

**United States
Defendant-Petitioner**

v.

**Tariq Hassan
Plaintiff-Respondent**

No. 06-1879

QUESTIONS PRESENTED

- I. Whether Tariq Hassan’s claim for relief is not yet ripe and thus non-justiciable?
- II. Whether detainees held in United States custody have a fundamental interest in autonomy and bodily integrity; and, if so, whether the government’s use of physically coercive methods of interrogation infringes upon that interest in violation of the Due Process clause of the Fifth Amendment?

STATEMENT OF THE FACTS

Respondent, Tariq Hassan (“Respondent” or “Hassan”), was born Adam D. Evans in Buffalo, New York in 1979. He was raised in the United States, first in New York and then in the suburbs of Dallas, Texas. During college, he became interested in the Islamic religion. He converted to Islam in 2001 at age 22, and adopted his current name then.

Following his graduation from college in June 2001, Hassan traveled to Pakistan to attend an Islamic religious school known as a madrasah. Hassan commenced his studies at a small madrasah in the town of Khar in the Bajaur Province, which is located in the semi-autonomous region near the border of Pakistan and Afghanistan known as the Federally Administered Tribal Areas.

What, exactly, happened during the time Hassan studied at the madrasah remains in question. Hassan avers that the school was not a terrorist training camp; he spent most of his time studying the Quran and learning how to read and write Arabic. He spent the remainder of his time performing various chores related to the maintenance of the school. The record supports these assertions. Hassan admits that the school served as a “rest stop” for what he believed to be al-Qaeda members traveling from Pakistan into Afghanistan. Most were foreign recruits, coming from abroad (including Yemenis, Chechens, Syrians, Palestinians and Somalis) to terrorist training camps in Afghanistan. Many initially traveled to Pakistan, spending anywhere from days to weeks at the madrasah before crossing the border into Afghanistan. While some of the terrorists conducted weapons training and informal discussions of tactics and explosives during their stay, the school served merely to provide shelter and food for the terrorists before they made their way into Afghanistan. Hassan claims that he received no terrorist training during his time at the school and had only minimal contact with the non-students who stopped at the school.

On September 11, 2001, the nation experienced one of the worst tragedies in its history when terrorists affiliated with the al-Qaeda network hijacked airliners and carried out coordinated attacks on the World Trade Center in New York and the Pentagon outside Washington, D.C. (A fourth plane hijacked by the terrorists crashed in rural Pennsylvania as passengers attempted to retake the plane from the hijackers, killing all aboard.) A week later, Congress passed a resolution known as the Authorization for the Use of Military Force (“AUMF”), authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” or “harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” The next month, American military forces (along with operatives from the Central Intelligence Agency (“CIA”)) commenced combat operations in Afghanistan to capture or kill terrorists affiliated with al-Qaeda and oust from the Taliban regime, which controlled Afghanistan and provided aid and sanctuary to those terrorists.

At some point around this time – either late September or early October 2001 – Hassan traveled to Afghanistan along with other students from the madrasah, ostensibly to provide aid to people displaced by the impending conflict. According to Hassan, he and the other students ended up in the village of Baghlan, located southwest of the town of Mazar-e-Sharif. Hassan claims that the students spent the majority of their time building a refugee camp: stockpiling meager medical supplies and food, constructing rough huts, and digging latrines. Although Hassan received no military training at any point (indeed he claims to have never fired a gun in his life), members of their party took turns in pairs guarding the camp from a perceived threat of bandits. The students would sit on a small hill overlooking the camp, each holding one of two AK-47 assault rifles, which they had purchased from a local villager. Hassan claims that, while standing sentry, he never fired his weapon. However, one evening shortly after they arrived at the camp, his counterpart fired a volley of four to five rounds to “scare off” a group of what they thought were bandits who approached the camp on horseback.

In late October 2001, Hassan and another student, Mohammad, were captured by paramilitary officers from the CIA, operating in conjunction with soldiers from the Northern Alliance. Hassan claims that he was standing guard near the camp when the officers and soldiers arrived; the two sentries immediately identified themselves as aid workers and relinquished their weapons. However, declassified excerpts of CIA reports on the incident indicate that, as CIA officers and Northern Alliance soldiers approached on horseback, one of the two sentries brandished his AK-47 in their direction, and they were forced to physically subdue him and his counterpart. No shots were fired. Those declassified excerpts from the report were included in the record developed in the district court.

Both Hassan’s account and U.S. government records substantiate that, after his capture on or about November 1, 2001, he was taken to a military facility outside of Kabul, Afghanistan, where he was held with other suspected al-Qaeda terrorists. Hassan recalled that those held at the facility included common criminals arrested in Kabul, a number of foreigners – who he believed to include Yemenis, Chechens and Syrians – and a number of non-Afghans like himself who had been “swept up” in the tumult during the conflict. Within three weeks of his capture,

Hassan was interviewed by a man who identified himself as an American (the man was dressed in civilian clothing, and Hassan believed he was an officer in the CIA or some other intelligence organization). Hassan identified himself as an American citizen and described his travel from Pakistan to Afghanistan and his work at the refugee camp.

