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Only days after a U.S. District Court in Washington allowed to proceed a suit by a U.S. citizen who alleged that he had been detained and tortured by U.S. forces in Iraq, the 7th Circuit Court of Appeals has permitted
a strikingly similar suit
to go forward as well. The three-judge panel of Judges Daniel Manion, Terence Evans, and David Hamilton split, with Judge Hamilton writing the majority opinion and Judge Manion dissenting on the key points.

Judge Hamilton's opinion begins:

This appeal raises fundamental questions about the relationship between the citizens of our country and their government. Plaintiffs Donald Vanc e and Nathan Ertel are American citizens and civilians. Their complaint alleges in detail that they were detained and illegally tortured by U.S. military personnel in Iraq in 2006. Plaintiffs were released from military custody without ever being charged with a crime. They then filed this suit for violations of their constitutional rights against former Secretary of Defense Donald Rumsfeld and other unknown defendants under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Plaintiffs seek damages from Secretary Rumsfeld and others for their roles in creating and carrying out policies that caused plaintiffs' alleged torture. Plaintiffs also bring a claim against the United States under the Administrative Procedure Act to recover personal property that was seized when they were detained.

Secretary Rumsfeld and the United States moved to dismiss the claims against them. The district court denied in part Secretary Rumsfeld's motion to dismiss, allowing plaintiffs to proceed with Bivens claims for torture and cruel, inhuman, and degrading treatment, which have been presented as Fifth Amendment substantive due process claims. *Vance v. Rumsfeld*, 694 F. Supp. 2d 957 (N.D. Ill. 2010). The district court also denied the government's m otion to dismiss the plaintiffs' property claim.
Vance v. Rumsfeld

, 2009 WL 2252258 (N.D. Ill. 2009). Secretary Rumsfeld and the United States have appealed, and we consider their appeals pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1292(b).

We agree with the district court that the plaintiffs may proceed with their Bivens claims against Secretary Rumsfeld. Taking the issues in ascending order of breadth, we agree first, applying the standards of Federal Rules of Civil Procedure 12(b)(6), that plaintiffs have alleged in sufficient detail facts supporting Secretary Rumsfeld's personal responsibility for the alleged torture. Second, we agree with the district court that Secretary Rumsfeld is not entitled to qualified immunity on the pleadings. The law was clearly established in 2006 that the treatment plaintiffs have alleged was unconstitutional. No reasonable public official could have believed otherwise.

Next, we agree with the district court that a Bivens remedy is available for the alleged torture of civilian U.S. citizens by U.S. military personnel in a war zone. We see no persuasive justification in the Bivens case law or otherwise for defendants' most sweeping argument, which would deprive civilian U.S. citizens of a civil judicial remedy for torture or even cold-blooded murder by federal officials and soldiers, at any level, in a war zone. 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.

The defendant s rely on two circuit decisions denying Bivens remedies to alien detainees alleging that U.S. officials caused them to be tortured, one case arising from war zones, *Ali v. Rumsfeld*
, ___ F.3d ___, 2011 W L 2462851 (D.C. Cir. June 21, 2011) (detainee s in Iraq and Afghanistan), and the other as part of the war on terror,
Arar v. Ashcroft
, 585 F.3d 559 (2d Cir. 2009) (en banc) ("extraordinary rendition" case). Those claims by aliens are readily distinguishable from this case based on the different circumstances of aliens and civilian U.S. citizens. Whether or not one agrees with those deisions, the difficult issues posed by aliens' claims should not lead courts to extend the reasoning in those cases to deny all civil remedie s to civilian U.S. citizens who have been tortured by their own government, in violation of the most fundamental guarantees in the constitutional pact between citizens and our government.

As to the modest property claim against the United States, however, we agree with the government that the Administrative Procedure Act's "military authority" except ion precludes judicial review of military actions affecting personal property in a war zone, and we reverse the

district court's decision on that claim.

Judge Manion's opinion in dissent begins as follows:

Much attention will be focused on the fact that the court has sustained a complaint alleging that former Secretary Rumsfeld was personally responsible for the torture of United States citizens. However, the most significant impact of the court's holding is its extension of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Specifically, the court holds that a "Bivens remedy," as implied causes of action for violations of constitutional rights have come to be known, is available to United States citizens alleging torture while held in an American military prison in an active war zone. Present case law requires a very cautious approach before extending a Bivens remedy into any new context, and emphasizes that there are many "special factors" present in this particular context that should cause us to hesitate and wait for Congress to act. Because the court has not exercised that restraint in this case, I respectfully dissent.

For starters, this case is not about constitutional rights, against torture or otherwise—the defendants readily acknowledge that the type of abuse alleged by the plaintiffs would raise serious constitutional issues. Rather, this case centers on the appropriate remedies for that abuse and who must decide what those remedies will be. Confronted by allegations as horrible as those described in this case, it is understandable that the court concludes that there must be a remedy for these plaintiffs. But that concern should not enable this court to create new law. For decades, the Supreme Court has cautioned that such decisions should be left to Congress, especially where there are "special factors counseling hesitation in the absence of affirmative action by Congress." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); see also, e.g., *Schweiker v. Chilicky*, 487 U.S. 412, 421-23 (1988) (refusing a cause of action of social security complaints); *United States v. Stanley*, 483 U.S. 669, 680-81 (1987) (no cause of action by military service member when the injury arise out of activity incident to service). This longstanding reluctance creates a veritable presumption against recognizing additional implied causes of action. In line with this presumption, both circuits confronted with allegations of constitutional violations in war zones have refused to recognize a Bivens remedy. See *Ali v. Rumsfeld*, ___ F.3d ___, 2011 WL 2462851, at *6 (D.C. Cir. Jun. 21, 2011); *Arar v. Ashcroft*, 585 F.3d 559, 635 (2d Cir. 2009). The court vaults over this consensus and, for the first time ever, recognizes a Bivens cause of action for suits alleging constitutional violations by military personnel in an active war zone. I dissent because sorting out the appropriate remedies in this

complex and perilous arena is Congress's role, not the courts'.