THE IMPLAUSIBLE ALIEN: *IQBAL* AND THE INFLUENCE OF IMMIGRATION LAW

by
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This Article addresses the subterranean impact of immigration law on the outcome of Ashcroft v. Iqbal*, a watershed case for civil pleading standards. In a new generation of cases seeking remedies for alleged mistreatment by high-level government officials, immigration law is exercising a quiet but powerful influence. Due to* Iqbal*, that influence will have a tremendous impact on the survival of civil complaints generally. The Supreme Court's adoption of a heightened civil pleading standard results from the limits that the immigration context placed on the scope of Iqbal's claims. This Article unearths the relevance of Iqbal's immigration status through comparison with two cases that apply* Iqbal*'s holding to U.S. citizens in circumstances strikingly similar to Iqbal's, yet rule in favor of the plaintiffs. In each case, the courts seized upon U.S. citizenship as the distinction that made the difference. The Article concludes that* Iqbal *relies on a questionable subtextual link between immigration law, national security, and ethnicity and religion.*

I. INTRODUCTION

Ashcroft v. Iqbal[1] has been heralded as a radical transformation in civil pleading standards,[2] as a bellwether of the Supreme Court's terrorism

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jurisprudence,[3] as a barrier to post-September 11th claims of ethnic discrimination by Arabs and Muslims,[4] and as a paper wall protecting high-level government actors from allegations of complicity in egregious mistreatment of detainees.[5] The case may indeed be all those things. At bottom, however, *Iqbal*'s outcome turns on the plaintiff's status as an undocumented immigrant.[6] *Iqbal* is, fundamentally, an immigration-law case.

In *Iqbal,* the Supreme Court rejected allegations that former U.S. Attorney General John Ashcroft and FBI Director Robert Mueller deprived Javaid Iqbal of constitutional rights in connection with Iqbal's mistreatment when he was detained and then designated an alien "of high interest" to the September 11th investigation.[7] Iqbal alleged that he was detained as part of the massive investigation of Arab and Muslim men that the FBI and INS undertook after the events of September 11th.[8]

Dismissing Iqbal's claim that Ashcroft and Mueller purposefully designated Iqbal and others as "of high interest" because of their race, religion, or national origin, the Court held that Iqbal's allegations were

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[1] 129 S. Ct. 1937 (2009).

[2] John P. Elwood, *What Were They Thinking: The Supreme Court in Revue, October Term 2008*, 12 GREEN BAG 2D 429, 434–35 (2009); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 4–6 (2009); Andrée Sophia Blumstein, Twombly *Gets* Iqbal*-ed: An Update on the New Federal—and Tennessee?—Pleading Standard*, TENN. B.J., July 2009, at 23, 24; *see generally* Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. 1063 (2009); Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 21, 2009, at A10; Tony Mauro, *Ashcroft Ruling Adds Hurdle for Plaintiffs: U.S. Supreme Court Decision in Iqbal Could Make It Easier for Defendants to Dismiss Civil Complaints*, NAT'L L.J., May 25, 2009, at 11.

[3] Robert Barnes, *Court Says Detainee's Lawsuit Can't Proceed*, WASH. POST, May 19, 2009, at A06 (noting that the decision affects similar lawsuits filed by Arab Muslims detained after the September 11th attacks). *See also* Michael Dorf, Iqbal *and Bad Apples,* 14 LEWIS & CLARK L. REV. 217 (2010) (describing *Iqbal* as an indication of the Supreme Court's general acceptance of limited responsibility for post-September 11th abuses). For an excellent synopsis of *Iqbal* see Adam Liptak, *Justices Void Ex-Detainee's Suit Against 2 Officials*, N.Y. TIMES, May 19, 2009, at A16.

[4] Michael T. Kirkpatrick & Margaret B. Kwoka, *Title VI Disparate Impact Claims Would Not Harm National Security—A Response to Paul Taylor*, 46 HARV. J. ON LEGIS. 503, 530 (2009); Editorial, *Throwing out Mr. Iqbal's Case*, N.Y. TIMES, May 20, 2009, at A28.

[5] Editorial*, Abuse and Accountability: The Supreme Court Turns Back a Detainee's Lawsuit Against Top Justice Department Officials*, WASH. POST, May 19, 2009, at A18; Dahlia Lithwick, *The Attorney General is a* Very *Busy Man: The Supreme Court Seems to Think That Also Makes Him Immune from Litigation*, SLATE, Dec. 10, 2008, http://www.slate.com/id/2206441; Posting of John Eden to Partnership for a Secure America: Across the Aisle, *The Unfortunate Impact of* Iqbal, http://blog.psaonline.org/2009/08/11/the-unfortunate-impact-of-iqbal (Aug. 11, 2009).

[6] *Iqbal,* 129 S. Ct. at 1951.

[7] *Id.* at 1952.

[8] *Id.* at 1944; Second Amended Complaint and Jury Demand at ¶¶ 47–48, Elmaghraby v. Ashcroft, No. 04 CV 01809 (JG)(SMG) (E.D.N.Y. Oct. 20, 2005) (on file with *Lewis & Clark Law Review*). *See also* MUZZAFFER A. CHISTI ET AL., MIGRATION POLICY INST., AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11, at 7 (2003).

implausible.[9] In the course of its analysis, the Court extended a heightened pleading standard originating in an antitrust case[10] to "all civil actions."[11]

This Article addresses the subterranean impact of immigration law on the outcome of *Iqbal*. I have written elsewhere about the influence of immigration law and the plenary power doctrine on judicial approaches to cases involving U.S. citizens deemed enemy combatants.[12] In a new generation of cases seeking remedies for mistreatment allegedly directed by officials in the highest levels of government, immigration law is similarly exercising a gravitational influence.[13] Due to *Iqbal*, that influence will have a tremendous impact on the survival of civil complaints generally.

Iqbal set forth a new standard for determining the sufficiency of a civil complaint under Rule 8 of the Federal Rules of Civil Procedure. This standard raised the bar for survival of civil complaints well beyond the prior long-standing pleading standard that had permitted dismissal for failure to state a claim only when it appeared "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[14] Instead, *Iqbal* articulated a two-pronged approach requiring, first, that a court identify pleadings that, "because they are no more than conclusions, are not entitled to the assumption of truth."[15] Next, a court must assume the veracity of any well-pleaded factual allegations and then "determine whether they plausibly give rise to an entitlement to relief."[16]

It is in the Court's analysis of the plausibility of Iqbal's factual allegations that the influence of immigration law is most apparent. The presence of immigration law in the case had two consequences. First, it narrowed the scope of Iqbal's claim of unconstitutional discrimination. Because of his conviction for immigration-related crimes, Iqbal did not challenge his arrest. Instead, he challenged only his designation as a "high interest detainee" leading to his placement in a maximum security section of the Metropolitan Detention Center in New York and his treatment while confined there.[17] Second, Iqbal's questionable

[9] *Iqbal*, 129 S. Ct. at 1952.

[10] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007).

[11] *Iqbal*, 129 S. Ct. at 1953 (quoting FED. R. CIV. P. 1).

[12] Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. DAVIS L. REV. 79 (2004).

[13] *See infra* Part II.

[14] Conley v. Gibson, 355 U.S. 41, 45–46 (1957). *See* Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15 (2010) (arguing that Iqbal and Twombly together heightened pleading standards so as to render them a form of the summary judgment motion, and collecting recent scholarly articles exploring the scope of *Iqbal*'s holding).

[15] *Iqbal*, 129 S. Ct. at 1950.