According to Hassan, he was treated humanely during his detention in Afghanistan. Prisoners were held in a converted factory; he and five other men shared a 15 by 20 foot room where they each had a cot. Muslim prisoners were each given a copy of the Quran and allowed to conduct their daily prayers without interruption, and prisoners received three meals a day. Hassan was questioned between five and ten times during his detention in Afghanistan by various men; he did not know their identities or whether they were military personnel or intelligence officers. During these sessions, he was made to sit in a stark room with a table and chair for periods as long as eight hours at a time; however, he was not struck by any of the interviewers or subjected to any sensory deprivation or other forms of mistreatment. Hassan repeatedly informed those questioning him that he was an American citizen and repeated his account of his travels first to Pakistan and then to Afghanistan and the circumstances regarding his capture. At no time did Hassan request an attorney or challenge his detention. Hassan states that he trusted that American officials would recognize that he was not affiliated with either al-Qaeda or the Taliban and that he would eventually be released.

In February 2002, soldiers at the prison awakened Hassan in the middle of the night. He was handcuffed, fitted with goggles that blocked out all light, earphones that blocked out all sound, and a hood that covered his head. Hassan was transported from the prison to a waiting airplane; he was handcuffed to a seat in the plane by his hands and ankles. The goggles, earphones, and hood were not removed. The plane flight lasted a number of hours (Hassan was unable to keep track of the time), and the plane made three stops before arriving at its final destination, which Hassan would learn was the U.S. naval base located in Guantanamo Bay, Cuba. At that base, federal agents conduct interrogations under the guidelines provided in the Army Field Manual on Intelligence Interrogation (“Army Field Manual”).¹

Since February 2002, Hassan has been held at the prison facility at Guantanamo. He has not challenged the legality of his detention through a petition for a writ of habeas corpus.² The instant case, however, arises out of the treatment of detainees, including Hassan, at the prison.

Prior to the filing of the suit at issue here, Hassan became increasingly concerned with the interrogation³ techniques used at the prison and began to fear for his own safety. Hassan

¹ In the fall of 2006, the Republican Congress, frustrated by the perceived lack of success of the policies and strategies designed to prosecute the so-called war on terror, repealed the Detainee Treatment Act, which – among other things – limited the acceptable forms of interrogation to those outlined in the Army Field Manual and imposed certain limitations on the procedural avenues open to detainees to challenge their detention. Although there is no evidence that interrogators at Guantanamo are now engaging in methods of interrogation more coercive than those approved in the Army Field Manual, the Detainee Treatment Act does not bear on the claim Hassan raises here.

² For the purposes of this problem, you may ignore the issue of habeas corpus. Hassan does not challenge the legality of his detention; as described below he merely challenges the use of the physically coercive methods of interrogation in questioning detainees at the facility.

came to believe that military and intelligence officers stationed at Guantanamo employed physically harmful techniques in the attempt to extract information from detainees. Hassan acknowledges that his understanding of these techniques was based mainly on hearsay and circumstantial evidence; however, he contends that a number of anecdotal examples support his belief, including:

- When he was first brought to Guantanamo, Hassan shared a cell with a man known to him as Ali. Though Ali never revealed his precise position within any terrorist organization, he told enough anecdotes about the organization's leaders to make it clear that he was highly-ranked. Hassan recalls that a number of times, Ali was taken from the cell and absent for periods of time as long as 3-4 days. When Ali returned to the cell after each absence, he was exhausted and his appearance was ragged. His eyes were bloodshot, his clothes were often soaking wet and dirty. Ali never told Hassan the extent of his treatment but often referred to his American captors as "animals" or "barbarians." In the fall of 2002, Ali was taken from the cell by American guards, and Hassan has not seen him since. Detainees are usually given no warning when they are to be transferred, but the guards talk among themselves. Some of the detainees can understand English, so information about where the departed detainees have been sent gradually makes its way around the Base. Hassan has heard no word of Ali's whereabouts since he disappeared.
- After Hassan was moved to Guantanamo Bay, he was re-united with Mohammad. He has seen Mohammad only four times during his detention. The most recent time they met (about one year before Hassan filed suit), the two old friends swapped stories about their interrogation experiences. At that point, Mohammad had not been exposed to any of the harshest methods, but he did report that on one occasion, he was forced to stand for eight hours with his arms extended away from his body. Mohammad, like Hassan, insisted he had no contact with, and had provided no aid to, any terrorist organization. He is, however, a distant relative of Osama bin Laden.
- Hassan claims that a number of unidentified detainees told him that the Americans were "torturing" prisoners during questioning sessions, and that they were personally subjected to such tactics as: keeping detainees awake for as long as three to four days continuously using loud music and bright lights; covering detainees' eyes and ears with sensory deprivation goggles and earphones; and repeatedly telling detainees that they may be handed off to foreign intelligence agencies known to engage in more overt forms of torture.
- Hassan recalls a number of nights when he distinctly heard screams coming from the direction of the building used to question prisoners.

