By Jonathan Hafetz

From Balkinization | Original Article

One or more of the “war on terror” Bivens cases now working their way through the lower courts may soon end up on the Supreme Court’s doorstep. Of these cases, five involve American citizens alleging torture and abuse while in illegal U.S. detention. The defendants have moved to dismiss each one, arguing that national security is a “special factor” counseling hesitation, thus precluding a Bivens damages remedy. (*Bivens v. Six Unknown Federal Narcotics Agents* is the 1971 Supreme Court decision recognizing a cause of action for constitutional violations committed by federal officials).

The “special factors” arguments boil down to this: federal courts have no place enforcing constitutional protections in the “war on terror” as a matter of separation of powers principles or institutional capacity. In that respect, these cases recall post-9/11 detainee habeas cases in which the Supreme Court has resisted sweeping claims of executive power (Hamdi, Rasul, *Hamdan,* and Boumediene). All, moreover, involve U.S. citizens, distinguishing them from the various noncitizen damages actions that have so far foundered. And none involves a government assertion of “state secrets,” at least not yet.

The five pending U.S. citizen Bivens cases are: (1) Vance v. Rumsfeld, in which the Seventh Circuit recently affirmed, in a divided opinion, the district court’s denial of a motion to dismiss of a suit by two civilian contractors tortured in Iraq; (2 & 3) Padilla v. Rumsfeld & Yoo v. Padilla —pending before the 4th & 9th Circuits, respectively—challenging the plaintiff's torture while detained as an “enemy combatant” in a South Carolina navy brig; (4) Doe v. Rumsfeld , in which the district court for the District of Columbia denied a motion to dismiss a suit by a civilian contractor tortured in Iraq; and (5) Meshal v. Higgenbotham , a suit challenging proxy detention, torture, and rendition in the Horn of Africa, pending on a motion to dismiss in the district court for the District of Columbia (Disclosure: I am cooperating counsel with the ACLU in Meshal

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The Supreme Court has, to be sure, resisted expanding Bivens during the past three decades. (Its 1980 decision in Carlson v. Green , recognizing a prisoner's right to sue federal officials under the Eighth Amendment, is the last time it extended Bivens). This Term, moreover, the Court will review the Ninth Circuit's decision in *Minneci v. Pollard* , holding that private employees operating a prison under contract with the federal government may be sued under Bivens . The cert. grant in *Minneci* may or may not presage a new limit on Bivens.

But the detainee Bivens cases are different because they fall so closely within Bivens ' heartland and purpose of deterring government misconduct. What most distinguishes them from run-of-mill Bivens cases alleging abuse in federal prisons is that the mistreatment was more egregious, not least because, in some instances, it resulted from official government policy. And, since none of these plaintiffs has alternative remedies, it is, as Justice Harlan explained in *Bivens* , "damages or nothing."

The defendants' arguments about the need to protect sensitive information and avoid interference with military decisionmaking rest on a fundamental misconception of Bivens: the Supreme Court intended "special factors" to protect legislative , not executive, prerogatives. Unlike, for example, in Bivens suits over Social Security benefits (see *Schweicker v. Chilicky*), Congress has not provided another remedial scheme for victims of U.S. torture that should cause judges to stay their Bivens hand. To the contrary, the limited congressional action in this area is consistent with recognizing a

Bivens
remedy for American citizens tortured and abused by officials of their own government (see, for example, Congress' denial of a
Bivens
remedy only to certain aliens in the Military Commission and Detainee Treatment Acts). Nor do any of the cases present a question of interfering with
internal
military affairs, an area that the Court has exempted from
Bivens (
e.g.,
Chappell v. Wallace
).

The defendants in each case try to suggest some limiting factor, be it detention in a warzone (V ance
and
Doe
) or the risk of interfering in the affairs of another sovereign (
Meshal
). But the varied facts of the cases highlight the problem with this approach. How, for example, can "warzone" be a limiting factor when Jose Padilla was arrested and detained in the U.S.? How, alternatively, can "enemy combatant" be a limiting factor when "special factors" would preclude a
Bivens
action by innocent civilians? There is, in short, no limit to defendants' "special factors" argument. Accepting it would create a broad national security exception to
Bivens
, denying even U.S. citizens a remedy no matter how egregious the mistreatment—no matter, that is, whether the harm was a detainee's loss of sleep or of his fingers, or whether that harm occurred in Kandahar or Kansas. It's the kind of argument that has troubled the Supreme Court in the past—and should trouble it no less this time around.