WITH BRADBURY'S APPENDIX M OPINION AND 7TH CIRCUIT VANCE DECISION, THE GOVERNMENT CAN TORTURE ANY OF US

Three years ago, I showed how Steven Bradbury wrote an OLC memo that approved in advance whatever techniques DOD wanted to put into the sometimes classified Appendix M of the Army Field Manual. At the time, DOJ implied to me that this memo was rescinded along with the rest of Bradbury and John Yoo's torture memos.

In a really important post yesterday, Jeff Kaye explained that the memo, in fact, remains operative.

> LTC Breasseale explained in an email response to my query last year:
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> > Executive Order (EO) 13491 did not withdraw "'All executive directives, orders, and regulations… from September 11, 2001, to January 20, 2009, concerning detention or the interrogation of detained individuals.'" It revoked all executive directives, orders, and regulations that were inconsistent with EO 13491, as determined by the Attorney General…. [bold emphasis added]
> >
> > One last point – you seem suggest below that EO 13491 somehow cancelled Steven Bradbury's legal review of the FM. EO 13491 did not cancel Mr. Bradbury's legal review of the FM."

> When I then asked the Department of Justice to confirm what Breasseale had said for a story on the Bradbury memo, spokesman Dean Boyd wrote to tell me, "We have no comment for your story." The fact Boyd did not object to Breasseale's statement seems to validate the DoD spokesman's statement.
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> Breasseale also described DoD's view that both the current AFM and Appendix M were "not inconsistent with EO 13491," which "expressly prohibits subjecting any individual in the custody of the U.S. Government to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in the FM. In addition, the Detainee Treatment Act of 2005 expressly prohibits subjecting any individual in the custody of the U.S. Department of Defense to any treatment or technique of interrogation that is not authorized by and listed in the FM. In short, both the President and the Congress have determined that the interrogation techniques listed in the FM are lawful," Breasseale said.

In his post, Kaye provides a lot of details for why the continued applicability of the memo, authorizing separation, is deeply troubling. I'd add that the particular structure of the memo, which of course allows the insertion of physical torture techniques previously abandoned under cover of classification, adds to the concern.

But there is a pending legal reason why it is important, too.

A few years ago, two contractors, Donald Vance and Nathan Ertel, sued Donald Rumsfeld and others for the torture they were subjected to at Camp Cropper after whistleblowing about Iraqi and US corruption.

The torture was, in large part, the "separation"

permitted in Appendix M. As part of their case implicated Rummy personally, they described how, immediately after Congress passed the Detainee Treatment Act, Rummy invented Appendix M as a way to evade the law. At first, the 7th Circuit permitted their Bivens case to move forward. But then the circuit reviewed the decision *en banc* and dismissed the case. The two have appealed that decision; it is pending a cert decision at SCOTUS as we speak.

As part of their petition for cert, Vance and Ertel describe how Rummy responded to passage of the Detainee Treatment Act by inventing Appendix M. (See PDF 340-341)

> 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:
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> > 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).
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> 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.
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> 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.
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> 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.
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> 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.

As I noted in 2011, the Bradbury opinion is further proof that Rummy's top aides — in this case, DOD General Counsel Jim Haynes — were personally involved in inventing Appendix M to bypass DTA. The date on it, too, is important: it shows that Rummy's office was still making changes to Appendix M in secret two days before Vance was detained.

But consider what all this means going forward. Several of the 7th Circuit Judges agreed that the separation techniques used on Vance and Ertel are torture that violates the DTA. In an

opinion that concurred that Rummy had qualified immunity in this case, Diane Wood nevertheless agreed that the techniques Vance and Ertel were subjected to, "easily qualify as 'torture.'" Ann Claire Williams said of their treatment,

> 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.

David Hamilton, more narrowly relying on the assumptions necessary in decision to dismiss a case, describes, "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." (The majority decision avoids stating one way or another whether their treatment constitutes torture.)

And yet, the majority opinion, which virtually ignored Rummy's actions in establishing Appendix M, nevertheless found that everyone in the chain-of-command had immunity for the torture they subjected Vance and Ertel to. As Williams noted in her dissent,

> 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?

That is, the 7th Circuit opinion holds that Rummy specifically, and anyone who comes after him, is immune from suit for violating someone's constitutional rights, up to and including

illegal detention and torture. As Steve Vladeck and James Pfander said in an amicus brief on this case to SCOTUS,

> The Seventh Circuit's decision in this case contravenes nearly 300 years of established tradition, this Court's well-settled precedents, and the United States' international obligations under the CAT. Operating under the assumption that it was being asked to "create" a new cause of action, the en banc majority took the unprecedented step of conferring, in effect, absolute immunity from liability on U.S. officials who torture citizens abroad.

The opinion is bad enough. Now add in Bradbury's still extant memo, which permits DOD to stick whatever torture techniques they want in Appendix M and have his sanction for it. The two together allow the government to continue to engage in torture with, as Vladeck puts it, absolute immunity, so long as it happens overseas.