At no time has Hassan been subjected to any form of physical coercion or sensory deprivation. He has, however, noticed that his interrogators have become increasingly insistent with him in recent months. During one questioning session two months before he filed suit,

³ Here, the term "interrogation" is not specific to the common notion of extracting confessions by force but rather should connote a spectrum of methods used to obtain information from detainees, ranging from simple questioning to more forceful means.

Hassan's interrogator became frustrated with his continued insistence that he had no information about Al-Qaeda or Taliban operations. He slammed his hands down on the table, and said: "You hear those screams at night? I think it's time to cooperate, Hassan." In the months leading up to the filing of this suit, he became increasingly anxious about the possibility that he could be subjected to the same interrogation methods used on the other detainees. His anxiety began to manifest itself physically – Hassan began having trouble sleeping, he lost his appetite (often going days unable to eat), and he began having panic attacks, often without any provocation. Hassan was treated by Army physicians. Dr. Martin Gonzales assumed primary responsibility for Hassan's care. Before the district court, Gonzales testified that Hassan's condition was partially pre-existing, partially the result of being in an unfamiliar place, and partially the result of anxiety. Dr. Gonzales did not state whether he thought Hassan's fears were rational or irrational; he hypothesized that some patients might have similar reactions if they fear any number of consequences, such as incarceration or return to their home country's government.

In order to stop the use of these tactics, Hassan filed suit in the district court in Washington, D.C. His complaint alleged that the use of physically coercive interrogation measures violated the due process clause of the 5th Amendment, and he sought preliminary and permanent injunctive relief that would 1) prohibit the use of any form of physically coercive interrogation against detainees held in Guantanamo, and 2) require the government to inform the detainees held at Guantanamo Bay of this limitation.

The district court rejected the United States' motion to dismiss the claim. It made several factual findings. First, it accepted as true that the following tactics were in use at Guantanamo Bay: waterboarding; use of stress positions (standing for extended period with arms outstretched to the side); the so-called "fear up" tactic (exploiting detainee's rational fears, such as the fear of being subjected to rendition); sleep deprivation; and sensory deprivation.⁴ Second, it found that Hassan's physical and emotional injuries stemmed from his fear that he would be subjected to these tactics. Finally, given persuasive evidence offered by each side, the court declined to reach a finding on the question of whether the tactics were an effective means of eliciting reliable intelligence. It concluded that in light of its inability to find the tactics effective, it must find that they were not sufficiently narrowly tailored to achieve the government's interest in protecting national security to justify the invasion into Appellee's liberty and autonomy interests. The district court found the matter ripe for adjudication, and found that Hassan had demonstrated a sufficient likelihood of success on the merits at trial to justify granting his request for a preliminary injunction. The United States immediately appealed the preliminary injunction. On appeal, the D.C. Circuit affirmed. The opinion of the D.C. Circuit is reprinted below, excerpted from the Federal Reporter at 470 F.3d 1000 (D.C. Cir. 2006).

⁴ For a helpful resource that describes many of the coercive tactics here referenced, see Phillip Carter, *Taxonomy of Torture: The Facts and the Law*, SLATE.COM, available at <http://www.slate.com/features/whatistorture/taxonomy.html>.

OPINION OF THE COURT OF APPEALS FOR THE D.C. CIRCUIT

STONE, Circuit Judge:

Today, this court is called upon to resolve a point of law that will help define the intersection between civil rights and national security. Our decision today is in furtherance of civil rights. We do not, however, believe that it is opposed to national security. This court firmly believes that our citizens at home and our soldiers abroad are safest when the principles of autonomy and respect that guide our interactions with allies also guide our interactions with the potential enemy.

I. Introduction

The Appellee here, Tariq Hassan, is a United States citizen currently in U.S. custody at the Guantanamo Bay Naval Base. He has been detained at Camp Delta on the Guantanamo facility since February of 2002. His detention there followed a roughly three-month detention in Afghanistan, which is where he was captured by a group of CIA paramilitary officer and Northern Alliance soldiers. While the Appellant, United States, alleges that Hassan was engaged in combat alongside the enemy, Hassan asserts that he was in Afghanistan with a group committed to providing relief to the people displaced by the conflict between U.S. military forces and their Northern Alliance allies and the Taliban. The United States government has filed no formal charges against him, and Hassan has not yet been brought before a Combatant Status Review Tribunal.

Since Hassan arrived at Camp Delta, he has become increasingly anxious about being subjected to physically coercive interrogation tactics – he alleges he has developed insomnia, loss of appetite, and anxiety attacks as a result of this fear. These fears stem from a series of events including Hassan witnessing other detainees returning from what he presumed to be interrogation sessions, conversations between Hassan and other detainees regarding the interrogations, and thinly-veiled threats from a guard at the facility. Hassan filed suit in the District Court for the District of Columbia to bring a halt to the physically coercive techniques he alleges are in use at Camp Delta. He argued the practices deny him substantive due process and sought preliminary and permanent injunctive relief. The district court found the likelihood Hassan would succeed at a trial on the merits sufficiently great to award a preliminary injunction. The case comes to us on Appellant’s challenge to the district court’s decision to grant a preliminary injunction.

