No. 12-

IN THE

Supreme Court of the United States

DONALD VANCE AND NATHAN ERTEL,

Petitioners,

v.

DONALD RUMSFELD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the federal courts may entertain damages claims brought by civilian American citizens who have been tortured by their own military when a post-deprivation damages remedy is the only means to vindicate their constitutional rights.

Whether *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), imposes a heightened mental-state requirement in all constitutional tort cases against supervising government officials or, alternatively, whether deliberate indifference remains a sufficiently culpable mental state to establish a supervisor's personal responsibility for certain constitutional violations.

PARTIES TO THE PROCEEDINGS

Donald Vance and Nathan Ertel were plaintiffs in the district court and appellees in the court of appeals, and are Petitioners in this Court.

Donald Rumsfeld, former Secretary of Defense of the United States, was a defendant in his individual capacity in the district court and an appellant in the court of appeals, and is Respondent in this Court.

The United States was a defendant in the district court and an appellant in the court of appeals, but Petitioners are not seeking review of their claim against the United States.

Petitioners also sued unknown agents of the United States, who Petitioners allege are the individuals who tortured them. All proceedings in the district court concerning the unknown agents were stayed when Respondent filed this appeal, at which time the United States had not provided Petitioners the information necessary to sue these federal agents.

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Petitioners Donald Vance and Nathan Ertel respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the *en banc* court of appeals (App. 1a-81a) is reported at 701 F.3d 193. The opinion of the panel (App. 82a-169a) is reported at 653 F.3d 591. The district court opinion (App. 170a-215a) is reported at 694 F.Supp.2d 957.

JURISDICTION

The judgment of the *en banc* court of appeals was entered on November 7, 2012. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law[.]"

Relevant portions of the Detainee Treatment Act of 2005, Pub. L. 109-148, §§ 1001-1006, 119 Stat. 2680 (2005), the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, 118 Stat. 1811 (2004), and the Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (1992), are reproduced at App. 218a-224a.

STATEMENT

A. Introduction

Petitioners Donald Vance and Nathan Ertel are American citizens who worked as civilian contractors in Iraq. In 2006, members of the U.S. military detained Petitioners *incommunicado* in a military prison and tortured them. Neither had committed any crime. On the contrary, Petitioners were whistleblowers, reporting corruption in Iraq to the FBI. After being released without charge and returning to the United States, Petitioners brought this damages suit against federal officials responsible for their torture.

It is undisputed that the misconduct Petitioners allege amounts to torture, in violation of clearly established constitutional rights. Moreover, the judges below agreed that Petitioners lack any adequate alternative remedy to this damages action. Nonetheless, the Seventh Circuit concluded in a sharply divided *en banc* decision that Petitioners cannot sue the individuals responsible for their torture under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). By improperly applying this Court's intra-military *Bivens* decisions *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669 (1987), the majority below held that no civilian American citizen may ever sue any member of the U.S. military for damages resulting from a violation of

constitutional rights, no matter the severity or location of the misconduct.

This Petition presents the exceptionally important question whether constitutional prohibitions on torture may ever be enforced in U.S. courts, given that torture victims cannot access the courts until after the torture is complete. The decision below also bars all constitutional damages actions brought by American civilians against military officials, and in so doing alters fundamentally the relationship between civilian and military and eliminates judicial review of a broad range of executive conduct that violates the constitution. This new bar on civilian *Bivens* actions against the military contradicts this Court's decisions in *Chappell*, *Stanley*, and *Saucier v. Katz*, 533 U.S. 194 (2001), and creates a circuit split over whether civilians may sue military officials who violate their constitutional rights.

The judgment below contradicts congressional legislation on the subject of torture committed by military officials and the remedies available to torture victims in U.S. courts. The Seventh Circuit ignores laws premised on the view that *Bivens* actions for torture will proceed subject to a qualified-immunity defense. It also untenably attributes to Congress an intent to provide damages actions in U.S. courts to aliens tortured by their governments while denying the same right to Americans. Such conflicts with Congress disobey this Court's command that congressional intent is paramount in the *Bivens* analysis.

The decision below also defies this Court's rulings articulating the importance of American citizenship in the protection of constitutional rights by U.S. courts. The majority states that Petitioners' citizenship has no bearing on their entitlement to redress constitutional injuries in their home courts. But by ignoring citizenship, the lower court imbues non-citizens with greater rights to redress torture in U.S. courts than citizens, contravening this Court's precedents.

Finally, the majority below improperly barred Petitioners' constitutional claims on the ground that *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), imposes a heightened mental-state requirement in all *Bivens* actions against supervising government officials. *Iqbal* imposes no such requirement. The Seventh Circuit's novel conclusion eliminates deliberate indifference as a basis for supervisory liability, in conflict with decisions of this Court and other circuits, which have held unanimously after *Iqbal* that deliberate indifference remains a sufficient basis to establish a supervisor's personal responsibility for certain constitutional violations.

As Judge Wood noted in her separate opinion below, "Civilized societies do not condone torture committed by governmental agents, no matter what job title the agent holds." App. 24a. Yet the majority's judgment ensures that torture and other military abuses of civilian American citizens can persist without judicial review. These issues merit further attention and this Court should grant the Petition.

B. Facts

1. Like thousands of American civilians, Petitioners travelled to Iraq in 2005 as contractors supporting our nation's mission to rebuild and promote democracy in the region. App. 229a, 237a, ¶¶ 3, 28.[1] They are patriotic U.S. citizens who love their country and who have served it for years. App. 236a, 275a, ¶¶ 24-25, 214.

While working for a private security company, Vance and Ertel observed corruption by Iraqi and U.S. officials. App. 234a-235a, 239a-251a, ¶¶ 18-19, 41-104. Prompted by their sense of duty, Petitioners reported what they had seen to FBI agents in Chicago. *Id.* These authorities urged Petitioners to act as whistleblowers and to inform them of other suspicious activity. *Id.* Petitioners obliged and communicated with agents frequently between October 2005 and April 2006, providing valuable intelligence. *Id.*

2. Certain American officials in Iraq discovered that Petitioners had been telling stateside law enforcement about corruption in Iraq; these officials decided to interrogate Petitioners. App. 235a, 241a-242a, 257a-258a, ¶¶ 19, 52-54, 132-37. In April 2006, they arrested Petitioners and imprisoned them at Camp Cropper, a U.S. military prison near Baghdad Airport. App. 258a-273a, ¶¶ 138-205.

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[1] This account summarizes the detail of Petitioners' 387-paragraph complaint, whose allegations are accepted as true. *Iqbal*, 556 U.S. at 677-80.

Judge Hamilton's panel opinion summarizes the allegations of unconstitutional treatment Petitioners suffered there:

> [T]hey experienced a nightmarish scene in which they were detained incommunicado, in solitary confinement, and subjected to physical and psychological torture for the duration of their imprisonment . . . . [T]he torture they experienced was of the kind "supposedly reserved for terrorists and so-called enemy combatants."
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> * * *
>
> Vance and Ertel allege that after they arrived at Camp Cropper they were . . . . held in solitary confinement, in small, cold, dirty cells and subjected to torturous techniques forbidden by the Army Field Manual and the Detainee Treatment Act. The lights were kept on at all times in their cells[.] Their cells were kept intolerably cold[.] There were bugs and feces on the walls of the cells[.] Vance and Ertel were driven to exhaustion; each had a concrete slab for a bed, but guards would wake them if they were ever caught sleeping. Heavy metal and country music was pumped into their cell at "intolerably-loud volumes," and they were deprived of mental stimulus. . . . They were often deprived of food and water and repeatedly deprived of necessary medical care.

> . . . [T]hey were physically threatened, abused, and assaulted by the anonymous U.S. officials working as guards. They allege, for example, that they experienced "hooding" and were "walled," *i.e.*, slammed into walls while being led blindfolded with towels placed over their heads to interrogation sessions. [Petitioners] also claim that they were continuously tormented by the guards[.]
>
> The constant theme of the aggressive interrogations was a haunting one—if Vance and Ertel did not "do the right thing," they would never be allowed to leave Camp Cropper. Vance and Ertel were not only interrogated but continuously threatened by guards who said they would use "excessive force" against them if they did not immediately and correctly comply with instructions.

App. 89a-91a (citations omitted).

The interrogations focused on what information Petitioners had disclosed as whistleblowers. App. 235a, 259a-266a, ¶¶ 21, 143-76. Because the military prison was a "sterilized" environment, personnel wore no identification; so Petitioners never learned the names of their torturers. App. 268a, ¶ 185. Nor were they ever allowed access to counsel or the courts. App. 263a, ¶¶ 161-63. So secret was their detention that their families never knew where they were. App. 229a, 263a, 270a, ¶¶ 1, 161, 194.

Vance was detained more than three months and Ertel was held six weeks before being released. App. 236a, 273a-275a, ¶¶ 22, 206-214. Petitioners were never charged with a crime; nor had they committed any wrongdoing. App. 229a, 274a-275a, ¶¶ 1, 212, 214.

C. Proceedings Below

1. Once home, Petitioners sued the federal officials responsible for their torture. Invoking the district court's jurisdiction pursuant to 28 U.S.C. § 1331, they alleged that the torture violated their Fifth Amendment right to due process and sought damages under *Bivens*. Petitioners named as defendants Respondent and unknown federal agents "who ordered, carried out, and failed to intervene to prevent the torture and unlawful detention." App. 236a-237a, ¶¶ 26-27.

Petitioners alleged Respondent personally devised and implemented illegal policies that caused their mistreatment in Iraq. App. 230a-232a, 235a, 275a-288a, ¶¶ 6, 9, 12, 14-15, 19, 215-57. Respondent first approved use of specific torture techniques at Guantanamo Bay in 2002, ordering their application even though they were prohibited by the Army Field Manual. App. 281a-282a, ¶¶ 232-34; S. Comm. on Armed Services, 110th Cong., Inquiry Into the Treatment of Detainees in U.S. Custody xix-xxii (Nov. 20, 2008). In 2003, Respondent ordered subordinates to "Gitmo-ize" U.S. military prisons in Iraq, applying the same

prohibited torture techniques at those facilities. App. 282a-283a, ¶¶ 235-39.

Petitioners' complaint details the ensuing reports that Respondent received from his staff and from international organizations, highlighting widespread abuse of detainees by U.S. officials in Iraq. App. 283a-287a, ¶¶ 240-252. The reports warned that detainees, including American citizens, were being tortured. *Id.* Despite these reports, Respondent did not halt the mistreatment and instead continued to authorize torture at military prisons in Iraq. App. 282a-285a, 287a, ¶¶ 235-45, 252.

Eventually Congress addressed the problem in two laws: the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 ("NDAA"), Pub. L. 108-375, 118 Stat. 1811 (2004), and the Detainee Treatment Act of 2005 ("DTA"), Pub. L. 109-148, §§ 1001-1006, 119 Stat. 2680 (2005). These laws made clear that torture was absolutely illegal and against military policy, and they limited interrogation techniques to those in the Army Field Manual. App. 218a-219a, DTA §§ 1002(a), 1003(a)&(d); App. 221a-222a, NDAA § 1091(b). They also required Respondent to take measures to halt the use of illegal torture immediately. App. 222a, NDAA § 1092(a).

Congress further addressed the question of lawsuits brought against U.S. officials accused of torture. It chose to provide good-faith immunity from suit for officials who had committed torture

not realizing its illegality, and it provided counsel for such suits. App. 219a-220a, DTA § 1004.

Petitioners allege Respondent took no steps to curb torture despite these clear laws, and that his inaction led to Petitioners' abuse. Respondent ensured continued use of illegal torture techniques by adding them to a classified section of the Army Field Manual. App. 284a-285a, ¶¶ 243-44; see also Eric Schmitt, *New Army Rules May Snarl Talks with McCain on Detainee Issue*, N.Y. Times, Dec. 14, 2005. Petitioners allege it was those techniques that were used against them at Camp Cropper. App. 236a, 260a-261a, 273a-275a, 284a-285a, ¶¶ 22, 144-52, 206-214, 243-44. Not until September 2006, after Petitioners' release, did Respondent stop using illegal torture. App. 282a-285a, 287a, ¶¶ 235-45, 252.

Importantly, Petitioners allege that the torture techniques they experienced required Respondent's personal approval on a case-by-case basis. App. 275a-276a, 282a, ¶¶ 217, 235. Petitioners therefore contend Respondent is personally responsible because he specifically authorized their torture. App. 275a-276a, 282a, ¶¶ 217, 235.

2. Respondent moved to dismiss, arguing that special factors precluded a *Bivens* action, that the pleadings were insufficient under Rule 8, and that he was entitled to immunity. The district court denied the motion in part, allowing Petitioners' substantive due process claims based on torture to proceed. App. 208a.

The judge noted, "*Iqbal* undoubtedly requires vigilance on our part to ensure that claims which do not state a plausible claim for relief are not allowed to occupy the time of high-ranking government officials." App. 176a. It continued, "[*Iqbal*] is not, however, a categorical bar on claims against . . . a high-ranking government official." *Id.* The judge concluded that Petitioners plausibly alleged Respondent's personal responsibility for their torture, App. 183a-184a, and that the conduct violated clearly established rights, App. 199a.

Applying this Court's two-step *Bivens* framework, the trial court noted "little dispute regarding the absence of an alternative remedy"; Petitioners were denied access to courts throughout their torture. App. 200a-201a. It next concluded that special factors did not counsel hesitation, identifying two aspects of the case that justified rejecting a "'blank check' for high-ranking government officials." App. 208a. First, Petitioners' damages action did not require intervention in military policy because it only sought *ex post* review of military treatment of civilians. App. 204a-208a. Second, the judge emphasized Petitioners' American citizenship and this Court's precedents protecting the constitutional rights of American civilians who interact with the military abroad. *Id.* (citing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

3a. A panel of the Seventh Circuit affirmed with one judge dissenting.[2] App. 82a-169a. Writing for the majority, Judge Hamilton recognized that the case "raises fundamental questions about the relationship between the citizens of our country and their government," App. 82a, and reiterated that high-level officials should not be subjected to civil proceedings lightly, App. 98a.

Noting that the Federal Rules "impose no special pleading requirements for *Bivens* claims, including those against former high-ranking government officials," App. 97a (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513-14 (2002)), the panel applied *Iqbal*'s requirement that Petitioners "allege facts indicating that [Respondent] was personally involved in and responsible for the alleged constitutional violations," App. 94a. Adhering to *Iqbal*'s teaching that "'the factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue,'" App. 94a-95a (quoting *Iqbal*, 556 U.S. at 675-77), the majority identified a critical difference between *Iqbal* and this case: "Unlike in *Iqbal*, which was a discrimination case, where the plaintiff was required to plead that the defendant acted with discriminatory purpose, the minimum . . . required

[2] The district court stayed proceedings when Respondent appealed. Prior to the stay, Petitioners repeatedly moved to compel and the court twice ordered the United States to provide information necessary to name the unknown federal agents as defendants, but "the United States . . . staunchly refused to divulge the fruits of its investigation." *Vance v. Rumsfeld*, 2007 WL 4557812, at *5 (N.D. Ill. Dec. 21, 2007).

here would be deliberate indifference[.]" App. 95a (citing *Farmer v. Brennan*, 511 U.S. 825 (1994)).

The panel examined the complaint in painstaking detail and concluded that Petitioners plausibly alleged three theories supporting their claims. App. 99a-109a. First, Respondent approved the use of torture against detainees *ad hoc* and thus against them specifically. App. 97a, 100a. Second, Respondent "devised and authorized policies that permit the use of torture in their interrogation and detention." App. 99a. And third, Respondent "acted with deliberate indifference by not ensuring that detainees were treated in a humane manner despite his knowledge of widespread detainee mistreatment." App. 107a. The complaint sufficiently alleged that Respondent "was well aware of detainee abuse because of both public and internal reports," App. 101a, that Congress outlawed those abuses in the DTA, App. 102a-103a, and that Respondent did nothing "despite his actual knowledge that U.S. citizens were being and would be detained and interrogated using the unconstitutional abusive practices that he had earlier authorized." App. 104a. "While it may be unusual that such a high-level official would be personally responsible for the treatment of detainees," the panel concluded, "here we are addressing an unusual situation where issues concerning harsh interrogation techniques and detention policies were decided, at least as the plaintiffs have pled, at the highest levels of the federal government." App. 97a.

3b. Both majority and dissent agreed that qualified immunity was not contested and that the facts, properly pleaded, stated a violation of clearly established rights. App. 111a-112a, 121a, 159a. "On what conceivable basis could a U.S. public official possibly conclude that it was constitutional to torture U.S. citizens?" the panel asked, App. 111a, noting that all three branches had repeatedly declared torture unconstitutional, App. 119a-121a.

3c. Regarding *Bivens*, the panel observed that Respondent argued "for a truly unprecedented degree of immunity from liability for grave constitutional wrongs committed against U.S. citizens." App. 130a. "The defense theory" it continued, immunized Respondent and every solider "from civil liability for deliberate torture and even cold-blooded murder of civilian U.S. citizens. The United States courts, and the entire United States government, have never before thought that such immunity is needed for the military to carry out its mission." *Id.* The panel concluded that *Bivens* is available to remedy the torture of civilian American citizens by U.S. military personnel. App. 84a.

Acknowledging that "*Bivens* remains the law of the land" and "prevent[s] constitutional rights from becoming 'merely precatory,'" App. 124a-125a & n.13 (quoting *Davis v. Passman*, 442 U.S. 228, 242 (1979)), the panel's analysis strictly applied this Court's recent decisions urging "caution in recognizing *Bivens* remedies in new contexts." App. 124a. The panel stressed, "*Bivens* does not provide

an 'automatic entitlement' to a remedy[.]" App. 124a (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)).

Because Respondent conceded the absence of alternative remedies, App. 122a, the analysis focused on special factors. The panel explained that the elements of Petitioners' claims were well established: prisoners abused by federal jailors may invoke *Bivens*, App. 132a (citing *Carlson v. Green*, 446 U.S. 14 (1980)); civilians may bring constitutional claims against military officers, *id.* (citing *Saucier*, 533 U.S. 194); American civilians can depend upon constitutional rights overseas, App. 134a (citing *Reid v. Covert*, 354 U.S. 1 (1957)); and *Bivens* actions may proceed against high-level officials, App. 135a (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)).

Respondent contended that *Chappell* and *Stanley* foreclosed Petitioners' claims and that courts should not interfere with military affairs. The panel rejected the first argument by pointing out that *Chappell* and *Stanley* were intra-military cases and that neither "provides a basis for rejecting a *Bivens* claim by a civilian against a military official." App. 133a-134a n.17.

Addressing the second argument, the panel decided that Petitioners were "not challenging military policymaking and procedure generally, nor an ongoing military action. They challenge only their particular torture at the hands and direction of U.S. military officials, contrary to the statutory

provisions and stated military policy, as well as the Constitution." *Id.* Because Petitioners did so "in a lawsuit to be heard well after the fact," the panel decided a *Bivens* remedy would "not impinge inappropriately on military decision-making," App. 137a-138a. It added that "it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims." App. 137a (citing *Hamdi*, 542 U.S. at 535; *Ex parte Quirin*, 317 U.S. 1, 19 (1942)). "Courts reviewing claims of torture in violation of statutes such as the Detainee Treatment Act or in violation of the Fifth Amendment do not endanger the separation of powers, but instead reinforce the complementary roles played by the three branches of our government." App. 138a-139a.

The panel found no indication that Congress intended the Judiciary to withhold a *Bivens* remedy in these circumstances. App. 146a-150a. "Congress was aware that *Bivens* might apply when it enacted legislation relevant to detainee treatment," the panel noted, and "when Congress enacted the Detainee Treatment Act, it opted to regulate—not prohibit—civil damages claims against military officials accused of tortur[e]" by creating "a good faith defense . . . for officials who believed that their actions were legal and authorized[.]" App. 147a. Legislation providing a qualified defense strongly suggested that citizens tortured by military officers could bring civil actions. *Id.*

The majority found "other powerful evidence that weighs heavily in favor of recognizing a judicial remedy," noting that "Congress has enacted laws that provide civil remedies under U.S. law for foreign citizens who are tortured by their governments[.]" App. 148a. "It would be extraordinary," said the panel, "for the United States to refuse to hear similar claims by a U.S. citizen against officials of his own government. And *Bivens* provides the only remedy." App. 150a.

Finally, the majority addressed Petitioners' citizenship, stressing two established principles. First, "'[e]ven when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'" App. 134a-135a (citing *Boumediene v. Bush*, 553 U.S. 723, 765 (2008)). And second, while foreigners can turn to their own governments for help, Americans tortured by their military can only rely upon U.S. courts. App. 143a.

In closing, the panel recognized that the courts for centuries have provided Americans redress when their rights are invaded by the government, App. 153a-154a (citing *Dunlop v. Munroe*, 7 Cranch 242 (1812); *Little v. Barreme*, 2 Cranch 170 (1804); *Marbury v. Madison*, 1 Cranch 137 (1803)), and concluded: "Relying solely on the military to police its own treatment of civilians . . . would amount to an extraordinary abdication of our government's checks and balances that preserve Americans' liberty." App. 154a.

4. The Seventh Circuit granted rehearing *en banc* and reversed. All judges acknowledged that Petitioners' mistreatment amounted to torture, in violation of statute and clearly established constitutional rights. App. 3a-4a, 7a-8a, 25a-26a, 67a. Nonetheless, the majority held that Petitioners could not pursue a *Bivens* action because civilian American citizens can never bring constitutional damages claims against military officials. App. 2a-8a. The majority based its categorical bar on *Chappell* and *Stanley*. App. 10a-12a.

Four judges wrote separately disavowing that conclusion. Judge Wood rejected the bar to "any and all possible claims against military personnel," App. 27a, and the dissenting judges called the majority's rule an "unprecedented exemption from *Bivens* for military officers," App. 71a (Williams, J., dissenting), and a "grant of absolute civil immunity to the U.S. military for violations of civilian citizens' constitutional rights," App. 68a (Hamilton, J., dissenting).

The *Bivens* analysis was again limited to special factors, all judges agreeing that Petitioners have no alternative remedy meeting the requirements of *Minneci v. Pollard*, 132 S. Ct. 617 (2012). App. 15a. The majority began with the premise that "[w]hatever presumption in favor of a *Bivens*-like remedy may once have existed has long since been abrogated," App. 8a-9a, and it identified two justifications for its categorical *Bivens* bar: judicial interference with military policy, App. 10a-13a; and

"diverting Cabinet officers' time from management of public affairs to defense of their bank accounts," App. 17a.[3]

Judge Wood rejected the notion that *Bivens* "sprang forth from the heads of federal judges," explaining that it is "solidly rooted in the most fundamental law we have, the Constitution," App. 27a, and has been repeatedly reaffirmed as good law, App. 29a-30a. Judge Hamilton reiterated that Petitioners "are not asking this court to *create* a cause of action. . . . It is the defendants who have sought and have now been given a new, extraordinary, and anomalous *exception* to *Bivens*." App. 40a.

Judges Rovner and Wood strongly criticized the majority's concern "that *Bivens* liability would cause Cabinet Secretaries to carry out their responsibilities with one eye on their wallets," App. 35a, calling it "disrespectful of those who serve in government and dismissive of the protections that such liability affords against serious and intentional violations of the Constitution," App. 69a. Judge Hamilton added that concern about damages liability cannot be a special factor given this Court's repeated recognition of *Bivens* actions against high-level officials and its cases expressing

[3] The majority mentioned briefly concerns about evidence, App. 18a, which Judge Calabresi has noted elsewhere are managed using judicial tools and not by barring *Bivens* actions altogether. *Arar v. Ashcroft*, 585 F.3d 559, 635 (2d Cir. 2009) (Calabresi, J., dissenting).

a preference for addressing liability concerns in the immunity analysis. App. 45a-46a. (citing *Mitchell*, 472 U.S. 511; *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Butz v. Economou*, 438 U.S. 478 (1978)).

Regarding interference with military affairs, the judges writing separately explained that the majority's bar on civilian *Bivens* claims found no support in *Chappell* or *Stanley* and actually contradicted those decisions' express limitation to intra-military disputes. App. 38a-42a, 73a-74a. "Can there be a clearer indication of error?" Judge Williams asked. App. 74a.

The dissenting judges identified two additional reasons that concerns about interfering with military policy provided no basis for barring Petitioners' claims. Judge Williams first reiterated that Petitioners were not asking for review of military command or policy. App. 72a-73a. "[T]here is little need to do so because Congress has already directly addressed and outlawed the detention practices inflicted on [Petitioners]." *Id.* Second, Judge Williams pointed out that the majority said in its own opinion that Petitioners should have sought injunctive relief, App. 17a, and noted that it is inconsistent to endorse injunctive relief against the military while citing concerns about interference as a reason to bar damages actions. App. 76a.

The majority's discussion of congressional intent also provoked criticism. Judge Hamilton noted that "the majority opinion converts the second step of

Bivens analysis . . . into a search for evidence that Congress has expressly authorized *Bivens* actions against U.S. military personnel." App. 51a. Not only had the majority "brush[ed] over the fact that the [DTA] expressly provides a defense to a civil action" for torture, App. 30a ("a strong indication that Congress has not closed the door on judicial remedies," App. 55a), but it ignored completely the State Department's declaration that *Bivens* is available to torture victims, App. 31a-32a. Moreover, the majority neglected that Congress has provided aliens tortured abroad a damages action in U.S. courts, and it thus "attribut[ed] to Congress an intention to deny U.S. civilians a right that Congress has expressly extended to the rest of the world." App. 53a. Judge Hamilton observed, "Congress has legislated on the assumption that U.S. nationals, at least, should have *Bivens* remedies against U.S. military personnel in most situations." App. 52a.

Finally, the majority held that even if a *Bivens* action proceeded "[Respondent] could not be held liable." App. 19a. The majority read *Iqbal* as imposing a rule that a "supervisor can be liable only if he wants the unconstitutional or illegal conduct to occur." *Id.* Though the majority's analysis refers only to the "gist" or "theme" of Petitioners' complaint, App. 19a-21a, the court decided that "[Petitioners] do not allege that [Respondent] *wanted* them to be mistreated in Iraq," and it held the pleadings insufficient on that ground. App. 19a; see also App. 33a-34a (Wood, J., concurring). The dissenting judges recognized that

vicarious liability does not apply in *Bivens* suits, App. 63a, but emphasized that "*Iqbal*'s different approach to pleading an individual's *discriminatory* intent" did not apply to Petitioners' claims of deliberate indifference. App. 65a. Petitioners' "complaint is unusually detailed," they concluded, making allegations that "go well beyond those deemed insufficient in [*Iqbal*]." App. 81a.

REASONS FOR GRANTING THE PETITION

A. The Seventh Circuit's Prohibition of Civilian *Bivens* Actions Against the Military Raises Issues of National Importance

The Seventh Circuit bars civilian American citizens from filing *Bivens* actions against any member of the U.S. military for all constitutional injuries, no matter how extreme the misconduct or where it occurs. Judge Wood observed that the decision means "that a civilian in the state of Texas who is dragged by a military officer onto the grounds of Fort Hood and then tortured would not have a *Bivens* cause of action." App. 27a. The lower court's complete bar to constitutional suits against military personnel applies "to military mistreatment of civilians not only in Iraq but also in Illinois, Wisconsin, and Indiana." App. 38a. The unlimited breadth of the decision and the fundamental change that it works in the relationship between civilians and the military presents a question of national importance warranting further review.

B. The Lower Court's Bar on Civilian *Bivens* Actions Undermines Checks and Balances by Foreclosing Judicial Review of A Range of Executive Conduct That Violates the Constitution

Certiorari is warranted because the judgment below undermines constitutional checks and

balances and abandons the Judicial Branch's obligation to exercise judicial review when the use of executive authority affects the rights of civilians. In so doing, the lower court contradicts this Court's precedents emphasizing that this judicial obligation persists even when war powers are implicated. See *Boumediene*, 553 U.S. at 765 ("[T]he political branches [do not] have the power to switch the Constitution on or off at will . . . . [That] would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'") (quoting *Marbury*, 1 Cranch 137); *Hamdan v. Rumsfeld*, 548 U.S. 557, 602 (2006) (discussing the risk of "concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution"); *Hamdi*, 542 U.S. at 535-36 ("[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts . . . . [A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens[.]"); *Reid*, 354 U.S. at 23-24 ("The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds."); *Ex Parte Quirin*, 317 U.S. at 19 ("[T]he duty which rests on the courts, in time of war as well as in time of peace, [is] to preserve unimpaired the constitutional safeguards of civil liberty[.]"); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) ("[E]ven the war power does not remove constitutional limitations safeguarding essential

liberties."); see also The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison) ("The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.").

The *en banc* majority invoked separation of powers as its reason for barring all *Bivens* actions against the military, but its decision actually eliminates judicial review of most military abuses committed against civilians. A post-deprivation damages action is usually the only way for a court to evaluate interactions between the military and civilians. Most such interactions fall in a category of conduct that courts cannot evaluate in advance, are unable to enjoin as it is occurring, and for which they cannot provide equitable relief after the fact. For such conduct, the Seventh Circuit's prohibition of a *Bivens* remedy represents a complete bar to judicial involvement in enforcing the constitutional rights of civilians harmed by the military.

"For people in [Petitioners'] shoes, it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). An *ex post* damages action is the only way a court can review the misconduct Petitioners allege. Other remedies are useless now that the constitutional violation is complete. *Mitchell*, 472 U.S. at 523 n.7. The majority below thought injunctive relief would vindicate Petitioners' rights. App. 17a. But Petitioners, like all torture victims, were held *incommunicado* and had no opportunity to petition for a writ of habeas corpus or to seek an

injunction while their torture was ongoing. Neither is there any basis today after the misconduct has ceased to pursue prospective relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-09 (1983).

Even assuming *arguendo* that injunctive relief was possible, a post-deprivation damages action is far less intrusive. Judge Williams's dissent highlights this additional tension in the majority's assertion that injunctive relief is a viable alternative to *Bivens* in these circumstances: an action to enjoin military conduct implicates precisely the same concerns about invading the political branches' prerogatives that the majority below cited as reasons for barring damages actions entirely. App. 78a. "Traditionally, damages actions have been viewed as *less* intrusive than injunctive relief because they do not require the court to engage in operational decision-making." *Id.*; see also *Bivens*, 403 U.S. at 395-97. The lower court's endorsement of injunctive relief fatally undermines its reasons for disallowing damages actions.

By forbidding civilian *Bivens* actions against military personnel, the Seventh Circuit closes the best and only avenue for judicial review of Petitioners' injuries and all transient constitutional violations committed by military officials. In so doing, the lower court "fails to carry out the judiciary's responsibility under Supreme Court precedents to protect individual rights under the Constitution, including a right so basic as not to be tortured by our government." App. 37a (Hamilton, J., dissenting); see also *Marbury*, 1 Cranch 137

(1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). This abdication of the judicial role requires correction.

C. The Decision to Bar Civilian *Bivens* Actions Contradicts *Chappell*, *Stanley*, and *Saucier* As Well As Lower Courts That Allow Civilians to Sue Military Officials for Constitutional Injuries

Review is warranted because the decision to bar civilian constitutional claims against military officials contradicts this Court's precedents that set the bounds of *Bivens* actions involving the military. It also creates a split among the lower courts, which until now had permitted *Bivens* actions by American civilians against military personnel. In light of the continual interaction between military and civilians, this Court should immediately address this division among the circuits.

1. The majority below concluded erroneously that *Chappell* and *Stanley* compelled its judgment that no American civilian may ever sue a military official for constitutional violations. App. 12a-13a. This conclusion actually contradicts *Chappell* and *Stanley*, which simply applied to *Bivens* the doctrine of *Feres v. United States*, 340 U.S. 135 (1950). *Feres* barred recovery under the Federal Tort Claims Act for servicemembers alleging injuries incident to military service, *id.* at 141; and *Chappell* and *Stanley* applied the same restriction

to *Bivens* actions, see *Stanley*, 483 U.S. at 684; *Chappell*, 462 U.S. at 305.

Both *Chappell* and *Stanley* expressly limited their holdings, rejecting a complete bar on all constitutional claims by servicemembers against other military personnel. This Court left servicemembers room to bring constitutional claims against military officials for violations arising outside of military service—*i.e.*, arising in servicemembers' capacity as civilians. *Stanley*, 483 U.S. at 681-83; *Chappell*, 462 U.S. at 304-05. These cases impose no limits on civilian *Bivens* actions against the military,[4] but instead draw a line between claims of servicemembers and those of civilians. *Chappell*, 462 U.S. at 303-04 ("[T]his Court has long recognized two systems of justice[:] one for civilians and one for military personnel.").

The Seventh Circuit contradicts both decisions by disregarding their limitation to intra-military injuries suffered incident to service and by applying them to foreclose relief for civilians. As Judge Williams noted, the majority's judgment "goes well beyond what the Supreme Court has expressly identified as a bridge too far." App. 74a.

Saucier further illustrates the conflict between this Court's decisions and the Seventh Circuit's new bar to civilian *Bivens* claims. 553 U.S. 194. *Saucier* was a *Bivens* action brought by a civilian

[4] Nor does *Feres* so limit civilian claims. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 510-11 (1988).

after *Chappell* and *Stanley*, in which the civilian alleged the use of excessive force by a military official. This Court found that the military officer was entitled to qualified immunity but nowhere suggested that civilians cannot bring *Bivens* claims against military personnel in the first place. Cf. *Stanley*, 483 U.S. at 684-85 (distinguishing the question of the *Bivens* cause of action from the immunity inquiry). The Seventh Circuit's decision conflicts with this Court's approval of such suits.

2. It is not surprising given these precedents that the lower courts had unanimously permitted civilians to bring *Bivens* actions against military officials who violated their constitutional rights. Before this case, five courts, including the Seventh Circuit, had taken that position. See *Case v. Milewski*, 327 F.3d 564, 568-69 (7th Cir. 2003) (considering civilian claim alleging military officers used excessive force); *Morgan v. United States*, 323 F.3d 776, 780-82 (9th Cir. 2003) (allowing *Bivens* action for civilian alleging military officers conducted illegal search); *Roman v. Townsend*, 224 F.3d 24, 29 (1st Cir. 2000) (entertaining *Bivens* action by civilian against military police); *Applewhite v. U.S. Air Force*, 995 F.2d 997, 999 (10th Cir. 1993) (considering military officers' immunity from civilian's allegations of illegal strip search); *Dunbar Corp. v. Lindsey*, 905 F.2d 754, 756-63 (4th Cir. 1990) (permitting civilian *Bivens* action against military officers for deprivation of

property). No court had previously barred such claims.[5]

The judgment below contradicts decisions of the First, Fourth, Ninth, and Tenth Circuits that permit civilian suits against military officers, consistent with *Saucier*. This conflict and the uncertainty that the judgment below engenders in interactions between military officials and American civilians—whether contractors, military families, or workers on bases—calls for review by this Court.

D. The Seventh Circuit's *Bivens* Analysis Disregards Congressional Legislation on Torture, In Conflict With This Court's Special-Factors Precedents

Certiorari is warranted because the decision to insulate military officials from all civilian constitutional suits contradicts congressional legislation contemplating that such suits will proceed subject to qualified immunity. By disregarding Congress's express policy choices, the lower court misapplies the special-factors analysis and disobeys *Davis* and *Stanley*'s instruction that the *Bivens* analysis should conform to congressionally enacted immunity standards.

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[5] *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), narrowly declined a *Bivens* remedy to a designated enemy combatant who challenged that designation and sought injunctive and declaratory relief.

1. In the guise of special-factors analysis, the Seventh Circuit reaches a conclusion in conflict with legislation that presumes *Bivens* actions will proceed against military officials, subject to good-faith immunity. When Congress addressed detainee abuses occurring during the war in which Petitioners were tortured, not only did it outlaw the techniques later used on Petitioners, App. 218a-219a, DTA §§ 1002(a), 1003(a)&(d); App. 221a-222a, NDAA §§ 1091(b), 1092(a), it also provided a right to counsel and qualified immunity to military officials accused of torture in civil suits, App. 219a-220a, DTA § 1004 (immunizing officials who torture aliens if they "did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful").

The decision to regulate rather than bar civil suits for torture is compelling evidence that Congress thought a *Bivens* remedy is available to people tortured by the U.S. military. When the DTA was passed, *Bivens* had been a fixture of this Court's jurisprudence for four decades. As Judge Wood concluded, by providing this immunity, "Congress can have been referring only to a *Bivens* action." App. 30a.

Rather than giving effect to this Act of Congress, the court below explained it away amidst a "special-factors" analysis that erected a barricade to the very claims Congress chose not to bar in the DTA. It was error to use special-factors analysis to impose judicial policy in a field where Congress

already had selected a different policy choice. The purpose of special-factors analysis is to ensure that courts defer to Congress on remedies for constitutional violations where there is reason to suspect Congress would expect such deference. *Bush v. Lucas*, 462 U.S. 367, 380, 388-90 (1983). Accordingly, absent a legislative remedy for a particular constitutional violation, courts must consider whether "Congress expected the Judiciary to stay its *Bivens* hand[.]" *Wilkie*, 551 U.S. at 554. Had the lower court heeded this directive, it would have found it dispositive that Congress legislated with the understanding that American civilians may file *Bivens* actions for torture.

This Court's special-factors precedents dictate judicial restraint where Congress has not spoken on remedies but has indicated that a judicial remedy is inappropriate. At the same time, those precedents encourage the opposite course—supplying a remedy—where congressional action suggests that a remedy should be available.

When the political branches supply partial immunity to protect officials exercising government authority, this Court has weighed that grant of immunity in the special-factors analysis. And it has directed that it is inappropriate to displace Congress's immunity choice by withholding the *Bivens* remedy entirely. *Davis* thus considered whether separation-of-powers concerns foreclosed a *Bivens* suit against a congressman, and concluded that a remedy was appropriate because the political branches had weighed those special factors already

in the Speech and Debate Clause and had established the appropriate level of immunity. 442 U.S. at 235 n.11, 246. The *Stanley* Court explained that where the political branches have "addressed the special concerns in [a] field through an immunity provision," it would "distort[] their plan to achieve the same effect as more expansive immunity by the device of denying a cause of action[.]" 483 U.S. at 685.

The Seventh Circuit improperly substituted its own policy judgment for that of Congress. When Congress enacted the DTA and provided officials qualified immunity for torture claims, it weighed precisely those special factors that the court below invoked as reasons for barring Petitioners' *Bivens* suit. Congress reached the conclusion that qualified immunity sufficiently protects officials accused of torture. The Seventh Circuit's decision to insulate the whole military from suit undermines Congress's plan of a more limited immunity, replacing congressional judgment with judicial policymaking.

2. The majority's special-factors analysis also requires the absurd conclusion that Congress intended to provide damages in U.S. courts to aliens tortured by their governments while denying the same remedy to U.S. citizens. The Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. 102-256, 106 Stat. 73 (1992), provides a damages action in U.S. courts for aliens tortured overseas. App. 222a-224a, TVPA §§ 2-3. Existing legislation thus provides aliens tortured by foreign

governments exactly the remedy in U.S. courts that the Seventh Circuit denied—and assumed that Congress would want denied—to civilian American citizens. As Judge Hamilton noted, assuming such congressional intent "attributes to our government and to our legal system a degree of hypocrisy that is breathtaking." App. 37a.

These divisions between Congress and the Seventh Circuit represent special-factors analysis upended. Only by improperly disregarding Congress's legislation on torture and what it has deemed the proper level of immunity for officials accused of torture could the court below conclude that it is appropriate to ban all *Bivens* actions against the military. This Court should grant the Petition to correct these conflicts with Congress and the misapplication of the special-factors framework.

E. The Lower Court's Refusal To Consider Petitioners' American Citizenship Contradicts This Court's Cases on the Rights of Citizens

Review is warranted because the lower court gave no weight to Petitioners' American citizenship before deciding that a remedy was unavailable. The majority dismissed Petitioners' argument that their citizenship affects the *Bivens* analysis, saying, "We do not think that the [Petitioners'] citizenship is dispositive one way or the other. . . . It would be offensive to our allies, and it should be offensive to our own principles of equal treatment, to declare

that this nation systematically favors U.S. citizens . . . when redressing injuries caused by our military[.]" App. 18a.[6] The majority's disregard for citizenship undermines this Court's longstanding emphasis on the special relationship that American citizens enjoy with their sovereign.

Reid established that citizens retain constitutional rights abroad, saying "the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." 345 U.S. at 6. Moreover, *Eisentrager* stated that Americans enjoy greater protection of those rights in U.S. courts than do aliens. 339 U.S. at 769 ("With the citizen we are now little concerned, except to set his case apart . . . and to take measure of the difference between his status and that of all categories of aliens. . . . The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection."). These principles run throughout the cases. See *Munaf v. Geren*, 553 U.S. 674, 685-88 (2008); *Hamdi*, 542 U.S. at 530-34; *Rasul v. Bush*, 542 U.S. 466, 486 (2004) (Kennedy, J., concurring); *United States v. Verdugo-Urquidez*,

[6] The majority ignored that the State Department has informed the United Nations that *Bivens* actions in U.S. courts are available to anyone tortured by U.S. officials. App. 227a, U.S. Written Response to Questions Asked by the U.N. Committee Against Torture, ¶ 5 (Apr. 28, 2006); see also App. 31a-32a.

494 U.S. 259, 273 (1990); *id.* at 275-78 (Kennedy, J., concurring).

Despite these precedents, the lower court disregarded Petitioners' citizenship on its way to concluding that Americans tortured by their military cannot vindicate their constitutional rights. That conclusion leaves citizens worse off than non-citizens. Judge Hamilton noted, "If the U.S. government harms citizens of other nations, they can turn to their home governments to stand up for their rights. That is not true for these U.S. citizens alleging torture by their own government." App. 59a. But the asymmetry is made worse because, as discussed, Congress has opened U.S. courts to aliens' damages claims based on torture. As Judge Wood observed, "Only by acknowledging the *Bivens* remedy is it possible to avoid treating U.S. citizens worse than we treat others." App. 33a.

The Seventh Circuit dismissed Petitioners' citizenship, saying, "The Supreme Court has never suggested that citizenship matters to a claim under *Bivens*." App. 18a. This ignores that evaluating "special factors counseling hesitation" necessarily requires evaluating Congress's design of remedial programs. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). Where Congress has provided robust remedies to aliens, citizenship is rendered a central special factor in the *Bivens* analysis. Ignoring citizenship in a decision that elevates the rights of aliens in U.S. courts above those of Americans contradicts this Court's decisions.

F. The Seventh Circuit Improperly Imposes A Heightened Mental-State Requirement For Claims Against Supervising Government Officials, Eliminating Deliberate Indifference As A Basis For Supervisory Liability

Finally, certiorari is warranted because the Seventh Circuit misconstrues *Iqbal* as imposing a heightened mental-state requirement in all constitutional tort claims involving supervisors. The majority requires litigants who wish to establish the personal responsibility of a supervising government official to plead that the supervisor acted with the specific intent to cause the precise harm alleged in the case.

This novel formulation for supervisor liability contradicts *Iqbal* and creates a circuit split about whether supervisors are liable for their deliberate indifference. The Seventh Circuit's new mental-state requirement eliminates deliberate indifference as a basis for supervisory liability and exempts supervisors from accountability for a wide range of unconstitutional conduct. The court below is therefore in conflict with this Court and all others that have held that deliberate indifference is a sufficiently culpable mental state to establish a supervisor's personal responsibility for numerous constitutional torts, including that alleged by Petitioners here.

1. The Seventh Circuit wrongly extracted the particular state-of-mind allegations necessary to

plead the intentional discrimination at issue in *Iqbal* and applied them as a general requirement for all constitutional claims against supervising officials. Iqbal claimed unconstitutional discrimination by the Attorney General and FBI Director. Reiterating that supervisors are not vicariously liable for acts of subordinates in *Bivens* cases and that "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution," this Court began "by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination." *Iqbal*, 556 U.S. at 675-76. That claim required showing that the government official took action "for the purpose of discriminating on account of race, religion, or national origin." *Id.* at 676-77.

This Court made painstakingly clear that "[t]he factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue." *Id.* at 676. One of the factors that varies with the constitutional violation at issue is the state of mind that a plaintiff must plead to hold a responsible party liable. *Id.* While Iqbal had to plead plausibly that the supervisor defendants intended to cause the harm that he had suffered based on a discriminatory purpose, that pleading requirement was tied to the claim Iqbal asserted; the same mental-state requirement would apply to supervisors and subordinates alike.

The Seventh Circuit misunderstood this and instead implemented a new rule that supervisor

defendants are only liable for constitutional torts when a plaintiff establishes that the supervisor acted with the specific intent to cause the precise injury alleged. "The supervisor can be liable only if he wants the unconstitutional or illegal conduct to occur," wrote the majority, "Yet [Petitioners] do not allege that [Respondent] *wanted* them to be mistreated in Iraq." App. 19a (citing *Iqbal*, 556 U.S. at 677). The lower court's heightened mental-state requirement for supervisory liability conflicts with *Iqbal*'s command that the requisite mental state in *Bivens* actions turns on the constitutional violation at issue in each case.

Unlike *Iqbal*, Petitioners' constitutional claims require that they plead that Respondent (like all other non-supervising defendants) acted with deliberate indifference to a serious risk of harm of which he was aware. *Farmer*, 511 U.S. at 829-30. This level of culpability is less blameworthy than the purposeful action in furtherance of harm required in *Iqbal* and applied in this case by the court below. See *id.* at 836. Petitioners' complaint contains entirely plausible allegations of deliberate indifference, and the Seventh Circuit's decision to impose a heightened mental-state requirement because Respondent is a supervisor set an improperly high bar to pleading personal responsibility.[7]

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[7] While the detail of Petitioners' complaint meets even the majority's improper standard, App. 69a-70a, 81a, Petitioners' allegations that Respondent personally crafted the torture policies used against them, ignored warnings that Americans were being tortured, disregarded prohibitions on torture

2. By requiring all litigants who file *Bivens* actions against supervising officials to plead that the supervisor acted with the specific purpose of causing the particular harm alleged, the Seventh Circuit eliminates deliberate indifference as a basis for supervisory liability. In so doing, the lower court exempts supervising officials from liability for a wide range of conduct that this Court has deemed unconstitutional. See *Farmer*, 511 U.S. 825; *Helling v. McKinney*, 509 U.S. 25 (1993); *Wilson v. Seiter*, 501 U.S. 294, 302-04 (1991). In these cases, the Court set deliberate indifference as the appropriate level of culpability for establishing personal responsibility on the part of supervisors and non-supervisors alike. Nothing in *Iqbal* overturned this well-established law. Nor does *Iqbal*'s discussion of supervisory liability and the normal bar on *respondeat superior* liability in constitutional tort cases invite lower courts to upset these precedents or impose new mental-state requirements for supervisors. After *Iqbal*, a supervisor who is deliberately indifferent still should be personally responsible for the type of constitutional violations that Petitioners have alleged without any reference to principles of vicarious liability.

3. Unsurprisingly, the lower court's conclusion that deliberate indifference cannot support

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passed by Congress, and authorized application of torture on a case-by-case basis certainly establish the deliberate indifference required to plead Respondent's personal responsibility.

supervisory liability in the wake of *Iqbal* creates a circuit split. Every other circuit to consider *Iqbal*'s impact on supervisory liability has correctly concluded that the constitutional provision at issue in each case dictates what mental state a plaintiff must plead to establish liability and that allegations of deliberate indifference remain sufficient to establish a supervisor's personal responsibility for certain constitutional torts. See *Wagner v. Jones*, 664 F.3d 259, 275 (8th Cir. 2011) (deciding that a supervisor is liable for deliberate indifference after *Iqbal*); *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (concluding there is "nothing in *Iqbal* indicating that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors"); *Dodds v. Richardson*, 614 F.3d 1185, 1204 (10th Cir. 2010) (noting that a plaintiff demonstrates supervisory liability by pleading deliberate indifference if "that is the same state of mind required for the constitutional deprivation he alleges"); *Harper v. Lawrence County*, 592 F.3d 1227, 1235-36 (11th Cir. 2010) (recognizing deliberate indifference as a basis for supervisory liability); *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir. 2009) (noting "supervisory officials may be liable on the basis of their own acts or omissions," including "deliberate indifference").

Iqbal left lower courts with questions about what allegations are necessary to establish supervisory liability. Now there is a conflict among lower courts about whether supervisors are ever personally responsible based on allegations of a

mental state less culpable than that at issue in *Iqbal* itself. In the Seventh Circuit, supervisors are now exempt from liability for constitutional violations involving their deliberate indifference. Supervisors elsewhere are not. The parties in *Iqbal* did not present briefing or argument on supervisory liability. This case presents an opportunity to consider the subject again in richer detail. Further review will permit this Court to restore unity among lower courts.[8]

[8] Even if this Court were to adopt a heightened mental-state requirement, leave to amend would be appropriate. Petitioners filed their complaint more than four years ago, before *Iqbal*. App. 228a. Since then, five of 13 judges have found its allegations sufficient, and no court suggested otherwise until the judgment below. The Seventh Circuit simply ignored Petitioners' alternative request to amend, a course this Court has said "is merely abuse of . . . discretion and inconsistent with the spirit of the Federal Rules." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

CONCLUSION

For all of these reasons, this Court should grant the Petition.

Respectfully submitted,

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FEBRUARY 5, 2013

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ON REHEARING EN BANC, FILED NOVEMBER 7, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 10-1687 & 10-2442

DONALD VANCE and NATHAN ERTEL,

Plaintiffs-Appellees,

v.

DONALD H. RUMSFELD and THE UNITED STATES OF AMERICA,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 06 C 6964—**Wayne R. Andersen**, *Judge.*

Argued February 10, 2011—Decided August 8, 2011
Reargued En Banc February 8, 2012
Decided November 7, 2012

Before Easterbrook, *Chief Judge*, and Posner, Flaum, Manion, Kanne, Rovner, Wood, Williams, Sykes, Tinder, and Hamilton, *Circuit Judges.*

Appendix A

EASTERBROOK, *Chief Judge*. This appeal presents the question whether the federal judiciary should create a right of action for damages against soldiers (and others in the chain of command) who abusively interrogate or mistreat military prisoners, or fail to prevent improper detention and interrogation. Both other courts of appeals that have resolved this question have given a negative answer. *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012); *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012); *Ali v. Rumsfeld*, 649 F.3d 762, 396 U.S. App. D.C. 381 (D.C. Cir. 2011). Another circuit declined to create a damages remedy against intelligence officials who turned a suspected terrorist over to another nation for interrogation. *Arar v. Ashcroft*, 585 F.3d 559, 571—81 (2d Cir. 2009) (en banc). We agree with those decisions.

I

In 2005 and 2006 Donald Vance and Nathan Ertel worked in Iraq for Shield Group Security (later known as National Shield Security), a private firm that provided protective services to businesses and governmental organizations. (This factual narration comes from the complaint, whose allegations we must accept for current purposes.) Vance came to suspect that Shield was supplying weapons to groups opposed to the United States. He reported his observations to the FBI. Ertel furnished some of the information that Vance relayed. Persons who Vance and Ertel suspected of gun-running retaliated by accusing Vance and Ertel of being arms dealers themselves. Military personnel arrested them in mid-April 2006. (The complaint does not specify which day the arrests occurred.)

Appendix A

According to the complaint, plaintiffs were held in solitary confinement and denied access to counsel. Their interrogators used "threats of violence and actual violence, sleep deprivation and alteration, extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, denial of needed medical care, yelling, prolonged solitary confinement, *incommunicado* detention, falsified allegations and other psychologically-disruptive and injurious techniques." Vance and Ertel were provisionally classified as "security internees" and called before a Detainee Status Board, but they were not allowed to present evidence—and the military officials running the proceedings refused to look at files on their computers that Vance and Ertel say would have established their innocence of arms-dealing charges. Nor did the Board contact the FBI, even though Vance and Ertel said that agents would verify their story.

The Board concluded on April 29, 2006, that Ertel should be released. Nonetheless he was held for another 18 days, during which interrogators continued to use harsh techniques. He was released on May 17, 2006. Vance remained in solitary confinement until his release on July 20, 2006, and was subjected to sleep deprivation, prolonged exposure to cold, intolerably loud music, "hooding," "walling" (placing a person's heels against a wall and slamming his body backward into that wall), threats of violence, and other techniques that caused physical or mental pain. The Army Field Manual forbids several of these techniques, which it classifies as "physical torture," "mental torture," or "coercion." *See Army Field Manual: Intelligence Interrogation* 1—8 (1992). Whether any of the techniques constitutes "torture" within the meaning of 18

U.S.C. § 2340(1), which makes torture by interrogators a crime, is a subject on which the parties' briefs do not join issue, and which we therefore do not address.

The Detainee Status Board eventually concluded that both Vance and Ertel are innocent of the allegations that had been made against them. Neither was charged with a crime.

In December 2006 Vance and Ertel filed this suit against persons who conducted or approved their detention and interrogation, and many others who had supervisory authority over those persons. The defendants included Secretary of Defense Donald Rumsfeld. Plaintiffs alleged that Secretary Rumsfeld had authorized the use of harsh interrogation methods in Iraq and contended that he is personally liable in damages—even though plaintiffs also alleged that they had never been accused of being enemy combatants and therefore were not within the scope of Secretary Rumsfeld's authorization. They also sued the United States, seeking the return of all property that had been seized from them in Iraq.

