

Supreme Court clears Bush officials for illegal detention of Muslims

By Alan Gilman
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The US Supreme Court ruled Monday in *Ziglar v. Abbasi* that top Bush Administration officials cannot be held personally liable for the unlawful detention and abuse suffered by Moslem immigrants following the 9/11 attacks.

This case began as a federal class action in 2002 filed by immigrants, most of whom were Muslim, over policies and practices that swept hundreds of people into detention centers on immigration violations in the weeks after the 9/11 attack. Most were held in small isolation cells for up to 23 hours at a stretch, subjected to beatings, humiliating searches and other abuses. All were later deported due to their immigration status.

The defendants included former Attorney General John Ashcroft and former FBI Director Robert Mueller, who is now serving as special counsel to investigate alleged Russian interference in the US presidential election.

The government appealed the denial by the trial court to dismiss the claims against Ashcroft and Mueller on the grounds that government officials cannot be held personally liable for actions performed in their official capacity.

Rachel Meeropol, one of the lead lawyers for the plaintiffs (and the granddaughter of Julius and Ethel Rosenberg), said, “No one is above the law. To suggest that the most powerful people in our nation should escape liability when they violate clearly established law defies the most fundamental principle of our legal system.”

A divided three-judge panel of the United States Court of Appeals for the Second Circuit, in New York, ruled in 2015 that this suit could proceed against these top government officials.

The Obama administration subsequently appealed this ruling to the US Supreme Court. In its petition

seeking Supreme Court review, the Obama Justice Department urged the justices to put an end to the litigation, urging that the nation’s highest-ranking law enforcement officials should not be liable “for the allegedly improper ways in which their undisputedly constitutional policies were being implemented by lower-level officials during an unprecedented national security crisis.”

In its 4-2 ruling the Supreme Court overturned the lower court’s decision, assuring that high-ranking government officials will be shielded from any personal liability for damages suffered by victims of federal violations of constitutional rights.

Only six justices heard the case. Justices Sonia Sotomayor and Elena Kagan recused themselves because they were involved in the case before they joined the Supreme Court, and newly appointed Justice Neil Gorsuch was not a member of the Court when the case was previously argued.

On behalf of the majority, Justice Anthony Kennedy concluded that Congress had the authority to decide whether suits against federal officials for money should be permitted, not the courts.

Kennedy wrote, “Allowing a damages suit in this context, or in a like context in other circumstances, would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch. The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy.”

Kennedy went on to acknowledge, “If the facts alleged in the complaint are true, then what happened to respondents in the days following September 11 was tragic. Nothing in this opinion should be read to condone the treatment to which they contend they were subjected.”

Justice Stephen Breyer who took the unusual step of reading his dissent from the bench, was joined by Justice Ruth Bader Ginsburg. Breyer would have allowed the plaintiffs' claims to go forward, and he noted the plaintiffs were "shackled," "slammed against walls" and "verbally abused."

"History tells us of far too many instances where the executive or legislative branch took action during time of war that on later examination, turned out unnecessarily and unreasonably to have deprived American citizens of basic constitutional rights," he said.

One of the many "instances" that Breyer was alluding to was the notorious Supreme Court case of *Korematsu v. United States* (1944), in which the Supreme Court infamously declared Japanese internment camps were constitutional on the grounds of "military urgency."

The late Justice Antonin Scalia, who Justice Gorsuch has replaced, said in 2014 during a speech at the University of Hawaii, "Well of course *Korematsu* was wrong and I think we have repudiated it in a later case. But you are kidding yourself if you think the same thing will not happen again."

Scalia invoked the Latin expression, "Inter arma enim silent leges" (roughly, in times of war the law is silent).

"That's what was going on—the panic about the war and the invasion of the Pacific and whatnot. That's what happens. It was wrong, but I would not be surprised to see it happen again, in time of war. It's no justification, but it is the reality," he said.

The "War on Terror," and the imminent threats of even greater wars, is the reality of today and underlies the legal apologetics for this latest assault on democratic rights by the Supreme Court as it does its part in laying the foundations for a police state.

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