DONALD RUMSFELD'S TORTURE DEFENSE AND APPENDIX M

As I noted yesterday, the 7th Circuit has permitted a *Bivens* lawsuit against Donald Rumsfeld to move forward.

I wanted to turn to a dispute not resolved in the opinion, which should be: whether or not Rummy changed the Army Field Manual after the Detainee Treatment Act so as to permit ongoing use of torture.

As the opinion notes, plaintiffs Donald Vance and Nathan Ertel claim that not only did Rummy ignore the DTA's prohibition on torture, he secretly changed the Army Field Manual to permit it.

> 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
>
> On appeal, the plaintiffs 8 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.

But the thing is, Vance doesn't need to rely on this newspaper article to prove a version of Appendix M authorizing their torture exists. They can rely on Steven Bradbury's opinion describing Appendix M as it existed during their torture.

As a reminder, Vance and Ertel were detained by American troops around April 15, 2006 and sent to Camp Cropper a few days later; Ertel was released in May 2006 and Vance was released July 2006. While there, they allege, they were subjected to:

> 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.

On April 13, 2006, just days before Vance and Ertel's torture started, in a memo for the file assessing whether changes to the AFM complied with the DTA, Steven Bradbury described Appendix M as it existed at that time. His description makes it clear that DOD had added six techniques not otherwise allowed by the AFM.

> Appendix M of the FM 2-22.3, provides guidance for the use of six "restricted interrogation techniques" that are otherwise not permitted by the Field Manual.

Now, DOJ redacted four of the six techniques in releasing this memo under FOIA (the two left unredacted are "Mutt and Jeff" and "False Flag"). But comments that remain unredacted later in the memo make it clear that they involve precisely the kind of environmental manipulation, sleep deprivation, and solitary confinement inflicted on Vance and Ertel. Bradbury writes:

> Similarly, the three "Adjustment" techniques are designed to change the detainee's environment [3/4 line redacted] but without depriving him of any basic necessities or exposing him to dangerous or tortuous conditions. Whether these techniques are used separately or in tandem, the detainee is guaranteed to received adequate levels of food, water, sleep, heat, ventilation, and light. In addition, the detainee's health must be continually monitored by medical personnel. These safeguards ensure that these techniques do not involve the infliction of punishment and negate any inference that

> they represent deliberative indifference.
>
> Finally, the "Separation" technique expressly requires that the "basic standards of humane treatment" be maintained even though the detainee may be isolated from other detainees. A detainee subjected to this technique does not undergo sensory deprivation and thus is far less likely to suffer the adverse physiological consequences associated with that experience. M-51. In addition, the Separation technique is carefully limited in duration, which is not to exceed 30 days without express authorization from a senior military officer. With these limitations in place, and given the important role isolation can play in conditioning detainees for interrogation (including limiting the ability to frustrate or mislead interrogators by sharing information about the interrogation process), the Separation technique does not amount to punishment and is not shocking to the conscience. [my emphasis]

Bradbury's description of detainees receiving adequate food and water, sleep, warmth, and light make it clear these are precisely the environmental factors manipulated under the "Adjustment" techniques. And his discussion of "Separation" makes it clear Bradbury is describing solitary confinement. Thus, while the description of these techniques may be redacted, they clearly must describe the techniques used on Vance and Ertel.

Now, at one level this memo—if Rummy weren't pretending it didn't exist—might help his case. After all, like the Yoo memos before it, this memo gives legal approval for torture, in this case stating that Appendix M techniques did not violate DTA.

But there are several reasons why, as used with American citizen non-combatant, the memo does not apply. Bradbury reveals, for example, that these techniques "may be used only during the interrogation of 'unlawful enemy combatants'." Vance and Ertel were actually given a detainee review board, and were called Security Internees, not Enemy Combatants.

Further, Appendix M as it existed when they were tortured "required that detainees receive adequate medical care," something Vance and Ertel were specifically denied.

In addition, Appendix M prohibited the use of threats; but threats of "excessive force" were used with Vance and Ertel.

There's one more out that Rummy might try to take. As I described in this post, this memo uses a structure I've not seen in any other OLC memo. Bradbury notes that he sent a letter (also on April 13, 2006) to DOD General Counsel Jim Haynes "advis[ing] that these documents are consistent with the requirements of law, in particular with the requirements of the Detainee Treatment Act of 2005." We don't have that letter. Rather, we have the memo that Bradbury wrote to the file. In other words, we have no way of knowing whether Bradbury communicated his caveats tying (for example) medical care to his judgment that the techniques described in Appendix M complied with the DTA (though we do know that the highest levels of DOD were involved in this approval process).