Rumsfeld asked the district court to dismiss the complaint, presenting three principal arguments: that federal law does not establish an action for damages on account of abusive military interrogation; that the complaint does not plausibly allege his personal involvement in plaintiffs' detention and interrogation; and that he is entitled to qualified immunity. The district court ruled against all of these contentions. 694 F. Supp. 2d 957 (N.D. Ill. 2010). Rumsfeld has appealed under the doctrine of *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct.

2806, 86 L. Ed. 2d 411 (1985), which treats the rejection of an immunity defense as a final decision for the purpose of 28 U.S.C. § 1291.

The United States also moved to dismiss the complaint, contending that the "military authority exception" to the Administrative Procedure Act, 5 U.S.C. § 701(b)(1)(G), bars the suit against it. Section 701(b)(1)(G) prohibits judicial review of "military authority exercised in the field in time of war or in occupied territory". The district court concluded that this language does not apply—at least, does not prevent Vance and Ertel from engaging in discovery that they contend would show the statute's inapplicability—and denied the motion to dismiss. 2009 U.S. Dist. LEXIS 67349 (N.D. Ill. July 29, 2009). The district court later certified this order for interlocutory appeal under 28 U.S.C. § 1292(b), see 2010 U.S. Dist. LEXIS 51973 (N.D. Ill. May 26, 2010), and a motions panel accepted the appeal.

A merits panel reversed the district court's decision with respect to the United States but affirmed with respect to Rumsfeld's claim of immunity. 653 F.3d 591 (7th Cir. 2011). We granted Rumsfeld's request for rehearing en banc and vacated the panel's opinion and judgment; this set aside both aspects of its decision.

II

Both the district court and the panel concluded that it is appropriate to create a private right of action for damages against persons in the military chain of command. *See* generally *Bivens v. Six Unknown Named*

Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). The lead argument in former Secretary Rumsfeld's brief contests this conclusion. Because the basis of appellate jurisdiction is the district court's rejection of an immunity defense, however, we must consider whether we are authorized to address the merits.

The answer is yes. The Supreme Court held in *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991), that when evaluating an argument that a right is not "clearly established"—the essential ingredient in any invocation of qualified immunity—a court may conclude that the right has not been "clearly" established because it has not been established at all. The Court followed up in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), by holding that a court of appeals must decide both whether the right in question exists and whether its existence had been "clearly established" before the time of the challenged acts. *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009), overruled that portion of *Saucier* and held that a court of appeals may use sound discretion when deciding whether to reach the merits ahead (or instead) of the immunity question. But the Court did not doubt that, on an interlocutory appeal under *Mitchell*, one potential ground of decision is a conclusion that the plaintiff does not have a legally sound claim for relief.

Wilkie v. Robbins, 551 U.S. 537, 548-50, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007), applies this approach to *Bivens* claims in particular. Robbins sued some federal

officials, asserting extra-statutory claims for damages and contending that reasoning along the lines of *Bivens* allowed the federal judiciary to recognize such a remedy. Defendants took an interlocutory appeal, contending that they enjoyed qualified immunity. The Supreme Court ruled in defendants' favor—not because of immunity, but because it concluded that it should not create a new *Bivens* remedy. Similarly, in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), the Supreme Court resolved a qualified-immunity appeal by deciding that the complaint did not state a plausible claim on the facts. We have jurisdiction to decide this case on the same grounds the Supreme Court employed in *Wilkie* and *Iqbal*. *See also Levin v. Madigan*, 692 F.3d 607, 610—11 (7th Cir. 2012).

The appeal by the United States does not present any jurisdictional problem, given the court's decision to accept the appeal certified under § 1292(b). Neither does it present a difficult question. The panel held that § 701(b)(1)(G) prevents any relief against the United States. 653 F.3d at 626—27. We agree with that conclusion, for the reasons the panel gave. Further discussion of the subject is unnecessary.

III

When considering whether to create an extra-statutory right of action for damages against military personnel who mistreat detainees, we assume that at least some of the conditions to which plaintiffs were subjected violated their rights. Although the Constitution's application to interrogation outside the United States is

not settled, see *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268—69, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990), Rumsfeld concedes (for current purposes at least) that it governs. The conduct alleged in the complaint appears to violate the Detainee Treatment Act, 10 U.S.C. §801 note and 42 U.S.C. §§ 2000dd to 2000dd—1, and may violate one or more treaties. The source of the substantive right does not matter for the analysis that follows.

Unless there is a right of action against soldiers and their immediate commanders, however, there cannot be a right of action for damages against remote superiors such as former Secretary Rumsfeld. And neither the Detainee Treatment Act nor any other statute creates a private right of action for damages under the circumstances narrated by plaintiffs' complaint. This much, at least, is common ground among the parties. Plaintiffs therefore ask us to create a right of action under federal common law.

Bivens was the first time the Supreme Court created a non-statutory right of action for damages against federal employees. Since then the Court has created two others: for unconstitutional discrimination in public employment, see *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979), and for violations of the eighth amendment by prison guards, see *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980). It has not created another during the last 32 years—though it has reversed more than a dozen appellate decisions that had created new actions for damages. Whatever presumption in favor of a *Bivens*-like remedy may once have existed

has long since been abrogated. The Supreme Court has never created or even favorably mentioned the possibility of a non-statutory right of action for damages against military personnel, and it has twice held that it would be inappropriate to create such a claim for damages. *See Chappell v. Wallace*, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983); *United States v. Stanley*, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987). The Court has never created or even favorably mentioned a non-statutory right of action for damages on account of conduct that occurred outside the borders of the United States. Yet plaintiffs propose a novel damages remedy against military personnel who acted in a foreign nation—and in a combat zone, no less.

The Court's most recent decision declining to extend *Bivens is Minneci v. Pollard*, 132 S. Ct. 617, 181 L. Ed. 2d 606 (2012). *Minneci* treated *Wilkie* as a restatement of the governing principles, 132 S. Ct. at 621. *Wilkie* tells us:

> our consideration of a *Bivens* request follows a familiar sequence, and on the assumption that a constitutionally recognized interest is adversely affected by the actions of federal employees, the decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. [*Bush v. Lucas*, 462 U.S. 367 (1983)] at 378, 103

> S. Ct. 2404, 76 L. Ed. 2d 648. But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Bush, supra*, at 378.

551 U.S. at 550. Congress has provided some opportunities for compensation of persons injured by the military in combat zones. Rumsfeld does not contend that these statutes (which we discuss later) supply a "convincing reason for the Judicial Branch to refrain from creating a new and freestanding remedy in damages." But he does contend that many factors make it inappropriate for the judiciary to create a common-law remedy for damages arising from military operations in a foreign nation.

Chappell and *Stanley* hold that it is inappropriate for the judiciary to create a right of action that would permit a soldier to collect damages from a superior officer. Plaintiffs say that these decisions are irrelevant because they were not soldiers. That is not so clear. They were security contractors in a war zone, performing much the same role as soldiers. Some laws treat employees of military contractors in combat zones the same as soldiers. *See, e.g.*, 18 U.S.C. § 3261 and § 3267(1)(A)(iii), parts of the Military Extraterritorial Jurisdiction Act discussed in *United States v. Brehm*, 691 F.3d 547 (4th Cir. 2012). *See also United States v. Ali*, 2012 CAAF LEXIS 815 (C.A.A.F. July 18, 2012) (holding that a civilian employee

of a security contractor in Iraq is treated as a soldier for the purpose of prosecution under the Uniform Code of Military Justice). But we need not decide whether civilians doing security work in combat zones are soldiers by another name, because *Chappell* and *Stanley* did not entirely depend on the relation between the soldier and the superior officer.

The Supreme Court's principal point was that civilian courts should not interfere with the military chain of command—not, that is, without statutory authority. *Chappell* observed that military efficiency depends on a particular command structure, which civilian judges could mess up without appreciating what they were doing. 462 U.S. at 300. The Court observed that Congress has ample authority, under its constitutional power to "make Rules for the Government and Regulation of the land and naval Forces" (Art. I §8 cl. 14), to provide for awards of damages and other kinds of judicial review of military decisions. When Congress does not exercise that power—or when, as we explain in a moment, it exercises that power without providing for damages against military wrongdoers—the judiciary should leave the command structure alone. "Matters intimately related to . . . national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981).

Stanley tried to circumvent *Chappell* by suing some civilians and contending that the officers he had named were not his superiors but had been in a different branch of the military hierarchy. Stanley also observed that the

plaintiff in *Chappell* had at least some monetary remedy through legislation, while he had none. The Court wrote in response: "The 'special facto[r]' that 'counsel[s] hesitation' [in creating a common-law remedy] 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." 483 U.S. at 683. That's equally true of our plaintiffs' situation. The fourth circuit addressed this subject in detail in *Lebron*, 670 F.3d at 548-52, and we agree with its evaluation.

What plaintiffs want is an award of damages premised on a view that the military command structure should be different—that, for example, the Secretary of Defense must do more (or do something different) to control misconduct by interrogators and other personnel on the scene in foreign nations. They want a judicial order that would make the Secretary of Defense care less about the Secretary's view of the best military policy, and more about the Secretary's regard for his own finances. Plaintiffs believe that giving the Secretary of Defense a financial stake in the conduct of interrogators would lead the Secretary to hold the rights of detainees in higher regard—which surely is true, but that change would come at an uncertain cost in national security.

If the judiciary never erred, damages awards against soldiers and their civilian supervisors would be all gain and no loss. But judges make mistakes: They may lack vital knowledge, may accept claims that should be rejected on the facts or the law, or may award excessive damages

on justified claims or create supervisory liability when they shouldn't. *See Stanley*, 483 U.S. at 682-83; see also *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2087, 179 L. Ed. 2d 1149 (2011) (Kennedy, J., concurring). Accounting for human fallibility is an important part of the design of a legal system. Military prosecutors (or civilian prosecutors acting under the President's direction) can consider the needs of effective military action when exercising prosecutorial discretion. Judges lack information that executive officials possess, and in civil litigation there is no source of discretion comparable to a prosecutor's. The Justices concluded in *Chappell* and *Stanley* that Congress and the Commander-in-Chief (the President), rather than civilian judges, ought to make the essential tradeoffs, not only because the constitutional authority to do so rests with the political branches of government but also because that's where the expertise lies. That is as true here as it was in *Chappell* and *Stanley*. Accord, *Doe*, 683 F.3d at 394 ("Doe is a contractor and not an actual member of the military, but we see no way in which this affects the special factors analysis.").

The political branches have not been indifferent to detainees' interests. To the contrary, the treatment of military detainees has occasioned extended debate and led to a series of statutes. The Detainee Treatment Act is one. Others enacted or amended in the past decade include the Torture Victim Protection Act, 28 U.S.C. §1350 note; the Military Claims Act, 10 U.S.C. §2733; the Foreign Claims Act, 10 U.S.C. §2734; the Military Commissions Act, 10 U.S.C. §948a *et seq.*; the federal torture statute, 18 U.S.C. §§ 2340-2340A; the War Crimes Act, 18 U.S.C.

§2441; and the Uniform Code of Military Justice, 10 U.S.C. §801 *et seq. Lebron* summarizes the ways in which the political branches have addressed the appropriate design of policies about interrogation. 670 F.3d at 548-52. These statutes have one thing in common: *none* provides for damages against military personnel or their civilian superiors. Some, such as the Detainee Treatment Act, expressly block damages liability. (We return to this shortly.) Others provide compensation to victims of military errors or misconduct, but the compensation comes from the public fisc rather than private pockets.

For example, the Military Claims Act provides that the Judge Advocate General of each service may award up to $100,000 from the Treasury to any person injured by the military. The Foreign Claims Act provides that a claims commission may award up to $100,000 of public money to a person injured by the U.S. military in a foreign nation. (These options are mutually exclusive; when the Foreign Claims Act or the Federal Tort Claims Act applies, the Military Claims Act does not. *See* 10 U.S.C. §2733(b)(2).) We asked plaintiffs' counsel at oral argument whether they had applied for awards under either statute. Counsel said no, telling us that $100,000 is too little for their injuries and that the persons charged with implementing these laws enjoy too much discretion for plaintiffs' liking. (Plaintiffs have not argued that 32 C.F.R. §536.45(h), which provides that the military will not make awards under either statute for assault and battery, would make these statutes useless to them. Section 536.46(h) allows awards for intentional torts related to an investigation; because the briefs do not discuss the effect of §536.45(h),

we do not consider whether plaintiffs' losses would come within the "investigation" clause.)

We are willing to assume that the cap on awards, and the existence of discretion about when to award compensation (and how much to provide), means that these statutes are not full substitutes for a *Bivens* remedy. *See Minneci*, the Court's most recent discussion of that subject. Still, the fact that Congress has provided for compensation tells us that it has considered how best to address the fact that the military can injure persons by improper conduct. We take two things from the Military Claims Act and the Foreign Claims Act: first, Congress has decided that compensation should come from the Treasury rather than from the pockets of federal employees; second, plaintiffs do not need a common-law damages remedy in order to achieve some recompense for wrongs done them. Unlike Webster Bivens, they are not without recourse.

Vance and Ertel maintain, however, that through the Detainee Treatment Act Congress has decided that they *are* entitled to damages from the Secretary of Defense and his subordinates. A portion of the Detainee Treatment Act codified at 42 U.S.C. §2000dd-1(a) provides that in both civil suits and criminal prosecutions, military interrogators and their superiors are protected from liability if "such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of

ordinary sense and understanding would have known the practices to be unlawful."

Of course a *defense* to damages liability does not *create* damages liability, but plaintiffs contend that §2000dd-1(a) assumes that this liability already exists, so personal liability must have Congress's blessing. That assumption is unwarranted. Congress often legislates to make doubly sure that federal employees will not be personally liable. The Westfall Act, 28 U.S.C. §2679, is an example of that strategy. (*Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), and *Ali v. Rumsfeld, supra*, discuss that law's scope and effects.) The Public Health Service Act, 42 U.S.C. §233(a), is another. *See Hui v. Castaneda*, 130 S. Ct. 1845 (2010). Section 7(a) of the Military Commissions Act, 28 U.S.C. §2241(e)(2), is a third. It forbids awards of damages to aliens detained as enemy combatants. *See Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012). The existence of safeguards against personal liability does not imply legislative authorization for the judiciary to create personal liability.

Section 2000dd-1(a) applies only to suits by aliens and therefore does not affect suits by citizens such as plaintiffs. Plaintiffs treat the restricted coverage of §2000dd-1 as a glitch, but we think it is more likely that the coverage reflects an assumption behind the statute. Aliens detained by U.S. military personnel might invoke multiple sources of authorization to award damages: one is the Torture Victim Protection Act; a second is the Alien Tort Act, 28 U.S.C. §1350; and the third is the law of the nation in which the detention occurred (here, the law of Iraq). Congress

may have wanted to make sure that military personnel enjoy some protection against suits by persons who have an express right of action. Vance and Ertel cannot use (at least, have not tried to use) the Torture Victim Protection Act, the Alien Tort Act, or the law of Iraq as a basis for the remedy they seek. That Congress has put an obstacle in the way of persons who could use those bodies of law does not imply that persons who cannot use them must have a common-law damages remedy.

The Detainee Treatment Act can be—and has been—enforced by criminal prosecutions. The Department of Defense has procedures for reporting claims of abuse; these procedures require all reports to be investigated and require prosecution to follow substantiated reports. *See* Army Regulation 190-8 at §§ 1-5, 3-16, 6-9; DoD Directives 5100.77, 2311.01E. Failure by military personnel to follow these procedures is a court-martial offense. 10 U.S.C. §892. Abusive interrogation in Iraq and Afghanistan has led to courts-martial. Injunctions that enforce the Detainee Treatment Act prospectively may be possible under the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), or the waiver of sovereign immunity in 5 U.S.C. §702. But Congress has not authorized awards of damages against soldiers and their superiors, and creating a right of action in common-law fashion would intrude inappropriately into the military command structure.

A *Bivens*-like remedy could cause other problems, including diverting Cabinet officers' time from management of public affairs to the defense of their bank accounts.

See Doe, 683 F.3d at 396. Then there are problems with evidence. *See Lebron*, 670 F.3d at 555-56. When the state-secrets privilege did not block the claim, a court would find it challenging to prevent the disclosure of secret information. Anyone, whether or not a *bona fide* victim of military misconduct, could sue and then use graymail (the threat of disclosing secrets) to extract an undeserved settlement. *See Arar*, 585 F.3d at 578-81. That's not a problem under the Military Claims Act and the Foreign Claims Act, which allow proceedings to be conducted in confidence.

The panel distinguished *Arar* and *Ali v. Rumsfeld* on the ground that those plaintiffs were aliens (Arar, for example, is a citizen of Canada). 653 F.3d at 620-22. More recent decisions, including *Lebron* and *Doe*, dealt with (and rejected) *Bivens*-like claims by U.S. citizens. We do not think that the plaintiffs' citizenship is dispositive one way or the other. *See Doe*, 683 F.3d at 396. Wallace and Stanley also were U.S. citizens. The Supreme Court has never suggested that citizenship matters to a claim under *Bivens*. It would be offensive to our allies, and it should be offensive to our own principles of equal treatment, to declare that this nation systematically favors U.S. citizens over Canadians, British, Iraqis, and our other allies when redressing injuries caused by our military or intelligence operations. Treaties may pose a further obstacle to favoring U.S. citizens in the design of common-law remedies, but we need not decide, because the choice of remedies for military misconduct belongs to Congress and the President rather than the judicial branch.

IV

Even if we were to create a common-law damages remedy against military personnel and their civilian superiors, former Secretary Rumsfeld could not be held liable. He did not arrest plaintiffs, hold them incommunicado, refuse to speak with the FBI, subject them to loud noises, threaten them while they wore hoods, and so on. The most one could say about him—the most plaintiffs *do* say about him—is that (a) in 2002 and 2003 he authorized the use of harsh interrogation techniques when dealing with enemy combatants, (b) he received reports that his subordinates sometimes used these techniques, without authorization, on persons such as plaintiffs despite the Detainee Treatment Act of 2005, and (c) he did not do enough to bring interrogators under control.

The Supreme Court held in *Iqbal* that liability under a *Bivens*-like remedy is personal. 556 U.S. at 676-77. Cabinet secretaries (in *Iqbal* the Attorney General) and other supervisory personnel are accountable for what they do, but they are not vicariously liable for what their subordinates do. The Court added that knowledge of a subordinate's misconduct is not enough for liability. The supervisor can be liable only if he wants the unconstitutional or illegal conduct to occur. *Id.* at 677. Yet plaintiffs do not allege that Secretary Rumsfeld *wanted* them to be mistreated in Iraq. His orders concerning interrogation techniques concerned combatants and terrorists, not civilian contractors. What happened to plaintiffs violated both Rumsfeld's directives of 2002 and 2003, and the Detainee Treatment Act of 2005. In an ideal

world, the Secretary of Defense and the Army's Chief of Staff would have achieved full compliance with the Detainee Treatment Act, but a public official's inability to ensure that all subordinate federal employees follow the law has never justified personal liability.

The gist of plaintiffs' claim against Rumsfeld is that harsh interrogation tactics were used erroneously, pointlessly, and excessively in their situation. Plaintiffs should be compensated, if their allegations are true—though it is too late for them to invoke the Foreign Claims Act, which has a two-year period of limitations. Just because it may be hard to use the statutory mechanisms of compensation, however, it does not follow that a Cabinet official must pay out of his own pocket. To see this, ignore for the moment the military and foreign-location issues and ask whether persons in the United States who are shot by federal agents or beaten by prison guards have a good claim against the Director of the FBI, the Director of the Bureau of Prisons, or the Attorney General. They do not. Both *Iqbal* and *al-Kidd* say that supervisors are not vicariously liable for their subordinates' transgressions.

The Director of the FBI allows field agents to carry guns and permits them to use deadly force. Yet if an agent shoots a fleeing suspect in the back, violating the fourth amendment, see *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), the Director is not liable just because the gun, issued under the Director's policy, was a cause of the injury. Similarly for a police chief who establishes a K-9 squad, if a dog bites a bystander, or who authorizes search or arrest based on probable cause, if the police then search or arrest *without* probable cause.

Plaintiffs' theme is that Secretary Rumsfeld, having authorized harsh interrogation tactics for enemy combatants in 2002 and 2003, should have intervened after receiving reports that non-combatants were being subjected to these tactics and that interrogators had not properly implemented the Detainee Treatment Act of 2005. Yet the standard form of intervention would have been criminal prosecution (in the civilian courts or by court-martial). The Department of Defense did prosecute some soldiers through courts-martial, and the Department of Justice filed some criminal prosecutions. Plaintiffs think that they should have done more, but no one can demand that someone else be prosecuted. *See, e.g., Castle Rock v. Gonzales*, 545 U.S. 748, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005); *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989); *Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973). A court cannot say that, if there are too few prosecutions (or other enforcement), and thus too much crime, then the Attorney General or the Secretary of Defense is personally liable to victims of (preventable) crime. Yet that's what plaintiffs' approach entails.

Iqbal held that knowledge of subordinates' misconduct is not enough for liability. The supervisor must want the forbidden outcome to occur. Deliberate indifference to a known risk is a form of intent. But *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994), holds that, to show *scienter* by the deliberate-indifference route, a plaintiff must demonstrate that the public official knew of risks with sufficient specificity to allow an inference that inaction is designed to produce or allow harm. A warden's

knowledge that violence occurs frequently in prison does not make the warden personally liable for all injuries. *See McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991). Prisons are dangerous places, and misconduct by both prisoners and guards is common. Liability for wardens would be purely vicarious. *Farmer* rejected a contention that wardens (or guards) can be liable just because they know that violence occurs in prisons and don't do more to prevent it on an institution-wide basis. To get anywhere, Vance and Ertel would need to allege that Rumsfeld knew of a substantial risk to security contractors' employees, and ignored that risk because he wanted plaintiffs (or similarly situated persons) to be harmed. The complaint does not contain such an allegation and could not plausibly do so.

The head of *any* large bureaucracy receives reports of misconduct. The Secretary of Defense has more than a million soldiers under his command. The Attorney General supervises thousands of FBI and DEA agents, thousands of prison guards, and so on. Many exceed their authority. People able to exert domination over others often abuse that power; it is a part of human nature that is very difficult to control. *See* Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (2007). The head of an organization knows this, or should know it. Every police chief knows that some officers shoot unnecessarily or arrest some suspects without probable cause, and that others actually go over to the criminal side and protect drug rackets. But heads of organizations have never been held liable on the theory that they did not do enough to combat subordinates' misconduct, and the

Supreme Court made it clear in *Iqbal* that such theories of liability are unavailing.

Plaintiffs do not cite even one instance in which an Attorney General, a Director of the FBI, a Director of the Bureau of Prisons, or a municipal chief of police has been held personally liable for not ensuring that subordinates respect prisoners' or suspects' rights. Claims against the Secretary of Defense, who has more people under his command, and a longer chain of subordinates between him and the culpable soldiers, are weaker.

Although Vance and Ertel contend that their injuries can be traced (remotely) to Secretary Rumsfeld's policies of 2002 and 2003, as well as to the misconduct of personnel in Iraq, they do not contend that the policies authorized harsh interrogation of security detainees, as opposed to enemy combatants. It is therefore unnecessary to decide when, if ever, a Cabinet officer could be personally liable for damages caused by the proper application of an unlawful policy or regulation. As we observed in *Hammer v. Ashcroft*, 570 F.3d 798, 800 (7th Cir. 2009) (en banc), the normal means to handle defective policies and regulations is a suit under the Administrative Procedure Act or an equivalent statute, not an award of damages against the policy's author. Accord, *Arar*, 585 F.3d at 572-73. No court has ever held the Administrator of the EPA personally liable for promulgating an invalid regulation, even if that regulation imposes billions of dollars in unjustified costs before being set aside. Cf. *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012) (Deputy Assistant Attorney General not personally liable for preparing an opinion concluding that

Secretary Rumsfeld's policies were valid). The extent to which untenable directives, policies, and regulations may support awards of damages can safely be postponed to another day.

V

Because we have held that a common-law right of action for damages should not be created—and that plaintiffs' complaint would fail to state a claim against former Secretary Rumsfeld even if such a right of action were to be created—it is unnecessary to decide whether Rumsfeld violated plaintiffs' clearly established rights. The decisions of the district court are reversed.

WOOD, *Circuit Judge*, concurring in the judgment. Civilized societies do not condone torture committed by governmental agents, no matter what job title the agent holds. I am confident that every member of this court would agree with that proposition. This is therefore a case of system failure: plaintiffs Donald Vance and Nathan Ertel assert that representatives of the U.S. government (who happened to be members of the Armed Forces) subjected them to a variety of measures that easily qualify as "torture," whether under the definitions found in the *Army Field Manual*, international law, or legislation such as the Torture Victim Protection Act, 28 U.S.C. § 1350 note, § 3(b). This shameful fact should

not be minimized by using euphemisms such as the term "harsh interrogation techniques." The question before us is whether the man who served as Secretary of Defense at the time of the plaintiffs' ordeal, Donald Rumsfeld, is entitled to qualified immunity in the suit they have brought against him. Although I part company in substantial ways from the majority's reasoning, I conclude that former Secretary Rumsfeld himself is entitled to such immunity. The same may well be true of others who had no personal participation in these events. Nevertheless, I am in substantial agreement with Judge Hamilton's dissenting opinion when it comes to the question of possible liability for those who actually committed these heinous acts. I therefore am able only to concur in the court's judgment.

I

The majority's account in Part I of the underlying facts, which it properly presents in the light most favorable to Vance and Ertel, provides the essential information for deciding the case. But I find its characterization of the facts to be incomplete in one important respect. In my view, "threats of violence and actual violence, sleep deprivation and alteration, extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, denial of needed medical care, yelling, prolonged solitary confinement, *incommunicado* detention, falsified allegations," as well as "prolonged exposure to cold, intolerably loud music, 'hooding,' 'walling,'" and the like, must be acknowledged for what they are: torture. *Ante* at 3. In other cases, we might need to draw a line between harsh techniques

and actual torture, but that is not a problem here. It is notable that courts have found that comparable actions also violate the Eighth Amendment to the U.S. Constitution, for prisoners, or the Due Process Clauses, in the case of pretrial detainees and others not facing punishment. *See, e.g.*, *Wilson v. Seiter*, 501 U.S. 294, 304, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991) (holding that conditions of confinement may establish an Eighth Amendment violation in combination, even if each would not suffice alone; this would occur when they have "a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise"); *DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001) (concluding that exposure to human waste for 36 hours would constitute a deprivation serious enough to violate the Eighth Amendment).

Like the majority, I conclude that we are authorized in this appeal to consider the question whether the plaintiffs have stated a claim against the Secretary. I have nothing to add to its analysis in Part II of its opinion. In particular, I agree with the majority that the panel correctly ruled that 5 U.S.C. § 701(b)(1)(G) forecloses plaintiffs' claims against the United States. I therefore proceed directly to explain my disagreement with Part III of the majority's opinion, and my agreement with the ultimate conclusion of Part IV (and thus with the ultimate decision to reverse the judgment of the district court).

II

In Part III of its opinion, the majority tackles the broad question "whether to create an extra-statutory right of action for damages against military personnel who mistreat detainees." *Ante* at 7. Almost every part of this phrasing of the issue needs closer examination. Although in a literal sense, the cause of action recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), might be called "extra-statutory," that does not mean that the claim sprang forth from the heads of federal judges. It was solidly rooted in the most fundamental source of law we have, the Constitution, and in particular the Fourth Amendment. The lawsuit fell comfortably within the boundaries of the federal-question jurisdiction Congress has conferred in 28 U.S.C. § 1331. To expand Vance's and Ertel's case to one that involves any and all possible claims against military personnel is, as Judge Hamilton has persuasively shown, neither necessary nor wise. Had Vance and Ertel known from the start the identity of their tormenters, and had they sued only those people, we might have a very different reaction to the issues presented. I consider it premature at best to assume that a civilian in the state of Texas who is dragged by a military officer onto the grounds of Fort Hood and then tortured would not have a *Bivens* cause of action against that officer. Although the majority stresses that the events in our case occurred in a "combat zone," even that is not entirely accurate. In fact, plaintiffs were removed from the active combat zone and placed into a military prison—critically, a place where there was plenty

of time to make considered decisions and enemy forces were nowhere to be seen. Finally, the phrase "mistreat detainees" wrongly implies possible liability for a broader range of injury than the plaintiffs are asserting (or at least than I would be prepared to recognize). More than simple mistreatment is at stake here. We are talking about conduct that the international community recognizes as torture and that lies at the extreme end of that which would support a finding of Eighth Amendment liability in a suit brought by a domestic prisoner.

Rather than starting—and ending—with Secretary Rumsfeld, the majority inexplicably starts at the bottom of the military hierarchy. It makes the obvious point that if the lowest private and her immediate commanders have done nothing wrong, then the lieutenants, captains, colonels, generals above her, including ultimately the Secretary of Defense, would similarly have no liability for that private's actions. But why start there? It is a fallacy to think that the converse of this is true: that just because the Secretary has done nothing wrong, then none of the people inferior to him can have erred. The majority acknowledges just this point in Part IV of its opinion, *ante* at 21-22. Cases are legion where a warden is exonerated even though prison guards are liable; where a school superintendent has no liability even though a principal does. *See, e.g., Lojuk v. Quandt*, 706 F.2d 1456 (7th Cir. 1983) (Veterans Administration staff psychiatrist may be liable for performing electroshock therapy on patient without consent, but supervisor is not); *Lenz v. Wade*, 490 F.3d 991 (8th Cir. 2007) (officers liable for beating inmate, but warden is not); *Baynard v. Malone*, 268 F.3d 228

(4th Cir. 2001) (principal and teacher liable for teacher's sexual abuse of student, but superintendent and personnel director are not).

The majority has written with a broad brush with respect to those lower down in the chain of responsibility, and it does not seem to have drawn any distinction between the obviously culpable actors and those whose involvement may have been more indirect. But perhaps it has: in the end I cannot tell whether the majority intends to preclude *Bivens* liability even for the direct actors. Either way, I find the gist of the majority's discussion troubling. The Court has seen many cases raising questions about abusive police, military, or prison guard tactics. In the police and prison contexts, the Court has affirmatively recognized the availability of *Bivens* actions. *See Bivens; Carlson v. Green*, 446 U.S. 14, 19, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980). And the majority passes over without comment the *Bivens* cases that have come before the Court at the *certiorari* stage over the years. Although we all know that a denial of *certiorari* in itself does not convey any message—either approval or disapproval—we know equally well that the Court does not hesitate to step in and correct lower courts that have strayed beyond the boundaries it has established. It has done just this in case after case in the *habeas corpus* area. *See Overstreet v. Wilson*, 686 F.3d 404, 410-11 (7th Cir. 2012) (Wood, J., dissenting) (listing cases reversing grants of *habeas corpus* relief and noting the use of summary reversals in this area). The Court has not sent such clear signals in the *Bivens* Eighth Amendment context, even as it has issued decisions such as *Minneci v. Pollard*, 132 S. Ct.

617, 181 L. Ed. 2d 606 (2012), which declined to make a *Bivens* remedy available against employees of a *private* prison facility. Had the Court wished to disapprove *Bivens* actions altogether, it would not have taken the trouble in *Minneci* to review the history of *Bivens* and decide on which side of the line the proposed claim fell.

The Court's acceptance of *Bivens* in the closely related area of the Eighth Amendment is consistent with both Congress's actions and the position of the Executive Branch. The majority brushes over the fact that the Detainee Treatment Act expressly provides a defense to a civil action brought against a member of the Armed Forces or any other agent of the U.S. government for engaging in practices prohibited by that law. What suit? Congress can have been referring only to a *Bivens* action. It did much the same thing when it passed the Westfall Act of 1988, which went out of its way to state that the substitution of the United States for a federal employee for purposes of the Federal Tort Claims Act "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2). Although it is theoretically possible that Congress was just underscoring its understanding that no such suit was possible, that is a strained reading of the statutory language, and it is a reading that some scholars have rejected. *See* James E. Pfander and David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 Georgetown L. J. 117, 132-38 (2009) (arguing that Congress "joined the Court as a partner in recognizing remedies in the nature of a *Bivens* action

[based on] the Westfall Act's preservation of suits for violation of the Constitution and [on] the considerations that led to its adoption.").

Moreover, as Judge Hamilton notes, the State Department relied on the availability of *Bivens* actions when it filed answers to a number of questions posed by the United Nations committee with oversight responsibility over the Convention Against Torture (CAT). Question 5 pointed out that the United States had taken the position that the CAT was not self-executing, and it asked for a specification of how the United States proposed to meet its obligations under the Convention. The State Department provided a lengthy response, which in relevant part read as follows:

> Finally, U.S. law provides various avenues for seeking redress, including financial compensation, in cases of torture and other violations of constitutional and statutory rights relevant to the Convention. Besides the general rights of appeal, these can include any of the following, depending on the location of the conduct, the actor, and other circumstances:
>
> * * *
>
> • Bringing a civil action in federal or state court under the federal civil rights statute, 42 U.S.C. § 1983, directly against state or local officials for money damages or injunctive relief;

> • Seeking damages for negligence of federal officials and for negligence and intentional torts of federal law enforcement officers under the Federal Tort Claims Act, 22 U.S.C. § 2671 *et seq.*, or of other state and municipal officials under comparable state statutes;
>
> • Suing federal officials directly for damages under provisions of the U.S. Constitution for "constitutional torts," see *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), and *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979);
>
> * * *

See United States Written Response to Questions Asked by the United Nations Committee Against Torture, ¶ 5 (Apr. 28, 2006) (Question 5), available at http://www.state.gov/g/drl/rls/68554.htm (last visited Oct. 30, 2012). I do not know whether the State Department will feel compelled to inform the Committee that it was in error with respect to its *Bivens*/*Davis* representation in light of the majority's opinion, but there is no ambiguity in what it said.

The last point the majority makes in Part III is that, in their view, the plaintiffs' citizenship should not be dispositive either way. If we were writing on a clean slate, then I would enthusiastically endorse that sentiment. The problem is that the background statutes—not to mention international law—are replete with distinctions based on citizenship. Thus, the Torture Victim Protection Act, 28

U.S.C. § 1350 note, provides a remedy to any "individual," but only against "[a]n individual" who acts "under actual or apparent authority, or color of law, of any foreign nation." *Id.*, § 2(a). The Alien Tort Statute, 28 U.S.C. § 1350, covers only "any civil action *by an alien* for a tort only . . . ." (Emphasis added.) Principles of legislative jurisdiction in international law recognize authority based not only on territory, but also on nationality. *See* Restatement (Third) of Foreign Relations Law of the United States, § 402, which provides that subject to certain reasonableness limitations, "a state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory." *Id.* § 402(2). In fact, if it were true that there is no *Bivens* theory under which a U.S. citizen may sue an official of the U.S. government (including a military official) who tortures that citizen on foreign land under the control of the United States (including its military), then U.S. citizens will be singled out as the only ones *without* a remedy under U.S. law. That is because existing law permits a U.S. citizen to sue a foreign official, and an alien can sue anyone who has committed a tort in violation of the law of nations. Only by acknowledging the *Bivens* remedy is it possible to avoid treating U.S. citizens worse than we treat others. The fear of offense to our allies that the majority fears dissipates as soon as we look at the broader picture.

III

I turn finally to Part IV of the majority's opinion, in which it concludes that Secretary Rumsfeld cannot be held liable to Vance and Ertel no matter what one says

about other military personnel and civilians who work for the armed forces. Here the majority properly reserves a critical question. Vance and Ertel, it notes, "do not contend that [Secretary Rumsfeld's] policies authorized harsh interrogation of security detainees, as opposed to enemy combatants." *Ante* at 23. Thus, it concludes, "[t]he extent to which untenable directives, policies, and regulations may support awards of damages can safely be postponed to another day." *Ante* at 24. I wholeheartedly endorse this statement.

With that said, I conclude, along with the majority, that the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), governs our decision here. In *Iqbal*, the Court concluded that the Attorney General's knowledge of and participation in the mistreatment of the plaintiff was remote enough that he could not be held vicariously liable for the actions of his subordinates. The same must be said of Secretary Rumsfeld. This is not because his leadership of the Department of Defense had nothing to do with the plaintiffs' injuries. His approval of the so-called harsh techniques may have egged subordinates on to more extreme measures—measures that surely violated the standards of the Detainee Treatment Act of 2005, as well as broader norms such as those in the CAT. But the link between their mistreatment and the Secretary's policies authorizing extreme tactics for enemy combatants is too attenuated to support this case.

IV

In closing, I wish to stress that I do not rest any part of my analysis on the fear that *Bivens* liability would cause Cabinet Secretaries to carry out their responsibilities with one eye on their wallets, rather than for the greater good of their department and the country. The majority suggests as much in several places, see *ante* at 12, 17-18, but I find this disrespectful of both the dedication of those who serve in government and the serious interests that the plaintiffs are raising. The majority's suggestions derive from comments the Court has made over the years in its qualified immunity decisions, where it has considered the question whether personal liability for constitutional torts might "dampen the ardor of all but the most resolute . . . in the unflinching discharge of their duties." *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, J.)); see also *Butz v. Economou*, 438 U.S. 478, 506, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978) (highlighting "public interest in encouraging the vigorous exercise of official authority"); *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (noting that "permitting damages suits against government officials 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."). But, as the Court has also acknowledged, that concern represents only one side of the balance. Otherwise, it would have adopted a rule of absolute immunity for government actors, in place of the qualified immunity it chose. *Bivens*, and its counterpart for

state actors, 42 U.S.C. § 1983, rest on the countervailing fact that the threat of personal liability for violations of clearly established rules gives some teeth to the need to conform to constitutional boundaries. Courts must balance the risk of over-deterrence against "the public interest in deterrence of unlawful conduct and in compensation of victims." *Harlow*, 457 U.S. at 819; see also *Carlson v. Green*, 446 U.S. 14, 21, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980) ("It is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability.") (internal citation omitted). While I recognize the need to avoid over-deterrence, I see nothing in this case that requires us to depart from the "balance that [the Supreme Court's] cases [traditionally] strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties" through qualified immunity. *Anderson*, 483 U.S. at 639.

Finally, I add that our decision here spells the practical end to this case. This is certainly true with respect to the "John Doe" defendants. The two-year statute of limitations that we apply in *Bivens* cases has long since run, and we do not permit relation back under Federal Rule of Civil Procedure 15(c)(1)(C) where the plaintiff simply did not know whom to sue. *See, e.g., Hall v. Norfolk So. Ry. Co.*, 469 F.3d 590, 597 (7th Cir. 2006); *King v. One Unknown Federal Correctional Officer*, 201 F.3d 910, 914 (7th Cir. 2000); see generally 6A Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 1498.3 (3d ed. 2010).

I therefore respectfully concur only in the judgment of the court.

HAMILTON, *Circuit Judge*, joined by ROVNER and WILLIAMS, *Circuit Judges*, dissenting. All members of this court agree that plaintiffs Vance and Ertel have alleged that members of the United States military tortured them in violation of the United States Constitution, and that in reviewing a denial of a motion to dismiss under Rule 12(b)(6), we must accept those allegations as true. Our disagreement is about whether plaintiffs have a civil remedy available to them under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), which allows a victim of a constitutional violation to sue a responsible federal officer or employee for damages.

If a victim of torture by the Syrian military can find his torturer in the United States, U.S. law provides a civil remedy against the torturer. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note. If the victim is killed, the same U.S. law provides his survivors a civil remedy. The same could be said for victims of torture by any other government in the world — any other, that is, except one. Under the majority's decision, civilian U.S. citizens who are tortured or worse by our own military have no such remedy. That disparity attributes to our government and to our legal system a degree of hypocrisy that is breathtaking.

The majority's result is not required or justified by Supreme Court precedent, and it fails to carry out the judiciary's responsibility under Supreme Court precedents to protect individual rights under the Constitution, including a right so basic as not to be tortured by our government. Although the majority opinion is written

in terms of whether to "create" a cause of action under *Bivens*, the majority in effect creates a new absolute immunity from *Bivens* liability for all members of the U.S. military. This new absolute immunity applies not only to former Secretary Rumsfeld but to all members of the military, including those who were literally hands-on in torturing these plaintiffs. It applies to military mistreatment of civilians not only in Iraq but also in Illinois, Wisconsin, and Indiana.

The majority's immunity is even more sweeping than the government and former Secretary Rumsfeld sought. To find this immunity, the majority relies on *Chappell v. Wallace*, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983), and *United States v. Stanley*, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987), which each held that soldiers may not sue under *Bivens* for injuries "incident to service." The majority decision takes *Chappell* and *Stanley* far beyond their holdings and rationales, granting the entire U.S. military an exemption from all *Bivens* liability, even to civilians. The majority decision is also difficult to reconcile with *Mitchell v. Forsyth*, 472 U.S. 511, 520-24, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), which held that national security considerations did not entitle another former cabinet officer to absolute immunity in a *Bivens* action.

For these reasons, and because this appeal raises such fundamental issues about the relationship between the American people and our government, I respectfully dissent. The panel opinion explained in detail why the civil immunity sought by defendants is not justified for a

claim for torture or worse in a U.S. military prison in Iraq. *Vance v. Rumsfeld*, 653 F.3d 591 (7th Cir. 2011). I will not repeat here all the details from the panel opinion. Instead, I address the majority's new grant of an even broader immunity and explain the core Supreme Court precedents, the relevant legislation, and the reasoning that should allow plaintiffs to pursue their claims for torture. Part I first reviews the familiar elements of plaintiffs' *Bivens* claims and then explains the errors in the majority's reliance on *Chappell* and *Stanley*, as well as the import of *Mitchell* and other cases rejecting absolute immunity in similar *Bivens* cases. Part I then turns to the legislation indicating that Congress has assumed that *Bivens* applies to cases like this one, as well as the anomalous consequences of the majority's decision. Finally, the opinion addresses briefly in Part II the sufficiency of the allegations against Mr. Rumsfeld personally and in Part III the question of qualified immunity.[1]

I. Civilian Remedies Under Bivens for Military Wrongdoing

Before this en banc decision and the Fourth Circuit's recent decision in *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), there should have been no doubt that a civilian U.S. citizen prisoner tortured by a federal official, even a military officer, could sue for damages under *Bivens*. *See Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L.

1. I continue to agree with the panel decision directing dismissal of the plaintiffs' claims against the United States for deprivation of their property in No. 10-2442, adopted by Part II of the majority opinion. *See Vance*, 653 F.3d at 626-27.

Ed. 2d 15 (1980) (allowing *Bivens* claim against prison officials who were deliberately indifferent to prisoner's serious medical needs); *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (holding that military police officer was entitled to qualified immunity on civilian's *Bivens* claim for excessive force, without suggesting that defendant's status as military officer alone would bar *Bivens* action). The majority rejects this conclusion, at least for torture by military personnel, by asking the wrong question. Plaintiffs are not asking this court to *create* a cause of action. It already exists. It is the defendants who have sought and have now been given a new, extraordinary, and anomalous *exception* to *Bivens*.

A. The Familiar Elements of Plaintiffs' Bivens Claims

All the key elements of plaintiffs' *Bivens* claims are well established under Supreme Court precedent: (1) prisoners may sue for abuse by federal officials; (2) civilians may sue military personnel; (3) the Constitution governs the relationship between U.S. citizens and their government overseas; and (4) claims against current and former cabinet officials are permitted. Permitting a *Bivens* claim for torture by military personnel should not be controversial, at least barring interference with combat or other highly sensitive activity, which is not involved here.

First, of course, *Bivens* is available to prisoners who have been abused or mistreated by their federal jailors, and that reasoning certainly extends to the torture

alleged here. In *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15, the Supreme Court reversed dismissal of a complaint in which a deceased prisoner's representative sued for violation of the Eighth Amendment prohibition on cruel and unusual punishment, in that case through an alleged deliberate denial of needed medical care. Since *Carlson*, federal courts have routinely considered prisoners' constitutional claims against federal prison officials. *E.g., Bagola v. Kindt*, 131 F.3d 632 (7th Cir. 1997) (district court properly heard *Bivens* claim alleging injury as part of prison work program where workers' compensation program did not provide adequate safeguards to protect prisoner's Eighth Amendment rights); *Del Raine v. Williford*, 32 F.3d 1024 (7th Cir. 1994) (recognizing prisoner's *Bivens* claim alleging that he was forced to live in bitterly cold cell). As Judge Wood points out, the torture alleged here lies at the extreme end of abuse that violates the Constitution.

Second, under *Bivens* civilians may sue military personnel who violate their constitutional rights. For example, *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272, an important but now overruled case on procedures for deciding qualified immunity, was a *Bivens* claim for excessive force brought by a civilian against a military police officer. *Saucier* did not hint that the civilian could not sue the military police officer for violations of clearly established constitutional rights. If the majority were correct, though, the Supreme Court in *Saucier* should have simply rejected the *Bivens* claim altogether, not explored the nuances of procedures for deciding qualified immunity.

Circuit and district courts have decided many *Bivens* cases brought by civilians against military personnel. While such claims often fail on the merits or for other reasons, the fact that a civilian has sued a military official is not a basis for denying relief under *Bivens*. If the majority here were right, though, all such cases should have been dismissed on the new and simple theory that military personnel are altogether immune from *Bivens* liability. *See*, *e.g.*, *Case v. Milewski*, 327 F.3d 564 (7th Cir. 2003) (civilian claim against military officers for Fourth and Fifth Amendment violations); *Morgan v. United States*, 323 F.3d 776 (9th Cir. 2003) (civilian claim against military police for search of vehicle); *Roman v. Townsend*, 224 F.3d 24 (1st Cir. 2000) (civilian claim against military police officer and Secretary of the Army for improper arrest and treatment in detention); *Applewhite v. United States Air Force*, 995 F.2d 997 (10th Cir. 1993) (civilian claim against military investigators for unlawful search and removal from military base); *Dunbar Corp. v. Lindsey*, 905 F.2d 754, 761 (4th Cir. 1990) (civilian claim against military officers for deprivation of property without due process of law); see also *Newton v. Lee*, 677 F.3d 1017, 1028 (10th Cir. 2012) (civilian claim against state National Guard officers under § 1983 for due process violation); *Meister v. Texas Adjutant General's Dep't*, 233 F.3d 332, 338 (5th Cir. 2000) (civilian employee of state National Guard could bring constitutional claims against officers under § 1983); *Wright v. Park*, 5 F.3d 586 (1st Cir. 1993) (whether National Guard technician could bring *Bivens* claim depended on whether he was deemed civilian or military personnel); *Fields v. Blake*, 349 F. Supp. 2d 910, 921 (E.D. Pa. 2004) (summary judgment on the merits of

civilian's claim against military officer for unconstitutional arrest); *Willson v. Cagle*, 711 F. Supp. 1521, 1526 (N.D. Cal. 1988) (concluding that "a *Bivens* action may potentially lie against military officers and civilian employees of the military" for protesters injured when a military munitions train collided with them), *aff'd mem.*, 900 F.2d 263 (9th Cir. 1990) (affirming denial of qualified immunity); *Barrett v. United States*, 622 F. Supp. 574 (S.D.N.Y. 1985) (allowing civilian's *Bivens* claim to proceed against military officials for their alleged concealment of their roles in the creation and administration of an army chemical warfare experiment), *aff'd*, 798 F.2d 565 (2d Cir. 1986).[2]

Third, when civilian U.S. citizens leave the United States, we take with us the constitutional rights that protect us from our government. In *Reid v. Covert*, 354 U.S. 1, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957), the Supreme Court held that civilian members of military families could not be tried in courts martial. Justice Black wrote for a plurality of four Justices:

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with

2. Among the cited cases, *Newton*, *Meister*, and *Wright* involved claims under 42 U.S.C. § 1983 against military officials in state National Guards, but the courts in those cases tracked the *Bivens* analysis under the *Chappell*, *Stanley*, and *Feres* cases discussed below.

> all the limitations imposed by the Constitution. *When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.* This is not a novel concept. To the contrary, it is as old as government.

Id. at 5-6 (emphasis added). That general proposition remains vital, as reaffirmed in *Boumediene v. Bush*, holding that aliens held as combatants at Guantanamo Bay may invoke the writ of habeas corpus to challenge their detention: "Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'" 553 U.S. 723, 765, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008), quoting *Murphy v. Ramsey*, 114 U.S. 15, 44, 5 S. Ct. 747, 29 L. Ed. 47 (1885); see also *Munaf v. Geren*, 553 U.S. 674, 688, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008) (holding that civilian U.S. citizens held in U.S. military custody in Iraq could petition for a writ of habeas corpus in federal district court). Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) (holding that non-resident alien could not invoke Fourth Amendment to challenge search by U.S. officials in foreign country).[3]

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3. The majority cites *Verdugo-Urquidez* to show it is "not settled" whether the Constitution applies to interrogation outside the United States, slip op. at 7-8, but the majority ignores the fact that the party in that case was a non-resident alien, not a citizen or national of the United States. *Reid* and *Munaf* show it is well

Fourth, our laws permit suit against public officials for actions taken while serving at the highest levels of the United States government. The majority expresses great concern over former Secretary Rumsfeld's personal finances and how the risk of *Bivens* liability might affect other senior government officials as they perform their public duties. The policy balances that are always part of *Bivens* analysis are no doubt delicate. The defendant's former rank, however, is not a basis for rejecting these plaintiffs' claims. The Supreme Court has repeatedly permitted *Bivens* actions against other cabinet members. *See*, *e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (former Attorney General was entitled to qualified immunity, not absolute immunity, from damages suit arising out of national security-related actions); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (senior presidential aides are entitled to qualified immunity, not absolute immunity, from liability when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"); *Halperin v. Kissinger*, 606 F.2d 1192, 196 U.S. App. D.C. 285 (D.C. Cir. 1979) (senior executive branch officials, including a former President, were not absolutely immune from suit for damages by citizen alleging an unconstitutional wiretap), *aff'd in relevant part*, 452 U.S. 713, 101 S. Ct. 3132, 69 L. Ed. 2d 367 (1981); *Butz v. Economou*, 438 U.S.

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established that U.S. citizens do not abandon their constitutional rights with respect to their own government when leaving U.S. borders. This dicta from our court should most definitely not be used to justify a defense of qualified immunity by federal personnel who violate constitutional rights in overseas interrogations.

478, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978) (Secretary of Agriculture and other executive branch officials ordinarily may be entitled to qualified, not absolute, immunity from constitutional claims).

B. Bivens Cases Involving the Military and National Security

Without coming to grips with the principles and precedents supporting plaintiffs' claims here, the majority errs by relying on *Chappell v. Wallace* and *United States v. Stanley* to exempt any military personnel from civil liability for violating the constitutional rights of civilians. The Supreme Court itself has never adopted or even suggested such a sweeping view.

Chappell was the easier case, in which enlisted sailors sued their direct superior officers under *Bivens* for race discrimination. In dismissing those claims, the Court was guided by the *Feres* doctrine under the Federal Tort Claims Act, which bars military personnel from suing for injuries "incident to service." *See Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950). Relying on *Feres*, the *Chappell* Court held unanimously that the sailors could not sue their direct superior officers under *Bivens*. 462 U.S. at 305. Nothing in *Chappell* hinted that its reasoning would apply to civilians whose constitutional rights were violated by military personnel, and it is well established that the *Feres* doctrine does not apply to claims by civilians. *E.g., United States v. Brown*, 348 U.S. 110, 75 S. Ct. 141, 99 L. Ed. 139 (1954); *M.M.H. v. United States*, 966 F.2d 285, 288-89 (7th Cir. 1992) (*Feres*

doctrine did not apply to veteran's negligence claim based on Army's negligence after veteran's discharge); *Rogers v. United States*, 902 F.2d 1268, 1273-74 (7th Cir. 1990). The reliance on the *Feres* doctrine is a strong signal that *Chappell* does not reach claims by civilians and that the majority errs by relying upon it here.

Stanley also provides no basis for barring *Bivens* claims by civilians. While plaintiff Stanley was serving in the Army, he was exposed to LSD without his consent in secret experiments, resulting in serious harm to him and his family. He sued under *Bivens* for violation of his constitutional rights. The potential individual defendants would have included not his direct superior officers but other military and civilian personnel. A closely divided Supreme Court held that he could not sue under *Bivens* because his injuries arose incident to his military service, essentially applying the full extent of the *Feres* "incident to service" standard to *Bivens* claims by military personnel. 483 U.S. at 684 ("We hold that no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service.'"), quoting *Feres*, 340 U.S. at 146. *Stanley* teaches that the plaintiff's status as military or civilian is decisive in a *Bivens* case, not that military defendants cannot be sued under *Bivens*.

