IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONALD VANCE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 06 C 6964**
	)	
DONALD RUMSFELD, et al.,	)	**Judge Andersen**
	)	**Magistrate Judge Keys**
Defendants.	)	
	)	

DEFENDANT RUMSFELD'S MOTION TO
DISMISS AND MEMORANDUM IN SUPPORT THEREOF

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Pursuant to Federal Rule of Civil Procedure 12(b)(6), defendant, Donald Rumsfeld, respectfully submits this motion to dismiss all claims asserted against him (Counts I - III) in plaintiffs' second amended complaint ("SAC"). In support of this motion, defendant Rumsfeld relies upon the attached exhibit and this memorandum of law.

INTRODUCTION

In April 2006, United States military forces arrested and detained plaintiffs, Donald Vance and Nathan Ertel, in Iraq on suspicion of supplying weapons and explosives to insurgents and of receiving stolen arms from coalition forces. Plaintiffs now seek to hold former Secretary of Defense Donald Rumsfeld personally liable for certain aspects of their detentions that they consider unconstitutional. As explained below, all of the claims against this defendant fail on several independent grounds. First, the circumstances surrounding plaintiffs' detentions in a foreign war zone constitute "special factors" that foreclose any implied cause of action under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and its progeny. Second, qualified immunity protects defendant Rumsfeld from suit, as plaintiffs have not adequately alleged his personal involvement in the violation of their constitutional rights and, in any event, they cannot demonstrate the denial of any clearly established right.

BACKGROUND[1]

Plaintiffs traveled to Iraq in the latter half of 2005 as civilians to work in Baghdad's "Red Zone" for a privately-owned Iraqi security services company, Shield Group Security ("SGS"). See SAC ¶¶ 18, 33, 35-37, 39. Apparently "very early on in [their] tenure at SGS," id. ¶ 86, plaintiffs learned, often first-hand, that their new employer and several of its employees and

[1] Unless otherwise noted, the following narrative is derived from the allegations in plaintiffs' second amended complaint, which are assumed to be true for the limited purpose of this motion only.

associates were involved in massive illegal arms trading, stockpiling of weapons, kickback schemes, bribery, fraudulent contract procurement, and suspicious meetings with government officials. See id. ¶¶ 41-42, 56-58, 66-69, 75-78, 84-90, 100-04, 110. One of their SGS colleagues, another American named Josef Trimpert, bragged to them about committing "brutal acts of violence" against Iraqi citizens and admitted to federal agents that he had bribed government employees, traded alcohol for weapons with American soldiers, and forged federal documents. See id. ¶¶ 95-97, 174.

On April 15, 2006, United States military personnel took plaintiffs into custody after they had armed and barricaded themselves inside a room on SGS' compound.[2] See id. ¶¶ 120, 124-28, 138 & SAC Exh. A. Based on "credible evidence . . . that certain members of SGS [were] supplying weapons to insurgent groups in Iraq," including "one or more large weapons caches" which were found on SGS' premises, plaintiffs were suspected of distributing weapons and explosives to terrorist, insurgent, or criminal groups "through [their] affiliation with [SGS]." SAC Exhs. A, B. They also were suspects in receiving "stolen weapons and arms in Iraq from Coalition Forces." SAC Exh. A. Plaintiffs eventually were taken to Camp Cropper (a military facility in Iraq) and kept there until their respective releases. See SAC ¶¶ 143, 144, 207, 210.

A few days after arriving at Camp Cropper, on April 20, 2006, plaintiffs received and signed a written notice that a "Detainee Status Board ha[d] been convened to determine [their] legal status as [] U.S. citizen[s] detained in the conflict in Iraq." SAC Exh. A. This notice informed them of the unclassified evidentiary basis for their detentions and explained that the

[2] Although plaintiffs allege they were detained by United States Armed Forces, see, e.g., SAC ¶¶ 20, 124, 138, 144, those forces actually are part of the Multinational Forces-Iraq ("MNF-I"), an entity comprised of forces from various nations acting under international authority at the request of the Iraqi government. See Munaf v. Geren, 128 S. Ct. 2207, 2213 (2008).

status board would determine whether they should be detained as security internees—i.e., whether reasonable grounds existed to believe that they posed a threat to security or stability in Iraq. See id. A separate "Notice of Status and Appellate Rights," dated April 22, 2006, advised plaintiffs of their right to appeal their detentions. See SAC Exh. B.

Plaintiffs appeared before the status board on April 26, 2006. See SAC ¶ 185. They subsequently were released and returned to the United States, with plaintiff Ertel's detention lasting "nearly 40 days" and plaintiff Vance's lasting "just short of 100 days." Id. ¶¶ 206-12.

Claiming that unidentified government officials in Iraq committed several violations of their constitutional rights in connection with their arrests and detentions, plaintiffs have sued defendant Rumsfeld in his individual capacity for three of those alleged violations: being "mistreated" by the prison guards (Count I); being denied a full panoply of procedural rights such as access to counsel (Count II); and being "prevented" from filing a petition for habeas corpus (Count III).[3] See id. ¶¶ 258-93. They have done so with little more than speculation and an implausible theory, unsupported by any pled fact, that the former Secretary of Defense had "actual knowledge" that plaintiffs Vance and Ertel specifically "were being detained unconstitutionally." Id. ¶ 280; see id. ¶ 267. Relying entirely on conclusory assertions like these, plaintiffs seek a remedy, in the form of money damages, against defendant Rumsfeld personally under "the Constitution" and the Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2680, 2739-44 (2005) ("DTA"). See SAC ¶¶ 265, 283, 293.

[3] Plaintiffs have brought several other constitutional tort claims, but only against the unnamed defendants, not defendant Rumsfeld. See SAC ¶¶ 298-380.

DISCUSSION

A complaint must be dismissed under Rule 12(b)(6) if it either fails to allege a cognizable private cause of action or (assuming one exists) does not contain sufficient facts to state a claim as a matter of law. See Hickey v. O'Bannon, 287 F.3d 656, 657 (7th Cir. 2002); Mallett v. Wisconsin Div. of Vocational Rehab., 130 F.3d 1245, 1248-51 (7th Cir. 1997). Defeating a motion to dismiss "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007). Plaintiffs instead must allege "enough factual detail" to show how defendant Rumsfeld acted unlawfully. Id. at 1965-66. Therefore, although the Court should accept as true all well-pleaded factual allegations and draw all reasonable inferences in plaintiffs' favor, see First Ins. Funding Corp. v. Federal Ins. Co., 284 F.3d 799, 804 (7th Cir. 2002), it should disregard any legal conclusions or unsupported conclusions of fact, see Hickey, 287 F.3d at 658.

I. PLAINTIFFS LACK A CAUSE OF ACTION AGAINST DEFENDANT RUMSFELD

Now on their third complaint, plaintiffs still do not specify the capacity in which they have sued defendant Rumsfeld. Given the nature of their allegations and relief requested, however, it is assumed they have named him in his individual capacity pursuant to Bivens. See Wynn v. Southward, 251 F.3d 588, 592 (7th Cir. 2001). It further appears plaintiffs intend to rely on Bivens for all three of their constitutional tort claims against this defendant. See SAC ¶¶ 265, 283, 293. Solely for purposes of Count I, they add "either an express or implied right of action" under the DTA. See id. ¶ 265. Because neither Bivens nor the DTA provides an avenue of relief in this case for the reasons discussed below, all of the counts against defendant Rumsfeld should be dismissed with prejudice.

A. "Special Factors" Preclude A Bivens Remedy Based On Plaintiffs' Detentions In A Foreign War Zone

Plaintiffs ask this Court to take the extraordinary step of creating a freestanding damages remedy for injuries that government officials and military personnel, and more particularly the former Secretary of Defense, allegedly caused while the United States was engaged in active hostilities in a foreign war zone. The "special factors" doctrine developed by the Supreme Court in Bivens and its progeny bars any such implied remedy.

A judicially-created cause of action for constitutional violations "is not an automatic entitlement." Wilkie v. Robbins, 127 S. Ct. 2588, 2597 (2007). In Bivens, the Supreme Court permitted a suit for damages to redress a garden-variety Fourth Amendment search and seizure claim against domestic federal law enforcement officers operating in the United States. See Bivens, 403 U.S. at 389. It did so, in the absence of statutory authority, only because there were "no special factors counseling hesitation" against creating that remedy. Id. at 396.

On just two occasions in the past forty-seven years since deciding that case has the Court made a similar finding and approved a Bivens-type action. See Davis v. Passman, 442 U.S. 228, 245-48 (1979); Carlson v. Green, 446 U.S. 14, 18-19 (1980). More telling, in the nearly three decades after Carlson, the Court has "consistently refused to extend Bivens liability to any new context or new category of defendants." Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001).[4] Even where an alternative process (be it statutory, administrative, or otherwise) for protecting a

[4] See, e.g., Wilkie, 127 S. Ct. at 2597-2605 (rejecting Bivens claim against Bureau of Land Management employees for retaliating against plaintiff's exercise of land ownership rights and noting that Court has "in most instances . . . found a Bivens remedy unjustified"); FDIC v. Meyer, 510 U.S. 471, 486 (1994) (rejecting Bivens claim against federal agency); Schweiker v. Chilicky, 487 U.S. 412, 424-29 (1988) (rejecting Bivens action challenging denial of Social Security benefits); Bush v. Lucas, 462 U.S. 367, 378-90 (1983) (rejecting Bivens claim for alleged First Amendment violation arising out of federal personnel decision).

constitutionally recognized interest does not exist, "special factors" still often make a Bivens remedy unavailable. See Wilkie, 127 S. Ct. at 2598, 2600; Wilson v. Libby, — F.3d —, No. 07-5257, 2008 WL 3287701, at *7-9 (D.C. Cir. Aug. 12, 2008); Spagnola v. Mathis, 859 F.2d 223, 228 (D.C. Cir. 1988) (per curiam) (refusing to create Bivens action even though plaintiff was left with "no remedy whatsoever") (internal quotations and citation omitted). The unmistakable lesson from this history is that inferring a Bivens action "is clearly disfavored." In re Iraq & Afghanistan Detainees Litig., 479 F. Supp. 2d 85, 94 (D.D.C. 2007), appeal docketed sub nom. Ali v. Rumsfeld, No. 07-5178 (D.C. Cir. May 31, 2007); accord Holly v. Scott, 434 F.3d 287, 289 (4th Cir.) (explaining that a Bivens action is "hardly the preferred course" as it is "implied without any express congressional authority whatsoever"), cert. denied, 547 U.S. 1168 (2006); Nebraska Beef, Ltd. v. Greening, 398 F.3d 1080, 1084 (8th Cir. 2005) (noting "a presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees") (internal quotations and citation omitted), cert. denied, 547 U.S. 1110 (2006).

In the face of this authority, plaintiffs here seek a radical extension of Bivens into an area already deemed off-limits for implied damages actions. See In re Iraq, 479 F. Supp. 2d at 103-07 (holding that "special factors" precluded constitutional tort claims by alien detainees in Iraq and Afghanistan). They do nothing less than propose a cause of action that would provide persons detained by United States military personnel in foreign battlefields a mechanism for forcing the Secretary of Defense, as well as military commanders and soldiers, to pay a money judgment for actions taken and policy choices faced in the midst of war. Creating a damages remedy in this context without any legal foundation whatsoever would violate bedrock separation-of-powers principles, including, most critically, the political branches' authority over military and foreign affairs. It also would lead to an unworkable cause of action in which domestic courts would be

asked to second-guess a host of decisions made during wartime that are traditionally and appropriately reserved for Congress and the Executive. Finally, recognizing a Bivens claim here would have serious adverse consequences for national defense.