[16] *Id.*

[17] *Id.* at 1943–44.

immigration status[18] and his conviction for immigration-related crimes[19] provided a platform for the Court to reject Iqbal's claims that Ashcroft and Mueller acted with discriminatory intent in implementing a policy of designating detainees like Iqbal as being of high interest.[20] This Article will unearth the impact of Iqbal's immigration status through comparison of two lower court cases with compelling parallels to *Iqbal*: *al-Kidd v. Ashcroft*[21] and *Padilla v. Yoo*.[22] These cases also allege mistreatment by former Attorney General John Ashcroft and a former high-ranking official of the Office of Legal Counsel, John Yoo, for nearly identical mistreatment after September 11th.[23] They are some of the first cases to interpret the Supreme Court's new standard in similar circumstances. However, Abdullah al-Kidd and José Padilla, the plaintiffs in these cases, are U.S. citizens. Both cases reach the opposite conclusion from that in *Iqbal*.[24] In both cases, the courts seized upon U.S. citizenship as the distinction that made the difference.[25]

Part II of this Article sets the stage for analysis of *Iqbal* through the lens of immigration law. It describes the role of the plenary power doctrine, which requires federal courts to take an intensely deferential stance toward the exercise of legislative and executive branch power in the realm of immigration law. To give context to the circumstances of Iqbal's case, this Part also describes the current criminalization of immigration law, with an emphasis on the quasi-criminal nature of immigration detention.

Part III argues that the Court's adoption of a heightened civil pleading standard is in great part the result of the limits that the immigration context placed on the scope of Iqbal's claims. This Part also critiques *Iqbal* as failing to accurately apply the pleading standard that it extends to civil actions in general. Excavating the opinion's questionable subtextual link between immigration law and national security, I critique the Court's failure to engage with a plausible explanation for Iqbal's allegations that supports the opposite outcome.

In Part IV, I compare *Iqbal* with *al-Kidd* and *Padilla*, and examine the effect of citizenship status in the three cases. More broadly, this Part critiques the corrosive influence of the plenary power doctrine when it leaks into mainstream areas of law such as civil rights and civil procedure.

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[18] Iqbal apparently did not challenge the government's assertion that he was unlawfully present in the United States. *See* Petition for Writ of Certiorari at 5, *Iqbal*, 129 S. Ct. 1937 (No. 07-827).

[19] Iqbal pled guilty to charges of fraud in relation to identification documents and conspiracy to defraud the United States. Elmaghraby v. Ashcroft, No. 04-CV-01809-JG-SMG, 2005 WL 2375202, at *1, n.1 (E.D.N.Y. Sept. 27, 2005).

[20] *See infra* Part III (analyzing *Iqbal*'s plausibility standard).

[21] 580 F.3d 949 (9th Cir. 2009).

[22] 633 F. Supp. 2d 1005 (N.D. Cal. 2009).

[23] *Al-Kidd*, 580 F.3d at 952; *Padilla*, 633 F. Supp. 2d at 1014–15.

[24] *Al-Kidd*, 580 F.3d at 977; *Padilla*, 633 F. Supp. 2d at 1034.

[25] *See infra* notes 123–52 and accompanying text.

II. THE PLENARY POWER DOCTRINE, CRIMMIGRATION, AND THE WAR ON TERROR

Precepts of immigration law channel the analysis and outcome of *Ashcroft v. Iqbal*. Immigration law, defined strictly, governs the exclusion and expulsion of noncitizens and the conditions under which noncitizens may remain in the United States.[26] The most influential of these precepts is the plenary power doctrine, which has traditionally barred most claims against federal officials alleging violations of individual constitutional rights in the enforcement of immigration laws.[27] For example, the first cases establishing the plenary power doctrine within immigration law upheld the racially-based exclusion and deportation from the United States of Chinese residents, concluding that the inherent sovereignty of the U.S. government existed apart from the Constitution, and rejecting arguments based on individual constitutional rights.[28] More recently, the Supreme Court has invoked the plenary power doctrine when deferring to federal government decisions to exclude noncitizens from the United States in the face of claims of substantive constitutional rights including the First Amendment[29] and the Equal Protection Clause.[30] The plenary power doctrine arose from the

[26] *E.g.*, De Canas v. Bica, 424 U.S. 351, 355 (1976).

[27] *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) (setting out the elements of the plenary power doctrine and excluding U.S. citizens from its reach). *See also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 5 (2002) (excavating the origins of the plenary power doctrine); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention,* 51 EMORY L.J. 1003, 1015–26 (2002) (describing the plenary power doctrine's requirement of deference to the federal government when creating "substantive criteria" to govern admission and expulsion of aliens, limited only by due process considerations).

[28] Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for a crime. It is not a banishment . . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law . . . ."); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.").

[29] *See* Galvan v. Press, 347 U.S. 522, 529–32 (1954) (upholding the deportation of a lawful permanent resident based on his membership in the Communist Party); Harisiades v. Shaughnessy, 342 U.S. 580, 584, 596 (1952) (upholding the deportation of a lawful permanent resident on the same grounds).

[30] *See* Fiallo v. Bell, 430 U.S. 787, 800 (1977) (holding that the "exclusion of the relationship between an illegitimate child and his natural father from the preferences accorded by the [Immigration and Nationality] Act to the 'child' or 'parent' of a United States citizen or lawful permanent resident" is not a violation of equal protection or due process).

notion that the federal government has inherent sovereign powers when acting in the realms of immigration, foreign policy, and national security.[31] Because the boundaries of immigration law have always been difficult to define, a penumbra of uncertainty surrounds the scope of government power over noncitizens. These issues have become especially salient in situations where the government conduct would be of questionable constitutionality when applied to U.S. citizens.[32]

I have elsewhere argued that the plenary power doctrine was originally conceived as granting a mere shard of federal omnipotence over noncitizens at the edges of the nation.[33] It has since escaped from its originally narrow confines in immigration law.[34] The plenary power doctrine has resulted in judicial deference to the political branches in areas far beyond the regulation of entry and exclusion of noncitizens, such as federal welfare statutes.[35] The doctrine has also relaxed constitutional restraints on federal power to arrest and detain noncitizens suspected of immigration violations.[36]

A related development in immigration law has also expanded the scope of government power over noncitizens: the advent of "crimmigration" law. Over the past three decades, immigration law has undergone a transformation from a primarily civil administrative scheme to one drawing heavily on substantive criminal law as grounds for exclusion and deportation, with the earmarks of a criminal enforcement scheme.[37] That transformation, however, is critically incomplete: while

[31] *Fong Yue Ting*, 149 U.S. at 711 ("The right to exclude or to expel all aliens, or any class of aliens . . . [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare . . . .").

[32] *See* Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

[33] Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1578 (2008) (explaining that when the plenary power doctrine was first articulated, it granted the federal government "a mere sliver of omnipotence" because the doctrine "would operate only at the edges of the country, wielded only by a federal sovereign that, to date, had not shown a lively interest in immigration legislation").

[34] *See* Stumpf, *supra* note 12, at 84–87.

[35] *Diaz*, 426 U.S. at 80.

[36] Demore v. Kim, 538 U.S. 510, 513 (2003) (holding that detention of lawful permanent aliens during removal proceedings without bail under the Immigration and Nationality Act is not a violation of due process); Zadvydas v. Davis, 533 U.S. 678, 701 (2001) (allowing post-removal-period detention for up to six months as a "presumptively reasonable period of detention"); United States v. Brignoni-Ponce, 422 U.S. 873, 884–85 (1975) (establishing a "reasonable suspicion" standard, not probable cause, to stop a vehicle; "reasonable suspicion" is satisfied by factors such as proximity to the border, previous experience with alien traffic in the area, recent illicit border crossings in the area, erratic driving, vehicle type, number of passengers, or Mexican-appearing passengers).

