CHENEY TELLS THE SEVENTH CIRCUIT IT WOULD ERODE MILITARY DISCIPLINE TO LET COURTS SECOND GUESS CHENEY'S TORTURE DECISIONS

Remember that letter a bunch of former Directors of Central Intelligence wrote begging Obama to kill an investigation into George W Bush-approved CIA torture?

Poppy, the father of the President who authorized that torture, had the good grace not to sign onto the letter.

These things tend to look like stunts when someone with that kind of personal conflict signs on.

Which is why this amicus brief from all former Secretaries of Defense, submitted in the Vance v. Rumsfeld suit suing Donald Rumsfeld for torture inflicted on two contractors in Iraq, is so farcical. (h/t Lawfare) Right there between "Frank C. Carlucci III, Secretary of Defense from 1987 to 1989" and "William S. Cohen, Secretary of Defense from 1997 to 2001" comes "Richard B. Cheney, Vice President of the United States from 2001 to 2009, and Secretary of Defense from 1989 to 1993."

Otherwise known as the architect of the torture program for which Dick's first important boss, Rummy, is now being sued.

As you might expect from a brief submitted by David Rivkin, the argument in the brief itself isn't any more credible. It does two things. First, it argues that if Vance were allowed to sue under Bivens for being tortured by his own government, then it would break down military

discipline that requires—and affords Vance as recourse, they claim—members of the military to report detainee abuse up the chain of command. We saw how well that worked for Joe Darby and a bunch of Gitmo whistleblowers. And of course these former Secretaries of Defense are arguing that military discipline will guarantee that the entire chain of command would be able to hold its civilian leadership accountable for illegal orders to torture civilians. Never mind that those former Secretaries pretty much admit there is little means under the UMCJ to actually punish civilian leaders (the whole brief ignores that some of the torturers were also civilians), as distinct from the members of the military whose punishment the brief lays out in some detail—for breaking the law.

> With respect to civilian officials and employees, the process of investigation would have vindicated Plaintiffs' rights by, at a minimum, providing "a forum where the allegedly unconstitutional conduct would come to light," Bagola v. Kindt, 131 F.3d 632, 643 (7th Cir. 1997) (citing Bush v. Lucas, 462 U.S. 367 (1983); Schweiker v. Chilicky, 487 U.S. 412 (1988)), and review of Plaintiffs' constitutional claims, with the possibility of review by the U.S. Supreme Court, 10 U.S.C. § 867A(a).

Military discipline that must be preserved would guarantee that the Lynndie Englands were held accountable. And that, for these former Secretaries of Defense, is enough, I guess.

Of course, all this only works because of the brief's other strategy: to simultaneously suggest that this was not torture (that is, something clearly prohibited by law), calling it consistently "mistreatment." Even while ignoring that *Ashcroft v. al-Kidd* requires the showing of obviously prohibited behavior, like torture.

> The panel majority's narrow framing of its holding—that it extends only to conduct of the nature alleged by Plaintiffs, Slip op. 58-59—is yet another attempt to craft "[a]

> test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking." Stanley, 483 U.S. at 682. But this "would itself require judicial inquiry into, and hence intrusion upon, military matters," and "the mere process of arriving at correct conclusions would disrupt the military regime." Id. at 683-84. Moreover, this limitation is arbitrary; in no case has Bivens' availability turned on the gravity of the alleged deprivation.
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> A final consequence is the likelihood that, fearing personal liability, those officials charged with ensuring the Nation's security "would be deterred from full use of their legal authority." Ashcroft v. al-Kidd, 131 S.Ct. 2074, 2087 (2011) (Kennedy, J., concurring).

It's not that Rummy (and Cheney, though Cheney and his colleagues don't say this) should have and in fact did know that torture was illegal, this brief pretends (as al-Kidd mistakenly, IMO, pretends that Ashcroft had no way of knowing what material witness detention allowed). Rather, you simply can't question military matters, at all, never ever, even in cases of gross violations of law, because that's a slippery slope that will erode military discipline.

The military discipline that ensures that Secretaries of Defense—and Vice Presidents—will never held accountable for their crimes.