanying text.
287. See Verdugo-Urquidez, 494 U.S. at 274 (allowing Bivens to aliens with some “attachment to this country”); United States v. Yousef, 327 F.3d 56, 163 (2d Cir. 2002). In Yousef the Second Circuit treated an Eighth Amendment claim brought by an alien but held in a federal prison on the merits, implying that the Eighth Amendment applies to aliens held within the United States. See also supra note 195.
288. 536 U.S. at 738.
289. Otherwise, the soldiers would not have been convicted at court martial. See supra notes
would create constitutional liability if done against either a U.S. citizen or an alien held in the territorial jurisdiction of the United States, it should be appropriate to allow the same liability for conduct taken against aliens in the physical and legal custody of United States officers.

Finally, where allowing a cause of action based on just one of the Bivens rationales would allow the victims of unconstitutional conduct by U.S. agents to assert a claim (subject to qualified immunity and other defenses), but requiring the other rationale would preclude that claim entirely, a court should be able to allow legitimately aggrieved plaintiffs a day in court to present their case. Obviously, fairness is not determinative, but when, as here, there is a conflict between two of the stated rationales for a judicial doctrine, courts should be allowed to consider it.

Therefore, even though Bivens’s vindication rationale does not apply because the victims are noncitizens, the particular circumstances in the Abu Ghraib scandal should allow extending Bivens on the basis of the deterrence rationale. Not only would this be consistent with the Sosa majority’s apparent understanding of Bivens, it would ensure that federal officers are governed by the same constitutional standards on the treatment of prisoners regardless of where they operate. It would allow the victims of abuse by U.S. soldiers a chance to seek compensation from their abusers.

b. Special factors counseling hesitation against extending Bivens: the political question doctrine and the military. Assuming that an extraterritorial violation of the Cruel and Unusual Punishment Clause would support a cause of action under Bivens, we still need to consider whether the political question doctrine and the deference that courts typically show the military should act as a “special factor[] counseling hesitation” in the creation of a Bivens remedy for the Abu Ghraib victims. Because Bivens is a judicially created remedy, the Court has

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290. See supra notes 98–103 and accompanying text. But for the Coalition Provisional Authority Order immunizing the soldiers, the Abu Ghraib victims would very likely have had a cause of action under Iraqi law against their abusers. See Civil Code art. 202 (1951) (Iraq); Coalition Provisional Authority Order No. 17 (revised), supra note 13, § 2; supra notes 8 & 13.

291. See Malesko, 534 U.S. at 67–68 (characterizing the extension of Bivens to those situations where no other effective remedy was available). Furthermore, because all incidents of torture throughout the world would not involve a U.S. government agent defendant, allowing a cause of action here would not extend Bivens to a limitless class of plaintiffs.

expressed hesitance in extending it when “Congress has provided an alternative remedy which it explicitly declare[s] to be a substitute for recovery directly under the Constitution and viewed as equally effective,”293 or when there are “special factors counseling hesitation in the absence of affirmative action by Congress.”294

In an opinion by then-Judge Scalia in Sanchez-Espinoza v. Reagan, a case brought against high-level executive officials challenging the Reagan administration’s role in the Nicaraguan Contra situation,295 the D.C. Circuit concluded 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.”296 This is a somewhat specialized phrasing of the political question doctrine, under which courts defer to the political branches in addressing problems better resolved by those branches.297 Because the legislative298 and executive299 branches have control of the military, regulating the conduct of soldiers is a prototypical situation calling for application of the political question doctrine.300