[37] Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (documenting the increase in criminal sanctions for immigration offenses); Stephen H. Legomsky, *The New Path of Immigration Law:*

the substance and enforcement norms of criminal law have been imported into immigration law, procedural criminal protections have not.[38] For example, when immigration authorities detain noncitizens in connection with exclusion or deportation, that detention is deemed a civil administrative matter, not criminal punishment,[39] and therefore the Fifth and Sixth Amendment procedural protections against loss of liberty that apply to criminal defendants are absent.[40]

Together, the expansion of the plenary power and the rise of crimmigration law has created broad federal power over the immigration-related arrest and detention of noncitizens. The unique treatment of detention that stems from those two sources had an important impact on the shape of the claims in *Ashcroft v. Iqbal* and ultimately on its outcome.[41]

III. IMMIGRATION LAW AND PLAUSIBILITY

Immigration law's influence on *Iqbal*'s outcome emerges when comparing the case to two subsequent cases raising very similar claims: *al-Kidd v. Ashcroft*[42] and *Padilla v. Yoo*.[43] Javaid Iqbal is a Pakistani Muslim

Asymmetric Incorporation of Criminal Justice Norms, 64 WASH. & LEE L. REV. 469 (2007) (describing the rise of criminal enforcement norms in immigration law without the corresponding procedural protections).

[38] Legomsky, *supra* note 37, at 511–15.

[39] *Demore*, 538 U.S. at 531. *Cf.* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR (forthcoming 2010) (draft manuscript on file with *Lewis & Clark Law Review*) (positing that immigration detention practices have come to approximate criminal incarceration, giving rise to a quasi-punitive system of "*immcarceration*").

[40] United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 155 (1923) (refusing to apply Fifth Amendment protection against self-incrimination "[s]ince the proceeding was not a criminal one"); Orehhova v. Gonzales, 417 F.3d 48, 52 (1st Cir. 2005) (explaining that there is no Sixth Amendment right to counsel in removal proceedings); United States v. Perez, 330 F.3d 97, 101 (2d Cir. 2003) ("As deportation proceedings are civil in nature, aliens in such proceedings are not protected by the Sixth Amendment right to counsel."); Vides-Vides v. INS, 783 F.2d 1463, 1469 (9th Cir. 1986) (finding that there is no Sixth Amendment right to counsel at government expense in deportation proceedings); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1895–96 &n.37 (2000) (clarifying that Fifth and Sixth Amendment rights do not apply to removal proceedings except in limited situations where "fundamental fairness" requires them); Legomsky, *supra* note 37, at 515–16 (listing the constitutional rights that have been rejected in immigration proceedings); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 293 (2008) (describing the reduced protections under immigration proceedings due to the "civil" nature of the proceedings); Stumpf, *supra* note 37, at 392–93 (noting that Fifth and Sixth Amendment rights do not apply to immigration proceedings despite the merging of the criminal and immigration models).

[41] *See infra* notes 56–59.

[42] 580 F.3d 949 (9th Cir. 2009).

[43] 633 F. Supp. 2d 1005 (N.D. Cal. 2009).

and a noncitizen. Abdullah al-Kidd and José Padilla are also Muslim, but both are native-born U.S. citizens and neither are of Arab (or Pakistan) ethnicity or origin.[44] Iqbal, al-Kidd, and Padilla each alleged that federal agents arrested them in the course of investigations into terrorist activity, detained them, and subjected each to extreme mental and physical abuse during detention.[45] Each filed a complaint claiming that federal officials at the highest level of government deprived them of their constitutional rights.[46] In each case, the government filed a motion to dismiss, arguing that the plaintiff had failed to allege facts sufficient to state a claim under Rule 8 of the Federal Rules of Civil Procedure.[47] Of the three cases, only the one brought by a noncitizen, Javaid Iqbal, was found to completely fail to state a claim against the highest ranking of the government-official defendants.[48]

My purpose in comparing these cases is not to evaluate whether *Iqbal* was decided correctly. Instead, the cases following *Iqbal* are occasions to reflect on whether Iqbal's immigration status may have meaningfully influenced the Supreme Court's analysis of his case, and on whether the absence of immigration law in subsequent cases may influence the reach of *Iqbal*'s holding.

This Part evaluates two critical ways in which immigration law may have impacted *Iqbal*. First, Iqbal's status as a noncitizen increased the likelihood of his arrest, while at the same time narrowing the scope of his claims to contest only his designation as a high-interest detainee and the resulting treatment. Second, his immigration status expanded the range of explanations that the defendants could offer for the policies they allegedly promulgated, leading to the dismissal of Iqbal's claims.

A. Immigration Law and the Scope of Constitutional Claims

According to Iqbal's complaint, on November 2, 2001, INS and FBI officers arrested him.[49] On November 5, 2001, federal officials moved

[44] Iqbal is Muslim and Pakistani, but not an Arab. His discrimination claim on the basis of Arab ethnicity is, in essence, "that officials believed, perhaps because of his appearance and his ethnicity, that he was an Arab" and acted unlawfully because of that perception. Iqbal v. Hasty, 490 F.3d 143, 148 n.2 (2007).

[45] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1943–44 (2009); *al-Kidd*, 580 F.3d at 957; *Padilla*, 633 F. Supp. 2d at 1012–13.

[46] *Iqbal*, 129 S. Ct. at 1943–44; *al-Kidd*, 580 F.3d at 957; *Padilla*, 633 F. Supp. 2d at 1016–18. Each of the three plaintiffs brought *Bivens* actions, which permit victims of constitutional rights by federal agents a private right of action for damages. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396–97 (1971).

[47] *Iqbal*, 129 S. Ct. at 1942; *al-Kidd*, 580 F.3d at 956; *Padilla*, 633 F. Supp. 2d at 1012–13. In *Iqbal*, the government relied on *Bell Atlantic Corp. v. Twombly*, which imposed a heightened fact-pleading standard in an antitrust case. *See Twombly*, 127 S. Ct. 1955, 1964–65 (2007).

[48] *Iqbal*, 129 S. Ct. at 1954.

[49] Second Amended Complaint and Jury Demand, *supra* note 8, ¶ 80.

him to the Metropolitan Detention Center in Brooklyn, New York.[50] He was housed with the general population until January 2002, when he was transferred to the Administrative Maximum Specialty Housing Unit (ADMAX SHU). He remained there for seven months.[51] He alleges that, during that time, he was subject to severe mental and physical abuse. The complaint asserts that he was

> kept in solitary confinement, not permitted to leave [his] cell[] for more than one hour each day with few exceptions, verbally and physically abused, routinely subjected to humiliating and unnecessary strip and body-cavity searches, denied access to basic medical care, denied access to legal counsel, denied adequate exercise and nutrition, and subjected to cruel and inhumane conditions of confinement.[52]

At the end of July 2002, Iqbal was transferred back to the general population in the Metropolitan Detention Center.[53]

1. Circumstances of Arrest

Iqbal's status as a noncitizen made his arrest more likely than if he had been a U.S. citizen. After the events of September 11th, the FBI and the U.S. Department of Justice undertook a large-scale investigation of the terrorist attacks.[54] The investigation swept up mainly noncitizen Muslim men of Arab or South Asian origin.[55] During the course of the investigation, then-Attorney General John Ashcroft issued instructions requiring investigators to detain any "aliens . . . who had violated the law" and charge them with appropriate violations.[56] Under this directive, investigators detained noncitizens they believed were not authorized to remain in the United States even when there was no link to the

[50] *Id.* ¶ 81.

[51] *Id.*

[52] *Id.* ¶ 82.

[53] *Id.* ¶ 81.

[54] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1943 (2009).

[55] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS, at 21 fig.2 (2003), *available at* http://www.usdoj.gov/oig/special/0306/full.pdf (providing chart summarizing the national origins of the detainees). Over one-third of those detained were Pakistani or Egyptian. The countries of origin of other detainees included: Turkey, Jordan, Yemen, India, Saudi Arabia, Morocco, Tunisia, Syria, Lebanon, Israel, Iran, Guyana, Algeria, Bangladesh, Afghanistan, United Kingdom, and France. *Id. See also* CHISTI ET AL., *supra* note 8, at 7.