Now, aside from the fact that Bradbury's direct quotes make it clear that those limitations were in Appendix M itself, there's another problem with this. Both Bradbury's unusual gimmick—as well as his subsequent failure to disclose it to Congress when specifically asked—is itself evidence that DOD and OLC were trying to hide their efforts to get around the clear meaning of DTA.

Here's the specific refutation Rummy's team made that his DOD revised the Army Field Manual

before the torture of Vance and Ertel.

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

Rummy claims that his DOD did not have a classified version of Appendix M; Rummy claims they didn't update the AFM before September 2006.

Except his General Counsel got approval from OLC for that updated classified version of Appendix M just days before the torture on Vance and Ertel started.

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.
>
> [snip]
>
> 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.
>
> 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.

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]
>
> 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.

HUNTER BIDEN'S PROSECUTORS COMPLAINED ABOUT THE LAPTOP, ONCE, TOO

In a bench conference at the Hunter Biden trial, prosecutors tried to exclude information from the laptop, once.

AN UNKNOWN UNKNOWN MADE KNOWN KNOWN

Former Defense Secretary Donald Rumsfeld who authorized torture under the Bush administration, passed away today at age 88. *spit*

NY TIMES FINDS TRUMP ADMINISTRATION INSERTED WUHAN CABLES INTO THE ALUMINUM TUBES ECHO CHAMBER

The Trump Administration is supporting an effort to present dubious information as confirmed intelligence on the escape of SARS CoV-2 from a Chinese lab, apparently in an effort to deflect

blame from Trump’s poor response to the outbreak and to stoke tension between the US and China.

ALEXANDER VINDMAN PROVES THAT WORKING WITHIN SYSTEM WORKS EVEN WHILE DEREK HARVEY WORKS TO DESTROY IT

It’s hard to imagine two more polar opposites than Alexander Vindman and Derek Harvey. Vindman is a patriot committed to the security of the US and working within the system while Harvey is willing to sell out US security to whatever wingnut is willing to pay him and to bypass every safeguard built into the system.

ON RESPONSIBLE SOURCING FOR DNC HACK STORIES

For some reason Lawfare thinks it is interesting that the two Democratic members of the Gang of Four — who have apparently not figured out there’s a difference between the hack (allegedly done by Russia) and the dissemination (done by Wikileaks, which has different motivations) are calling for information on the DNC hack to be released.

> The recent hack into the servers of the

> Democratic National Committee (DNC) and the subsequent release via WikiLeaks of a cache of 20,000 internal e-mails, demonstrated yet again the vulnerability of our institutions to cyber intrusion and exploitation. In its timing, content, and manner of release, the email dissemination was clearly intended to undermine the Democratic Party and the presidential campaign of Secretary Hillary Clinton, and disrupt the Democratic Party's convention in Philadelphia.
>
> [snip]
>
> Specifically, we ask that the Administration consider declassifying and releasing, subject to redactions to protect sources and methods, any Intelligence Community assessments regarding the incident, including any that might illuminate potential Russian motivations for what would be an unprecedented interference in a U.S. Presidential race, and why President Putin could potentially feel compelled to authorize such an operation, given the high likelihood of eventual attribution.

For some equally bizarre reason, WaPo thinks Devin Nunes' claim — in the same breath as he claims Donald Trump's repeated calls on Russia to release Hillary's email were sarcastic — that there is "no evidence, absolutely no evidence" that Russia hacked the DNC to influence the election is credible.

> Rep. Devin Nunes (R-Calif.), the chairman of the House Intelligence Committee, told The Washington Post in an interview Wednesday that speculation about Russian attempts to sway the presidential election is unfounded.
>
> "There is no evidence, absolutely no

> evidence, that the Russians are trying to influence the U.S. election," Nunes said, repeatedly swatting away the suggestion made by some Democrats that the Russians may be using their intelligence and hacking capabilities to boost Donald Trump's chances.
>
> "There is evidence that the Russians are actively trying to hack into the United States – but it's not only the Russians doing that. The Russians and the Chinese have been all over our networks for many years."

