

Mueller, Ashcroft Win Supreme Court Ruling That Blocks Sept. 11 Claims



FBI director Robert Mueller listens to comments and questions from the Senate Judiciary Committee during a hearing on FBI Oversight. December 6, 2006. Photo by Diego M. Radzinski/LEGAL TIMES.

The U.S. Supreme Court on Monday blocked a lawsuit from moving forward against former George W. Bush administration U.S. Attorney General John Ashcroft and former FBI director Robert Mueller III over claims they crafted and executed unlawful detention policies in the aftermath of the September 11, 2001, terror attacks.

Eight undocumented men, part of a group of more than 700 immigrants who were arrested and detained under a “hold-until-cleared” policy, alleged they were rounded up and imprisoned—based only on their race or religion—for months. One of the men, Ahmer Abbasi, said in the suit he spent nearly 11 months in jail before being deported to Pakistan.

The Supreme Court’s 4-2 decision in the cases of Ziglar v. Abbasi, Ashcroft v. Abbasi and Hasty v. Abbasi overturned a ruling by the U.S. Court of Appeals for the Second Circuit. Only six justices heard the case. The late Justice Antonin Scalia’s seat was vacant at the time, and justices Sonia Sotomayor and Elena Kagan sat out the case. Kagan worked on the case when she was U.S. solicitor general, and Sotomayor sat on the U.S. Court of Appeals for the Second Circuit in an earlier phase of the litigation.

Justice Anthony Kennedy delivered the majority ruling for the court Monday. Justice Stephen Breyer wrote a dissent that was joined by Justice Ruth Bader Ginsburg.

In his majority opinion, Kennedy wrote that Congress had not provided a damages remedy for the circumstances the lawsuit raised. “In any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant; and here that silence is telling,” Kennedy wrote. He added: “This silence is notable because it is likely that high-level policies will attract the attention of Congress. Thus, when Congress fails to provide a damages remedy in circumstances like these, it is much more difficult to believe that ‘congressional inaction’ was ‘inadvertent.’”

The majority singled out one particular claim for different treatment in the decision: the prisoner abuse claim against Warden Dennis Hasty of the Metropolitan Detention Center in Brooklyn. The detained men claimed that Hasty violated the Fifth Amendment by allowing prison guards to abuse them.

Kennedy said the Second Circuit, in allowing the claim to go forward, failed to perform a “special factors” analysis and analyzed whether alternative remedies were available to the men. The majority vacated the appellate court’s judgment on this claim and remanded it for that analysis.

Breyer Reads Dissent from the Bench

Breyer read a lengthy summary of his and Ginsburg’s dissent—an indication of how strongly the two felt about the majority decision. He said they “most strongly disagreed” with the majority’s view “that the post 9/11 circumstance—the national security emergency—does, or might well constitute, a ‘special factor’ precluding a damages remedy.”

He noted that in time of war or a national security emergency, this type of damages action may be particularly needed. Given the safeguards that would ensure that the allegations raised here are not threadbare and that qualified immunity still serves as a defense, Breyer said, “why abolish the constitutional tort action itself? If you are cold, put on a sweater, perhaps an overcoat, and maybe even turn up the heat. But don’t set fire to the house.”

Rachel Meeropol of the Center for Constitutional Rights said Monday that the Supreme Court’s decision “allows for high-level officials to violate the Constitution without fear of personal accountability—a dangerous message in this time of rampant state-sponsored discrimination against Muslim and immigrant communities.”

The eight men sought a **so-called Bivens remedy, a civil rights action named after the 1971 Supreme Court decision in Bivens v. Six Unknown Named Agents.** A divided Second Circuit allowed the Sept. 11 suit to go forward despite the government’s argument that national security concerns motivated the officials’ actions.

“The suffering endured by those who were imprisoned merely because they were caught up in the hysteria of the days immediately following 9/11 is not without a remedy,” the appellate court wrote.

At high court arguments in January, several justices appeared skeptical of that remedy. Justice Anthony Kennedy said the men’s lawyers were asking the court to create **a new**

Bivens cause of action” and he noted how “very careful” the court has been to not extend Bivens.

Chief Justice John Roberts Jr. said the Bush officials were implementing a **national security policy in the wake of the terror attacks**. “You may disagree with that approach, but what concerns me is that this is a way **to challenge national security policy** through a damages action,” Roberts told Rachel Meeropol of the Center for Constitutional Rights, who argued for the immigrants. “I understand the argument there were constitutional violations, but you are asking the court to adopt a remedy that Congress has not chosen.”

Representing the government, then-Obama acting solicitor general Ian Gershengorn urged the court to avoid the Bivens issue and to find that the former officials were entitled to qualified immunity because they did not violate clearly established law.

The high court case stemmed from a lawsuit filed in 2002 by the Center for Constitutional Rights. It was the third time the justices have reviewed suits against Ashcroft and other officials arising from the government’s actions after the terror attacks.