[56] OFFICE OF THE INSPECTOR GEN., *supra* note 55, at 13 (summarizing Ashcroft's statement to the Office of the Inspector General (OIG) that "if, during the course of the investigation, aliens were encountered who had violated the law, they should be charged with appropriate violations, particularly if the alien had a relationship to the September 11 attacks").

September 11th attacks.[57] The existence of an immigration violation was sufficient for detention.[58] This arrest policy was expanded to include immigration grounds that had not been enforced in the past.[59]

As a result of the investigation, 762 individuals of primarily Arab and South Asian national origin were held on immigration charges.[60] Of those, 184 were identified as being "of 'high interest'" to the investigation, including Javaid Iqbal.[61]

Iqbal had lived on Long Island for ten years before his arrest, and had married and separated from a U.S. citizen.[62] FBI and immigration officers arrested him on November 2, 2001.[63] The basis for his arrest is not clear,[64] but media reports suggest that the federal agents investigated Iqbal based on a tip concerning false identification papers,[65] which are often used by undocumented immigrants.[66] The agents apparently arrested Iqbal after seeing in his apartment a copy of a *Time* magazine open to pictures of the World Trade Center towers burning, and paperwork showing that Iqbal was in downtown Manhattan on

[57] *Id.* at 14 (explaining that investigators would "arrest any alien encountered in the course of investigating a . . . lead who was found to be in the country illegally. . . . whether or not the alien was the subject of the lead").

[58] *Id. See also id.* at 75 (quoting a September 27, 2001, email from the Senior Counsel, Deputy Attorney General's Office, to David Ayers, Chief of Staff to the Attorney General, that included a "strategy for maintaining individuals in custody" and explained that the tools the Justice Department had employed to maintain custody of individuals suspected of involvement in the September 11th attacks included "criminal charges and material witness warrants for those in the United States legally and immigration charges for those" who were unlawfully present).

[59] *Id.* at 13 (reporting the understanding of Alice Fisher, Deputy Assistant Attorney General for the U.S. Department of Justice's Criminal Division, then in charge of immigration issues for the Division, that the Department was detaining aliens on immigration violations that generally had not been enforced in the past).

[60] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1943 (2009); OFFICE OF THE INSPECTOR GEN., *supra* note 55, at 20.

[61] *Iqbal*, 129 S. Ct. at 1943; OFFICE OF THE INSPECTOR GEN., *supra* note 55, at 111.

[62] Nina Bernstein, *2 Men Charge Abuse in Arrests After 9/11 Terror Attack*, N.Y. TIMES, May 3, 2004, at B1.

[63] *Id.*

[64] Although the Court's opinion states that Iqbal was arrested on fraud charges, the Second Circuit's opinion, to which the Court cites, points out that it lacks knowledge as to the reason for Iqbal's arrest. *See* Iqbal v. Hasty, 490 F.3d 143, 148 n.1 (2d Cir. 2007) (citing Elmaghraby v. Ashcroft, No. 04 CV 01809 (JG)(JA), 2005 WL 2375202, at *1 n.1 (E.D.N.Y. Sept. 27, 2005)).

[65] Bernstein, *supra* note 62. The indictment and plea agreement indicate that Iqbal may have possessed a false Social Security card and New York driver's license. *See* Superseding Indictment at ¶¶ 9–10, United States v. Iqbal, Cr. No. 01-1318 (E.D.N.Y. 2001) (on file with *Lewis & Clark Law Review*); Plea Agreement at ¶ 5, *Iqbal*, Cr. No. 01-1318 (on file with *Lewis & Clark Law Review*).

[66] *See, e.g.*, Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Criminal Law*, 32 SEATTLE U. L. REV. 651, 672 (2009) (documenting that of the 305 workers arrested in an immigration raid on the Agriprocessors, Inc., meat processing plant in Postville, Iowa, 230 accepted plea offers for using false identification documents of another person and another 30 accepted plea offers for using the social security number or card of another person).

September 11th obtaining a work permit from INS.[67] The records of Iqbal's criminal proceedings allege that on or about the same day federal agents discovered a false social security card in Iqbal's possession, which also could have led them to arrest him.[68] Thus, both the fact of his noncitizen status and the government's policy of detaining noncitizens, whether on the basis of a link to terrorism or solely on suspicion of an immigration violation, were predicates for his arrest.

2. Narrowing the Scope of Iqbal*'s Claims*

Second, immigration law and its interaction with criminal law constrained the scope of the challenge that Iqbal could bring against the federal defendants in his case. Most significantly, unlike Padilla and al-Kidd, Iqbal did not challenge his arrest.[69] A few days after his arrest, on November 5, 2001, he was charged with conspiracy to defraud the United States[70] and fraud in connection with identification documents.[71] On April 22, 2002, Iqbal pleaded guilty to the charges, receiving a sixteen-month sentence.[72] On January 15, 2003, he was deported to his native Pakistan.[73] Despite the evidence of selective enforcement of the immigration and criminal laws against Arab Muslims,[74] challenging Iqbal's arrest in the face of his apparent undocumented status and the criminal convictions would have been an uphill battle at best.

The law authorizes arrest of noncitizens in a broader range of situations than U.S. citizens face. Noncitizens are subject to the same criminal laws as U.S. citizens; government authority to arrest, however, exists in two situations that do not apply to U.S. citizens. First, violations of civil immigration law serve as the lawful basis for a federal immigration

[67] Bernstein, *supra* note 62.

[68] *See* Superseding Indictment, *supra* note 65, ¶ 10.

[69] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1943 (2009).

[70] Elmaghraby v. Ashcroft, No. 04 CV 01809 (JG)(JA), 2005 WL 2375202, at *1 n.1 (E.D.N.Y. Sept. 27, 2005) (citing 18 U.S.C. § 371 (2006) (making it a crime for two or more people to conspire to commit an offense against or defraud the United States or any agency of the United States if one or more of those people acts to effect the conspiracy)).

[71] *Id.* (citing 18 U.S.C. § 1028 (2006) (making it a crime to knowingly and without lawful authority produce, transfer, possess, use, or traffic a false identification document, an identification document belonging to someone else, or any material to create such a document)).

[72] *Id.*

[73] Iqbal v. Hasty, 490 F.3d 143, 149 (2d Cir. 2007).

[74] *See* OFFICE OF THE INSPECTOR GEN., *supra* note 55, at 16 (noting that "[m]any of the leads pursued by [federal officials] in New York City and elsewhere across the country involved aliens, many from countries with large Arab or Muslim populations"); *id.* at 21 (revealing that most detainees were of Arab and South Asian extraction); CHISTI ET AL., *supra* note 8, at 12 (finding that "[l]aw enforcement agencies selectively followed up on . . . tips for persons of Arab or Muslim extraction" and that the tips were often based on "profiling by ordinary citizens, who called government agencies about neighbors, coworkers and strangers based on their ethnicity or appearance").

officer to make an administrative arrest.[75] Federal officers may arrest noncitizens pending a decision whether to deport them.[76]

Second, some crimes can be committed by noncitizens only, and this category is increasing with the rise of crimmigration law.[77] For example, because every U.S. citizen is considered authorized to work in the United States, only noncitizens can commit the crime of using false documents to complete the employment eligibility requirements of the Immigration and Nationality Act.[78]

In sum, Iqbal's status as a noncitizen played a major role both in identifying him as a person of interest to federal agents investigating the September 11th events, and in providing the legal authority to arrest and charge him with immigration-related crimes. Moreover, the wide scope of authority that immigration law grants to federal officials, especially in the intersection with criminal law, narrowed the scope of Iqbal's claims to challenge only conduct that occurred after his detention began.