These are two obvious (because they're on the record) examples of partisans using their access to classified information to try to boost or refute a narrative that the Hillary Clinton campaign has explicitly adopted: focusing on the alleged Russian source of the hack rather on the content of the things the hack shows.

Kudos to Richard Burr, who is facing a surprisingly tough reelection campaign, for being the one Gang of Four member not to get involved in the partisan bullshit on this.

There are plenty of people with no known interest in either seeing a Trump or a Clinton presidency that have some measure of expertise on this issue (this is the rare moment, for example, when I'm welcoming the fact that FBI agents are sieves for inappropriate leaks). So no outlet should be posting something that obviously primarily serves the narrative one or the other candidate wants to adopt on the DNC hack without a giant sign saying "look at what partisans have been instructed to say by the campaign." That's all the more true for positions, like the Gang of Four, that we'd prefer to be as little politicized as possible. Please don't encourage those people to use their positions to serve a partisan narrative, I beg of you!

For the same reason I'm peeved that Harry Reid

suggested the Intelligence Community give Trump fake intelligence briefings. Haven't we learned our lesson about politicizing intelligence?

More generally, I think journalists should be especially careful at this point to make it clear whether their anonymous sources have a partisan dog in this fight, because zero of those people should be considered to be unbiased when they make claims about the DNC hack.

A very special case of that comes in stories like this, where Neocon ideologue Eliot Cohen, identified as Bush appointee, is quoted attacking Trump for suggesting Russia should leak anymore emails.

> But now Republican-aligned foreign policy experts are also weighing in along similar lines.
>
> "It's appalling," Dr. Eliot A. Cohen, who was counselor of the State Department during the second term of George W. Bush's presidency, said to me today. "Calling on a foreign government to go after your opponent in an American election?"
>
> Cohen recently organized an open letter from a range of GOP national security leaders that denounced Trump in harsh terms, arguing that Trump's "own statements" indicate that "he would use the authority of his office to act in ways that make America less safe, and which would diminish our standing in the world." The letter said: "As committed and loyal Republicans, we are unable to support a Party ticket with Mr. Trump at its head. We commit ourselves to working energetically to prevent the election of someone so utterly unfitted to the office."
>
> But this latest from Trump, by pushing the envelope once again, raises the question of whether other prominent Republicans are ever going to join in.

> For instance, to my knowledge, top national security advisers to George W. Bush, such as Stephen Hadley and Condoleezza Rice (who was also secretary of state), have yet to comment on anything we've heard thus far from Trump. Also, there could theoretically come a point where figures like former Defense Secretary Donald Rumsfeld and possibly even Dubya and George H.W. Bush feel compelled to weigh in.
>
> Meanwhile, senior Republican elected officials who have backed Trump continue to refrain from taking on his comments forcefully or directly. Some Republicans actually defended Trump's comments today. Paul Ryan's spokesman issued a statement saying this: "Russia is a global menace led by a devious thug. Putin should stay out of this election."

I feel differently about Trump's asinine comment than I do about attribution of the attack. I'm all in favor of Hillary's campaign attacking Trump for it, and frankly Cohen is a far more credible person to do so than Jake Sullivan and Leon Panetta, who also launched such attacks yesterday, because as far as I know Cohen has not mishandled classified information like the other two have.

But I would prefer if, rather than IDing Cohen as one of the Republicans who signed a letter opposing Trump, Greg Sargent had IDed him as someone who has also spoken affirmatively for Hillary.

> On foreign policy, Hillary Clinton is far better: She believes in the old consensus and will take tough lines on China and, increasingly, Russia. She does not hesitate to make the case for human rights as a key part of our foreign policy. True, under pressure from her own left wing, she has backtracked on the Trans-Pacific

> Partnership, a set of trade deals that supports American interests by creating a counterbalance to China and American values by protecting workers' rights. But she might edge back toward supporting it, once in.

