

# JUDGE: PADILLA CAN'T SUE FOR TORTURE BECAUSE JUSTIFICATION FOR HIS TORTURE WAS BASED ON TORTURE

Here's the main thrust of Judge Richard Mark Gergel's decision to dismiss Jose Padilla's Bivens suit against Donald Rumsfeld and other high level Bush officials who denied him his Constitutional rights.

The Court finds that "special factors" are present in this case which counsel hesitation in creating a right of action under Bivens in the absence of express Congressional authorization. These factors include the potential impact of a Bivens claim on the Nation's military affairs, foreign affairs, intelligence, and national security and the likely burden of such litigation on the government's resources in these essential areas. Therefore, the Court grants the Defendants' Motion to Dismiss (Dkt. Entry 141) regarding all claims of Plaintiffs arising from the United States Constitution.

Basically, the "special factors" in this case mean Padilla can't sue for having been tortured and denied counsel.

Now that's not all that surprising. That's been one of the favored ways of making Bivens claims go away.

But what's particularly interesting is the implicit argument in Gergel's opinion that Abu Zubaydah's torture was one of those "special factors." Between the long passage where Gergel lays out the "special factors" as the guideline governing his decision and where he argues that

those special factors require dismissal of the case, he includes this passage:

In analyzing this substantial body of case law relating to Bivens claims, it is useful to soberly and deliberately evaluate the factual circumstances of Padilla's arrival and the then-available intelligence regarding his background and plans on behalf of Al Qaeda. Padilla arrived in Chicago nearly eight months after September 11, 2001 with reports that he was an Al Qaeda operative with a possible mission that included the eventual discharge of a "dirty bomb" in the Nation's capital. (Dkt. Entry 91-2 at 4) He also had reportedly engaged in discussions with Al Qaeda operatives about detonating explosives in hotels, gas stations and train stations. (Jd. at 5). He was also thought to possess significant knowledge regarding Al Qaeda plans, personnel and operations. (Dkt. Entry 91-23 at 8-9).

Based on the information available at the time, which reportedly included information from confidential informants previously affiliated with Al Qaeda, the President of the United States took the highly unusual step of designating Padilla, an American citizen arrested on American soil, an enemy combatant. (Dkt. Entry 91-3).

Note how the judge doesn't cite a source here for the claim that Padilla's designation "reportedly included information from confidential informants;" the source for that sentence is just Bush's designation itself, which has the section on sources redacted. But earlier he referenced Michael Mobbs' declaration which included the following footnote describing these sources.

Based on the information developed by U.S. intelligence and law enforcement

activities, it is believed that the two detained confidential sources have been involved with the Al Qaeda terrorist network. One of the sources has been involved with Al Qaeda for several years and is believed to have been involved in the terrorist activities of Al Qaeda. The other source is also believed to have been involved in planning and preparing for terrorist activities of Al Qaeda. It is believed that these confidential sources have not been completely candid about their association with Al Qaeda and their terrorist activities. Much of the information from these sources has, however, been corroborated and proven accurate and reliable. Some information provided by the sources remains uncorroborated and may be part of an effort to mislead or confuse U.S. officials. One of the sources, for example, in a subsequent interview with a U.S. law enforcement official recanted some of the information that he had provided, but most of the information has been independently corroborated by other sources. In addition, at the time of being interviewed by U.S. officials, one of the sources was being treated with various types of drugs to treat medical conditions.

Gergel doesn't say it, but we all know that one of those "confidential informants" is Abu Zubaydah and the other is probably Binyam Mohamed. Presumably, Zubaydah was the one "being treated" with drugs. And given the reference to US law enforcement, he is also presumably the one who recanted his statements about Padilla.

But more importantly, Gergel doesn't say, but we know, that both Zubaydah and Mohamed had been subjected to extreme sleep deprivation—and possibly a great deal more—by the time they made their statements tying Padilla to terrorism.

Gergel also doesn't say that other cases based on Mohamed's torture-induced testimony had been dismissed.

Gergel also doesn't acknowledge that the federal conspiracy charges of which Padilla was convicted have nothing to do with the charges laid out in these documents related to his designation as an enemy combatant; that doesn't stop Gergel from emphasizing that Padilla is a "convicted terrorist."

Nevertheless, his discussion of Padilla's designation using torture-induced evidence, appearing as it does right between his establishment of "special factors" as the guiding principle and his dismissal of the suit betrays that this torture-induced evidence is a key part of these "special factors."

That background, though, makes it clear why Gergel thought those special factors should trump Padilla's constitutional rights.

Padilla's counsel would likely seek information on intelligence methods and interrogations of other Al Qaeda operatives. All of this would likely raise numerous complicated state secret issues. A trial on the merits would be an international spectacle with Padilla, a convicted terrorist, summoning America's present and former leaders to a federal courthouse to answer his charges. This massive litigation would have been authorized not by a Congressionally established statutory cause of action, but by a court implying an action from the face of the American Constitution.<sup>3</sup>

3 Plaintiffs' counsel urged the Court at oral argument to delay consideration of the practical realities of allowing a Bivens claim to go forward under these facts and circumstances until after the motion to dismiss stage. This approach, however, would result in the Court

failing to timely consider “special factors” counseling hesitation, which include here the potential disruption and burdening of national security, intelligence and military operations arising from discovery under the Federal Rules of Civil Procedure.

You can’t have a “convicted terrorist” summon someone like Rummy to a federal courthouse to answer questions about the torture the government used to justify Padilla’s own designation as an enemy combatant so we could in turn torture him. That would be a “spectacle.”

It all makes so much sense!