The majority's use of *Stanley* to bar torture claims by *civilians* depends on dicta severed from context: "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." Slip op. at 11-12, quoting 483 U.S. at 683. That sentence cannot reasonably be read to have extended a blanket exemption to all U.S. military personnel for *Bivens* liability to civilians. That was not the issue before the Court, and the Court would not have casually embraced such a sweeping rule in dicta. Even if it had, surely someone would have noticed. Until the majority's decision here, though, no other circuit court has read *Chappell* and *Stanley* to produce this extraordinary result.[4]

We should focus instead on the Supreme Court's more relevant decisions in *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411, and *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974). In *Mitchell*, the Court held that former Attorney General Mitchell was not entitled to absolute immunity from *Bivens* liability for ordering unconstitutional surveillance of the plaintiff

4. Even the Fourth Circuit's opinion in *Lebron* did not go as far as the majority. *Lebron* rejected *Bivens* claims by a U.S. citizen held in military custody after the President himself had designated the plaintiff an enemy combatant. First, the *Lebron* court emphasized the enemy combatant designation. 670 F.3d at 549. Second, the plaintiff had dropped claims against the lower-level personnel with hands-on responsibility for his treatment. He was pursuing only high-level policy claims that raised "fundamental questions incident to the conduct of armed conflict." *Id.* at 550. The plaintiffs in this case, by contrast, were employed by U.S. military contractors and were trying to help the FBI investigate corruption in the U.S. mission to Iraq. They assert claims that are perfectly consistent with U.S. law and stated military policy on interrogation techniques and treatment of prisoners. Plaintiffs contend here that the defendants violated military policy and U.S. statutes, as well as the Constitution.

even though Mr. Mitchell argued he acted for reasons of national security. 472 U.S. at 520-24. The Court observed that the national security context counseled in favor of permitting the suit. Because national security tasks are carried out in secret, "it is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation," *id.* at 522, and the "danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity," *id.* at 523.

The *Mitchell* Court anticipated and firmly rejected the majority's arguments for absolute immunity based on concerns about the chilling effect that the prospect of personal liability might have for even senior government officials. The Court held instead that qualified immunity would strike the correct balance between deterring clear violations of constitutional rights and giving government officials room for discretionary judgment and reasonable mistakes:

> "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate . . . ." [*Harlow v. Fitzgerald*, 457 U.S. 800, 819, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (emphasis added).] This is as true in matters of national security as in other fields of government action. We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.

472 U.S. at 524. That reasoning applies directly to this case and to the Secretary of Defense and other military personnel in the operation of military prisons.

Scheuer v. Rhodes arose from the fatal shots that National Guardsmen fired at protesting students at Kent State University in 1970. The plaintiffs alleged constitutional violations in a suit under 42 U.S.C. § 1983 against the state's governor and several officers in the National Guard. The defendants argued they were entitled to absolute immunity when using military force to restore public order. The Supreme Court unanimously rejected that defense and held that the defendants were entitled to only qualified immunity for these claims by civilians. 416 U.S. at 248-49. Because the defendants were state officials, the suit was under section 1983 rather than *Bivens*, but for present purposes the key point is that the use of military force against civilians was subject to only qualified immunity, not the absolute immunity that the majority in this case grants to military personnel.[5]

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5. The majority's discussion of *Chappell* and *Wallace* begins with what in football would be called a head-fake, suggesting mistakenly that because plaintiffs Vance and Ertel were civilians working for a military contractor, they might be deemed soldiers for purposes of *Bivens, Chappell*, and *Stanley*. Slip op. at 10-11. Under the statutes cited by the majority, plaintiffs could have been subject to *civilian* U.S. criminal law if they had been suspected of committing a crime in Iraq. *See* 18 U.S.C. §§ 3261, 3267(1)(A)(iii). Section 3261 does not treat them as soldiers or make them subject to military discipline or the Uniform Code of Military Justice. Also, of course, no one relied on section 3261 to detain plaintiffs, let alone to justify torturing them.

C. Legislation and "Special Factors"

In addition to reading *Chappell* and *Stanley* too broadly, the heart of the majority opinion converts the second step of *Bivens* analysis — looking at "special factors" that might counsel hesitation before authorizing the claim — into a search for evidence that Congress has expressly authorized *Bivens* actions against U.S. military personnel. This method of analysis fails to follow the Supreme Court's instructions for considering new questions about the scope of the *Bivens* remedy. The first step is to consider "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie v. Robbins*, 551 U.S. 537, 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007). The short answer is no. The defendants do not suggest that there is any alternative remedial scheme at all comparable to a potential *Bivens* remedy in the way that Social Security procedures and remedies in *Schweiker* or the federal civil service procedures and remedies in *Bush* provided substitute remedies that foreclosed *Bivens* remedies. *See Schweiker v. Chilicky*, 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988); *Bush v. Lucas*, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983).

Because there is no sufficient alternative, we should proceed to the second step of the *Bivens* test as described in *Bush v. Lucas*: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however,

to any special factors counselling hesitation before authorizing a new kind of federal litigation." 462 U.S. at 378, quoted in *Wilkie*, 551 U.S. at 550.

The focus before the panel was on torture claims arising from military custody in the controlled, non-combat environment of military prisons in an overseas war zone. That context requires careful balancing under the second step of the *Bivens* analysis, and the panel opinion discussed the relevant considerations for rejecting the defense arguments based on the narrower rationale they offered. *See Vance*, 653 F.3d at 617-26. Because the en banc majority's approach sweeps so much more broadly than the defendants' own arguments, I will not repeat the panel's discussion here. The majority reviews a wide range of statutes and finds in them congressional disfavor for *Bivens* actions against military personnel generally, based on an inference that Congress would prefer to have compensation for wrongs done by the military come from the Treasury rather than the judgments against individual personnel.

When we look closely at the statutes, however, it should become clear that Congress has legislated on the assumption that U.S. nationals, at least, should have *Bivens* remedies against U.S. military personnel in most situations.

First, let's look at legislation on the subject of torture. Torture is a crime under international and U.S. law. U.S. law provides expressly for civil remedies for victims of torture by government officials of *other* nations in the Torture Victim Protection Act of 1991, Pub. L. 102-256,

codified as note to the Alien Tort Statute, 28 U.S.C. § 1350. Section 2(a) of that Act provides a cause of action for damages against a person who, "under actual or apparent authority, or color of law, of any foreign nation," subjects another person to torture or extrajudicial killing. Section 2(b) requires U.S. courts to decline to hear such claims "if the claimant has not exhausted adequate and available remedies in the place" where the conduct occurred. Under the Act, if an alien has been tortured by her own government, and if that foreign government provides no adequate and available civil remedies, then a U.S. court can hear the case against a defendant found here.

Under the majority holding here, however, the same U.S. courts are closed to U.S. citizens who are victims of torture by U.S. military personnel. The majority thus errs by attributing to Congress an intention to deny U.S. civilians a right that Congress has expressly extended to the rest of the world. A victim of torture by the Syrian military, for example, can sue in a U.S. court, but a U.S. citizen tortured by the U.S. military cannot. That conclusion should be deeply troubling, to put it mildly. We should not attribute that improbable view to Congress without a far more compelling basis than the majority offers.

To illustrate this anomaly further, suppose another country has enacted its own law identical to the U.S. Torture Victim Protection Act. Under the majority's reasoning, there are no "adequate and available remedies in the place" where the conduct occurred (a U.S. military base). If Mr. Rumsfeld could be found visiting a country with its own TVPA (so he could be served with process),

plaintiffs Vance and Ertel could sue him in that country under its TVPA because U.S. law would provide no remedy. Surely the Congress that enacted the Torture Victim Protection Act would rather have such claims against U.S. officials heard in U.S. courts.

In fact, the U.S. government has relied on the availability of *Bivens* claims in cases of government torture to help show that the U.S. is complying with our obligations under the United Nations Convention Against Torture. A United Nations committee overseeing compliance questioned the fact that the United States had enacted virtually no new legislation to implement the Convention Against Torture. *The State Department assured the United Nations that the Bivens remedy is available to victims of torture by U.S. officials.* The State Department made no exception for military personnel, who were the principal focus of the U.N. inquiry. *See* United States Written Response to Questions Asked by the United Nations Committee Against Torture, ¶ 5 (Apr. 28, 2006) (Question 5), available at http://www.state.gov/g/drl/rls/68554.htm (last accessed Oct. 25, 2012); see also *Arar v. Ashcroft*, 585 F.3d 559, 619 (2d Cir. 2009) (en banc) (Parker, J., dissenting) (pointing out this reliance on *Bivens*).

In addition to the Torture Victim Protection Act, Congress acted in the Detainee Treatment Act of 2005 to grant only *limited* (good faith) immunity to U.S. personnel, including military personnel, in lawsuits by alien detainees. For those alien plaintiffs, Congress opted to regulate — not prohibit — civil damages claims against

military officials accused of torturing aliens suspected of terrorism. Congress created a good-faith defense in civil and criminal cases for officials who believed that their actions were legal and authorized by the U.S. government:

> In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government [for engaging in practices involving detention and interrogation of alien detainees suspected of terrorism] it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful . . . . Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.

42 U.S.C. § 2000dd-1(a). This express but limited defense against civil claims by alien detainees suspected of terrorism is a strong indication that Congress has not closed the door on judicial remedies that are "otherwise available," certainly for U.S. citizens, even though it chose not to wrestle with just what those remedies might be.[6]

6. The majority cites the Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), codified as 28 U.S.C. § 2241(e), 120 Stat. 2600, 2635-36 (2006), enacted after Vance and Ertel were

Congress took the trouble to grant limited immunity in civil actions brought by aliens. Just what potential civil liability did Congress have in mind? *Bivens* suits are the most obvious candidate.

To avoid this reasoning, the majority misses the mark by suggesting that Congress might have been worried about suits brought by aliens under the Torture Victim Protection Act, the law of the nation where the torture occurred, or the Alien Tort Statute. Slip op. at 16-17. First, the Torture Victim Protection Act applies only to torture carried out "under actual or apparent authority, or color of law, of any *foreign* nation." The Act does not apply at all to torture under color of U.S. law. Second, if an alien were to sue under the law of the nation where the torture took place, it is not likely that the other nation's law would take into account a defense created by U.S. law. As for the Alien Tort Statute, such a claim by an alien against a U.S. official would be a fairly exotic creature, especially as compared to the familiar *Bivens* doctrine.

Young doctors are taught, "When you hear hoofbeats, think horses, not zebras." The point is that when trying to explain an unknown phenomenon, it's usually sensible to look first to the familiar and only later to the exotic. That reasoning applies here. When Congress created the

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in custody. In that Act, Congress prohibited federal courts from exercising jurisdiction over a civil claim by an alien "properly detained as an enemy combatant." That narrow prohibition clearly does not apply to Vance or Ertel, and the very narrowness of it indicates that Congress has not acted to bar actions like this one, by U.S. citizens who were not enemy combatants.

limited good-faith immunity from civil claims by aliens in the Detainee Treatment Act, *Bivens* had been a major part of U.S. law for 40 years. If Congress had wanted to grant absolute immunity against claims by aliens, it would have been easy to draft different language. Congress chose instead to grant qualified immunity in suits by alien detainees, a policy decision that was consistent with the Supreme Court's reasoning in *Mitchell v. Forsyth*, 472 U.S. at 523-24.

The majority reasons that the DTA's grant of qualified immunity in suits brought by aliens does not imply that similar remedies would be available to U.S. citizens. By that route, the majority reaches another odd result. Under the majority's reasoning, aliens tortured by the U.S. military in violation of international law have more rights than U.S. citizens: Aliens could sue U.S. military officers for torture (under *Bivens*, or the Alien Tort Statute, or both). They would still need to overcome the DTA's qualified immunity, but under the majority's reading, U.S. citizens cannot bring such a suit at all. That reading of congressional intent is highly improbable. Reading the DTA, it is more reasonable to attribute to Congress the assumption that courts would allow U.S. citizens to pursue relief under *Bivens*, subject to the familiar qualified immunity defense.

Looking to other legislation, the majority criticizes plaintiffs for not having sought relief under the Military Claims Act, 10 U.S.C. § 2733, or the Foreign Claims Act, 10 U.S.C. § 2734, though the majority wisely concedes at least for the sake of argument that these statutes

are not full substitutes for a *Bivens* remedy. Slip op. at 15. This criticism is misguided, as implied by the fact that even the defendants did not rely on these statutes at all before the en banc phase of the case. At the most basic level, those laws simply do not apply to claims for constitutional violations. 32 C.F.R. § 536.42. Nor do they apply to intentional torts, including assault, battery, and false imprisonment. 32 C.F.R. § 536.45(h). Plaintiffs would have been wasting everyone's time by asserting claims under either Act.[7]

D. The Role of Citizenship in Constitutional Remedies

The panel relied on plaintiffs' status as U.S. citizens to distinguish *Arar v. Ashcroft*, 585 F.3d 559, and *Ali v. Rumsfeld*, 649 F.3d 762, 396 U.S. App. D.C. 381 (D.C. Cir. 2011), where plaintiffs asserting torture claims under *Bivens* were aliens. The panel issued its decision before *Lebron*, 670 F.3d 540, and *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012), went further and dismissed similar *Bivens* claims by U.S. citizens. The majority describes the panel's distinction between citizens and aliens as "offensive to our allies" and "offensive to our own principles of equal

7. Sections 536.42 and 536.45(h) apply to claims under both the MCA and the FCA. Even if those laws could apply to these plaintiffs' allegations, relief under the MCA and FCA is unlike the remedies in *Schweiker* and *Bush* because it is left to the discretion of the Secretary of the Army or Defense and there is no right to judicial review. Also, plaintiffs Vance and Ertel probably would not have qualified as "inhabitants" of a foreign country as required for the limited and discretionary relief under the FCA. *See* 10 U.S.C. § 2734(a).

treatment." Slip op. at 18. The prohibitions against torture are matters of international law as well as U.S. law, and those prohibitions reflect basic and universal human rights. That does not mean, however, that citizenship is irrelevant in deciding about remedies for torture. If the U.S. government harms citizens of other nations, they can turn to their home governments to stand up for their rights. That is not true for these U.S. citizens alleging torture by their own government. No other government can stand up for them.

Other federal courts have faced difficult issues when alien enemy combatants have sought protection in civilian U.S. courts. U.S. courts have been reluctant to extend constitutional protections to such parties or to examine too closely the actions of our military in armed conflicts. We do not need to decide those difficult issues in this case, which was brought not by members of al Qaeda or designated enemy combatants, but by U.S. citizens working for military contractors and trying to help the FBI uncover corrupt dealings that were endangering U.S. troops. The enemy combatant cases are difficult, but we should not let those difficulties lead us to turn our backs on legitimate constitutional claims of U.S. citizens.

The Supreme Court has relied on the difference between citizens and aliens in deciding whether to allow access to civilian U.S. courts in similar contexts. We should decide this case in favor of allowing these U.S. citizens to proceed, even if we might be reluctant to extend such rights to enemy combatants or other alien detainees in Iraq or other war zones.

When considering actions our government takes overseas, there is room to distinguish between the government's duties to its own citizens and duties it may have to other persons. As the Supreme Court concluded in *Reid*: "When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." 354 U.S. at 6 (plurality opinion of Black, J.); see also *Kar v. Rumsfeld*, 580 F. Supp. 2d 80, 83 (D.D.C. 2008) (finding that the "Fourth and Fifth Amendments certainly protect U.S. citizens detained in the course of hostilities in Iraq"), citing *Reid* and *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974) ("That the Bill of Rights has extraterritorial application to the conduct of federal agents directed at United States citizens is well settled.").

In fact, the Supreme Court has distinguished between citizens and aliens in deciding whether remedies were available in civilian courts for U.S. military detention overseas. *In Johnson v. Eisentrager*, 339 U.S. 763, 785, 70 S. Ct. 936, 94 L. Ed. 1255 (1950), the Supreme Court held that enemy aliens (Germans working in Asia to aid Japan after the German surrender in 1945) were not entitled to seek writs of habeas corpus in civilian U.S. courts. *Eisentrager* repeatedly made clear that its holding was limited to aliens during wartime and did not apply to U.S. citizens. For example: "our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens . . . ." *Id.* at 769. "With the citizen we are now little concerned, except to set his case

apart as untouched by this decision and to take measure of the difference between his status and that of all categories of aliens. Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection." *Id.*[8]

More recently, the Supreme Court relied on this distinction between aliens and citizens in *Munaf v. Green*, 553 U.S. 674, 685-88, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008), holding unanimously that U.S. citizens in U.S. military custody in Iraq were entitled to seek habeas corpus relief in U.S. civilian courts. *Munaf* distinguished *Hirota v. MacArthur*, 338 U.S. 197, 69 S. Ct. 197, 93 L. Ed. 1902 (1948), which held that aliens in military custody overseas could not seek habeas relief in civilian courts. To support its use of the difference between citizens and aliens, the *Munaf* Court cited *Eisentrager, Rasul v. Bush*, 542 U.S. 466, 486, 124 S. Ct. 2686, 159 L. Ed. 2d

8. Justice Jackson's reference in *Eisentrager* to the Apostle Paul fits surprisingly well with today's case. *See* Acts 25:11 (Paul invokes Roman citizen's right to appeal to emperor); Acts 22:2529 (Paul invokes his Roman citizenship as defense against being flogged before he was convicted of any crime); Acts 16:3539 (upon being told he was free to leave prison, "Paul replied, 'They have beaten us in public, uncondemned, men who are Roman citizens, and have thrown us into prison; and now are they going to discharge us in secret? Certainly not! Let them come and take us out themselves.' The police reported these words to the magistrates, and they were afraid when they heard that they were Roman citizens; so they came and apologized to them.").

548 (2004) (Kennedy, J., concurring in judgment), and the D.C. Circuit's opinions in *Munaf* itself. 553 U.S. at 688. (In fact, the government did not even try to argue in *Munaf* that U.S. citizens in military custody in Iraq could not have access to civilian U.S. courts. The government instead argued unsuccessfully that the petitioners were in international custody rather than U.S. custody. *Id.* at 687-88.)

Distinguishing between citizens and aliens is not beyond controversy, but in these sensitive contexts involving overseas activity, it is sometimes decisive. In this case brought by U.S. citizens, we do not need to decide the different issues posed by plaintiffs who are alien enemy combatants. But if we follow the majority's route of equal treatment, notwithstanding *Munaf, Eisentrager*, and *Rasul*, we should not treat these U.S. citizens as if they were known terrorists and enemy combatants who are subject to torture, "extraordinary rendition," and indefinite detention. Our law's treatment of U.S. citizens should not be brought down to the floor that we are now tolerating for the most dangerous foreign terrorists.

II. Personal Responsibility

As explained above, the majority opinion erroneously grants absolute immunity to U.S. military personnel from civilians' *Bivens* suits, not only for former Secretary Rumsfeld and other senior officials but also for lower-ranking personnel, including even those who were literally hands-on in torturing the plaintiffs. Under that reasoning, the majority need not reach the issue of personal responsibility for any defendant. Also, since the panel

decision, plaintiffs have been able to learn the identities of the personnel directly responsible for torturing them. Because plaintiffs now have the information they would need to amend their complaint to add those individuals as defendants, the issue of former Secretary Rumsfeld's personal responsibility has less practical significance now than it did in the district court or before our court's panel. Nevertheless, because the majority also reaches the issue, and because the question must be addressed to affirm the district court's denial of dismissal, it must be addressed here.

I agree with the majority's general statements of the law of personal responsibility under *Bivens* and 42 U.S.C. § 1983. Responsibility is personal, not vicarious. Where we differ is in the application of those general principles to plaintiffs' second amended complaint. The majority offers the following examples:

> The Director of the FBI allows field agents to carry guns and permits them to use deadly force. Yet if an agent shoots a fleeing suspect in the back, violating the fourth amendment, see *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), the Director is not liable just because the gun, issued under the Director's policy, was a cause of the injury. Similarly for a police chief who establishes a K-9 squad, if a dog bites a bystander, or who authorizes search or arrest based on probable cause, if the police then search or arrest *without* probable cause.

Slip op. at 20-21. The majority is correct about those examples, but they miss the target of plaintiffs' actual allegations. To sharpen the issue, suppose instead that a local police chief or even the FBI director issued a policy that authorized the use of deadly force against any fleeing suspect. The policy itself would be unconstitutional under *Tennessee v. Garner*. The chief or director who authorized that unconstitutional use of force could certainly be held personally responsible under section 1983 or *Bivens* to a person shot by an officer following the policy.

The allegations in this complaint are closer to the latter example than to the majority's examples. The plaintiffs may or may not be able to prove their allegations — it now is unlikely they will ever have the chance to try — but they allege that the use of harsh interrogation techniques amounting to torture was the subject of Mr. Rumsfeld's personal attention. Cmplt. ¶¶ 217, 244, 252. They allege that he issued policies or orders contrary to governing U.S. law but authorizing the torture they suffered. ¶ 244. That should be enough to withstand a motion to dismiss under Rule 12(b)(6).

In *Ashcroft v. Iqbal* itself, the Attorney General and the Director of the FBI conceded that they would have been subject to personal liability for actions of their subordinates if they "had actual knowledge of the assertedly discriminatory nature of the classification of suspects being of 'high interest' and that they were deliberately indifferent to that discrimination." 556 U.S. 662, 690-91, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (Souter, J., dissenting). We and other circuits have taken that

approach as well. *See T.E. v. Grindle*, 599 F.3d 583, 590 (7th Cir. 2010) (affirming denial of summary judgment for school principal who failed to investigate or take action in response to complaints indicating teacher was sexually abusing students); accord, *McCreary v. Parker*, 456 Fed. Appx. 790, 793 (11th Cir. 2012) (affirming denial of qualified immunity where plaintiff alleged sheriff was deliberately indifferent to known dangers resulting from overcrowding policy in jail); *Wagner v. Jones*, 664 F.3d 259, 275 (8th Cir. 2011) (reversing summary judgment grant of qualified immunity for defendant law school dean where evidence indicated that dean was on notice that faculty's negative hiring recommendation was based on plaintiff's political beliefs and associations); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (reversing dismissal; superior's knowledge of abuse of prisoners combined with inaction allowed inference of deliberate indifference at the pleading stage); *Dodds v. Richardson*, 614 F.3d 1185 (10th Cir. 2010) (affirming denial of summary judgment of a claim against county sheriff for adopting policy that would violate detainees' rights). *Iqbal's* different approach to pleading an individual's *discriminatory* intent does not address the issue of personal responsibility for an unconstitutional practice or policy asserted here. *See Vance*, 653 F.3d at 599 n.5.

The case is before us on an interlocutory appeal from the denial of a motion to dismiss under Rule 12(b)(6). The allegations against Mr. Rumsfeld satisfy the plausibility standard of *Iqbal, Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 167 L.

Ed. 2d 1081 (2007). And even if they did not, the plaintiffs should be allowed to amend their pleadings, especially in view of the uncertainty of federal pleading standards after *Iqbal* and the fact that the district court and panel found their present pleadings sufficient to state plausible claims. *See, e.g., Bausch v. Stryker Corp.*, 630 F.3d 546, 562 (7th Cir. 2010); *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 666 (7th Cir. 2007). Consider two possible amendments, for example. After years of delay, the government finally complied with the district court's order to identify the individuals who slammed plaintiffs into walls, deprived them of sleep, food, water, and adequate clothing, and who subjected them to extreme cold, though after plaintiffs have been seeking the needed information in the district court for nearly six years, the government still has not provided sufficient information to serve any of those individuals with process. If this stone-walling finally ended, plaintiffs could amend their complaint to name at least some of those individuals. (Whether plaintiffs could invoke equitable tolling or other doctrines to overcome a statute of limitations defense based on a concerted effort to conceal identities of their torturers is a different question, especially in light of plaintiffs' diligence over nearly six years, and one we should not try to decide now.) Or suppose for purposes of argument that plaintiffs could even produce an order personally signed by Mr. Rumsfeld ordering that these two plaintiffs, in particular, be treated as they allege they were treated. Either amendment should be enough to allow plaintiffs to proceed, but under the majority's erroneous view of military immunity from *Bivens* liability, both amendments would be futile.

III. Qualified Immunity

In *Mitchell v. Forsyth*, the Supreme Court rejected absolute immunity for a former cabinet member who said he had acted to protect national security. Qualified immunity was sufficient: "'Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate . . . .'" 472 U.S. at 524, quoting *Harlow v. Fitzgerald*, 457 U.S. at 819 (emphasis added in *Mitchell*). The panel concluded that plaintiffs had alleged violations of clearly established constitutional law. Even the defendants do not seriously argue that prolonged deprivation of sleep, food, water, and adequate clothing, exposure to extreme cold, and hooded "walling" do not violate clearly established constitutional law. *See Vance*, 653 F.3d at 606-11. On rehearing, defendants have not disagreed with that analysis. (The argument they have labeled "qualified immunity" addresses only whether plaintiffs sufficiently alleged Mr. Rumsfeld's personal responsibility.) The majority also does not question the substantive constitutional law or qualified immunity, so there is no need for further discussion of those points.

CONCLUSION

Our courts have a long history of providing damages remedies for those whose rights are violated by our government, including our military. In *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178-79, 2 L. Ed. 243 (1804), the Supreme Court held that the commander of a warship was liable to the owner of a neutral vessel seized pursuant

to orders from the President but in violation of a statute. *See also Iqbal*, 556 U.S. at 676, citing *Dunlop v. Munroe*, 11 U.S. (7 Cranch) 242, 268, 3 L. Ed. 329 (1812) (in case against postmaster, federal official's liability "will only result from his own neglect in not properly superintending the discharge" of his subordinates' duties); *Bivens*, 403 U.S. at 395-97 (collecting cases showing that damages against government officials are historically the remedy for invasion of personal interests in liberty, and quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803): "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

The majority's grant of absolute civil immunity to the U.S. military for violations of civilian citizens' constitutional rights departs from that long heritage. We leave citizens legally defenseless to serious abuse or worse by their own government. I recognize that wrongdoers in the military are still subject to criminal prosecution within the military itself. Relying solely on the military to police its own treatment of civilians fails to use the government's checks and balances that preserve Americans' liberty. The legal foundations for the claims before us are strong and in keeping with the Supreme Court's decisions and the best traditions of American liberty and governance. We should affirm the district court's decision to allow plaintiffs to try to prove their claims for torture.

Appendix A

ROVNER, *Circuit Judge*, joined by WILLIAMS and HAMILTON, *Circuit Judges*, dissenting. I join Judge Hamilton's dissent and Judge Wood's concurrence in all but Part III. Judge Wood in her concurrence has rightfully reminded us that our legal analysis should not rest on "fear that *Bivens* liability would cause Cabinet Secretaries to carry out their responsibilities with one eye on their wallets, rather than for the greater good of their department and the country." *Ante* at 35. I agree with Judge Wood that such fear is disrespectful of those who serve in government and dismissive of the protections that such liability affords against serious and intentional violations of the Constitution. For this same reason, we cannot allow fear to cause us to stray from the established federal pleading standards governing resolution of a motion to dismiss. This case lends credence to the cliched adage that hard facts make bad law.

To survive a motion to dismiss, a complaint need not do more than enunciate a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The plausibility standard is not akin to a "probability requirement." *Twombly*, 550 U.S. at 556. It does not imply that the district court should decide whether the claim is true, which version of the facts to believe, or whether the allegations are persuasive. *See Iqbal*, 556 U.S. at 679; *Richards v. Mitcheff*, No. 11-3227, 696 F.3d 635, 2012 U.S. App. LEXIS 16549, 2012 WL 3217627, at *1,*2 (7th Cir. Aug. 9, 2012); *Morrison v. YTB Int'l, Inc.*, 649 F.3d 533, 538 (7th Cir. 2011); *Swanson v. Citibank, N.A.*, 614 F.3d

400, 404 (7th Cir. 2010). Provided the complaint invokes a recognized legal theory (and for the reasons expounded upon by Judge Wood and Judge Hamilton, it does), and contains plausible allegations on the material issues, it cannot be dismissed under Rule 12. *Richards*, 2012 U.S. App. LEXIS 16549, 2012 WL 3217627, at *2.

Vance and Ertel have alleged Secretary Rumsfeld's direct participation in their torture. Vance contends, for example, that Secretary Rumsfeld authorized the interrogation tactics utilized on the plaintiffs and that some of these techniques required Secretary Rumsfeld's personal approval on a case-by-case basis thus inferring that Secretary Rumsfeld must have authorized the torturous interrogation himself. (R.116, p.44, ¶ 217). These claims may not be true, and if they are, the plaintiffs may have little chance of providing sufficient evidence to convince a trier-of-fact, but they are nevertheless plausible and contain more than bare legal conclusions. *Twombly* and *Iqbal* require no more.

I fear future appeals of dismissals will be muddied by the court's attempt to refract the Rule 12(b)(6) standard to protect a high level governmental official engaged in a war to protect the citizens and ideals of this country. But even in the most difficult of cases, we must adhere to the federal pleading requirements dictated by Federal Rule of Civil Procedure 12(b)(6) and the precedent of the United States Supreme Court.

WILLIAMS, *Circuit Judge*, joined by ROVNER and HAMILTON, *Circuit Judges*, dissenting. I join Judge Hamilton's and Judge Rovner's dissenting opinions in full, as well as Judge Wood's concurrence in all but Part III. I write separately to voice my own concerns with the majority decision.

Applying *Bivens* to (even arguably) novel factual scenarios has always required a delicate balance of competing considerations. But in the effort to wall off high officials' bank accounts, the majority appears to have erected a sweeping, unprecedented exemption from *Bivens* for military officers. No case from our highest court or our sister circuits has approached such a sweeping conclusion. The vagueness of the majority's analysis makes the actual scope of the exemption unclear. Does the new immunity apply only to the highest officials in the chain of command? To suits brought by security contractors in a conflict zone? As for the doctrine of *Bivens* itself, the majority's reservations about this constitutional bulwark are transparent. That should not matter. "The Supreme Court alone is entitled to declare one of its decisions defunct . . . [e]ven if later decisions wash away the earlier one's foundation . . . ." *United States v. Booker*, 375 F.3d 508, 516 (7th Cir. 2004) (Easterbrook, J., dissenting) (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997) and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)). Whatever the status of *Bivens*, this decision sweeps too broadly and vaguely, and so I must dissent.

Appendix A

I.

The majority states that "[w]hat plaintiffs want is an award of damages premised on a view that the military command structure should be different—that, for example, the Secretary of Defense must do more (or do something different) to control misconduct by interrogators and other personnel on the scene in foreign nations." Slip op. at 12. The characterization misrepresents the nature of this suit. The plaintiffs are not asking the courts to give Rumsfeld a poor performance evaluation as Secretary of Defense. They are suing him for personally and intentionally violating their fundamental rights as American citizens. Nor does the complaint seek to alter the "military command structure." No count requests an injunction or declaratory judgment regarding military discipline, the chain of command, or the policies employed by Rumsfeld or his subordinates. *Cf. Lebron v. Rumsfeld*, 670 F.3d 540, 546 (4th Cir. 2012) (plaintiff principally sought to enjoin his designation as an enemy combatant, requesting nominal damages from defendants).

What plaintiffs assert is: (1) they were tortured in violation of the Constitution and laws of the United States; (2) Rumsfeld is personally liable because he authorized their torture and made case-specific determinations about who would receive "enhanced" treatment after it was made clear that his detention policies were illegal; and (3) plaintiffs should receive monetary damages for the abuse they endured in military custody. Vance and Ertel do not want to remake military policy through the judiciary. Frankly, there is little need to do so because

Congress has already directly addressed and outlawed the detention practices inflicted on these plaintiffs. Instead, the allegation before us is willful, directed non-compliance with the law. The majority may believe that Rumsfeld's actions were merely negligent and that may be true. But that is not the allegation.

Having misinterpreted the complaint, the majority next misreads the Supreme Court's opinions in *Chappell v. Wallace*, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983), and *United States v. Stanley*, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987). It is suggested that in these decisions, "[t]he Supreme Court's principal point was that civilian courts should not interfere with the military chain of command . . . [because] military efficiency depends on a particular command structure, which civilian judges easily could mess up without appreciating what they were doing." Slip op. at 11. Judge Hamilton comprehensively explains why the majority has incorrectly applied the precedent. I would only add that *Stanley* explicitly addressed the scope of the decision, as well as the potential "levels of generality at which one may apply 'special factors' analysis":

> Most narrowly, one might require reason to believe that in the particular case the disciplinary structure of the military would be affected—thus not even excluding all officer-subordinate suits, but allowing, for example, suits for officer conduct so egregious that no responsible officer would feel exposed to suit in the performance of his duties. Somewhat

> more broadly, one might disallow Bivens actions whenever an officer-subordinate relationship underlies the suit. More broadly still, one might disallow them in the officer-subordinate situation and also beyond that situation when it affirmatively appears that military discipline would be affected. (This seems to be the position urged by Stanley.) Fourth, *as we think appropriate*, one might disallow Bivens actions whenever the injury arises out of activity "incident to service." And finally, one might conceivably disallow them by servicemen entirely.

483 U.S. at 681 (emphasis added). Here, *Stanley* describes its principal point unambiguously: Members of the military cannot invoke *Bivens* for injuries arising out of "activity incident to service." Indeed, the Court *reserved* the possibility of *Bivens* suits by servicemen against military officials in other contexts. Despite *Stanley's* clarity, the majority contends that the Supreme Court actually meant to bar *any* suit, even by civilians, that "interfere[s] with the military chain of command." I cannot tell what this purported standard means. But it goes well beyond what the Supreme Court has expressly identified as a bridge too far. Can there be a clearer indication of error?

At heart, in *Chappell* and *Stanley*, the Supreme Court did not want to permit service members to litigate what are effectively employment disputes against superiors through the federal courts rather than through the

military's internal channels. *See Chappell*, 462 U.S. at 303-05 (barring race discrimination claim). That rationale does not apply here.[1] *Cf. id*. at 300 ("Civilian courts must . . . hesitate long before entertaining a suit which asks the court to *tamper with the established relationship between enlisted military personnel and their superior officers; that relationship* is at the heart of the necessarily unique structure of the military establishment." (emphasis added)). This court's decision leaves unexplained how or why a suit by an American civilian, with no connection to the chain of command, would interfere with military

1. The majority entertains the idea that the plaintiffs, as security contractors, might be considered equivalent to soldiers anyway when evaluating the availability of a *Bivens* action. But this is a distraction. The individuals in *United States v. Brehm*, 691 F.3d 547 (4th Cir. 2012) and *United States v. Ali*, 2012 CAAF LEXIS 815 (C.A.A.F. July 18, 2012) were effectively employees of the United States military, subcontracted through American companies. Notably, this was the same scenario in *Doe v. Rumsfeld*, 683 F.3d 390, 392 (D.C. Cir. 2012), where the court treated a defense contractor employee as equivalent to a serviceman because he was working for the United States military. This case is different. When Vance and Ertel were detained and tortured, they worked for Shield Group Security, an Iraqi corporation which provided security contracts to the government of Iraq and private companies. The plaintiffs do not appear to have had a connection to the United States government beyond being American citizens. At very least, a reading of the complaint in the light favorable to plaintiffs cannot support an employment relationship with the United States military. The majority further suggests that security contractors are inherently similar to soldiers. Perhaps this is true in the sense that a mall guard is like a homicide detective. But Vance and Ertel's job descriptions have no bearing on the availability of *Bivens* in this case.

discipline in the manner anticipated by *Chappell* and *Stanley*.[2]

Even if judicial participation might interfere in some other way, there is a further irony underlying the majority's approach. The opinion recognizes that injunctive relief against illegal military conduct is already available under established doctrine. *See* slip op. at 17 ("Injunctions that enforce the Detainee Treatment Act prospectively may be possible under the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), or the waiver of sovereign immunity in 5 U.S.C. §702."). This point was also raised at oral argument where the parties agreed that the judiciary retains the power to enjoin an unconstitutional practice or unlawful deprivation of rights. Do such suits "interfere" with the military command structure or the chain of command? They certainly would seem to. So, to the extent that the majority fears judicial scrutiny of military policy, that state of affairs is already upon us and is sanctioned by this decision itself.

The Supreme Court requires us to exercise judicial review in various circumstances impacting national security. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 536, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004) ("[A] state

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2. As Judge Hamilton notes, the majority altogether ignores the Supreme Court's contradictory analysis in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), which treated a civilian's excessive force suit against a military officer as permissible (though barred in that case by qualified immunity). *Saucier* was decided well after *Stanley* and *Chappell*. If the Supreme Court had been concerned all along with the threat posed by civilian suits to the chain of command, why didn't it say so?

of war is not a blank check for the President when it comes to the rights of the Nation's citizens. . . . Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."); *Mitchell v. Forsyth*, 472 U.S. 511, 523, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) ("[D]espite our recognition of the importance of [the Attorney General's activities in the name of national security] to the safety of our Nation and its democratic system of government, we cannot accept the notion that restraints are completely unnecessary."); *Baker v. Carr*, 369 U.S. 186, 211, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426, 54 S. Ct. 231, 78 L. Ed. 413 (1934) ("[E]ven the war power does not remove constitutional limitations safeguarding essential liberties."). Executive power to protect national security or conduct foreign affairs does not deprive the judiciary of its authority to check abuses that violate individual rights. Judicial review may be deferential to the interests of national security, *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24, 26, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008), but it remains necessary. Habeas corpus review certainly interferes with the military's assessment of national security priorities. No matter. Our constitutional system requires the judiciary's participation. *Boumediene v. Bush*, 553 U.S. 723, 765, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008) ("[T]he political branches [do not] have the power to switch the Constitution on or off at will . . . .").

I do not mean that actions for money damages must be treated identically to actions for prospective relief. The remedies are distinct. But this puts into sharp perspective the majority's implication that there is a categorical ban on "judicial intrusion into military affairs." The judiciary is already intertwined in the constitutional review of military determinations. It is inconsistent to consider federal courts competent on the one hand to balance policy concerns associated with injunctive relief (as the majority must concede), while treating these courts as unqualified to address actual injury to citizens caused by official abuse. Traditionally, damages actions have been viewed as *less* intrusive than injunctive relief because they do not require the court to engage in operational decision-making. *Compare Gilligan v. Morgan*, 413 U.S. 1, 11, 93 S. Ct. 2440, 37 L. Ed. 2d 407 (1973) (rejecting a suit seeking judicial supervision of the operation and training of the Ohio National Guard in the wake of the Kent State shootings) with *id.* at 5 (suggesting that a damages action against the National Guard could be justiciable) and *Scheuer v. Rhodes*, 416 U.S. 232, 247-49, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974) (permitting such a suit). True, courts make mistakes, but this has little to do with the propriety of *Bivens*. Every government institution errs, including the military. The point of judicial participation is not infallibility but independence and neutrality, something executive entities do not have when evaluating their own officers' conduct.

For these reasons, I cannot accept the majority's rationale for rejecting *Bivens* in this context. The majority pins much of its reasoning on the *Lebron* decision but does not mention any of the relevant details. The *Lebron*

suit was brought on behalf of Jose Padilla, an individual designated as an enemy combatant by the President and later convicted of criminal terrorism charges. Padilla's proposed *Bivens* action sought a judicial declaration that his designation as an enemy combatant and resulting detention were unconstitutional. The *Lebron* court rejected the claim on separation-of-powers grounds reasoning that in identifying terrorists, the President acted with express congressional approval under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

Whatever the merits of *Lebron*, it is disingenuous to suggest that the same analysis applies in this case. The majority endeavors to stretch a blanket of immunity over the entire "military chain of command" in an effort to cover the very different facts presented here. Vance and Ertel do not challenge their status and detention as enemy combatants; they could not do so because they never received such a designation. And far from authorizing their treatment, Congress and the President acted twice to outlaw it through the National Defense Authorization Act and the Detainee Treatment Act ("DTA"). 10 U.S.C. §801 note. The complaint charges the defendant with intentionally acting *in derogation of* the newly enacted laws to retain and administer illegal interrogation practices, approving them on an individualized basis. These allegations may not be true. But if they are true, I cannot agree that the separation of powers bars a citizen's recovery from a rogue officer affirmatively acting to subvert the law. That is a quintessential scenario where *Bivens* should function to enforce individual rights.

Every member of this court recognizes that the job of the military is challenging, dangerous, and critical to our national security. For these reasons and more, members of the armed forces enjoy unparalleled respect in our society. But this respect does not put the military's highest officers beyond the reach of the Constitution or adjudication by Article III courts. We would abdicate our duty if we permit *Bivens* to become a mirage. If it is an illusion, it is a dangerous one because it has tricked not only plaintiffs, but the other branches of our government into relying upon it. Congress created in the DTA a limited, good-faith defense against *Bivens* meant to be available in situations precisely like this one. And the State Department pointed to *Bivens* suits as evidence that we take seriously our commitments to preventing torture. The majority suggests that the other branches of government were only leaping at shadows. But we have an independent obligation to individual citizens and to the Constitution to apply the precedent even in difficult cases. Otherwise we risk creating a doctrine of constitutional triviality where private actions are permitted only if they cannot possibly offend anyone anywhere. That approach undermines our essential constitutional protections in the circumstances when they are often most necessary. It is no basis for a rule of law.

II.

Whether the plaintiffs have adequately pled Rumsfeld's personal liability for violations of clearly established law is also a delicate question. Arguably qualified immunity should shoulder more of the burden of the majority's

demonstrable hesitation to hold high government officials accountable for constitutional violations. *Cf. Padilla v. Yoo*, 678 F.3d 748, 768 (9th Cir. 2012) (disposing of suit on qualified immunity grounds rather than affording total immunity to *Bivens*). Nevertheless, I agree with my dissenting colleagues that the plaintiffs' complaint should survive. This complaint is unusually detailed and alleges Rumsfeld's personal participation in interrogation determinations, something the majority ignores. It is plausible (if not necessarily probable) to infer from Rumsfeld's direct involvement in developing interrogation practices at Camp Cropper and his case-specific approval of techniques used on detainees that he personally authorized the plaintiffs' abuse or remained intentionally indifferent to it. These allegations go well beyond those deemed insufficient in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), and present more than a mere possibility of liability. Therefore, I would permit the suit to continue to at least limited discovery. *See, e.g., Crawford-El v. Britton*, 523 U.S. 574, 593 n.14, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998).

I respectfully dissent.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED AUGUST 8, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 10-1687 & 10-2442

DONALD VANCE and NATHAN ERTEL,

Plaintiffs-Appellees,

v.

DONALD RUMSFELD and
THE UNITED STATES OF AMERICA,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 06 C 6964—**Wayne R. Andersen**, *Judge.*

ARGUED FEBRUARY 10, 2011—DECIDED AUGUST 8, 2011

Before MANION, EVANS, and HAMILTON, *Circuit Judges.*

HAMILTON, *Circuit Judge.* This appeal raises fundamental questions about the relationship between the citizens of our country and their government. Plaintiffs Donald Vance and Nathan Ertel are American citizens and civilians. Their complaint alleges in detail that they were

detained and illegally tortured by U.S. military personnel in Iraq in 2006. Plaintiffs were released from military custody without ever being charged with a crime. They then filed this suit for violations of their constitutional rights against former Secretary of Defense Donald Rumsfeld and other unknown defendants under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Plaintiffs seek damages from Secretary Rumsfeld and others for their roles in creating and carrying out policies that caused plaintiffs' alleged torture. Plaintiffs also bring a claim against the United States under the Administrative Procedure Act to recover personal property that was seized when they were detained.

Secretary Rumsfeld and the United States moved to dismiss the claims against them. The district court denied in part Secretary Rumsfeld's motion to dismiss, allowing plaintiffs to proceed with *Bivens* claims for torture and cruel, inhuman, and degrading treatment, which have been presented as Fifth Amendment substantive due process claims. *Vance v. Rumsfeld*, 694 F. Supp. 2d 957 (N.D. Ill. 2010). The district court also denied the government's motion to dismiss the plaintiffs' property claim. *Vance v. Rumsfeld*, 2009 U.S. Dist. LEXIS 67349, 2009 WL 2252258 (N.D. Ill. 2009). Secretary Rumsfeld and the United States have appealed, and we consider their appeals pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1292(b).

We agree with the district court that the plaintiffs may proceed with their *Bivens* claims against Secretary

Rumsfeld. Taking the issues in ascending order of breadth, we agree first, applying the standards of Federal Rule of Civil Procedure 12(b)(6), that plaintiffs have alleged in sufficient detail facts supporting Secretary Rumsfeld's personal responsibility for the alleged torture. Second, we agree with the district court that Secretary Rumsfeld is not entitled to qualified immunity on the pleadings. The law was clearly established in 2006 that the treatment plaintiffs have alleged was unconstitutional. No reasonable public official could have believed otherwise.

Next, we agree with the district court that a *Bivens* remedy is available for the alleged torture of civilian U.S. citizens by U.S. military personnel in a war zone. We see no persuasive justification in the *Bivens* case law or otherwise for defendants' most sweeping argument, which would deprive civilian U.S. citizens of a civil judicial remedy for torture or even cold-blooded murder by federal officials and soldiers, at any level, in a war zone. United States law provides a civil damages remedy for aliens who are tortured by their own governments. It would be startling and unprecedented to conclude that the United States would not provide such a remedy to its own citizens.

The defendants rely on two circuit decisions denying *Bivens* remedies to alien detainees alleging that U.S. officials caused them to be tortured, one case arising from war zones, *Ali v. Rumsfeld*, 649 F.3d 762, 396 U.S. App. D.C. 381, 2011 U.S. App. LEXIS 12483, 2011 WL 2462851 (D.C. Cir. June 21, 2011) (detainees in Iraq and Afghanistan), and the other as part of the war on terror, *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc) ("extraordinary rendition" case). Those claims by

aliens are readily distinguishable from this case based on the different circumstances of aliens and civilian U.S. citizens. Whether or not one agrees with those decisions, the difficult issues posed by aliens' claims should not lead courts to extend the reasoning in those cases to deny all civil remedies to civilian U.S. citizens who have been tortured by their own government, in violation of the most fundamental guarantees in the constitutional pact between citizens and our government.

As to the modest property claim against the United States, however, we agree with the government that the Administrative Procedure Act's "military authority" exception precludes judicial review of military actions affecting personal property in a war zone, and we reverse the district court's decision on that claim.

I. Factual and Procedural Background

A. Factual Allegations

Plaintiffs Donald Vance and Nathan Ertel have alleged sobering claims that they were tortured by U.S. military personnel while they were detained indefinitely at Camp Cropper, a U.S. military prison in Iraq in 2006, during the ongoing Iraq War.[1] Because this case comes before us from

1. The amicus brief filed by former Secretaries of Defense and former Members of the Joint Chiefs of Staff in support of Secretary Rumsfeld and the government points out that the United States technically operated in Iraq through 2008 as part of the Multinational Force — Iraq ("MNF-I"). We assume that the forces holding Vance and Ertel were under the authority of the United

the denial of a motion to dismiss, we assume the truth of all well-pled allegations in the complaint, viewing those allegations in the light most favorable to the plaintiffs. See *Muscarello v. Ogle County Bd. of Comm'rs*, 610 F.3d 416, 421 (7th Cir. 2010), citing *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). We do not vouch for the truth of the allegations. By seeking dismissal under Rule 12(b)(6), however, the defendants have asked us to decide the issues based on the assumption that the allegations are true. We proceed on that basis.

We can only summarize here the key allegations in the detailed Complaint, with its 79 pages and 387 paragraphs, citing the pertinent paragraph numbers.[2] Vance and Ertel, two young American civilians, independently moved from their homes in Illinois and Virginia to work in Iraq to help "rebuild the country and achieve democracy" following the beginning of the current conflict there. See ¶¶ 3, 28. In 2005 and 2006, before their detention, the two Americans worked for a privately-owned Iraqi security services company, Shield Group Security, in the "Red Zone" in Iraq, the area outside the secure "Green Zone" in Baghdad. ¶¶ 33-39. Over time, Vance became suspicious that the company was involved with corruption and other illegal activity. ¶¶ 18, 42. He noticed, for example, that Shield Group Security officials were making payments to Iraqi sheikhs, which he believed was done to obtain

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States. Like the amici, we refer to the forces who detained the plaintiffs as the "U.S. military," not the "MNF-I."

2. All references to the Complaint are to the operative pleading, the Second Amended Complaint.

influence. ¶¶ 41-42. While Vance was home in Chicago for his father's funeral, he contacted U.S. government officials to report his suspicions. ¶ 43. He met with an FBI agent, who arranged for Vance to continue reporting suspicious activity back to Chicago. The FBI agent also requested that Vance meet U.S. government officials in Iraq to report his observations. ¶¶ 44-47, 49. Vance told his friend and colleague Ertel that he had become an informant, and Ertel contributed information as well. ¶¶ 48-49.

The plaintiffs were frequently in touch with their government contacts, sometimes multiple times a day. ¶ 45. At the request of a U.S. government official in Iraq, Vance copied and shared Shield Group Security documents with U.S. officials. ¶ 47. Vance and Ertel reported their in-depth observations of individuals closely associated with Shield Group Security, including U.S. and Iraqi government officials who were involved with illegal arms trading, stockpiling of weapons, bribery, and other suspicious activity and relationships. ¶¶ 45-104. Their whistleblowing allegedly included the sharing of sensitive information with the U.S. government, including reports that their supervisor, who called himself the "Director" of the "Beer for Bullets" program, traded liquor to American soldiers in exchange for U.S. weapons and ammunition that Shield Group Security then used or sold for a profit. ¶ 95.

Shield Group Security officials became suspicious about the plaintiffs' loyalty to the firm. On April 14, 2006, they confiscated the credentials that allowed plaintiffs access to the Green Zone, effectively trapping them inside

the firm's compound in the Red Zone. ¶¶ 107-12, 116-19. Plaintiffs called their U.S. government contacts in Iraq for help. They were told that they should interpret Shield Group Security's actions as taking them hostage, and should barricade themselves with weapons in a room of the compound. ¶¶ 120, 124-25. They were assured that U.S. forces would come to rescue them. ¶ 124. U.S. forces came to the compound and took Vance and Ertel to the U.S. Embassy for questioning. ¶¶ 125-31. Military personnel seized all of their personal property, including laptop computers, cell phones, and cameras. ¶ 127. The plaintiffs shared information about Shield Group Security transactions and were sent to a trailer to sleep. ¶¶ 130-31.

After two or three hours of sleep, Vance and Ertel, who were under the impression that they had been rescued by their government, were in for a shock. They were awakened and arrested, handcuffed, blindfolded, and driven to Camp Prosperity, a U.S. military compound in Baghdad. ¶¶ 131, 138-39. There, plaintiffs allege, they were placed in a cage, strip-searched, fingerprinted, and issued jumpsuits. ¶ 140. They were instructed to keep their chins to their chests and not to speak. They were threatened that if they did speak, they would have "excessive force" inflicted on them. ¶ 141. Vance and Ertel were then taken to separate cells and held in solitary confinement for what they believe was two days. ¶¶ 142-43.

For those two days, the plaintiffs were held incommunicado in their cells, and were not permitted to contact their families or lawyers. They were fed twice a day and allowed to go to the bathroom twice a day. They

each had a thin mat on concrete on which to sleep, but the lights were kept on 24 hours a day. ¶¶ 142, 161. After two days, Vance and Ertel were shackled, blindfolded, and transported to Camp Cropper, a U.S. military facility near Baghdad International Airport. ¶¶ 143-44.

After the plaintiffs were taken to Camp Cropper, they experienced a nightmarish scene in which they were detained incommunicado, in solitary confinement, and subjected to physical and psychological torture for the duration of their imprisonment — Vance for three months and Ertel for six weeks. ¶¶ 2, 20-21, 146-76, 212. They allege that all of the abuse they endured in those weeks was inflicted by Americans, some military officials and some civilian officials. ¶ 21. They allege that the torture they experienced was of the kind "supposedly reserved for terrorists and so-called enemy combatants." ¶ 2. If the plaintiffs' allegations are true, two young American civilians were trying to do the right thing by becoming whistleblowers to the U.S. government, but found themselves detained in prison and tortured by their own government, without notice to their families and with no sign of when the harsh physical and psychological abuse would end. ¶¶ 1-4, 19, 21, 52-54, 161.[3]

3. The plaintiffs were informed that they were being held as "security internees" because they worked for a business that possessed large weapons caches and that might be involved in distributing weapons to insurgent and terrorist groups. ¶¶ 179-80. The plaintiffs adamantly deny any wrongdoing and allege that the U.S. government officials in Iraq fabricated these allegations, for which they were never charged, in retaliation for their whistleblowing of "high-value information" that could reflect poorly on U.S. officials in Iraq. ¶¶ 1, 4, 132.

Appendix B

Vance and Ertel allege that after they arrived at Camp Cropper they were strip-searched while still blindfolded, and issued jumpsuits. ¶ 145. They were then held in solitary confinement, in small, cold, dirty cells and subjected to torturous techniques forbidden by the Army Field Manual and the Detainee Treatment Act. ¶¶ 146, 217-18, 242-44, 265. The lights were kept on at all times in their cells, so that the plaintiffs experienced "no darkness day after day" for the entire duration of their time at Camp Cropper. ¶¶ 21, 147. Their cells were kept intolerably cold, except when the generators failed. *Id*. There were bugs and feces on the walls of the cells, in which they spent most of their time in complete isolation. ¶ 146. Vance and Ertel were driven to exhaustion; each had a concrete slab for a bed, but guards would wake them if they were ever caught sleeping. ¶¶ 148, 149. Heavy metal and country music was pumped into their cells at "intolerably-loud volumes," and they were deprived of mental stimulus. ¶¶ 21, 146, 149. The plaintiffs each had only one shirt and a pair of overalls to wear during their confinement. ¶ 152. They were often deprived of food and water and repeatedly deprived of necessary medical care. ¶¶ 151, 153-55.