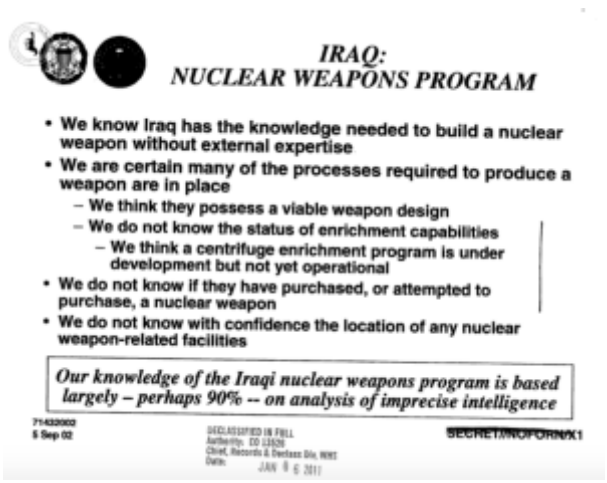
Admittedly, this was at a time when Cohen and others still hoped some Mike Bloomberg like savior would offer them a third choice; that was before Bloomberg gave a very prominent speech endorsing Hillary last night.

Here's the thing. The Neocons (led by Robert Kagan, who's wife got named as a target of Russian aggression in the Feinstein-Schiff letter) are functioning as surrogates for Hillary just like top Democrats are. They are, just like Democrats are, now scrambling to turn their endorsements into both policy and personnel wins. Therefore we should no more trust the independence of a pro-Hillary Neocon — even if he did work for George Bush — than we would trust the many Democrats who have used their power to help Hillary win this election. Progressives should be very wary about the promises Hillary has made to get the growing number of Neocons (and people like Bloomberg) to so aggressively endorse her. Because those endorsements will come with payback, just like union or superdelegate endorsements do.

In any case, it's hard enough to tease out attribution for two separate hacks and the subsequent publication of the hacked data by Wikileaks. Relying on obviously self-interested people as sources only further obscures the process.

Update: The Grammar Police actually nagged me to fix "whose/who's" error in the Kagan sentence. Fun!

WHAT WE DON'T KNOW ABOUT WHAT RUMMY DIDN'T KNOW



Earlier this week, Politico did a story on a report done for Donald Rumsfeld in summer 2002 about what the Joint Chiefs of Staff's Intelligence team knew about Saddam's WMD program.

There are two specifics of significant note the Politico report doesn't get into. First, it notes that the report itself was dated September 5 and Rumsfeld passed it on to Richard Myers, saying, "It is big" on September 9. But it neglects one significant detail about the date.

The report said "we think a centrifuge enrichment program is under development but not yet operational." Someone — presumably either Rummy or Myers — marked that passage in the Powerpoint. That same person also marked an earlier slide that said "Our assessments rely heavily on analytic assumptions and judgment rather than hard evidence," though that person did not mark the following line that read, "The evidentiary base is particularly sparse for Iraqi nuclear programs."

Those dates are significant, however, because between the time the report was finished on September 5 and Rummy passed it on on September

9, both he and Myers did the Sunday shows as part of the aluminum tube bonanza, which itself was premised on the claim that Iraq had tried to obtain those tubes because they "were intended as components of centrifuges to enrich uranium." (On Saturday, at least Rummy and possibly Myers spent the day at Camp David with other top Bush officials and Tony Blair planning to get their war on.)

To be fair to them both, they didn't say anything that greatly varied from this report (in any case, both may not have read it yet) or even directly address the centrifuge story.

> The secretary also asserted that Iraq is on the list of the world's terrorist states, and under Saddam Iraq continues to possess chemical and biological weapons, and seeks to acquire nuclear arms, as well. As such, he said, Iraq represents a clear and present danger to America — and to the world.
>
> Show host Bob Schieffer asked Rumsfeld if the United States was close to going to war against Iraq. The secretary said President Bush has decided that a regime change in Iraq is necessary, but hasn't yet decided how it would be accomplished. The nation's leader is slated to go before the United Nations to "make what he believes to be is a recommendation to the international community and to the world" about what to do about Saddam and Iraq, Rumsfeld said.
>
> Iraq, Rumsfeld said, has invaded its neighbors, persists in violating U.N. resolutions it had agreed to, and continues to amass weapons of mass destruction, creating a significant problem for the international community.
>
> The world can approach the problem of Saddam in a number of ways, Rumsfeld remarked. However, he emphasized that he