II. Ripeness

On appeal, the United States argues we must reverse the district court’s decision because Hassan presented no Article III case or controversy ripe for adjudication. Appellant advances two main theories to support this claim. First, it argues that because Appellee’s fear that he will be subjected to coercive interrogation methods is unreasonable, he has failed to demonstrate an

*1001 injury that has been caused by the Appellant such that a decision in his favor will provide redress. Second, Appellant argues that since Appellee has not yet been subjected to any coercive techniques, he presents a claim that is unripe for reason of insufficient factual development. Because we reject each of these theories in turn, we affirm the district court's holding on the Article III question.

The federal courts are courts of limited jurisdiction; the judicial power of the United States extends only to instances in which the parties present a "case" or "controversy." U.S. Const. art. III, § 2, cl. 1. A party who lacks standing does not present a case or controversy fit for judicial resolution. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Though it is true that the standing inquiry contains both prudential and constitutional components, the prudential considerations do not concern us here. Instead, we focus on the three elements that comprise the standing inquiry's "irreducible constitutional minimum." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Those elements are injury-in-fact, causation, and redressability. *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 132 (D.C. Cir. 2006). An "injury-in-fact" is one that is concrete and particularized, and actual or imminent. Generalized, conjectural, or hypothetical injuries do not injuries-in-fact make. To satisfy the causation requirement, a party must identify a causal link between the injury alleged and the conduct complained of. The redressability requirement is closely related; to meet it, a party must demonstrate that a decision in his favor is likely to redress the injury. The party who seeks to invoke this court's jurisdiction bears the burden of proof on each of these three elements. *Lujan*, 504 U.S. at 561.

Appellant makes a half-hearted argument that Appellee has sustained no injury-in-fact; Appellant has given this argument the effort it is worth. Appellee is unable to sleep or eat, and has begun to experience panic attacks. These are not hypothetical injuries that may be manifest at some unknown future date and that would fail to satisfy the injury-in-fact requirement. *See Zitofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 617 (D.C. Cir. 2006). These injuries are real, and Appellee feels their effects in the present. Appellee's injuries are, moreover, individualized – he fears the government may apply its aggressive interrogation tactics to him at any moment – and the extent of the psychological harm he suffers, manifest as it is in physical symptoms, has surpassed the generalized "emotional harm" that might stem from witnessing government conduct with which one disagrees and that would be insufficient to confer standing. *See Valley Forge Christian Coll. v. Am. United For Separation of Church and State*, 454 U.S. 464, 485-86 (1982); *Humane Soc'y v. Babbitt*, 46 F.3d 93, 98 (D.C. Cir. 1995). Finally, it is of no moment that the injuries stem from the challenged interrogation methods only indirectly. Injuries that flow indirectly from the challenged conduct may still be injuries-in-fact. *See Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-82 (2000).

Appellant makes a stronger argument that the Appellee has failed to demonstrate a causal link between his injuries and the challenged conduct, a failure which may also suggest a decision in his favor could fail to redress the harm. We have identified a causal link between a defendant's conduct and a plaintiff's injuries when those injuries flow from a "reasonable fear" of some harm. *See id.* at 183-84. The Appellee here has not yet been subjected to the interrogation techniques he seeks to enjoin; his injuries may only be caused by those techniques if his fear that he will be subjected to them is a reasonable one. If a reasonable person in

Appellee's shoes would not have developed similar fears, Appellee's fear is unreasonable and *1002 the injuries that flow from that fear cannot be caused by Appellant's conduct. *Teamsters v. Surface Transp. Board*, 457 F.3d 24, 28 (D.C. Cir. 2006) (plaintiff's self-inflicted injuries cannot be caused by defendant). We conclude, however, that Appellee's fear is reasonable.

Appellee has heard screams coming from the building the government devotes to detainee questioning. He is interred with people who claim to have been subjected to the interrogation methods he seeks to challenge. Appellee saw his cell mate, Ali, return to the cell more than once looking wet and soiled. These conditions are suggestive of methods of interrogation such as waterboarding. It was under these circumstances that Ali disappeared, leaving his cell mate to worry that his interrogators had taken their harsh tactics too far. Indeed, Hassan has received no information about Ali's whereabouts, and the grim reality is that Ali would not be the first detainee in U.S. custody to meet the fate Hassan has imagined for him.¹ Appellee's captors have suggested that if he would protect himself from the fate of those whose screams pierce the air around him, he had better cooperate.

There is no doubt Appellant benefits from creating a climate of fear among the detainees at Guantanamo Bay. Detainees are sure to be more easily managed and more pliant during the course of interrogation when they are afraid that physically and emotionally devastating treatment may follow in the wake of a failure to cooperate. Having put the evidence of such treatment before the detainees' eyes and ears, and having suggested to Appellee that he may himself be subjected to such treatment, this Court will not now credit Appellant's argument that Appellee's fears are unreasonable. They are very reasonable indeed, and have been caused by Appellant's conduct. The district court's preliminary injunction, the terms of which prohibit the continued use of coercive interrogation techniques and require the Guantanamo Bay administrators to inform the detainees as much, should redress the Appellant's harm.