Beyond the sleep deprivation and the harsh and isolating conditions of their detention, plaintiffs allege, they were physically threatened, abused, and assaulted by the anonymous U.S. officials working as guards. ¶ 157. They allege, for example, that they experienced "hooding" and were "walled," *i.e*., slammed into walls while being led blindfolded with towels placed over their heads to interrogation sessions. ¶¶ 21, 157. Plaintiffs also claim that they were continuously tormented by the guards, who

would conduct shake-downs of their cells, sometimes on the false premise that they had discovered contraband, and who seemed intent on keeping them off-balance mentally. ¶ 156.

The constant theme of the aggressive interrogations was a haunting one — if Vance and Ertel did not "do the right thing," they would never be allowed to leave Camp Cropper. ¶ 176. Vance and Ertel were not only interrogated but continuously threatened by guards who said they would use "excessive force" against them if they did not immediately and correctly comply with instructions. ¶ 158. The plaintiffs allege that this treatment lasted for the duration of their detention at Camp Cropper. ¶¶ 2, 165, 176.

While Vance and Ertel were detained and interrogated, their loved ones did not know whether they were alive or dead. ¶¶ 1, 161. Eventually, Vance and Ertel were allowed a few telephone calls to their families but were not allowed to disclose their location or anything about the conditions of their detention or the nature of their interrogations. ¶ 162. When they were not being interrogated, they were held in almost constant solitary confinement. Vance's requests for clergy visits were denied, and plaintiffs were forbidden to correspond with a lawyer or a court. ¶¶ 163-64.

Vance and Ertel were never charged with any crime or other wrongdoing, nor were they designated as security threats. ¶¶ 1, 212, 214. Instead, both were eventually released and dropped off at the airport in Baghdad to find their way home. ¶¶ 208, 210. Vance and Ertel both allege that they were devastated physically and emotionally by

what they endured at the hands of their own government. ¶ 213.

B. Procedural History

Following their release, the plaintiffs sued former Secretary of Defense Donald Rumsfeld, in his individual capacity, as well as unidentified defendants.[4] The plaintiffs also brought a claim against the United States to recover the personal property seized from them at the time they were taken into custody.

Secretary Rumsfeld and the United States moved to dismiss all claims against them. The district court dismissed plaintiffs' claims against Secretary Rumsfeld for denial of procedural due process (Count II) and denial of access to the courts (Count III), but declined to dismiss their claim that their treatment amounted

4. Plaintiffs explained in oral argument that they were limited in identifying other defendants given the nature of their detention in a "sterilized system." No name tags were worn by Camp Cropper officials, and the American guards had code names for each other. The magistrate judge ordered some discovery so the plaintiffs could identify other defendants. See Memorandum Opinion and Order, Dkt. No. 89 (Dec. 21, 2007) (ordering limited discovery for plaintiffs to learn identities of unknown defendants responsible for their detention and alleged mistreatment); Minute Entry (Order on Motion to Compel), Dkt. No. 267 (Jun. 14, 2010) (granting plaintiffs' motion to compel discovery). But the district court later granted the government's motion to stay proceedings, including pending discovery requests to identify unknown defendants, during this appeal. See Minute Entry (Order on Motion to Stay), Dkt. No. 285 (Nov. 17, 2010).

to unconstitutional cruel, inhuman, and degrading treatment (Count I). The district court concluded that plaintiffs had sufficiently pled Secretary Rumsfeld's personal responsibility for their alleged treatment and that Secretary Rumsfeld was not protected by qualified immunity. The district court also rejected the defendants' argument that "special factors" preclude the recognition of a *Bivens* remedy for torture of civilian U.S. citizens in a war zone. In a separate order, the district court denied the United States' motion to dismiss the plaintiffs' personal property claim.

These matters are now before us in two separate appeals. The district court's rejection of a defendant's qualified immunity defense is considered a final judgment subject to immediate appeal, so we have jurisdiction over Secretary Rumsfeld's appeal, docketed as No. 10-1687, pursuant to the general appellate jurisdiction statute, 28 U.S.C. § 1291. See *Behrens v. Pelletier*, 516 U.S. 299, 301, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996), citing *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). The broader *Bivens* issue is "directly implicated by the defense of qualified immunity" and is thus also properly before us. *Wilkie v. Robbins*, 551 U.S. 537, 550 n.4, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007), quoting *Hartman v. Moore*, 547 U.S. 250, 257 n.5, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006). We have jurisdiction over the United States' appeal on the property issue, docketed as No. 10-2442, because the district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). We have consolidated the appeals for disposition.

II. Analysis

We affirm the district court's decision on the *Bivens* claims in No. 10-1687, concluding in this sequence, from the narrowest issue to the broadest: (a) that plaintiffs adequately alleged Secretary Rumsfeld's personal responsibility for their treatment, as required under *Bivens*; (b) that Secretary Rumsfeld is not entitled to qualified immunity on the defense theory that a reasonable government official could have believed in 2006 that the abuse plaintiffs have alleged was not unconstitutional; and (c) that a *Bivens* remedy should be available to civilian U.S. citizens in a war zone, at least for claims of torture or worse. We reverse the district court's decision in No. 10-2442, concluding that the district court should have dismissed the plaintiffs' property claims under the "military authority" exception to the Administrative Procedure Act.

A. Personal Responsibility

To proceed with their *Bivens* claims, plaintiffs must allege facts indicating that Secretary Rumsfeld was personally involved in and responsible for the alleged constitutional violations. See *Iqbal*, 129 S. Ct. at 1948-49; *Alejo v. Heller*, 328 F.3d 930, 936 (7th Cir. 2003). "Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 129 S. Ct. at 1948. As the Supreme Court said in *Iqbal*, "[t]he factors necessary to establish a *Bivens* violation will vary with

the constitutional provision at issue." *Id.* Unlike in *Iqbal*, which was a discrimination case, where the plaintiff was required to plead that the defendant acted with discriminatory purpose, the minimum knowledge and intent required here would be deliberate indifference, as in analogous cases involving prison and school officials in domestic settings. See *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (finding that a prison official acts with "deliberate indifference" if the "official acted or failed to act despite his knowledge of a substantial risk of serious harm"); *T.E. v. Grindle*, 599 F.3d 583, 591 (7th Cir. 2010) ("When a state actor's deliberate indifference deprives someone of his or her protected liberty interest in bodily integrity, that actor violates the Constitution, regardless of whether the actor is a supervisor or subordinate, and the actor may be held liable for the resulting harm.").[5]

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5. The defendants rely heavily on *Iqbal*, but the case is clearly distinguishable because of the nature of the alleged constitutional violations. The issue in *Iqbal* was not what the defendants (Attorney General Ashcroft and FBI Director Mueller) actually did, but their subjective purposes — whether they acted on the basis of religious or ethnic bias or instead acted to fight terrorism. The plaintiff alleged that the Attorney General and the FBI Director had established and implemented policies following the attacks of September 11, 2001 that led to the detention of the plaintiff under harsh conditions separate from the general prison population, allegedly because of a policy that kept prisoners separate because of their race, religion, or national origin. Because there was a legitimate explanation for the policy — the "nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist attacks" — the Court held

Appendix B

In arguing that the district court erred in holding that qualified immunity does not protect Secretary Rumsfeld from liability, the defendants blend both the issue of Secretary Rumsfeld's personal responsibility for plaintiffs' treatment and the doctrine of qualified immunity. These issues are actually quite distinct, and we treat them separately. We begin by addressing the defendants' personal responsibility arguments, which are primarily about whether the plaintiffs have pled a sufficient level of detail about Secretary Rumsfeld's personal responsibility to survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. We first examine the applicable pleading requirements. We then summarize the detailed allegations of Secretary Rumsfeld's personal responsibility from the Complaint. Finally, we address the defendants' specific concerns about the Complaint.

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that personal responsibility was not pled sufficiently where the complaint provided no plausible basis for rejecting that legitimate explanation. *Iqbal*, 129 S. Ct. at 1951-52. In this case, by contrast, the inquiry before us is whether the plaintiffs have pled sufficiently that defendant Secretary Rumsfeld personally established the relevant policies that authorized the unconstitutional torture they allege they suffered. *Iqbal* did not disturb the *Bivens* and section 1983 principles holding that a supervisor may be liable as an individual for wrongs he personally directed or authorized his subordinates to inflict.

A similar distinction applies to the Supreme Court's recent decision in *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). There the Supreme Court held that where the plaintiff's seizure under the federal material witness statute was objectively reasonable, the plaintiff could not pursue a *Bivens* claim on the theory that the seizure was pretextual, based in fact on a different and unconstitutional subjective purpose. See *id.* at 2082-83.

We conclude that the plaintiffs have sufficiently alleged Secretary Rumsfeld's personal responsibility. While it may be unusual that such a high-level official would be personally responsible for the treatment of detainees, here we are addressing an unusual situation where issues concerning harsh interrogation techniques and detention policies were decided, at least as the plaintiffs have pled, at the highest levels of the federal government. We conclude that plaintiffs have sufficiently alleged that Secretary Rumsfeld acted deliberately in authorizing interrogation techniques that amount to torture. (Whether he actually did so remains to be seen.) We differ with the district court in one respect, though. We think that the plaintiffs' pleadings, if true, have sufficiently alleged not only Secretary Rumsfeld's personal responsibility in creating the policies that led to the plaintiffs' treatment but also deliberate indifference by Secretary Rumsfeld in failing to act to stop the torture of these detainees despite actual knowledge of reports of detainee abuse.

1. Applicable Pleading Requirements

The Federal Rules of Civil Procedure impose no special pleading requirements for *Bivens* claims, including those against former high-ranking government officials. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513-14, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). The notice pleading standard under Rule 8 of the Federal Rules of Civil Procedure applies, and a plaintiff is required to provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The complaint will survive a motion to dismiss if it meets the

"plausibility" standard applied in *Iqbal* and *Twombly*. See *Iqbal*, 129 S. Ct. at 1949, quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (holding that "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

These pleading rules are meant to 'focus litigation on the merits of a claim' rather than on technicalities that might keep plaintiffs out of court." *Brooks v. Ross*, 578 F.3d 574, 580 (7th Cir. 2009), quoting *Swierkiewicz*, 534 U.S. at 514. At the same time, "a defendant should not be forced to undergo costly discovery unless the complaint contains enough detail . . . to indicate that the plaintiff has a substantial case." *Limestone Development Corp. v. Village of Lemont*, 520 F.3d 797, 802-03 (7th Cir. 2008). We agree with the district court's observation in this case: "*Iqbal* undoubtedly requires vigilance on our part to ensure that claims which do not state a plausible claim for relief are not allowed to occupy the time of high-ranking government officials. It is not, however, a categorical bar on claims against these officials." *Vance*, 694 F. Supp. 2d at 961. "When a plaintiff presents well-pleaded factual allegations sufficient to raise a right to relief above a speculative level, that plaintiff is entitled to have his claim survive a motion to dismiss even if one of the defendants is a high-ranking government official." *Id.*

2. The Complaint

We agree with the district court that the plaintiffs have alleged sufficient facts to show that Secretary Rumsfeld personally established the relevant policies that caused the alleged violations of their constitutional rights during detention. The detailed Complaint provided Secretary Rumsfeld sufficient notice of the claims against him and stated plausible claims that satisfy Rule 8 and *Iqbal* and *Twombly*.

The plaintiffs allege that Secretary Rumsfeld devised and authorized policies that permit the use of torture in their interrogation and detention. ¶ 217. They claim that he was "personally responsible for developing, authorizing, supervising, implementing, auditing and/or reforming the policies, patterns or practices governing the . . . treatment . . . [and] interrogation . . . of detainees." ¶ 26. Specifically, they allege that in 2002, Secretary Rumsfeld "personally approved a list of torturous interrogation techniques for use on detainees" at Guantanamo Bay that, "[c]ontrary to . . . the then-governing Army Field Manual 34-52 . . . included the use of 20-hour interrogations, isolation for up to 30 days, and sensory deprivation." ¶ 232. In 2003, Secretary Rumsfeld allegedly "rescinded his formal authorization to use those techniques generally, but took no measures to end the practices which had by then become ingrained, nor to confirm that the practices were in fact . . . terminated." ¶ 233. Instead, he authorized the use of techniques outside of the Army Field Manual if he personally approved them. *Id.* The plaintiffs also allege that in 2003, Secretary Rumsfeld approved a new set of

policies that included isolation for up to 30 days, dietary manipulation, and sleep deprivation (the "2003 List"). ¶ 234. In addition to these formal policies, Secretary Rumsfeld also authorized additional harsh techniques if he approved them in advance. ¶ 235.

The plaintiffs allege that Secretary Rumsfeld then directed that the techniques in place at Guantanamo Bay also be extended to Iraq. ¶¶ 235-39. The plaintiffs claim, for instance, that Secretary Rumsfeld sent Major General Geoffrey Miller to Iraq in August 2003 to evaluate how prisons could gain more "actionable intelligence" from detainees. ¶ 236. In September 2003, in response to General Miller's suggestion to use more aggressive interrogation policies in Iraq, and as allegedly "directed, approved and sanctioned" by Secretary Rumsfeld, the commander of the United States-led military coalition in Iraq signed a memorandum authorizing the use of 29 interrogation techniques (the "Iraq List"), which included sensory deprivation, light control, and the use of loud music. ¶ 238.[6] The commander later modified

6. The plaintiffs elaborate on the September 2003 policy in their brief, noting that the Senate Armed Services Committee reported that this list "drew heavily" on Secretary Rumsfeld's guidance for Guantanamo Bay. See *Inquiry Into The Treatment of Detainees in U.S. Custody*, Committee on Armed Services (Nov. 20, 2008), available at http://www.armed-services.senate.gov/ Publications/Detainee Report Final_April 22, 2009.pdf (last accessed Aug. 4, 2011). "According to LTG Sanchez, the September 14, 2003 policy 'drew heavily' on the Secretary of Defense's April 16, 2003 guidance for GTMO." *Id.* at 201. A party whose pleading is being attacked on appeal under Rule 12(b)(6) may elaborate on his allegations so long as the elaborations are consistent with

the memorandum, but interrogators were still given discretion to subject detainees to interrogation methods involving manipulation of lighting, heating, food, shelter, and clothing of the detainees. ¶ 239.

The plaintiffs also allege that Secretary Rumsfeld was well aware of detainee abuse because of both public and internal reports documenting the abuse. ¶¶ 240-41, 252. In May 2003, the International Red Cross began reporting on the abuse of detainees in U.S. custody in Iraq. ¶ 240. The plaintiffs allege that then-Secretary of State Colin Powell confirmed that Secretary Rumsfeld knew of the reports of abuse and regularly reported them to President Bush throughout 2003. *Id.* They also allege that Secretary Rumsfeld also knew of other investigative reports into detainee abuse in Iraq, including a report by former Secretary of Defense James Schlesinger. ¶ 241.[7]

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the pleading. See *Chavez v. Illinois State Police*, 251 F.3d 612, 650 (7th Cir. 2001); *Highsmith v. Chrysler Credit Corp.*, 18 F.3d 434, 439-40 (7th Cir. 1994) (reversing dismissal in relevant part based on such new elaborations); *Dawson v. General Motors Corp.*, 977 F.2d 369, 372 (7th Cir. 1992) (reversing dismissal based on new elaborations). If a party can win reversal with such new elaborations on its pleadings, then these plaintiffs can defend the denial of the motion to dismiss in the same way. *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1146-47 (7th Cir. 2010) (concluding after *Iqbal* and *Twombly* that plaintiffs may still suggest facts outside of the pleadings to show that their complaints should not be dismissed).

7. The plaintiffs elaborate on this point in their brief, citing the Final Report of the Independent Panel to Review DoD Detention Operations (Aug. 24, 2004), available at http://www. defense.gov/

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Congress took action in response to allegations of detainee abuse. ¶ 14. First, Congress passed the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, which reaffirmed the U.S. prohibition against torture techniques that violate the United States Constitution and the Geneva Conventions. Pl. Br. at 7. The law instructed then-Secretary Rumsfeld to take action to stop abusive interrogation techniques:

> The Secretary of Defense shall ensure that policies are prescribed not later than 150 days after the date of the enactment . . . to ensure that members of the Armed Forces, and all persons acting . . . within facilities of the Armed Forces, treat persons detained by the United States Government in a humane manner consistent with the international obligations and laws of the United States and the policies set forth in section 1091(b).

Pub. L. No. 108-375, § 1092, 118 Stat. 1811, 2069-70 (2004), codified at 10 U.S.C. § 801, stat. note § 1092. The plaintiffs argue that, despite that specific direction from Congress, Secretary Rumsfeld took no action to rescind

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news/Aug2004/d20040824finalreport.pdf (last accessed Aug. 4, 2011). This report, addressed from former Secretary of Defense Schlesinger to Secretary Rumsfeld, noted that "the changes in DoD interrogation policies . . . were an element contributing to uncertainties in the field as to which techniques were authorized" and that "the augmented techniques for Guantanamo migrated to . . . Iraq where they were neither limited nor safeguarded." *Id.* at 14.

unauthorized interrogation methods before the plaintiffs were released from custody in 2006. ¶¶ 244, 252.

In 2005, Congress enacted the Detainee Treatment Act, which limited allowable interrogation techniques to those authorized in the Army Field Manual, thus specifically outlawing the interrogation techniques that Secretary Rumsfeld had earlier authorized, and which the plaintiffs allege in detail they suffered at the hands of U.S. military personnel in 2006. ¶¶ 242-43. The Detainee Treatment Act stated in relevant part:

> No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

Pub. L. 109-148, § 1002(a), 119 Stat. 2680, 2739 (2005), codified at 10 U.S.C. § 801, stat. note § 1002.

The plaintiffs contend that, after the enactment of the Detainee Treatment Act, Secretary Rumsfeld continued to condone the use of techniques from outside the Army Field Manual. ¶ 244. They allege that on the same day that Congress passed the Detainee Treatment Act in December 2005, Secretary Rumsfeld added ten classified pages to the Field Manual, which included cruel, inhuman, and degrading techniques, such as those allegedly used on the plaintiffs (the plaintiffs refer to this as "the

December Field Manual"). *Id.* The defendants describe this allegation as speculative and untrue, but we must accept these well-pled allegations as true at the Rule 12(b)(6) stage of the proceedings.[8]

The plaintiffs also claim that Secretary Rumsfeld, in the face of both internal reports and well-publicized accusations of detainee mistreatment and torture by U.S. forces in Iraq, did not investigate or correct the abuses, despite his actual knowledge that U.S. citizens were being and would be detained and interrogated using the unconstitutional abusive practices that he had earlier authorized. ¶ 252. The plaintiffs allege that reports of the abusive treatment of detainees by the U.S. military were widely reported by Amnesty International, the

8. On appeal, the plaintiffs cite a newspaper article reporting on the development of this classified set of interrogation methods. See Eric Schmitt, "New Army Rules May Snarl Talks with McCain on Detainee Issue," *New York Times* (Dec. 14, 2005), available at http://www.nytimes.com/2005/12/14/politics/ 14detain.html (last accessed Aug. 4, 2011) ("The Army has approved a new, classified set of interrogation methods . . . The techniques are included in a 10-page classified addendum to a new Army field manual . . ."). The plaintiffs contend that Secretary Rumsfeld eventually abandoned efforts to classify the Field Manual, but that the "December Field Manual" was in operation during their detention and was not replaced until September 2006, after plaintiffs had been released, when a new field manual (Field Manual 2-22.3) was instituted. ¶ 244; Pl. Br. at 11. The dissent criticizes plaintiffs' reliance on the newspaper report, but plaintiffs' case for personal responsibility rests on allegations that are far more extensive. In any event, these are disputes of fact that cannot be resolved by a Rule 12(b)(6) motion.

United Nations Assistance Mission for Iraq, and the International Committee of the Red Cross. ¶¶ 245-51. The plaintiffs contend that Secretary Rumsfeld was the "official responsible for terminating this pattern of abuse and reforming the policies causing it." ¶ 252. Instead, the plaintiffs allege, Secretary Rumsfeld took no action because "this conduct was being carried out pursuant to the interrogation and detention policies [he] himself created and implemented." *Id.*

3. Secretary Rumsfeld's Personal Responsibility is Pled Sufficiently

We see no deficiency in the Complaint that would warrant dismissal on the issue of personal responsibility. Taking the factual allegations in the complaint as true, as we must, the plaintiffs have pled facts showing that it is plausible, and not merely speculative, that Secretary Rumsfeld was personally responsible for creating the policies that caused the alleged unconstitutional torture. The Complaint also alleges that the Secretary was responsible for not conforming the treatment of the detainees to the standards set forth in the Detainee Treatment Act. Congress specifically ordered the Secretary to "ensure" that detainees in custody of the United States were treated in a "humane manner consistent with the international obligations and laws of the United States." See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, 10 U.S.C. § 801, stat. note § 1092.[9]

9. To be clear, we read the Complaint as asserting claims arising under the United States Constitution, not the Detainee

The plaintiffs have adequately pled the "kind of active and intentional disregard for their treatment" that the defendants suggest "would be necessary to establish liability." First, while Secretary Rumsfeld did not personally carry out the alleged violations of plaintiffs' constitutional rights, the plaintiffs have alleged that he personally created the policies that authorized and led to their torture. If adequately pled, that is sufficient at this stage to allege personal involvement. See, *e.g., Doyle v. Camelot Care Centers, Inc.*, 305 F.3d 603, 615 (7th Cir. 2002) (finding under 42 U.S.C. § 1983 that allegations that agency's most senior officials were personally "responsible for creating the policies, practices and customs that caused the constitutional deprivations . . . suffice at this stage in the litigation to demonstrate . . . personal involvement in [the] purported unconstitutional conduct"); *Steidl v. Gramley*, 151 F.3d 739, 741 (7th Cir. 1998) (finding that a warden is "not liable for an isolated failure of his subordinates to carry out prison policies, however — unless the subordinates are acting (or failing to act) on the warden's instructions"); see also Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses*, § 7.19[C], at 7-239 (4th ed. 2010) (noting that "supervisory officials who promulgate policies that are enforced by subordinates are liable if the enforcement of the policy causes a violation of federally protected rights"); *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010) (concluding after *Iqbal* that "§ 1983 allows a plaintiff to impose liability

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Treatment Act, which does not provide for a private right of action. The Detainee Treatment Act and the Secretary's responsibilities in executing it are relevant in evaluating the Secretary's knowledge of and responsibility for the treatment of detainees.

upon a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement (by the defendant-supervisor or her subordinates) of which" subjects plaintiffs to constitutional violations); *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir. 2003) (concluding that supervisory liability under § 1983 may be shown, inter alia, by "creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue.").

Second, the plaintiffs have adequately alleged that Secretary Rumsfeld acted with deliberate indifference by not ensuring that the detainees were treated in a humane manner despite his knowledge of widespread detainee mistreatment. See *Farmer*, 511 U.S. at 842 (concluding that it is sufficient if a plaintiff bringing an Eighth Amendment claim shows that the "official acted or failed to act despite his knowledge of a substantial risk of serious harm"); *Gayton v. McCoy*, 593 F.3d 610, 620 (7th Cir. 2010) (citations omitted) ("Simply put, an official 'must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference.'"). The plaintiffs have plausibly alleged Secretary Rumsfeld's personal responsibility on this theory.

Finally, we reject the defendants' argument that plaintiffs' claims rest on "naked assertions" of illegal conduct without factual development. The defendants seek to poke holes in a number of the plaintiffs' allegations, but we do not find their arguments convincing, at least at

the pleading stage under Rule 12(b)(6). The defendants argue that the plaintiffs' only "concrete allegations" about detention and interrogation policies relate to policies that did not even apply to U.S. citizens in Iraq, and were, in any case, rescinded before the plaintiffs were detained. We are not persuaded by this argument. The plaintiffs have adequately alleged that Secretary Rumsfeld was responsible for creating policies that governed the treatment of the detainees in Iraq and for not conforming the treatment of the detainees in Iraq to the Detainee Treatment Act.

We also are not persuaded by the defendants' argument that the Detainee Treatment Act superseded the policies described in the Complaint. This argument misunderstands the plaintiffs' point — that Secretary Rumsfeld's policies continued to condone the unconstitutional practices he had allegedly created even after Congress mandated otherwise. The plaintiffs' allegation that Secretary Rumsfeld secretly sought to add permissible techniques to the Army Field Manual after Congress passed the Detainee Treatment Act is plausible and supports their broader allegation that Secretary Rumsfeld continued to promote and condone unconstitutional treatment of detainees. It remains to be seen whether plaintiffs can prove this, but they need not have done so yet.

The defendants also argue that the plaintiffs offer nothing to link the guards' threats of excessive force or the denial of medical care to a particular policy issued by Secretary Rumsfeld. Examining these particular allegations as part of the totality of allegations and the

program for dealing so harshly with detainees, however, we think they are sufficiently pled to survive the motion to dismiss. With discovery of the identities of the individuals involved, we expect plaintiffs to refine their theories and their allegations concerning the defendants' individual responsibilities.

Finally, while a supervisor's mere "knowledge and acquiescence" is not sufficient to impose liability under *Iqbal*, 129 S. Ct. at 1949, we agree with the district court that outside documentation of detainee abuse, such as reports by international organizations, provides some support for the plausibility of plaintiffs' allegations. *Vance*, 694 F. Supp. 2d at 964; see also *Al-Kidd v. Ashcroft*, 580 F.3d 949, 976 (9th Cir. 2009) (finding that complaint alleges facts that might support liability where it alleges that "'abuses occurring . . . were highly publicized in the media, congressional testimony and correspondence, and in various reports by governmental and non-governmental entities,' which could have given [the defendant] sufficient notice to require affirmative acts to supervise and correct the actions of his subordinates"), *rev'd on other grounds*, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). In sum, we hold that the plaintiffs have sufficiently and plausibly pled Secretary Rumsfeld's personal responsibility.

B. Qualified Immunity

We now turn to whether qualified immunity protects Secretary Rumsfeld from liability. The qualified immunity doctrine protects government officials "from liability for civil damages insofar as their conduct does not violate

clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). As the Supreme Court explained in *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009), the doctrine "balances two important interests — the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." We review de novo the district court's decision denying a motion to dismiss on the basis of qualified immunity. *Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001).

To resolve the qualified immunity defense, we use the two-step sequence that the Supreme Court articulated in *Saucier v. Katz*, 533 U.S. 194, 200-01, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). We first determine whether "[t]aken in the light most favorable to the party asserting the injury . . . the facts alleged show the [defendants'] conduct violated a constitutional right." *Id.* at 201. Second, we determine if the right was "clearly established" at the time of the relevant events. *Id.* While the Court has since decided that applying the Saucier test sequentially is not mandatory, it is still "often appropriate." *Pearson*, 129 S. Ct. at 818. See, *e.g., al-Kidd*, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (deciding both constitutional merits and qualified immunity); *Hanes v. Zurick*, 578 F.3d 491 (7th Cir. 2009) (same). Here it makes sense to apply both steps of the *Saucier* test, just as the district court did.

We agree with the district court that plaintiffs have articulated facts that, if true, would show the violation

of a clearly established constitutional right. In fact, the defendants' argument to the contrary evaporates upon review. The plaintiffs have pled that they were subjected to treatment that constituted torture by U.S. officials while in U.S. custody. On what conceivable basis could a U.S. public official possibly conclude that it was constitutional to torture U.S. citizens? See, *e.g.*, 18 U.S.C. § 2340A (statute criminalizing overseas torture); Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, 113 (1984), at Art. 2 ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (concluding that "it would be unthinkable to conclude other than that acts of official torture violate customary international law. And while not all customary international law carries with it the force of a *jus cogens* norm, the prohibition against official torture has attained that status").

The wrongdoing alleged here violates the most basic terms of the constitutional compact between our government and the citizens of this country. The defendants seem to agree, and go so far as to state:

> We do not argue that well-pled, factually-supported and concrete allegations of, for instance, persistent exposure to extreme cold, sustained failure to supply food and water, sustained sleep deprivation, and the

> failure to furnish essential medical care, if of sufficient severity and duration, would not state a violation of substantive due process in the context of military detention in a war zone.

Def. Br. 50. We concur with that view. Viewing the complaint in the light most favorable to the plaintiffs, as we must at this stage, this is exactly what the plaintiffs have pled. There can be no doubt that the deliberate infliction of such treatment on U.S. citizens, even in a war zone, is unconstitutional.

1. The Alleged Abuse Violated a Constitutional Right

If the plaintiffs' allegations of torture are true, there was a violation of their constitutional right to substantive due process.[10] "Substantive due process involves the

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10. The plaintiffs have presented and briefed their claim as a substantive due process claim under the Fifth Amendment. As the Supreme Court has held: "Due process requires that a pretrial detainee *not be punished*. A sentenced inmate, on the other hand, may be punished, although that punishment may not be 'cruel and unusual' under the Eighth Amendment." *Bell v. Wolfish*, 441 U.S. 520, 537 n. 16, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (emphasis added) (concluding that the court of appeals appropriately relied on the Due Process Clause rather than the Eighth Amendment in adjudicating the rights of pretrial detainees); see also *Ingraham v. Wright*, 430 U.S. 651, 671 n. 40, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977) (finding that "[w]here the state seeks to impose punishment without [an adjudication of guilt], the pertinent constitutional guarantee is the Due Process Clause"). The government suggests that the constitutional inquiry here requires this court to "wade

exercise of governmental power without reasonable justification. . . . It is most often described as an abuse of government power which 'shocks the conscience.'" *Tun*, 398 F.3d at 902, quoting *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952). The physical or mental torture of U.S. citizens, as the district court concluded, is a paradigm of conduct that "shocks the conscience." *Vance*, 694 F. Supp. 2d at 966. The Supreme Court "has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause." *Miller v. Fenton*, 474 U.S. 104, 109, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985); see also *Wilkerson v. Utah*, 99 U.S. 130, 136, 25 L. Ed. 345 (1878) (concluding that "it is safe to affirm that punishments of torture . . . are forbidden by . . . the Constitution"). The defendants do not argue that the plaintiffs' allegations, if pled correctly, do not amount to a violation of a constitutional right. See Def. Br. at 50-51. Doing so would be futile.

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into the murky waters of that most amorphous of constitutional doctrines, substantive due process." See *Tun v. Whitticker*, 398 F.3d 899, 900 (7th Cir. 2005). As we have consistently said, however, "[t]he protections for pre-trial detainees are 'at least as great as the Eighth Amendment protections available to a convicted prisoner' . . . and we frequently consider the standards to be analogous." *Washington v. LaPorte County Sheriff's Dep't*, 306 F.3d 515, 517 (7th Cir. 2002), quoting *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983). We thus look to the case law for both substantive due process and the Eighth Amendment in examining the plaintiffs' claims. We are confident that the Framers meant to forbid abusive treatment of uncharged and unconvicted detainees where the same abusive treatment of a convicted prisoner would be prohibited.

The defendants instead argue that plaintiffs have not alleged more than "vague, cursory, and conclusory references to [their] conditions of confinement, without sufficient factual information from which to evaluate their constitutional claim." This argument, which is more of a pleading argument to extend *Iqbal* and *Twombly* than an argument about qualified immunity, is not persuasive. The defendants argue, for example, that while the plaintiffs allege that their cells were extremely cold, they provide no "factual context, no elaboration, no comparisons." At this stage of the case, we are satisfied with the description of the cells as "extremely cold." Cf. Fed. R. Civ. P. 84 and Forms 10-15 (sample complaints that "illustrate the simplicity and brevity that these rules contemplate").

The defendants also suggest that the plaintiffs did not detail in their Complaint whether they sought and were denied warmer clothing or blankets. Even if it was not necessary, the plaintiffs actually specified the clothing and bedding that was available to each of them — a single jumpsuit and a thin plastic mat. The defendants also argue that plaintiffs did not specify how long they were deprived of sleep. That level of detail is not required at this stage, but a fair reading of this Complaint indicates that the sleep deprivation tactics were a constant for the duration of their detention, as was the physical and psychological abuse by prison officials.

As the defendants acknowledge, a substantive due process inquiry requires "an appraisal of the totality of the circumstances rather than a formalistic examination of fixed elements." See *Armstrong v. Squadrito*, 152 F.3d

564, 570 (7th Cir. 1998) (reversing summary judgment for defendants). The plaintiffs have alleged sufficient details to conclude at this stage of the proceedings that, if true, their treatment, when considered in the aggregate, amounted to torture in violation of their right to substantive due process.[11]

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11. The district court thought the Complaint was sufficient, and so do we. But even if we found some inadequacy in the details of the already detailed pleading, through an unusually vigorous extension of the *Iqbal* pleading standard, for example, plaintiffs would be entitled to an opportunity to amend their Complaint to remedy any perceived defects. Basic fairness and the liberal amendment policy under Federal Rule of Civil Procedure Rule 15(a)(2) would require that plaintiffs be given an opportunity to cure the defects, if they could, at least absent undue delay, bad faith, dilatory motive, or undue prejudice. See, *e.g., Bausch v. Stryker Corp.*, 630 F.3d 546, 562 (7th Cir. 2010); *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 666 (7th Cir. 2007). The Supreme Court's recent decisions in *Iqbal* and *Twombly* have created new uncertainties about the level of detail required in pleadings under the notice pleading regime of the Federal Rules of Civil Procedure. Circuit and district courts have not yet identified a clear boundary between what is sufficient and what is not. See, e.g., *Swanson v. Citibank N.A.*, 614 F.3d 400, 403 (7th Cir. 2010) (observing that courts are "still struggling" with "how much higher the Supreme Court meant to set the bar, when it decided not only *Twombly*, but also *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007), and [*Iqbal*]," and noting that "[t]his is not an easy question to answer"); see also *Swanson*, 614 F.3d at 411 (Posner, J., dissenting in part) (noting the "opaque language" that the Supreme Court used to establish the "plausibility" requirement). As Professor Miller has suggested, "inconsistent rulings on virtually identical complaints may well be based on individual judges having quite different subjective views of what allegations are plausible." See Arthur R. Miller,

Though Vance and Ertel were never charged with, let alone convicted of, any crime, our precedents concerning the abuse of convicted criminals help guide our thinking about whether the alleged abuse violated a constitutional right. As the Supreme Court concluded recently, "[p]risoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Brown v. Plata*, 131 S. Ct. 1910, 1928, 179 L. Ed. 2d 969 (2011) (citations omitted); see also *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) (concluding that the Eighth Amendment "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . against which we must evaluate penal measures") (citations omitted). It is important to keep these fundamental concepts in mind as we focus on the claims before us. See *Forrest v. Prine*, 620 F.3d 739, 744 (7th Cir. 2010) (borrowing Eighth Amendment standards to analyze pre-trial detainee's claim).

From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure, 60 Duke L. J. 1, 30-31 (2010) (describing "confusion and disarray among judges and lawyers" in applying *Iqbal*). Rule 1 instructs courts to construe the rules to secure the "just" determination of lawsuits, and there is a general policy in favor of allowing parties to have their cases decided on their merits. See, *e.g.*, *Swierkiewicz*, 534 U.S. at 514; *Christensen v. County of Boone*, 483 F.3d 454, 458 (7th Cir. 2007). A reversal for inadequate pleading would require an opportunity to cure the defect unless it were clear that the defect could not be cured.

Examining the plaintiffs' claims against the backdrop of the Supreme Court's decisions on prison conditions of confinement and prison treatment cases, we remember that abuse in American prisons was once authorized and even thought of as part of the punishment of prisoners. See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (detailing authorized state practice of chaining inmates to one another and to hitching posts in the hot sun); *Hutto v. Finney*, 437 U.S. 678, 682, 98 S. Ct. 2565, 57 L. Ed. 2d 522 nn. 4-5 (1978), citing *Talley v. Stephens*, 247 F. Supp. 683 (E.D. Ark. 1965) (describing the lashing of inmates with a "wooden-handled leather strap five feet long and four inches wide" as part of authorized corporal punishment program) and *Jackson v. Bishop*, 268 F. Supp. 804 (E.D. Ark. 1967) (describing the use of a "Tucker telephone," a hand-cranked instrument "used to administer electrical shocks to various sensitive parts of an inmate's body" in prison that authorized the use of a strap to punish prisoners), *remanded with orders for broader relief*, 404 F.2d 571 (8th Cir. 1968) (Blackmun, J.).

Today, the idea that a prisoner in a U.S. prison might be abused in such a manner and not have judicial recourse is unthinkable. While the Constitution "does not mandate comfortable prisons, . . . neither does it permit inhumane ones." *Farmer*, 511 U.S. at 832 (citations omitted) (noting that the Eighth Amendment requires that prison officials "ensure that inmates receive adequate food, clothing, shelter, and medical care, and . . . 'take reasonable measures to guarantee the safety of the inmates'"). If a prisoner in a U.S. prison had his head covered and was repeatedly "walled," or slammed into walls on the

way to interrogation sessions, we would have no trouble acknowledging that his well-pled allegations, if true, would describe a violation of his constitutional rights. See, *e.g.*, *Hudson v. McMillian*, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992) (concluding that the use of excessive physical force against a prisoner may constitute cruel and unusual punishment even where prisoner is not seriously injured).

If a prisoner was kept awake as much as possible, kept in insufferably cold conditions, and not given sufficient bedding or clothing, we would likewise believe that there could well have been a violation of his constitutional rights. See, *e.g.*, *Wilson v. Seiter*, 501 U.S. 294, 304, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991) (clarifying that "[*s*]*ome* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise — for example, a low cell temperature at night combined with a failure to issue blankets"). If a U.S. prisoner with a serious medical condition is denied medical attention or has necessary medicine withheld, that too can violate the prisoner's constitutional rights. See *Estelle*, 429 U.S. at 104 (concluding that deliberate indifference to serious medical needs states a claim under the Eighth Amendment); *Board v. Farnham*, 394 F.3d 469, 480-81 (7th Cir. 2005) (holding that allegations of dental problems constitute objectively serious harm under the Eighth Amendment). The plaintiffs in this case, detained without charges, have pled in detail allegations of such severe conditions and treatment, the likes of which courts have

held unconstitutional when applied to convicted criminals in U.S. prisons. The allegations of abuse state claims for violations of the constitutional right not to be deprived of liberty without substantive due process of law.

2. The Rights Were Clearly Established

To decide qualified immunity, we turn next to whether the alleged rights were clearly established. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004), quoting *Saucier*, 533 U.S. at 202. The question is whether a reasonable official in Secretary Rumsfeld's position would have known that the conduct he allegedly authorized violated the Constitution of the United States.

This is not a case where the precise violation must have been previously held unlawful. Where the constitutional violation is patently obvious and the contours of the right sufficiently clear, a controlling case on point is not needed to defeat a defense of qualified immunity. See, *e.g., Hope*, 536 U.S. at 741 (reversing grant of qualified immunity for prison officials who chained a prisoner to a post for seven hours in the hot sun); *Nanda v. Moss*, 412 F.3d 836, 844 (7th Cir. 2005). Given the totality of the plaintiffs' allegations, that they were interrogated with physical violence and threats, were kept in extremely cold cells without adequate clothing, were continuously deprived of sleep, and were often deprived of food, clothing, and

medical care, a reasonable official in Secretary Rumsfeld's position in 2006 would have known that this amounted to unconstitutional treatment of a civilian U.S. citizen detainee. See, *e.g., Farmer*, 511 U.S. at 832; *Hudson*, 503 U.S. at 4; *Estelle*, 429 U.S. at 104. Lest there might have been any uncertainty on the point, Congress had twice recently and expressly provided as much as a matter of statutory law. See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, 10 U.S.C. § 801, stat. note § 1092 (stating that U.S. military policy prohibits techniques that violate the Constitution and instructing Secretary of Defense to ensure that polices are consistent with international obligations and laws of the United States); Detainee Treatment Act, 10 U.S.C. § 801, stat. note. § 1002 (limiting interrogation techniques to those authorized in the Army Field Manual).

The defendants offer a final argument that the law was not sufficiently developed with respect to the treatment of detainees in the context of military detention for the plaintiffs to allege adequately the violation of a clearly established constitutional right by Secretary Rumsfeld. The defendants argue that the Supreme Court and appellate courts "have struggled, and continue to struggle, with the precise constitutional contours applicable to the detention of individuals — citizen and non-citizen alike — seized in a foreign war zone." On this point, however, the defendants cite only cases involving procedural due process claims: *Munaf v. Geren*, 553 U.S. 674, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008), *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008), and *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578

(2004). Those procedural issues are undoubtedly difficult. But they shed no useful light on how a reasonable federal official might have thought that the Constitution permitted him to torture, or to authorize the torture of, a civilian U.S. citizen. The defendants themselves acknowledge that, if properly pled, allegations of violations of substantive due process, the likes of which the plaintiffs have raised, would amount to a constitutional violation. In sum, a reasonable official in Secretary Rumsfeld's position in 2006 would have realized that the right of a United States citizen to be free from torture at the hands of one's own government was a "clearly established" constitutional right and that the techniques alleged by plaintiffs add up to torture. We affirm the district court's decision to deny dismissal based on qualified immunity.

C. Bivens Claims by Civilian U.S. Citizens in a War Zone

There can be no doubt that if a federal official, even a military officer, tortured a prisoner in the United States, the tortured prisoner could sue for damages under *Bivens*. See *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980) (allowing *Bivens* claim against prison officials who were deliberately indifferent to prisoner's serious medical needs); *Saucier*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (holding that military police officer was entitled to qualified immunity on civilian's *Bivens* claim for excessive force, without suggesting that any broader immunity might apply). In this case, however, the defendants assert a broad immunity from suit under *Bivens*, claiming that civilian U.S. citizens can

never pursue a *Bivens* action against any U.S. military personnel if the constitutional violations occurred in a war zone. We review this question of law de novo. See *Thomas v. General Motors Acceptance Corp.*, 288 F.3d 305, 307 (7th Cir. 2002); *Wilson v. Libby*, 535 F.3d 697, 704, 383 U.S. App. D.C. 82 (D.C. Cir. 2008).

The unprecedented breadth of defendants' argument should not be overlooked. The defendants contend that a *Bivens* remedy should not be available to U.S. citizens for any constitutional wrong, including torture and even cold-blooded murder, if the wrong occurs in a war zone. The defendants' theory would apply to any soldier or federal official, from the very top of the chain of command to the very bottom. We disagree and conclude that the plaintiffs may proceed with their *Bivens* claims.

We address first the nature of the *Bivens* remedy and then apply the two-step process the Supreme Court has applied for deciding when a *Bivens* remedy should be available. The first step is to consider whether there is a sufficient "alternative remedy" for the alleged constitutional wrong indicating that Congress has intended to supplant *Bivens*. Here there is no meaningful alternative, and the defendants do not argue otherwise. The second step is to consider whether "special factors" weigh against recognition of a *Bivens* remedy under the circumstances. In taking this second step, we explain that the key elements of plaintiffs' claims are well established under *Bivens*: (a) that civilian claims against military personnel are permissible; (b) that claims based on abuse of prisoners are permissible; (c) that the Constitution

governs the relationship between U.S. citizens and their government overseas; and (d) that claims against current and former cabinet officials are permitted. We then conclude that Congress has not indicated any bar to claims under these circumstances. In fact, Congress has acted to provide civil remedies to *aliens* who are tortured by *their* governments. It would be extraordinary to find that there is no such remedy for *U.S. citizens* tortured by *their own government*. In taking the second step, we then weigh and reject the defendants' arguments and authorities offered to support a special rule that would immunize government officials from *Bivens* liability for the torture, or worse, of a civilian U.S. citizen in a war zone.

Section 1 of the Civil Rights Act of 1871, codified as 42 U.S.C. § 1983, authorizes civil lawsuits against state and local government officials for the deprivation of federal constitutional and statutory rights. No analogous statute broadly authorizes similar suits against federal officials. The Supreme Court recognized in *Bivens*, however, that private citizens have an implied right of action directly under the Constitution to recover damages against federal officials for constitutional violations even where Congress has not conferred such a right by statute. In *Bivens*, the plaintiff sued federal law enforcement agents for searching his property without a warrant, using excessive force, and arresting him without probable cause. In holding that Bivens was entitled to sue the agents for damages, the Supreme Court observed that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bivens*, 403 U.S. at

392, quoting *Bell v. Hood*, 327 U.S. 678, 684, 66 S. Ct. 773, 90 L. Ed. 939 (1946). "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 395. The *Bivens* remedy has been designed to prevent constitutional rights from becoming "merely precatory." *Davis v. Passman*, 442 U.S. 228, 242, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979) (holding that congressional employee could sue member of Congress for sex discrimination in employment in violation of equal protection branch of Fifth Amendment due process right).[12]

The Supreme Court's more recent *Bivens* decisions direct us to exercise caution in recognizing *Bivens* remedies in new contexts. *Bivens* does not provide an "automatic entitlement" to a remedy for a constitutional violation by a federal official, and "any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee." *Wilkie v. Robbins*, 551 U.S. 537, 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007). We have

12. Long before *Bivens*, federal courts provided remedies for federal officials' violations of federal law, and individuals sought post-deprivation remedies against federal officials in federal court. See *Iqbal*, 129 S. Ct. at 1948, citing, *e.g.*, *Dunlop v. Munroe*, 11 U.S. (7 Cranch) 242, 268, 3 L. Ed. 329 (1812) (concluding, in case against postmaster, that a federal official's liability "will only result from his own neglect in not properly superintending the discharge" of his subordinates' duties); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178-79, 2 L. Ed. 243 (1804) (holding that commander of a warship was "answerable in damages" to the owner of a neutral vessel seized pursuant to orders from President but in violation of statute).

reminded plaintiffs that *Bivens* is not an automatic "gap-filler, available whenever a plaintiff seeks a particular remedy not provided for by any statute or regulation, for a constitutional violation by federal officers." *Robinson v. Sherrod*, 631 F.3d 839, 842 (7th Cir. 2011); see also *United States v. Norwood*, 602 F.3d 830, 836 (7th Cir. 2010). Given this history, as well as the gravity of the claims before us, we "proceed cautiously" in determining whether to allow Vance and Ertel to pursue a cause of action under *Bivens*. See *Bagola v. Kindt*, 131 F.3d 632, 638 (7th Cir. 1997).[13]

The Supreme Court has developed a two-step test for structuring judgments about whether a particular *Bivens* claim should be recognized. First, courts must consider "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550. Where Congress has provided for an adequate alternative remedy, an implied *Bivens* remedy is neither necessary nor available. The Court has reached this conclusion in

13. Some members of the Supreme Court have said that *Bivens* is outdated. *Wilkie*, 551 U.S. at 568 (Thomas, J., concurring); *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 75, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001) (Scalia, J., concurring) (observing that "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action-decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."). Despite this criticism, *Bivens* remains the law of the land, and it remains one vital way of ensuring that fundamental guarantees in the Bill of Rights are not hollow, precatory promises. *Wilkie* provides a helpful and recent guide for its application.

two cases where Congress has established comprehensive and well-defined civil remedies: Social Security benefits, in *Schweiker v. Chilicky*, 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988), and federal civil service employment, in *Bush v. Lucas*, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983).

If there is no sufficient alternative, the courts must proceed to the second step of the *Bivens* test, as described in *Bush*: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Bush*, 462 U.S. at 378, quoted in *Wilkie*, 551 U.S. at 550.

1. Step One — Alternative Remedies

The first step of the inquiry is to consider "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550. The short answer is no. The defendants do not suggest that there is any alternative remedial scheme at all comparable to the Social Security procedures and remedies in *Schweiker* or the federal civil service procedures and remedies in *Bush*. While the defendants do not argue that there is an "alternative remedy," their "special factors" arguments invite us to look more broadly for indications of Congressional intent as to whether a *Bivens* action should be permitted under the circumstances. We do so below in our discussion of "special factors" in the second step.

Appendix B

Although the defendants do not argue that there is an "alternative remedy" for the plaintiffs, an amicus brief by former Secretaries of Defense and Members of the Joint Chiefs of Staff addresses the issue. They argue, as defendants do not, that Congress has created an elaborate and well-structured scheme for remedies and an administrative system that encourages detainees to make complaints. These amici suggest that Vance and Ertel enjoyed the protections of, among others, the Geneva Conventions, the Coalition of Provisional Authority Memorandum #3, and the Uniform Code of Military Justice. They argue that the plaintiffs are not entitled to pursue *Bivens* claims because they could have taken advantage of these protections by complaining about their treatment at the time of their detention.

We respect these amici and their distinguished public service. For three reasons, however, we are not persuaded by the argument that a *Bivens* remedy should be barred because detainees who are being tortured may submit a complaint about their treatment to the very people who are responsible for torturing them. First, if, as plaintiffs allege here, there was a problem stretching to the very top of the chain of command, it would make little sense to limit their recourse to making complaints within that same chain of command. Second, the opportunity to complain offers no actual remedy to those in plaintiffs' position other than possibly to put a stop to the ongoing torture and abuse. A system that might impose discipline or criminal prosecution of the individuals responsible for their treatment does not offer the more familiar remedy of damages. Third, during oral argument, plaintiffs' counsel

asserted that Vance and Ertel in fact did complain about their treatment while detained. At least one of the men had face-to-face conversations with the commander of Camp Cropper, who said there was nothing he could do about their treatment.[14]

The administrative remedy of inviting detainees to complain about their treatment is also nothing like the alternative remedies that the Supreme Court has found to preclude *Bivens* remedies in *Schweiker* and *Bush*. Those elaborate and comprehensive remedial systems provided meaningful safeguards and remedies established by Congress for victims of official wrongdoing. See *Schweiker*, 487 U.S. at 425. The situation before us is very different: Congress has not given civilian U.S. citizens claiming torture by U.S. officials in a war zone anything like the "frequent and intense" attention it has

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14. The panel invited this elaboration on the plaintiffs' complaint, as permitted on appeal of a Rule 12(b)(6) decision as long as the elaboration is not inconsistent with the complaint. See *supra* n. 6. The friends of the court refer to the applicable Army Regulation 190-8, which states that if civilian detainees are "not satisfied with the way the commander handles a complaint or request, they may submit it in writing." AR 190-8, § 6-9. The matter must be reported up the chain of command, investigated, and remedied under DoD Directive 5100.77 (Dec. 9, 1998). Def. Sec. Amicus Br. at 11. The amici note that at the time the plaintiffs were detained, there had been more than 800 investigations by military law enforcement officials of alleged detainee abuse. *Id.* at 13 n.8. We do not believe that this is the kind of comprehensive remedial system that would preclude a *Bivens* remedy. Apparently, neither does the government; its brief does not rely on this internal administrative complaint system.

given the Social Security system and disability review. *Id*. It has not provided these plaintiffs any remedy. As we have concluded in other *Bivens* cases, "without an explicit indication from Congress, we will not foreclose this right when the statutory remedy is wholly inadequate." *Bagola*, 131 F.3d at 645. Here, there is no statutory remedy at all. We must proceed to step two of the *Bivens* inquiry.[15]

2. Step Two — "Special Factors"

The second step of the Bivens inquiry is to make "the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Bush*, 462 U.S. at 378, quoted in *Wilkie*, 551 U.S. at 550. We must be cautious in addressing the question, but we can draw sound guidance from many precedents addressing closely related problems. In considering this special factors analysis, we note first the breadth of the proposed defense and the narrowness of the asserted claim. We then turn to the *Bivens* precedents dealing with civilian claims against military personnel, those dealing with claims of abuse of prisoners, and then the more general principles that apply to the Bill of Rights outside of United States territory. We

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15. Our dissenting colleague argues that we should leave the question of remedies entirely to Congress. Although we disagree, for reasons explained at length in the text, nothing in our reasoning would prevent Congress from addressing the problems posed here with a statutory solution. The *Bivens* line of cases shows that when Congress has acted to address the relevant context, as in Social Security and civil service cases, courts have been more than willing to defer to congressional solutions.

consider then the precedents and arguments relied upon by the defendants, including their invitation to consider Congressional intent in this area.

a. The Scope of the Defense and the Claim

The defendants' principal *Bivens* argument is that, because this case arose in a foreign war zone, no *Bivens* claim should be recognized. This sweeping defense is proposed against a fairly narrow claim. The defendants are arguing for a truly unprecedented degree of immunity from liability for grave constitutional wrongs committed against U.S. citizens. The defense theory would immunize not only the Secretary of Defense but all personnel who actually carried out orders to torture a civilian U.S. citizen. The theory would immunize every enlisted soldier in the war zone and every officer in between. The defense theory would immunize them from civil liability for deliberate torture and even cold-blooded murder of civilian U.S. citizens. The United States courts, and the entire United States government, have never before thought that such immunity is needed for the military to carry out its missions.[16]

16. We hope that the serious claims before us are truly unusual, but the defense theory is of particular concern because of our nation's increased reliance on civilian contractors in modern war zones. A majority of our nation's wartime presence in Iraq and Afghanistan has been made up of private contractors. The Congressional Research Service reported that, as of March 2011, the Department of Defense had more contractor personnel (155,000) than uniformed personnel (145,000) in Iraq and Afghanistan. In Iraq, as of March 2011, there were 64,253 Defense

In asserting this broad defense, defendants have also sought to broaden plaintiffs' claims beyond those they are actually asserting. Contrary to the defense arguments, plaintiffs are not asserting a broad challenge to the detention or interrogation policies of the United States military. Plaintiffs assert that their treatment was actually contrary to explicit statutory law and stated military policy, because they claim they were subjected to interrogation techniques that were not authorized by the applicable Army Field Manual. This case, in other words, does not invite a broad debate over appropriate detention and interrogation techniques in time of war. It presents factual issues over whether there was a deliberate decision to violate the U.S. Constitution and other applicable laws and, if so, who was responsible for that decision. With the broad scope of the proposed defense and the narrow focus of the asserted claim, we turn to precedent for guidance.

b. Precedents Supporting Plaintiffs' Claims

The key elements of plaintiffs' claims for constitutional wrongs committed by military officials are all familiar in *Bivens* jurisprudence, and nothing about their claims would extend *Bivens* beyond its "core premise," which is "the deterrence of individual officers who commit unconstitutional acts." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 71, 122 S. Ct. 515, 151 L. Ed. 2d

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Department contractors and 45,660 uniformed personnel in the country. See "Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis," Moshe Schwartz and Joyprada Swain, Congressional Research Service (May 13, 2011).