Because the Constitution commits authority over military affairs and national security to the President and Congress, see U.S. Const. art. I, § 8, cls. 1, 11-16 (Congress); id. art. II, § 2, cl. 1 (President), the Supreme Court has expressed deep reluctance to interfere in such "core" executive and legislative functions.[5] Lower federal courts have been careful to follow this lead.[6] As the United States Court of Appeals for the Seventh Circuit has said, courts defer to the military for one "simple" reason: "judges are not military leaders and do not have the expertise nor the mandate to govern the armed forces." Alhassan v. Hagee, 424 F.3d 518, 525 (7th Cir.

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[5] See Hamdi v. Rumsfeld, 542 U.S. 507, 531 (2004) (plurality) ("Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them."); Lincoln v. Vigil 508 U.S. 182, 192 (1993) ("[N]ational security [is] an area of executive action in which courts have long been hesitant to intrude.") (internal quotations and citation omitted); North Dakota v. United States, 495 U.S. 423, 443 (1990) ("When the Court is confronted with questions relating to . . . military operations, we properly defer to the judgment of those who must lead our Armed Forces in battle."); Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988) ("[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.").

[6] See, e.g., Bassiouni v. FBI, 436 F.3d 712, 724 (7th Cir.) (stating that courts "owe considerable deference" to Executive Branch's "assessment in matters of national security"), cert. denied, 127 S. Ct. 709 (2006); El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1369 (Fed. Cir. 2004) (cautioning that courts should be "loath to add to the President's calculus concerns regarding [constitutional] liability when he exercises his power as Commander-in-Chief"); Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918, 926-27 (D.C. Cir. 2003) (stating it is "well-established that the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview"); United States v. Hawkins, 249 F.3d 867, 873 n.2 (9th Cir. 2001) (observing that "courts have long recognized that the Judicial Branch should defer to decisions of the Executive Branch that relate to national security"); Khalsa v. Weinberger, 779 F.2d 1393, 1395 n.1 (9th Cir. 1986) (noting "the difficulty of finding judicially manageable standards to justify intervention into internal decisions grounded in military expertise and experience").

2005). This judicial deference is not limited to the military and national security contexts, however, but extends to matters implicating foreign policy as well.[7]

Heeding these principles, the Supreme Court twice has declined, on special factors grounds, to create a Bivens remedy against military officials. In both Chappell v. Wallace, 462 U.S. 296 (1983), and United States v. Stanley, 483 U.S. 669 (1987), the Court relied on the separation-of-powers doctrine to reject an implied damages claim for alleged constitutional torts occurring incident to military service. See Chappell, 462 U.S. at 298-305; Stanley, 483 U.S. at 679-84. More than that, it emphasized:

> [I]t is irrelevant to a "special factors" analysis whether the laws currently on the books afford [plaintiff], or any other particular serviceman, an "adequate" federal remedy for his injuries. The special factor that counsels hesitation is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.

Stanley, 483 U.S. at 683 (internal quotations and alterations omitted). This "uninvited intrusion into military affairs" counsels against judicial review even when a federal statute provides an express right of action to sue a public official in an individual capacity. See, e.g., Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765, 768-70 (7th Cir. 1993) (holding that due process

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[7] See, e.g., Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004) (noting "policy of case-specific deference to the political branches" in foreign affairs and acknowledging "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"); United States v. Verdugo-Urquidez, 494 U.S. 259, 273-75 (1990) (rejecting argument for extraterritorial application of Fourth Amendment due to "significant and deleterious consequences" it would have on "foreign policy operations" and the "ability of the political branches to respond to foreign situations involving our national interest"); Ye v. Zemin, 383 F.3d 620, 626 (7th Cir. 2004) (explaining that judiciary's "deference to the Executive Branch is motivated by the caution" that is "appropriate of the Judicial Branch when the conduct of foreign affairs is involved"); Sampson v. Fed. Republic of Germany, 250 F.3d 1145, 1155-56 (7th Cir. 2001) (observing that "judicial resolution of cases bearing significantly on sensitive foreign policy matters . . . might have serious foreign policy implications which courts are ill-equipped to anticipate or handle") (internal quotations and citation omitted).

claims brought under 42 U.S.C. § 1983 against National Guard officer for conduct occurring within United States were non-justiciable based on Chappel and principle that, "as far as the immunity of government officials is concerned, Bivens and section 1983 claims merit similar treatment"). But where, as here, a case contemplates an implied cause of action that arises out of and would affect military operations overseas, the need for judicial deference is even stronger.[8] For this very reason courts repeatedly refuse to inject Bivens and other tort remedies into national security and foreign affairs matters that are constitutionally delegated to the political branches.[9]

Contrary to this settled law, plaintiffs wish to enmesh this Court in an extensive reexamination of judgments made by the Secretary of Defense, military leaders, and personnel on the ground in Iraq. The facts underlying their claims are not only inextricably tied up with a foreign military engagement that Congress specifically authorized the President to conduct, see

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[8] It becomes stronger still after taking into account the fact that the disruptive effect a Bivens suit would have on military affairs is not something qualified immunity alone can address. See Stanley, 483 U.S. at 684 (stating that "the availability of a damages action under the Constitution for particular injuries (those incurred in the course of military service) is a question logically distinct from immunity to such an action on the part of particular defendants") (emphasis in original). Indeed, the very act of deciding the "extent to which particular suits" implicate military "decisionmaking" would "itself require judicial inquiry into, and hence intrusion upon, military matters." Id. at 682; see id. at 683 (warning that "the mere process of arriving at correct conclusions would disrupt the military regime").

[9] See, e.g., Libby, 2008 WL 3287701 at *9 (refusing to create Bivens remedy for alleged retaliatory disclosure of covert status where it "would inevitably require judicial intrusion into matters of national security and sensitive intelligence information"); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 205, 208-09 (D.C. Cir. 1985) (refusing, in light of judicial deference to the Executive in matters of foreign policy and military affairs, to infer Bivens claims against federal officials for their alleged role in a foreign conflict abroad as "redress for tortious injuries to [plaintiffs] or their families at the hands of the Contras in Nicaragua"); In re Iraq, 479 F. Supp. 2d at 103-07 (rejecting Bivens claims of individuals detained in Iraq and Afghanistan against military and other government officials on "special factors" grounds); cf. Schneider v. Kissinger, 412 F.3d 190, 194-98 (D.C. Cir. 2005) (refusing, under political question doctrine, to decide common law tort claims for alleged orchestration of coup and torture), cert. denied, 547 U.S. 1069 (2006); Van Tu v. Koster, 364 F.3d 1196, 1198 (10th Cir. 2004) (questioning use of Bivens to challenge conduct of American military officers during Vietnam War).

Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002), but resolving those claims would require the Court to pass judgment on, and thus intrude directly into, a quintessential matter of war—detaining and interrogating persons apprehended on the field of battle on suspicion of aiding insurgents. See Hamdi, 542 U.S. at 518. This intrusion would be far greater than that presented by any of the claims in Chappell, Stanley, Libby, or Sanchez-Espinoza, all of which were rejected even though none dealt with United States military actions in an area of ongoing hostilities or concerned a congressional authorization for use of military force. The one court to address that situation has reached, not surprisingly, the same conclusion by following much of the same precedent. See In re Iraq, 479 F. Supp. 2d at 103-07. In short, the well-established limits on judicial review of military actions, combined with the Supreme Court's clear instructions for not extending Bivens remedies to new contexts, preclude this Court's involvement in the warmaking, foreign policy, and national defense functions that plaintiffs' Bivens claims would entail.[10]

Recent case law confirms this all the more. Of particular relevance is Munaf, where the Supreme Court unanimously denied the habeas petitions of two United States citizens detained continuously in Iraq by MNF-I forces since 2004. See Munaf, 128 S. Ct. at 2213-15, 2228. Like plaintiffs, the petitioners in Munaf "voluntarily traveled to Iraq," were "detained within an ally's

[10] Anticipating that their proposed Bivens remedy would interfere with the military's ability to wage war, plaintiffs suggest that the policies at issue in this case (to the extent they exist at all) are not limited to "detainees in Iraq nor to persons seized on battle field [sic]." SAC ¶ 254. This argument is riddled with logical fallacies. First, it contradicts their allegations that defendant Rumsfeld directed the creation of certain "interrogation policies" specifically for detainees in Iraq. See id. ¶¶ 236-39. Second, if, as plaintiffs say, those policies apply to the "Global War on Terror, which is a non-traditional and undefined conflict waged throughout the world," id. ¶ 254, then a Bivens action challenging those policies would remain problematic for the same reasons discussed above. Third, such policies still would be used in places where the military is actively engaged in war, like Iraq. Which leads to the last and most obvious retort to this argument: plaintiffs were detained in a war zone and that is what this case is about.

territory during ongoing hostilities involving our troops," and were accused of committing "serious hostile acts" involving "unlawful insurgency" in an "active theater of combat." Id. at 2221, 2224-25 (internal quotations omitted). Providing habeas relief in these circumstances would be improper, the Court explained, because it would result in the "unwarranted judicial intrusion into the Executive's ability to conduct" both "military operations abroad" and the country's "international relations." Id. at 2218, 2224 (internal quotations and citations omitted). The "sensitive foreign policy" implications of the United States' role in Iraq were of particular concern. Id. at 2220-24. Stressing that the petitioners had been arrested for crimes against the Iraqi Government "within the sovereign territory of Iraq" and were "being held by United States Armed Forces at the behest of the Iraqi Government," pursuant to MNF-I's United Nations mandate to act as Iraq's jailor, the Court concluded that a "release of any kind would interfere with the sovereign authority of Iraq 'to punish offenses against its laws committed within its borders.'" Id. at 2223, 2227 (emphasis in original) (quoting Wilson v. Girard, 354 U.S. 524, 529 (1957), and citing U.N. Security Council, U.N. Doc. S/Res/1546 (June 2004)). A United States court therefore may not grant habeas relief to someone in the Munaf petitioners' situation as doing so would impermissibly intrude on Iraq's sovereign rights. See id. at 2227-28. Given that the Supreme Court denied a prospective, statutorily-authorized habeas remedy to United States citizens currently detained in Iraq, it follows that a federal court should not recognize a retrospective, judicially-created damages remedy for individuals previously detained in Iraq.

Plaintiffs' proposed cause of action raises concerns beyond just constitutional theory, however. It also would have significant and adverse real world consequences. First, the threat of personal liability for money damages would jeopardize swift military action in the field. See Stanley, 483 U.S. at 683 (reasoning that "the risk of erroneous judicial conclusions . . . would

becloud military decisionmaking"). Because federal officials charged with implementing the United States war effort could be held personally liable when battlefield conduct did not satisfy the standards of a domestic court, fear of personal tort liability rather than sound military policy could motivate decisions regarding sensitive matters of national security and the actions of our troops abroad.[11] The risk of paying a money judgment also would have soldiers on the front lines second-guessing themselves and their commanders in an environment where discipline and decisive action are paramount. See Chappell, 462 U.S. at 300 (describing how "the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection"); In re Iraq, 479 F. Supp. 2d at 105 (warning that recognition of damages remedy "might leave subordinate personnel questioning the authority by which they are being commanded and further encumber the military's ability to act decisively").