293. Id. at 18–19.
294. Bivens, 446 U.S. at 396.
295. 770 F.2d 202, 204 (D.C. Cir. 1985).
296. Id. at 209. Specifically, the plaintiffs in Sanchez-Espinoza sought Bivens relief for alleged violations of the Fourth Amendment by guerilla forces allegedly trained by United States citizens. See id. at 205. Under the later Supreme Court decisions in Verdugo-Urquidez, 494 U.S. at 273–75 (refusing to allow Bivens liability for alleged violations of the Fourth Amendment committed abroad), and in Malesko, 534 U.S. at 69 (refusing to apply Bivens liability under a respondent superior theory), the suit in Sanchez-Espinoza would have clearly not been viable.
298. U.S. CONST. art I, § 8, cl. 1 ("provide for the common [defense]"); id. at cl. 13 ("[t]o provide and maintain a Navy"); id. at cl. 14 ("[t]o make Rules for the Government and Regulation of the Land and Naval forces"); id. at cl. 15 ("[t]o provide for calling forth of the Militia"); id. at cl. 16 ("[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States").
299. Id. at art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . ").
300. It is in large part due to the deference traditionally shown the military that courts have recognized the so-called Feres doctrine, which generally provides that soldiers cannot use the FTCA to sue the United States for injuries arising from activities incident to military service. See Feres v. United States, 340 U.S. 135 (1950); see also CHEMERINSKY, supra note 42, at 625. The Feres doctrine has often been justified on the ground that courts should stay out of internal military governance. See id. at 627–28.
However, would the creation of a judicial remedy interfere with the “special needs of foreign affairs” or with the political branches’ control of the military? Not in the context of Abu Ghraib. First, the decision in *Sanchez-Espinoza* focused on the political character of the lawsuit and the policymaking role of the defendants.

Whether or not the present litigation is motivated by considerations of geopolitics rather than personal harm, we think that as a general matter the danger of foreign citizens’ using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist.\(^{301}\)

The soldiers implicated in the Abu Ghraib scandal are not policymakers, and the courts do not need to protect them to protect the formation and execution of foreign or military policy in the same way that was necessary in *Sanchez-Espinoza*. This is because, unlike *Sanchez-Espinoza*, any suits by the Abu Ghraib victims would challenge individual conduct, rather than the entire official government policy putting the soldiers in the country.\(^{302}\)

Second, any relief against the soldiers would not “obstruct the foreign policy of our government” because the United States has condemned the abuse at Abu Ghraib.\(^{303}\) While condemnation does not mean the courts should automatically create a judicial remedy for the victims of the condemned conduct, the President, Congress, and the military’s courts martial have stated that what happened at Abu Ghraib was inappropriate.\(^{304}\) That the Executive and Legislative branches have refused to defend what happened indicates that allowing a judicial remedy would not obstruct a government policy.

Third, providing a judicial remedy would not interfere with internal military governance because the military has already investigated,

\(^{301}\) *Sanchez-Espinoza*, 770 F.2d at 209 (emphasis added).

\(^{302}\) *Id.* at 204 (describing the suit as a general challenge to Executive support for the Nicaraguan Contras).

\(^{303}\) *Id.*; see Global Message (May 6, 2004), at http://www.whitehouse.gov/news/releases/2004/05/20040506-1.html (statement by President Bush calling the abuse at Abu Ghraib “abhorrent”).

\(^{304}\) See Eric Schmitt & Douglas Jehl, *Army Says C.I.A. Hid More Iraqis than It Claimed*, N.Y. TIMES, Sept. 9, 2004, at A6 (“‘We had a gigantic failure of leadership—one that a year ago, I would have said was impossible to have in the United States Army.’” (quoting Representative John Kline, Republican of Minnesota)); Global Message, supra note 303; *supra* notes 4–6 (discussing court martial proceedings).
reprimanded, and sentenced many of the participants. And fourth, creating a judicial remedy for past conduct against specified tortfeasors would not frustrate whatever efforts the military or Congress may undertake to prevent future abuses.

In summary, because the Abu Ghraib victims cannot sue their abusers under Iraqi law, they must use U.S. law. Under U.S. law, the two primary theories under which they could sue U.S. military personnel in their individual capacities are the ATS and Bivens. Courts should have no trouble in creating a cause of action for torture under the ATS because the Sosa majority adopted a flexible standard that would allow clearly defined violations of customary international law to be actionable in U.S. courts. Based on various treaties and domestic statutes addressing and even defining torture, courts should find that the international norm against torture is sufficiently clearly defined to allow liability under the ATS.

Whether there should be a Bivens cause of action is a more difficult question. This Comment has argued that Bivens should be available against the soldiers who participated in the abuse at Abu Ghraib because one of the principal purposes of the Bivens remedy is to deter federal agents from acting unconstitutionally, and because foreign and military policy would not be frustrated by the imposition of civil liability against the soldiers.

