THE PADILLA V. YOO DECISION WILL NOT PUT CHONG'S CLAIM UP IN SMOKE

There has already been a lot of very good commentary across the internets and media on the notable decision in the 9th Circuit this week in the case of *Jose Padilla v. John Yoo*. Although many, if not most, commenters seem outraged, the decision is, sadly, both predictable and expected. I also think Marcy had about the right, and appropriately snarky, take on the decision embodied in her post title "Jay Bybee's Colleagues Say OLC Lawyers Couldn't Know that Torture Was Torture in 2001-2003". Yep, that is just about right.

As to the merits, Jonathan Hafetz, in a very tight post at Balkinization, hits every note I would urge is appropriate, and does so better than I probably could hope to. Go read Jonathan. Above and beyond that, I think Steve Vladeck's analysis is spot on:

> In other words, (1) it wasn't clear from 2001-03 that CIDT "shocks the conscience"; (2) Padilla's mistreatment was not as severe as prior cases in which courts had recognized a torture claim; (3) it therefore wasn't clear whether Padilla's mistreatment was torture or CIDT; (4) it therefore wasn't clear that Padilla's mistreatment "shocks the conscience."

> Thus, the panel's approach is basically that the mistreatment here falls between conduct that prior courts (including the Ninth Circuit) had held to be torture and conduct that prior courts had held to be merely CIDT. Because Padilla's mistreatment was less severe than prior examples of torture, and more severe than prior examples of CIDT, it's just not "clear" on which side of the torture/CIDT line Padilla's mistreatment falls… Of course, the fact that A > B > C proves nothing about where B is. And under Hope v. Pelzer, the question in qualified immunity cases is not whether the plaintiff can prove that the defendant's conduct was at least as bad as something already acknowledged to be unlawful. As Justice Stevens explained, it isn't the case that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." Instead, "in the light of pre-existing law[,] the unlawfulness must be apparent."
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> Perhaps the panel would have reached the same result had they not skipped these steps. But to my mind, these are fairly significant omissions…

Wheeler, Hafetz and Vladeck are all correct about the infirmities in the 9th Circuit's version of *Padilla* (without even getting to the 4th Circuit's version of *Padilla*, contained in *Padilla/Lebron v. Rumsfeld*).

At this point, arguing over key governmental personnel accountability, or lack thereof, is pretty much a bit of Walter Mitty fantasy; I am much more interested in the way the various Bush/Cheney war on terror cases have cemented an already present trend in American jurisprudence to restrict, if not outright block, access of litigants to courts. Jon Hafetz thinks the rule of law caught a break when the 9th didn't reach

the merits and weight of "special factors" preclusion of *Bivens* liability. And, sadly, that may be about right. There are two real issues that, while perhaps trending before the national security state set in after 911, jumped to warp speed after. Access preclusion and *Bivens* narrowing.

The first area, access preclusion, is demonstrated perfectly by the insidious effects of the twin opinions in *Bell Atlantic Corporation v. Twombly* and *Ashcroft v. Iqbal*. Then House Judiciary Chairman Nadler said of the evil twin cases in a 2009 hearing:

> In the past the rule had been, as the Supreme Court stated in *Conley v. Gibson* 50 years ago, that the pleading rules exist to ''give the defendant fair notice of what the claim is and the grounds upon which it rests,'' assuming provable facts. Now the Court has required that prior to discovery, courts must somehow assess the plausibility of the claim.
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> This rule will reward any defendant who succeeds in concealing evidence of wrongdoing, whether it is government officials who vio- late people's rights, polluters who poison the drinking water, employers who engage in blatant discrimination, or anyone else who violates the law. Often evidence of wrongdoing is in the hands of the defendants, of the wrongdoers, and the facts necessary to prove a valid claim can only be ascertained through discovery.
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> The *Iqbal* decision will effectively slam shut the courthouse door on legitimate plaintiffs based on the judge's take on the plausibility of a claim rather than on the actual evidence, which has not been put into court yet, or even discovered yet. This is another wholly inventive new rule overturning 50 years

> of precedent designed to close the courthouse doors. This, combined with tightened standing rules and cramped readings of existing remedies, implement this conservative Court's apparent agenda to deny access to the courts to people victimized by corporate or government misconduct.
> ….
> Rights without remedies are no rights at all. There is an ancient maxim of the law that says there is no right without a remedy. Americans must have access to the courts to vindicate their rights, and the concerted attempt by this Supreme Court to narrow the ability of plaintiffs to go into courts to vindicate their rights is something that must be reversed.

But it is not just *Iqbal/Twombly* barring the courthouse doors for plaintiffs seeking redress against the federal government, it is the concurrent narrowing of accessibility of claim under *Bivens*, more properly known as *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. Against state level actors, there are claims available under 42 USC 1983, commonly known as Section 1983 litigation. But Section 1983 is only for claims against state actors under the color of law, and does not extend to claims against the federal government.

Since the federal government is "the sovereign" and the sovereign has immunity, the federal government cannot, generally, be sued without its permission. This is why the decision by Judge Vaughn Walker in al-Haramain that there was a cause of action available under FISA was so important; if the decision was otherwise, there would have been no other available avenue open for the plaintiff therein to sue and obtain relief. Walker ruled Congress had, indeed, granted "the permission" of the federal sovereign to be sued.