Second, recognizing a Bivens action in this context would allow enemy detainees to enlist the courts in continuing hostilities against the United States and interfering with the execution of foreign and military affairs.[12] Responding to discovery requests, for instance, would divert scarce

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[11] See In re Iraq, 479 F. Supp. 2d at 105 (finding that military commanders "likely would hesitate to act for fear of being held personally liable for any injuries resulting from their conduct"); cf. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (highlighting concern that fear of lawsuits would "dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties") (internal quotations, citation, and alterations omitted); Johnson v. Eisentrager, 339 U.S. 763, 779 (1950) (finding that to grant the right of habeas corpus to alien prisoners of war held in custody of United States military in foreign country would "hamper the war effort" and "divert [the] efforts and attention [of field commanders] from the military offensive abroad to the legal defensive at home").

[12] See Eisentrager, 339 U.S. at 779 ("It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts . . . ."); Sanchez-Espinoza, 770 F.2d at 209 ("[T]he danger of foreign citizens' using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that [courts] must leave to Congress the judgment whether a damage remedy should exist."); In re Iraq, 479 F. Supp. 2d at 105 ("There is no getting around the fact that authorizing monetary damages remedies against military officials

military resources and pose intractable dilemmas for military leaders, such as removing soldiers from the field to provide testimony or directing them to gather evidence in a war zone, without regard for prudent military planning and strategy. See In re Iraq, 479 F. Supp. 2d at 105 ("The discovery process alone risks aiding our enemies by affording them a mechanism to obtain what information they could about military affairs and disrupt command missions by wresting officials from the battlefield to answer compelled deposition and other discovery inquiries about the military's interrogation and detention policies, practices, and procedures.").

Third, plaintiffs' proposed cause of action inherently would embroil the judiciary in war-related decisions made in the field and would prove extremely difficult to define or adjudicate. See Wilkie, 127 S. Ct. at 2601-02 (noting "difficulty in defining a workable cause of action" and "line-drawing difficulties" in defining a standard of proof are reasons to reject proposed Bivens claim). Detaining individuals in a war zone and overseeing their detentions involve challenges, conditions, and considerations wholly unrelated to domestic arrests or detentions that are familiar to federal judges. Cf. Arar v. Ashcroft, 414 F. Supp. 2d 250, 282 (E.D.N.Y. 2006) (observing that, "[i]n the international realm, . . . judges have neither the experience nor the background to adequately and competently define and adjudge the rights of an individual vis-à-vis the needs of officials acting to defend the sovereign interests of the United States"), aff'd, 532 F.3d 157 (2d

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engaged in an active war would invite enemies to use our own federal courts to obstruct the Armed Forces' ability to act decisively and without hesitation in defense of our liberty and national interests . . . ."). Although these three cases dealt with the danger of aliens using the judicial system to disrupt foreign policy, the potential for such disruption does not vary according to the plaintiff's nationality. United States citizens, no less than foreigners, can use personal capacity tort litigation rather than the political process to oppose the government's foreign policy objectives. Cf. Hamdi, 542 U.S. at 519 (recognizing that a citizen, like an alien, can be hostile to the United States); Padilla v. Hanft, 423 F.3d 386, 391-92 (4th Cir. 2005) (upholding "enemy combatant" designation of United States citizen who "took up arms against United States forces" through association with al Qaeda), cert. denied, 547 U.S. 1062 (2006).

Cir. 2008), reh'g en banc granted, No. 06-4216 (2d Cir. Aug. 12, 2008). Courts would be required to make delicate judgments outside of their traditional role concerning military resources and necessity. They also would become entangled with discovery into sensitive military tactics and confidential matters of national security, with much of that discovery taking place in the foreign war zone itself during ongoing hostilities. See Hamdi, 542 U.S. at 531-32 (warning of problems with discovery that "would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war").[13]

To put all of this into perspective, it is easy to imagine the harmful and even deadly consequences that ordering the release of detainees in Iraq before determining what security threat they pose would have on United States soldiers, our allies, and innocent Iraqi citizens. Plaintiffs nevertheless would have domestic courts holding military officers on the battlefield liable for their decisions as to when, where, and how to conduct a status hearing and which procedures to use at that hearing. That in turn would have courts overseeing decisions related to staffing, the assignment of personnel, and other logistical concerns in a war zone. Plaintiffs' cause of action also would require domestic courts to adjudicate where detainees captured in a war zone could be held, how they could be interrogated, and the operation and conditions of facilities located in areas of open hostilities that are subject to attack by insurgents.

These circumstances by themselves would turn crafting a "workable cause of action" into a nearly unattainable task. Wilkie, 127 S. Ct. at 2601. Complicating it all the more is that, as

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[13] This point is borne out by plaintiffs' claims against defendant Rumsfeld, which depend in part on their allegation that he added "ten pages of classified interrogation techniques" to the Army Field Manual on Intelligence Interrogation ("Field Manual"). SAC ¶ 244. Assuming that were true, litigating this case "would inevitably require judicial intrusion into matters of national security" and classified information, and that by itself counsels against creating a Bivens remedy. Libby, 2008 WL 3287701 at *9-10. (In fact, though, no part of the Field Manual is classified, as explained below in footnote 19.)

discussed elsewhere in this brief, any constitutional rights an individual may claim in a foreign war zone are not only unsettled, but subject to the broad latitude that the military must have while engaged in war. See infra Section II-B. Fashioning a "workable cause of action" from such ill-defined and contingent rights raises the same type of "line-drawing difficulties" the Supreme Court has cited in refusing to extend Bivens. Wilkie, 127 S. Ct. at 2601-02.

In light of the above constitutional precepts and practical considerations, the creation of any damages remedy in this context should be left to the Legislative, not Judicial, Branch.[14] Congress, however, has not created a damages remedy against federal officials for detainees held abroad. To the contrary, twice it has "issued legislation addressing detainee treatment without creating a private cause of action for detainees injured by military officials." In re Iraq, 479 F. Supp. 2d at 107 n.23 (citing DTA and Reagan Act, Pub. L. No. 108-375, 118 Stat. 1811, 2068-71 (2004)).[15] This is, at the very least, "some indication that Congress' inaction in this regard has not been inadvertent." Id. Without explicit legislation or other guidance from Congress, this Court should decline plaintiffs' invitation to inject itself into a highly sensitive area that has been left untouched by, and is within the unique purview and expertise of, the political branches.

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[14] See Wilkie, 127 S. Ct. at 2604-05 (declaring that "any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation"); Alvarez-Machain, 542 U.S. at 727 (noting that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases"); Holly, 434 F.3d at 290 (stating that "'Congress is in a better position to decide whether or not the public interest would be served' by the creation of 'new substantive legal liability'") (quoting Schweiker, 487 U.S. at 426-27).

[15] In addition, both the Military Commissions Act of 2006 and the Uniform Code of Military Justice address the treatment of detainees, see Pub. L. No. 109-366, 120 Stat. 2600 (2006); 10 U.S.C. §§ 892, 893, 928; United States v. Hartman, 66 M.J. 710 (2008), but neither provides a private right of action.

In sum, this case "arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." Chappell, 462 U.S. at 301 (internal quotations and citation omitted). Plaintiffs nevertheless contemplate an implied remedy that would ignore fundamental separation-of-powers principles and create significant practical problems both on the field of battle and in domestic courts:

> The hazard of such multifarious pronouncements [by the military, the Executive, Congress, and the judiciary on whether specific interrogation techniques and detention practices employed by the military while prosecuting wars are improper or unlawful]—combined with the constitutional commitment of military and foreign affairs to the political branches and . . . concerns about hindering our military's ability to act unhesitatingly and decisively—warrant leaving to Congress the determination whether a damages remedy should be available under the circumstances presented here.

In re Iraq, 479 F. Supp. 2d at 107. In more ways than one then, "a general Bivens cure" in this case "would be worse than the disease." Wilkie, 127 S. Ct. at 2604. This Court therefore should not recognize such an unprecedented cause of action.

B. There Is Neither An Express Nor An Implied Cause Of Action Under The Detainee Treatment Act

With respect to just Count I (at least insofar as their claims against defendant Rumsfeld are concerned), plaintiffs suggest that the DTA contains "either an express or implied right of action." SAC ¶ 265. This theory is untenable. Absolutely no part of the DTA can be read as creating an express private cause of action. See 119 Stat. 2739-44; In re Iraq, 479 F. Supp. 2d at 107 n.23 (describing DTA as "legislation addressing detainee treatment without creating a private cause of action for detainees injured by military officials") (emphasis added); see generally Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (stating that statute must display "an intent to create not just a private right but also a private remedy"). If anything, the DTA sought

to limit any remedies that otherwise might be available to detainees by stripping federal courts of jurisdiction to hear habeas corpus petitions "or any other action" brought by aliens detained at the United States Naval Station at Guantanamo Bay, Cuba ("Guantanamo"). See 28 U.S.C. § 2241(e) (2006), as amended by DTA, 119 Stat. 2742; Boumediene v. Bush, 128 S. Ct. 2229, 2241 (2008). As for an implied right of action, the Supreme Court has repeated time and again that it "abandoned" long ago, at least since deciding Cort v. Ash, 422 U.S. 66 (1975), the practice of inferring a private cause of action from a federal statute where Congress has not provided one. Sandoval, 532 U.S. at 287 (collecting cases); see Malesko, 534 U.S. at 67 n.3. This binding precedent unquestionably scotches plaintiffs' attempt to imply a cause of action from the DTA.[16]

II. DEFENDANT RUMSFELD IS ENTITLED TO QUALIFIED IMMUNITY

Not only do plaintiffs lack any cognizable cause of action in this case, but defendant Rumsfeld is also immune from suit. Qualified immunity shields government officials from civil liability so long as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. Harlow, 457 U.S. at 818. Because individual

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[16] Implicitly contradicting themselves, plaintiffs argue in their complaint that the absence of a remedy in the DTA is proof that Congress "clearly left courts the power" to permit Bivens actions involving detainees. SAC ¶¶ 228-30. This is, in a word, backwards. Creating a Bivens remedy inherently raises separation-of-powers concerns and doing so therefore requires a "clear expression of congressional intent that the courts preserve" such a remedy. Spagnola, 859 F.2d at 229. It is precisely because Congress did not provide a civil damages remedy or clearly express an intent to "preserve" a Bivens remedy in the DTA that this Court should refrain from devising one on its own. See In re Iraq, 479 F. Supp. 2d at 107 n.23. Even more illogically, plaintiffs suggest that the absence of any reference to United States citizens in the specific provision of the DTA upon which they rely (42 U.S.C. § 2000dd-1)—a statute that, by their own admission, provides a type of good faith immunity only in civil actions or criminal prosecutions involving the detention and interrogation of alien detainees—is actually a reason to create a damages remedy for citizens. See SAC ¶¶ 229-30. It is not. Cf. Libby, 2008 WL 3287701 at *7-9 (refusing to infer Bivens remedy where federal statute provided relief against enumerated federal agencies but not those which employed three of the individually-named defendants, Congress' omission of the latter was not inadvertent, and the lack of a Bivens claim left plaintiffs without any remedy for the allegedly unlawful conduct of those defendants).

capacity suits "can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties," Anderson v. Creighton, 483 U.S. 635, 638 (1987), qualified immunity exists to provide "ample room for mistaken judgments" and protect all government officials except "the plainly incompetent or those who knowingly violate the law," Malley v. Briggs, 475 U.S. 335, 341, 343 (1986). As "an immunity from suit rather than a mere defense to liability," qualified immunity must be resolved as early as possible to avoid subjecting a defendant to unnecessary and time-consuming discovery at the expense of the public. Saucier v. Katz, 533 U.S. 194, 200-01 (2001) (internal quotations and citation omitted) (emphasis in original).