305. See supra notes 4–6.
306. If anything, the imposition of civil liability against the abusers would likely augment whatever deterrents the military would otherwise impose by showing other soldiers that they could be responsible for damages to the people they may abuse. One Law Review editor suggested that exposing soldiers to personal liability would make military recruiting more difficult. While I understand the concern, § 1983 and Bivens liability have not proven insurmountable obstacles to the recruitment of police officers, FBI agents, or prison guards. Furthermore, I sincerely doubt that military recruits join the army so they will be able to abuse people.
307. See Coalition Provisional Authority Order No. 17 (revised), supra note 13, § 2.
310. One practical consideration to be addressed if a court recognizes a cause of action under Bivens is the statute of limitations. Because Bivens is an implied remedy it includes no limitations period, and courts usually borrow the state statute of limitations for personal injury. See Indus. Constructors Corp. v. United States Bureau of Reclamation, 15 F.3d 963, 968 (10th Cir. 1994). Iraq has a three-year statute of limitation for tort actions. CIVIL CODE art. 232 (1951) (Iraq). A three year statute of limitations is not unreasonable.

The Iraqi Civil Code, as amended, is still in force. The Law of Administration for the State of Iraq for the Transitional Period, the document governing the Coalition Provisional Government,
Moreover, allowing civil relief under the ATS or Bivens would not open the floodgates to litigation. First, as federal officers, soldiers would be able to assert the defense of qualified immunity. Because qualified immunity “shield[s] [a government defendant] from liability for [civil damages] if their actions did not violate ‘clearly established statutory or constitutional rights of which a reasonable person would have known,’” innocent soldiers would be protected. While it is tempting to suggest that the soldiers must have known that what they were doing was wrong, this is an outsider’s perspective. In any civil suit, the soldiers would be able to explain the unique circumstances at Abu Ghraib, and qualified immunity may be appropriate. Second, given the fact that the United States really is at war, it would be appropriate for a court to refuse to hear suits for conduct that would not be compensable under the FCA’s combat activities exclusion. In the FCA, Congress permitted liability to be asserted against the United States for the military’s noncombat activities, and where those noncombat activities have clear analogues in the civilian prison system, subjecting military personnel to the same standards and the same liability as their domestic counterparts.

provided that “[e]xcept as otherwise provided in this Law, the laws in force in Iraq on 30 June 2004 shall remain in effect unless and until rescinded or amended by the Iraqi Transitional Government in accordance with this Law.” The Law of Administration for the State of Iraq for the Transitional Period, art. 26 (Mar. 8, 2004); E-mail from M. Lawrence, Iraqi International Law Group, to Scott J. Borrowman (Dec. 11, 2004, 03:53 MST) (on file with author).

Another practical consideration for any suit under either Bivens or the ATS would be where the victim could sue. Because the violations occurred in Iraq—even though in a prison wholly controlled by the United States—venue would lie in the defendant’s home district under 28 U.S.C. § 1391 (2004). Because the soldiers are “officer[s] or employee[s] of the United States or an agency thereof acting . . . under color of legal authority” (that is, because they work for the Department of Defense), 28 U.S.C. § 1391(e) applies. This section allows suit in any district where a defendant resides, or even where the plaintiff resides “if no real property is involved in the action.” Id. As to the civilian contractors, § 1391(b) applies. This section provides that venue is proper in (1) a judicial district where any defendant resides, if all defendants reside in the same state, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . , or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Id. While most of the soldiers involved in the Abu Ghraib scandal were in the 327th Military Police Brigade Company, which is based in Maryland, see Richard A. Serrano, Soldier ‘Bewildered’ over Abuse, L.A. TIMES, Aug. 7, 2004, at A14, the individual soldiers may be residents of other states. Also, the civilian contractors could be from anywhere.


should not unnecessarily infringe on the United States’ ability to prosecute the war.

C. Individual Private Contractors

At his sentencing hearing, Specialist Graner testified that “his orders came from civilian contractors as well as military intelligence.” The Taguba Report also indicates that civilian contractors were responsible for some of the abuse. Because private contractors enjoy immunity under Iraqi law similar to that enjoyed by soldiers, any suits against the contractors would also need to arise under U.S. law.