456 (2001). That point does not end the "special factors" debate, but it provides a useful starting point.

First, of course, it is well established that *Bivens* is available to prisoners who assert that they have been abused or mistreated by their federal jailors. In *Carlson*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15, the Supreme Court reversed dismissal of a complaint in which a deceased prisoner's representative sued for violation of the Eighth Amendment prohibition on cruel and unusual punishment, in that case through an alleged deliberate denial of needed medical care. Since *Carlson*, we have regularly allowed prisoners to pursue their constitutional challenges against federal prison officials as *Bivens* claims. See, *e.g., Bagola*, 131 F.3d 632 (concluding that district court properly heard *Bivens* claim alleging injury as part of prison work program where workers' compensation program did not provide adequate safeguards to protect prisoner's Eighth Amendment rights); *Del Raine v. Williford*, 32 F.3d 1024 (7th Cir. 1994) (recognizing prisoner's *Bivens* claim alleging that he was forced to live in bitterly cold cell). The fact that the plaintiffs were imprisoned while not even charged with, let alone convicted of, any crime only tends to emphasize how familiar this aspect of their claim is.

Second, it is also well established under *Bivens* that civilians may sue military personnel who violate their constitutional rights. For example, *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272, an important but now overruled qualified immunity case, was a Fourth Amendment excessive force claim by a civilian against a military police officer. There was no suggestion that the

civilian could not sue the military police officer. Circuit courts have also decided a number of *Bivens* cases brought by civilians against military personnel. See, e.g., *Case v. Milewski*, 327 F.3d 564 (7th Cir. 2003) (civilian claim against military officers for Fourth and Fifth Amendment violations); *Morgan v. United States*, 323 F.3d 776 (9th Cir. 2003) (civilian claim against military police for search of vehicle); *Roman v. Townsend*, 224 F.3d 24 (1st Cir. 2000) (civilian claim against military police officer and Secretary of the Army for improper arrest and treatment in detention); *Applewhite v. United States Air Force*, 995 F.2d 997 (10th Cir. 1993) (civilian claim against military investigators for unlawful search and removal from military base); see also *Willson v. Cagle*, 711 F. Supp. 1521, 1526 (N.D. Cal. 1988) (concluding that "a *Bivens* action may potentially lie against military officers and civilian employees of the military" for protesters injured when a military munitions train collided with them), *aff'd mem.*, 900 F.2d 263 (9th Cir. 1990) (affirming denial of qualified immunity); *Barrett v. United States*, 622 F. Supp. 574 (S.D.N.Y. 1985) (allowing civilian's *Bivens* claim to proceed against military officials for their alleged concealment of their role in the creation and administration of an army chemical warfare experiment in which her father unknowingly served as a test subject), *aff'd*, 798 F.2d 565 (2d Cir. 1986). While such claims often fail on the merits or for other reasons, the fact that a civilian has sued a military official is not a basis for denying relief under *Bivens*.[17]

17. We are not persuaded by the defendants' reliance on *Chappell v. Wallace*, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983), and *United States v. Stanley*, 483 U.S. 669, 107 S. Ct. 3054,

Third, when civilian U.S. citizens leave the United States, they take with them their constitutional rights that protect them from their own government. In *Reid v. Covert*, 354 U.S. 1, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957), the Supreme Court held that civilian members of military families could not be tried in courts-martial. Justice Black wrote for a plurality of four Justices:

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

Id. at 5-6. The general proposition remains vital, as recently reaffirmed in *Boumediene*, holding that aliens

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97 L. Ed. 2d 550 (1987), two cases in which the Supreme Court applied the "special factors" analysis to hold that one member of the U.S. Armed Forces could not sue another member of the Armed Forces under *Bivens*. Both decisions were based on the unique disciplinary structure within the military. Neither case provides a basis for rejecting a *Bivens* claim by a civilian against a military official.

held as combatants at Guantanamo Bay may invoke the writ of habeas corpus to challenge their detention: "Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'" 553 U.S. at 765, quoting *Murphy v. Ramsey*, 114 U.S. 15, 44, 5 S. Ct. 747, 29 L. Ed. 47 (1885); see also *Munaf*, 553 U.S. at 688 (holding that civilian U.S. citizens held in U.S. military custody in Iraq could seek petition for the writ of habeas corpus in federal district court). Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) (holding that non-resident alien could not invoke Fourth Amendment to challenge search by U.S. officials in foreign country).

Fourth, defendant Rumsfeld is being sued for actions taken and decisions made while serving at the highest levels of the United States government. We express no view at this stage as to whether plaintiffs can prove their factual allegations. The former rank of the defendant, however, is not a basis for rejecting the plaintiffs' claims. The Supreme Court has repeatedly entertained *Bivens* actions against other cabinet members. See, *e.g., Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (holding that Attorney General was entitled to qualified immunity, not absolute immunity, from damages suit arising out of national security-related actions); *Harlow v. Fitzgerald*, 457 U.S. at 818 (concluding that senior aides and advisors of the President of the United States may be entitled to qualified immunity from liability when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known");

Halperin v. Kissinger, 606 F.2d 1192, 196 U.S. App. D.C. 285 (D.C. Cir. 1979) (concluding that senior Executive Branch officials, including a former president of the United States, were not absolutely immune from suit for damages by citizen alleging an unconstitutional wiretap), *aff'd in pertinent part*, 452 U.S. 713, 101 S. Ct. 3132, 69 L. Ed. 2d 367 (1981); *Butz v. Economou*, 438 U.S. 478, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978) (concluding that federal officials in the Executive Branch, including the Secretary of Agriculture, ordinarily may be entitled to qualified immunity, not absolute immunity, from constitutional claims).

c. The Defense Arguments and Precedents for Special Factors

Although the principal elements of plaintiffs' claims are familiar aspects of *Bivens* jurisprudence, the claims are challenging because they arose in a U.S. military prison in Iraq during a time of war. As the defendants acknowledged at oral argument, however, neither the Supreme Court nor any other federal circuit court has ever denied civilian U.S. citizens a civil remedy for their alleged torture by U.S. government officials.

i. Military Affairs and National Security

The defendants' argument that the courts should stay out of military affairs rests on the assumption that the plaintiffs are mounting a broad challenge to U.S. military and detention policy, raising issues of national

security and even foreign relations. If plaintiffs were actually seeking a general review of "military actions and policies," as the defense suggests, this case would present different issues. That is not what plaintiffs seek. They are not challenging military policymaking and procedure generally, nor an ongoing military action. They challenge only their particular torture at the hands and direction of U.S. military officials, contrary to statutory provisions and stated military policy, as well as the Constitution. Allowing *Bivens* liability in these unusual circumstances would not make courts, as defendants suggest, "the ultimate arbiters of U.S. military or foreign policy."

We are sensitive to the defendants' concerns that the judiciary should not interfere with military decision-making. The "Constitution recognizes that core strategic matters of warmaking" rest with the Executive. *Hamdi*, 542 U.S. at 531. But it is equally clear that "[w]hile we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims." *Id*. at 535; see also *Ex parte Quirin*, 317 U.S. 1, 19, 63 S. Ct. 2, 87 L. Ed. 3 (1942) (acknowledging that "the duty which rests on the courts, in time of war as well as in time of peace, [is] to preserve unimpaired the constitutional safeguards of civil liberty"). Recognizing the plaintiffs' claims for such grave — and, we trust, such rare — constitutional wrongs by military officials, in a lawsuit to be heard well after

the fact, should not impinge inappropriately on military decision-making.

The defendants raise the concern that litigation of the plaintiffs' claims "would inevitably require judicial intrusion into matters of national security." See *Wilson*, 535 F.3d at 710. This may be a serious concern, but at a very pragmatic level, the fact that classified information (from years ago) might be implicated at some point in this litigation is not a bar to allowing it to go forward at this stage. If classified information becomes a problem, the law provides tools to deal with it. As Judge Calabresi explained in *Arar v. Ashcroft*, the state-secrets privilege is the appropriate tool by which state secrets are protected: "Denying a *Bivens* remedy because state secrets might be revealed is a bit like denying a criminal trial for fear that a juror might be intimidated: it allows a risk, that the law is already at great pains to eliminate, to negate entirely substantial rights and procedures." 585 F.3d at 635 (Calabresi, J., dissenting). As the majority in *Arar* acknowledged, "courts can — with difficulty and resourcefulness — consider state secrets and even reexamine judgments made in the foreign affairs context *when they must*, that is, when there is an unflagging duty to exercise our jurisdiction." *Id.* at 575-76. Fear of the judiciary "intruding" into national security should not prevent us from recognizing a remedy at this stage, in this case.

Courts reviewing claims of torture in violation of statutes such as the Detainee Treatment Act or in violation of the Fifth Amendment do not endanger the separation

of powers, but instead reinforce the complementary roles played by the three branches of our government. See, *e.g., Boumediene*, 553 U.S. at 742 ("The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty."); see also *Hamdi*, 542 U.S. at 536-37 (emphasizing, with respect to challenges to the factual basis of a citizen's detention, that "it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to . . . his detention by his Government, simply because the Executive opposes making available such a challenge"). The defendants' broad argument that the judiciary should stay out of all matters implicating national security is too broad to be convincing.

Our dissenting colleague suggests that "given the significant pitfalls of judicial entanglement in military decisionmaking, it must be Congress, not the courts, that extends the remedy and defines its limits." Dissent at 88. We respectfully disagree. As the Supreme Court said in *Hamdi*: "Whatever power the United States Constitution envisions for the Executive . . . in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." 542 U.S. at 536.

Recent habeas corpus cases reinforce our understanding that federal courts have a role to play in safeguarding citizens' rights, even in times of war. The *Hamdi* Court, examining a claim by an American citizen

detained on U.S. soil as an enemy combatant, held that the detainee was entitled to contest the basis for his detention. "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Hamdi*, 542 U.S. at 535, quoting *Sterling v. Constantin*, 287 U.S. 378, 401, 53 S. Ct. 190, 77 L. Ed. 375 (1932).

The *Munaf* Court later made clear that the habeas statute "extends to American citizens held overseas by American forces." *Munaf*, 553 U.S. at 680. Thus, courts may enforce the habeas rights of U.S. citizens in U.S. military custody in Iraq, though in *Munaf* itself, relief was denied because Iraq had a sovereign right to criminally prosecute the petitioners. *Id.* at 694-95.

Most recently, in *Boumediene*, the Supreme Court held that aliens detained as enemy combatants at Guantanamo Bay were entitled to seek a writ of habeas corpus to challenge their detention and that the Detainee Treatment Act review procedures were an inadequate alternative to habeas corpus. 553 U.S. at 795. This line of cases undermines the defendants' broad insistence that the judiciary must stay out of all matters concerning wartime detention and interrogation issues.[18]

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18. The defendants suggest that "it is telling" that the plaintiffs rely on habeas corpus cases rather than cases permitting *Bivens* claims in the context of reviewing military actions and policies, because habeas is a remedy authorized by statute and the Constitution while *Bivens* is merely a judicially-created remedy for damages, with what the defense argues is a presumption against recognizing claims in new contexts. The argument is not

The fact that the plaintiffs are U.S. citizens is a key consideration here as we weigh whether a *Bivens* action may proceed.[19] As the Court in *Reid* concluded: "When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Reid*, 354 U.S. at 6 (plurality opinion of Black, J.); see also *Kar v. Rumsfeld*, 580 F. Supp. 2d 80, 83 (D.D.C. 2008) (finding that the "Fourth and Fifth Amendments certainly protect U.S. citizens detained in the course of hostilities in Iraq").

The defendants cite a number of cases, both habeas corpus and *Bivens* cases, for the proposition that the judiciary should not create damages remedies in the context of foreign affairs. Almost all of these were suits by aliens, not U.S. citizens, detained and suspected of

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persuasive. Those cases also involve some judicial inquiry into matters affecting national security and military activity. *Hamdi, Munaf*, and *Boumediene* thus weigh against the argument that the courts must simply defer to executive authorities in a case involving alleged torture of a U.S. citizen in U.S. military custody.

19. This is not to say that we think that citizenship should be a dispositive factor in all *Bivens* cases implicating national security. But as we explain, in the context of this particular set of facts and allegations, U.S. citizenship or permanent resident alien status counsels in favor of recognizing a judicial remedy against federal officials even if the result might be different for an alien's similar claim. Such an alien could have his own government intervene to protect his rights, and such claims could implicate foreign affairs and diplomacy in a way that this case does not.

terrorism ties. For example, the defendants cite *Arar v. Ashcroft*, where the sharply divided Second Circuit declined to recognize an alien's *Bivens* claim for "extraordinary rendition" because several related "special factors" counseled hesitation. 585 F.3d at 575-81. The plaintiff in *Arar* was an alien with Syrian and Canadian citizenship who challenged an alleged U.S. presidential policy allowing extraordinary rendition and torture by foreign governments. The majority found that allowing the alien plaintiff to proceed with a *Bivens* claim "would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation, and that fact counsels hesitation." *Id.* at 574. More recently, the D.C. Circuit held that Afghan and Iraqi citizens who alleged that they were tortured in U.S. custody in those nations could not pursue *Bivens* claims against U.S. officials, including Secretary Rumsfeld. *Ali v. Rumsfeld*, 649 F.3d 762, 396 U.S. App. D.C. 381, 2011 U.S. App. LEXIS 12483, 2011 WL 2462851 (D.C. Cir. June 21, 2011).[20]

We are fully aware that prohibitions against torture are matters of international law as well as United States law, and that those prohibitions reflect basic and universal human rights. The question of remedies, however, has

20. Our dissenting colleague contends that recognizing a *Bivens* claim here "vaults over this consensus" and "too-casually sidesteps the weight of precedent from other circuits." Dissent at 82, 88. There is in fact no such consensus to vault over, nor a "casual sidestep." There is no circuit court decision with which we disagree. The two circuits we have cited addressed the very different situation of alien detainees. The plaintiffs here are U.S. citizens entitled to the full protection of our Constitution.

more room for nuance, and the Second Circuit majority in *Arar* was concerned in large part about the diplomatic and foreign policy consequences of hearing Arar's claims. 585 F.3d at 574; see also *Arar*, 585 F.3d at 603 (Sack, J., concurring in part and dissenting in part) (concluding that security and secrecy concerns should not be considered "special factors counseling hesitation," but should be dealt with on a case-by-case basis employing the state-secrets doctrine). If the U.S. government harms citizens of other nations, they can turn to their home governments to stand up for their rights. These considerations are simply not present in this lawsuit by two U.S. citizens challenging their alleged illegal torture by their own government.

In a series of cases, the D.C. Circuit has rejected efforts by aliens to use *Bivens* to seek relief from U.S. foreign policy and military actions overseas. In *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 248 U.S. App. D.C. 146 (D.C. Cir. 1985), members of the U.S. Congress and citizens of Nicaragua brought claims, including *Bivens* claims, against U.S. government officials for their alleged support of forces bearing arms in Nicaragua. In rejecting the obvious invitation to the federal courts to make foreign policy, the court explained: "we think that as a general matter the danger of foreign citizens' using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist." 770 F.2d at 209.

The D.C. Circuit followed that reasoning in *Rasul v. Myers*, 563 F.3d 527, 530, 385 U.S. App. D.C. 318 (D.C.

Cir. 2009) (*Rasul II*), where the court relied on the alien citizenship of the plaintiffs in granting the defendants qualified immunity, finding that "[n]o reasonable government official would have been on notice that [alien] plaintiffs had any Fifth Amendment or Eighth Amendments rights." Because the *Rasul II* court found that the defendants were immune from suit, it reached the broader *Bivens* issue only in a footnote, concluding in the alternative that the plaintiffs' *Bivens* claims were foreclosed by "special factors." *Id.* at 532 n.5, citing Judge Brown's concurrence in *Rasul v. Myers*, 512 F.3d 644, 672-73, 379 U.S. App. D.C. 210 (*Rasul I*) (concluding that special factors foreclose a *Bivens* claim in the context of treatment and interrogation of enemy combatant detainees), *vacated*, 555 U.S. 1083, 129 S. Ct. 763, 172 L. Ed. 2d 753 (2008). In *Rasul I*, Judge Brown had written:

> Treatment of detainees is inexorably linked to our effort to prevail in the terrorists' war against us, including our ability to work with foreign governments in capturing and detaining known and potential terrorists. Judicial involvement in this delicate area could undermine these military and diplomatic efforts and lead to embarrassment of our government abroad.

512 F.3d at 673 (Brown, J., concurring) (quotation marks omitted); see also *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 112 (D.D.C. 2010), *appeal pending*, No. 10-5393 (D.C. Cir.) (relying on *Rasul II*, finding that "[t]he D.C. Circuit's conclusion that special factors counsel against

the judiciary's involvement in the treatment of detainees held at Guantanamo binds this Court and forecloses it from creating a *Bivens* remedy for plaintiffs here"). Judge Brown's reasoning in *Rasul* cannot be extended to bar claims by U.S. citizens who have not been charged with, let alone convicted of, any terrorist activity.

Most recently, in *Ali v. Rumsfeld*, the D.C. Circuit followed *Rasul II* and *Sanchez-Espinoza* to hold that Iraqi and Afghan citizens detained abroad in U.S. military custody could not sue under *Bivens* for claims of torture. The court's analysis of "special factors" under *Bivens* emphasized the plaintiffs' status as aliens. __ F.3d at __, 2011 U.S. App. LEXIS 12483, 2011 WL 2462851, at *4-7. The D.C. Circuit's opinions in *Ali, Rasul II*, and *Sanchez-Espinoza* do not even hint that their reasoning would extend to bar *Bivens* claims by civilian U.S. citizens who can prove that their own government tortured them.

As our dissenting colleague points out, there is some overlap in the special factors analysis that applied in the cases brought by aliens in *Ali* and *Arar*, all of whom alleged they were tortured, either directly by the U.S. government or as a result of a U.S. practice of extraordinary rendition. Those cases presented very disturbing allegations about our government, especially in view of our nation's long commitment to comply with international law and our leadership in opposing torture worldwide. We acknowledge that those cases presented difficult issues in applying the *Bivens* special factors analysis.

Whether one agrees or disagrees with *Ali* and *Arar*, however, we should not let the difficulty of those cases lead us to lose sight of the fundamentally different situation posed by the claims of civilian U.S. citizens in this case. These plaintiffs have alleged a grave breach of our most basic social compact — between "We the People" and the government we created in our Constitution. As difficult as torture claims by aliens may be, we repeat that nothing in *Ali* or *Arar*, or in the opinions in *Rasul II* or *Sanchez-Espinoza*, indicates that those courts were willing to extend the unprecedented immunity that defendants and the dissent advocate here, for claims that our government tortured its own citizens.

ii. Congressional Intent

The defendants do not argue that Congress has created an "alternative remedy" that forecloses a *Bivens* remedy. They argue, though, that because Congress has passed numerous pieces of legislation regarding detainee treatment, none of which provide detainees with a statutory private right of action, the courts should not recognize a *Bivens* remedy for civilian U.S. citizens tortured in military custody in a war zone. See, *e.g.*, Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, 10 U.S.C. § 801, stat. note § 1092; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2635, codified at 28 U.S.C. § 2241(e)(2). Congress has also addressed detention standards in a criminal statute without providing for a private civil right of action. See 10 U.S.C. § 893 (a person guilty of cruelty and maltreatment of person subject to his orders shall be

punished as a court-martial may direct). Congress has even gone so far as to criminalize overseas torture, see 18 U.S.C. § 2340A, but explicitly provided that it was not creating a new civil right of action. See 18 U.S.C. § 2340B ("Nothing in this chapter shall be construed . . . as creating any substantive or procedural right enforceable by law by any party in any civil proceeding."). From Congress' close attention to detainee treatment without creating a civil right of action, defendants infer that a *Bivens* remedy is not appropriate here.

We disagree. *Bivens* is a well-known part of the legal landscape, so it is significant that Congress has taken no steps to foreclose a citizen's use of *Bivens*. We can assume that Congress was aware that *Bivens* might apply when it enacted legislation relevant to detainee treatment. In fact, when Congress enacted the Detainee Treatment Act, it opted to regulate — not prohibit — civil damages claims against military officials accused of torturing aliens suspected of terrorism. Congress created a good faith defense in civil and criminal cases for officials who believed that their actions were legal and authorized by the U.S. government:

> In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government [for engaging in practices involving detention and interrogation of alien detainees suspected of terrorism] it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know

> that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful . . . . Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.

42 U.S.C. § 2000dd-1(a).[21] This express but limited defense against civil claims by *alien* detainees suspected of terrorism is a strong indication that Congress has not closed the door on judicial remedies that are "otherwise available," certainly for *U.S. citizens*, even though it chose not to wrestle with just what those remedies might be.

Accepting defendants' invitation to consider other indications of Congressional intent, we find other powerful evidence that weighs heavily in favor of recognizing a judicial remedy here. Congress has enacted laws that provide civil remedies under U.S. law for foreign citizens who are tortured by their governments. The plaintiffs cite the Torture Victim Protection Act and the Alien Tort Statute, 28 U.S.C. § 1350, which was part of the Judiciary Act of 1789, to show that "Congress and the American people have always stood against torture, and Congress has seen litigation against officials of other nations as an important tool to implement America's foreign policy

21. The defendants emphasize the last sentence in the quoted passage, but it indicates only that Congress did not intend to make any other change in law that would otherwise apply.

against torture." Pl. Br. at 30. Where Congress has authorized such claims by non-citizen victims of torture by foreign governments, it would be startling if United States law did not provide a judicial remedy for U.S. citizens alleging torture by their own government.

It would be difficult to reconcile the law of nations' prohibition against torture and the remedies United States law provides to aliens tortured by their governments with a decision not to provide these citizen-plaintiffs a civil remedy if they can prove their allegations. The defendants have not attempted to do so. As the Second Circuit held in *Filartiga v. Pena-Irala*, "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties." 630 F.2d 876, 878 (1980) (holding that alien victims of torture in Paraguay could sue responsible Paraguayan official in U.S. district court under Alien Tort Statute for damages for violation of law of nations); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004) (describing the history of the Alien Tort Statute and holding that district courts may recognize private causes of action for some violations of the law of nations).

Most relevant, though, is the Torture Victim Protection Act of 1991, Pub. L. 102-256, codified as a note to the Alien Tort Statute, 28 U.S.C. § 1350. Section 2(a) of that Act provides a cause of action for civil damages against a person who, "under actual or apparent authority, or color of law, of any foreign nation," subjects another person to torture or extrajudicial killing. Section 2(b) requires U.S.

courts to decline to hear such claims "if the claimant has not exhausted adequate and available remedies in the place" where the conduct occurred. Under the Torture Victim Protection Act, if an alien has been tortured by her own government, and if that foreign government has denied her a civil remedy, then a U.S. court could hear the case against a defendant found in the U.S. It would be extraordinary — one might even say hypocritical — for the United States to refuse to hear similar claims by a U.S. citizen against officials of his own government. And *Bivens* provides the only available remedy.

To illustrate the anomalous result the defendants seek, consider the possibility that another country has enacted its own law identical to the U.S. Torture Victim Protection Act. If we accepted defendants' argument in this case and held there is no civil remedy available, then there would be no "adequate and available remedies in the place" where the conduct occurred (a U.S. military base). If Secretary Rumsfeld could be found visiting such a country with its own TVPA (so he could be served with process), Vance and Ertel could sue him in that country under its torture victim protection law because U.S. law would provide no remedy. That would be a very odd result. Surely the Congress that enacted the Torture Victim Protection Act would rather have such claims against U.S. officials heard in U.S. courts.[22]

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22. Other parts of our government seem to agree, as Judge Parker pointed out in *Arar*, 585 F.3d at 619 (Parker, J., dissenting). The U.S. State Department has assured the United Nations Committee Against Torture that the *Bivens* remedy is available to victims of torture by federal officials. United States Written

In sum, we are not convinced by the defendants' argument that "special factors" preclude recognition of a *Bivens* remedy in this case. A couple of final concerns remain in our *Bivens* analysis. The defendants argue that, under the plaintiffs' approach, any military action could result in a *Bivens* claim if the action were characterized as a violation of some government policy. The defendants argue, for example, that this could include a plaintiff seeking damages from the Secretary of Defense for an air strike in a location beyond the bounds of congressional authorization to wage war. The argument is not convincing. Today we decide only the narrow question presented by the extraordinary allegations now before us. The *Bivens* case law weighs in favor of allowing plaintiffs, U.S. citizens, to proceed with their claims that while they were in U.S. military custody, they were *tortured* by U.S. government officials. Our decision today opens up the courts to other claims like this, but we hope and expect that allegations of this nature will be exceedingly rare. We make no broader holding about whether other future claims about violations of government policy would be cognizable under *Bivens*.

A difficult related question is whether recognizing the plaintiffs' *Bivens* claim in this instance creates a special category of constitutional rights that would still

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Response to Questions Asked by the United Nations Committee Against Torture, ¶ 5 (Apr. 28, 2006), available at http://www.state.gov/g/drl/rls/68554.htm (last accessed Aug. 4, 2011). This answer was in response to a question about the fact that the only legislation the United States had enacted to give effect to the Convention Against Torture gave U.S. courts criminal jurisdiction over only extraterritorial acts of torture.

be enforceable in a war zone and, if so, what the limits are of such a category. While the plaintiffs are arguing, for example, that Fifth Amendment substantive due process rights apply to U.S. citizens detained by the U.S. military in a war zone, this appeal presents no issue regarding the fact of plaintiffs' detention or some aspects of that detention that would not have passed constitutional muster if the detention had been subject to civilian processes in the United States.[23]

The amicus brief by the Society of Professional Journalists, the Project on Government Oversight, and the Government Accountability Project in support of the plaintiffs also raises important questions about what remedies U.S. citizen-journalists have in war zones. The concerns of these amici were manifest in *Kar*. In that case, a U.S. citizen alleges that he went to Iraq to make a historical documentary film, was arrested by Iraqi authorities, and then was transferred to U.S. authorities and detained at Camp Cropper for two months. Although recognizing that the Fourth and Fifth Amendments "certainly protect U.S. citizens detained in the course of hostilities in Iraq," see 580 F. Supp. 2d at 83, the district judge found that the defendants had not violated any clearly established constitutional rights:

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23. The district court dismissed the plaintiffs' Counts II and III. In Count II, plaintiffs claimed that they were denied procedural due process, specifically through the denial of a factual basis for their detention, access to exculpatory evidence, and the opportunity to appear before an impartial adjudicator. In Count III, the plaintiffs contended that they were denied access to a court of law to challenge their detention. These claims are not before us.

> As weak as the government's authority is, Kar has provided none at all — no precedent that clearly establishes the right of a U.S. citizen to a prompt probable cause hearing when detained in a war zone. Any attempt to apply the two-day requirement from [*County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991)] or the seven-day requirement from the Patriot Act to Kar's circumstances ignores the differences between detention on U.S. soil and detention in hostile territory.

Id. at 85. We are inclined to agree with that observation, and indeed, many broader questions remain about the application in a war zone of constitutional safeguards we have developed over time to protect U.S. citizens' rights.[24] There may be difficult questions ahead, but our job is to deal with those questions. We should not let the prospect of difficult questions in the future cause us to close the courthouse doors to the serious claims presented by these allegations.

In rejecting the defendants' "special factors" arguments for a complete and unprecedented civil immunity for torture of U.S. citizens, we have tried to apply the caution required in applying *Bivens*. But caution is also required from the opposing perspective. Our courts have a long history — more than 200 years

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24. For a thoughtful discussion of some of these issues, see José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 Yale L.J. 1660 (2009).

— of providing damages remedies for those whose rights are violated by our government, including our military. See *Iqbal*, 129 S. Ct. at 1948, citing *Dunlop v. Munroe*, 11 U.S. (7 Cranch) 242, 268, 3 L. Ed. 329 (1812) (in case against postmaster, federal official's liability "will only result from his own neglect in not properly superintending the discharge" of his subordinates' duties); *Bivens*, 403 U.S. at 395-97 (collecting cases showing that damages against government officials are historically the remedy for invasion of personal interests in liberty, and quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803): "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178-79, 2 L. Ed. 243 (1804) (holding that commander of a warship was "answerable in damages" to the owner of a neutral vessel seized pursuant to orders from President but in violation of statute).

If we were to accept the defendants' invitation to recognize the broad and unprecedented immunity they seek, then the judicial branch — which is charged with enforcing constitutional rights — would be leaving our citizens defenseless to serious abuse or worse by another branch of their own government. We recognize that wrongdoers in the military would still be subject to criminal prosecution within the military itself. Relying solely on the military to police its own treatment of civilians, however, would amount to an extraordinary abdication of our government's checks and balances that preserve Americans' liberty. The district court correctly allowed plaintiffs to proceed with their *Bivens* claims for torture.

D. Military Authority Exception to the Administrative Procedure Act (APA)

Finally, we turn to the plaintiffs' claim against the United States to recover personal property seized from them by the U.S. military when they were detained.[25] The question is whether the "military authority" exception in the Administrative Procedure Act, which prohibits judicial review of "military authority exercised in the field in time of war or in occupied territory," 5 U.S.C. § 701(b)(1)(G), precludes subject matter jurisdiction over the plaintiffs' claim. We review this question of law de novo. See *Thomas v. General Motors Acceptance Corp.*, 288 F.3d 305, 307 (7th Cir. 2002). We conclude that the "military authority" exception precludes judicial review and reverse the district court's decision on this claim.

The "military authority" exception to the Administrative Procedure Act provides that the right of judicial review for persons aggrieved by government actions does not extend to the exercise of military authority "in the field in time of war." 5 U.S.C. § 701(b)(1)(G). The plain language of the statutory exception prevents the court from reviewing military decisions regarding these plaintiffs' personal property. First, there is no question that the seizure of plaintiffs' property was an exercise of "military authority" by U.S. military

25. Vance has been able to recover his laptop computer from military officials, who recovered it from a search of an Army Criminal Investigative Command evidence facility at Camp Victory in Iraq, but plaintiffs are still missing other personal items seized when they were detained.

personnel stationed in Iraq. Vance and Ertel acknowledge that their property was taken by members of the military in connection with a military investigation. Second, the confiscation of property occurred "in time of war." The alleged seizure of the property occurred in 2006 in the midst of a congressionally-authorized war in Iraq. See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002); *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 102 (D.D.C. 2007) (taking judicial notice that the United States is at war in Iraq); *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 283-84 (D.D.C. 2005) (recognizing that the United States was at war in Iraq). Third, the military personnel seized plaintiffs' property "in the field." When their property was seized, Vance and Ertel were in Baghdad during an armed conflict. See, *e.g.*, *Rasul v. Bush*, 215 F. Supp. 2d 55, 64 n. 11 (D.D.C. 2002) (concluding that the military authority exception would bar relief under the APA because plaintiffs were captured in areas where the United States was "engaged in military hostilities pursuant to the Joint Resolution of Congress"), *aff'd, Al Odah v. United States*, 321 F.3d 1134, 355 U.S. App. D.C. 189 (D.C. Cir. 2003), *rev'd on other grounds, Rasul v. Bush*, 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004); *Doe v. Sullivan*, 938 F.2d 1370, 1380, 291 U.S. App. D.C. 111 (D.C. Cir. 1991) (suggesting that the exception applies to "military commands made in combat zones or in preparation for, or in the aftermath of, battle").

The district court relied on *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979), to distinguish between a claim for the return of property and a challenge to the

initial seizure of property. We find *Jaffee* inapposite. There, in a case that did not address recovery of personal property, the plaintiff sued under the APA to challenge the government's failure to take remedial measures to protect soldiers who were exposed to an atomic explosion at a military base in Nevada. The court held that the "military authority" exception did not apply because the army's failure to act was "neither in the field nor in time of war." *Id*. at 720. The atomic blast occurred during the Korean conflict, but thousands of miles of land and ocean separated the blast site in Nevada from the active combat zone in Korea. These facts are readily distinguishable from those before us, where Vance and Ertel's property was allegedly seized from them in the middle of a war zone. Furthermore, while the *Jaffee* plaintiffs sought relief for the government's failure to act years after the Korean War had officially ended, Vance and Ertel, by contrast, seek an inquiry into the whereabouts of their property while the conflict in Iraq is ongoing.

The district judge denied the motion to dismiss based on the possibility that the plaintiffs' property might no longer be held "in the field," and allowed the claim to proceed to permit discovery to inquire into its present location. We do not find this reasoning persuasive. The cases cited by the district court to support this reasoning are all readily distinguishable. See, *e.g.*, *Doe v. Rumsfeld*, 297 F. Supp. 2d 119, 129 (D.D.C. 2003) (finding that the "military authority" exception did not prevent judicial review of a decision to require American troops stationed within the United States to submit to anthrax vaccinations because claims did not challenge "military authority

exercised in the field in a time of war or in occupied territory"); *Rosner v. United States*, 231 F. Supp. 2d 1202, 1217-18 (S.D. Fla. 2002) (allowing, in "an abundance of caution," discovery on the application of the "military authority" exception to the United States Army's seizure of property expropriated by the Hungarian government during World War II). In contrast to these cases, it is clear that Vance and Ertel's personal property was seized by "military authority exercised in the field in time of war." 5 U.S.C. § 701(b)(1)(G).

Regardless of the current location of the property — whether in Fort Hood, Texas, or in Rock Island, Illinois, as plaintiffs suggest, or in Baghdad — it was seized by and remains in the custody of military engaged in ongoing hostilities in Iraq. While in some cases it may be appropriate for the district court to order discovery to determine whether the "military authority" exception applies, no additional discovery is necessary on this issue here where the exception clearly applies as the claims have been pled.

III. Conclusion

The decision of the district court in No. 10-1687 denying in part Secretary Rumsfeld's motion to dismiss is AFFIRMED. The decision in No. 10-2442 denying dismissal of the personal property claims under the Administrative Procedure Act is REVERSED.

Appendix B

MANION, *Circuit Judge*, concurring in part and dissenting in part. Much attention will be focused on the fact that the court has sustained a complaint alleging that former-Secretary Rumsfeld was personally responsible for the torture of United States citizens. However, the most significant impact of the court's holding is its extension of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Specifically, the court holds that a "*Bivens* remedy," as implied causes of action for violations of constitutional rights have come to be known, is available to United States citizens alleging torture while held in an American military prison in an active war zone. Present case law requires a very cautious approach before extending a *Bivens* remedy into any new context, and emphasizes that there are many "special factors" present in this particular context that should cause us to hesitate and wait for Congress to act. Because the court has not exercised that restraint in this case, I respectfully dissent.

For starters, this case is not about constitutional rights, against torture or otherwise--the defendants readily acknowledge that the type of abuse alleged by the plaintiffs would raise serious constitutional issues. Rather, this case centers on the appropriate *remedies* for that abuse and who must decide what those remedies will be. Confronted by allegations as horrible as those described in this case, it is understandable that the court concludes that there *must* be a remedy for these plaintiffs. But that concern should not enable this court to create new law. For decades, the Supreme Court has cautioned that such decisions should be left to Congress, especially

where there are "special factors counseling hesitation in the absence of affirmative action by Congress." *Wilkie v. Robbins*, 551 U.S. 537, 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007); *see also, e.g., Schweiker v. Chilicky*, 487 U.S. 412, 421-23, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988) (refusing a cause of action of social security complaints); *United States v. Stanley*, 483 U.S. 669, 680-81, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987) (no cause of action by military service member when the injury arise out of activity incident to service). This longstanding reluctance creates a veritable presumption *against* recognizing additional implied causes of action. In line with this presumption, both circuits confronted with allegations of constitutional violations in war zones have refused to recognize a *Bivens* remedy. *See Ali v. Rumsfeld*, 649 F.3d 762, 396 U.S. App. D.C. 381, 2011 U.S. App. LEXIS 12483, 2011 WL 2462851, at *6 (D.C. Cir. Jun. 21, 2011); *Arar v. Ashcroft*, 585 F.3d 559, 635 (2d Cir. 2009). The court vaults over this consensus and, for the first time ever, recognizes a *Bivens* cause of action for suits alleging constitutional violations by military personnel in an active war zone. I dissent because sorting out the appropriate remedies in this complex and perilous arena is Congress's role, not the courts'.[1]

Before explaining the particulars of my disagreement with the court, it is important to stress the proper questions before the court. Otherwise, given the severity of the allegations and the controversy surrounding the

1. I concur, however, in the court's dismissal of the plaintiffs' property claims pursuant to the military authority exception to the Administrative Procedure Act.

military policies underlying this case, we risk getting sidetracked. What we are asked to decide is simply who--the courts or Congress--should decide whether the courts will review constitutional claims against military personnel that arise in an active war zone, under what conditions and parameters that review should take place, and to what extent members of the military, whether high or low, should have immunity from suit.[2] Whether there *should* be judicial review of these claims is a policy question, one that I believe is outside the purview of this court to decide.

The Supreme Court refined its cautious approach to this question in *Wilkie v. Robbins*, 551 U.S. 537, 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007). There, it adopted a two-part test to determine whether to extend implied actions into a new context. First, if there are adequate alternative remedies, there is no need for an implied *Bivens* remedy. And second, if there are "special factors counseling hesitation," courts should leave the creation of new remedies to Congress, which is after all "in a far better position than a court to evaluate the impact of a new species of litigation against those who act on the public's behalf." *Id*. at 550, 562. The court focuses most of

2. The court's rhetorical dissection of "immunity" obscures, rather than clarifies, an already complex and confusing issue. Whether a *Bivens* remedy is available and whether particular federal officials are entitled to either absolute or qualified immunity are entirely distinct questions. "Immunity" is indeed an issue elsewhere in this suit, *see infra* note 5, but primarily the issue before us is whether or not there is an implied *Bivens* cause of action directly under the Constitution.

its attention on the "special factors" prong of the test. I will follow suit and assume for the sake of argument that the first prong is satisfied and no meaningful alternative remedy exists in statute or regulation.[3] I think it's clear that there are special factors and precedents that should control this case. The court holds otherwise, but I would point to what I see as the five defects in the court's holding: (1) the lack of precedent in its favor; (2) the underestimation of the risks of judicial review of wartime military activity; (3) its unsuccessful attempt to distinguish precedent from other circuits; (4) the inapplicability of recent habeas corpus jurisprudence; and finally (5) the failure to recognize the consequences of its holding and the precedent it sets.

The resolution of the special factors analysis is straight-forward. If anything qualifies as a "special factor[] counseling hesitation," it is the risk of the judiciary prying into matters of national security or disrupting the military's efficient execution of a war. National security matters are "rarely proper subjects for judicial intervention," *Haig v. Agee*, 453 U.S. 280, 292, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981), and "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of Navy v. Egan*, 484 U.S. 518, 530, 108 S. Ct. 818, 98 L. Ed.

3. A distinguished collection of fourteen former Secretaries of Defense and Members of the Joint Chiefs of Staff filed an amicus brief urging us to wait for Congress to decide how to handle alleged constitutional violations by military personnel. They make a strong case that there are adequate alternative remedies that the plaintiffs have not pursued, contrary to the court's conclusion.

2d 918 (1988). In that arena, courts will necessarily have to pass judgment on sensitive matters of military policy, including who is (or should be) responsible for making and implementing that policy at various levels. Further, judicial review of wartime decisions will necessarily involve significant amounts of classified materials, generating public discussion of sensitive matters of national security in open court. The commonsense understanding that the courts should exercise caution before venturing out into the battlefield is reflected in the limited precedent to date. While the Supreme Court has not taken up the question of *Bivens* in the context of wartime military actions, the D.C. Circuit and the en banc Second Circuit have both concluded that *Bivens* should not extend to suits by wartime detainees. *See Ali*, _ F.3d _, 2011 U.S. App. LEXIS 12483, 2011 WL 2462851, at *6; *Arar*, 585 F.3d 559. We should follow our sister circuits in leaving for Congress the task of addressing the "who," "what," "when," "where," "why," and "how much" questions of civil damages remedies for military decisions in wartime, rather than exploring an uncharted maze of military and national security policy in a foreign war zone.

The court's citations seem to acknowledge this lack of precedent. All of the cases it cites in its favor addresses different contexts and different special factors. It approaches the "special factors" analysis in this case by arguing that the military detainee context is not that much different from other contexts in which *Bivens* actions have been allowed. But these cases are largely beside the point, because they do not concern the legitimate special factors of national security and military policy at play

in this case. The court points out precedent that *Bivens* claims have long been "available to prisoners who assert that they have been abused or mistreated by their federal jailors," *see, e.g., Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980); (Opn. at 53) that the Supreme Court, this court, and others have allowed *Bivens* claims to continue against military officials, *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), and even cabinet members, *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).[4] These cases do establish that a *Bivens* remedy may lie against military personnel—and even their cabinet-level superiors—in a domestic setting. But because none of them involved claims arising abroad or during war, they do not provide any guidance to the issue at the heart of this case. Namely, whether judicial review of actions undertaken by the military in an active foreign war zone raises special factors that should caution us to hesitate and allow Congress to create an appropriate cause of action.

Second, the court understates the difficulties that inhere in judicial review of military activity in a time of war. While it does acknowledge the issue, the court does

4. The court also correctly notes that United States citizens do not lose their constitutional rights when they venture abroad. I stress again that the lack of an implied cause of action under *Bivens* does not strip plaintiffs here of their constitutional rights (against torture or anything else) in a war zone; it merely forces Congress to sort out a difficult issue. Moreover, the court's citations involve military trials for civilians and habeas corpus rights for citizens, and have nothing to do with liability under *Bivens* (or any other cause of action). (Opn. at 56)

not appear to appreciate just how much judicial review might intrude on difficult and sensitive matters. The court argues--as did Judge Calabresi in his dissenting opinion in *Arar*--that the state secret privilege is all the protection we need to safeguard confidential matters of national security from compromise in open court. *See Arar*, 585 F.3d at 635 (Calabresi, J. dissenting). But sorting out claims of privilege would itself entail significant judicial intrusion in national security affairs, and Congress is in a much better position to balance the competing needs for national security and the vindication of citizens' constitutional rights. The court also stresses that the judicial scrutiny in this and other cases will be "well after the fact" and "should not impinge inappropriately on military decision-making." (Opn. at 59) But it should go without saying that the existence of a civil damage remedy years down the line may affect decisions being made on the same battlefield today, by the same or similarly situated individuals. That is not to say that some judicial review in this area may not be necessary — I agree with the court that allegations of torture against a U.S. citizen are a very serious matter. But given the significant pitfalls of judicial entanglement in military decisionmaking, it must be Congress, not the courts, that extends the remedy and defines its limits.

Third, the court too-casually sidesteps the weight of precedent from other circuits that *Bivens* should not be extended to suits against military officials for wartime actions. *See Ali*, _ F.3d _, 2011 U.S. App. LEXIS 12483, 2011 WL 2462851, at *6; *Arar*, 585 F.3d 559. It does this by pointing out that those cases involved aliens, rather

than citizens. But the foreign status of the plaintiffs and potential foreign policy implications were hardly the only special factors at play in those decisions. In its *en banc* decision refusing to recognize a *Bivens* remedy, the Second Circuit also listed three other special factors: national security interests, confidential information, and the risks posed by proceedings in open court. *Arar*, 585 F.3d at 575, 576-77. And the D.C. Circuit has consistently referred to the risk of "obstructing national security policy" and has recently stressed that "allowing a *Bivens* action to be brought against American military officials engaged in war would disrupt and hinder the ability of our armed forces to act decisively and without hesitation in defense of our liberty and national interests." *Ali*, _ F.3d at __, 2011 U.S. App. LEXIS 12483, 2011 WL 2462851, at *6; *see also Rasul v. Myers*, 563 F.3d 527, 532 n.4, 385 U.S. App. D.C. 318 (D.C. Cir. 2009) (*Rasul II*) (internal quotes omitted).[5]

Fourth, the court cites recent Supreme Court habeas corpus cases approving limited judicial oversight

5. The court also distinguishes *Rasul II* because it involved detainees who were known or potential terrorists, whereas here the plaintiffs "have not been charged with, let alone convicted of, any terrorist activity." (Opn. at 67) But the plaintiffs were obviously considered a security threat when they were first apprehended; why should the fact that the military eventually concluded otherwise be relevant to the *Bivens* special factor analysis? Instead, it highlights why the court should not be picking and choosing between various constitutional tort claims based on "countervailing factors that might counsel alacrity or activism," which have never been a part of the *Bivens* special factors analysis. *Arar*, 585 F.3d at 573-74.

over military detention decisions, but these are clearly inapposite. The defendants cogently object that the fact that Congress has permitted the limited relief of habeas corpus actions—essentially equitable relief—says next to nothing about whether the courts should give the green light to a much broader implied cause of action for money damages. To this, the court responds that "those [habeas] cases also involve some judicial inquiry into matters affecting national security and military activity," and therefore "weigh against the argument that the courts must simply defer to executive authorities in a case involving alleged torture of a U.S citizen in U.S. military custody." (Opn. at 62 n.18) This rejoinder misses the point entirely, however. I emphasize once again that it is not a question of deferring to *executive* authority, but to *Congress*. And the question is not whether the courts are competent to review military decisions, nor even whether such review would be necessary or wise. The only question before us is whether these complex questions of military efficiency, national security, and separation of powers constitute "special factors counseling hesitation." Clearly they do, and therefore Supreme Court precedent dictates that these sensitive questions be left for Congress to resolve through the creation (or not) of a cause of action for civil remedies.

Finally, the court does not recognize the far-reaching implications of its holding. It stresses that its holding is limited to "the narrow question presented by the extraordinary allegations now before us." (Opn. at 73) That is, the remedy extends (at least for now) only to U.S. citizens who are tortured—and perhaps to other,

nebulous "core constitutional rights"—while in U.S. military custody in a war zone. The court offers no logical reason why its unprecedented holding that a *Bivens* remedy is available for allegations of torture by military personnel in an active war zone should not extend to other constitutional violations. Instead, the court labels such concerns "not convincing." (Opn. at 73) But claims similar to those before us could certainly proliferate based on this precedent. Given the enormous numbers of civilian contractors working in the current foreign war zones (a fact to which the court itself alludes), the potential scope of the court's *Bivens* remedy is itself a special factor that should cause us to hesitate before taking this first step. Unfortunately, fraud and corruption among American workers in a war zone is not rare. These and common crimes of robbery and assault can land an American civilian in the brig under military supervision. The voluminous litigation by prisoners in our domestic prisons evidence the possibility of "well pleaded complaints" under the *Bivens* framework by Americans who claim torture and other cruel and unusual treatment while being held in a military prison in a war zone. Which of the potentially thousands of wartime claims from American employees of contractors (or others) will the court entertain under this new cause of action? Future courts should not have to put the lid back on Pandora's Box.

For these reasons, I dissent from the court's decision to allow the plaintiffs constitutional claims to proceed.[6] I concur with the court's dismissal of plaintiffs' Administrative Procedure Act claims.

6. I also have serious reservations about other aspects of the court's opinion, especially its holding that Secretary Rumsfeld may be held personally liable for the alleged actions of his subordinates under the plaintiffs' allegations. The court identifies two alleged bases for Secretary Rumsfeld's personal responsibility—his actual authorization of abusive interrogation techniques at the time plaintiffs allege they were tortured, and his deliberate indifference in the face of knowledge of ongoing abusive treatment of detainees, including Americans. The first set of allegations is entirely speculative. The purported basis is a single article in the New York Times that does not actually support the plaintiffs' claims that Secretary Rumsfeld approved the continued use of the techniques in question via confidential addendum to the Army Field Manual. The article states neither that the confidential addendum approved the techniques, nor that the addendum was ever approved. The second set of allegations may have greater plausibility, but the court's opinion does not explain why the predicates for deliberate indifference in the military context (far removed from the usual prison context) are sufficiently clearly established as to defeat qualified immunity.

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED MARCH 5, 2010

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

No. 06 C 6964

DONALD VANCE and NATHAN ERTEL,

Plaintiffs,

v.

DONALD RUMSFELD, UNITED STATES OF AMERICA and UNIDENTIFIED AGENTS,

Defendants.

Wayne R. Andersen, District Judge

MEMORANDUM OPINION AND ORDER

This case is before the court on defendant Donald Rumsfeld's motion to dismiss plaintiffs' second amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, the motion to dismiss [135] is denied as to Count I and granted with respect to Counts II and III.

Appendix C

BACKGROUND

According to the complaint, plaintiffs Donald Vance ("Vance") and Nathan Ertel ("Ertel"), both American citizens, traveled to Iraq in the fall of 2005 to work for a private Iraqi security firm, Shield Group Security ("SGS"). In the course of their employment, plaintiffs allegedly observed payments made by SGS agents to certain Iraqi sheikhs. Plaintiffs also claim to have seen mass acquisitions of weapons by SGS and sales in increased quantities. Questioning the legality of these transactions, Vance claims to have contacted the FBI during a return visit to his hometown of Chicago to report what he had observed. Vance asserts that he was put in contact with Travis Carlisle, a Chicago FBI agent, who arranged for Vance to continue to report suspicious activity at the SGS compound after his return to Iraq. Vance alleges that he complied with Carlisle's request and continued to report to him daily. Several weeks later, Vance claims Carlisle put him in contact with Maya Dietz, a United States government official working in Iraq. Dietz allegedly requested that Vance copy computer documents and forward them to her. Vance contends that he complied with that request.

Plaintiff Ertel claims to have been aware of Vance's communications with the FBI and alleges to have contributed information to those communications. Ertel asserts that both he and Vance communicated their concerns about SGS to Deborah Nagel and Douglas Treadwell, two other United States government officials working in Iraq.

Plaintiffs contend suspicions within SGS grew as to Vance and Ertel's loyalty to the company. On April 14, 2006, armed SGS agents allegedly confiscated plaintiffs' access cards which permitted them freedom of movement into the "Green Zone" and United States compounds. This action effectively trapped plaintiffs in the "Red Zone" and within the SGS compound. Plaintiffs claim to have contacted Nagel and Treadwell who instructed them to barricade themselves in a room in the SGS compound until United States forces could come rescue them. Plaintiffs subsequently were successfully removed from the SGS compound by United States forces.

Plaintiffs allege that they then were taken by United States forces to the United States Embassy. Plaintiffs allege that military personnel seized all of their personal property, including their laptop computers, cellular phones, and cameras. At the Embassy, plaintiffs claim they were separated and then questioned by an FBI agent and two other persons from United States Air Force Intelligence. Plaintiffs contend that they disclosed all their knowledge of the SGS transactions and directed the officials to their laptops in which most of the information had been documented. Plaintiffs also assert that they informed the officials of their contacts with Agent Carlisle in Chicago and Agents Nagel and Treadwell in Iraq. Following these interviews, plaintiffs claim they were escorted to a trailer to sleep for two to three hours.

Next, plaintiffs claim they were awakened by several armed guards who placed them under arrest and then handcuffed and blindfolded them and pushed them into

a humvee. Plaintiffs contend that they were labeled as "security internees" affiliated with SGS, some of whose members were suspected of supplying weapons to insurgents. According to plaintiffs, that information alone was sufficient, under the policies enacted by Rumsfeld and others, for the indefinite, incommunicado detention of plaintiffs without due process or access to an attorney. Plaintiffs claim to have been taken to Camp Prosperity, a United States military compound in Baghdad. There they allege they were placed in a cage, strip searched, and fingerprinted. Plaintiffs assert that they were taken to separate cells and held in solitary confinement 24 hours per day.

After approximately two days, plaintiffs claim they were shackled, blindfolded, and placed in separate humvees which took them to Camp Cropper. Again, plaintiffs allege they were strip searched and placed in solitary confinement. During this detention, plaintiffs contend that they were interrogated repeatedly by military personnel who refused to identify themselves and used physically and mentally coercive tactics during questioning. All requests for an attorney allegedly were denied.