Although qualified immunity is an affirmative defense, plaintiffs bear the burden of defeating it. See Mannoia v. Farrow, 476 F.3d 453, 457 (7th Cir. 2007). To do so, they must allege "enough factual matter (taken as true)," Twombly, 127 S. Ct. at 1965, that would demonstrate defendant Rumsfeld personally and plausibly deprived them of a constitutional right that was "clearly established" at the time he allegedly violated it. See Vose v. Kliment, 506 F.3d 565, 568 (7th Cir. 2007) (reversing denial of qualified immunity at motion to dismiss stage), cert. denied, 128 S. Ct. 2500 (2008); Robbins v. Oklahoma, 519 F.3d 1242, 1248-49 (10th Cir. 2008) (observing that Twombly "may have greater bite" in qualified immunity context to protect public officials from ordeal of disruptive and broad-ranging discovery).

Because it is "sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts," a qualified immunity inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." Saucier, 533 U.S. at 201, 205. The constitutional right at issue thus needs to be "'clearly established' in a more particularized, and hence more relevant, sense: The contours of

the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson, 483 U.S. at 640.

With these parameters in mind, demonstrating that a particular constitutional right is clearly established requires a plaintiff to present case law that "has both articulated the right at issue and applied it to a factual circumstance similar to the one at hand." Boyd v. Owen, 481 F.3d 520, 526 (7th Cir. 2007) (internal quotations and citation omitted). This precedent "must dictate, that is, truly compel the conclusion," that, at the time the defendant acted, his alleged conduct in the particular situation before him violated the law. Khuans v. Sch. Dist. 110, 123 F.3d 1010, 1019-20 (7th Cir. 1997) (internal quotations, citation, and alteration omitted). A plaintiff must identify such preexisting law in all but "rare cases, where the constitutional violation is patently obvious." Jacobs v. City of Chicago, 215 F.3d 758, 767 (7th Cir. 2000).

A. Plaintiffs Do Not Sufficiently Allege Defendant Rumsfeld's Personal Participation In The Violation Of Their Constitutional Rights

Consistent with its purpose "to deter individual federal officers from committing constitutional violations," Bivens liability is limited to those who are "directly responsible" for such violations. Malesko, 534 U.S. at 70-71. Plaintiffs therefore must allege sufficient facts that defendant Rumsfeld was "personally involved in the deprivation of [their] constitutional rights." Gossmeyer v. McDonald, 128 F.3d 481, 494 (7th Cir. 1997). A necessary corollary to this rule is that defendant Rumsfeld cannot be held liable under the doctrine of respondeat superior for his subordinates' (or the unnamed defendants') allegedly unconstitutional conduct. See Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994). Rather, in a constitutional tort suit against a supervisory official in his or her individual capacity, "the official must actually have participated in the constitutional wrongdoing." Cygnar v. City of Chicago, 865 F.2d 827, 847 (7th Cir. 1989).

Despite the prolixity of their complaint, and despite amending it for the stated purpose of addressing the personal participation requirement, plaintiffs still have made no credible allegations that the former Secretary of Defense was directly involved with any aspect of their detentions, let alone that he was aware their constitutional rights were being violated but did nothing about it. Instead, they continue to rely on rampant speculation about detainee operations in Iraq. See Twombly, 127 S. Ct. at 1965 (holding that complaint must be dismissed if it does not allege facts that "raise a right to relief above the speculative level"); Bryson v. Gonzales, — F.3d —, No. 07-6071, 2008 WL 2877474, at *4-8 (10th Cir. July 28, 2008) (reversing denial of qualified immunity at motion to dismiss stage because, under Twombly, plaintiff failed to allege enough facts regarding defendant's personal participation).

So it is with a significant part of plaintiffs' theory to prove defendant Rumsfeld's personal involvement: an allegation that a "draft document on detentions" indicates that the transfer or release of detainees in United States military custody "requires the approval of the SecDef." SAC ¶ 257 (internal quotations and citation omitted). From this—and this alone—plaintiffs "infer" that defendant Rumsfeld had "actual knowledge" that they "were being detained and mistreated," as well as conclude that he had "personal control" over the length of someone's detention and "the decision to release a detainee." Id. ¶¶ 256, 267, 280. This "inference" cannot withstand even cursory scrutiny.

Plaintiffs themselves admit that the document upon which they rely is merely a draft. It therefore does not and cannot establish any formal policy. The final version was not published until May 30, 2008, long after Secretary Rumsfeld left office in December 2006, more than 2 full

years after plaintiffs' detentions began, and well after their respective releases.[17] Not only that, but the final version significantly changed the very language that is the lynchpin of plaintiffs' attempt to hold defendant Rumsfeld personally liable. It now reads that the transfer or release of detainees in the custody of United States forces "requires the approval of the SecDef, or his designee." Exh. A at VII-2, ¶ 4(a) (emphasis added). Designating authority to release detainees in military custody is not only sensible, but necessary. As of June 2008, MNF-I forces were holding approximately 24,000 detainees, see Munaf, 128 S. Ct. at 2213, to say nothing of all the other detainees held by United States forces throughout the world. The suggestion that the Secretary of Defense is personally responsible for the release of, and has actual knowledge of, every single one of those detainees is simply divorced from reality.

Equally implausible is plaintiffs' claim that the former Secretary of Defense personally authorized their alleged "torture." Plaintiffs assert it is their "understanding" that "certain techniques which the interrogators used on them required Mr. Rumsfeld's personal approval on a case-by-case basis," from which they once again "infer" that defendant Rumsfeld "gave specific authorization to use these techniques against them" and "knew they were experiencing [the] same." SAC ¶¶ 217, 267. Plaintiffs' "understanding" seems to derive solely from their allegation that various types of interrogation methods could be used at Guantanamo, if approved by defendant Rumsfeld "himself in individual cases." Id. ¶¶ 233, 235.

Plaintiffs of course were never detained at Guantanamo. More to the point, they do not assert a plausible ground from which the Court could find that, out of all the other detentions in

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[17] Because this document is a matter of public record, the Court may take judicial notice of it in resolving this motion to dismiss. See Palay v. United States, 349 F.3d 418, 425 n.5 (7th Cir. 2003). It is available on the Internet at: http://www.fas.org/irp/doddir/dod/jp3_63.pdf (last visited August 18, 2008). Relevant excerpts are attached to this brief as Exhibit A.

Iraq, theirs were so noteworthy that they demanded the personal attention of the Secretary of Defense (especially since their detentions lasted just six weeks and three months, respectively). Plaintiffs actually contradict themselves in this regard by alleging that the "Unidentified Agents," not defendant Rumsfeld, "authorize[d]" their "interrogations;" that Lieutenant General Ricardo Sanchez, the former Commander of Coalition Joint Task Force Seven (the predecessor to MNF-I), not defendant Rumsfeld, was responsible for authorizing certain interrogation techniques for use on detainees in Iraq on a case-by-case basis; and that even this authority (originating from two memoranda signed by Lt. General Sanchez in September and October 2003) no longer existed by the time they were detained. See id. ¶¶ 133, 238-39, 242-43.[18] Lacking any legitimate factual foundation, plaintiffs' "understanding" that defendant Rumsfeld personally signed off on employing specific interrogation techniques against plaintiff Vance and plaintiff Ertel in particular does not rise "above the speculative level." Twombly, 127 S. Ct. at 1965. That "understanding" certainly is not enough to hold him individually liable.[19] Cf. Trulock v. Freeh,

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[18] Even plaintiffs' more general allegation that defendant Rumsfeld was "aware" that "all detainees, including Americans," were subjected to the same "degrading" treatment in Iraq, SAC ¶¶ 259, 266, is—apart from being an unsupported conclusion of fact—directly contradicted by their other allegations that "this treatment was intentionally used on Plaintiffs for its perceived value as an interrogation tactic" and that "many persons detained in the same facility were treated far better and far more humanely," id. ¶¶ 260-61 (emphasis added). As such, this is just another way of speculating that defendant Rumsfeld singled plaintiffs out for particularly harsh treatment.

[19] Nor is plaintiffs' allegation that defendant Rumsfeld "modified" the Field Manual on "the same day Congress passed the DTA" to add "ten pages of classified interrogation techniques that apparently authorized, condoned, and directed the very sort of violations that Plaintiffs suffered." SAC ¶ 244. Apart from relying on pure guesswork about the contents of supposedly classified information plaintiffs have never seen, there is no credible factual basis for the theory that the Field Manual was modified in any manner on December 30, 2005 (the DTA's date of passage) or even in "December 2005," id. ¶ 245, or that some portion of it is classified. To the contrary, the only update of the Field Manual since September 1992 was in September 2006, and no part of either of these versions is classified. Both the 1992 and 2006 Field Manuals are matters of public record and can be viewed in their entirety on the Internet at: www.loc.gov/rr/frd/Military_Law/pdf/intel_interrrogation_sept-1992.pdf (1992 Field Manual)

275 F.3d 391, 400, 402 (4th Cir. 2001) (affirming dismissal of Bivens claim against former Director of Federal Bureau of Investigation where allegations did not establish his personal participation in "allegedly heavy-handed interrogation").

As to their claim of inadequate process, plaintiffs all but concede that the detainee status board's procedures on their face "satisfy[] constitutional minimums." SAC ¶ 197. But they then claim in conclusory fashion that defendant Rumsfeld was "aware" that the process "actually" afforded to detainees in Iraq was constitutionally inadequate and that he either "dictated" the "actual practices of the Board" or was "deliberately indifferent" to those "actual practices." Id. ¶¶ 198-99, 272-73, 287. Again, plaintiffs offer nothing but unfounded speculation. They do not allege a single fact to support the theory that defendant Rumsfeld instructed his subordinates to give plaintiffs in particular, or even detainees in general, less due process rights than those authorized by policy or to "prevent" them from filing a habeas petition. Nor do plaintiffs provide a plausible factual basis for concluding that defendant Rumsfeld had personal knowledge of military personnel in Iraq denying constitutionally-mandated procedural or habeas rights (to the extent such rights even exist or have ever been defined) to plaintiffs and that he deliberately failed to intervene on their behalf.

Plaintiffs instead rely on the formulaic assertion that the violation of their constitutional rights resulted from unspecified "policies and practices of Defendant Rumsfeld." Id. ¶¶ 262, 272, 286. It is axiomatic, however, that an individual capacity claim cannot proceed just because a plaintiff baldly says that a former cabinet officer "acted to implement, approve, carry out, and otherwise facilitate alleged unlawful policies." Nuclear Transp. & Storage, Inc. v. United States,

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(last visited August 18, 2008); www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf (2006 Field Manual) (last visited August 18, 2008).

890 F.2d 1348, 1355 (6th Cir. 1989) (internal quotations omitted); accord Patton v. Przybylski, 822 F.2d 697, 701 (7th Cir. 1987) (finding "boilerplate" allegations of an unconstitutional "custom, practice and policy" fell "far short" of demonstrating individual defendant's personal involvement) (internal quotations omitted); Estate of Rosenberg v. Crandell, 56 F.3d 35, 38 (8th Cir. 1995) (stating that neither "a bare allegation that someone in supervisory authority has been deliberately indifferent, without any specification of that person's contact in fact with the plaintiff, nor even an explicit charge of inadequate training or supervision of subordinates, is sufficient to state a Bivens claim").