> agrees with the president in that doing nothing is not an option.
>
> *People seeking a "smoking gun" — absolute, conclusive evidence that Saddam has nuclear weapons — Rumsfeld noted, is like developing a case in a court of law by proving a person's guilt without a reasonable doubt*.
>
> "The way one gains absolute certainty as to whether a dictator like Saddam Hussein has a nuclear weapon is if he uses it. And that's a little late," Rumsfeld emphasized.
>
> The secretary pointed out how *some U.S. intelligence on Iraqi capabilities may not be revealed to the public for good reason*. Putting certain intelligence out to the public could "put people's lives at risk," he noted. However, the secretary said more information about Iraq would likely become known in the days and months ahead.
>
> Rumsfeld noted there is also "*a category of things we don't know*." After Operation Desert Storm, he noted, American officials discovered that Saddam was six months to a year away from developing a nuclear weapon. The best previous intelligence had estimated it would take two to six years for Saddam to obtain a nuclear bomb, Rumsfeld said. [my emphasis]

Indeed, while Rummy used a variant of the "smoking gun" line Condi Rice used, he presented it more as a legalistic phrase than the fearful line the National Security Advisor delivered it as. He stressed that US intelligence was withholding information. And he admitted that there was stuff "we don't know," though suggested that in the past the stuff we didn't know ended up being that Saddam was closer to getting nukes than previously believed.

And Myers, too, emphasized Saddam's quest to improve his nuke program.

> Air Force Gen. Richard B. Myers, chairman of the Joint Chiefs of Staff, reiterated to ABC This Week host Sam Donaldson that Saddam Hussein has chemical and biological weapons.
>
> Saddam, Myers added, also wants "to better his nuclear program."
>
> "He's going to go to any means to do that, we think," he said. "Our estimate is at this point he does not have nuclear weapons, but he wants one."

Basically, though, it appears that after Rummy and Myers had just been put on the Sunday shows to reinforce the hysteria Condi and Cheney were sowing, Rummy read a report and learned that his own intelligence people were none too sure about what he and Myers had just said, at which point he sent it to Myers and said "it is big."

At that point, it was probably too late.

The other thing Politico didn't note, however, is that the actual Powerpoint was not entirely declassified. Indeed, the entire last page was redacted under 1.4 a, b, and c exemptions.

> 1.4(a) military plans, systems, or operations;
>
> 1.4(b) foreign government information;
>
> 1.4(c) intelligence activities, sources

> or methods, or cryptology;

I find that interesting because the Iraq foreign government information in the presentation is no longer considered sensitive, so it presumably cites some other foreign government information.

I suspect the redacted information either cites the equally dubious British intelligence claiming Saddam had WMD or that it invokes Saddam's ties to terrorism (which both Rummy and Myers did mention in their Sunday appearances). If it's the latter, it would mean the government is still trying to hide — as it is with a letter Carl Levin tried but failed to get declassified before he retired — the utterly bogus claims about Saddam having ties to Al Qaeda that were partially used to justify the war.

All of which is to say, we know that Rummy probably learned a bit more about what his unknown unknowns immediately after going on a the Sunday shows making a claim about known unknowns. But there's still something about what Rummy didn't know that we don't know.

MONDAY MORNING: GET A PICK AND SHOVEL

Mississippi John Hurt's lyrics seem appropriate this morning — get a pick and shovel to dig your way out of all that snow and ice this Monday morning.

Getting a late start here because I stayed up watching the X-Files revival.

Apple iMessage users' content at risk if backed up to iCloud
While iMessages themselves use end-to-end encryption, the same content when backed up to iCloud is encrypted by an Apple-controlled key.

As many as 500 million users have data in iCloud services, at risk of exposure. You'd think after The Fappening, Apple users would be more leery about enabling iCloud backup.

Network problems affect NFL's Microsoft Surface tablets, left New England Patriots in the dark Wow, right down to the "last defensive possession" and *blip* — nothing on the Surface tablets for Pats' coaches to show their players. Not the first time there've been problems with this technology, either. NFL's network problems are blamed for the loss of play information, but Microsoft's tablets are taking the brunt of it. Have to wonder why there wasn't adequate redundancy to ensure network burps would not affect the game. Can't fault the tablets or the network outage for the delay of X-Files on FOX, though, since the Patriots vs. Broncos were on CBS.

Donald Rumsfeld, video game designer
One of the last things I ever expected to see in my feed: Donald Rumsfeld, former Secretary of Defense under George W. Bush, designed a video game. It's an obscure form of solitaire attributed to Winston Churchill. "…I've signed off on something they call 'UX'," Rumsfeld said. Heaven help us.

I'm deferring my date with a shovel for later today and crawling back into bed. Stay safe and warm, gang.