Appellant argues that even if the Appellee has standing, his claim is not yet ripe. The ripeness doctrine counsels hesitation when the court's too-early involvement may entangle the court in an abstract debate that might be comparatively easily resolved at a later time through improved factual development. The inquiry is two-fold. It evaluates whether the issues are sufficiently well-developed to render them fit for adjudication, and considers the hardship to the parties that might flow from postponing judgment. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967); *Worth v. Jackson*, 451 F.3d 854, 861 (D.C. Cir. 2006). Although Appellant makes a strong argument that the decision we are to make here could be made more easily with a better-developed factual record, we believe the danger of hardship to the parties that would flow from postponing judgment is too great to justify delay.

There is no doubt that certain factual information may be gained by waiting. We might learn whether Appellant would in fact use the challenged techniques on Appellee and, if it did, whether the use of those techniques yielded information of sufficient import to justify their use. Unfortunately, the very nature of the techniques may render the information they yield, which this court would use to judge the need for the techniques' use, unreliable. That is, we may wait

¹ See Human Rights First, *COMMAND'S RESPONSIBILITY: SETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN* 10 (2006) (spotlighting detainee's apparent death by harsh interrogation tactics like those challenged here).

for further factual development, only to find that we cannot trust the “facts” that have been *1003 developed. Moreover, the record below, subject though it is to the limitations inherent in hearings for preliminary injunction, suggests that if given appropriate resources, Appellee could develop an extensive record of the coercive tactics in use at Guantanamo Bay. Though we might wait to find out which tool his captors would use on the Appellee, there is no doubt about which tools are in the box. The tactics in use are well-defined, and though there is some chance they will be modified, such a modification may itself contribute to the danger in waiting: Appellee’s captors may render the practices more – not less – cruel through innovation.

Appellant argues that *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), requires an outcome in its favor. Not so. The plaintiff there, who had once been the victim of a police chokehold, sought to enjoin the local police department’s use of the particular restraint method. The injunction was denied because the plaintiff could not convincingly allege either that he would come into contact with police again, or that in the event he were apprehended, the police would be provoked to again use a chokehold on him. *Id.* at 105. Appellee’s case could not be more different. He is in constant contact with the parties whose practices he seeks to enjoin. Moreover, Appellee’s conduct here is the very conduct likely to provoke harsh interrogation tactics: he insistently asserts his innocence. Finally, the practices the plaintiff in *Lyons* sought to enjoin were state law enforcement practices. The principles of *Younger v. Harris*, 401 U.S. 37 (1971), counseled hesitation. Appellee’s interrogators are either private citizens or federal agents. Neither *Lyons* nor *Younger* presents a barrier to reaching the merits of this case.

The dangers of delay are overwhelming. If no court intervenes, the Appellee here, who asserts that he provided no aid to al-Qaeda or Taliban forces, may be subjected to interrogation techniques that would result in lasting physical or psychological scars, or even death. Without this court’s help, Appellee will be forced to make a terrible choice: continue to assert his innocence, and risk a course of interrogation tactics with potentially devastating results; or concoct false information to satisfy his interrogators, and risk the prospect of having then validated his detention under the terms of the AUMF. Appellee should not be required to make such a choice. We find his claim is ripe and move on to consider the likelihood of success on the merits.

III. Due Process

The Supreme Court has made clear that a state of war is not a blank check for the President to abrogate the rights of the Nation’s citizens. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004). Against that backdrop, the district court granted Appellee’s motion for a temporary injunction, finding: (1) a substantial likelihood of success on the merits, (2) that Appellee would suffer irreparable harm without injunctive relief, (3) that an injunction would not substantially harm other interested parties, and (4) that issuance of the injunction is in the public interest. *See Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004).

We review the district court’s factual findings for clear error and that court’s legal conclusions in allowing the injunction to issue *de novo*. *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 835 n.32 (D.C. Cir. 1984). The government does not challenge any of the district court’s evidentiary rulings, but disagrees that the record developed is

sufficient to support its findings that there was a substantial likelihood of success on the merits *1004 and that issuing the injunction was in the public interest.

We analyze the substantive due process claims raised by Hassan to determine: (1) whether a fundamental liberty interest is impaired by the government's action; and if so, (2) whether that impairment is narrowly tailored to meet a compelling governmental interest. Only if, on the balance, it appears that the legitimate governmental interest justifies the interruption of Appellee's liberty interest *and* that intrusion is sufficiently narrowly-tailored, we will not constrain the government's challenged activities.

A. Fundamental Liberties

The Supreme Court has found that basic issues of human autonomy are "fundamental," placing them beyond the government's power to curtail absent a showing of compelling interest. For instance, a woman's right to obtain an abortion is fundamental in that the decision to carry a child is a critical aspect of her autonomy. *See Roe v. Wade*, 410 U.S. 113 (1973). Similarly, the decision to engage in adult consensual sexual activity also qualifies as fundamental because it relates to an integral aspect of identity and autonomy. *See Lawrence v. Texas*, 539 U.S. 558 (2003). Another aspect of personal autonomy protected as fundamental liberty interest is the right to be free from unwanted life-saving medical care. *See Cruzan v. Director, Missouri Health Dept.*, 497 U.S. 261 (1990) (O'Connor, J., concurring); *cf. Washington v. Glucksberg*, 521 U.S. 702 (1997) (upholding a state statute outlawing physician assisted suicide). The Due Process Clause protects certain liberty interests against government constraint "regardless of the fairness of the procedures used to implement [that constraint]." *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *but see Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (holding that complainant must demonstrate the law places an undue burden on her ability to exercise her right to abortion); *Victoria W. v. Larpen*, 369 F.3d 475, 486 (5th Cir. 2004) (requiring judicial approval for an abortion in custodial setting does not unduly burden prisoner's substantive due process right to an abortion).