Applying this same reasoning, the Seventh Circuit has found that the superintendent of a correctional facility and the commissioner of a state's department of corrections were not liable under 42 U.S.C. § 1983 in a case where the plaintiff had alleged that they "oversaw others or established wrongful policies" but not that "either of them was personally involved in the constitutional wrongdoing." Zimmerman v. Tribble, 226 F.3d 568, 574 (7th Cir. 2000); accord Antonelli v. Caridine, No. 96-2877, 1999 WL 106224, *2 (7th Cir. Feb. 26, 1999) (unpublished) (finding that, although warden allegedly "oversaw an unconstitutional sick call policy," he was not liable for particular inadequate medical treatment because plaintiff did not claim that warden "participated directly in the day-to-day implementation of that policy"). This is consistent with similar precedent rejecting individual capacity claims against wardens and senior-level prison officials premised on equally vague allegations of supervisory involvement.[20] If prison wardens,

[20] See, e.g., Steidl v. Gramley, 151 F.3d 739, 742 (7th Cir. 1998) (dismissing individual capacity claims against warden pursuant to "the uniform application of a rule of construction: an inference that a warden is directly involved in a prison's daily operations is not reasonable"); Crowder v. Lash, 687 F.2d 996, 1005-06 (7th Cir. 1982) (upholding directed verdict in favor of Commissioner of Corrections on conditions-of-confinement claim even though he was familiar with conditions of specific unit where plaintiff was held based on communications with subordinates and plaintiff; because there was no evidence that defendant personally participated,

who work daily at the correctional facilities they oversee, cannot be held liable for the acts of subordinates, then most certainly the Secretary of Defense cannot be held liable for the alleged acts of military personnel at a detention facility in a foreign war zone.

Indeed, numerous cases make clear that imposing personal liability on the heads of federal agencies or other senior government officials requires more than simply alleging they approved a policy or plan of action that led to a subordinate violating someone's constitutional rights.[21] Were it otherwise, a plaintiff could "engage in fishing expeditions into the affairs of high-level government officials every time a member of their department is accused of committing a [constitutional] violation" and do so in almost every case without any meaningful factual foundation. Tricoles, 2006 WL 767897 at *4 & n.4 (collecting cases); see Nuclear Transp., 890 F.2d at 1355 (cautioning that allowing claim against former cabinet officer to proceed with conclusory allegations of personal participation "could needlessly subject him to the burdens of discovery and trial"). Concerns about the expense and impositions of discovery

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directed, or expressly consented to any of the challenged actions, finding against him would leave "any well informed Commissioner . . . personally liable for damages flowing from any constitutional violation occurring at any jail within that Commissioner's jurisdiction") (emphasis in original); Duncan v. Duckworth, 644 F.2d 653, 656 (7th Cir. 1981) (dismissing claims against warden for deliberate indifference to prisoner's medical needs because it is "doubtful that a prison warden would be directly involved in the day-to-day operation of the prison hospital such that he would have personally participated in, or have knowledge of, the kinds of decisions that led to the delay in treatment complained of by [plaintiff]"); Crandell, 56 F.3d at 37 (dismissing Bivens claims against warden because "the general responsibility of a warden for supervising the operation of a prison is not sufficient to establish personal liability" and there was no allegation that he "had anything to do with the decisions affecting plaintiff's medical care, or even that [he] knew that plaintiff was ultimately diagnosed with cancer").

[21] See, e.g., Evancho v. Fisher, 423 F.3d 347, 353-54 (3d Cir. 2005); Dalrymple v. Reno, 334 F.3d 991, 996-97 (11th Cir. 2003); Gonzalez v. Reno, 325 F.3d 1228, 1234-36 (11th Cir. 2003); Nuclear Transp., 890 F.2d at 1355; Varon v. Sawyer, No. 04-2049, 2006 WL 798880, at *3 (D. Conn. Mar. 25, 2006); Tricoles v. Bumpus, No. 05-3728, 2006 WL 767897, at *4 (E.D.N.Y. Mar. 23, 2006); Oladipupo v. Austin, 104 F. Supp. 2d 623, 626 (W.D. La. 2000).

are especially acute here, as the allegations of defendant Rumsfeld's personal participation are wholly speculative. See Twombly, 127 S. Ct. at 1966-67; Bryson, 2008 WL 2877474 at *4. For all of these reasons, plaintiffs' allegations are insufficient to link defendant Rumsfeld to their asserted injuries and Counts I - III should be dismissed.

B. Plaintiffs Do Not Allege The Violation Of Any Clearly Established Constitutional Right

Besides not adequately pleading his personal involvement, the claims against defendant Rumsfeld are flawed for a more fundamental reason: the underlying conduct that plaintiffs attribute to him, even assuming all of it were true, did not violate their constitutional rights. To defeat a qualified immunity defense, the alleged constitutional violation must be defined at the appropriate level of specificity. See Anderson, 483 U.S. at 640. Plaintiffs' vague incantation of constitutional buzzwords, however—e.g., due process, equal protection, and habeas corpus—does not come close to meeting this standard:

> For example, the right to due process is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, . . . [p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

Id. at 639. Here, then, plaintiffs must demonstrate that persons detained by military forces in an active theater of war, on suspicion of supplying explosives to insurgents and receiving stolen weapons from coalition forces, are entitled to, but were denied, particular constitutional rights. Cf. Brosseau v. Haugen, 543 U.S. 194, 200 (2004) (per curiam) (identifying relevant issue as whether it violated the Fourth Amendment, not simply to use excessive force, but "to shoot a

disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight"). This they cannot do.

To begin, the extraterritorial application of the Constitution in a foreign war zone is far from settled. No case ever has squarely addressed whether a United States citizen has any constitutional protection while detained in a foreign territory by American military forces on the field of battle. Cf. Best v. United States, 184 F.2d 131, 138 (1st Cir. 1950) (assuming without deciding that "Fourth Amendment extends to United States citizens in foreign countries under occupation by our armed forces"). Meanwhile the Supreme Court repeatedly has refused to endorse any bright line rule for staking out the Constitution's reach in the territory of another sovereign, and certainly has not done so in the context of a war zone in a foreign land.[22] Case law from the lower federal courts is of like effect.[23] The Supreme Court even has suggested that

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[22] See Verdugo, 494 U.S. at 268-70 (rejecting "view that every constitutional provision applies wherever the United States Government exercises its power" and characterizing the concurrences in Reid v. Covert, 354 U.S. 1 (1957) (plurality), as "declin[ing] even to hold that United States citizens were entitled to the full range of constitutional protections in all overseas criminal prosecutions"); Reid, 354 U.S. at 74 (Harlan, J., concurring) (disputing that "every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world" and arguing instead "there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place"); Eisentrager, 339 U.S. at 783 (stating there is "no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses"); cf. Boumediene, 128 S. Ct. at 2258 (holding that reach of Suspension Clause beyond country's borders depends on host of "objective factors and practical concerns").

[23] See, e.g., Sami v. United States, 617 F.2d 755, 773 n.34 (D.C. Cir. 1979) (stating that "extent to which the Constitution's protections shield citizens, resident-aliens or aliens from actions which occur in other countries is not clear"), abrogated on other grounds by Alvarez-Machain, 542 U.S. 692; In re Iraq, 479 F. Supp. 2d at 95 (finding it "clear that the Constitution's reach is not so expansive that it encompasses these nonresident aliens who were injured extraterritorially while detained by the military in foreign countries where the United States is engaged in wars"); United States v. Bin Laden, 126 F. Supp. 2d 264, 270-71 (S.D.N.Y. 2000) (describing extent of Fourth Amendment protection as applied to search of United States citizen in Kenya "unclear").

any "restrictions on searches and seizures" occurring incident to the use of American armed force in another part of the world "must be imposed by the political branches," not the Fourth Amendment itself. Verdugo, 494 U.S. at 275. Within this legal landscape, plaintiffs' allegations do not establish the denial, much less a clearly established one, of any constitutional rights in connection with their detentions in a foreign war zone.

1. Plaintiffs' Constitutional Right To Habeas Corpus Was Neither Violated Nor Clearly Established (Count III)

Disposing of the last of their three claims against defendant Rumsfeld first (Count III), plaintiffs allege they were denied access to a court to challenge their detentions. See SAC ¶¶ 284-93.[24] To state a denial of access to courts claim, plaintiffs must allege both: (1) a "nonfrivolous, arguable" underlying claim, and (2) official acts frustrating litigation of that claim. See Christopher v. Harbury, 536 U.S. 403, 414-15 (2002) (internal quotations and citation omitted). As to the first prong of this test, plaintiffs assert that their lack of access to a court "prevented" them from filing a petition for habeas corpus. SAC ¶¶ 4, 6, 286-87.

At the same time, plaintiffs explicitly plead that Count III "seeks a remedy only under the Constitution." Id. ¶ 293 (emphasis added). This is critical because no court has ever found that a person detained by United States military forces in a foreign war zone during ongoing hostilities has a constitutional right to the writ of habeas corpus. Cf. Boumediene, 128 S. Ct. at 2262 (finding that non-resident aliens designated as "enemy combatants" and detained at Guantanamo may invoke the constitutional privilege of habeas corpus); Munaf, 128 S. Ct. at 2216-18 & n.2 (finding that federal habeas statute extends to United States citizens detained in Iraq by American

[24] Count III also references the denial of counsel and plaintiffs' limited communication with their families. See SAC ¶¶ 286-90. Because these allegations overlap with their claims in Counts I and II, they are addressed separately in Sections II-B-2 and II-B-3 of this brief.

military forces acting under authority of MNF-I but clarifying that the opinion does not address the "constitutional scope of the writ"); Eisentrager, 339 U.S. at 779 (finding that enemy aliens detained at Landsberg Prison in postwar Germany, then under control of Allied Forces, had no constitutional right to file habeas petition in federal court).

Assuming plaintiffs nevertheless had a theoretical right to habeas "under the Constitution," the Supreme Court has qualified such a right with the condition that a habeas court should not "intervene the moment an enemy combatant steps foot in a territory where the writ runs. The Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition." Boumediene, 128 S. Ct. at 2275-76; see id. at 2276 (stating that, "[e]xcept in cases of undue delay," federal courts should wait at least until the Department of Defense "has had a chance to review [a detainee's] status" before considering a habeas petition). The need for this temporary abstention is even more compelling in the context of individuals held at a detention facility, like Camp Cropper, located in an active theater of war. Cf. id. at 2257-62 (comparing circumstances of present-day Guantanamo with those existing at Landsberg Prison in postwar Germany circa 1950).

By any standard, six weeks (for plaintiff Ertel) or even a little over three months (for plaintiff Vance) are reasonable amounts of time to review and determine a detainee's status. Cf. id. at 2277 (noting that some petitioners "have been in custody for six years with no definitive judicial determination as to the legality of their detention"); Zadvydas v. Davis, 533 U.S. 678, 701 (2001) (setting six months as presumptively constitutional period for detention of aliens in United States pending arrangements for removal). It is eminently more so when the reviews take place on the battlefield itself. It also cannot be forgotten that plaintiffs were released after those periods of time, a fact which would have made any hypothetical habeas petition moot. This is

one practical but highly significant justification for the rule articulated in Boumediene: by waiting a reasonable amount of time for the initial review procedures to run their course, habeas may become altogether unnecessary. Under the reasoning of Boumediene, therefore, plaintiffs cannot establish the violation of a constitutional right to habeas because they were let go before any such right would have taken effect.