THE WAYNE SIMMONS OPERATION

In August 2008, in the waning days of Bush Administration, GOP hack Wayne Simmons got a job with a Defense Contractor (I'm not sure, but it may be BAE Systems) to serve as a Human Terrain System team Leader. He told the contractor he

had worked for CIA for decades, and as such was eligible for security clearance. He got an interim security clearance for the role. He completed training for the role, but never deployed, and appears to have ended that relationship in March 2009, after President Obama's election and inauguration.

From April 2010 through August 2010, presumably relying on the representation a security clearance was already in the works with the earlier Human Terrain contract and relying on a second interim security clearance, Simmons contracted with the subcontractor to another company and deployed to Afghanistan to serve as a senior counterinsurgency consultant to ISAF. This would have put him in the vicinity of Stanley McChrystal and — after McChrystal's Rolling Stone related downfall — David Petraeus during the early days of the surge.

These details from the Simmons indictment released yesterday make me wonder whether there's not something more to this case.

The case ties its jurisdiction to Eastern District of Virginia — where local spooks and the Pentagon can bury really inconvenient facts — through three different charges. The first is a scheme, dating from 2011 to 2013, to get Virginia bank account holder E.L. to send him $125,000 for some kind of land deal, which seems like an add on to the indictment that otherwise ties to fraudulently getting clearance. There's a separate part, tied to the invoices from the ISAF subcontractor in MD to its prime in VA, that ties it to VA, as well, but that's an attenuated basis (not that that ever stopped EDVA).

And then there's the false statement Simmons made in 2009 to State (but in a letter sent to Arlington, VA) to support his security clearance application. As part of his false statements, Simmons hid a felony weapons possession conviction that dates to 1984, which in turn dates back to a 1980ish Maryland conviction.

The indictment is silent about how Simmons' lies were discovered. It is also silent on whether he ever actually received a full clearance. (I wondered, when I first heard of this, if his lies were discovered in the aftermath of the OPM hack, since his attempts to get clearance, and potentially any record of the 1984 felony, would have shown up there; remember that records dating back to 1984 were stolen.)

In his online bio (which is presumably facetious as well), Simmons claims to have done the following:

1973: Join the Navy

1973: Recruited by the CIA where he joined the "Outside Paramilitary Special Operations Group," working in Central and South America and the Middle East

[1984: Possession of a firearm with prior felony]

2002: Joins Fox

2004: Joins Donald Rumsfeld's Pentagon Outreach Program for Military and Intelligence Analysts propaganda program (which would probably not be unrelated to his ties to Fox)

July 2005: First trip to Gitmo as an "outside Intelligence officer"

July 2006: Second trip to Gitmo [see below for update]

July 2006: Consultant to write Military Commissions Act of 2006

March 2008: Third trip to Gitmo

2014: Citizens Commission for Benghazi serves to drive "demand" for Benghazi committee (though curiously, the report tied to this actually offers more serious critiques of our engagement in Libya than any other right wing attack, which is rather interesting given Simmons' past association with Petraeus)

Media Matters has a summary of the stances he

has taken on Fox, which are core anti-Democratic attacks and Islamophobia.

All of which is to say that Simmons seems to be a long time conservative covert operative and propagandist, with (if his claims about Gitmo are true) ties to torture and similar. Which would make his deceitful efforts to get himself stationed in ISAF at a key time of particular interest.

Update: Thanks to Konrad Roeder for the link to Simmons' firearms charge, which notes he was convicted of something else in Maryland in 1980.

Update: I asked Joseph Hickman, author of the (highly recommended) *Murder at Camp Delta* whether he had ever run into Simmons. Hickman was at Gitmo from March 2006 through March 2007. He responded,

> One of my responsibilities at GTMO was to keep track of every person coming in and out of Camp America (Camp America housed all of the DOD detention facilities at the time: Camp Delta, Camp 5, Camp Echo, and Camp Iguana). I had several soldiers under my command for this task. I can tell you Wayne Simmons Never went to any of those facilities. I never saw him. I contacted two of my soldiers after you raised the question to me, and asked them as well. Neither of them ever saw him at GTMO.

That doesn't mean Simmons wasn't at Gitmo, but if he was, he was somewhere else, such as at the Camp No facility where three detainees died in June 2006.

Update: I pinged Cannonfire, who's great at digging into these half-live frauds. He's got a post on what he found on Simmons here.