A person awaiting trial or similar adjudication may be held in pretrial custody to ensure their presence at that forum. *Bell v. Wolfish*, 441 U.S. 520, 533-34 (1979). In assessing what fundamental liberties Appellee may assert, we must bear in mind that detainees lose those rights that are incompatible with proper captivity. *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003); *see Jones v. North Carolina Prisoner's Labor Union, Inc.*, 433 U.S. 119, 125 (1977). While government detention necessarily limits the expression of many liberties, such as freedom of movement and the enjoyment of a private lifestyle, there are certain liberties that the government may not abridge no matter what the basis for the detention. *Daniels*, 474 U.S. at 331.

This Court notes that the custodial relationship between the government and Appellee places Appellee in a special situation. The government is correct that certain liberty interests, due to the very fact of detention, must bow before the government's penal and security-related interests. *Overton*, 539 U.S. at 131. However, at a minimum, "[w]hen the [government] takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety." *DeShaney v. Winnebago County Dep't of Social Svcs.*, 489 U.S. at 199-200; *Smith v. District of Columbia*, 413 F.3d 86,

93 (D.C. Cir. 2005). Chief among them is treatment for medical ailments, *see Estelle v. Gamble*, 429 U.S. 97, 103 (1976), and freedom from abusive treatment by governmental authorities. *Ingraham v. Wright*, 430 U.S. 651, 674 & n.43 (1977); *see also Davidson v. Cannon*, 474 U.S. 344, 348 (1986) (implying that had prisoner shown gross negligence in ignoring credible threats from other inmates, he may be entitled to redress against the government). These freedoms form *1005 the cornerstone of an ordered liberty in which certain benefits of humanity are vested - and constitutionally guaranteed - despite the custodial setting.

We are aware, however, that the Supreme Court has cautioned against the expansion of these substantive guarantees because “guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.” *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). As the Supreme Court’s decision in *Glucksberg* indicates, one such guidepost may be the history at common law of the liberty in question. The *Glucksberg* court concluded that no “right to die” had ever existed, and that assisting one’s suicide was traditionally outlawed by the state. *Id.* at 712.

While we do not hope to undertake the same thorough historical investigation that Justice Rehnquist took in *Glucksberg*, we do note that our country has long prided itself on its humane treatment of its captives, regardless of whether the country is at war or not. *See Hamdi*, 542 U.S. at 536. We break no new ground when we recognize that government detainees have liberty interests that prevent the government from using the interrogation methods the district court has found it to use as a matter of fact. *See, e.g., Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996) (holding that constant lighting of a prisoner’s cell violated the 8th Amendment). The detainees’ interests in bodily integrity and autonomy are analogous to those the Supreme Court has recognized in cases such as *Roe* and *Lawrence*. Because such interests of fundamental liberty are at stake here, the government must justify its attempts to curtail them by demonstrating both a compelling interest and that the means used to achieve that interest are narrowly-tailored.²

B. Compelling Government Interest

It is without question that the protection of national security is a compelling government interest. *See Korematsu v. U.S.*, 323 U.S. 214 (1944). The government asserts that in order to further that interest in national security, it must be able to obtain actionable intelligence from those who have it, including individuals captured in the theater of battle. In the district court, the government presented a number of reasons why Hassan may possess such valuable information.

² In addition to its claim that the challenged methods of interrogation do not impermissibly burden Appellee’s liberty interest, the government also challenges Hassan’s characterization of his injury, arguing that his injury flows from mere government negligence. *See Daniels*, 474 U.S. at 333-34 (holding that a guard’s accidental injury of prisoner does not implicate prisoner’s due process rights). Though the government does not admit that it uses physically coercive interrogation techniques, it argues in the alternative that, even if it did so, it uses those techniques solely to extract information from the detainees on whom they’re used; any effects those techniques may have on other detainees are unintentional. In light of the fact that one of its agents told Hassan that it was time to cooperate if he didn’t want to be one of the people screaming in the night, and of the fact that other detainees were told to cooperate or face rendition, we reject the government’s contention that the effects of its use of coercive tactics on other detainees were meant to have no indirect effects on Hassan or similarly-situated detainees. We reject the application of *Daniels* the government urges.

First, Hassan may know crucial international transfer points for terrorist funds, arms, and drugs. Second, he may also know other human intelligence sources still active in terrorist networks, as *1006 well as have personal knowledge of hiding locations for international criminals.