The narrowing of Iqbal's challenge to post-detention conduct alone affected the breadth of his discrimination claims against Ashcroft and Mueller. Iqbal did not claim injury based on a theory that the investigation itself unconstitutionally singled out Arabs and Muslims. Yet the investigation created the pool of 762 largely Arab and Muslim detainees from which the smaller subset of high-interest detainees was chosen.[79] Proving that Iqbal was singled out on the basis of his race, national origin, or religion became much harder when the pool from which he was singled out already consisted of detainees perceived to be of the same race, ethnicity, and religion.[80]

B. The Plausibility of the Immigration Explanation

Immigration law may have its greatest influence in the analysis of the plausibility of Iqbal's claims under Rule 8 of the Federal Rules of Civil Procedure, and the later treatment of that analysis in the lower courts. *Iqbal* established a two-pronged approach to evaluating the sufficiency of

[75] *See* Immigration and Nationality Act (INA), 8 U.S.C. § 1357(a)(2) (2006).

[76] *See id.* § 1226(a).

[77] Stumpf, *supra* note 37, at 371 (stating that by 2009, "[d]eportation became the consequence of almost any criminal conviction of a noncitizen, including legal permanent residents. Immigrants who had previously been subject only to civil immigration proceedings, including tourists and business travelers who had overstayed their visas and students working beyond allotted hours or in unauthorized employment, were newly subject to criminal sanctions in addition to removal").

[78] 18 U.S.C. § 1546(b) (2006). *See also* 18 U.S.C. § 1546(a) (defining crimes relating to the use of false immigration and employment documents).

[79] Ashcroft v. Iqbal, 129 S. Ct 1937, 1943, 1951 (2009).

[80] A discrimination claim remains well-founded in these circumstances, because the Supreme Court has recognized that actors can unlawfully discriminate against one individual on the basis of a protected characteristic while treating others of the same class in a nondiscriminatory manner. *See, e.g.,* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998) (holding that a male employee in an all-male workplace could make out a claim for employment discrimination under Title VII).

a claim under Rule 8. The first step is to distinguish allegations that "are no more than conclusions" from "well-pleaded factual allegations" that are entitled to the assumption of truth.[81] Second, assuming the veracity of the factual allegations only, the court must then determine "whether they plausibly give rise to an entitlement to relief."[82]

Applying the first part of this test, the Court winnowed out allegations it determined were conclusory.[83] It declined to assume as true any part of the allegations that Ashcroft or Mueller "knew of, condoned, and willfully and maliciously agreed to subject" Iqbal to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."[84] The Court similarly discarded the allegation that Ashcroft was the "principal architect" of the allegedly discriminatory policy, and that Mueller was "instrumental in [its] adoption, promulgation, and implementation."[85]

The Court held that two allegations contained sufficient factual support to bear the assumption of truth. The first was that the FBI, "under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11."[86] The second was the allegation that the "policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by" Ashcroft and Mueller "in discussions in the weeks after September 11, 2001."[87]

Second, the Court considered whether discrimination was a plausible explanation for those facts.[88] The Court agreed with the plaintiffs that those actions were "consistent with" discrimination.[89] It then held that the existence of more likely explanations rendered implausible the explanation that discrimination motivated the defendants. That is, rather than evaluating the plausibility of the plaintiff's explanation on its own, the Court employed a relative

[81] *Iqbal*, 129 S. Ct. at 1950.

[82] *Id.*

[83] Others have critiqued the use of this first step to weed out allegations in Iqbal's complaint that were not clearly conclusory, and more generally, the difficulty in distinguishing between conclusory allegations and those with factual support. *E.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. (forthcoming 2010), *available at* http://ssrn.com/abstract=1467799.

[84] *Iqbal*, 129 S. Ct. at 1951 (quoting First Amended Complaint and Jury Demand at ¶ 96, Elmaghraby v. Ashcroft, No. 04 CV 1809 (JG)(JA), 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) [hereinafter First Amended Complaint]).

[85] *Id.* at 1944 (quoting First Amended Complaint, *supra* note 84, ¶¶ 10–11).

[86] *Id.* at 1951 (quoting First Amended Complaint, *supra* note 84, ¶ 47).

[87] *Id.* (quoting First Amended Complaint, *supra* note 84, ¶ 69).

[88] *Id.* at 1951–52.

[89] *Id.* at 1951.

approach, measuring plausibility compared to competing reasonable explanations from the defendant.

This implausibility analysis proceeded in two parts. First, the Court assessed the possible explanations for the FBI's arrest and detention of thousands of Arab Muslim men as part of the post-September 11th investigation.[90] Rejecting the explanation that the arrests were discriminatory, the Court found more plausible an immigration-related explanation: that the defendants intended to detain "aliens who were illegally present in the United States" and who had "potential connections" to terrorists.[91] Second, having dispensed with the plausibility of discrimination as a motive for the arrests, then instating the arrestees as potential terrorists, Justice Kennedy easily dismissed as implausible a discriminatory motive for holding high-interest detainees in the more restrictive conditions of the ADMAX SHU.[92] Instead, the defendants intended to "keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity."[93]

Thus, one function of Iqbal's immigration status was to expand the range of non-discriminatory explanations for the arrest and detention policies, and place a thumb on the side of the scale for the terrorism explanation. In that way, Iqbal's immigration status directly contributed to the dismissal of his claims against Ashcroft and Mueller.

One critique of the Court's conclusion regarding the defendants' motives for the arrest and detention policy is that it is inaccurate. The Court had before it evidence that the defendants intended to arrest and detain noncitizens unlawfully present in the United States even in the absence of a link to terrorism. According to the Office of the Inspector General's report on the treatment of the Metropolitan Detention Center (MDC) detainees, cited earlier in the Court's opinion,[94] Ashcroft had directed the arrest of any noncitizens encountered during the investigation solely on the basis of immigration violations.[95] Because of the procedural posture of the motion to dismiss, however, the Court could not consider the Inspector General's report to determine whether the allegations were plausible.[96] The plausibility standard, combined with

[90] *Id.*

[91] *Id.*

[92] *Id.* at 1952.

[93] *Id.*

[94] *Id.* at 1943 (citing the OIG Report as support for the statement of facts regarding the FBI investigation and the practice of detaining suspects on immigration charges).

[95] *See* OFFICE OF THE INSPECTOR GEN., *supra* note 55, at 14 (describing Ashcroft's directive and noting that under it, investigators would "arrest any alien encountered in the course of investigating a . . . lead who was found to be in the country illegally," even when the alien was not the subject of the lead).

[96] *See* FED. R. CIV. P. 12(d) (requiring courts to convert a motion to dismiss to a motion for summary judgment when matters outside the pleadings are presented to the court).

the procedural constraints of the motion to dismiss, fostered an emphasis on the defendants' proffered explanation for the arrest while precluding the consideration of countervailing evidence.

Why does this matter? The presence of an immigration-enforcement motive for some of the arrests does not preclude the presence of another motive: discrimination on the basis of race, religion, or national origin in one or more instances. The Inspector General's finding that Ashcroft authorized arrests of Arab Muslim noncitizens solely on the basis of immigration violations, however, critically undermines the explanation that Justice Kennedy found so plausible—that the arrests were not discriminatory, but rather were pursuant to a suspicion that the arrestees were connected to terrorism. Because the arrestees included Arab Muslim men, like Iqbal, who did not have a connection to terrorism, the terrorism explanation is less plausible.

The Court's error lies also in its premise that it could consider the government's immigration law explanation in isolation. Iqbal was not arrested solely because the officers suspected him of immigration violations. He alleged that they arrested him because they identified him as Arab and Muslim and a noncitizen, and because Ashcroft and Mueller had allegedly directed them to single out noncitizens with those ethnic characteristics and religious beliefs.[97] Iqbal's explanation is that ethnicity, religion, and national origin were factors used to choose among the suspected immigration violators. In other words, Iqbal's ethnicity and his religion were inextricably bound up with the decision to arrest and later single him out for transfer to the ADMAX SHU.

