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Newsroom: Margulies on Rumsfeld Lawsuits

Roger Williams University School of Law

Newsroom

Margulies on Rumsfeld Lawsuits

The ABA Journal talks with Professor Peter Margulies about prospects for two post-9/11 lawsuits against former Defense Secretary Donald Rumsfeld.

From the ABA Journal: "Unknown Knowns: Torture Suits Against Rumsfeld May Revive a 40-Year-Old Liability Case" by Leslie A. Gordon

Feb 1, 2012 - Asked in 2002 whether there was any evidence that Iraq had supplied terrorists with weapons of mass destruction, then-Defense Secretary Donald Rumsfeld famously opined: “As we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say, we know there are some things we do not know. But there are also unknown unknowns—the ones we don’t know we don’t know.”

One of the things we don’t know but may find out soon is whether Rumsfeld will become the first high-ranking federal official to be tried on civil claims of alleged torture during the Iraq war.

Two federal courts have allowed to proceed separate cases in which U.S. citizens sue Rumsfeld personally. In allowing them to continue past the pleading stage, the cases pave the way for Rumsfeld’s personal liability for constitutional violations if the allegations are proven true at trial.

The cases also revive claims stemming from the watershed 1971 decision *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, in which the U.S. Supreme Court said the Constitution itself provides a cause of action when a federal officer violates the law.

The cases are “the only examples of civil suits against officers for post-9/11 abuses that have gone anywhere,” says Stephen Vladeck, a law professor at American University and a senior editor of the *Journal of National Security Law & Policy*. “Courts have traditionally been pro-government.”

In *Doe v. Rumsfeld*, a former military translator who was both a U.S. citizen and a civilian claims to have been abducted and tortured by American forces at Camp Cropper, a U.S. military prison in Iraq. In August, the U.S. District Court for the District of Columbia denied Rumsfeld’s motion to dismiss.

Similarly, in *Vance v. Rumsfeld*, a 29-year-old Navy veteran-turned-security contractor was detained as a suspect at the same prison after U.S. soldiers raided the company where he worked. It was Donald Vance himself who had provided the FBI with information about possible illegal weapons trading at the company. A week after *Doe*, a three-judge panel of the 7th U.S. Circuit Court of Appeals at Chicago also denied Rumsfeld’s dismissal motion. The 7th Circuit then agreed in October to the government’s motion to hear the case en banc.

Both cases spark *Bivens* claims. “In the last 30 years, the [Supreme] Court has been scaling back *Bivens* so much so that we ask whether there is even anything left to *Bivens*,” Vladeck says. “The 7th Circuit and the D.C. District Court are saying ‘maybe.’ That’s a surprise.”

A RELUCTANT REMEDY

Unlike state officers, liable under section 1983 for violations of the 1871 Civil Rights Act, there is no federal statute permitting lawsuits against federal officers. But the core principle of Bivens is that the Constitution itself provides a cause of action when a federal officer violates the law.

“*Bivens* provided for damages and injunctive relief,” Vladeck says. The *Bivens* court held that, absent a federal statute authorizing such suits, private individuals can sue federal officials directly under the Constitution.

For the most part, though, the Supreme Court has been reluctant to extend *Bivens*, leaving remedies for these abuses largely up to Congress. “At the time Bivens was decided and in the years since, the decision has provoked controversy, especially among conservatives,” Vladeck says.

“It’s considered the epitome of judicial lawmaking — creating a remedy that Congress has not,” he adds. Indeed, the dissent in *Vance* disagreed with what it deemed was an improper extension of *Bivens*, arguing that establishing remedies for these kinds of claims is better left to the legislative branch.

“In the Rumsfeld cases, the plaintiffs tried very hard to argue that they’re not actually seeking an extension of *Bivens*,” Vladeck notes. “Rather, they argued they’re just seeking application of *Bivens* because the misconduct violates constitutional provisions already covered by *Bivens* and other precedent. So part of the fight here is framing.”