Though a government interest may be compelling, when fundamental liberties are at stake, the government practice must achieve that interest via the least burdensome means possible. *Lawrence*, 539 U.S. at 593. The government submits two arguments that it meets this standard. First, it argues that to the extent that its practices are guided by the Army Field Manual, a primer on methods of interrogation, which provides guidelines that ensure that the interrogator will use the least burdensome means of extracting the information needed for national security purposes. Department of the Army, FM 34-52, Army Field Manual on Intelligence Interrogation FM 34-52 (1992), *available at* <http://www.fas.org/irp/doddir/army/fm34-52.pdf> [hereinafter “Army Field Manual”]. Second, the government argues, even if the Manual itself is too vague, the practices listed in Hassan’s complaint are nonetheless the least burdensome means of extracting the relevant information. We reject each of these arguments in turn.

We turn first to the government’s reliance on the Army Field Manual, which includes § 3-15, instructing interrogators to use the “Fear Up (Harsh)” approach:

[T]he interrogator behaves in an overpowering manner with a loud and threatening voice. The interrogator may even feel the need to throw objects across the room to heighten the sources implanted feelings of fear. . . . Use the confirmation of fear only on sources whose fear is justified. During this approach, confirm to the source that he does indeed have a legitimate fear. . . . [T]he source should be convinced the interrogator is his best or only hope in avoiding or mitigating the object of his fear.

The Army Field Manual does not provide sufficient guidance or detail for how the government must interrogate. For instance, while the Manual indicates that an interrogator may not take advantage of an unjustified fear of “torture or death,” it says nothing about making that fear justifiable through deception (or otherwise creating an environment that gives the appearance that torture or death may result from a lack of cooperation), and subsequently exploiting that fear. So while the government contends that no evidence developed at the district court shows the government is not obeying the letter of the Army Field Manual, we nonetheless hold that the government has failed to demonstrate that its interrogation policy described in that document is the least burdensome means of achieving its goal of intelligence gathering.

We turn next to the government’s argument that the practices found by the district court to be in use at Guantanamo are the least burdensome means of achieving its goal of intelligence gathering. In support of this position, the government relies on the precedents of *Overton* and *Youngerberg v. Romeo*, 457 U.S. 307 (1982). We read *Youngerberg* and *Overton* to stand for the proposition that incarcerated individuals are subject to a differing liberty analysis – in a penal or involuntary commitment setting, certain liberties are unquestionably constrained by the necessity to retain control over the custodial setting. Essentially, these cases represent instances where the

ends and means are intricately intertwined. The government argues that the means and ends are *1007 similarly intertwined here – the government has a compelling interest in national security, and the coercive techniques they use at Guantanamo are tailored to extract information that can be used to protect national security. The district court noted that the evidence is equivocal on the question of whether coercive interrogation tactics are an effective means of obtaining information. Where the evidence is equivocal, the district court reasoned, it would err on the side of protecting individual liberties. We agree, and the government has not here presented evidence of effectiveness sufficient to convince us the district court should have found differently. We agree with the reasoning of the district court that where the effectiveness of means is questionable, a reviewing court should err on the side of liberty.

We therefore affirm both parts of the district court's order: 1) temporarily ceasing the use of the coercive tactics currently in use, including those tactics meant to inspire a rational fear of torture in all detainees, present and future; and 2) inform all present and future detainees of this limitation.

*1008 BROWN, Senior Circuit Judge dissenting:

Because the Appellee does not present a claim that is ripe for adjudication, our jurisdiction is inappropriate. Accordingly, I do not believe we need to reach the merits of Appellee's challenge to the measures used to question prisoners at the Guantanamo facility. Appellee's claim for injunctive relief should be dismissed for want of jurisdiction.

The federal courts are courts of limited jurisdiction. Article III of the Constitution demands that the courts hear only those cases that present an actual case or controversy. As the Supreme Court has declared, "[i]t goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons*, 465 U.S. 95, 101 (1983); *see also Nat'l Treasury Employees Union v. U.S.*, 101 F.3d 1423, 1427 (D.C. Cir. 1996). In order to give meaning and structure to the case or controversy requirement, courts have elucidated a series of constitutional principles – the so-called "justiciability doctrines" – including standing, mootness, ripeness and the political question doctrine. *Allen v. Wright*, 468 U.S. 737, 750 (1984).

To establish Article III standing, a plaintiff must meet three separate, yet interrelated requirements – injury in fact; a causal connection between the challenged conduct or policy and that injury (traceability); and proof that a favorable decision for the plaintiff would ameliorate that injury (redressability). The alleged injury in fact must be both concrete and particularized and actual or imminent. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). That injury cannot be "conjectural or hypothetical," *Lyons*, 461 U.S. at 102, "remote," *Warth v. Seldin*, 422 U.S. 490, 507 (1975), "speculative," *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-46 (1976), or "abstract," *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

It is apparent from the record that Appellee has suffered some injury during his detention at the naval base at Guantanamo. He presents credible evidence of anxiety, panic attacks, insomnia, and loss of appetite. The question remains, however, whether those injuries are indeed linked to the practices of coercive interrogation that he challenges here. The Appellee must show more than his belief that the government used these tactics on detainees in Guantanamo and the existence his mental and physical injuries. He must demonstrate that those injuries directly attributable to the government's use of those measures. In short, he has proven correlation, but not causation. As such, at this juncture, his complaint is not ripe for review on the merits.