In that light, there were three explanations for the Court to consider: first, that Ashcroft and Mueller were motivated only by an interest in immigration enforcement and links to terrorism (the one the Court accepted); second, that they were instead motivated by discrimination and not immigration enforcement nor links to terrorism (the explanation the Court rejected); and third, that they were motivated by stereotyping: a perception that individuals with three characteristics—Muslim religion, Arab ethnicity, and alienage—were likely to be potential terrorists. This third explanation resists de-coupling ethnicity and religion from citizenship status. It takes seriously the potential that high-level officials may, in their efforts to address terrorism, act illegitimately on the basis of myths and stereotypes about Arab Muslim noncitizens.[98] If

[97] Second Amended Complaint and Jury Demand, *supra* note 8, ¶ 52, (alleging that within the New York area, "all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as 'of interest' to the post-September-11th investigation").

[98] Tung Yin, *"I Do Not Think [Implausible] Means What You Think It Means":* Iqbal v. Ashcroft *and Judicial Vouching for Government Officials,* 14 LEWIS & CLARK L. REV. 203, 215 (2010) ("[I]t in fact is not implausible to think that the government might have decided in the dark days after September 11th, with a majority of Americans in support of racial profiling, that it was necessary to focus on Arabs and Muslims . . . .").

the basis for choosing among suspected immigration violators was ethnicity, religion, or national origin, or some combination of those characteristics, discrimination has occurred.[99]

The notion that government enforcement of immigration law may readily act in concert with or as a proxy for impermissible discrimination is not new.[100] The question, then, is why the Court failed to seriously consider the third explanation. Even a theory that the Court has become hostile to discrimination claims cannot explain why the Court so readily turned to immigration enforcement as the most plausible explanation. Immigration violations appear to be the only grounds, other than links to terrorism, that Ashcroft approved for arresting individuals in the course of the investigation, despite the potential that federal investigators might encounter evidence of other criminal activities within the Justice Department's law enforcement mandate.[101]

One answer lies in the habit of deference that the plenary power doctrine instills in the courts when immigration enforcement concerns are present. The plenary power doctrine imbues the federal government with broad discretion over the exclusion and removal of noncitizens based on a theory that immigration, foreign policy, and national security are intertwined.[102] Executive branch actors have more room to exercise authority over noncitizens when enforcing immigration law because of the perceived link between immigration law and foreign affairs, including national security.[103] By relying on national security and foreign affairs considerations to expand the executive's discretion over noncitizens, the doctrine forefronts the notion that noncitizens, especially those present without sovereign authorization, are inherently threatening. Iqbal's status as a noncitizen, especially an Arab-seeming

[99] Whether there may be a lawful justification for using Iqbal's ethnicity, religion, or national origin as a basis for his arrest, such as a tip to law enforcement identifying factors in addition to those characteristics, is a question of fact and therefore inappropriate for resolution on a motion to dismiss for failure to state a claim.

[100] *E.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 884–86 (1975) (holding that "broad congressional power over immigration" does not justify border patrol officers making a discriminatory Fourth Amendment stop on the basis of Mexican ancestry alone).

[101] *See* OFFICE OF THE INSPECTOR GEN., *supra* note 55, at 14. In addition to enforcing the immigration laws, the Department of Justice was also tasked with enforcing federal criminal statutes, including laws governing weapons and drugs. *See* U.S. Dep't of Justice, About: Department of Justice Agencies: Organization Chart View, http://www.usdoj.gov/agencies/index_org.html (providing a graphical overview of the Department of Justice and its agencies responsible for enforcing federal statutes).

[102] *See supra* note 31 and accompanying text.

[103] S*ee* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 262–63 (1985) (describing jurisprudence that draws a close connection between foreign policy and immigration law and critiquing judicial deference to the political branches based on foreign policy concerns).

Muslim noncitizen, may have evoked in the Court a subtextual deference to government officials that was rooted in the plenary power doctrine.

If so, that use of the plenary power doctrine is deeply troubling. Employing deference to the government to dismiss Iqbal's civil discrimination claims would be, at best, a *sub silentio* expansion of a powerful rights-diminishing doctrine, and at worst, a plain misapplication of the law. The extraordinary nature of the plenary power doctrine, with its capacity to render nearly impotent the judicial power to review the constitutionality of government action, has significant limits. At least as a formal matter, the plenary power doctrine requires deference to the federal political branches only when the case squarely invokes immigration law, national security, or foreign policy.[104] Even within those confines, the Court has resisted recent government attempts to forestall judicial review of deprivations of liberty, including for noncitizens outside of the United States such as the detainees at Guantanamo Bay.[105] In the ordinary course, beyond the limited context of exclusion or removal from the country, the plenary power doctrine has no effect on the ability of a noncitizen within the United States to raise civil claims against government officials like those that Iqbal brought.[106] Most troubling, though consistent with the Court's lack of discussion of judicial deference, is the possibility that the Court's dismissiveness arose from something akin to a habit: a reflexive reaction of deference to executive branch officials in the presence of immigration and national security issues.

IV. THE AFTERMATH: *PADILLA*, *AL-KIDD*, AND THE SIGNIFICANCE OF CITIZENSHIP

The full extent of the influence of immigration law on *Iqbal* becomes apparent in retrospect, when viewed through the lens of two subsequent cases with similar facts. This Part teases out the difference that citizenship status makes in determining plausibility.

One month after the U.S. Supreme Court reversed the Second Circuit and dismissed Iqbal's claims against Attorney General Ashcroft and FBI Director Mueller, a federal district court in California declined to dismiss José Padilla's claims against John Yoo, former Deputy Attorney

[104] Stumpf, *supra* note 12, at 83 (noting that the plenary power doctrine "calls for extraordinary judicial deference to the executive and legislative branches and diminished constitutional protections when those branches act within the spheres of immigration, national security, or foreign policy").

[105] *See* Boumediene v. Bush, 128 S. Ct. 2229, 2253 (2007) (rejecting arguments that the political question doctrine prevented the judiciary from considering Guantanamo detainees' habeas petitions).

[106] Rasul v. Bush, 542 U.S. 466, 484 (2004) (stating that the "courts of the United States have traditionally been open to nonresident aliens"); Disconto Gesellschaft v. Umbreit, 208 U.S. 570, 578 (1908) (declaring that "[a]lien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights").

General of the Office of Legal Counsel.[107] According to the complaint, Yoo was the senior administration official in charge of authoring policies governing the designation of enemy combatants and authorizing the use of unlawfully harsh interrogation tactics and pressure techniques against individuals so designated.[108]

In September 2009, three months later, the Ninth Circuit concluded that Abdullah al-Kidd had stated a *Bivens* claim against John Ashcroft.[109] Al-Kidd alleged that the Attorney General had promulgated policies unlawfully permitting the use of the federal material witness statute to arrest and detain him, and that he suffered unduly harsh conditions of confinement as a result.[110]

There are a number of ways to explain the disparate outcomes of the three motions to dismiss. Each complaint alleges different unconstitutional conduct by the federal defendants: Iqbal challenged as discriminatory his designation as a high-interest detainee and the harsh conditions resulting from that designation;[111] Padilla challenged his designation as an enemy combatant and the resulting arrest and harsh treatment;[112] and al-Kidd challenged his designation as a material witness and the resulting arrest and harsh treatment.[113] Iqbal did not challenge his arrest, while both Padilla and al-Kidd did.[114] Finally, the motion to dismiss in *Iqbal* reached the Supreme Court, while lower courts decided *Padilla* and *al-Kidd*.[115] Nevertheless, themes of citizenship, membership, and belonging run powerfully through the cases in ways that coincide with their outcomes.

In *Padilla*, José Padilla and his mother brought a *Bivens* action against John Yoo, formerly a Deputy Attorney General in the Office of Legal Counsel.[116] Padilla was arrested in Chicago in connection with a grand jury investigation into the events of September 11th,[117] on suspicion that he met with senior al Qaeda officials and discussed plans to detonate a radioactive bomb in the United States.[118]

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[107] Padilla v. Yoo, 633 F. Supp. 2d 1005, 1030 (N.D. Cal. 2009).