Law professor Peter Margulies at Roger Williams University in Bristol, R.I., adds that “*Vance* is a departure from the way the Supreme Court has signaled it wants to handle these cases. Notwithstanding *Bivens*, courts generally protect officials.”

Vance’s case, however, offers what some academics argue is the perfect fact pattern for a *Bivens* extension: namely, U.S. citizens — civilians, no less — alleging torture at an American military prison in an active war zone. The *Vance* decision reads: “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.”

In addition to the plaintiffs’ American citizenship, the *Doe* and *Vance* courts also found a lack of “special factors” — such as foreign diplomacy or national security —that have historically been used to bar *Bivens* remedies. In doing so, the courts rejected Rumsfeld’s arguments that a threat of personal liability for officers would intrude on military management, and that pretrial discovery would be distracting and could reveal classified military information.

While the *Bivens* element of these cases centers on whether a cause of action against Rumsfeld even exists, the next question — a factual one — is whether he is entitled to qualified immunity. The qualified immunity doctrine analyzes the objective reasonableness of the official's discretionary action, providing the defendant immunity if the action did not violate "clearly established law" even if it's later found unlawful.

In denying Rumsfeld's claim of qualified immunity, the *Doe* court held that "a reasonable federal official would have under stood conscience-shocking physical and psychological mistreatment — including temperature, sleep, food and light manipulation — of a United States citizen detainee to violate the detainee's constitutional right to substantive due process."

As a result, the *Doe* and *Vance* decisions may indicate a shift in the traditional zeal with which courts have protected officials in war-on-terror cases.

"It's probably not too much to ask that officials know who is detained and how," **says Margulies, author of *Law's Detour: Justice Displaced in the Bush Administration*.** "We don't detain a lot of people. They should do due diligence."

And some constitutional law experts argue that no reasonable official could conclude that it is constitutional to torture an American. Margulies suggests, however, that "the mere fact that someone is a citizen" shouldn't necessarily change the outcome of the qualified immunity analysis.

ACCOUNTING FOR SECURITY?

Even if the *Doe* and *Vance* rulings (should they withstand appeals) are limited to plaintiffs who are U.S. citizens, it would signal a shift regarding accountability from high-level officials.

"It would give clear rules for the future and demonstrate whether we're going to have learned any lessons about lines that cannot be crossed in national security situations," Vladeck says. "The court, however, has shown no inclination to draw these lines so far."

As for the future of these or similar cases against federal officers, Vladeck emphasizes that the Supreme Court has been reluctant even to hear damages cases regarding terrorism.

For example, the court agreed to hear the 2009 *Ashcroft v. Iqbal* case, which heightened pleading standards, only because the government had lost in the court below. The same reasoning could apply in the Rumsfeld cases.

Vladeck points to another 2009 case, *Arar v. Ashcroft*, in which a Canadian man was arrested at John F. Kennedy International Airport in New York City and rendered to Syria, where he was tortured. The 2nd U.S. Circuit Court of Appeals at New York City threw out the case, holding that rendition was not a reason to apply a Fifth Amendment-based Bivens remedy, especially when national security — one of the "special factors" — was at stake.

"I thought that Arar might be the case in which *Bivens* would be extended [by the Supreme Court], but maybe these Rumsfeld cases will be the ones," Vladeck says. "Although the court has been skeptical of *Bivens*, it has refused to overrule it. It's messy stuff."

Margulies is convinced that if Rumsfeld moves for en banc reconsideration in *Vance*, the decision may be vacated. Otherwise, he says he has no doubt that the Supreme Court would agree to hear a *Vance* appeal and, if so, most certainly reverse the 7th Circuit.

"The court feels that senior officials need to be treated with great deference," **Margulies says**. "Even mere discovery is considered an excessive burden on the official. Otherwise, there's a chilling effect. It's part of the landscape of post-9/11 America."

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