At the very least, defendant Rumsfeld is entitled to qualified immunity as to Count III. Plaintiffs can point to no case clearly establishing that citizens detained in a foreign war zone for a reasonable amount of time (e.g., a little more than three months) while their initial status is determined and reviewed have a constitutional right to habeas corpus (let alone a case predating April 2006). That issue remains unsettled to this very day. Nor can they legitimately argue that the violation of such a right would be "patently obvious," Jacobs, 215 F.3d at 767, especially in light of the disagreement that these kinds of issues has engendered among lower courts and Justices of the Supreme Court. See Wilson v. Layne, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."). Finally, even if the Court were to ignore plaintiffs' own pleadings by considering whether plaintiffs had a statutory right to habeas while detained in Iraq, that matter was not clarified until two years after they were detained, when the Supreme Court decided Munaf in June 2008 (and thereby resolved conflicting lower court opinions, compare Mohammed v. Harvey, 456 F. Supp. 2d 115 (D.D.C. 2006), with Omar v. Harvey, 416 F. Supp. 2d 19 (D.D.C. 2006)). See Brosseau, 543 U.S. at 200 n.4 (explaining that decisions which postdate challenged conduct "are of no use in the clearly established inquiry").

2. Any Procedural Rights Due Plaintiffs Under The Constitution Were Neither Violated Nor Clearly Established (Count II)

Though never mentioned by name, plaintiffs' second cause of action is primarily a Fifth Amendment procedural due process claim against defendant Rumsfeld.[25] SAC ¶¶ 268-83. Plaintiffs essentially allege that the method used to determine their status was marred by deficient process, such as the inability to confront all the evidence against them or present their own evidence, the non-disclosure of exculpatory evidence, the lack of legal representation, and decisionmakers that were "not neutral." See id. ¶¶ 269-70, 276. The significance of these defects is unclear given the end result—namely, plaintiffs' release. See id. ¶¶ 207, 210. Regardless, the proceedings violated no clearly established due process rights.

The closest guidance on what process is due when determining whether a citizen should be held as a security internee comes from the plurality opinion in Hamdi. That opinion turned to the balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976), which involves "weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." Hamdi, 542 U.S. at 529 (quoting Mathews, 424 U.S. at 335). Applying this test, the plurality balanced the detainee's liberty interest against the "weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States" and the "practical difficulties that would accompany a system of trial-like process." Id. at 529-32. It then concluded that the only process due "a citizen-detainee seeking to challenge his classification as an enemy combatant" is

[25] Plaintiffs also have grafted an equal protection theory on to this count. See SAC ¶¶ 278-79. This too falls under the umbrella of due process, see Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (recognizing equal protection component to Fifth Amendment's Due Process Clause), but as discussed below, their allegations fail to state an equal protection claim.

"notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Id. at 533.

In this case, the Mathews balancing test permits proceedings even more streamlined than those outlined in Hamdi. Whereas the detainee in Hamdi was held within the United States and already had been classified as an enemy combatant, Hamdi, 542 U.S. at 509, the plaintiffs here were detained in a foreign country in the midst of active hostilities and their initial status had not yet been determined. Cf. Reid, 354 U.S. at 33-35 (reaffirming broad power of military officials over individuals apprehended on the field of battle and observing that the "exigencies which have required military rule on the battlefront are not present in areas where no conflict exists"). The limited resources and pressing security concerns of operations in a war zone severely limit the options available to military officials. Moreover, the government interests highlighted in Hamdi—that "military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away" and that "discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war," Hamdi, 542 U.S. at 531-32—are far stronger in a situation involving initial status determinations made on the battlefield itself. See id. at 534 (noting that "initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to continue to hold those who have been seized") (emphasis in original); cf. Boumediene, 128 S. Ct. at 2275-76 (holding that Executive Branch is entitled to a "reasonable period of time to determine a detainee's status" before the constitutional right to habeas takes effect).

But even if this Court were to find that Hamdi sets the baseline here, plaintiffs still received every protection the Hamdi plurality envisioned. They received written notice of the

factual basis for their detentions. See SAC ¶¶ 177, 179-80 & SAC Exhs. A, B. They appeared before a military tribunal, see id. ¶ 185, which Hamdi explicitly recognized could meet due process requirements, see Hamdi, 542 U.S. at 538. And they were allowed to see the unclassified evidence in their cases. See SAC ¶ 190.

Although plaintiffs complain they were not provided with attorneys during their status board hearings or interrogations, see SAC ¶ 276, due process does not ineluctably require an attorney for every proceeding, even when physical liberty is at stake. This becomes clearer when, as here, there is a concern for the effectiveness of ongoing military operations. See Middendorf v. Henry, 425 U.S. 25, 43-48 (1976) (holding that due process does not entitle military personnel to right to counsel at summary courts-martial due to burdens and disruptions it would impose on military). Significantly, and contrary to the legal positions asserted in plaintiffs' complaint, see SAC ¶¶ 220, 226, the Hamdi plurality did not find that detainees held in either wartime Iraq or even the United States, where attorneys are readily available, must have access to counsel when appearing before a status board.[26] This is hardly surprising, as it would require government personnel operating in a war zone to provide counsel to suspected enemy combatants before being allowed to question them or determine their status. Thus, even if plaintiffs could demonstrate some prejudice in appearing before status boards or being interviewed without an attorney, due process did not demand that one be provided under the circumstances of this case.

Plaintiffs further allege they were not permitted to review all the evidence before the status board (both adverse and exculpatory), have each other present at their hearings, or present their own evidence (e.g., their computers and cell phones that were seized when they were taken

[26] The most it said was that an individual already classified as an enemy combatant and detained within the United States would have the right to counsel in connection with ongoing habeas proceedings, Hamdi, 542 U.S. at 539, something obviously not at issue here.

into custody). See id. ¶¶ 183, 187, 190-92, 269-70, 276. The Hamdi plurality, however, contemplated that due process for hearings to challenge an enemy combatant classification would not replicate the full complement of evidentiary rules and presumptions common to criminal trials. See Hamdi, 542 U.S. at 533-34. This makes even more sense with respect to initial status determinations made on the battlefield to decide if an individual poses a threat to the United States, allied forces, or Iraqi citizens. Giving detainees access to sensitive and confidential evidence while still in Iraq during active hostilities would present an intolerable security risk. Cf. Reno v. Am.-Arab Anti- Discrimination Comm., 525 U.S. 471, 490-91 (1999) (recognizing risk of disclosing sensitive foreign-policy materials). It would be equally unacceptable to give detainees access to—and thereby run the risk of them altering or destroying—potentially incriminating evidence of their wrongdoing. This is, after all, one of the main reasons for seizing evidence in the first place.

Plaintiffs similarly assert they were "denied notice of the complete factual basis" underlying their detentions. SAC ¶ 269. This amounts to nothing more than a restatement of their claim that they were denied access to all the evidence used to determine their status. As such, due process once again does not require the military to turn over the entire factual record used in making an initial status determination in light of the serious security concerns doing so would pose. Even with respect to someone who is challenging his enemy combatant classification inside the United States, the plurality in Hamdi said only that he must "receive notice of the factual basis for his classification." Hamdi, 542 U.S. at 533. That is exactly what plaintiffs got. They were told specifically that they were suspected of "supplying weapons and explosives to insurgent/criminal groups through [their] affiliation with [SGS]" and of receiving

"stolen weapons and arms in Iraq from Coalition Forces." SAC Exh. A. This is more than sufficient "notice of the factual basis" for their detentions.[27]

At a minimum, plaintiffs' proposed procedures were not so clearly required as to defeat qualified immunity. When the "area [of law] is one in which the result depends very much on the facts of each case," a right will not be clearly established unless extant cases "squarely govern." Brosseau, 543 U.S. at 201. Procedural due process has no "fixed content" but is a "flexible" concept that "calls for such procedural protections as the particular situation demands." Gilbert v. Homar, 520 U.S. 924, 930 (1997) (internal quotations and citations omitted). As it depends entirely on the "time, place, and circumstances" presented in each case, "[a]pplying the Due Process Clause is . . . an uncertain enterprise." Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24 (1981) (internal quotations and citation omitted). More to the point, due process is "one type of constitutional rule . . . for which the standard may be clearly established, but its application is so fact dependent that the 'law' can rarely be considered 'clearly established.'" Benson v. Allphin, 786 F.2d 268, 276 (7th Cir. 1986), superseded by rule on other grounds, Fed. R. Civ. P. 50 (1991 Amendment), as recognized in Laborers' Pension Fund v. A & C Envtl., Inc., 301 F.3d 768 (2002).

There are few, if any, contexts in which due process standards are less developed than the one presented by this case. No precedent holds that detainees taken into military custody in a war zone and detained for the purpose of making an initial status determination are entitled to:

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[27] Plaintiffs also vaguely assert that "the decision makers were not neutral." SAC ¶ 270. Because this is nothing more than a legal conclusion unsupported by any factual allegations, it should be disregarded. See Hickey, 287 F.3d at 658. Even so, it is belied by the fact that both plaintiffs were released in just over three months from their initial detentions (with plaintiff Ertel being released in less than six weeks). See SAC ¶ 212. That is hardly what would be expected if the decision makers were "not neutral."

consult with an attorney; confront all the witnesses and see all the evidence, no matter how sensitive; present their own evidence in the manner of their choosing; and have exculpatory evidence disclosed. In fact, the Supreme Court has taken care to distinguish between initial status determinations made in an active theater of war and challenges to an enemy combatant classification taking place far from the battlefield, affording virtually unlimited deference to the Executive's handling of the former. See Hamdi, 542 U.S. at 534; Boumediene, 128 S. Ct. at 2260-62, 2275-76. Government officials therefore could not have had fair notice that the procedures demanded by plaintiffs would have been required.

This conclusion is not affected in the least by plaintiffs' new equal protection twist on their procedural due process claim. See SAC ¶¶ 277-78. That theory is premised on the following misleading allegations: (1) "[f]ull Uniform Code of Military Justice ('UCMJ') procedural rights were routinely afforded in Baghdad" to "numerous other Americans;" (2) "American civilians can have such rights under the UCMJ;" (3) UCMJ "procedural rights" were "withheld" from plaintiffs; and (4) there was no "no principled distinction" in applying the UCMJ to "other Americans suspected of similar misconduct" but not plaintiffs. Id. ¶¶ 200-04, 220-22, 278. The fallacies in this argument are numerous and obvious.

First, plaintiffs have set up a false dichotomy as every single example in their complaint of the UCMJ being applied to "other Americans" involved, by their own admission, "military personnel in Baghdad." Id. ¶ 221; see id. ¶¶ 201-03, 221-22. The distinction between civilians and service members within the UCMJ is not only "principled," but a long-standing and deeply-entrenched one that the law itself mandates. Contrary to plaintiffs' misrepresentation, civilians in general do not "have . . . rights under the UCMJ," which, by its own terms, is applicable almost exclusively to members of the armed forces. See generally 10 U.S.C. § 802; cf. Reid, 354 U.S. at

19-41 (finding it unconstitutional to subject civilian dependents of service members, who accompanied the service members abroad, to courts-martial).[28] Second, the notion that the UCMJ should have been applied to plaintiffs is refuted by the one case they cite the most in support of Count II, Hamdi. Even though Hamdi was detained at a naval brig in South Carolina, none of the opinions in Hamdi mentions the UCMJ even once, let alone suggests that Hamdi was entitled to "full [UCMJ] procedural rights." SAC ¶ 220. This is almost certainly because, once again, the UCMJ generally does not apply to civilians.