[108] *Id.* at 1014–15.

[109] Al-Kidd v. Ashcroft, 580 F.3d 949, 964–65, 976, (9th Cir. 2009).

[110] *Id.* at 957.

[111] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1944 (2009).

[112] *Padilla*, 633 F. Supp. 2d at 1014–18 (summarizing the plaintiff's allegations).

[113] *Al-Kidd*, 580 F.3d at 957.

[114] *Iqbal*, 129 S. Ct. at 1943; *al-Kidd*, 580 F.3d at 957; Padilla v. Hanft, 423 F.3d 386, 390 (4th Cir. 2005).

[115] The District Court for the Northern District of California decided *Padilla v. Yoo*, 633 F. Supp. 2d 1005; the Ninth Circuit decided *al-Kidd*, 580 F.3d 949.

[116] *Padilla*, 633 F. Supp. 2d at 1016–18.

[117] *Id.* at 1012–13; Rumsfeld v. Padilla, 542 U.S. 426, 430–31 (2004).

[118] Padilla v. Rumsfeld, 352 F.3d 695, 700–01 (2d Cir. 2003) (citing declaration of Michael H. Mobbs, special advisor to Under Secretary of Defense for Policy), *rev'd*, 542 U.S. 426 (2004). *Padilla v. Yoo*, 633 F. Supp. 2d 1005, was a new chapter in Padilla's long battle to obtain judicial review of his military detention, which ended in the government's decision to transfer him to civilian detention for criminal charges

Padilla claimed that in 2001, Yoo was the senior administration official responsible for crafting policies governing how individuals were designated as enemy combatants and was personally involved in the decision to designate Padilla as an enemy combatant.[119] Yoo's actions allegedly led to Padilla's detention without charge for three years and eight months in a military brig.[120] Padilla alleged that Yoo unconstitutionally authorized the use of overly harsh interrogation tactics against enemy combatants, leading to Padilla's subjection to abuses that included extreme isolation, including isolation from both counsel and from his family; interrogation under threat of torture, deportation, and death; placement in solitary confinement; sensory deprivation; severe physical pain; sleep deprivation; and extreme sensory disruption.[121] Yoo moved to dismiss the claims, arguing that they failed to measure up to the pleading standard articulated in *Twombly* and *Iqbal*.[122]

Padilla is a U.S. citizen.[123] Citizenship status played a role in the outcome of the motion to dismiss in two ways. First, in determining whether Padilla had a cause of action under *Bivens* for the injuries he alleged, the district court distinguished the detention and interrogation of noncitizens detained abroad.[124] The court relied explicitly on Padilla's citizenship, holding that a *Bivens* remedy was available for "an American citizen residing in America."[125] Rejecting Yoo's argument that the political branches had plenary power over issues relating to foreign affairs and foreign relations, the court reasoned that "when it comes to the rights of the Nation's citizens," courts may review citizen's claims when the "allegations concern the possible constitutional trespass on a detained individual citizen's liberties," even when the claims arise in wartime.[126] Foreign policy concerns do not bar judicial review when the case involves claims about "American officials' treatment of . . . . an American citizen on American soil."[127] Tellingly, the opinion sharply distinguishes cases in which similar claims by noncitizens were barred to avoid judicial intrusion into the realm of foreign policy.[128]

distinct from and less serious than the reasons for his original detention. *See* Padilla v. Hanft, 432 F.3d 582, 584 (4th Cir. 2005).

[119] *Padilla v. Yoo*, 633 F. Supp. 2d. at 1014.

[120] *Id.* at 1013.

[121] *Id.* at 1013–15.

[122] *Id.* at 1011, 1018.

[123] *Id.* at 1012.

[124] *Id.* at 1024–25.

[125] *Id.* at 1025.

[126] *Id.* at 1027–28. The court distinguished claims challenging the detention of U.S. citizens when needed to remove them from the battlefield, as well as claims that implicate core strategic war-making powers. *Id.*

[127] *Id.* at 1030.

[128] *See id.* at 1029 (distinguishing Rasul v. Myers, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (relying on the special needs of foreign affairs to bar damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad); Arar v. Ashcroft, 532 F.3d 157, 177–78 (2d Cir. 2008) (barring claims that U.S. officials rendered a Canadian citizen to Syria

Three months after *Padilla*, the Ninth Circuit permitted Abdullah al-Kidd's *Bivens* claim to proceed against John Ashcroft, denying Ashcroft's motion to dismiss based on *Iqbal*.[129] Al-Kidd alleged that the Attorney General had promulgated policies unlawfully authorizing use of the federal material witness statute to arrest and detain al-Kidd in connection with a criminal case against a Muslim man who was alleged to have links with terrorism.[130] Like Padilla, al-Kidd is a native-born U.S. citizen.[131] Like Iqbal and Padilla, al-Kidd alleges that he was detained in a high-security facility and was subjected to abuses and deprivations during detention and for a period of months afterward.[132] Like Padilla, but unlike Iqbal, the court concludes that al-Kidd stated a claim. The Ninth Circuit relied heavily on al-Kidd's citizenship status in rejecting Ashcroft's motion to dismiss.

Like Iqbal, al-Kidd claimed that Ashcroft promulgated an unconstitutional policy that resulted in grave abuses.[133] He alleged that Ashcroft was responsible for policies or practices under which federal agents used material witness warrants without sufficient evidence and with the unconstitutional purpose of investigating or preemptively detaining him.[134] He also alleged that the harsh conditions of his confinement resulted directly from those policies or practices.[135]

Al-Kidd's U.S. citizenship played a major role in shaping his claims and influencing the outcome. In contrast to the effect of immigration and criminal law in legitimizing Iqbal's arrest and thereby limiting the scope of Iqbal's claims, al-Kidd's U.S. citizenship precluded the government from detaining him on immigration-related charges.

where he was tortured; litigation would delve too deeply into foreign affairs); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208–09 (D.C. Cir. 1985) (barring Nicaraguans' claims against federal officials arising out of the United States' actions in Nicaragua in supporting forces bearing arms against the Nicaraguan government)). Like Padilla and Iqbal, Maher Arar was detained in the United States. *Arar*, 532 F.3d at 165.

[129] Al-Kidd v. Ashcroft, 580 F.3d 949, 952 (9th Cir. 2009).

[130] *Id.* at 952–53. The affidavit asserted that Sami Omar al-Hussayen was involved with a Muslim organization in the United States with the "purpose of *Da'wa* (proselytizing), which included the website dissemination of radical Islamic ideology the purpose of which was indoctrination, recruitment of members, and the instigation of acts of violence and terrorism." *Id.* at 952 n.3.

[131] *Id.* at 951.

[132] *Id.* at 953. Al-Kidd alleges that he was "detained for an aggregate of sixteen days at the Alexandria Detention Center in Virginia, the Oklahoma Federal Transfer Center, and the Ada County, Idaho, Jail," was "strip searched on multiple occasions and confined in the high-security unit of each facility . . . . was allowed out of his cell only one to two hours each day, and his cell was kept lit twenty-four hours a day, unlike other cells in the high-security wing." *Id.* After his release, he was required to "live with his wife at his in-laws' home in Nevada, limit his travel to Nevada and three other states, report regularly to a probation officer and consent to home visits throughout the period of supervision, and surrender his passport." *Id.*

[133] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1942 (2009); *al-Kidd*, 580 F.3d at 957.

[134] *Al-Kidd*, 580 F.3d at 957.

[135] *Id.*

Instead, the unlawful use of the material witness warrant to effect al-Kidd's arrest and detention was the basis for al-Kidd's claim and the one which survived the motion to dismiss.[136]

Al-Kidd presents relatively straightforward questions of statutory interpretation and prosecutorial immunity, with the added complexity of applying the *Iqbal* pleading standard. Al-Kidd's claims do not raise immigration law issues and there is nothing in the material witness statute or his Fifth Amendment conditions-of-confinement claims that draw distinctions based on citizenship status.[137] Al-Kidd's citizenship, however, permeates the case.