Because Sosa is concerned with whether a norm of customary international law is sufficiently clearly defined as to justify the creation of a common law cause of action, rather than the identity of the defendant, the analysis of the ATS against soldiers applies equally against private contractors. Therefore, because the international consensus condemning torture is clearly established by both domestic and international materials, a court should allow suit under the ATS against civilian contractors who participated in the abuse at Abu Ghraib.

The one wrinkle in determining whether Bivens should be available against private contractors is the Supreme Court’s Malesko decision, which many commentators see as precluding Bivens actions against private actors. However, the core holding of Malesko forbids a Bivens remedy based solely on respondeat superior liability. The decision does not necessarily preclude the assertion of liability under Bivens against private individuals acting under federal authority. In Malesko, the Court concluded that “if a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury.” Suing an employer for the conduct of an employee would frustrate the deterrence rationale of

319. See Malesko, 534 U.S. at 71–73.
Bivens because it would not deter individual violations of the Constitution.\(^{321}\) But holding the individual employees—the very people capable of violating the Constitution and therefore being deterred by Bivens—liable would not frustrate the deterrence rationale.\(^{322}\) It was on this analysis that the majority held, “[w]ith respect to the alleged constitutional deprivation, [the plaintiff’s] only remedy lies against the individual” who injured him (even if he is a private contractor).\(^{323}\)

Therefore, the apparent hurdle in Malesko should not prevent asserting a cause of action under Bivens against the private contractors who participated in the abuse at Abu Ghraib. Because, in contrast to federal officers, civilian contractors would not enjoy qualified immunity, suing the civilian contractors is a potentially attractive option.\(^{324}\)

Thus, the FCA provides the most efficient method of obtaining compensation for the injuries the Abu Ghraib detainees received. Because the FTCA’s foreign country exception would bar suit against the United States, if any of the detainees wanted to sue for compensation, they would need to sue the soldiers and civilian contractors in their individual capacities. Such suits should be permitted under the ATS because the international consensus against torture is clearly defined by both international treaties and other documents, and by domestic statutes.\(^{325}\) The question on Bivens liability is somewhat trickier because

\(^{321}\) Id. at 69–70.

\(^{322}\) Moreover, the Supreme Court did not have the opportunity to rule on the Bivens action against the employee who refused to let the inmate use the elevator because that claim had been dismissed as barred by the statute of limitations. See id. at 65.

\(^{323}\) Id. at 72; see CHEMERINSKY, supra note 42, at 610 n.122.

\(^{324}\) See CHEMERINSKY, supra note 42, at 539–40 (citing Wyatt v. Cole, 504 U.S. 158, 168–69 (1992)). Malesko would bar the assertion of liability against a private contractor’s employer on a respondeat superior theory. See Malesko, 534 U.S. at 71–73. Because these corporations share their employees’ immunity to suit under Iraqi law, see Coalition Provisional Authority Order No. 17 (revised), supra note 13, § 4(2), obtaining relief from these corporations requires a little more creativity. In a class action suit filed against the Titan Corporation—the employer of one of the civilian contractors identified in the Taguba Report—the plaintiffs allege causes of action arising under RICO, the ATS, the Constitution, and the Geneva Convention. See Complaint, Al-Rawi v. Titan (S.D. Cal. June 9, 2004) (No. 04 CV 1143 R), at http://www.cdi.org/news/law/Al-Rawi-v-Titan-Complaint.pdf (last visited Mar. 26, 2005). It also raises a number of common law theories, including negligent hiring, failure to train, and unjust enrichment, that have their locus in America and should therefore be exempt from the immunity to Iraqi law. See id.; Saleh v. Titan Corp., 353 F.Supp.2d 1087 (S.D. Cal. 2004). The most recent action on this case was an order transferring it to the Eastern District of Virginia. Saleh v. Titan Corp., No. 04 CV 1143 R(NLS), 2005 WL 668830 (S.D. Cal. Mar. 21, 2005). A similar purported class action has also been filed in the District Court for the District of Columbia. See Complaint, Ibrahim v. Titan Corp. (D.D.C. Feb. 9, 2005) (No. 04-01248). It also asserts causes of action under the ATS, RICO, and common law tort theories. Id.