Plaintiffs allege that on or about April 20, 2006 they each received a letter from the Detainee Status Board indicating that a proceeding would be held on April 23, 2006 to determine their legal status as "enemy combatants," "security internees," or "innocent civilians." The letters informed plaintiffs that they did not have a right to legal counsel at that proceeding. The letters

also informed plaintiffs they only would be permitted to present evidence or witnesses for their defense if evidence or witnesses were reasonably available at Camp Cropper. Vance and Ertel allege that on April 22, 2006 they each received a notice stating that they were "security internees." The letters informed plaintiffs they had the right to appeal by submitting a written statement to camp officials. Both Vance and Ertel appealed, requesting each other as witnesses and their seized personal property as evidence.

Plaintiffs allege they were taken before the Detainee Status Board on April 26, 2006. Ertel and Vance claim they were not provided with the evidence they requested, nor were they permitted to testify on the other's behalf. Plaintiffs assert that they were not permitted to see the evidence against them or confront any adverse witnesses.

On May 17, 2006, Major General John Gardner authorized the release of Ertel, allegedly 18 days after the Detainee Status Board officially acknowledged that he was an innocent civilian. Vance's detention continued an additional two months, and he alleges that he continuously was interrogated throughout his detention. On July 20, 2006, allegedly several days after Major General Gardner authorized his release, Vance was permitted to leave Camp Cropper. Neither Vance nor Ertel was ever charged with any crime.

On December 18, 2006, plaintiffs initiated this lawsuit against defendants for the alleged constitutional violations that occurred in Iraq by the unidentified agents of the

United States as well as for the practices and policies enacted by Rumsfeld who allegedly authorized such actions by those agents. Rumsfeld has filed a motion to dismiss the claims against him.

STANDARD OF REVIEW

Rule 8 of the Federal Rules of Civil Procedure has long required that a plaintiff need only provide a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). At the motion to dismiss stage, the court must accept the material facts contained in a plaintiff's complaint as true and generally construe the complaint in a light favorable to the plaintiff. *See Jackson v. E.J. Branch Corp.,* 176 F.3d 971, 978 (7th Cir. 1999). In two recent decisions, however, *Bell Atlantic Corporation v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), the United Supreme Court made clear that Federal Rule 8 is not a license for wild conspiracies or baseless speculation.

In *Twombly,* the Supreme Court held that pleading a sufficient antitrust violation requires more than a mere allegation of parallel conduct. 550 U.S. at 556. Instead, a plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. The Seventh Circuit recently recognized that the lesson of *Twombly* is that "a defendant should not be forced to undergo costly discovery unless the complaint contains enough detail, factual or argumentative, to indicate that the plaintiff has a substantial case." *Limestone Dev. Corp. v. Village of Lemont, Illinois,* 520 F.3d 797, 802-803 (7th Cir. 2008).

Appendix C

In *Iqbal,* the Supreme Court clarified that *Twombly* is not limited only to the antitrust context and set forth the general burden plaintiffs face on a motion to dismiss. *Iqbal,* 129 S. Ct. at 1953. In *Iqbal,* the plaintiff Javaid Iqbal was arrested as part of a mass roundup of Muslim non-citizens in the period following September 11, 2001. *Id.* at 1951. He alleged that a policy of selectively detaining individuals based on race and religion improperly led to his arrest. *Id.* Iqbal named former Attorney General John Ashcroft and current Director of the Federal Bureau of Investigation Robert Mueller as defendants, arguing that each was an architect of the policy that permitted his detention. *Id.* Because these officials were named in the lawsuit, the Supreme Court was particularly concerned with ensuring that baseless or purely speculative allegations were properly dismissed. *Id.* at 1954. The Supreme Court recognized that it was "impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties." *Id.*

Iqbal undoubtedly requires vigilance on our part to ensure that claims which do not state a plausible claim for relief are not allowed to occupy the time of high-ranking government officials. It is not, however, a categorical bar on claims against these officials. When a plaintiff presents well-pleaded factual allegations sufficient to raise a right to relief above a speculative level, that plaintiff is entitled to have his claim survive a motion to dismiss even if one of the defendants is a high-ranking government official.

Appendix C

ANALYSIS

I. Count I: Cruel and Inhumane Treatment Methods

In Count I, plaintiffs allege that they were subject to a number of cruel and degrading treatment methods during their respective periods of detention. Plaintiffs allege that the treatment methods included "threats of violence and actual violence, sleep deprivation and alteration, extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, denial of needed medical care, yelling, prolonged, solitary confinement, *incommunicado* detention, falsified allegations and other psychologically-disruptive and injurious techniques." SAC ¶ 259. We must determine whether it is plausible that Rumsfeld was personally involved in the decision to implement the class of harsh treatment methods that allegedly were utilized against plaintiffs Vance and Ertel.

A. Rumsfeld's Personal Involvement in Alleged Cruel Treatment

Plaintiffs bring their claim against Rumsfeld as a *Bivens* action. The United States Supreme Court in *Bivens v. Six Unknown Namaed Agents of Federal Bureau of Narcotics* established that victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of a statute conferring such a right. 403 U.S. 388, 396, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1999). In *Bivens,* the Supreme Court held that it is "well settled that where legal rights

have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* (citing *Bell v. Hood,* 327 U.S. 678, 684, 66 S. Ct. 773, 90 L. Ed. 939 (1946)). From its inception, *Bivens* has been based on "the deterrence of individual officers who commit unconstitutional acts." *Correctional Services Corp. v. Malesko,* 534 U.S. 61, 71, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001). Another purpose of extending a *Bivens* remedy to a person who has been subjected to the deprivation of constitutionally-guaranteed rights by an individual officer is to "provide a cause of action for a plaintiffs who lack any alternative remedy for harms caused by an individual officer's unconstitutional conduct." *Id.* at 70.

Consistent with its purpose to "deter individual officers from committing constitutional violations," liability under *Bivens* is limited to those "directly responsible" for such violations. *Malesko,* 534 U.S. at 69-71. This requires a plaintiff to sufficiently allege that a defendant was "personally involved in the deprivation of [his] constitutional rights." *Gossmeyer v. McDonald,* 128 F.3d 481, 494 (7th Cir. 1997). We will later evaluate Rumsfeld's claim that this court should not imply a *Bivens* remedy even if a constitutional violation is found to exist. First, however, we address the threshold question of whether Rumsfeld's personal involvement has been sufficiently alleged. Because of the factually intensive nature of plaintiffs' allegations of Rumsfeld's personal involvement, our evaluation of this issue is filtered through the lens of *Iqbal* to ensure that the facts alleged go beyond bare assertions or mere speculation.

Appendix C

According to plaintiffs' allegations in their second amended complaint, Rumsfeld was personally involved in their unconstitutional treatment by his decision to approve the adoption of harsh treatment methods that were utilized at Camp Cropper during plaintiffs' confinement. While plaintiffs acknowledge that Rumsfeld did not personally subject them to the harsh interrogation and confinement methods, plaintiffs rely on a number of Seventh Circuit cases to establish the proposition that individuals who issue an order to engage in unconstitutional conduct can themselves be held liable for that conduct. In other words, a superior officer may be considered personally involved in a constitutional violation when his subordinates carried out such a violation pursuant to his policy directive. *See e.g., Doyle v. Camelot Care Centers, Inc.,* 305 F.3d 603, 614-615 (7th Cir. 2002) ("Ms. Doyle and Mr. Konold allege that the DCFS Director and his deputy personally were responsible for creating the policies, practices, and customs that caused the constitutional deprivations. . . . [T]hese allegations . . . suffice at this stage in the litigation to demonstrate . . . personal involvement in the purported unconstitutional conduct."); *see also Gentry v. Duckworth,* 65 F.3d 555, 561 (7th Cir. 1995).

Rumsfeld cites seemingly contrary language from the Sixth Circuit that appears quite favorable to his position. *See Nuclear Transp. & Storage, Inc v. United States,* 890 F.2d 1348, 1355 (6th Cir. 1989) (holding that an individual capacity claim against a cabinet officer cannot proceed simply based upon allegations that a cabinet officer "acted to implement, approve, carry out, and otherwise facilitate alleged unlawful policies"). Upon further review, however, it appears that the Sixth Circuit's objection was

to the quality of the pleading--which the Court of Appeals characterized as a "mere assertion"--rather than to the principle of policymaker liability generally. *Id.* Thus, plaintiffs' complaint against Rumsfeld at this stage can proceed only if it properly alleges that Rumsfeld created a policy that expressly authorized those under his command to carry out a constitutional violation. *See Ryan v. Mary Immaculate Queen Ctr.,* 188 F.3d 857, 859 (7th Cir. 1999).

In their second amended complaint, plaintiffs lay out a number of factual allegations in support of their claim that Rumsfeld personally crafted the policies responsible for their harsh treatment in Iraq. While the secretive, classified nature of many of the alleged policy decisions in this area makes precise identification of events more difficult, plaintiffs have identified a number of key dates and facts in support of their allegations. The following factual allegations are laid out in plaintiffs' second amended complaint.

First, plaintiffs allege that on December 2, 2002 "Rumsfeld personally approved a list of torturous interrogation techniques for use on detainees on Guantanamo." Second Amended Complaint ("SAC") ¶ 232. In defiance of established military rules and standards, plaintiffs allege that Rumsfeld added a number of methods to the Army Field manual including, use of 20-hour interrogations, isolation for up to 30 days, and sensory deprivation. *Id.*

Plaintiffs allege that on January 15, 2003 Rumsfeld rescinded his formal authorization for those techniques. SAC ¶ 233. Plaintiffs allege that he instead authorized

the Commander of the United States Southern Command to use these methods "if warranted and approved by Rumsfeld himself in individual cases." *Id.*

Around the same time, plaintiffs also allege that Rumsfeld convened a "Working Group" to evaluate the status of interrogation policy. SAC ¶ 234. Plaintiffs allege that in April 2003 Rumsfeld approved a new set of interrogation techniques, which included isolation for up to thirty days, dietary manipulation, and sleep deprivation and again provided that additional harsh techniques could be used with his approval. SAC ¶¶ 234-235.

Plaintiffs further allege that in August 2003 Rumsfeld sent Major Geoffrey Miller to Iraq to review the United States prison system. SAC ¶ 236. Plaintiffs claim that Rumsfeld informed Major Miller that his mission was to "gitmo-ize" Camp Cropper, a task that required recommendations on how to more effectively obtain actionable intelligence from detainees and "authorized Major Miller to apply in Iraq the techniques that Rumsfeld had approved for use at Guantanamo and elsewhere. At Rumsfeld's direction, Major Miller did just that." *Id.* at ¶¶ 236-237.

Plaintiffs allege that on September 14, 2003, in response to Major Miller's call for more aggressive interrogation policies in Iraq and as authorized by Rumsfeld, Lieutenant General Ricardo Sanchez, Commander of the Coalition Joint Task Force, "signed a memorandum authorizing the use of 29 interrogation techniques which included yelling, loud music, light control, and sensory deprivation, amongst others." SAC ¶ 238.

Finally, plaintiffs allege that Rumsfeld, on the same day that Congress passed the Detainee Treatment Act, modified the Army Field Manual to include ten new interrogation techniques, including those allegedly used against plaintiffs. SAC ¶ 244. While plaintiffs acknowledge that these modifications to the Field Manual were subsequently repealed, it is their belief that this repeal did not occur until after their detention. *Id.*

Plaintiffs also assert a series of allegations regarding Rumsfeld's supposed knowledge of cruel and inhumane treatment of detainees in Iraq. *See generally* SAC ¶¶ 262-267. We do not agree that these allegations are sufficient to separately demonstrate personal involvement through deliberate indifference. These allegations, however, do give some support to the core assertion regarding Rumsfeld's role as the architect of the detainee treatment methods at issue in this case.

First, plaintiffs allege that in May 2003, the Red Cross began sending detailed reports that detainees within United States custody in Iraq were being mistreated. SAC ¶¶ 240-241. According to plaintiffs, Colin Powell, then the Secretary of State, confirmed that Rumsfeld knew of the various reports and regularly apprised the President of their content. *Id.* Second, plaintiffs allege that Rumsfeld similarly was aware of a series of investigative reports into detainee abuse in Iraq, including those of former Secretary of Defense James Schlesinger, Army Major General Antonio Taguba, and Army Lieutenant General Anthony Jones. *Id.*

These allegations, if true, would substantiate plaintiffs' claim that Rumsfeld was aware of the direct impact that his newly approved treatment methods were having on detainees held in Iraq. In cases like this one in which much of the decision-making at issue took place behind closed doors, courts have shown a willingness to accept outside documentation of abuse as a factor supporting the plausibility of a plaintiff's allegations. *See al-Kidd v. Ashcroft,* 580 F.3d 949, 976 (9th Cir. 2009) (holding that the "abuses occurring under the material witness statute after September 11, 2001 were highly publicized in the media, congressional testimony and correspondence, and in various reports by governmental and non-governmental entities, which could have given Ashcroft sufficient notice to require affirmative acts to supervise and correct the actions of his subordinates").

Based on these allegations, we conclude that plaintiffs have alleged sufficient facts to survive Rumsfeld's motion to dismiss on account of a lack of personal involvement. Two federal courts forced to address similar issues share our conclusion. In *al-Kidd v. Ashcroft,* the Ninth Circuit addressed a United States citizen who claimed that Attorney General Ashcroft and the Department of Justice ("DOJ") unlawfully used a material witness statute as a pretext to arrest and confine him based on suspicions that he was involved in terrorism-related activities. 580 F.3d at 951-952. Ashcroft argued that he was entitled to absolute prosecutorial immunity as to two of the claims asserted by al-Kidd and that he was entitled to qualified immunity on all three claims asserted by al-Kidd. *Id.* at 957. With respect to the plaintiff's core Fourth Amendment claim, the Ninth Circuit agreed with the district court that al-

Kidd had met his burden of pleading a claim for relief that was plausible and that his lawsuit on the material witness claim should be allowed to proceed and the district court properly denied Ashcroft's motion to dismiss. *Id.* at 951-952.

While acknowledging that *Iqbal* compels courts to carefully scrutinize a plaintiff's claim against high-ranking government officials, the Ninth Circuit nonetheless determined that the specific facts alleged by al-Kidd were sufficient to survive a motion to dismiss. *Id.* at 974-977. The Ninth Circuit relied on the detailed nature of the plaintiff's complaint, the existence of a number of public statements from Ashcroft and the DOJ regarding their use of the material witness statute, and evidence from the media that the statute had been abused to support its conclusion that the plaintiff's allegations were plausible. *Id.*

This was not a circumstance, however, in which the evidence was crystal clear in establishing the underlying merit of the plaintiff's claim. The Ninth Circuit acknowledged that if it were deciding a motion for summary judgment on the facts pled in the complaint, it's decision "might well be different." *Id.* at 977. Nonetheless, the Ninth Circuit recognized that the requirement of plausibility "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence." *Id.* at 976 (quoting *Twombly,* 550 U.S. at 556.) In light of this standard, the Ninth Circuit determined that al-Kidd had sufficiently stated a claim for relief. *Id.* at 977.

Appendix C

The second relevant *post-Iqbal* case is *Padilla v. Yoo,* 633 F. Supp. 2d 1005 (2009). Jose Padilla, a United States citizen, was designated an enemy combatant as part of the "war on terror." *Id.* at 1012. Padilla alleges that he was imprisoned without charge, subject to extreme isolation from family and counsel, and interrogated under threat of torture, deportation, or death. *Id.* at 1013-1014. The named defendant was John Yoo, a Deputy Attorney General in the Office of Legal Counsel and *de facto* head of war-on-terrorism legal issues under George W. Bush. *Id.* at 1014. Padilla alleged that Yoo was instrumental in designating him as an enemy combatant and in drafting the policy of employing harsh interrogation tactics against enemy combatants. *Id.* at 1014-1015.

To support these allegations, Padilla relied primarily on a host of memoranda written by Yoo that paved the way for the implementation of harsh interrogation methods. *Id.* at 1015-1016. The ten memoranda that were identified showed a pattern of statements from Yoo giving legal authorization for the use of these treatment methods. Based largely on these memoranda, the district court concluded that Padilla had alleged sufficient facts to satisfy the requirement that Yoo set in motion a series of events that resulted in the deprivation of Padilla's constitutional rights. *Id.* at 1034. The district court distinguished *Iqbal,* concluding that *Iqbal* rejected "bare assertions" that would only suffice if given an "assumption of truth." *Id.* In contrast, the district court recognized that Padilla alleged "with specificity that Yoo was involved in the decision to detain him and created a legal construct designed to justify the use of interrogation methods that

Padilla alleges were unlawful." *Id.* The district court denied Yoo's motion to dismiss.

Like the Ninth Circuit in *al-Kidd* and the district court in *Padilla,* we conclude that the allegations of Rumsfeld's personal involvement in unconstitutional activity are sufficiently detailed to raise the right to relief above the speculative level and would survive a motion to dismiss. Therefore, we must next consider whether Rumsfeld is entitled to qualified immunity on plaintiffs' claims.

B. Qualified Immunity

Rumsfeld argues that he is entitled to qualified immunity on all claims, including Count I. The doctrine of qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The doctrine "balances two important interests -- the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan,* 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009). When established, qualified immunity operates as "*an immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (italics in original).

In *Saucier v. Katz,* the Supreme Court established a mandatory two-step sequence for resolving government

officials' qualified immunity claims. 533 U.S. 194, 200-201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). First, a court must determine whether the facts alleged show that the official's conduct violated a constitutional right. *Id.* Second, if the court concludes that a constitutional right was violated, then it must determine whether that right was clearly established at the time of the relevant events. *Id.* The Supreme Court in *Pearson v. Callahan* determined that the specific order of the qualified immunity inquiry is not required and held that "judges of the district court and courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed in light of the circumstances in the particular case at hand." 129 S. Ct. at 818.

1. The Proscribed Treatment Methods Violated a Constitutional Right

It is clear that certain conduct may be deemed "so brutal and so offensive to human dignity" as to exceed the permissible limits of our Constitution. *Rochin v. California,* 342 U.S. 165, 174, 72 S. Ct. 205, 96 L. Ed. 183 (1952). When such conduct "shocks the conscience" of those belonging to a civilized system of justice, it can and should be deemed a violation of the Due Process Clause. *Id.* at 172-174. It is equally clear that the use of physical or mental torture on American citizens often will embody the paradigmatic example of "shocks the conscience" conduct. *See, e.g., Miller v. Fenton,* 474 U.S. 104, 109, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985) ("[C]ertain interrogation techniques, either in isolation or as applied

to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause . . . ."); *Palko v. Connecticut,* 302 U.S. 319, 326, 58 S. Ct. 149, 82 L. Ed. 288 (1937), overruled on other grounds by *Benton v. Maryland,* 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969) (noting that the Due Process Clause must at least "give protection against torture, physical or mental").

As early as 1878, the United States Supreme Court declared that it is "safe to affirm that punishments of torture . . . are forbidden by . . . the Constitution." *Wilkerson v. State of Utah,* 99 U.S. 130, 136, 25 L. Ed. 345 (1878). The existence of a strong constitutional right to be free from torture is highly important to our evaluation of whether a right to be free from Rumsfeld's alleged actions exists in this case. However, this general right alone does not resolve our qualified immunity inquiry. Instead, as Rumsfeld correctly points out, we must undertake this inquiry "in light of the specific context of the case, not as a broad general proposition." *Saucier,* 533 U.S. at 202.

Rumsfeld is correct that questions remain regarding whether the alleged treatment plaintiffs received is properly classified as torture. For now, however, we believe that the allegations set forth by plaintiffs are comprehensive enough to merit an invocation of the line of cases assessing torture in a constitutional light. As we have previously discussed, plaintiffs allege that the treatment methods used against them included "threats of violence and actual violence, sleep deprivation and

alteration, extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, denial of needed medical care, yelling, prolonged, solitary confinement, *incommunicado* detention, falsified allegations and other psychologically-disruptive and injurious techniques." SAC ¶ 259. Accepting at this stage that these treatment methods were in fact used, we conclude that a court might plausibly determine that the conditions of confinement were torturous. *See Rhodes v. Chapman,* 452 U.S. 337, 362-63, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1991) (noting that, for the purposes of evaluating an alleged constitutional violation, courts may often evaluate the effect of conditions of confinement "in combination" to determine their validity); *Armstrong v. Squadrito,* 152 F.3d 564, 570 (7th Cir. 1998) (holding that an "investigation into substantive due process involves an appraisal of the totality of the circumstances rather than a formalistic examination of fixed elements").

Based on our assessment of the cumulative impact of the alleged practices, we feel comfortable distinguishing this case from the cases Rumsfeld cites in which the use of a single practice in isolation was insufficient to shock the conscience. Even if we were to agree with Rumsfeld that depriving plaintiffs of food and water or placing them in extreme segregation alone passes constitutional muster, this would not change our conclusion that plaintiffs have set forth the cumulative allegations necessary to state a claim of mistreatment. While the evidence may ultimately show that neither the individual treatment methods nor their cumulative impact "shocks the conscience," that determination is not one we may properly make at this

stage of the proceedings. *See Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 724 (7th Cir. 2004) (noting that the proper task is to determine whether the plaintiff should be given a chance to offer evidence in support of their claims rather than whether they will ultimately prevail on the merits of those claims).

Additionally, plaintiffs correctly argue that this case is distinguishable from many in which detainee deprivation or suffering was upheld because the alleged injuries were unintentional or incidental. Indeed, the parties' briefs feature little dispute that, unlike many of these more traditional injurious actions, torturous treatment methods may manifest an inextricable aim to injure those subject to their use. In other words, these methods might at times themselves embody an intent to inflict harm. The importance of this factor is reflected in the Supreme Court statement that: "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *County of Sacramento v. Lewis,* 523 U.S. 833, 849, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (citing *Daniels v. Williams,* 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) ("Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property."

Lewis does not suggest that every practice aimed at inflicting injury will be deemed to shock the conscience absent a compelling governmental interest. Equally, it does not rule out a "shock the conscience" finding in cases

in which some governmental interest is present. Instead, *Lewis* makes clear that evidence regarding an intent to injure and an identifiable government interest may be relevant to evaluate a substantive due process claim.

Viewed as one factor among many in what amounts to a balancing of the justifications for the alleged behavior, it becomes clear that the scope of the government's interest in this case is not something we can or should fully assess at this stage. Such an inquiry would extend our role beyond that which is proper on a motion to dismiss. *See Cole,* 389 F.3d at 724. It also would force us to examine justifications proffered by Rumsfeld in a way that would lead us beyond the allegations contained in the pleadings. *See Clair v. Harris Trust and Savings Bank,* No. 96-7311, 1998 U.S. Dist. LEXIS 7123, 1998 WL 246482, at *2 (N.D. Ill. 1998) ("In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court is limited to the allegations contained in the pleadings."). Thus, while it is quite possible that we may later determine that the justification for Rumsfeld's action was strong and/or the aim to injure embodied in the relevant treatment methods weak, this is not a determination that is properly made at this stage of the process in which no real evidence is before us. Plaintiffs have stated facts sufficient to warrant giving them an opportunity to provide such evidence in support of their claims.

At the conclusion of his brief on the constitutional right issue, Rumsfeld cites facially powerful Seventh Circuit authority for the proposition that even conduct deemed to be "abhorrent" does not give rise to a substantive

due process claim. *See Tun v. Whitticker,* 398 F.3d 899, 900 (7th Cir. 2005) ("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."). From this, Rumsfeld would have us conclude that the contours of a right to be free from allegedly torturous behavior are murky and amorphous at best.

As plaintiffs correctly point out, the specific substantive issue dealt with in *Tun* makes a meaningful application of that case to ours difficult to rationalize. *Tun* dealt with the six-week suspension of an Indiana high school student for possession of nude photographs. *Id.* at 900-901. The issue facing the court was whether the principal's decision to suspend the student gave rise to a substantive due process claim. *Id.* The Seventh Circuit concluded that no constitutional violation was present. *Id.* at 904. It was in this context, in which the court declined to create a new constitutional protection against the disciplinary decisions of a school principal, that the Seventh Circuit chose to note that a refusal to grant a constitutional remedy does not necessarily connote agreement with an official's behavior. *Id.* at 903. Rumsfeld certainly is correct that many questionable decisions by government officials do not give rise to a constitutional violation. He errs, however, in assuming that a reference made in the context of a high school suspension is dispositive of the allegations of mistreatment made here.

Finally, Rumsfeld argues that, because the alleged abuse occurred in Iraq during a period of war, the scope of constitutional protection available is drastically limited. This argument highlights many of the same issues we face in determining whether plaintiffs' constitutional rights were clearly established in the circumstances identified. Accordingly, we will address the scope of the constitutional protections available to plaintiffs in the context of determining whether the constitutional rights were clearly established.

2. The Applicable Constitutional Right Was Clearly Established

In determining whether a constitutional right was clearly established, we must assess whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier,* 533 U.S. at 213. It is not necessary for the particular violation in question to have "previously been held unlawful." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). "Instead, a clearly established constitutional right exists in the absence of precedent, 'where the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Nanda v. Moss,* 412 F.3d 836, 844 (2005) (quoting *Anderson,* 483 U.S. at 640). Here, we must determine whether it would have been clear to a reasonable official in Rumsfeld's position that the application of the alleged treatment methods on American citizens was unconstitutional. Because we already have determined that the alleged treatment methods exceeded

the scope of generally permissible practices, we now must determine if any of the circumstances at the time and place of plaintiffs' confinement eliminated the knowing availability of these constitutional limits.

First, the fact that the alleged events occurred in a foreign war zone rather than within the confines of the United States does not eliminate the entitlement of United States citizens to the protections of the U.S. Constitution. In *Kar v. Rumsfeld,* a district court faced the claim of a United States citizen who alleged a Fourth Amendment and procedural due process claim relating to his detention by U.S. military officials in Iraq. 580 F. Supp. 2d 80 (D.D.C. 2008). The court ultimately granted the government's motion to dismiss these claims. *Id.* at 86. In the process, however, the court first addressed the argument that Kar was not entitled to the protections of the Fourth and Fifth Amendment because he was seized and detained in a foreign war zone. *Id.* at 83. Stating that this argument was "easily disposed of," the district court noted that "the Fourth and Fifth Amendments certainly protect U.S. citizens detained in the course of hostilities in Iraq." *Id.* For support, the court relied on the oft-cited Supreme Court plurality opinion in *Reid v. Covert:*

> The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen abroad, the shield which the Bill of Rights and other parts of the Constitution

> provide to protect his life and liberty should not be stripped away just because he happens to be in another land.

354 U.S. 1, 5-6, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957) (plurality opinion). Also cited was the Second Circuit's conclusion that "[t]he Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed at United States citizens is well settled." *United States v. Toscanino,* 500 F.2d 267, 280 (2d. Cir. 1974)). Clearly, a plaintiff's citizenship often goes a long way in determining the scope of available constitutional protections.

In two recent cases, federal courts have entertained claims from plaintiffs asserting that they were subject to constitutional violations while detained outside United States territory. *See Rasul v. Myers,* 563 F.3d 527, 385 U.S. App. D.C. 318 (D.C. 2009); *In re Iraq and Afghanistan Detainees Litigation,* 479 F. Supp. 2d 85 (D.D.C. 2007). In both cases, the court determined that the constitutional rights asserted were not clearly established. *Rasul,* 563 F.3d at 532; *In re Iraq,* 479 F. Supp. 2d at 108. In each case, the court drew a sharp distinction between citizens and non-citizens when determining what constitutional rights were clearly established at the time of their injuries, and the plaintiffs' non-citizen status was the driving factor in the court's determination that no clearly established right was available. *Id.*

In *In re Iraq,* a group of Iraqi and Afghani citizens claimed that they had been tortured and abused by U.S. military officials at various locations in Iraq and Afghanistan. 479 F. Supp. 2d. at 88. The court determined

that Rumsfeld and other high-ranking military officials were entitled to qualified immunity because they had not violated any clearly established right. *Id.* at 108-109. The court made clear that the plaintiffs' non-citizenship was the primary factor in reaching this conclusion: "[d]etermining whether the defendants' acts violated clearly established constitutional rights need not require extended explanation in this case because . . . Supreme Court precedent at the time the plaintiffs were injured established that the Fifth Amendment did not apply to nonresident aliens outside the sovereign territory of the United States . . . . [B]asic constitutional protections were unavailable to aliens abroad." *Id.* at 108-09.

In *Rasul,* the D.C. Circuit was asked to evaluate a series of constitutional claims from British nationals relating to their detention at Guantanamo Bay. 563 F.3d at 528. In concluding that Secretary Rumsfeld and ten other defendants were entitled to qualified immunity, the D.C. Circuit also relied on the plaintiffs' non-citizenship. *Id.* at 530-532. In addition to reiterating that limited constitutional protections were available to non-citizens abroad, the D.C. Circuit reaffirmed that American citizens are in fact entitled to such protections. *Id.* at 531. Discussing the Supreme Court's decision in *Verdugo-Urquidez,* 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990), the D.C. Circuit recognized that "[t]he majority noted that although American citizens abroad can invoke some constitutional protections . . . aliens abroad are in an altogether different situations." *Rasul,* 563 F.3d at 531 (citing *Verdugo-Urquidez,* 494 U.S. at 270) (internal citations omitted).

Appendix C

These cases establish the importance of citizenship in circumstances in which federal agents outside the United States carry out constitutional violations. American citizens do not forfeit their core constitutional rights when they leave the United States, even when their destination is a foreign war zone. *See Kar,* 580 F. Supp. 2d at 83; *Toscanino,* 500 F.2d at 280. Given our previous determination that the right of American citizens to be free from torture is a well-established part of our constitutional fabric, we conclude that this right follows American citizens abroad.

Of course, our belief in the existence of such a generalized right does not conclude our inquiry. *See Saucier,* 533 U.S. at 201. This right must be evaluated in the context of the specific circumstances of each case. However, it is equally important that we not shirk from protecting against clear constitutional violations simply because the clear general right has not previously been enforced in the precise circumstances facing the court. *See Padilla,* 633 F. Supp. 2d at 1036 (citing *Hope v. Pelzer,* 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (holding that "officials can still be on notice that their conduct violates established law even in novel factual circumstances") (other citations omitted). As the Supreme Court noted in *United States v. Lanier,* "[t]here has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." 520 U.S. 259, 271, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) (internal citations omitted).

Because at this stage we generally accept the allegations set forth in the complaint as true, the particularized question we face is whether it was clearly established to a reasonable official in Rumsfeld's position that the application of torturous treatment methods against American civilians in Iraq might give rise to a constitutional violation. We are cognizant of the difficult circumstances that situated Rumsfeld's decision-making responsibilites. As Rumsfeld correctly points out, someone in his position of responsibility is "subject to an array of competing considerations." *See Benzman v. Whitman,* 523 F.3d 119, 128 (2008). Decisions by the Secretary of Defense in the context of an ongoing conflict are undoubtedly difficult ones that should not be called into question each time an alleged constitutional violation arises. However, it is equally true and important that American citizens must not be denied the opportunity to challenge genuine mistreatment at the hands of a government official simply because that official is tasked with difficult and extremely important decisions.

In *Lewis,* the Supreme Court recognizes that behavior is particularly prone to be shocking when it comes after decision-makers have had "time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations." 523 U.S. at 853. We do not think Rumsfeld's job can be described as one uncomplicated by the pulls of competing obligations. We do, however, believe that there is merit to plaintiffs' assertion that Rumsfeld's position afforded him an opportunity to reflect on the material and constitutional consequences of his alleged actions. The thrust of the

allegations against Rumsfeld personally is not that he had to make a split-second decision to use torture in a particular moment of unprecedented emergency. To the contrary, plaintiffs allege that Rumsfeld approved the use of torture for general purposes as an interrogation technique and did so with ample time to consider the consequences of his actions.

Our determination that American citizens have the right to offer evidence in support of a claim that they were subject to the type of treatment methods identified in this case does not reflect an attempt to second-guess the judgment of Rumsfeld or military officials. Instead, it represents a recognition that federal officials may not strip citizens of well-settled constitutional protections against mistreatment simply because they are located in a tumultuous foreign setting. Plaintiffs have set forth facts that if true could show a violation of a well-established constitutional right. As such, we believe it would be improper to deny them the ability to give evidentiary grounding for the allegations they have set forth.

C. Availability of a *Bivens* Remedy

A determination that plaintiffs have sufficiently alleged a constitutional violation does not conclude our inquiry regarding Count I. We still must answer another fundamental question regarding whether a federal remedy arises out of this violation. As discussed above, the Supreme Court established in *Bivens* that victims of a constitutional violation by a federal official may recover damages despite the absence of a statute conferring such a

right. 403 U.S. at 396. However, in *Wilkie v. Robbins,* the Supreme Court made clear that *Bivens* does not provide an "automatic entitlement" to a remedy when a federal official has committed a constitutional violation. 551 U.S. 537, 550, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007).

In determining whether plaintiffs should be provided a federal remedy for their injury, the Supreme Court determined that courts should employ a two step process. *Id.* First, "there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* Second, "even in the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation." *Id.* (citing *Bush v. Lucas,* 462 U.S. 367, 378, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)); *see also Bivens,* 403 U.S. at 398 (holding that the right to such a cause of actions may be defeated if there are "special factors counseling hesitation in the absence of affirmative action by Congress). We analyze these questions in turn.

1. No Alternative Remedy Exists

Outside of a prospective *Bivens* action, there exists no remedy for plaintiffs' alleged injuries. As it was for the plaintiffs in *Bivens,* "it is damages or nothing." *Bivens,* 403 U.S. at 410 (Harlan, J., concurring). Other than a brief

discussion of the Detainee Treatment Act ("DTA") by each side, there appears little dispute regarding the absence of an alternative remedy. With respect to the DTA, we agree with Rumsfeld that the statute does not apply to the facts of this case and does not provide a remedy to vindicate a detainee's constitutional rights. There is no evidence in the record proffered by either party, and the court likewise has found none, that any alternative process exists to address the alleged constitutional deprivations suffered by plaintiffs in this case.

Historically, the absence of an alternative remedy has given strong support to the application of a *Bivens* remedy to an identifiable constitutional wrong. As the Supreme Court stated in *Davis v. Passman,* "unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." 442 U.S. 228, 242, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979).

2. No Special Factors Counsel Hesitation

Because we have concluded there is no alternative forum for seeking a remedy, we must examine step two of the *Bivens* analysis, which requires us to determine whether thee are any "special factors counseling hesitation" and to weigh "reasons for and against the creation of a new cause of action, the way common law judges have always done." *Wilkie,* 551 U.S. at 554 (citing

Bush, 462 U.S. at 378) . The bulk of special factors concerns raised by Rumsfeld deal with warmaking authority and judicial deference.

Before addressing these particularized concerns, however, we must address Rumsfeld's argument that the *Bivens* remedy has become generally disfavored amongst federal courts. According to Rumsfeld, since the Supreme Court created the *Bivens* remedy in 1971, it has consistently refused to extend *Bivens* to any new context or category of defendants. *See, e.g., Malesko,* 534 U.S. at 68. Rumsfeld correctly asserts that, in cases that have come before them since *Bivens,* the Supreme Court often has declined to extend a *Bivens* remedy to the particular constitutional violation it was addressing. *See, e.g. Wilkie,* 551 U.S. 537, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007) (harassment of a landowner by federal officials in violation of the Fifth Amendment), *Schweiker v. Chilicky,* 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988) (wrongful denials of Social Security benefits), *Bush v. Lucas,* 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983) (First Amendment violations by federal employers). The Supreme Court, however, has not been steadfast in its reluctance to extend a judicial remedy. *See e.g., Davis v. Passman,* 442 US. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979); *Carlson v. Green,* 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980); *Wilkie,* 551 U.S. at 550-551.

While the Supreme Court has been hesitant to apply *Bivens* in some of the particular circumstances brought before it, it can hardly be said to have adopted a steadfast rule against the application of *Bivens* constitutional

remedies. More importantly, the Supreme Court's refusal to apply *Bivens* in particular constitutional contexts does not remove the availability of a *Bivens* remedy to federal courts tasked with adjudicating distinct constitutional violations. The frequency with which federal courts have been willing to apply *Bivens* to address a constitutional deprivation leaves us unwilling to decline such a remedy in this case based on Rumsfeld's assertion that *Bivens* is a generally disfavored vehicle for redress.

With respect to this case, Rumsfeld has identified three special factors: separation of powers; misuse of the courts as a weapon to interfere with the war effort; and other serious adverse consequences for national defense. Special factors counseling hesitation "relate not to the merits of the particular remedy, but to the questions of who should decide whether such a remedy should be provided." *Sanchez-Espinoza v. Reagan,* 770 F.2d 202, 208, 248 U.S. App. D.C. 146 (D.C. Cir. 2004). According to this reasoning, "courts should avoid creating a new, nonstatutory remedy when doing so would be 'plainly inconsistent' with authority constitutionally reserved for the political branches." *In re Iraq and Afghanistan Detainees Litigation,* 479 F. Supp. 2d 85, 103 (D. D.C. 2007 (quoting *Chappell v. Wallace,* 462 U.S. 296, 304, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983)).

We find two elements of Count I most important to our assessment of these special factors. First, Count I requires us only to determine whether the judiciary may properly provide a *post-hoc* remedy to American citizens who allege that, during a period of war, they were

tortured. While plaintiffs' second amended complaint as a whole urges a much broader wartime role for the judiciary--specifically, providing robust procedural requirements for detention, hearings, and access to courts--Count I asks at a more targeted level whether it is appropriate to provide enforceable limits on the treatment of American citizens.

It is well-settled that the "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." *Hamdi v. Rumsfeld,* 542 U.S. 507, 532, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004) (citing *Dep't of the Navy v. Egan,* 484 U.S. 518, 530, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988) (noting the reluctance of the courts "to intrude upon the authority of the Executive in military and national security affairs") and *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 587, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952) (acknowledging "broad powers in military commanders engaged in day-to-day fighting in a theater of war")). As Rumsfeld correctly argues, courts defer to the military for one primary reason: judges are not military leaders and have neither the expertise nor the mandate to govern the armed forces. *See Alhassan v. Hagee,* 424 F.3d 518, 525 (7th. Cir. 2005).

Count I, however, does not require this court to govern the armed forces. It equally does not require that we challenge the desirability of military control over core warmaking powers. The remedy requested does not implicate such powers. This conclusion follows

an arc of reasoning quite similar to that employed in *Padilla.* Addressing analogous special factors concerns, the *Padilla* court considered "the possible constitutional trespass on a detained individual citizen's liberties where the detention was not a necessary removal from the battlefield." *Padilla,* 633 F. Supp. 2d at 1028. The court was not "persuaded that such conduct implicated a core strategic warmaking power." *Id.* We reach a similar conclusion.

Future evidence may demonstrate that particular treatment methods or rationales for use that we have been asked to consider implicate military affairs in a more direct manner than has thus far been shown. At this stage, however, we are not yet in a position to consider such evidence. Based on the pleadings submitted and the backdrop of prior precedent, we are not convinced that dismissing the claim of these two American citizens is a proper exercise of judicial authority. Instead, we believe "a state of war is not a blank check" for the President or high-ranking government officials when it comes to the rights of the American citizens, and therefore, it does not infringe "on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here." *Id.* at 1027-1028 (citing *Hamdi,* 542 U.S. at 535).

The second element of Count I we find important to our special factors analysis is the American citizenship of plaintiffs Vance and Ertel. As the preceding discussion of *Hamdi* and *Padilla* illustrates, the existence of such

citizenship has gone a long way for recent courts asked to assess the scope of constitutional protection overseas. In each case, the plaintiffs' American citizenship was a crucial factor in the decision to allow a suit to proceed. *See Hamdi,* 542 U.S. at 532 ("[I]t is . . . vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship."); *Padilla,* 633 F. Supp. 2d at 1020 (distinguishing scope of constitutional protections available to citizens and non-citizens abroad).

This view of the relevant case law is confirmed by the most recent primary case Rumsfeld invokes in support of his special factors argument. *See In re Iraq and Afghanistan Detainees Litigation,* 479 F. Supp. 2d 85. As we discussed in our qualified immunity analysis, the plaintiff's non-citizenship in *In re Iraq* was a crucial factor in that court's decision to grant the government's motion to dismiss. *See Padilla,* 633 F. Supp. 2d at 1025 (citing *In re Iraq,* 479 F. Supp. 2d at 103-105) ("The holding in *In re Iraq* demonstrates that the courts are not willing to extend a *Bivens* remedy to a non-citizen detained abroad who engages in acts of war against this country."). In reaching its decision, the district court in *In re Iraq* raised the specter of allowing "the very enemies [a field commander] is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." 479 F. Supp. 2d at 105 (citing *Johnson v. Eisentrager,* 339 U.S. 763, 779, 70 S. Ct. 936, 94 L. Ed. 1255 (1950).

More broadly, however, it is clear that the court's fears were directed at the prospect of a judicial remedy for non-citizens engaged in battle against the United States. *See In re Iraq,* 479 F. Supp. 2d at 105-106 (relying exclusively on precedent concerning "enemy aliens" to support the aversion to a judicial remedy against military officials). This is consistent with the general rationale underlying the court's reluctance to provide access to American courts in cases like these. *See, e.g. Sanchez-Espinoza v. Reagan,* 770 F.2d 202, 209, 248 U.S. App. D.C. 146 (D.C. Cir. 1985) ("[W]e think that as a general matter the danger of foreign citizens' using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist.").

According to Rumsfeld, the Supreme Court's decision in *Munaf v. Geren* undermines the traditional force of American citizenship in cases like ours. 553 U.S. 674, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008). Faced with two American citizens who had been detained in Iraq, the Supreme Court did in fact conclude that habeas relief would be improper because it would result in "unwarranted judicial intrusion into the Executive's ability to conduct" both "military operations abroad" and the country's "international relations." *Id.* at 2218, 2224. The circumstances at issue in *Munaf,* however, are clearly distinct from ours. In *Munaf,* the citizen-detainees had been arrested by the Iraqi government for crimes allegedly committed within the confines of its sovereign territory. *Id.* at 2214. In denying habeas relief, the Supreme Court relied heavily on the principle that such relief cannot be used to defeat

the criminal jurisdiction of a foreign sovereign. *Id.* at 2227-2228. A special interest in avoiding sensitive and direct foreign policy concerns, rather than a newfound hostility to the protections provided American citizens abroad, is what drove the Court's holding in *Munaf*. *Id.* at 2226. As such, we do not view *Munaf* as altering the principle that courts may provide a judicial remedy to American citizens abroad in circumstances in which such protection might not exist for a non-citizen.

Count I does not ask us to approve of a general expansion of judicial authority in matters of core military competence. When an American citizen sets out well-pled allegations of torturous behavior by executive officials abroad, we believe that courts are not foreclosed from denying a motion to dismiss such allegations at the very first stage of the trial process. "[T]he position that the courts must forgo any examination of the individual case . . . serves only to condense power into a single branch of government." *Hamdi,* 542 U.S. at 535-36. Because we do not believe that precedential or prudential concerns counsel in favor of such a "blank check" for high-ranking government officials, we do not believe that any special factors counsel hesitation sufficient to foreclose a constitutional remedy for Vance and Ertel. *Id.* at 536. ["E]ven the war power does not remove constitutional limitations safeguarding essential liberties." *Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 426, 54 S. Ct. 231, 78 L. Ed. 413 (1934). Therefore, Rumsfeld's motion to dismiss Count I is denied.

Appendix C

II. Count II: Procedural Due Process

In Count II, plaintiffs allege that they were denied procedural due process during their confinement in Iraq. In particular, they allege that they were denied knowledge of the factual basis for their detention, access to exculpatory evidence, and an opportunity to appear before an impartial adjudicator. *See* SAC ¶¶ 58-62. Plaintiffs argue that the Supreme Court's decision in *Hamdi v. Rumsfeld* clearly establishes that the military cannot detain American citizens without affording them procedural due process, even in wartime. 542 U.S. at 532.

In *Hamdi,* the Supreme Court identified a set of core rights due to American citizen-detainees. 542 U.S. at 535. However, Rumsfeld argues that *Hamdi* is inapplicable because it addressed a domestic detention setting whereas the allegations in this case occur in the midst of a foreign war zone. We agree with Rumsfeld that Vance and Ertel must, at a minimum, demonstrate a violation of a *Hamdi* core right in order for their claim to proceed. If the procedures plaintiffs were afforded would have been acceptable in a domestic setting, we will not deem them insufficient in the context of a foreign status determination. *See Kar,* 580 F. Supp. 2d at 84-85 (holding that the interests considered in *Hamdi* "strike a different balance"--more deferential to the government--in a case in which the detention occurred in the midst of a foreign war zone). Indeed, plaintiffs agree that the sufficiency of their claim depends on their ability to allege a violation of a core right recognized in *Hamdi.* This requires an allegation that, in part or in whole, plaintiffs were denied "notice

of the factual basis of [their] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi,* 542 U.S. at 533.

First, plaintiffs assert that the status board letters they received were not sufficient to put them on notice of the factual basis for their detentions. We disagree. These letters informed each plaintiff why he was being detained:

> for being a suspect in supplying weapons and explosives to insurgent/criminal groups through your affiliation with the Shield Groups Security Company (SGS) operating in Iraq. Credible evidence suggests that certain members of SGS are supplying weapons to insurgent groups in Iraq. Further, you are suspected of illegal receipt of stolen weapons and arms in Iraq from Coalition Forces.

SAC Ex. A. Under *Hamdi,* we find that these letters did, in fact, provide sufficient notice. *Hamdi* does not require a detailed affidavit be provided to each detainee in a foreign war zone, it merely requires "notice of the factual basis." 542 U.S. at 533. Plaintiffs have given this court no reasoned means by which to reach a contrary conclusion. Moreover, our conclusion is confirmed by the holding of in *Kar.* The plaintiff in *Kar* was given a similar status letter that informed him that the military suspected him of "possess[ing] explosive materials." 580 F. Supp. 2d at 85. Referring to this as the "formal notice of his detention," the court held that Kar "did receive notice of the factual basis for his detention." *Id.*

Second, plaintiffs argue that they were denied a fair opportunity to rebut the government's factual assertions. They assert that they sought to call each other and a handful of government officials as witnesses and to retrieve the cell phones and laptops from which they had communicated with the FBI. It is unrealistic, and out of line with *Hamdi*'s requirements, however, to assume that a citizen-detainee hearing like the one here would require the government to replicate the full complement of evidentiary protections afforded in criminal trials. *See Hamdi,* 542 U.S. at 533-534.

Again the court's holding in *Kar* court confirms our conclusion. The plaintiff in *Kar* claimed that the military denied his requests that government witnesses, including "the FBI agents and military officers who interrogated him" be made available at his hearing. *Kar,* 580 F. Supp. 2d at 82. In declining to find a due process violation, the court said that "[t]he government's inability or unwillingness to summon certain military personnel as witnesses and its refusal to turn over reports that might divulge interrogation techniques were acceptable given the interests at stake." *Id.* at 86. We find no reasoned basis to conclude differently here.

Third, plaintiffs assert that the Detainee Status Board that conducted their hearings was not impartial, but rather, outcome driven. Plaintiffs allege that were it otherwise, the Board would have provided them the reasonably available evidence they requested. As we noted above, however, given the legitimate considerations that may lead to reduced evidentiary access in a foreign status

hearing, plaintiffs' assertion provides no support for their allegation of impartiality. We also agree with Rumsfeld that, because the outcome of this hearing was the release of each plaintiff, nothing beyond speculation grounds the claim of impartiality.

Finally, plaintiffs have asserted an equal protection theory as part of their procedural due process claim. Plaintiffs claim that civilian Americans who are detained by the military get cut off from a host of due process protections that the military affords to its own. This theory cannot support a right to relief.

In an equal protection claim, a plaintiff must prove he was treated differently than someone similarly situated--someone "prima facie identical in all relevant respects." *Landry v. McCollum,* 424 F.3d 631, 634 (7th Cir. 2005). By plaintiffs' own admission, the only people who have received protections of the Uniform Code of Military Justice ("UCMJ") were military personnel. Because they were not military personnel at the time of their detentions, plaintiffs cannot satisfy the "similarly situated" requirement. Plaintiffs argument that the UCMJ is nonetheless relevant because it demonstrates the feasibility of providing due process protections is not an equal protection argument. Instead, it is simply an argument about the practicality of adding new protections for non-military officials. Because this argument is not sufficient to show a constitutional violation with respect to existing procedural due process rights, it does not provide a sufficient basis for plaintiffs' claims.

Plaintiffs have not alleged facts that go beyond a speculative level in support of a claimed violation of a constitutional right to procedural due process. Therefore, Rumsfeld's motion to dismiss Count II is granted.

III. Count III: Denial of Access to Courts

In Count III, their final claim, plaintiffs allege that they were denied access to the court to challenge their detention. *See* SAC ¶¶ 284-293. This claim is properly broken into two parts. First, plaintiffs allege that they were prevented from challenging torturous conditions of confinement. Second, they allege that they were prohibited from challenging the basis of their detention in Iraq. We will address each argument in turn.

First, plaintiffs claim that they had a right of access to the court to seek relief against the use of torture against them. Plaintiffs do not identify an actual predicate claim by which we would properly assess this as part of our habeas inquiry. In other words, a claim regarding their inability to challenge alleged torturous conditions is distinct from an assessment of their habeas right to access to the court during confinement. *See, e.g., Cochran v. Buss,* 381 F.3d 637, 639 (7th Cir. 2004) (holding that a state prisoner "challenging the fact or duration of his confinement must seek habeas corpus relief; a prisoner challenging a condition of his confinement, by contrast, must seek relief under 42 U.S.C. § 1983").

Insofar as plaintiffs assert a right of access to the court to challenge their conditions of confinement, we

believe that their claim is properly articulated and assessed as part of Count I of their complaint. This is consistent with the Supreme Court's requirement that a "backward-looking denial-of-access claim [must] provide a remedy that could not be obtained on an existing claim." *Christopher v. Harbury,* 536 U.S. 403, 421, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002). Because the only remedy plaintiffs can seek for this part of their denial of access claim is monetary damages, the same remedy they are seeking in Count I, plaintiffs may not "maintain the access claim as a substitute, backward-looking action." *Id.* at 422.

In the second part of Count III, plaintiffs assert a habeas claim regarding their inability to gain access to the courts for the purpose of challenging the grounds for their detention. This claim is addressed by the well-established principle that 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 v. Bush,* 553 U.S. 723, 128 S. Ct. 2229, 2276, 171 L. Ed. 2d 41 (2008). We are not persuaded that six weeks and three months--the lengths of plaintiffs' respective detentions--were unreasonable amounts of time to make initial status determinations in Iraq. *Cf. Zadvydas v. Davis,* 533 U.S. 678, 701, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001) (setting six months as a presumptively constitutional period for detention of non-citizens within the United States pending removal). In *Boumediene,* the Supreme Court's assessment of a reasonable period of time involved detainees who had been awaiting their status determinations for as long as six years. 128 S. Ct. at 2275. To sustain their claim, plaintiffs would need to

establish that they possessed a "nonfrivolous, arguable" underlying claim that was frustrated by official acts impeding litigation of that claim. *See Harbury,* 536 U.S. at 415. Because existing precedent illustrates that plaintiffs would have not been able to seek habeas relief during their reasonably brief detentions in Iraq, they have failed to allege a predicate claim with even arguable legal merit. As such, Rumsfeld's motion to dismiss Count III is granted.

CONCLUSION

For the reasons set forth in the court's Memorandum Opinion and Order, defendant Donald Rumsfeld's motion to dismiss [135] is denied as to Count I and granted with respect to Counts II and III.

It is so ordered.

/s/_____
Wayne R. Andersen
United States District Court

Dated: March 5, 2010

APPENDIX D — ORDER GRANTING PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED OCTOBER 28, 2011

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 28, 2011

By the Court:
Nos. 10-1687 and 10-2442

DONALD VANCE and NATHAN ERTEL,

Plaintiffs-Appellees,

v.

DONALD RUMSFELD and THE UNITED STATES OF AMERICA,

*Defendants-Appellant*s.

Appeal from the United District Court for the Northern District of Illinois, Eastern Division.

No. 06 C 6964

Wayne R. Andersen,
Judge.

Appendix D

ORDER

The petition for rehearing *en banc* is **GRANTED**. The panel's opinion and judgment previously issued on August 8, 2011 are **VACATED**.

Oral argument will be set by the Court at a date to be determined.

APPENDIX E — EXCERPTS OF RELEVANT STATUTES

Relevant Portions of The Detainee Treatment Act of 2005 ("DTA"), Pub. L. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-2744 (Dec. 30, 2005).

> Sec. 1002. UNIFORM STANDARDS FOR THE INTERROGATION OF PERSONS UNDER THE DETENTION OF THE DEPARTMENT OF DEFENSE.
>
> (a) IN GENERAL.—No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation. . . .
>
> SEC. 1003. PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT OF PERSONS UNDER CUSTODY OR CONTROL OF THE UNITED STATES GOVERNMENT.
>
> (a) IN GENERAL.—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.
>
> * * *

Appendix E

(d) CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.—In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

SEC. 1004. PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL ENGAGED IN AUTHORIZED INTERROGATIONS.

(a) PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL.—In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a

serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.

(b) COUNSEL.—The United States Government may provide or employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation of an officer, employee, member of the Armed Forces, or other agent described in subsection (a), with respect to any civil action or criminal prosecution arising out of practices described in that subsection, under the same conditions, and to the same extent, to which such services and payments are authorized under section 1037 of title 10, United States Code.