Keeping in mind that plaintiffs do not challenge the constitutionality of the UCMJ itself, but only the failure to apply it to them, they can state no equal protection violation because the UCMJ compelled that very result.[29] See Lauth v. McCollum, 424 F.3d 631, 634 (7th Cir. 2005) (stating that equal protection claim requires plaintiff to prove he was treated differently than someone similarly situated, i.e., "prima facie identical in all relevant respects"). This means no precedent even remotely, let alone clearly, establishes that a civilian would enjoy any "[UCMJ] procedural rights" under the circumstances presented here. Thus, whether spun as a procedural due process or equal protection claim, the lack of additional procedural protections, beyond what

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[28] One exception to this rule, as it existed at the time plaintiffs were detained in April 2006, is that, "[i]n time of war, persons serving with or accompanying an armed force in the field" were subject to the UCMJ. 10 U.S.C. § 802(a)(10) (2006). But given their description of SGS, see SAC ¶¶ 33-34, plaintiffs would not have been considered "persons serving with or accompanying an armed force in the field." See United States v. Burney, 6 C.M.A. 776, 788 (1956) (holding that the relevant test is whether the individual "has moved with a military operation and whether his presence with the armed force was not merely incidental, but directly connected with, or dependent upon, the activities of the armed force or its personnel"). What thus "prevents the [civilian] citizen from accessing reasonably available UCMJ procedures" is not a "bureaucrat's decision to affix the 'possible enemy' label to" that individual, SAC ¶ 223, but the military's general lack of jurisdiction over civilians.

[29] This is one more reason why defendant Rumsfeld cannot be held personally liable. Only the Congress and the President can change the UCMJ; therefore, defendant Rumsfeld in no way is responsible for the fact that it would not have applied to plaintiffs.

plaintiffs actually received, in connection with their on-the-battlefield initial status determinations did not violate any clearly established constitutional right.

3. Plaintiffs' Substantive Due Process Rights Were Neither Violated Nor Clearly Established (Count I)

Turning to Count I of their second amended complaint, plaintiffs again fail to identify which part of the Constitution is implicated by the conduct they describe. See SAC ¶¶ 258-67. They seek to hold defendant Rumsfeld personally liable for prison guards at Camp Cropper steering them into walls, taking away their medication, waking them up, playing loud music, denying them food and water, keeping the lights on and the temperature low in their cells, and falsely accusing them of possessing contraband; for being kept in segregated cells for the duration of their detentions; and for having limited and monitored communication with their families. See id. ¶¶ 146-64, 259, 266-67. Neither the Fourth nor Eighth Amendments would provide relief under these facts, leaving only the Fifth Amendment as arguably relevant. Cf. Sides v. City of Champaign, 496 F.3d 820, 828 (7th Cir. 2007) (holding that Fourth Amendment applies only at time of arrest, Eighth Amendment applies only after conviction, and "Due Process Clause of the Fifth Amendment supplies the standard" for a claim challenging a detainee's conditions of confinement "between arrest and conviction"), cert. denied, 128 S. Ct. 1450 (2008). Defendant Rumsfeld therefore assumes solely for purposes of this motion that Count I "plays out on the yielding natural grass of substantive due process rather than the stiff astroturf of specific constitutional rights." Armstrong v. Squadrito, 152 F.3d 564, 569 (7th Cir. 1998); see Graham v. Connor, 490 U.S. 386, 395 (1989) (holding that constitutional claims are analyzed under rubric of substantive due process if they lack "explicit textual source" from the Constitution).[30]

[30] It bears repeating that plaintiffs alternatively rely on the DTA in Count I but that the DTA does not provide a private cause of action. See Section I-B. Assuming the Court were to

Wading into the "murky waters of that most amorphous of constitutional doctrines, substantive due process," is a treacherous exercise at best. Tun v. Whitticker, 398 F.3d 899, 900 (7th Cir. 2005). It is at once "a difficult concept to pin down" and one with a "very limited" scope. Id. at 902. As to this latter point, the Supreme Court often has expressed reluctance "to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

Indeed, the concept boils down to just one inchoate consideration: whether the conduct at issue "shocks the conscience." County of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998). This measure is, by the Supreme Court's own reckoning, "no calibrated yard stick." Id. at 847. What gives it meaning is context, which is why every substantive due process inquiry "demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." Id. at 850; see Armstrong, 152 F.3d at 570 (stating that "investigation into substantive due process involves an appraisal of the totality of the circumstances rather than a formalistic examination of fixed elements"). The degree of culpability a plaintiff must show to prove a violation of substantive due process thus will vary depending on those circumstances.

The bar is set highest in cases where government officials are faced with competing obligations "that tend to tug against each other." Lewis, 523 U.S. at 853. Conduct will violate substantive due process in these situations only if it is "intended to injure in some way unjustifiable by any government interest." Id. at 849. Although this formulation is typically used in cases involving a prison riot or high-speed chase, see id. at 853-54, its underlying

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find otherwise, a claim under the DTA still would add nothing to the qualified immunity analysis because the DTA merely incorporates by reference the prohibitions of the "Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States." 42 U.S.C. § 2000dd(d).

rationale—i.e., "the pulls of competing obligations," id. at 853—applies with equal, if not more, force in the context of fighting a war. Cf. Benzman v. Whitman, 523 F.3d 119, 127-28 (2d Cir. 2008) (finding that, absent credible allegation of intent to injure, conduct does not "shock the conscience" where Bivens defendant must choose between "competing considerations" in "aftermath of an unprecedented disaster," i.e., the terrorist attacks of September 11, 2001). It is in fact hard to imagine an environment where the "shocks the conscience" test should be more demanding than on the battlefield. The military's primary objective in Iraq is to suppress a brutal insurgency, a task that was difficult, dangerous, and deadly in 2006 and remains so to this day. But the military simultaneously has myriad other responsibilities, such as training Iraqi forces, assisting in Iraq's reconstruction efforts, and gathering intelligence from various sources to preempt future threats to stability and security in Iraq. See Munaf, 128 S. Ct. at 2213. Added to these duties, it also is in charge of running multiple detention facilities throughout Iraq. See id. Without conceding that even the "intent to harm" standard "adequately capture[s] the importance of such competing obligations" confronting the military in Iraq, Lewis, 523 U.S. at 852 (internal quotations and citation omitted), it should be the minimum by which plaintiffs' allegations against defendant Rumsfeld are judged.[31]

Under this (or any) standard, the actions underlying plaintiffs' substantive due process claim do not "shock the conscience." As an initial matter, their implausible allegations of defendant Rumsfeld's personal involvement (see Section II-A infra) remain just as implausible for the purpose of proving his intent to injure plaintiffs. Because there is no credible factual

[31] The Supreme Court actually has said that conduct satisfying the "intent to harm" test is "most likely to rise to the conscience-shocking level." Lewis, 523 U.S. at 849 (emphasis added). Because "most likely" is not the same as "always," it recognizes there will be situations requiring still greater culpability before a defendant's actions "shock the conscience." Certainly a war zone is one such potential situation, for all of the reasons discussed herein.

basis offered to demonstrate that defendant Rumsfeld had any idea who these two individuals were before this lawsuit, let alone that he had contemporaneous knowledge of instances of their mistreatment by prison guards or other military personnel at Camp Cropper, plaintiffs could not possibly demonstrate that he intended to injure them.

Their substantive due process claim does not come up short on just the culpability prong, however. Plaintiffs have described conduct that may seem harsh when viewed in a vacuum but is not "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience" when viewed in the larger context of a war. Id. at 847 n.8. Nothing illustrates this better than their own pleadings.

Plaintiffs, who actually chose to move halfway around the world to live and work in a war zone, describe in detail the many threats and dangers they experienced in Iraq on a daily basis before they were ever taken into military custody. They say, for example, that their own colleagues and SGS' clients often "threatened and accosted" them, causing them to fear for their own safety and lives. SAC ¶¶ 97, 112, 123. Their supervisor, Josef Trimpert, apparently had a history of "threatening [plaintiff Vance] with violence" and of bragging "about brutal acts of violence he claimed to" have committed against Iraqi citizens. Id. ¶¶ 97, 123. Separately, plaintiffs "ran into problems with the Iraqi sheiks," one of whom supposedly threatened to have them both kidnaped during a "highly-publicized spate of abductions and beheadings in Iraq." Id. ¶¶ 109, 112. They also recount how Mr. Trimpert "disparage[d]" them for having a "'negative' approach" and "hurting SGS's business" to SGS' president, who in turn conspired with his subordinates to hold both plaintiffs "hostage" and simultaneously orchestrated a plan to "lure [plaintiff Vance] off" the SGS compound with the intent of injuring or killing him. Id. ¶¶ 108, 113-123. And this is to say nothing of the ubiquity of weapons and weapons-dealing in Iraq,

noted throughout plaintiffs' complaint. See id. ¶¶ 39, 58, 75-78, 86, 95-96, 100-04. It therefore is no surprise that plaintiff Vance says he "feared for his life" when he was transported along "Highway Irish, a notorious sniper trap." Id. ¶ 143.

The working environment plaintiffs describe aptly illustrates that conduct which would be considered intolerable in most other settings is simply a fact of life inside a war zone. Against this backdrop, their allegations that prison guards "threatened" them with "excessive force," "purposefully steer[ed] them into walls," falsely accused them of possessing contraband, and that "interrogators" used "threats of indefinite detention," id. ¶¶ 156-58, 176, 259, cannot fairly be said to "shock the conscience." Cf. Bender v. Brumley, 1 F.3d 271, 274 & n.4 (5th Cir. 1993) (holding that verbal abuse and threats by prison guards do not violate Constitution); DeWalt v. Carter, 224 F.3d 607, 619-20 (7th Cir. 2000) (noting that, in analyzing Eighth Amendment claim, "not every push or shove by a prison guard violates a prisoner's constitutional rights") (citing Hudson v. McMillian, 503 U.S. 1, 9 (1992)).

Plaintiffs also vaguely complain that their "cells were kept extremely cold." SAC ¶ 147. Yet they ignore the fact that they were detained in the middle of a desert during the late Spring and Summer months and, more importantly, do not allege they asked for but were denied blankets. Cf. Wilson v. Seiter, 501 U.S. 294, 304 (1991) (holding that a low cell temperature at night may establish an Eighth Amendment violation only if combined with a failure to issue blankets). Plaintiffs complain "it was difficult to obtain meaningful rest" because the guards would play loud music or pound on their cell doors and "the lights were always turned on." SAC ¶¶ 147, 149. Yet a desire for a more tranquil and restful detention, even if understandable, is not a reasonable expectation in a military facility located amidst the chaos of armed conflict. Plaintiff Vance complains about how long it took to receive dental care and the lack of any

follow-up care and both plaintiffs complain about medication like antacids or pain relievers being withheld. Id. ¶¶ 153-54. Yet a delay in receiving, or even a lack of, non-life-threatening medical treatment and medicine in a war zone does not "shock the conscience."

