US Supreme Court shields Bush administration officials from torture lawsuit

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On Monday, the Supreme Court ruled that a Pakistani immigrant could not proceed with a lawsuit against former Attorney General John Ashcroft and Federal Bureau of Investigation (FBI) Director Robert Mueller for torture he suffered while detained in a New York City prison.

Javaid Iqbal was arrested in November 2001, ostensibly for violations of his immigration status. In fact, Iqbal was jailed because he is Muslim and a native of Pakistan. After the September 11 terrorist attacks on New York and Washington, D.C., Ashcroft vowed he would arrest terror suspects for "spitting on the sidewalk." What this meant in practice was a nationwide dragnet against Muslim men, at least 762 of whom were swept up and charged with petty immigration violations in the weeks after 9/11.

Iqbal, a cable television installer who lived in Long Island, was locked up in the federal ADMAX SHU jail ("administrative maximum special housing unit") of the Metropolitan Correctional Center in Brooklyn, along with 184 other "high interest" prisoners.

Iqbual said prison guards and FBI agents tortured and humiliated him using methods strikingly similar to those carried out on detainees at the military prison camp at Guantanamo Bay in Cuba, at US military-run prisons in Iraq and Afghanistan, and at Central Intelligence Agency "black site" prisons in a number of countries. Iqbal was kept in solitary confinement, denied adequate food, subjected to daily body cavity searches, exposure to extreme temperatures, severe beatings, and forced nudity. He said he was also denied medical care and the right to pray, and that he lost 40 pounds during his six-month confinement.

Iqbal's allegations not only correspond to a growing body of evidence detailing the systematic character of Washington's worldwide torture regime. They were also corroborated by a 2003 report issued by the Inspector General of the Justice Department, which found that widespread abuse in fact took place at the Brooklyn prison (see, "US Justice Department admits abuse of immigrant detainees after September 11")

Attorneys for Ashcroft and Mueller did not place in doubt Iqbal's allegations of torture. The case hinged on whether or not the two could be held responsible for the torture Iqbal sustained based on the policies and directives they authored. Ashcroft and Mueller claimed legal immunity because they had no *personal* involvement in the abuse carried out by low-level government employees and prison guards.

Iqbal was ultimately cleared of all terror-related charges, but pleaded guilty to the immigration violation of carrying false Social Security papers, and was deported after his sentence. After returning to Pakistan, he launched a lawsuit against Ashcroft and Mueller—along with dozens more prison officials, guards, and FBI agents—charging in a complaint that Ashcroft was "the chief architect" of his abuse, and that both men "knew of, condoned, and willfully and maliciously agreed to" the torture which was carried out "as a matter of policy, solely on account of religion, race, and/or national origin."

The high court split 5-4, with the "swing" vote going to Justice Anthony Kennedy. Kennedy wrote the majority decision, ruling Iqbal's complaint failed to plausibly link Ashcroft and Mueller to the abuses he suffered, and so could not proceed toward trial in the court system. The decision reversed a ruling by the US Court of Appeals for the 2nd Circuit in New York, which had determined it was plausible that Ashcroft and Mueller were aware of the discriminatory actions Iqbal suffered.

Legal experts believe the decision will make it more difficult for "terror detainees" to sue government officials. The decision creates a Catch-22 for victims of torture. The court effectively ruled that for suits to go forward, plaintiffs must show specific evidence that top officials ordered or were aware of the torture in question. But without lawsuits, it will be next to impossible for plaintiffs to gain access to such documentary evidence.

The ruling's implications go beyond cases related to the redress of those abused in "the war on terror." In ruling that "supervisory liability" in civil rights complaints is a "misnomer," the high court has created a precedent shielding government officials from legal responsibility for the actions of those they supervise, employ, and command. The decision may well make it more difficult for victims of government wrongdoing to sue public officials for damages.

Justice David H. Souter, a liberal justice who is about to leave the bench, exposed a flaw in the majority's assertion that Iqbal had failed to establish a link between his torture and top Bush administration officials. "Iqbal does not say merely that Ashcroft was the architect of some amorphous discrimination," Souter wrote for the court's minority, "or that Mueller was instrumental in some ill-defined constitutional violation; he alleges that they helped to create the discriminatory policy he has described."