Appendix E

Relevant Portions of The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 ("NDAA"), Pub. L. 108-375, 118 Stat. 1811, 1811-2199 (Oct. 28, 2004).

SEC. 1091. SENSE OF CONGRESS AND POLICY CONCERNING PERSONS DETAINED BY THE UNITED STATES.

* * *

(b) POLICY.—It is the policy of the United States to—

(1) ensure that no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States;

(2) investigate and prosecute, as appropriate, all alleged instances of unlawful treatment of detainees in a manner consistent with the international obligations, laws, or policies of the United States;

(3) ensure that all personnel of the United States Government understand their obligations in both wartime and peacetime to comply with the legal prohibitions against torture, cruel, inhuman, or degrading

treatment of detainees in the custody of the United States . . . .

SEC. 1092. ACTIONS TO PREVENT THE ABUSE OF DETAINEES.

(a) POLICIES REQUIRED.—The Secretary of Defense shall ensure that policies are prescribed not later than 150 days after the date of the enactment of this Act regarding procedures for Department of Defense personnel and contractor personnel of the Department of Defense intended to ensure that members of the Armed Forces, and all persons acting on behalf of the Armed Forces or within facilities of the Armed Forces, treat persons detained by the United States Government in a humane manner consistent with the international obligations and laws of the United States and the policies set forth in section 1091(b).

Relevant Portions of The Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. 102-256, 106 Stat. 73 (Mar. 12, 1992).

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) LIABILITY.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual;

* * *

(b) EXHAUSTION OF REMEDIES.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) STATUTE OF LIMITATIONS.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

* * *

(b) TORTURE.—For the purposes of this Act—

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that

individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

APPENDIX F — EXCERPTS OF UNITED STATES WRITTEN RESPONSE TO QUESTIONS ASKED BY THE UNITED NATIONS COMMITTEE AGAINST TORTURE

United States Written Response to Questions Asked by the United Nations Committee Against Torture, ¶ 5 (Apr. 28, 2006) (Question 5), *available at* http://www.state.gov/j/drl/rls/68554.htm (last visited February 1, 2013).

* * *

With regard to torture, "cruel and unusual punishments" have always been proscribed by the Eighth Amendment to the U.S. Constitution. This Amendment is directly applicable to actions of the federal government and, through the Fourteenth Amendment, to those of the constituent states. *See Robinson v. California*, 370 U.S. 660, *reh'g den.* 371 U.S. 905 (1962); *Estelle v. Gamble*, 429 U.S. 97 (1976). While the constitutional and statutory law of the individual states in some cases offers more extensive or more specific protections, the protections of the right to life and liberty, personal freedom and physical integrity found in the Fourth, Fifth and Eighth Amendments to the U.S. Constitution, as incorporated by the Fourteenth Amendment to the U.S. Constitution, create a minimum legal protection against the actions of state and local governments. Every state constitution also contains detailed guarantees of individual liberties, in most cases paralleling the

protections set forth in the federal bill of rights. For example, nearly all state constitutions expressly forbid cruel and unusual punishment (including acts constituting "torture") and guarantee due process protections no less stringent than those in the federal Constitution.

Finally, U.S. law provides various avenues for seeking redress, including financial compensation, in cases of torture and other violations of constitutional and statutory rights relevant to the Convention. Besides the general rights of appeal, these can include any of the following, depending on the location of the conduct, the actor, and other circumstances:

• Seeking a writ of habeas corpus, which, in certain circumstances, allows judicial review of whether there is a valid reason for detention;

• Filing criminal charges, which can lead to investigation and possible prosecution . . . .

• Bringing a civil action in federal or state court under the federal civil rights statute, 42 U.S.C. 1983, directly against state or local officials for money damages or injunctive relief;

• Seeking damages for negligence of federal officials and for negligence and intentional torts of federal law enforcement officers under the Federal Tort Claims Act, 22 U.S.C. 2671 *et seq.*,

or of other state and municipal officials under comparable state statutes;

• Suing federal officials directly for damages under provisions of the U.S. Constitution for "constitutional torts," see *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and *Davis v. Passman*, 442 U.S. 228 (1979);

* * *

• Bringing civil suits for damages for certain acts of torture perpetrated by officials of foreign governments based on international legal prohibitions against torture under the Alien Tort Statute and the Torture Victims Protection Act, 28 U.S.C. 1350, and note . . . .

APPENDIX G — SECOND AMENDED COMPLAINT OF DONALD VANCE AND NATHAN ERTEL IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, WITH EXHIBITS, FILED MAY 23, 2008

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

06 c 6964

DONALD VANCE AND NATHAN ERTEL,

Plaintiffs,

v.

DONALD RUMSFELD, UNITED STATES OF AMERICA AND UNIDENTIFIED AGENTS,

Defendants.

Judge Andersen

Magistrate Judge Keys

JURY TRIAL DEMANDED

SECOND AMENDED COMPLAINT

NOW COMES Plaintiffs, DONALD VANCE and NATHAN ERTEL, by his attorneys, LOEVY &

LOEVY, and complaining of Defendants, DONALD RUMSFELD, the UNITED STATES OF AMERICA, and UNIDENTIFIED AGENTS, state as follows:

Introduction

1. In 2006, Plaintiffs Donald Vance and Nathan Ertel were indefinitely detained without due process of law in a United States military installation in Iraq. They were not charged with any crime, nor had they committed any crime. None of Plaintiffs' loved ones could find out if they were even alive.

2. During this extended and unlawful detention, Mr. Vance and Mr. Ertel were interrogated repeatedly by United States military and civilian officials. Their interrogators utilized the types of physically and mentally torturous tactics that are supposedly reserved for terrorists and so-called enemy combatants. Throughout the ordeal, they were denied an attorney or even access to a court to challenge their mistreatment.

3. Plaintiffs are American citizens. Mr. Vance was born and raised in Illinois. He previously served proudly and honorably as a member of the United States Navy. Mr. Ertel was born and raised in Virginia. He has worked as a government contract administrator for over 13 years. Neither of them violated the laws of this country or any other law.

4. Plaintiffs are not now, and never have been, terrorists or enemies of the United States. To the best of

their knowledge, Plaintiffs were never even legitimately accused of being the same. To the contrary, the people who caused them to be detained—U.S. officials stationed in Iraq, including State Department officials—knew Plaintiffs were innocent. They had Plaintiffs detained *incommunicado* for months, without just grounds, and denied them of the ability to seek *habeas corpus* so that they could extract information from Plaintiffs to learn what they had told to state-side law enforcement officials about misconduct occurring in Iraq. This misconduct was within the purview of these officials and potentially embarrassing to them.

5. As Americans, Plaintiffs are entitled to the liberties and protections of the United States Constitution, and these detentions blatantly violated their rights.

6. Nevertheless, officials at the highest levels of the United States government have endorsed just such abuses. In particular, Defendant Donald Rumsfeld devised policies that permit the use of torture in interrogations and the detention of Americans without just grounds and effectively without access to a court to seek habeas. Providing government officials such powers over American citizens is completely unprecedented in the history of the Bill of Rights and, as Plaintiffs' experience shows, inherently susceptible to corruption and abuse.

7. This lawsuit seeks accountability and justice for Defendants' violations. Mr. Vance and Mr. Ertel also bring this lawsuit at least in part so that other Americans will not have their civil rights suspended in a similar fashion in the future.

Appendix G

Jurisdiction and Venue

8. This Court has subject matter jurisdiction of this action pursuant to 28 U. S. C. § 1331. This Court has personal jurisdiction over Defendant Rumsfeld due to his ties to Illinois. Venue is proper under 28 U. S. C. § 1391(b)(1).

Background

9. Earlier this decade, Defendant Donald Rumsfeld and others, enacted a series of measures applicable to persons whom government officials, in their unilateral discretion, decide to designate as possible enemies of the United States. These new measures, crafted in secret and without resort to the democratic process, effectively suspended certain very basic human and civil rights for those whom the officials targe.

10. For example, once the federal officials decided to affix a "possible enemy" label to a given person, that person would lose fundamental procedural rights to challenge the truthfulness of the accusation or to seek a court's review of the official's determination.

11. Americans designated as an enemy or possible enemy could thus be held indefinitely, in secret, cut off from the courts, without access to an attorney, and with no fair procedure even to challenge the "enemy" designation assigned them.

12. Throughout these *incommunicado* detentions, the officials are free to interrogate Americans without the

benefit of counsel. Furthermore, Defendant Rumsfeld has approved and, at times, ordered the use of interrogation tactics that are universally condemned as torture. These tactics contravene the protections embedded in the Geneva Conventions, *i.e.*, the global norms for the treatment of detainees that were adopted by the communities of the entire world in the wake of the horrors of World War II.

13. After enacting the new rules, members of the federal government endeavored to keep them secret, both from the public and from the people's elected representatives. However, in a still-free society, such secrets remain difficult to keep.

14. For example, upon discovering that Defendant Rumsfeld had endorsed the use of torture in interrogations, the American people were repulsed, and the United States Congress enacted laws, including the Detainee Treatment Act of 2005 ("DTA"), to forbid torture by or against Americans, stating:

> No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

DTA Pub. L. 109-148, Div. A, Title X, § 1003, 119 Stat. 2739-40 (Dec. 30, 2005).

15. As is explained below, Defendant Rumsfeld flouted Congress' command and continued the use of torture against detainees, including American detainees, and Plaintiffs themselves were tortured as a result.

16. Similarly, when family members of American detainees sued Defendant Rumsfeld seeking to end to the unconstitutional detentions, the Supreme Court made clear to Mr. Rumsfeld that the government must afford detainees fair due process rights with which to challenge a "possible enemy" designation and must permit detainees to seek review of any resulting detention decision in a court of law, stating:

> Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process.

Hamdi v. Rumsfeld, 542 U.S. 507, 536-537 (2004). Again, Mr. Rumsfeld took matters into his own hands. He ignored the Supreme Court's command to provide fair processes and to submit the detention decisions to judicial review, as Plaintiffs' experience (and that of many others) demonstrates.

17. Though Defendant Rumsfeld' s rules were originally justified as applying only to terrorists, there is a very real potential for slippage and abuse. As with

any concentration of extraordinary power in the executive branch, this risk is more than hypothetical. The Supreme Court also warned Mr. Rumsfeld about the need for due process rights to prevent official abuse of the detention powers Rumsfeld had given them, stating:

> [A]s critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.

Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004). Such abuse is exactly what happened to Plaintiffs in 2006 after Mr. Rumsfeld failed to reform his detention policies.

18. While working as civilians with privately-owned companies operating in Baghdad, Plaintiffs came into contact with political, financial, and operational information that they considered to be suspicious and potentially indicative of corruption in Iraq. Fulfilling what they believed to be their patriotic duties as American citizens, Mr. Vance and Mr. Ertel reported these irregularities to law enforcement officials, primarily the Federal Bureau of Investigation ("FBI") in Chicago, but also to members of the State Department and other federal officials. Both Mr. Vance and Mr. Ertel undertook this reporting for their country, even though they knew

full well that the disclosures could result in serious, if not deadly, retaliation by some of those on whom they were informing.

19. The information they reported was also potentially embarrassing to U.S. bureaucrats in Iraq as it concerned misconduct and lawlessness within their assigned areas. When some of these bureaucrats learned of Plaintiffs' reports they labeled Plaintiffs "security internees" and invoked the powers Rumsfeld had given them to detain Plaintiffs and interrogate them about what they had been reporting, particularly what they had told state-side FBI officials.

20. Mr. Vance was held *incommunicado* for three months and Mr. Ertel was so held for over one month, both is U.S. facilities under U.S. control.

21. During this time they were repeatedly subjected to torturous interrogations. This included psychologically-disruptive tactics designed to induce compliance with their interrogators' will, such as exposure to intolerable cold and continuous artificial light (no darkness day after day) for the duration of their imprisonment; extended solitary confinement in cells without any stimuli or reading material; blasting by loud heavy metal and country music pumped into their cells; being awoken by startling if they fell asleep; threats of excessive force; blindfolding and "hooding"; and selective deprivation of food and water, amongst other techniques. All of the mistreatment was inflicted by Americans, some of them military, some of them from civilian agencies.

22. The months of unconscionable interrogations revealed only that Plaintiffs were innocents who had already volunteered everything they knew to the federal government.

23. Secret imprisonment and torturous interrogation of American citizens by their own government is antithetical to this nation's longstanding commitment to liberty. The basic scheme of our constitutional democracy mandates that such infringements must be subject to meaningful challenge and review by the judicial branch.

The Parties

24. Plaintiff Donald Vance is a 30 year-old United States citizen who was born and raised in Chicago, Illinois, where he currently resides. Before beginning his career as a security consultant, Plaintiff served his country in the United States Navy, spending two years on active duty and four years in the reserves. Following 9/11, in an act of patriotism, he voluntarily upgraded his reentry code to reactivate if needed.

25. Plaintiff Nathan Ertel is a 30 year-old United States citizen who was born and raised in Virginia. For over 13 years, Mr. Ertel has worked as a contract manager for numerous government contractors.

26. Defendant Donald Rumsfeld is the former Secretary of the United States Department of Defense ("DoD"). At all relevant times, Defendant Rumsfeld was personally responsible for developing, authorizing,

supervising, implementing, auditing and/or reforming the policies, patterns or practices governing the arrest, detention, treatment, interrogation and adjudication of detainees held in U.S. custody throughout the world.

27. The Unidentified Defendants are the U.S. officials and agents who ordered, carried out, and failed to intervene to prevent, the torture and unlawful detention of the Plaintiffs.

The Sandi Group

28. In 2004, following the United States invasion of Iraq, Plaintiffs separately went to Iraq to try to help rebuild the country and achieve democracy.

29. Both went to work for the Sandi Group. The Sandi Group, in a joint venture with DynCorp International, provides security services for the United States State Department, nongovernmental organizations ("NGOs"), and commercial and media firms operating in Iraq.

30. The Sandi Group was at one point the largest private employer of Iraqi citizens in Iraq, employing approximately 6,000 people.

31. Mr. Ertel began working for the Sandi Group in August 2004 as a security contract administrator. Mr. Vance joined Sandi Group in December 2004, when he was hired as a supervisor of security personnel. Among their various duties, Plaintiffs were privileged to provide security escorts and to help secure polling facilities

during Iraq's constitutional election period. Plaintiffs also provided security for employees of various NGOs who strived, under difficult conditions, to improve the quality of life for Iraqi citizens.

32. Frustrated with the Sandi Group's lack of concern for its employees, both Mr. Vance and Mr. Ertel eventually quit. Mr. Vance returned home to Chicago and Mr. Ertel returned to Virginia.

Shield Group Security

33. At all relevant times, Shield Group Security ("SGS") was an Iraqi security services company owned by Mustafa Al-Khudairi, a dual Iraqi-British citizen. He is also known as Mustafa Kamel. SGS was formed under Iraqi law as the Al-Dera' Al-Watani Company for Security Services & General Guards Ltd.

34. SGS contracts with the Iraqi government, Iraqi companies, NGOs, United States contractors, and the Multinational Forces-Iraq ("MNF-I"). To the best of Plaintiffs' knowledge, the company is still operating, providing services, *inter alia*, for the Iraqi government and United States-aligned NGOs.

35. In the Fall of 2005, Mr. Vance was contacted in Chicago by Dan Johnson, a former colleague who also had left the Sandi Group and now worked for SGS.

36. At that time, Mr. Johnson asked Mr. Vance to return to Iraq to work for SGS. Mr. Vance agreed and was

hired pursuant to a one-year contract to provide security services and supervise security personnel.

37. A short time later, in November 2005, Mr. Ertel too was recruited to work for SGS by another former Sandi Group employee, Josef Trimpert. Mr. Ertel was recruited by Mr. Trimpert to work for SGS as a contract manager tasked with ensuring contract compliance and developing business for SGS. In that position, Mr. Ertel reported directly to Mustafa Al-Khudairi.

38. Plaintiffs were paid monthly by SGS in United States dollars.

39. At all relevant times, SGS maintained its offices in a gated community in the Red Zone in Baghdad, Iraq (the "compound"). Mr. Vance, Mr. Ertel, and Mr. Trimpert all lived in dormitory-type housing on the compound. Mustafa Al-Khudairi also maintained his residence on the compound. The two gates into the compound were controlled by armed guards.

40. The compound was essentially a neighborhood, populated by both native Iraqis and expatriates working for other companies. As was true for everyone living in Baghdad, there were frequent disruptions in electricity and the water was not potable.

Plaintiffs Begin Whistleblowing

41. Most of Plaintiffs' work took place in SGS's main offices where, from time-to-time, they would observe

payments being made by SGS agents to certain Iraqi sheikhs.

42. Based on these observations, Plaintiffs came to believe that these payments were being made to obtain influence. Plaintiffs did not know whether these payments were legal or corrupt, but suspected the latter.

43. In October 2005, Mr. Vance returned to Chicago to attend his father's funeral. Acting out of a sense of patriotism and moral obligation, Mr. Vance took this opportunity to telephone the FBI to report what he had been observing at SGS.

44. Mr. Vance was eventually connected to Travis Carlisle, an FBI agent. Mr. Carlisle asked Mr. Vance to report to him any strange activity that he witnessed at SGS. Mr. Vance agreed, and pledged his cooperation.

45. Upon returning to Iraq, Mr. Vance regularly emailed and called Mr. Carlisle in Chicago, sometimes as often as twice per day, to report his observations.

46. Approximately two and a half weeks after the in-person meeting, Mr. Carlisle telephoned Mr. Vance and asked him to meet with Maya Dietz, a U.S. official who was working in Iraq.

47. Mr. Vance met with Ms. Dietz. She asked him to capture SGS's computer documents on memory sticks and forward them to her. Mr. Vance complied with this request.

48. Mr. Ertel was aware of and contributed information for Mr. Vance's communications with the FBI.

49. In addition, both Mr. Vance and Mr. Ertel were in contact with Deborah Nagel and Douglas Treadwell, who were working for civilian U.S. agencies including the State Department in Iraq, about their concerns regarding SGS.

50. Plaintiffs' whistleblowing ultimately expanded to cover a number of topics related to SGS, its dealings with the Iraqi government, other companies and contractors, and the sheikhs. Plaintiffs also reported on others associated with SGS, as well as on high-level officials in the Iraqi government.

51. Much of Plaintiffs' whistleblowing was directed towards Agent Carlisle in the United States rather than to United States officials on the ground in Iraq. Unlike Carlisle, the local United States officials were often unreceptive to Plaintiffs' whistleblowing, even going so far as to discourage Plaintiffs by telling them that there was nothing the local officials could do.

Plaintiffs' Whistleblowing/
Evidence of Pretext

52. As is explained in the following paragraphs, Plaintiffs' whistleblowing eventually triggered retaliation by their own government. Upon learning the magnitude of information Plaintiffs had been reporting to intelligence agents at home, these officials wanted to find out the specifics of what the law enforcement agents in the

United States knew about their territory and operations. The unconstitutional policies that Rumsfeld and other Unidentified Agents had implemented for detaining and interrogating "enemies" provided ample cover for them to extract information about Plaintiffs' whistleblowing.

53. These officials claimed that Plaintiffs could possibly be enemies because they were affiliated with SGS and that "certain [unnamed] members" of SGS were supposedly suspected of aiding insurgents. Under the applicable policies, no further explanation or evidence was required of them for their actions.

54. This supposed justification for detaining and interrogating Plaintiffs for months was a complete pretext as the following facts show.

1. Plaintiffs' Whistleblowing About SGS Vice President Jeff Smith, Who Defendants Decided Not to Arrest

55. Plaintiffs' whistleblowing included reports to Mr. Carlisle and other U.S. officials about Jeff Smith.

56. Mr. Smith was high-up in the chain of command at SGS. At one point, he was the Vice President of SGS.

57. In addition, Mr. Smith also operated several of his own companies in Iraq, with whom SGS would subcontract.

58. Mr. Smith was known in Iraq as a weapons merchant. He was capable of obtaining, and routinely

sold, arms and ammunition, night vision technology, and infrared targeting systems (amongst other items), throughout Iraq, including to SGS. On information and belief, Mr. Smith also sold large quantities of weapons to the Iraqi Ministry of Interior, which desired to obtain caches of arms other than through the United States military. At various times, SGS also sold weapons to Mr. Smith.

59. Given his line of business, Mr. Smith was also very well-connected, including having direct relationships with both General George Casey and Iraq President Jalal Talabani.

60. Indeed, Mr. Smith's activities and affiliations were a frequent subject of the interrogations Plaintiffs were subjected to during their unlawful detentions.

61. Although Defendants supposedly justify their actions against Plaintiffs on grounds that they suspected SGS of weapons dealing and that Plaintiffs were affiliated with SGS, Mr. Smith was also a person affiliated with SGS but he was not arrested (much less detained *incommunicado*, interrogated, or tortured). Moreover, unlike with Plaintiffs, there was actual evidence that Smith was a weapons merchant.

62. There was no legitimate impediment to arresting Mr. Smith. First, he was well known in the Green Zone and was often present in Baghdad.

63. Second, based on several photographs of Mr. Smith posing with U.S. General Casey and President Talabani,

Smith was present with the aforementioned gentlemen at a party Smith hosted on July 4, 2006 (while Plaintiff Vance was being held in solitary confinement, interrogated, and tortured). It would have been easy for any agency to have arrested Mr. Smith at this party.

64. If the supposed basis for arresting and detaining Plaintiffs were legitimate and true, then Mr. Smith also would have been arrested. The reason Smith was never arrested was because the supposed justification of affiliation with SGS was a pretext for Plaintiffs' detention and the Defendant officials were not in fact concerned about SGS or its associates. Rather, they were concerned about what Plaintiffs told the FBI in Chicago about Smith and others.

2. Plaintiffs' Whistleblowing About Laith Al-Khudairi, an SGS-connected U.S. State Department Employee in Baghdad, Who Defendants Decided not to Arrest

65. Plaintiffs also reported to United States officials on other persons with clear connections to SGS, most of whom were family of Mustafa Al-Khudairi.

66. One of the persons about whom Mr. Vance reported to Mr. Carlisle and Ms. Nagel was Laith Al-Khudairi, Mustafa Al-Khudairi's uncle.

67. Laith Al-Khudairi is a citizen of the United States and a resident of Texas who was employed by the United States Department of State in detainee operations.

68. Because of his position in the United States government, Laith Al-Khudairi could not easily move between the Green and Red Zones. Mustafa would often task Mr. Vance with transporting Laith from the State Department to the SGS compound.

69. On numerous instances, Laith would come to the SGS compound and meet with large groups of sheikhs. During those meetings, SGS would shut down the entire floor on which the meeting was being held. Neither Mr. Vance nor Mr. Ertel were allowed in and they do not know what transpired during them. Nevertheless, they considered these meetings suspicious and dutifully passed on the information to Mr. Carlisle.

70. The nature of scope of Plaintiffs' reports to the FBI about Laith Al-Khudairi was a frequent subject of Plaintiffs' interrogations during their detentions.

71. Although Defendants supposedly justify their actions against Plaintiffs on grounds that they suspected SGS of weapons dealing and Plaintiffs were affiliated with SGS, Laith Al-Khudairi was also a person affiliated with SGS but the did not arrest him (much less detain, interrogate, or torture him).

72. It would have been easy for the Defendants to have arrested Laith Al-Khudairi. He lived in the Green Zone at the United States Embassy.

73. If the Defendants' supposed basis for arresting and detaining Plaintiffs were legitimate and true, then Laith Al-Khudairi also would have been arrested. Far from

arresting him, the United States government continued to employ Laith Al-Khudairi at the State Department.

3. Plaintiffs' Whistleblowing About SGS Manager Mukdam Hassany, Who Defendants Decided Not to Arrest

74. Plaintiffs were also providing information to their contacts within the United States government on Mustafa's second-in-command, Mukdam Hassany.

75. Mr. Hassany was heavily involved in all of SGS's contracting, including the selling and procuring of weapons.

76. For example, Mr. Hassany brokered a deal with a Lieutenant Colonel in the South Korean Army, by which SGS sold South Korea a large quantity of weapons including AK-47s. There were no end-user certificates issued for those weapons nor was any formal paperwork created to memorialize the sale.

77. In addition, Mr. Hassany networked with the Iraqi police for the questionable purchase of government-issued handguns. Handguns were in high demand but short supply in Iraq. Therefore, Mr. Hassany used his contacts within the Iraqi police to procure handguns for SGS and its clients.

78. Mr. Hassany also bribed the same Iraqi police officers to ensure their presence near the compound and thereby adequate protection for SGS.

79. Although Defendants attempted to justify their actions against Plaintiffs on grounds that they suspected SGS of weapons dealing and that Plaintiffs were affiliated with SGS, Mr. Hassany too was also a person affiliated with SGS but he was not arrested (much less detained *incommunicado*, interrogated, or tortured). Moreover, unlike with Plaintiffs, there was actual evidence that Mr. Hassany had committed crimes.

80. There was no impediment to arresting Mr. Hassany. On the morning of April 15, 2006, Mr. Hassany was on the compound and, to the best of Plaintiffs' knowledge he continued to live in Baghdad and to frequent the compound after that time.

81. To the best of Plaintiffs' knowledge, Mr. Hassany was never detained, interrogated, or even questioned by United States officials.

82. If the Defendants' supposed basis for arresting and detaining Plaintiffs were legitimate and true, then Mr. Hassany also would have been arrested.

4. Plaintiffs' Whistleblowing About Other SGS-Affiliated Al-Khudairi Family Members, Whom Defendants Decided Not to Arrest

83. Plaintiffs also provided Mr. Carlisle information about Mazin Al-Khudairi and Haydar Jaffar.

84. Mazin al-Khudairi is a Saudi Arabian citizen. He lived at the SGS compound. He is Laith Al-Khudairi' s brother.

85. Mazin somehow obtained a United States Embassy badge. That badge enables freedom of movement among any United States-controlled property in Iraq.

86. Mazin was the main link between SGS and Iraqi politicians. For example, very early on in Plaintiffs' tenure at SGS, SGS sought to develop the capability to manufacture small arms. Once SGS developed that technical ability, Mazin held a meeting with the Iraqi police and officials from the Ministry of Interior and Ministry of Defense to solicit buyers as well as support for a manufacturing license. Shortly after this meeting, SGS was granted a certificate to manufacture M-16s.

87. Mr. Jaffar was Mazin Al-Khudairi' s nephew by marriage and Mustafa Al-Khudairi's brother-in-law.

88. Mr. Jaffar was a co-founder of SGS and also ran a a very large construction company called National Buildings General Contracting Company ("National Buildings").

89. National Buildings contracts with the United States Army Corp of Engineers and the Iraqi Ministry of Defense on multi-million dollar contracts. On information and belief, both SGS and National Buildings are still operating in Iraq and Mr. Jaffar remains involved in both entities.

90. During Plaintiffs' tenure at SGS, Mr. Jaffar had a close working relationship with SGS. Mr. Jaffar would frequently subcontract security work for his construction projects to SGS and provide SGS with tips about upcoming projects. He also worked extensively on developing SGS's security protocols.

91. Although Defendants supposedly justify their actions against Plaintiffs on grounds that they suspected SGS of weapons dealing and that Plaintiffs were affiliated with SGS, Mr. Mazin Al-Khudairi and Mr. Jaffar were also persons affiliated with SGS but were not arrested (much less detained *incommunicado*, interrogated, or tortured).

92. Moreover, both Mazin Al-Khudairi and Jaffar were available for arrest. They occupied conspicuous jobs in Baghdad and Mazin was a frequent visitor to the U.S. Embassy.

93. If Defendants' supposed basis for arresting and detaining Plaintiffs were legitimate and true, both Mr. Mazin Al-Khudairi and Haydar Jaffar also would have been arrested.

Additional subjects of Plaintiffs' Whistleblowing

94. Plaintiffs were also providing Mr. Carlisle, Ms. Nagel, Mr. Treadwell and other United States officials information regarding their supervisor, Josef Trimpert.

95. Mr. Trimpert would often obtain large quantities of cash from Mustafa Al-Khudairi and use it to buy liquor. He would then provide this liquor to American soldiers in exchange for U.S. government property, primarily weapons and ammunition, which SGS then used or sold. Mr. Trimpert referred to this as the "Beer for Bullets" program and called himself the "Director." As with the other conduct they observed, Plaintiffs passed this information on to Carlisle and others in the U.S. government.

96. Plaintiffs also reported on Mr. Trimpert's disturbing trend towards violence. This problem was compounded by the fact that it was not uncommon for civilians in the Red Zone to carry weapons, and Mr. Trimpert was often armed.

97. Plaintiffs were becoming concerned that Mr. Trimpert was a threat to their and other's safety. He threatened and accosted Plaintiffs, and bragged to them about brutal acts of violence he claimed to be committing against Iraqi citizens.

98. Plaintiffs warned fellow workers at SGS about Mr. Trimpert, and they expressed their concerns directly to Mustafa.

99. Mr. Trimpert, however, had more superiority at SGS. He had also been at the company significantly longer than Plaintiffs, and he was very closely allied with Mustafa.

100. In addition to providing information on certain persons, Plaintiffs duly reported information regarding SGS's suspicious activity—most notably, its weapons sales and acquisitions—to Mr. Carlisle, Ms. Nagel and Mr. Treadwell.

101. Plaintiffs came to learn that SGS, with Trimpert's assistance, was amassing and selling weapons for profit. As a security contractor, SGS was in fact licensed and permitted to have and to sell weapons. However, SGS came to possess unnecessary and alarming quantities of weapons.

102. In addition to reporting the existence of these weapons to United States officials, Plaintiffs tried to block SGS's weapons transactions when they had the ability and when they could do so in a manner that protected their safety.

103. Plaintiffs also observed and reported on other suspicious activity relating to SGS's weapons acquisition. For example, on one occasion, SGS came to be in possession of a United States military rifle that appeared badly burned. Mustafa Al-Khudairi asked Mr. Trimpert to have the gun repaired, and Mr. Trimpert took the gun to Camp Victory, a United States military installation to do so.

104. After the gun was repaired and returned to Mr. Trimpert, Sergeant Daniel Boone of the United States military contacted Mr. Vance via email about the gun. Sergeant Boone said that he had been trying to reach Mr. Trimpert to no avail, and he asked Mr. Vance to let Mr. Trimpert know that there was a problem with the gun—namely, the last time the weapon had been seen was in an attack with insurgents. Sergeant Boone indicated that he needed the weapon returned to him. Mr. Vance relayed the message to Mr. Trimpert immediately, and the weapon was returned.

Operational Problems at SGS

105. SGS was poorly run, and was generally non-compliant with its various contracts. Its poor performance was well-known, and this reputation made it difficult for

Plaintiffs to fulfill the expectations placed on them in terms of obtaining new business.

106. Plaintiffs attempted to encourage upper management to improve performance and fulfill SGS's outstanding contractual obligations, indicating that until SGS demonstrated proper performance it would be virtually impossible for them to bring in new contracts. There was, however, little impetus at SGS to spend the money and resources needed to become compliant and improve its reputation.

107. Plaintiffs' repeated entreaties to change SGS were misinterpreted as showing a lack of loyalty and enthusiasm.

108. Additionally, reports began filtering to Mustafa that Plaintiffs had a "negative" approach and were hurting SGS's business. This perception was communicated to Mustafa by the armed Iraqi SGS employees who accompanied Plaintiffs whenever they left the office to meet with present customers and to develop new leads. Mr. Trimpert would disparage Plaintiffs to Mustafa for the same reason.

109. Plaintiffs also ran into problems with the Iraqi sheikhs, mentioned above, who were among the stakeholders in SGS and who helped it obtain influence.

110. In the local power structure, sheikhs maintain influence by providing for the needs of the members of their tribes, including their employment needs. To

maintain influence, the sheikhs needed to be able to deliver jobs, and they relied on SGS for that purpose. Thus, the sheikhs helped bring SGS contracts and demanded jobs for their tribes and, apparently, cash, in return.

111. From time to time, the sheikhs would attend SGS business development meetings at which Plaintiffs would be pressured to obtain more contracts. When Plaintiffs would explain that SGS needed to invest in and improve its present performance before it could acquire new business, the meetings would become heated and argumentative.

112. At one point, during the highly-publicized spate of abductions and beheadings in Iraq, Sheik Abu Bakir made a threat in front of Mustafa that he would have Plaintiffs kidnaped if they did not obtain more contracts.

Plaintiffs are Taken Hostage and the Rescued

113. As a result of the above-described suspicious activity at SGS, Mr. Ertel tendered his resignation to Mustafa Al-Khudairi on April 1, 2006, stating that he would cease working for the company.

114. Mustafa called a meeting two days later to speak with Mr. Ertel about why he wanted to leave SGS. That meeting was delayed because Mustafa had temporarily left the country.

115. Unable to formally resign and wanting to find a way out of the company, Mr. Ertel sent Mustafa an email on April 13 indicating that he was going on a brief vacation.

116. The next day, a high-ranking Iraqi employee of SGS came to Mr. Ertel's apartment and took Mr. Ertel's Common Access Card ("CAC card"). CAC cards are issued by the DoD to certain American civilian contractor personnel in Iraq in order to give them freedom of movement into the Green Zone and various United States installations.

117. After taking Mr. Ertel's CAC card, the very same SGS employee proceeded to Mr. Vance's apartment next door and took Mr. Vance's CAC card. When the two demanded an explanation, the employee told them a dubious story that Mustafa was opening up bank accounts for them in Dubai, where he was vacationing, and therefore needed their cards.

118. Mr. Vance called Mustafa on his cellular telephone to protest, but Mustafa would not answer any of Plaintiffs' questions.

119. Without their CAC cards, Plaintiffs could not leave the Red Zone and the SGS compound. They could not get to the Green Zone to procure the proper documentation necessary to leave the country. They were trapped.

120. Plaintiffs contacted Ms. Nagel and Mr. Treadwell, to report their situation. They were told that they should interpret SGS's actions as taking them hostage. Plaintiffs were advised to stay together and to stay armed at all times.

121. The next morning, when the two arrived for work, the SGS employee who had earlier taken Plaintiffs' CAC

cards returned the card to Mr. Vance. The same SGS employee told Mr. Ertel that he could not have his CAC card back on direct orders from Mustafa Al-Khudairi.

122. This SGS employee then told Mr. Vance that Mr. Vance and Mr. Trimpert would be escorting Mustafa's brother-in-law to Camp Victory so that Mustafa's brother-in-law could obtain a CAC card.

123. Knowing that it would be impossible to procure a CAC card for Mustafa's brother-in-law because he was not a United States citizen, and knowing that Mr. Trimpert had been threatening him with violence, Mr. Vance suspected that the assignment was a set-up calculated to lure him off of the compound where he would be injured or killed. Mr. Vance also feared for what would happen to Mr. Ertel if the two of them were separated.

124. Accordingly, Mr. Vance called Ms. Nagel and Mr. Treadwell for help. They advised Plaintiffs to arm themselves and barricade themselves inside a room in the SGS compound until United States forces could come rescue them. Plaintiffs gave Ms. Nagel and Mr. Treadwell specific instructions for their rescue.

125. After Plaintiffs did as they were told and barricaded themselves in a room, United States military forces came to the SGS compound to rescue them.

126. Mr. Trimpert attempted to dissuade the forces from removing them, representing that he was an American citizen and that there were no problems at

the compound. Mr. Trimpert's efforts to keep Plaintiffs on the SGS compound failed, and they were successfully removed.

127. The military personnel seized all of Plaintiffs' personal property, including but not limited to their personal laptop computers, Mr. Ertel's cell phone and Mr. Vance's digital and video cameras, as well as the associated data contained in these items.

128. Plaintiffs were then put into humvees and taken to the United States Embassy.

Plaintiffs' Debriefing at the Embassy

129. When they arrived at the Embassy, Plaintiffs were separately debriefed. Both were questioned by an FBI Special Agent who identified himself as "Doug" and by two persons who stated they were from United States Air Force Intelligence.

130. Plaintiffs related their experiences at SGS, and explained that they had been reporting these problems regularly to another FBI agent in the United States, Travis Carlisle, as well as to Deborah Nagel, Douglas Treadwell and other officials. They told the questioners that many of the communications were documented on their laptops via emails with these parties, and they encouraged the questioners to review them.

131. After the interviews, Plaintiffs were escorted to a trailer on the Embassy grounds to sleep. They slept for approximately two to three hours.

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Retaliation and Disparate Treatment from the Whistleblowing

132. While Plaintiffs slept, the officials with whom they debriefed and/or other officials to whom the debriefing was reported digested the information and came to understand that Plaintiffs possessed a great deal of potentially "high-value" information. On information and belief, they also came to the realization that intelligence personnel in the United States had been privy to this high-value information via Plaintiffs' whistleblowing to Agent Carlisle and therefore knew more about the goings on in these officials' own territory than they knew themselves.

133. These officials, who are among the Unidentified Agents, and who include officials of civilian agencies, determined that they would authorize interrogation of the Plaintiffs to learn what they knew and what they had reported to Mr. Carlisle. Moreover, based on the policies enacted by Defendant Rumsfeld and others, they also knew that they could detain Plaintiffs indefinitely, without any legitimate review for as long as they desired to extract this information.

134. Therefore, they accused Plaintiffs of being possible threats which, under the applicable policies, would allow Plaintiffs' indefinite detention without due process or access to an attorney.

135. The supposed unclassified portions of the justification for labeling Plaintiffs as such was that Plaintiffs were affiliated with SGS and that "certain [unnamed] members" of SGS were suspected of supplying

weapons to insurgents. Plaintiffs were never given notice of nor an opportunity to rebut the classified portions of the supposed grounds for holding them nor to marshal evidence in their favor to prove that they were not a threat.

136. Even the unclassified portion of the justification used to detain Plaintiffs was pure pretext, designed to keep Plaintiffs in custody so that they could be interrogated at length about any and all topics of information known to them. The detentions were also at least in part to retaliate against Plaintiffs and to punish them for reporting potentially embarrassing information to Agent Carlisle.

137. Among the numerous facts proving this pretext, is the fact that United States officials did not arrest other persons within their grasp who were also affiliated with SGS. For example Jeff Smith, Laith Al-Khudairi, Mazin Al-Khudairi, Mukdam Hassany, and others, were all affiliated with SGS, were all in Baghdad, and were all available for arrest. They did not arrest or interrogate any of these persons even though for some of them, like Jeff Smith, there was serious and disturbing evidence of weapons dealings.

Plaintiffs Are Arrested and Detained

138. After their debriefing at the Embassy, Plaintiffs were awoken by a knock on the door, whereupon armed guards instructed them to exit the trailer. These same guards walked Plaintiffs to the gate of the Embassy, where Plaintiffs were both placed under arrest by the military.

139. They were handcuffed and blindfolded and pushed into separate humvees. They were not given any protective equipment for the drive, notwithstanding the dangers. Plaintiffs believe that they were driven to Camp Prosperity, a military installation in Iraq controlled by the United States military.

140. Upon their arrival, guards at Camp Prosperity placed them in a cage, strip searched and fingerprinted them, and issued them jumpsuits.

141. Plaintiffs were told to keep their chins to their chests and not to speak; if they did either, the guards told them that they would "use excessive force" on them, or words to that effect.

142. Plaintiffs were taken to separate cells. For the entire duration of their short detention at Camp Prosperity, they were held in solitary confinement 24 hours per day. The lights in their cells were kept on the entire time. There was no toilet in their cells, and they were allowed to go to the bathroom only twice per day. They also were fed only twice per day. The only surface for sleeping was a thin mat on concrete.

143. Plaintiffs believe that they were at Camp Prosperity for approximately two days. Thereafter, Plaintiffs were shackled, blindfolded, and taken in separate humvees to Camp Cropper. As before, Plaintiffs were not given any protective gear or bulletproof vests for the dangerous drive, which involved traveling along Highway Irish, a notorious sniper trap. At one point, the

vehicle in which Mr. Vance was traveling was stopped and Mr. Vance heard gunfire. Mr. Vance feared for his life.

Torturous Mistreatment and Interrogations at Cropper

144. Camp Cropper is a military facility near the Baghdad International Airport, which the United States military uses to house persons considered to be "high-value" detainees.

145. Plaintiffs arrived at Camp Cropper, and, while still blindfolded, were strip searched and given a jumpsuit.

146. They were each then taken to a military jail occupied mainly by foreign prisoners. They spent the remainder of their respective detentions in solitary confinement, housed in tiny and unclean cells, mostly deprived of stimuli and reading materials. There were bugs and feces on the cell walls.

147. The cells were kept extremely cold, and the lights were always turned on, except when the electric generators for the Camp would fail.

148. Each cell contained a concrete slab for sleeping. Plaintiffs were furnished only very thin plastic mats.

149. Under these conditions, it was difficult to obtain meaningful rest; Plaintiffs were purposefully deprived of sleep. Often, the cells were filled with heavy metal or country music at intolerably-loud volumes. Guards would

pound on the cell doors when they observed Plaintiffs to be sleeping.

150. The cells had no sinks nor any potable running water. Plaintiffs had to rely on guards for their drinking water, which was often withheld.

151. Plaintiffs also often were denied food and water completely, sometimes for an entire day. When it did arrive, food and water were delivered through a slit in one of the walls.

152. During the entire length of their detention, Plaintiffs each received only one shirt and one pair of overalls to wear. They were never given adequate shoes to protect their feet.

153. Furthermore, Plaintiffs were repeatedly denied necessary medical care. Mr. Vance, for example, requested and was denied basic dental hygiene equipment and treatment for severe tooth pain that he was experiencing. Mr. Vance's requests in that regard were ignored until he eventually had to have his tooth pulled, an extreme procedure that could and should have been avoided.

154. When it was finally administered, this dental procedure was performed hurriedly and covertly, late at night. While the dentist had provided Mr. Vance with pain killers and antibiotics, the guards took them all and refused to provide any to Mr. Vance. As a result, Mr. Vance experienced severe pain and the hole where the tooth had been became infected and filled with pus. No necessary follow-up care was provided.

155. Similarly, Mr. Ertel had been suffering from an esophageal ulcer which required regular doses of antacids. That medication, too, was often withheld from him.

156. The guards would also torment Plaintiffs, apparently trying to keep them off-balance mentally. For example, the guards would often "shake down" their cells, sometimes claiming falsely to have discovered contraband, a nonsensical accusation given their obvious lack of access to anything prohibited.

157. The guards also physically threatened and assaulted Plaintiffs. For example, when Plaintiffs were transported within the Camp, they would be blindfolded and a towel would be placed over their heads. Plaintiffs had to rely on the guards to direct their movements such as when to walk forward or which way to turn. The guards would often purposefully steer them into walls.

158. Plaintiffs were constantly threatened that guards would use "excessive force" against them if they did not immediately and correctly comply with every instruction given them.

159. Plaintiffs were not allowed to go outdoors at any time for approximately one week after their arrival. Thereafter, the two were occasionally allowed a brief period outdoors, but otherwise remained in complete solitary confinement.

160. These infrequent yard privileges were only permitted at midnight. Plaintiffs were told that this was so because no one was supposed to know that Americans were being imprisoned at Camp Cropper.

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Plaintiffs' Isolation

161. For the first several weeks of their detentions, Plaintiffs were not permitted to make any phone calls to the outside world. During that entire time, their families did not know where they were, or whether they were alive or dead.

162. Over the entire duration of their detention, Plaintiffs were allowed only a few calls to family, the majority of which occurred toward the very end and related to making financial arrangements for their eventual departures from Iraq. At all times, Plaintiffs communications with their families was monitored. They were forbidden to share their whereabouts or discuss the nature of their detentions or interrogations, much less to criticize their treatment.

163. Plaintiffs were also forbidden to send correspondence to attorneys or to a court. Indeed, the only mail they were permitted to send were Red Cross letters to family and, even then, the mail was monitored and subject to the above restrictions on content.

164. Mr. Vance was allowed to meet with a clergyman only one time. All of his other requests for clergy visits were denied. Mr. Ertel was never permitted such visits.

Unlawful Interrogations

165. Throughout their detention at Camp Cropper, Plaintiffs were continuously interrogated by military and

civilian United States officials. These interrogations took place either in an interrogation room or in their cells.

166. Before each interrogation, both Mr. Vance and Mr. Ertel would always ask for an attorney, but each such request was invariably denied. Mr. Ertel wrote a letter to the Judge Advocate General requesting counsel and asked his captors to send it. He doubts it was in fact sent. The request was never granted.

167. Without the assistance and advice of counsel, Plaintiffs were each subjected to a series of interrogations (always separate) conducted by FBI agents and Navy Criminal Investigative Service officers, as well as possibly Central Intelligence Agency and Defense Intelligence Agency agents.

168. At both Mr. Vance's and Mr. Ertel's sessions, the interrogators would not identify themselves by name, and none would honor their requests for an attorney.

169. At the initial interrogation sessions, both Mr. Vance and Mr. Ertel separately communicated to the FBI agent present that they had been talking to Special Agent Carlisle, and that Mr. Carlisle would confirm their identities and their stories.

170. The initial interrogators confirmed that they knew Travis Carlisle, and were aware that Mr. Vance had been speaking to him. Several sessions later, however, a different set of interrogators denied to both Mr. Vance and Mr. Ertel that a Travis Carlisle even existed.

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171. The numerous interrogations to which Plaintiffs were subjected shared no consistent focus. The sessions were usually conducted by different interrogators, often inquiring into different sets of topics, and demonstrating differences in their apparent knowledge bases.

172. Some interrogators were interested in learning more about the Sandi Group, its operations and employees. Others focused on SGS, its political contacts in the Iraqi government, its structure and hierarchy, its relationships with the sheikhs described above and the persons at its helm. Other of Plaintiffs' interrogators were interested in Mustafa, Laith and Mazin Al-Khudairi, as well as Mr. Jaffar, Mr. Smith, and others.

173. Still other interrogators questioned Plaintiffs about their communications with Carlisle and their relationships with Deborah Nagel and Douglas Treadwell.

174. Some of the interrogators also focused on Mr. Trimpert's relationship with United States soldiers, and how Mr. Trimpert obtained United States weapons and ammunition. Plaintiffs were told that Mr. Trimpert had admitted to forging federal documents to procure CAC cards, bribing government officials, and trading alcohol for weapons with military employees.

175. At least one interrogator focused solely on how Mr. Vance had been treated at the camp, and what Mr. Vance would do if he were released. Mr. Vance was asked questions such as whether he intended to write a book or obtain an attorney.

176. The main constant throughout all of the sessions was the interrogators' aggressive techniques and their repeated threats that if Plaintiffs did not "do the right thing," they would never be allowed to leave.

The "Detainee Status Board"

177. On or about April 20, 2006, Plaintiffs each were served with letters from Colonel Bradley J. Huestis, President of a body he called the Detainee Status Board, indicating that a proceeding would be convened no earlier than April 23 to determine their legal status as "enemy combatants," "security internees," " or "innocent civilians." A true and correct copy of those letters are attached as Exhibit A hereto.

178. The letters informed Plaintiffs that they did not have a right to legal counse l. They were further told that they would only be permitted to call witnesses for their defense and present evidence if the evidence and witnesses were "reasonably available" to them at Camp Cropper.

179. On or about April 22, 2006, Plaintiffs each received a communication called a "Notice of Status and Appellate Rights" stating that each had now been determined to be a "security internee," which, according to the document meant "[a]n individual detained because there is reasonable grounds to believe you pose a threat to security or stability in Iraq." In fact there were no such grounds, and Plaintiffs' history of whistleblowing activity actually proved the exact opposite.

180. Plaintiffs were told only the "unclassified" basis for the false designation, which was:

> You work for a business entity that possessed one or more large weapons caches on its premises and may be involved in possible distribution of these weapons to insurgent/ terrorist groups.

That affiliation alone was not sufficient to support a reasonable belief that Plaintiffs themselves were a threat justifying indefinite detention and could certainly not be considered so in conjunction with the facts of Plaintiffs' whistleblowing.

181. The letters indicated that Plaintiffs had the right to appeal their "internment" by submitting a written statement to camp officials. The Notice gave precious little other guidance as to what the appeal entailed, how it would be adjudicated, or any other salient aspects of the process. A true and correct copy of the April 22nd Notice to Mr. Ertel is attached as Exhibit B hereto.

182. Despite the lack of guidance, on the very day that they received these April 22 letters, Plaintiffs prepared their appeals and requested evidence for the Board. Each requested to have the other be present as a witness, among other witnesses.

183. Each also requested, among other evidence, their previously-seized laptops and cellular telephone records, all of which would prove their numerous conversations

with Travis Carlisle, Maya Dietz, Deborah Nagel, and Douglas Treadwell.

184. Despite the representations in the previously-mentioned letter from Colonel Huestis, neither Mr. Vance nor Mr. Ertel were ever provided with any of the evidence they had requested for their defense, all of which was readily available.

185. On or about April 26, 2006, Plaintiffs were both transported within Camp Cropper to appear before a group calling themselves the Detainee Status Board. This board consisted of two men and one woman, all of whom were in "sterilized" military garb, meaning that they wore no insignia of name or rank. There was also an additional person present in a sterilized uniform who directed the line of questioning. He appeared to be the prosecutor.

186. The "hearings" did not afford Plaintiffs any genuine opportunity to rebut the factual assertions against them nor to offer additional evidence showing their innocence. They were conducted merely as another interrogation.

187. Mr. Ertel' s Board proceeding convened first. Neither Mr. Ertel' s request for evidence nor his request for witnesses at his proceeding were honored, including his specific request that Mr. Vance (who was certainly "reasonably available" at Camp Cropper) be present.

188. At the outset, one of the three panel members stated to Mr. Ertel that he had the right to an attorney at

no cost to MNF-I. Mr. Ertel told them that he had been provided the letter attached hereto as Exhibit A, stating that he had no such right, and, as a practical matter, he had been provided no opportunity to arrange for the presence of counsel.

189. When Mr. Ertel stated that he would like an attorney to be present, he was told that no one on the panel knew how to obtain an attorney for him. The panel told Mr. Ertel that they had to move forward with the proceedings and that he would simply have to do without an attorney.

190. Once the proceeding began, Mr. Ertel was not allowed to see most of the purported facts or evidence concerning him. In particular, Mr. Ertel was told that a stack of documents, which was visible in front of the panel, was evidence in his case but that he would not be allowed to review it. At least some of these documents would have been presumptively exculpatory, given his innocence. He was told that he was only allowed to see "unclassified" portions of the materials.

191. Mr. Ertel was also denied the opportunity to hear the testimony of, much less cross-examine, whatever adverse witnesses the panel may have been relying upon in reaching its determination(s).

192. Mr. Vance's proceeding before the "Detainee Status Board" followed the same format as Mr. Ertel's. Both were denied: (1) all of their evidentiary requests; (2) the right to counsel; (3) the right to call one another and others as witnesses; (4) the right to see all of the evidence

presented against them and to have exculpatory evidence provided to them; (5) the right to remain silent (although they had nothing to hide); and, (6) the right to confront adverse witnesses.

193. At the end of this proceeding, Mr. Vance asked the tribunal if his family knew where he was, or whether or not he was even alive. Mr. Vance was told that they did not know what, if anything, his family had been told.

194. In fact, neither Mr. Vance's nor Mr. Ertel's family or friends knew of their detention despite vigorous efforts to contact United States officials to determine the Plaintiffs' whereabouts.

195. Mr. Vance also asked when he would get an answer about his status. He was told that he would find out the results in three to four weeks. In the interim, he would remain in solitary confinement.

196. No legitimate investigation was ever undertaken. Indeed, Mr. Carlisle was not even contacted for at least three weeks after Plaintiffs were detained.

Plaintiffs Were Victims Of A Pattern of Board Failures

197. The procedures actually afforded Plaintiffs to challenge their designations as security internees fell below the minimums for notice and opportunity to respond required by the Supreme Court in the 2004 *Hamdi* decision. While the procedures as stated in the April 22nd

letters come closer to satisfying constitutional minimums, the Detainee Status Board did not in fact provide the procedures listed in the letters.

198. This is part of a widespread practice of which Mr. Rumsfeld intended, knew, or to which he was at least deliberately indifferent. As is explained below, there is a very high rate of erroneous detentions. Moreover, while actual board proceedings are kept secret, Plaintiffs have uncovered two other Americans who received similarly-flawed board proceedings: one is the person who was detained in Iraq from approximately November 2005 until approximately August of 2006 and who is described in the Northern District of Illinois case of *Doe v. Rumsfeld*, 07-c-6220; and Cyrus Kar who was detained in Iraq in 2005 and whose release was highly publicized at that time.

199. Accordingly, the policies and/or the actual practices of the Detainee Status Board fall below minimum due process standards.

Plaintiffs Were Victims of Discriminatory Policies

200. Under Defendant Rumsfeld's detention policy Plaintiffs were deprived of far better procedures that were afforded to other Americans alleged to have committed similar misconduct in the same locale but who were not labeled "security internees" or "enemy combatants." There was no government need for this discrimination and Mr. Rumsfeld's policies did not require one. Rather, the policies left the decision of which system an American will be detained under to the unbridled discretion of bureaucrats and of the Defendant Agents, here.