\(^{325}\) See Sosa, 124 S. Ct. at 2766–67.
allowing liability would advance the deterrence rationale of the *Bivens* doctrine, but not the vindication rationale. I have argued that because the *Sosa* majority assumes *Bivens* is available to remedy extraterritorial torts, because the Cruel and Unusual Punishment Clause is a broad limitation on government conduct, and because the conduct at Abu Ghraib would likely give rise to *Bivens* liability if it had occurred in the United States, courts should be able to allow *Bivens* liability. I have also argued that the fact that the defendants would be military personnel should not constitute a special factor counseling hesitation against the creation of a *Bivens* remedy against either the soldiers or the private contractors.

VI. CONCLUSION

The United States should provide civil relief to the victims of the Abu Ghraib prisoner abuse scandal. Doing so would promote the United States’ image among the Iraqi people and in the Middle East at large, and would therefore aid both our efforts in Iraq and in the prosecution of the larger war on terror. It would also reflect compliance with our obligation under the Convention Against Torture to “ensure in [our] legal system that the victim of an act of torture [can] obtain redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”

The most efficient way of providing these victims compensation is through the Foreign Claims Act. Under the FCA, victims could go to a military claims commission in Iraq and, hopefully with no more than the now infamous pictures, obtain a settlement. But many Iraqis see both the FCA and court martial proceedings against the offenders as

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326. Draft Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984, art. 14, 23 I.L.M. 1027. The Senate’s statement on the ratification of the Convention indicated that this provision would not be self-executing. See Understanding on the Convention Against Torture, supra note 255, at III(1). In other words, Congress stated that the Convention would not create a cause of action without further action by Congress. See id. at II(5). The TVPA was supposed to be this further action. On the one hand, the TVPA went further than the Understanding indicated that Congress would go—it created a cause of action for the victims of torture whenever the defendant operated under color of foreign law and regardless of where the torture was committed. 28 U.S.C. § 1350 note. On the other hand, the TVPA was also apparently based on the (unfortunately erroneous) conclusion that someone acting under U.S. law would not torture. See supra notes 4–10, 265–68 and accompanying text. In any event, by ratifying the Convention, the United States has acknowledged its obligation to provide legal remedies for the victims of torture.

inadequate.328 If the FCA does not provide sufficient compensation, or if the victims are interested in suing those who abused them, they must assert violations of United States law to avoid the immunity provided under Coalition Provisional Authority’s Orders.329 This Comment has suggested that the Supreme Court’s decision in Sosa v. Alvarez-Machain should allow a cause of action under the ATS because there is broad, clear international consensus that torture and abuse of prisoners is unlawful. It has also suggested that the statement in Sosa that Bivens “now provide[s] damages remedies” for extraterritorial constitutional torts330 indicates that the Supreme Court would consider liability on a constitutional tort theory like Bivens.

Whatever the avenue, providing a remedy to those abused by U.S. military personnel and civilian contractors is the right thing to do. Convicting the soldiers involved has shown the Iraqi people that our own soldiers are not above the law. Providing civil relief to the victims would show the Iraqi people that the law serves everyone, even the politically unimportant. Hopefully, that would provide the same sort of enthusiasm for democracy and the rule of law that the recent elections have.331

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328. See Todd Richissin & Gail Gibson, Iraqis See U.S. Sham as Abuse Trials Open, BALTIMORE SUN, June 21, 2004, at 1A; Report: Army Denies Most Compensation Claims by Iraqis, supra note 26 (“‘Our point of view toward the Americans has changed. You can feel the fury inside you,’ said Amir Shleman, who lost a brother who was a father of a 7-year-old boy and 13-year-old girl. ‘If they treated people like human beings, no one would take up weapons against them.’”).

329. See Coalition Provisional Authority Order No. 17 (revised), supra note 13, § 2.

330. Sosa, 124 S. Ct. at 2768–69.


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371] Civil Remedies for Victims of Extraterritorial Torts