Souter said the majority decision had ignored a concession from

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the government admitting that, if Iqbal were able to prove Ashcroft and Mueller knew of discrimination by those under their supervision but disregarded it, they would be liable. In spite of the concession, the majority ruled that such proof would still be insufficient.

According to Kennedy, for Iqbal's suit to go forward not only would he have to provide evidence that Ashcroft was aware of the torture and disregarded it. He would also have to provide evidence Ashcroft and Mueller did so *for the specific purpose* of carrying out discrimination—that they "acted with discriminatory purpose," in Kennedy's words. In other words, if the torture was carried out for the purpose of national security rather than just to single out Muslims, discrimination was incidental and could be justified.

There is no difference between Kennedy's argument and the pseudo-legal justifications of the Bush administration attorneys in the Office of the Legal Counsel, who argued that torture was not really a crime if its specific intent was not to cause pain or mental suffering, but to elicit information.

Souter argued further that at preliminary stages of lawsuits, allegations must only be *plausible*. This is a core legal principle—the very purpose of the court case being to determine the validity of lawsuits. "The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel," Souter wrote. "That is not what we have here."

But the majority went further, rationalizing the disparity in the justice meted out to those of Muslim and Middle Eastern/South Asian background. Because the 9/11 terrorist attacks "were perpetrated by 19 Arab Muslim hijackers," Kennedy reasoned, "It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs or Muslims." (In fact, Iqbal is not Arab, but Pakistani.)

The implications of Kennedy's reasoning are astounding. In effect, the court justified police targeting of entire national, racial, and religious groups based on the alleged actions of a few "members" of the aforementioned groups. A legal expert, Eric Muller of the University of North Carolina Law School, noted the similarities of Kennedy's reasoning to that used to justify the internment of Japanese American during WWII. Mueller called Kennedy's rationale "dictum," meaning "language that pushe[d] beyond what was necessary to decide the case." Though unnecessary to the ruling at hand, Kennedy's language will "weigh heavily against future efforts at accountability," Muller wrote.

Muller referred to the "common core" of Kennedy's argument and the internment of Japanese Americans between 1942 and 1945: "the identification and detention of an internal 'enemy,' in whole or in part, on the basis of race." He called Kennedy's dictum "a sad reminiscence of the Supreme Court's eagerness in 1944 to put the best possible face on the evacuation orders against Japanese Americans."

Because the court did not issue a ruling that explicitly exempted top officials from legal responsibility for torture, Iqbal's defense attorney will attempt to amend the case in lower court. "We think the court is telling us we need to put more meat on our allegations," Prof. Alex Reinert of Yeshiva University said. "But to the extent that the defendants are asking for immunity for the decisions made by high-level officials in the aftermath of tragedies like 9/11, this decisions rejects that contention." In his opinion, Kennedy intimated that Iqbal might alter his charges to secure another hearing in New York's US Court of Appeals for the 2nd Circuit.

The ruling did not affect Iqbal's cases against others he alleges carried out or facilitated his torture, including FBI agents, the prison warden, and prison guards.

An editorial in the *Washington Post*, the most influential newspaper among beltway liberals, welcomed the decision. "The court has rightly set a high—but not insurmountable—bar when private litigation serves as the vehicle," the *Post* declared. "Plaintiffs should name as defendants only those for which there is credible evidence of direct involvement in constitutional breaches."

This is a sophistry. There is plenty of "credible evidence" implicating Ashcroft and other top-ranking Bush administration officials of torture. Furthermore, the entire purpose of a court trial is to determine guilt or innocence through an examination of the validity of evidence. And the *Post's* demand that cases should go forward only on evidence of "direct involvement" is a formula for shielding those who ordered torture and setting up as fall guys those who carried it out.

The *Post* explains that "there are several [other] ways in which" top government officials can "be held accountable." It then listed "public hearings, elections, [and] prosecutions." The *Post's* editors are well aware that each and every one of these avenues for redress has been shut down by President Barack Obama, who has guaranteed that there will be no hearings, investigations, or prosecutions of Bush administration torturers.

As for elections providing justice, Obama's actions over the past month—promising amnesty for those under Bush who ordered and carried out torture, reviving military commission trials of "terror suspects," and suppressing photographic evidence of US torture of prisoners in Iraq and Afghanistan—have demonstrated that this, too, is a dead end.

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