ANOTHER DAY, ANOTHER PERSON SUING DONALD RUMSFELD FOR TORTURE

The 7th Circuit has just issued a decision in yet another case where a US citizen (actually, two of them—Donald Vance and Nathan Ertel) are suing Donald Rumsfeld for the torture they suffered at the hands of the military. (h/t scribe) The opinion allows the *Bivens* lawsuit to go forward.

Vance and Ertel are both American citizens who reported the contractor they worked for in Iraq, Shield Group Security, to the FBI for making payments to Iraqi sheikhs. Following the discovery of a cache of guns owned by Shield, Vance and Ertel were ultimately put in Camp Cropper and tortured. As the opinion describes,

> 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.
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> [snip]
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> 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.

The decision, written by Obama appointee David Hamilton, had little patience for Rummy's defense. It accused Rummy, first of all, of ignoring the detail alleged in the complaint so as to expand the meaning of *Iqbal*.

> 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.

It dismisses the argument—submitted in a amicus brief by the military—that regular military justice offered Vance and Ertel alternative means of justice.

> 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.
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> 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.
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> 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.

And it got really outraged when Rummy tried to claim the war constituted a special factor that should exempt the government from prohibitions on torturing its own citizens.

> 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 coldblooded 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.
>
> [snip]
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> 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.

Now, the ruling is significant for a number of reasons. The facts here are very close to the facts in Doe v. Rumsfeld—the DC District case which was just allowed to move forward. In both, US citizens who were civilian employees in Iraq were tortured in Camp Cropper. Both took place after the Detainee Treatment Act. That's particularly significant, since both cases argue that since Congress didn't address torture of US civilians under the DTA, it both reinforces the notion there is no other remedy, but also rules out the possibility that Rummy simply couldn't be expected to know that torturing American citizens was wrong.

> 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.

In fact, this case goes further, pointing to news reports that after DTA, Rummy rewrote part of the Army Field Manual (Appendix M) to permit torture to continue.

> 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.

But this ruling—particularly the language about the immunity that a rejection of the *Bivens* suit would imply—applies in large part to Jose Padilla's suit against Rummy for almost the same terms (though Padilla wasn't even seized in a war zone).

This ruling in the 7th Circuit, with another ruling due at some point in Padilla's 4th and 9th Circuit suits, as well as the DC District Doe case, all raise the chances that SCOTUS will have to answer the question of whether our government can torture US citizens with impunity.

Sure, Justice Roberts and his pals are likely to try to find some way to thread this needle, if not approve such treatment more generally. But it looks increasingly likely they're going to have to decide the question one way or another.