
Top Bush Officials Unlikely to Face Personal Liability for 9/11 Detentions

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The Supreme Court has already shown its skepticism of the Bush administration's war-on-terror policies through a series of rulings vindicating the rights of Guantanamo detainees and "enemy combatants."

On Wednesday, another aspect of the administration's policies drew criticism from at least some justices: the roundup of Arab-Americans and Muslims that the government said had some terrorist connection, in the immediate aftermath of the Sept. 11, 2001, attacks. But the Court seemed unlikely to act on that skepticism and expose top government officials to personal liability for their role in ordering and administering the roundup.

Pakistani citizen Javaid Iqbal, one of 184 "high-interest" suspects taken in, claims the policy was discriminatory and that he was mistreated at the so-called ADMAX housing unit at the federal correction center in Brooklyn, N.Y. In the

case now titled *Ashcroft v. Iqbal*, Iqbal is seeking to hold former Attorney General John Ashcroft and former FBI director Robert Mueller, as well as middle- and lower-ranked prison officials, personally liable for violating his rights. Iqbal filed the suit in May 2004 after being deported to Pakistan.

The issue before the Court was whether Iqbal's complaint was sufficient to state a claim against Ashcroft and Mueller and to get past summary judgment -- thereby exposing the officials to costly and time-consuming discovery.

At the district court and appeals court levels, judges rejected government efforts to dismiss the complaint. The 2nd U.S. Circuit Court of Appeals, citing the high court's sometimes contradictory rulings on what plaintiffs must state at the outset to make a viable complaint, said Iqbal's allegations, though general, were plausible enough to survive.

As the justices debated the issue, several discussed that issue of plausibility -- whether it was even plausible that Ashcroft and Mueller could have been involved in setting policies or actually doing harm to Iqbal.

Solicitor General Gregory Garre, arguing for Ashcroft and Mueller, insisted that Iqbal's attempt to link top officials to his treatment was not plausible. "Common government experience," Garre said, would suggest that the attorney general is not involved in "microscopic decisions" such as those at issue in the Iqbal case.

But Justice David Souter disagreed, stating that "the claim ... that the attorney general or the director of the FBI was establishing a ... policy that centered on people with the same characteristics as the hijackers does not have that kind of bizarre character to it and, I think, would not run afoul of the plausibility standard."

Justice Ruth Bader Ginsburg also seemed to doubt Garre, invoking a report by the inspector general of the Justice Department that she suggested "lends some plausibility to Iqbal's claims." That 2003 report found that Ashcroft and Mueller were intimately involved in the policies regarding post-9/11 detentions and that most detentions were based on racial and religious characteristics.

Alexander Reinert, representing Iqbal, also cited the report as proof that "from the attorney general's office there was a direction to make the conditions of confinement as harsh as possible." Reinert is a lawyer with the New York

firm Koob & Magoolaghan.

But Garre insisted the policies were "perfectly lawful" and that the inspector's report "can't make up for the deficiencies in the complaint itself." He argued that under the doctrine of qualified immunity, aimed at protecting officials from being sued for their official acts, Iqbal's complaint should have been dismissed at the district court level.

Several of the Court's conservatives seemed sympathetic to Garre's position. With disdain, Justice Antonin Scalia said at one point, "That's lovely, that the ability of the attorney general and the director of the FBI to do their jobs without having to litigate personal liability is dependent on the discretionary decision of a single district judge."

The case has attracted the attention of former and current government officials who fear that if the 2nd Circuit is upheld, they will be exposed to liability in their decision-making that could be harmful, especially in reacting to national security emergencies.

A brief filed by the [Washington Legal Foundation](#) on behalf of five former attorneys general said the Iqbal case raises the prospect that top officials will have to face discovery and other proceedings even in frivolous cases. "They are very concerned by the effects that such disruptions are likely to have on the ability of high-level officials to carry out their missions effectively," the brief states.