201. For example, in April 2007, Lt. Colonel William H. Steele, former Commander of Camp Cropper, was charged under the Uniform Code of Military Justice with aiding the enemy while at Camp Cropper from October 2005 through October 2006. Specifically, it was alleged that he gave cell phones to interned insurgents and violated rules regarding classified documents. In this was he was suspected of "pos[ing) a threat to security or stability in Iraq," conduct which meets the definition of the security "security internee" label attached to Plaintiffs.

202. However, Lt. Colonel Steele was not treated as a security internee. He was given access to an attorney upon arrest. Prior to being formally charged, the Army held a grand jury proceeding to determine what violations, if any, Lt. Colonel Steele had committed. Once indicted, Lt. Colonel Steele had the opportunity to challenge his arrest and detention in court, including to learn of the complete factual allegations him, to confront all witnesses and evidence against him, and to compulsory process for obtaining evidence and testimony, as well as other procedures.

203. Further, numerous other Americans accused of conduct which poses a threat to security or stability in Iraq received the same high level of due process as Steele, including, for example, the soldiers to whom Trimpert provided alcohol in exchange for government weapons.

204. There was no principled distinction between these persons and Plaintiffs that would justify cutting off Plaintiffs from access to better procedures. Rather, Mr. Rumsfeld's policies give officials this discretion to

discriminate in the provision of due process rights, without any form of review, despite the obvious potential for abuse.

205. Such discrimination violates the Constitution. Americans are entitled to be treated equally in the provision of due process rights, and the mere decision to label some as "security internees" cannot justify providing them lesser due process rights than those provided to other Americans in the same locales confronting similar allegations of misconduct.

Release From Camp Cropper

206. After their Detainee Status Board proceedings, Plaintiffs received little additional information regarding their detention until shortly before their respective releases, when travel arrangements had to be made.

207. About one month after the Detainee Status Board convened, on May 17, 2006, Major General John D. Gardner, the Commanding General of Task Force 134 (Detainee Operations) for the MNF-I, signed a letter authorizing the release of Mr. Ertel.

208. Mr. Ertel was released some 18 days after the board officially acknowledged that he was an innocent civilian. Instead of securing his safety and transporting him on a military aircraft as Mr. Ertel requested, he was placed on a bus headed to Baghdad International Airport. Mr. Ertel was forced to sign a form agreeing to this manner of his release. Mr. Ertel was not provided with an exit visa nor other documentation necessary to permit him to leave the county. Mr. Ertel was able to get

out of Iraq only after he ran into a friend at the Airport. Mr. Ertel's friend called someone in the United States Air Force Special Operations Unit who was able to help Mr. Ertel leave Iraq.

209. For no legitimate reason, Mr. Vance's detention was continued for more than two additional months after Mr. Ertel's release and, presumably, after the Detainee Status Board had exonerated him. This extended over-detention was used to continue Mr. Vance's interrogations on topics apparently of interest to the persons who detained him.

210. Finally, on July 20, 2006, several days after Major General Gardner authorized his release, Mr. Vance was dropped at the Baghdad Airport to fend for himself without the documentation needed to return to the United States.

211. Fortunately, without too much delay, Mr. Vance was able to secure a flight out of Iraq to Amman, Jordan; he subsequently flew home to Chicago.

212. All told, Mr. Ertel was held *incommunicado* for nearly 40 days and Mr. Vance was held *incommunicado* just short of 100 days until their anonymous interrogators determined that there were apparently no more questions that they wanted answered. Both were ultimately released without ever being charged with any wrongdoing.

213. Though both Mr. Vance and Mr. Ertel were eventually allowed to return home, the cumulative effect of the foregoing ordeal has been devastating for both.

For months, Plaintiffs were deprived of their most basic human rights, to say nothing of those guaranteed them by the United States Constitution. As a result, Plaintiffs have suffered serious emotional and physical distress.

214. Plaintiffs are not terrorists. They are United States citizens, who love this country, and everything for which it stands, as much as any other American. They have never committed, much less been charged with, any crime.

Plaintiffs' Claims Against Defendant Rumsfeld (Counts I-III)

215. Defendant Rumsfeld is a highly experienced and dedicated former public official. He has served as an elected representative for the State of Illinois, as Secretary of Defense under two Presidents, as Ambassador to NATO, and in other executive branch appointments. Plaintiffs acknowledge Mr. Rumsfeld's long record of service and dedication to this country.

216. Plaintiffs have sued Mr. Rumsfeld because he exceeded his authority as the Secretary of Defense by crossing clear constitutional lines which all public officials are obligated to recognize and respect and by violating the direct commands of both Congress and the Supreme Court.

217. Plaintiffs' dispute with Mr. Rumsfeld involves three fundamental rights of which he deprived them. First, Mr. Rumsfeld is responsible for the cruel, inhuman, degrading and torturous interrogation tactics used

on Plaintiffs during their months-long interrogations. He authorized the general use of these tactics through specific policies and practices, as is explained further below. Moreover, Plaintiffs' understanding is that certain techniques which the interrogators used on them required Mr. Rumsfeld's personal approval on a case-by-case basis, and they accordingly infer that Mr. Rumsfeld gave specific authorization to use these techniques against them.

218. This torture violated Plaintiffs' rights under the Constitution as well as under the DTA. *See, e.g.* DTA § 1003 ("[T]he term 'cruel, inhuman, or degrading treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States").

219. Second, Mr. Rumsfeld's policies deprived Plaintiffs of fundamental and cherished due process protections such as assistance of counsel, confrontation of adverse witnesses, and notice of, and the right to see and rebut, the evidence being used against them. Indeed, Plaintiffs' "board hearings," which were carried out according to the dictates of Mr. Rumsfeld's policies, were nothing more than a continued interrogation; Plaintiffs were allowed no counsel, no access to evidence, and no witnesses but themselves.

220. These procedures failed to meet even the minimum standards of notice and an opportunity to respond set out by the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Moreover, the Supreme

Court in *Hamdi* required procedural rights greater than these minimums where such procedures are reasonably available, which they were in the place where Plaintiffs were detained. Full Uniform Code of Military Justice ("UCMJ") procedural rights were routinely afforded in Baghdad and American civilians can have such rights under the UCMJ.

221. Indeed, as explained above, military personnel in Baghdad, who allegedly committed acts far more severe than those which the local U.S. officials falsely attributed to Plaintffs, received counsel and the right to confront witnesses and test all of the evidence against them. For example, the soldiers who sold the U.S. weapons to Trimpert were afforded these rights, as was the commandant of Camp Cropper, Lt. Col. William Steele, when he was alleged to have provided cell phones to enemy insurgents within the camp and committed other treasonous acts.

222. There is no legitimate governmental interest in affording these fundamental rights to soldiers who committed the same or more severe offences than Plaintiffs were accused of while withholding these rights from Plaintiffs. All American detainees are entitled to be treated equally with other Americans in the provision of due process rights, and the mere decision to label them "security internees" cannot justify providing lesser due process rights than those available to other Americans in the same locales confronting similar allegations. However, Mr. Rumsfeld's policies discriminate in the provision of these fundamental procedures, notwithstanding their ready availability.

223. Under his policies, a bureaucrat's decision to affix the "possible enemy" label to a fellow citizen prevents the citizen from accessing reasonably available UCMJ procedures to challenge the designation. Instead, Americans are shunted into the Detainee Review Board process. Thus, a bureaucrat's false accusation alone permits him to deprive a citizen of readily available procedures to refute the accusation.

224. Almost two years before the bureaucrats retaliated against Plaintiffs using these detention powers, the Supreme Court expressly warned Mr. Rumsfeld of the need for procedures which prevent this type of official abuse in *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004). Nevertheless, Mr. Rumsfeld implemented and left in place procedures which permitted and, in fact, encouraged, the retaliation Plaintiffs suffered.

225. Thirdly, Mr. Rumsfeld's policies prohibit citizens who have been detained from accessing a court for help. As detainees, Plaintiffs were forbidden to correspond with counsel, forbidden to use the mails to present a petition to a court, and even forbidden from advising their families where they were being held. As a result, Plaintiffs could not petition a court to free them, or to require the government to provide better procedures, or to stop their torturous interrogations.

226. Again, Mr. Rumsfeld was warned b y the Supreme Court almost two years before Plaintiffs' detentions that American citizens held under the detention system must be permitted access to a court to challenge a detention decision as well as access to counsel for that challenge in

Hamdi v. Rumsfeld, 542 U.S. 507, 536-537 (2004). In the wake of that decision, Defendant Rumsfeld not only failed to enact policies that allow such access, he purposefully continued policies and practices calculated to prevent it in the misguided belief that courts should not review the detention and interrogation practices.

227. Plaintiffs are entitled to a judicial remedy against Defendant Rumsfeld for all of these violations. Their legal challenges are well within the competence of a court to adjudicate (indeed, the Supreme Court has already spoken on many of these topics), and it is entirely consistent with the traditional role of the courts to afford damages remedies to compensate and to ensure future compliance with the law.

228. Moreover, Congress has not precluded the remedy Plaintiffs seek. To the contrary, Congress expressly recognized in the DTA that civil remedies could be available for the sorts of improper detentions and torture Defendant Rumsfeld approved, and it declined to bar such actions.

229. This recognition is reflected in the amendments to the DTA, in which Congress created a special extended "good faith" defense for allegations of improper detentions and torturous interrogations in claims brought by aliens against U.S. officials, stating:

> In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United

> States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.

DTA § 1004, PL 109-163, 119 Stat 3136, 3475 (Jan. 6, 2006).

230. Having adopted a civil affirmative defense without foreclosing civil liability entirely, and having declined to adopt a defense for claims by U.S. citizens, Congress clearly left courts the power to provide civil remedies where appropriate for unjustified practices that involve U.S. detention and interrogation of American citizens.

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The History of Defendant Rumsfeld' s Approval of Torturous Interrogations and Unconstitutional Detentions

231. Most of Mr. Rumsfeld's unconstitutional policies were adopted in secret and far too few have seen the light of day. Nevertheless, there is a public record demonstrating the existence of the above-described policies and widespread practices and Mr. Rumsfeld's involvement in creating them.

232. For example, on December 2, 2002, Defendant Rumsfeld personally approved a list of torturous interrogation techniques for use on detainees at Guantanamo. Contrary to established rules and military standards for interrogations, which were set forth in the then-governing Army Field Manual 34-52, the techniques Rumsfeld approved included the use of 20-hour interrogations, isolation for up to 30 days, and sensory deprivation.

233. On January 15, 2003, Defendant Rumsfeld rescinded his formal authorization to use those techniques generally, but took no measures to end the practices which had by then become ingrained, nor to confirm that the practices were in fact being terminated. Moreover, he authorized the Commander of the United States Southern Command to use these very practices if warranted and approved by Rumsfeld himself in individual cases. Thus, rather than terminate the torturous techniques, Mr. Rumsfeld encouraged them and involved himself in their case-by-case use.

234. At the same time, Defendant Rumsfeld convened a "Working Group" to evaluate his interrogation policies. Following that Working Group, in April 2003, Rumsfeld approved a new set of interrogation techniques, which included isolation for up to thirty days, dietary manipulation and "sleep adjustment," meaning sleep deprivation.

235. Just as before, Rumsfeld provided that additional harsh techniques could be used with his prior approval. At the time Rumsfeld approved these April policies, he was well-aware of the cruel, inhuman and degrading torture of detainees that occurred in Guantanamo Bay, Afghanistan, and Iraq. Instead of trying to stop and prevent such abuses, Defendant Rumsfeld took measures to increase their use.

236. For instance, Defendant Rumsfeld sent Major Geoffrey Miller to Iraq in August 2003 to review the United States military prison system in Iraq and make suggestions on how prisons could be used to more effectively obtain actionable intelligence from detainees—or, in Mr. Rumsfeld's own terms, to "gitmo-ize" Camp Cropper.

237. In so doing, Defendant Rumsfeld knew and tacitly authorized Major Miller to apply in Iraq the techniques that Rumsfeld had approved for use at Guantanamo and elsewhere. At Rumsfeld's direction, Major Miller did just that.

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238. On September 14, 2003, in response to Major Miller's call for the use of more aggressive interrogation policies in Iraq, and as directed, approved and sanctioned by Defendant Rumsfeld, Lieutenant General Ricardo Sanchez, Commander of the United States-led military coalition in Iraq ("Coalition Joint Task Force-7") signed a memorandum authorizing the use of 29 interrogation techniques which included yelling, loud music, light control, and sensory deprivation, amongst others.

239. A month later, Commander Sanchez modified the previous authorization, but continued to allow interrogators to control the lighting, heating, food, shelter and clothing given to detainees.

240. Starting in May 2003, the Red Cross began sending reports detailing these abuses of detainees in United States custody in Iraq to the United States Central Command in Qatar. Colin Powell, then the Secretary of State, confirmed that Defendant Rumsfeld knew of the various reports by the Red Cross, stating that he and Defendant Rumsfeld kept President Bush regularly apprised of their contents throughout 2003.

241. Indeed, Defendant Rumsfeld was not only aware of the 2003 Red Cross reports, but also of its February 2004 Report, discussed below, as well as a series of other investigative reports into detainee abuse in Iraq, including those of former Secretary of Defense James Schlesigner, Army Major General Antonio Taguba, and Army Lieutenant General Anthony Jones.

Appendix G

Defendant Rumsfeld Flouts Congressional Restrictions on Torturous Interrogations

242. Further evidence that Defendant Rumsfeld made policy decisions to authorize and encourage the use of torture for interrogating detainees, including detained American citizens, occurred on December 30, 2005. On that day, Congress enacted the Detainee Treatment Act which *inter alia*, stated:

> No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

DTA Pub. L. 109-148, Div. A, Title X, § 1001 (a), 119 Stat. 2739-40 (Dec. 30, 2005). Congress went on to state in the DTA that the U.S. shall not subject any detainees to "to cruel, inhuman, or degrading treatment or punishment." *Id.* § 1003.

243. Congress thereby evidenced its intent to limit U.S. interrogation techniques to those permitted by the Field Manual when the DTA was drafted. The Field Manual at that time limited the allowable techniques to those consistent with international norms which forbid cruel, inhuman and degrading treatment. In other words, the Field Manual forbade the interrogation techniques that Mr. Rumsfeld had authorized and to which Congress and the American people took exception.

244. In spite of this clear command, the same day Congress passed the DTA, Mr. Rumsfeld modified the Field Manual to include the cruel, inhuman and degrading techniques described above. He added ten pages of classified interrogation techniques that apparently authorized, condoned, and directed the very sort of violations that Plaintiffs suffered. To the best of Plaintiffs' knowledge, the December Field Manual was in operation during their detention. It was not replaced until September 2006, shortly before Mr. Rumsfeld resigned.

245. Numerous instances of abuse occurring since Defendant Rumsfeld changed the Field Manual in December 2005, including Plaintiffs' experiences and those documented by UNAMI, make clear that Mr. Rumsfeld did not take measures to conform the interrogation techniques to Congress' command.

246. For example, on March 6, 2006, Amnesty International published a report criticizing United States-led MNF-I detentions in Iraq. The Amnesty Report references the arbitrary nature of the security internment system, and the ways in which MNF-I consistently denies detainees their rights to counsel and the ability to meaningfull y challenge the lawfulness of their detentions, as well as access to their families and the outside world.

247. The Amnesty Report also documents a repeated pattern of instances of torture and ill-treatment of detainees by United States troops, such as exposing detainees to extremes of heat and cold and unlawfully restraining and physically assaulting detainees.

248. A March/April 2006 Human Rights Report by the United Nations Assistance Mission for Iraq ("UNAMI") made similar findings, concluding that "[t]he general conditions of detention in Iraqi facilities are not consistent with human rights standards." The Report documents numerous instances in which detainees were deprived of sufficient food, hygiene and medical care.

249. Likewise, the May/June 2006 UNAMI Human Rights Report documents still more examples of detainee abuse in Iraq. That Report includes an accounting by DoD of its own wrongdoing, and references DoD admissions that United States soldiers have withheld food from and physically threatened detainees.

250. Similarly, the International Committee of the Red Cross ("ICRC") has published a Report criticizing the United States military detention system in Iraq as appallingly defective. According to the Red Cross Report, military officials routinely deny detainees the opportunity to contact their families to notify them of their whereabouts. The Report further documents other forms of mistreatment, including solitary confinement, hooding, physical threats, confiscation of property, sleep deprivation including exposure to loud noise or music, and deprivation of food and water.

251. Disturbingly, the Red Cross noted that military intelligence officers of the Coalition Forces in Iraq have admitted that, like Plaintiffs, "between 70% and 90% of the persons deprived of their liberty in Iraq had been arrested by mistake."

252. Faced with these and many other reports of similar violations by U.S. military officials, Mr. Rumsfeld took no steps to investigate or correct the abuses, despite his actual knowledge of same and despite the fact that he knew American citizens were being and would be detained and interrogated under these systems. Defendant Rumsfeld was the official responsible for terminating this pattern of abuse and reforming the policies causing it. Mr. Rumsfeld took no such measures because these were not unwanted or random violations. Rather, this conduct was being carried out pursuant to the interrogation and detention policies Mr. Rumsfeld himself created and implemented.

Global Applicability of the Policies

253. Many of the policies which Mr. Rumsfeld implemented regarding detention and interrogation of detainees are not limited to Iraq, or, for that matter, to fields of battle generally. For example, see the definition of "detainee" contained in Detainee Operations Inspections, available at www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/DAIG%20Detainee%20Operations%20Inspection%20Report.pdf, which states: "Detainees include, but are not limited to, those persons held during operations other than war."

254. Thus, Mr. Rumsfeld did not intend to, and did not, limit his interrogation and detention policies to detainees in Iraq nor to persons seized on battlefield. Rather, Defendant Rumsfeld adopted the policies against the background of the administration's Global War on

Terror, which is a non-traditional and undefined conflict waged throughout the world.

255. Further, the detention and interrogation policies Mr. Rumsfeld created are not limited to military personnel. Torturous interrogation tactics are approved for use by members of civilian agencies such as DOJ/FBI working with the U.S. military. Similarly, civilians in the Department of State, Department of Justice and the Central Intelligence Agency can have input into the decision of whether to release detainees.

Defendant Rumsfeld's Personal Control Over Length of Detention and Release Decisions

256. Aside from setting the inadequate and discriminatory procedures for challenging a security internee designation, explained above, Mr. Rumsfeld, as the Secretary of Defense, also maintained control over the decision to release a detainee.

257. This practice is evidenced by a draft document on detentions which is now publicly available. It states in pertinent part: "[t]he permanent transfer or release of detainees from the custody of US forces to the host nation, other allied/coalition forces or outright release requires the approval of the SecDef." *See* Joint Doctrine for Detainee Operations at VII-6 (March 23, 2005), available at http://hrw.org/campaigns/torture/jointdoctrine/jointdoctrine040705.pdf.

Appendix G

Count I Against Defendant Rumsfeld – Dictating Torture, Cruel, Inhuman, and Degrading Treatment

258. Each of the Paragraphs in this Complaint is incorporated as if restated fully herein.

259. As described more fully above, Plaintiffs were subjected to torturous, cruel, inhuman, and degrading treatment. This included threats of violence and actual violence, sleep deprivation and alteration, extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, denial of needed medical care, yelling, prolonged solitary confinement, *incommunicado* detention, falsified allegations and other psychologically-disruptive and injurious techniques.

260. This treatment was unnecessary. Indeed, many persons detained in the same facility were treated far better and far more humanely.

261. Rather, this treatment was intentionally used on Plaintiffs for its perceived value as an interrogation tactic.

262. This treatment was visited on Plaintiffs pursuant to and in accordance with the above-described policies and practices of Defendant Rumsfeld which apply to all persons, including Americans. This treatment was also knowingly condoned by him for use in interrogating and developing information from persons detained by U.S. forces, including Americans.

263. The misconduct described in this Count was undertaken under color of federal law.

264. The misconduct described in this Count was undertaken with malice, willfulness and reckless indifference to the rights of others.

265. This treatment violated Plaintiffs' rights under the United States Constitution. This treatment also violated Plaintiffs' rights under the Detainee Treatment Act, which includes either an express or implied right of action. This Count seeks a remedy only under the Constitution or, in the alternative, under the DTA.

266. These violations of Plaintiffs' rights were known and/or foreseeable to Defendant Rumsfeld. His policies authorized the use of the above-described interrogation tactics on all detainees, including Americans, and he was aware that the interrogation practices were in use in facilities which included American detainees and had in fact been used on Americans.

267. Finally and alternatively, Defendant Rumsfeld reserved the use of the harsher interrogation techniques to his prior, case specific, approval. Plaintiffs therefore infer that Defendant Rumsfeld specifically authorized some or all of the above mistreatment on them and knew they were experiencing same. Further, based on the policies requiring approval of the Secretary of Defense prior to permanently releasing a detainee, Plaintiffs infer that even if Defendant Rumsfeld did not direct their specific mistreatment, he had actual knowledge that they

were being detained and mistreated as described above, and that he failed to intervene to sooner terminate this mistreatment.

WHEREFORE, Plaintiffs DONALD VANCE and NATHAN ERTEL respectfully demand judgement against Defendant DONALD RUMSFELD awarding actual and punitive damages, costs and fees, together with any and all other relief to which they may appear entitled.

Count II Against Defendant Rumsfeld – Dictating Inadequate and Discriminatory Detention Procedures

268. Each of the Paragraphs in this Complaint is incorporated as if restated fully herein.

269. As described more fully above, after being labeled as security internees based on false allegations, Plaintiffs were prevented from meaningfully challenging the designation through fair procedures. Plaintiffs were denied notice of the complete factual basis being used for this designation and of the opportunity to rebut it or to introduce other evidence showing that they were not a threat. Indeed, the Detainee Status Board letter each Plaintiff received did not even state that they had the right to examine or rebut the complete factual assertions against them. Further, there was no basis to have withheld the "classified" portions of the factual basis and no method afforded to test the labeling of this factual basis as "classified" so that Plaintiffs could then rebut it.

270. Even as to the disclosed factual basis, Plaintiffs were denied a meaningful opportunity to challenge the designation. Plaintiffs were not provided with nor allowed to use reasonably available evidence and witnesses to demonstrate that they were not a threat. Moreover, the decision makers were not neutral. They conducted the hearing as an interrogation, using some of the improper tactics identified above.

271. This process fails to meet constitutional bare minimums which must always be applied when the government deprives a U.S. citizen of liberty for a prolonged period, as it did with Plaintiffs, regardless of the context.

272. The deficient process Plaintiffs actually received was in accordance with policies and actual practices of the Board and dictated and condoned by Defendant Rumsfeld. Defendant Rumsfeld was aware of the fact that the Detainee Status Boards actual practices were failing to provide the constitutional minimums for detaining Americans.

273. Alternatively, Mr. Rumsfeld was deliberately indifferent to the fact that the Detainee Status Board's actual procedures failed to provide the constitutional minimums. Notice of these failures of the Board were available to Defendant Rumsfeld through internal reports to him, through published reports on the high rate of erroneous detentions identified, and through news articles about the Board's practices.

274. In addition to the failures in each other's hearings, Plaintiffs are aware of similar failures in the hearing for two other Americans: the plaintiff in *Doe v. Rumsfeld* and Cyrus Kar.

275. Despite notice, Mr. Rumsfeld failed to take appropriate efforts to reform these policies and practices.

276. Further, Plaintiffs were entitled as a matter of due process to additional procedures including the assistance of counsel in connection with the Board hearing, the assistance of counsel in connection with their constant interrogations, the right to disclosure of exculpatory evidence, the right to disclosure of and to rebut all adverse evidence and witnesses, if any, and the right to offer evidence in their favor. These and other procedures were readily available in Baghdad to other Americans, such that there was no sufficient governmental need or justification to deny them to Plaintiffs.

277. However, Defendant Rumsfeld's detention policies never permit any such procedures to detainees, including security detainees and persons detained for other reasons, even when they are reasonably available and even when there is no actual or sufficient governmental need to withhold these procedures. By prohibiting such procedures even when they are reasonably available and no legitimate interest in denying them, Defendant Rumsfeld's policies violate due process. On information and belief, Defendant Rumsfeld prohibited these procedures because of their likelihood to exonerate detainees and thereby prevent their further interrogation.

278. Defendant Rumsfeld's detention policies also violate equal protection in that they withhold readily available fundamental procedures which are given to other Americans suspected of similar misconduct in the same locale based solely on the label of "security internee" rather than on any legitimate particular government need.

279. An official's decision to call a citizen a security internee or any other label cannot justify depriving him of the due process afforded other Americans in the same place.

280. Finally and alternatively, based on the policies requiring approval of the Secretary of Defense prior to permanently releasing a detainee, Plaintiffs infer that Defendant Rumsfeld had actual knowledge that they were being detained unconstitutionally, as described above, and that he failed to intervene to sooner terminate their detentions.

281. The misconduct described in this Count was undertaken under color of federal law.

282. The misconduct described in this Count was undertaken with malice, willfulness and reckless indifference to the rights of others.

283. This Count seeks a remedy only under the Constitution.

WHEREFORE, Plaintiffs DONALD VANCE and NATHAN ERTEL respectfully demand judgement

against Defendant DONALD RUMSFELD awarding actual and punitive damages, costs and fees, together with any and all other relief to which they may appear entitled.

Count III Against Defendant Rumsfeld – Dictating Denial of Access to Courts and Counsel

284. Each of the Paragraphs in this Complaint is incorporated as if restated fully herein.

285. As described more fully above, Plaintiffs were prohibited and/or prevented from obtaining judicial review of the decision to intern them and of the mistreatment that they were suffering, all of which is described above.

286. It was the policy of Defendant Rumsfeld that detainees in Iraq not be permitted to involve courts in the detention decision nor in their treatment. Defendant Rumsfeld's policies preventing access to the courts, and preventing access to counsel for assistance in seeking *habeas*, applied to all detainees, including Americans. Defendant Rumsfeld implemented these policies based on the misguided assertion that courts are not competent to adjudicate issues of detention and treatment of detainees in Iraq and in order to prevent courts from inquiring into his other policies as described above.

287. Alternatively, following the Supreme Court's *Hamdi* ruling, Defendant Rumsfeld was deliberately indifferent to the need to adopt and/or enforce policies which permit American detainees to access courts or to contact an attorney following their detainee status

determination. *Hamdi* was clear that American detainees have both a right of access to the courts and a right to access an attorney to challenge a detention decision via the writ of *habeas corpus*.

288. Despite notice, Mr. Rumsfeld failed to take appropriate efforts to reform these policies and practices.

289. As a result, Plaintiffs were forbidden to contact or speak with attorneys or to send any correspondence to an attorney or to a court. In fact the only correspondence Plaintiffs could send was one ICRC letter per week and, even then, only to famil y. Moreover, when communicating with family, Plaintiffs further were forbidden, in accordance with Rumsfeld's policy, from informing family of their whereabouts or of the nature of their detentions and treatment.

290. Plaintiffs attempted to obtain access to a courts and attorneys during their detentions but were prohibited and prevented from doing so. Had Plaintiffs not been denied access, they could have challenged the torturous mistreatment, the deficiencies in their detention procedures, the false detentions themselves, and the taking of their property.

291. The misconduct described in this Count was undertaken under color of federal law.

292. The misconduct described in this Count was undertaken with malice, willfulness and reckless indifference to the rights of others.

293. This Count seeks a remedy only under the Constitution. WHEREFORE, Plaintiffs DONALD VANCE and NATHAN ERTEL respectfully demand judgement against Defendant DONALD RUMSFELD awarding actual and punitive damages, costs and fees, together with any and all other relief to which they may appear entitled.

The Role of the Unidentified Agents

294. The Unidentified Agents are employees of the United States and/or contractors working for the United States who, at least in part, exercise government authority. The Unidentified Agents made the decisions and took the actions to arrest, detain, retaliate against and mistreat Plaintiffs, and to violate their rights as described throughout this complaint. These Defendants also include all persons (other than Defendant Rumsfeld) who enacted unconstitutional polices and/or had knowledge that the violations Plaintiffs suffered would occur or were occurring and who failed to intervene to prevent them. Further, the Unidentified Agents include persons who are presently conspiring to unlawfully cover-up from Plaintiffs the identities of those who are liable to them in order to prevent them from exercising their rights in this lawsuit.

295. For example, Plaintiffs were interrogated by persons identifying themselves as members of various United States intelligence agencies. Other of their interrogators did not identify any agency and may very well be for profit contractors employed to engage in

interrogation tactics that are (at least in black letter law) illegal for United States agents to use. All of their interrogators violated Plaintiffs' rights.

296. Similarly the person or persons who retaliated against Plaintiffs for reporting to the FBI in Chicago and who made the decision to arrest and detain Plaintiffs, to deprive them of counsel, and of their due process rights are currently unidentified. Nevertheless, all of the individuals involved were exercising government authority. Moreover, all of the officials present for those decisions had an opportunity to insist that Plaintiffs' rights be respected and they failed to do so.

297. These Unidentified Agents are personally liable to Plaintiffs regardless of whether they were merely "following order" when they violated the Constitution and basic standards of decency. In other words, even though these actors may have been merely implementing an unconstitutional and unconscionable set of policies and widespread practices they cannot "blame the system." Any reasonable official should and does know that American s cannot be treated in the way Plaintiffs have alleged.

Count IV Against the Unidentified Agents – False Arrest

298. Each of the Paragraphs in this Complaint is incorporated as if restated fully herein.

299. As described more fully above, Plaintiffs were arrested and detained without legal justification.

300. The Unidentified Agents committed and caused these violations of Plaintiffs' constitutional rights by their decisions, actions, and failures to act or intervene.

301. The misconduct described in this Count was undertaken under color of federal law.

302. The misconduct described in this Count was undertaken with malice, willfulness and reckless indifference to the rights of others.

303. As a result of the above-described wrongful infringement of Plaintiffs' rights, Plaintiffs suffered damages, including but not limited to loss of liberty, physical pain and suffering, serious emotional distress, and anguish.

304. This Count seeks a remedy only under the Constitution.

WHEREFORE, Plaintiffs DONALD VANCE and NATHAN ERTEL respectfully demand judgement against the UNIDENTIFIED AGENTS awarding actual and punitive damages, costs and fees, together with any and all other relief to which they may appear entitled.

Count V Against the Unidentified Agents – Unlawful Detention

305. Each of the Paragraphs in this Complaint is incorporated as if restated fully herein.

306. As described more fully above, Plaintiffs were detained for an unreasonable length of time without being charged with a crime and without access to an attorney or legitimate court.

307. Plaintiffs' detentions also violated their constitutional rights because there was no judicial approval of their detention within a reasonable amount of time.

308. Plaintiffs' detentions were further unreasonable because their detentions were unjustifiedly extended even after the time the Detainee Status Board determined that there were no grounds to continue detaining them.

309. The Unidentified Agents committed and caused these violations of Plaintiffs' constitutional rights by their decisions, actions, and failures to act or intervene.

310. The misconduct described in this Count was undertaken under color of federal law.

311. The misconduct described in this Count was undertaken with malice, willfulness and reckless indifference to the rights of others.

312. As a result of the above-described wrongful infringement of Plaintiffs' rights, Plaintiffs suffered damages, including but not limited to loss of liberty, physical pain and suffering, serious emotional distress, and anguish.

313. This Count seeks a remedy only under the Constitution.

WHEREFORE, Plaintiffs DONALD VANCE and NATHAN ERTEL respectfully demand judgement against the UNIDENTIFIED AGENTS awarding actual and punitive damages, costs and fees, together with any and all other relief to which they may appear entitled.

Count VI Against the Unidentified Agents, Torturous and Unlawful Interrogations

314. Each of the Paragraphs in this Complaint is incorporated as if restated fully herein.

315. As described more fully above, Plaintiffs were repeatedly interrogated without counsel despite requests for the same and were never warned of their rights to counsel or to remain silent. In fact they were not permitted to remain silent, but, rather threatened that their detentions would be continued unless they cooperated with the questioning.

316. Moreover, Plaintiffs were abused by their guards and interrogators for months, as described more fully above, all in a manner that "shocks the conscience" in violation of Due Process.

317. The Unidentified Agents committed and caused these violations of Plaintiffs' constitutional rights by their decisions, actions, and failures to act or intervene.

318. This treatment violated Plaintiffs' rights under the United States Constitution. This treatment also violated Plaintiffs' rights under the Detainee Treatment Act, which includes either an express or implied right of action. This Count seeks a remedy only under the Constitution and/or the DTA.

319. The misconduct described in this Count was undertaken under color of federal law.

320. The misconduct described in this Count was undertaken with malice, willfulness and reckless indifference to the rights of others.

321. As a result of the above-described wrongful infringement of Plaintiffs' rights, Plaintiffs suffered damages, including but not limited to loss of liberty, physical pain and suffering, serious emotional distress, and anguish.

WHEREFORE, Plaintiffs DONALD VANCE and NATHAN ERTEL respectfully demand judgement against the UNIDENTIFIED AGENTS awarding actual and punitive damages, costs and fees, together with any and all other relief to which they may appear entitled.

Count VII Against the Unidentified Defendants, Denial of the Right to Counsel

322. Each of the Paragraphs in this Complaint is incorporated as if restated fully herein.

323. As described more fully above, Plaintiffs were not furnished with counsel and/or denied the opportunity to procure counsel at any time.

324. The Unidentified Agents committed and caused these violations of Plaintiffs' constitutional rights by their decisions, actions, and failures to act or intervene.

325. This treatment violated Plaintiffs' rights under the United States Constitution. This Count seeks a remedy only under the Constitution.

326. The misconduct described in this Count was undertaken under color of federal law.

327. The misconduct described in this Count was undertaken with malice, willfulness and reckless indifference to the rights of others.

328. As a result of the above-described wrongful infringement of Plaintiffs' rights, Plaintiffs suffered damages, including but not limited to loss of liberty, physical pain and suffering, serious emotional distress, and anguish.

WHEREFORE, Plaintiffs DONALD VANCE and NATHAN ERTEL respectfully demand judgement against the UNIDENTIFIED AGENTS awarding actual and punitive damages, costs and fees, together with any and all other relief to which they may appear entitled.

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Count VII Against the Unidentified Defendants, Denial of the Right to Confront Adverse Witnesses/Evidence

329. Each of the Paragraphs in this Complaint is incorporated as if restated fully herein.

330. As described more fully above, Plaintiffs were denied the right to confront, or even know the existence or identity of, the adverse witnesses against them. Plaintiffs were also denied the right to know all or even most of the evidence that was being used against them, to rebut it, to prepare to meaningfully dispute it, or to respond to it in any way.

331. The Unidentified Agents committed and caused these violations of Plaintiffs' constitutional rights by their decisions, actions, and failures to act or intervene.

332. This treatment violated Plaintiffs' rights under the United States Constitution. This Count seeks a remedy only under the Constitution.

333. The misconduct described in this Count was undertaken under color of federal law.

334. The misconduct described in this Count was undertaken with malice, willfulness and reckless indifference to the rights of others.

335. As a result of the above-described wrongful infringement of Plaintiffs' rights, Plaintiffs suffered

damages, including but not limited to loss of liberty, physical pain and suffering, serious emotional distress, and anguish.

WHEREFORE, Plaintiffs DONALD VANCE and NATHAN ERTEL respectfully demand judgement against the UNIDENTIFIED AGENTS awarding actual and punitive damages, costs and fees, together with any and all other relief to which they may appear entitled.

Count VIII Against the Unidentified Defendants, Denial of the Right to Present Witnesses and Evidence, and to have Exculpatory Evidence Disclosed

336. Each of the Paragraphs in this Complaint is incorporated as if restated fully herein.

337. As described more fully above, Plaintiffs were denied the right to present witnesses and evidence at the Detainee Status Board and to have exculpatory evidence disclosed.

338. The Unidentified Agents committed and caused these violations of Plaintiffs' constitutional rights by their decisions, actions, and failures to act or intervene.

339. This treatment violated Plaintiffs' rights under the United States Constitution. This Count seeks a remedy only under the Constitution.

340. The misconduct described in this Count was undertaken under color of federal law.

341. The misconduct described in this Count was undertaken with malice, willfulness and reckless indifference to the rights of others.

342. As a result of the above-described wrongful infringement of Plaintiffs' rights, Plaintiffs suffered damages, including but not limited to loss of liberty, physical pain and suffering, serious emotional distress, and anguish.

WHEREFORE, Plaintiffs DONALD VANCE and NATHAN ERTEL respectfully demand judgement against the UNIDENTIFIED AGENTS awarding actual and punitive damages, costs and fees, together with any and all other relief to which they may appear entitled.

Count IX Against the Unidentified Defendants, Torturous Conditions, Intentional Infliction of Suffering, and Denial of Medical Care

343. Each of the Paragraphs in this Complaint is incorporated as if restated fully herein.

344. As described more fully above, Plaintiffs were subjected to torturous conditions, violence, mental anguish, and deprived on basic human needs all in a manner which shocks the conscience. These conditions were inflicted by the Unidentified Agents intentionally and/or through their deliberate indifference to Plaintiffs' suffering.

345. The Unidentified Agents committed and caused these violations of Plaintiffs' constitutional rights by their decisions, actions, and failures to act or intervene.

346. This treatment violated Plaintiffs' rights under the United States Constitution. This treatment also violated Plaintiffs' rights under the Detainee Treatment Act, which includes either an express or implied right of action. This Count seeks a remedy only under the Constitution and/or the DTA.

347. The misconduct described in this Count was undertaken under color of federal law.

348. The misconduct described in this Count was undertaken with malice, willfulness and reckless indifference to the rights of others.

349. As a result of the above-described wrongful infringement of Plaintiffs' rights, Plaintiffs suffered damages, including but not limited to loss of liberty, physical pain and suffering, serious emotional distress, and anguish.

WHEREFORE, Plaintiffs DONALD VANCE and NATHAN ERTEL respectfully demand judgement against the UNIDENTIFIED AGENTS awarding actual and punitive damages, costs and fees, together with any and all other relief to which they may appear entitled.

Count X Against the Unidentified Defendants, Equal Protection: "Class of One"

350. Each of the Paragraphs in this Complaint is incorporated as if restated fully herein.

351. The Unidentified Defendants arrested, detained, interrogated, and otherwise abused Plaintiffs, but did not treat Jeff Smith, Laith Al-Khudairi, Mazin Al-Khudairi, Haydar Jaffar, and/or Mukdam Hussany in a similar fashion.

352. These Defendants had no legitimate basis for so treating Plaintiffs and for treating Plaintiffs differently than these other individuals, all of whom were (in the best light to Defendants) similarly situated to Plaintiffs with regard to the purported justification for arresting, detaining, and abusing Plaintiffs as alleged herein.

353. The Unidentified Agents committed and caused these violations of Plaintiffs' constitutional rights by their decisions, actions, and failures to act or intervene.

354. This treatment violated Plaintiffs' rights under the United States Constitution. This Count seeks a remedy only under the Constitution.

355. The misconduct described in this Count was undertaken under color of federal law.

356. The misconduct described in this Count was undertaken with malice, willfulness and reckless indifference to the rights of others.

357. As a result of the above-described wrongful infringement of Plaintiffs' rights, Plaintiffs suffered damages, including but not limited to loss of liberty, physical pain and suffering, serious emotional distress, and anguish.

WHEREFORE, Plaintiffs DONALD VANCE and NATHAN ERTEL respectfully demand judgement against the UNIDENTIFIED AGENTS awarding actual and punitive damages, costs and fees, together with any and all other relief to which they may appear entitled.

COUNT XI – UNITED STATES CONSTITUTION, DENIAL OF ACCESS TO THE COURTS AND TO PETITION FOR REDRESS OF GRIEVANCES

358. Each of the Paragraphs in this Complaint is incorporated as if restated fully herein.

359. As described more fully above, Plaintiffs were denied access to the courts to challenge their unlawful detention, the conditions of their confinement and the taking of their property in violation of the constitutional right to Due Process and the First Amendment.

360. The Unidentified Agents committed and caused these violations of Plaintiffs' constitutional rights by their decisions, actions, and failures to act or intervene.

361. This treatment violated Plaintiffs' rights under the United States Constitution. This Count seeks a remedy only under the Constitution.

362. The misconduct described in this Count was undertaken under color of federal law.

363. The misconduct described in this Count was undertaken with malice, willfulness and reckless indifference to the rights of others.

364. As a result of the above-described wrongful infringement of Plaintiffs' rights, Plaintiffs suffered damages, including but not limited to loss of liberty, physical pain and suffering, serious emotional distress, and anguish.

WHEREFORE, Plaintiffs DONALD VANCE and NATHAN ERTEL respectfully demand judgement against the UNIDENTIFIED AGENTS awarding actual and punitive damages, costs and fees, together with any and all other relief to which they may appear entitled.

Count XII Against the Unidentified Defendants, Retaliation for Speech

365. Each of the Paragraphs in this Complaint is incorporated as if restated fully herein.

366. As described more fully above, Plaintiffs were retaliated against for speaking out on matters of public concern including, *inter alia*, by being arrested, detained, interrogated, abused and having their property taken from them.

367. The Unidentified Agents committed and caused these violations of Plaintiffs' constitutional rights by their decisions, actions, and failures to act or intervene.

368. This treatment violated Plaintiffs' rights under the United States Constitution. This Count seeks a remedy only under the Constitution.

369. The misconduct described in this Count was undertaken under color of federal law.

370. The misconduct described in this Count was undertaken with malice, willfulness and reckless indifference to the rights of others.

371. As a result of the above-described wrongful infringement of Plaintiffs' rights, Plaintiffs suffered damages, including but not limited to loss of liberty, physical pain and suffering, serious emotional distress, and anguish.

WHEREFORE, Plaintiffs DONALD VANCE and NATHAN ERTEL respectfully demand judgement against the UNIDENTIFIED AGENTS awarding actual and punitive damages, costs and fees, together with any and all other relief to which they may appear entitled.

Count XIII – Conspiracy Among Unidentified Agents

372. Each of the Paragraphs in this Complaint is incorporated as if restated fully herein.

373. The Unidentified Agent s, or some of them, reached an agreement, or agreements, amongst themselves and/or with others, to violate Plaintiffs' rights in the unlawful manner alleged herein.

374. As a result of the Unidentified Agents' conspiracies, Plaintiffs had their rights violated and were injured.

375. Additionally, the Unidentified Agents, or some of them, reached an agreement, or agreements, amongst themselves and/or with others, to unlawfully cover-up from Plaintiffs the identities of those who are liable to them for the violation of their rights as well as the evidence needed to prove those violations, all in order to prevent Plaintiffs from exercising their rights to challenge in this lawsuit the legality of what happened to them during their arrests and detentions. In the event that Plaintiffs lose or have lost any rights or causes of action relating to their arrests and detentions, it is due to this conspiracy to cover-up.

376. The Unidentified Agents committed and caused these violations of Plaintiffs' constitutional rights by their decisions, actions, and failures to act or intervene.

377. This misconduct violated Plaintiffs' rights under the United States Constitution. This Count seeks a remedy only under the Constitution.

378. The misconduct described in this Count was undertaken under color of federal law.

379. The misconduct described in this Count was undertaken with malice, willfulness and reckless indifference to the rights of others.

380. As a result of the above-described wrongful infringement of Plaintiffs' rights, Plaintiffs suffered damages, including but not limited to loss of liberty, physical pain and suffering, serious emotional distress, and anguish.

WHEREFORE, Plaintiffs DONALD VANCE and NATHAN ERTEL respectfully demand judgement against the UNIDENTIFIED AGENTS awarding actual and punitive damages, costs and fees, together with any and all other relief to which they may appear entitled.

Count XIV – Return of Seized Property

381. Each of the Paragraphs in this Complaint is incorporated as if restated fully herein.

382. As described more fully above, Plaintiffs' property, including without limitation their laptop computers, as well as their cell phones, digital and video cameras, and all data stored therein, and other personal property, were taken by United States officials in violation of the United States Constitution.

383. Plaintiffs have tried to secure the return of their property, *inter alia*, by petitioning the United States Army, but the Army has refused to produce same, and by working with the United States Department of Justice. To date the only piece of property that has been returned is Plaintiff Vance's laptop.

384. The Army's ruling on this matter, and the Department of Justice's statement that the government does not intend to return any other property constitute final agency actions under the Administrative Procedure Act, 5 U.S.C. § 702.

385. These actions are arbitrary, capricious and an abuse of discretion.

386. As a result, Plaintiffs have not been able to secure return of all of their personal property, including data which may have critical importance for this suit.

387. This is the only claim that Plaintiffs bring directly against the United States.

WHEREFORE, Plaintiffs, DONALD VANCE and NATHAN ERTEL, respectfully request that this Honorable Court enter judgment in their favor and against Defendant UNITED STATES OF AMERICA ordering the return of all of Plaintiffs' personal property including computers, other electronics, and the data included therein.

JURY DEMAND

Plaintiffs, DONALD VANCE and NATHAN ERTEL, hereby demand a trial by jury pursuant to Federal Rule of Civil Procedure 38(b) on all issues so triable.

RESPECTFULLY SUBMITTED,

/s/ Michael Kanovitz
Attorneys for Plaintiff

Arthur Loevy
Mike Kanovitz
Jon Loevy
Gayle Horn
LOEVY & LOEVY
312 North May St.
Suite 100
Chicago, IL 60607
(312) 243-5900

Appendix G

MULTI-NATIONAL FORCE – IRAQ
CAMP VICTORY, BAGHDAD
APO AE 09342-1400

20 APR 2006

Office of the Staff Judge Advocate

Name: Donald Vance
ISN: 200343
SSN: [REDACTED]

Subject: Detainee Status Board

Dear Mr. Donald Vance:

A Detainee Status Board has been convened to determine your legal status as a U.S. citizen detained in the conflict in Iraq. The board has been scheduled to begin no earlier than 23 April, 2006. This Board will determine your status as one of the following:

(1) Enemy Combatant: An individual who is a member agent of Al Qaeda, the Taliban, or another international terrorist organization against which the United States is engaged in an Armed Conflict.

(2) Security Internee: An individual detained because there exists reasonable grounds to believe you pose a threat to security or stability in Iraq. Reasonable grounds consist of sufficient indicators to lead a reasonable person to believe that detention is necessary for imperative

reasons of security, *e.g.* that you pose a threat to MNF-I or Iraqi security forces, or to the safety of civilians in Iraq, or otherwise pose a threat to security and stability in Iraq.

(3) Innocent Civilian: An individual who should be immediately released because there are no reasonable grounds to believe that you pose a threat to security or stability in Iraq. Detention is not necessary for imperative reasons of security, *e.g.* you do not pose a threat to MNF-I or Iraqi security forces, or to the safety of civilians in Iraq, or are otherwise not a threat to security and stability in Iraq.

The unclassified factual basis that will be used by the Board to determine your status is as follows:

On or about April 15, 2006 you were detained by members of the Coalition Forces for being a suspect in supplying weapons and explosives to insurgent/criminal groups through your affiliation with the Shield Group Security Company (SGS) operating in Iraq. Credible evidence suggests that certain members of SGS are supplying weapons to insurgent groups in Iraq. Further, you are suspected of illegal receipt of stolen weapons and arms in Iraq from Coalition Forces.

You have the following rights at the Board:

(1) You have the right to be present at all open sessions of the Board.

(2) You have the right to testify or not to testify.

(3) You do not have the right to legal counsel, but you may have a personal representative assist you at the hearing if the personal representative is reasonably available.

(4) You have the right to present evidence, including the testimony of witnesses who are reasonably available.

(5) You have the right to examine and cross-examine witnesses.

The following procedures apply at Board hearings:

(1) All relevant evidence, including hearsay evidence, is admissible. The Board hearing is not adversarial. A recorder may present evidence to the Board. Witnesses will testify under an oath or affirmation to tell the truth.

(2) The Board's decisions are determined by a majority of voting members.

If you wish to have evidence, witnesses or a personal representative at the Board, you must deliver a written request to the Camp Commander of your detention facility before the Board convenes. The Board will attempt to accommodate reasonable requests for persons who it finds are immediately available. If you have any questions concerning this Board, please contact the Camp Commander with your inquiry and it will be forwarded to

Appendix G

The Multi-National Force – Iraq Office of the Staff Judge Advocate for clarification.

Sincerely,

/s/
Bradley J. Huestis
LTC, U.S. Army
President of the Board

ACKNOWLEDGEMENT OF RECEIPT:
/s/
Donald Vance (Signature)

Date: 4-20-06

Time: 21:42

Appendix G

MULTI-NATIONAL FORCE – IRAQ
CAMP VICTORY, BAGHDAD
APO AE 09342-1400

20 APR 2006

Office of the Staff Judge Advocate

Name: Nathan Adam Erpel
ISN: 200342
SSN: [REDACTED]

Subject: Detainee Status Board

Dear Mr. Nathan Adam Erpel:

A Detainee Status Board has been convened to determine your legal status as a U.S. citizen detained in the conflict in Iraq. The board has been scheduled to begin no earlier than 23 April, 2006. This Board will determine your status as one of the following:

(1) Enemy Combatant: An individual who is a member agent of Al Qaeda, the Taliban, or another international terrorist organization against which the United States is engaged in an Armed Conflict.

(2) Security Internee: An individual detained because there exists reasonable grounds to believe you pose a threat to security or stability in Iraq. Reasonable grounds consist of sufficient indicators to lead a reasonable person to believe that detention is necessary for imperative

reasons of security, *e.g.* that you pose a threat to MNF-I or Iraqi security forces, or to the safety of civilians in Iraq, or otherwise pose a threat to security and stability in Iraq.

(3) Innocent Civilian: An individual who should be immediately released because there are no reasonable grounds to believe that you pose a threat to security or stability in Iraq. Detention is not necessary for imperative reasons of security, *e.g.* you do not pose a threat to MNF-I or Iraqi security forces, or to the safety of civilians in Iraq, or are otherwise not a threat to security and stability in Iraq.

The unclassified factual basis that will be used by the Board to determine your status is as follows:

On or about April 15, 2006 you were detained by members of the Coalition Forces for being a suspect in supplying weapons and explosives to insurgent/criminal groups through your affiliation with the Shield Group Security Company (SGS) operating in Iraq. Credible evidence suggests that certain members of SGS are supplying weapons to insurgent groups in Iraq. Further, you are suspected of illegal receipt of stolen weapons and arms in Iraq from Coalition Forces.

You have the following rights at the Board:

(1) You have the right to be present at all open sessions of the Board.

(2) You have the right to testify or not to testify.

(3) You do not have the right to legal counsel, but you may have a personal representative assist you at the hearing if the personal representative is reasonably available.

(4) You have the right to present evidence, including the testimony of witnesses who are reasonably available.

(5) You have the right to examine and cross-examine witnesses.

The following procedures apply at Board hearings:

(1) All relevant evidence, including hearsay evidence, is admissible. The Board hearing is not adversarial. A recorder may present evidence to the Board. Witnesses will testify under an oath or affirmation to tell the truth.

(2) The Board's decisions are determined by a majority of voting members.

If you wish to have evidence, witnesses or a personal representative at the Board, you must deliver a written request to the Camp Commander of your detention facility before the Board convenes. The Board will attempt to accommodate reasonable requests for persons who it finds are immediately available. If you have any questions concerning this Board, please contact the Camp Commander with your inquiry and it will be forwarded to

Appendix G

The Multi-National Force – Iraq Office of the Staff Judge Advocate for clarification.

Sincerely,

/s/_____
Bradley J. Huestis
LTC, U.S. Army
President of the Board

ACKNOWLEDGEMENT OF RECEIPT:
/s/_____
Nathan Adam Erpel (Signature)

Date: 20 April 06

Time: 21:45

Appendix G

DEPARTMENT OF DEFENSE
LEGAL OFFICE – TASK FORCE 134
MULTI-NATIONAL FORCE – IRAQ
APO AE 09342

REPLY TO
ATTENTION OF:
Magistrate Office

Date: 22 April 2006

Detainee Name: **NATHAN ADAM ERTEL**
ISN: **200342**
Internment Facility: **CROPPER**

Subject: Notice of Status and Appellate Rights

1. *Status.* This is to notify you of your status and the basis for your detention. You are being detained as a Security Internee pursuant to United Nations Security Council Resolution (UNSCR) 1546, 1637, and Coalition Provisional Authority (CPA) Memorandum 3 (Revised). You have been detained for the following reasons:

You work for a business entity that possessed one or more large weapons caches on its premises and may be involved in the possible distribution of these weapons to insurgent/terrorist groups.

2. *Appellate Rights.* You have the right to appeal your internment in accordance with Article 78 of the Geneva Convention. You may use the appeal form provided, or

any writing containing your full name and ISN. If you provide a written statement of appeal, the statement will be translated into English and included in your case file for consideration by subsequent competent review authorities. **To be considered, written material must be submitted to any guard, military police, or camp official for delivery to the Magistrate.**

3. You may also have another person submit additional written material on your behalf. If another person is submitting written material, ensure they put your full name and ISN number on the document so it can be properly placed in your file. Written materials may be submitted to any military police or camp official at any visitation site at Abu Ghraib, Bucca, Cropper or Suse to be forwarded to the reviewing authority.

4. Written material you wish to submit for consideration from any source must be received by the reviewing authority in a timely manner. It is imperative that you gather and submit your written appeal and any other written submissions AS SOON AS POSSIBLE. Untimely written submissions could result in the reviewing authority not having all the information available when making a decision on your case. Written matters will be translated into English and included in your case file.