Citizenship bookends the legal analysis in the case. Most of the facts that Judge Smith culls from the record to present to the reader do not figure prominently in the actual legal analysis of the motion to dismiss. Al-Kidd's citizenship introduces the case in the first line of the opinion: the case is about "a United States citizen and a married man with two children" who was arrested in the United States "at a Dulles International Airport ticket counter."[138] The statement of facts begins by portraying al-Kidd as "born Lavoni T. Kidd in Wichita, Kansas."[139] Before revealing al-Kidd's conversion to Islam, the opinion highlights his success in college football at the University of Idaho, and drops a footnote clarifying that al-Kidd is "African-American and not of Arab descent."[140]

Al-Kidd's citizenship arises again in the statement of facts when the court describes the affidavit of an FBI agent submitted in support of the request for the material witness warrant.[141] After pointing out several inaccuracies and innuendoes in the affidavit, the court noted that it had also omitted "the facts that al-Kidd was a U.S. resident and citizen; [and] that his parents, wife, and two children were likewise U.S. residents and citizens."[142] U.S. citizenship comes into play in the legal analysis itself, though not as an explicit basis for the court's conclusion. Instead, it is more subtly woven in as a counterpoint to immigration status. The

[136] *Id.* at 977.

[137] *See id.* at 957. The federal material witness statute provides: "If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure." 18 U.S.C. § 3144 (2006).

[138] *Al-Kidd*, 580 F.3d at 951.

[139] *Id.* at 952.

[140] *Id.* at 952 n.2. The footnote relates to the statement that the FBI investigated al-Kidd and his wife "as part of a broad anti-terrorism investigation allegedly aimed at Arab and Muslim men." *Id.* at 952.

[141] *Id.* at 952–53.

[142] *Id.* at 953.

opinion characterizes the Fourth Amendment as a protection for "citizen's privacy,"[143] and notes that immigration authorities made the vast majority of material witness arrests.[144]

Al-Kidd ends with what Judge Bea in dissent describes as a "measure of bristling righteousness" with regard to al-Kidd's U.S. citizenship.[145] Summoning the rhetorical force of "the experience of the American colonists with the abuses of the British Crown," the majority declares: "We are confident that . . . the Framers of our Constitution would have disapproved of the arrest, detention, and harsh confinement of a United States citizen as a 'material witness' under the circumstances."[146] Excoriating the idea that "the government has the power to arrest and detain or restrict American citizens for months on end,"[147] the court raises the concern that exercising such power "against a significant number of its citizens" may give reason "for disfavored minorities (whoever they may be from time to time) to fear the application of such arbitrary power to them."[148]

Why does the court go to such pains to insert U.S. citizenship into the case when it has no explicit application to the statutory or constitutional analysis? The significance of citizenship in this case is underlined by its absence in the discussion of the law. In a case with national security implications, allegiance to the nation becomes a subtext. The appellate court leans on the omission from the material witness affidavit of al-Kidd's U.S. citizenship because, presumably, citizenship provides a countervailing factor in determining the propriety of issuing that warrant. Citizenship as a formal matter flags the individual as presumptively loyal, as entitled to the full panoply of constitutional rights accorded members of the national community.[149]

The court's treatment of citizenship, however, delves deeper, reaching beyond the formalist fact of al-Kidd's citizenship to evaluate its quality. The majority depicts the nature of al-Kidd's citizenship as quite robust: native-born, a player in American institutions such as American college football, a product of U.S. citizens, and ensconced in a U.S. citizen family of his own creation.[150] This thicker form of citizenship is, perhaps, a much more compelling proxy for allegiance, a signal that greater scrutiny of government action is called for when government action questions such a citizen's loyalty.

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[143] *Id.* at 971 (quoting Dunaway v. New York, 442 U.S. 200, 213 (1979) (stating that "[t]he central importance of the probable-cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion")).

[144] *Id.* at 966 n.16 (noting that in 2003, 92.3% of material witness arrests were made by immigration authorities).

[145] *Id.* at 1000 n.21.

[146] *Id.* at 981.

[147] *Id.*

[148] *Id.* at 980–81.

[149] *See* Stumpf, *supra* note 12, at 87; Cleveland, *supra* note 27, at 20–21.

[150] *Al-Kidd*, 580 F.3d at 951–52.

In the background is *Iqbal*. While the holding of *al-Kidd* toes the letter of *Iqbal*'s holding by dismissing the parallel challenge to conditions of confinement,[151] it allows the material witness claim to proceed against the same high-level government official who was a defendant in *Iqbal*, regarding claims that arise out of the same events. Although the Ninth Circuit does not rely explicitly on citizenship to distinguish the two cases, the distinction is palpably there. The depiction of al-Kidd as a home-grown, U.S.-educated member of a U.S. family with the formal legal status of a U.S. citizen stands in stark contrast to the unlawfully-present alien from Pakistan who is convicted of immigration-related crimes.[152]

The focus on citizenship status in these cases engenders a false and troubling dichotomy between the survival of civil claims of noncitizens versus those of citizens. Citizenship seems to play a role in the court's analysis even when, as a formal matter, citizenship is not relevant to the substance of the claim. If the courts are using citizenship as a proxy for allegiance, and placing a thumb on the side of plausibility when the claims in some way forefront citizenship status, the effect is an unjustifiable devaluation of the legal claims of noncitizens.

V. CONCLUSION

The contrast that *al-Kidd* and *Padilla* make with *Iqbal* reveals that *Iqbal* is, at bottom, an opinion heavily influenced by its immigration law context. Iqbal's immigration status affected the likelihood of his arrest, the criminal charges he pleaded guilty to, the scope of his claims, and the outcome of his case. Immigration law has played a significant role in re-calibrating the pleading standard for civil cases across the board.

There are two lessons to take from *Iqbal* and the citizen cases. The first is an irony: *Iqbal* seems poised to heighten pleading barriers for civil cases across the board. Those cases most factually akin to *Iqbal* may have a greater chance of succeeding, however, if they involve a U.S. citizen. While *Iqbal* announced a transformation in pleading standards for all civil cases, *Padilla* and *al-Kidd* suggest that its influence may be most limited in

[151] *Id.* at 979.

[152] This distinction becomes more marked in light of *Arar v. Ashcroft*, in which the Second Circuit applied *Iqbal* to dismiss as insufficiently pleaded Maher Arar's claim of unconstitutional conditions of confinement and denial of access to courts. Arar v. Ashcroft, 585 F.3d 559, 590 (2d Cir. 2008). Arar, a dual citizen of Canada and Syria, alleged that he was wrongfully arrested while changing planes in the United States, mistreated while detained there, and then rendered to Syria where he was interrogated under torture. *Id.* at 563. Although discussion of citizenship status does not appear in the sufficiency analysis, the question of whether *Arar* was an "immigration case" is a point of contention between the majority and the dissenters. *Id.* at 570 (majority opinion noting that "this is not a typical immigration case"); *id.* at 582 (Sack, J., dissenting) (stating that "[w]e would prefer that the Court concede that this is not an immigration case at all—it is about the alleged unconstitutional treatment of an alien suspected of terrorism").

cases with the most similar claims: those involving allegations of mistreatment by high-level officials, but brought by U.S. citizen plaintiffs.

The second is that scholars, practitioners, and judges should pay close attention to cases raising issues seemingly outside of immigration law when the facts of the case implicate immigration status. At stake is the fragility of the commitment that the courts of the United States be open to claimants regardless of citizenship status, ethnicity, religious belief, or national origin. On a larger scale, *Iqbal* illustrates how the background presence of immigration law, national security, and ethnicity can trigger judicial skittishness about review of government action that results in significant change to mainstream areas of law.