The same is true of the remaining allegations that underlie Count I. Plaintiffs claim they were not given food and water "sometimes for an entire day." Id. ¶ 151. Although being deprived of food and water for a single day may cause some temporary discomfort, it does not amount to an "extreme deprivation." Cf. Hudson, 503 U.S. at 9 (holding that "extreme deprivations are required to make out a conditions-of-confinement claim" in domestic prison context).[32] Nor do plaintiffs allege it caused them any physical injury.[33] More broadly, it does not "shock the conscience" (even if it is disquieting) to learn that individuals living in a war zone sometimes go without food or water for a twenty-four-hour period, as plaintiffs' own allegations make clear. Compare SAC ¶ 40 (alleging that, "[a]s was true for everyone living in Baghdad,

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[32] Cf. Reed v. McBride, 178 F.3d 849, 853-54 (7th Cir. 1999) (finding that withholding of food is not a "per se objective violation of the Constitution" and that a court instead "must assess the amount and duration of the deprivation"); Duncan v. Levenhagen, No. 99-3967, 2000 WL 557009, at *1 (7th Cir. Apr. 28, 2000) (unpublished) (holding that depriving prisoner of food for twelve hours does not violate Eighth Amendment); Spicer v. Berezansky, No. 03-291, 2005 WL 2177077, at *2 (D. Del. Sept. 8, 2005) (finding that denying food to prisoner for seventeen hours is "not sufficiently serious" to state a constitutional violation); Brown v. Madison Police Dep't, No. 03-177, 2003 WL 23095753, at *3-4 (W.D. Wis. May 15, 2003) (finding that denial of food and water for sixteen and one-half hours was not sufficient to sustain Eighth Amendment claim); Gardner v. Beale, 780 F. Supp. 1073, 1075-76 (E.D. Va. 1991) (holding that eighteen hours between meals did not violate prisoner's Eighth Amendment rights)

[33] Cf. Berry v. Brady, 192 F.3d 504, 508 (5th Cir. 1999) (rejecting deprivation-of-food claim where prisoner did not allege any physical harm "other than hunger pains"); Rush v. Astacio, No. 97-2661, 1998 WL 480751, at *2 (2d Cir. July 31, 1998) (unpublished) (finding that refusal to feed pretrial detainee for twelve hours did not violate his due process rights because, "while unpleasant, [it] was far from excessive" and plaintiff had not alleged that it "resulted in any injuries whatever"); Allen v. Ramos, No. 03-495, 2005 WL 1420746, at *3 (S.D. Ill. June 15, 2005) (finding that depriving prisoner of lunch and dinner on same day did not violate Eighth Amendment where prisoner did "not allege harm to his health").

there were frequent disruptions in electricity and the water was not potable") with id. ¶ 150 (complaining that cells at Camp Cropper "had no sinks nor any potable running water"). Cf. Reed, 178 F.3d at 854 (noting that Eighth Amendment denial-of-food claim depends in part on whether there are "extraordinary or extenuating circumstances"); Talib v. Gilley, 138 F.3d 211, 214 n.3 (5th Cir. 1998) (observing that "[m]issing a mere one out of every nine meals is hardly more than that missed by many working citizens over the same period").

Finally, plaintiffs assert that they were kept in "solitary confinement" with limited outdoor recreation time and communications with their families were limited both in quantity and content and monitored. See SAC ¶¶ 159-63, 259. None of this advances their substantive due process claim. Courts have rejected constitutional challenges to the duration and conditions of administrative segregation in the domestic prison setting far more egregious than what plaintiffs allege in this case.[34] Restrictions on inmate communications in domestic prisons are also routinely upheld in light of the "wide-ranging deference" accorded prison officials "in the adoption and execution of policies and practices that in their judgment are needed to preserve

[34] Cf. West v. Hautamaki, 172 Fed. Appx. 672, 674-75 (7th Cir.) (holding that no Eighth Amendment violation occurred where prisoner was kept in administrative segregation for 180 days and allowed only one hour of recreation time per week), cert. denied, 127 S. Ct. 170 (2006); Padilla, 423 F.3d at 390-97 (upholding continuous detention of citizen who alleged he had been held incommunicado within the United States for over three years without criminal charges); Jones v. Baker, 155 F.3d 810, 812-13 (6th Cir. 1998) (holding that prisoner placed in administrative segregation for two and one-half years did not violate due process); Beverati v. Smith, 120 F.3d 500, 504 (4th Cir. 1997) (holding that prisoners' procedural and substantive due process rights were not violated by six-month placement in administrative segregation, even though inmates were kept in cells except three to four times each week; denied outside recreation, educational, and religious services; denied warm or large portions of food, clean clothing, and bedding; and housed in cells infested with vermin, smeared with human feces and urine, flooded with toilet water, and unbearably hot).

internal order and discipline and to maintain institutional security."[35] Bell v. Wolfish, 441 U.S. 520, 547 (1979). Even more to the point, the court in Al-Odah v. United States, 406 F. Supp. 2d 37 (D.D.C. 2005), found that the inherent security risks posed by conversations between a detainee at Guantanamo and the detainee's family members, including the possible transmittal of "impermissible information," justified the government "carefully monitor[ing]" such conversations. Al-Odah, 406 F. Supp. 2d at 45-46. But because such monitoring "occup[ies] considerable government time, money, and resources," id. at 46—all of which is just as, if not more, scarce in Iraq—detainees' telephone access is necessarily quite limited. The government has a strong interest in curtailing detainee communications for the additional reasons of obtaining more effective intelligence from detainees and avoiding the risk of detainees and their coconspirators "getting their stories straight." Cf. Padilla, 423 F.3d at 395 (upholding continuous detention within the United States of citizen who was classified as enemy combatant and who alleged he was held incommunicado throughout his detention, based in part on Executive's "efforts to gather intelligence from the detainee" and need to "restrict the detainee's communication with confederates so as to ensure that the detainee does not pose a continuing threat to national security even as he is confined").[36]

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[35] See, e.g., Shaw v. Murphy, 532 U.S. 223, 228-32 (2001) (upholding restrictions on inmate-to-inmate legal correspondence); United States v. Van Poyck, 77 F.3d 285, 291 (9th Cir. 1996) (upholding policy of recording inmate phone calls); United States v. Willoughby, 860 F.2d 15, 21 (2d Cir. 1988) (same); Benzel v. Grammer, 869 F.2d 1105, 1108-09 (8th Cir. 1989) (upholding policy of limiting inmate's telephone use).

[36] This last reason would have been especially relevant here, as the military had to make an initial determination regarding the security threat posed by two individuals who had armed and barricaded themselves in together and were both suspected of the same serious misconduct through their shared employment with the same company, at the same time, in the same place. See SAC ¶¶ 35-37, 124-25 & SAC Exhs. A, B.

It should go without saying that the practical difficulties of running a detention facility housing suspected insurgents in wartime Iraq are even less "susceptible of easy solutions," Bell, 441 U.S. at 547, than those encountered within the United States or even at Guantanamo. Restricting and monitoring detainees' communications, keeping detainees in segregated cells, and limiting their recreation time are all reasonably related to the military's far more acute security concerns and its far fewer resources in a war zone. Cf. id. at 539 (holding that a "particular condition or restriction of pretrial detention" does not violate due process if it "is reasonably related to a legitimate governmental objective").

The result does not change when plaintiffs' substantive due process allegations are considered collectively. Plaintiffs repeatedly characterize all of the alleged "mistreatment" and conditions of their confinement as "interrogation techniques" or "interrogation tactics" that were related solely to the government's efforts to obtain intelligence from them about a variety of topics that could pose significant security threats to forces in Iraq. See SAC ¶¶ 4, 12, 21, 165-174, 209, 217, 261-62, 266-67. Given that the military thus was pursuing legitimate government interests, even if in an allegedly unauthorized manner, and given that courts have found conditions of confinement comparatively more severe than what plaintiffs have alleged do not violate the Constitution in comparatively less demanding contexts than a war zone, the limitations allegedly imposed upon them do not "shock the conscience." Cf. Lewis, 523 U.S. at 849 (holding that only conduct which is "in some way unjustifiable by any government interest" will violate substantive due process).

This is not to condone the intentional mistreatment of detainees or to downplay any discomfort plaintiffs may have experienced during their detentions. But even if the Court considered the conduct underlying Count I of their complaint (assuming it to be true and viewing

it in full context) "abhorrent," that still would not be enough to violate substantive due process. Tun, 398 F.3d at 903 ("It is one thing to say that officials acted badly, even tortiously, but—and this is the essential point—it is quite another to say that their actions rise to the level of a constitutional violation. We have declined to impose constitutional liability in a number of situations in which we find the officials' conduct abhorrent."). For all of the reasons discussed above, the most important one being that plaintiffs' detentions occurred on the battlefield, the conditions of their confinement as pled do not shock the conscience. See id. at 902 ("Cases abound in which the government action—though thoroughly disapproved of—was found not to shock the conscience.").

Were this Court nevertheless to determine in hindsight that those conditions did violate due process, defendant Rumsfeld still is entitled to qualified immunity on Count I. Due process is "not . . . subject to mechanical application in unfamiliar territory." Lewis, 523 U.S. at 850. There can be no territory any more unfamiliar than deciding how, if at all, substantive due process applies to on-the-battlefield detentions of individuals who are suspected of supplying weapons to insurgents and receiving stolen weapons in a war zone. Plaintiffs can point to no case—because none exists—that even discusses, let alone clearly establishes, any limits imposed by substantive due process on the conditions of a detainee's confinement in such circumstances. If anything, the case law confirms that the particular conditions alleged by plaintiffs in this case did not violate the Constitution. The Court therefore should dismiss Count I based on defendant Rumsfeld's qualified immunity.

CONCLUSION

For the reasons stated above, defendant Rumsfeld respectfully requests that the Court dismiss all of the claims against him.

Respectfully submitted,

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EXHIBIT A

Joint Publication 3-63

Detainee Operations

30 May 2008

(2) Coordinates all media coverage regarding detainee transfer or release operations through the chain of command.

2. Detainee Classification

The initial classification of a detainee may be based on unsupported statements or documentation accompanying the detainee. After a detainee is assigned to a facility, expect a continuing need for further classification. If the identity of the detainee may have been based on unsupported statements or documentation, it may be necessary to reclassify the detainee as more information is obtained. If the detainee's classification remains in doubt, a tribunal may be convened to determine the detainee's status. Reclassification may result in release of detainees, or reassignment of detainees within the facility or to other facilities.

3. Review and Approval Process

a. For transfer or release authority of U.S.-captured detainees, the SecDef, or designee, will establish criteria for the transfer or release of detainees and communicate those criteria to all commanders operating within the theater.

b. For detainees at the TIF, the designated combatant commanders will periodically assess the detainees for release or transfer per applicable regulations. The JIDC commander, with the advice of the assigned interrogators, should provide recommendations to the DFC for release/transfer of detainees, to ensure that detainees are not released while still being exploited for HUMINT. Recommendations for transfer or release will be coordinated with other U.S. Government agencies as appropriate and forwarded to SecDef, or his designee, for decision.

4. Transfer to Established Recognized National Authority, Allied Facilities, or Inter-Service Agencies

a. The permanent or temporary transfer or release of detainees from the custody of U.S. forces to the host nation, other allied/coalition forces, or any non-DOD U.S. Government entity, requires the approval of the SecDef, or his designee. The permanent or temporary transfer of a detainee to a foreign nation may be governed by bilateral agreements, or may be based on ad hoc arrangements. However, detainees who qualify, as a matter of law, as EPWs, RP, CIs, or ECs may only be transferred IAW the requirements of the applicable U.S. law, the law of war, and U.S. policy.

b. The DFC, IAW applicable procedures, will make the transfer or release of a detainee from a collection point or a detention facility. All proposed transfers/releases should be reviewed by the legal adviser to ensure compliance with applicable law and policy. Unless prohibited by command policies, immediate release of detainees may be made at the point of capture based on the decision of the most senior official on the ground. The decision should be based on criteria established by higher headquarters.