Like standing, the doctrine of ripeness is constitutionally-derived. *See Lujan*, 504 U.S. at 560; *Nat'l Treasury Employees Union*, 101 F.3d at 1427. In essence, the ripeness inquiry adds a temporal component to standing, emphasizing whether the plaintiff's complaint is fit for judicial adjudication at the instant moment. Ripeness seeks to sort out those cases that are premature for review – because the alleged injury or link between the injury and defendant's conduct is too speculative or may never occur – from those that are fit for review.

The Supreme Court has developed a two-part prudential test to guide the constitutional ripeness inquiry; courts must evaluate whether the issues presented before them are sufficiently

well developed as to be fit for adjudication and the hardship that would result from postponing *1009 adjudication until the record becomes more fully developed. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967); *Worth v. Jackson*, 451 F.3d 854, 861 (D.C. Cir. 2006). Applying that test to the instant case, it is evident both that the record is insufficient to support adjudication on the merits and that Appellee has not shown that postponing judgment until a later time would wreak undue hardship.

Appellee asks us to issue an injunction which could have far-reaching effects on the ability of our military forces and intelligence services to prosecute the war on terror – and perhaps endanger the fundamental security of this country – based on a scant record of wholly circumstantial evidence, much of which is hearsay derived from other detainees, some of whom are admitted members of terrorist organizations. The incompleteness of the record dooms Appellee's claims in two respects. First, it gives the court little or no evidence of the actual methods of interrogation used upon detainees at Guantanamo. Without more detailed evidence on the nature and scope of those tactics, it is difficult to evaluate whether they should be struck down as violative of due process. Far from presenting a "purely legal question [] ... presumptively suitable for judicial review," *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 92 (D.C. Cir.1986), the claim here turns on highly complicated issues of fact regarding the methods of interrogation used upon the Guantanamo detainees. Second, the record evinces no indication of whether Appellee himself will actually be subjected to the practices, which he seeks to challenge, thus hindering any meaningful determination of whether the injuries he has suffered are indeed traceable to the challenged practices or whether an injunction barring the challenged practices would ameliorate those injuries. The Supreme Court has repeatedly held that "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. U.S.*, 523 U.S. 296, 300 (1998); *see also Thomas v. Union Carbide Ag. Prods. Co.*, 473 U.S. 568, 580-581 (1985). Appellee has alleged precisely such speculative and contingent events; absent any proof that he will be subjected to the tactics challenged here, his claim is not ripe for adjudication at the present time.

Moreover, Appellee has failed to establish that if we are to delay judgment on this issue of whether the challenged practices violate the guarantees of due process, he would face some hardship – there is no evidence, as the majority contends, that the Appellee will be subjected to these coercive interrogation measures. If indeed, the Appellee was a student who went to Afghanistan merely to provide aid to refugees displaced by the conflict, what information would he have to provide U.S. interrogators? Even given the reported atrocities of Abu Ghraib and Bagram, it is impossible to conceive that the U.S. military and intelligence communities have gone so astray that the presumption should be that they will torture enemy combatants who cannot provide any meaningful intelligence, absent any proof that such is the case. Indeed, the government asserts that, if physically coercive measures are used against detainees at the Guantanamo facility, such measures comply with the Army Field Manual.

The majority contends that to shirk adjudication at this stage would force Appellee into an untenable dilemma – that he must wait until he is subjected to these physically coercive measures (and potentially suffer some irreparable harm) before he can challenge the constitutionality of those measures. Not so. Indeed, any harm suffered during the course of the interrogation would be separate and unique from the injury alleged here – the mental and

physical manifestations of Appellee's fear of being tortured. In order to present a claim that is *1010 ripe for adjudication, however, the Appellee must show that his deteriorating mental and physical condition are the result of a real and apprehensible belief that he will be subjected to methods of interrogation that he challenges here. As described above, Appellee has presented only tenuous and circumstantial evidence that (1) the government is actually engaged in the methods of interrogation, which he seeks to enjoin and (2) that he will be subjected to those same measures.³ Absent any proof of either of these claims, Appellee cannot allege that the court's decision not to hear the case on the merits would wreak undue hardship.

In its opinion, the majority accepts the conclusion of the district court that, given equivocal evidence on the question of whether physically coercive measures produce reliable intelligence, the court should err on the side of rejecting those measures in favor of the articulated liberty interest of the Appellee. I disagree. Given the paramount national security interests at stake, even in the face of equivocal evidence on the question of the efficacy of these tactics, they should be deemed presumptively valid, despite the liberty interests of the Appellee.

For the above reasons, I respectfully dissent from the majority's opinion.

³ An issue not raised by the government, but one which merits consideration, is whether both the specific methods of interrogation and the exact identities of those detainees who will be subjected to those methods (including, potentially, the Appellee) are protected by the national security privilege and thus precluded from disclosure to the court. *See U.S. v. Yunis*, 867 F.2d 617, 622-23 (D.C. Cir. 1989).