But, what if the most fundamental and sacred

Constitutional rights are violated in a heinous manner, and there is no specific provision like Judge Walker found under FISA? This is where the implied right to sue under *Bivens* comes to bear (for a variety of reasons, and some very much to do with the narrowing of the *Bivens* remedy, the al-Haramain plaintiffs would not have been able to proceed under *Bivens*). And is exactly why the disdain for, and narrowing of, *Bivens* over the years by the ever more conservative Supreme Court is so troubling – and it is exactly what you see in the various *Padilla* opinions.

In spite of the fact he disagrees somewhat on what should be done as a solution, the scope of the problem is summed up very well by Professor Steve Vladeck:

> …the consensus view has been that Iqbal is an unremarkable addition to a long line of Supreme Court decisions over the past quarter-century in which the Court has effectively limited Bivens to its facts—just another nail in a coffin long-since sealed.11 From that perspective, Iqbal is a small part of a much larger problem, the only real solution to which (other than a massive doctrinal shift) appears to be the creation of a statutory cause of action that would provide a rough equivalent to § 1983 relief13 for claims against federal officers.

Although Steve has different thoughts, I suggest that is precisely what is needed – Congress needs to specifically provide a designated avenue of access to courts so that plaintiffs, including ones in so called "national security" situations (think Jose Padilla, the AT&T/Hepting wiretapping plaintiffs and a host of others) can address their concerns and obtain redress for them. In short, accountability! It may be time to stop lamenting the failure of accountability for the wrongs occasioned by the Bush/Cheney regime and use them as leverage to an expanded path for court access and accountability in the

future. The Roberts Court will never open this area up as was initially done by Justice Brennan during the Burger Court; the Roberts Court will only continue to narrow and eliminate access. In an election year, this is something that ought to be being specifically demanded of candidates for Congress, whether incumbent or otherwise.

All of which leads to the teaser I put in the post title, the hot off the presses case of Daniel Chong. From CBS News:

> The Drug Enforcement Administration issued an apology Wednesday to a California student who was picked up during a drug raid and left in a holding cell for four days without food, water or access to a toilet.
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> DEA San Diego Acting Special Agent-In-Charge William R. Sherman said in a statement that he was troubled by the treatment of Daniel Chong and extended his “deepest apologies” to him.
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> The agency is investigating how its agents forgot about Chong.
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> Chong, 23, was never arrested, was not going to be charged with a crime and should have been released, said a law enforcement official who was briefed on the DEA case and spoke on the condition of anonymity.
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> The engineering student at the University of California, San Diego, told U-T San Diego that he drank his own urine to survive and that he bit into his glasses to break them and tried to use a shard to scratch “Sorry Mom” into his arm.

There is some evidence Chong was also handcuffed for the five days he was abandoned in the crypt of a holding cell he was in. Pretty darn close to what the US did to detainees under the “enhanced interrogation techniques”, more

commonly known to rational humans as torture. In fact, if the concrete floor of Chong's crypt of a holding cell at the DEA facility had been frozen, he would have effectively been Gul Rahman of the Salt Pit frozen infamy. Or, you know, Jose Padilla.

The similarity to the detainee torture was clearly not lost on Daniel Chong's attorney, Eugene Iredale, who, in the already filed Statutory Notice of Claim, makes reference to The Detainee Treatment Act of 2005, The Military Commissions Act of 2006, and the Conventions Against Torture.

That is going to leave a serious mark.

But could Daniel Chong be cheeched out of court access like Jose Padilla and so many others have been? Could the dreaded *Iqbal/Twombly* and *Bivens* narrowing block his action? No, probably not.

Mr. Chong Has pled under the Federal Tort Claims Act in 28 USC 2671 et. seq, as well as *Bivens*, and his claims appear to be square in the wheelhouse of the provisions. While, like Jose Padilla, Chong is a citizen, unlike Padilla, Chong's status cannot be impaired by craven designation as an enemy combatant terrorist. Recall, the 9th Circuit framed Padilla in this manner:

> As we explain below, we reach this conclusion for two reasons. First, although during Yoo's tenure at OLC the constitutional rights of convicted prisoners and persons subject to ordinary criminal process were, in many respects, clearly established, it was not "beyond debate" at that time that Padilla — who was not a convicted prisoner or criminal defendant, but a suspected terrorist designated an enemy combatant and confined to military detention by order of the President — was entitled to the same constitutional protections as an ordinary convicted prisoner or accused criminal. Id.

> Second, although it has been clearly established for decades that torture of an American citizen violates the Constitution, and we assume without deciding that Padilla's alleged treatment rose to the level of torture, that such treatment was torture was not clearly established in 2001-03.

Those concerns are simply not going to apply to Daniel Chong. It is hard to see how he will not either get an acceptable settlement, or his day in court. And, while punitive damages are not available under a straight Federal Tort Claims Act claim under 28 USC 2674, they are available under a *Bivens* Claim (see: *Carlson v. Green*, 446 U.S. 14 (1980)). In short, Mr. Chong has a heck of a claim and some decent legal leverage. For once.

For the foregoing reasons, Daniel Chong may have the most important and compelling tort case against the United States government in recent memory. He cannot be glibly chiseled out of court access like the terrorist torture plaintiffs but, yet, he otherwise stands in nearly identical damage shoes, both factually and in terms of his legal damage pleading. The government and DOJ cannot avoid this one, and it is going to set a stark contrast to exactly what they have been cravenly avoiding with "terrorist" and "national security" detainees.