

JUSTICE JOHN PAUL STEVENS (Ret.)

LAWYERS FOR CIVIL JUSTICE
MEMBERSHIP MEETING

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REFLECTIONS ABOUT THE SOVEREIGN'S DUTY TO COMPENSATE
VICTIMS HARMED BY CONSTITUTIONAL VIOLATIONS

Fear plays a more important role in the process of making important decisions at the outset of international hostilities than is often recognized. That emotion sometimes leads to erroneous decisions that do far more harm than good. President Franklin D. Roosevelt's decision to approve the mass relocation and internment of thousands of American citizens of Japanese ancestry during World War II is a vivid example of such a decision.

The hardships caused by that decision prompted Congress to enact the American Japanese Claims Act of 1948, permitting Japanese Americans to apply for compensation for property losses suffered as a result of their relocation. The \$37 million disbursed pursuant

to that statute, however, represented only a small fraction of the harms suffered by the internees. It was not until 1976 when President Gerald Ford acknowledged that the internment was "wrong" and a "national mistake" that "shall never again be repeated" that most Americans became fully aware of the magnitude of the error. Congress subsequently enacted the Civil Liberties Act of 1988, which provided financial redress of \$20,000 for each surviving internee, totaling \$1.2 billion. The statute included an official apology acknowledging that "a grave injustice [had been] done to both citizens and permanent residents of Japanese ancestry". A few years later Congress authorized the construction of the memorial on New Jersey Avenue, a few blocks from the Capitol. That monument should serve as a reminder of the need to be especially vigilant when fear provides the primary motivation for an important decision.

Today I plan to say a few words about two such decisions: The decision to use facilities at our naval

base in Guantanamo, Cuba to perform functions that either could be performed effectively on the mainland, or should not have been performed at all, and the later decision to prohibit the transfer of any person detained at Guantanamo to the United States. I shall also comment on a mistake made by the Supreme Court in a detention case, and propose a remedy that would minimize the risk of similar mistakes in the future.

I

Since January 2002, when the government began using Guantanamo as a detention facility, almost 800 individuals have been detained there. About two-thirds of them were released while George W. Bush was President. Of the 242 prisoners being detained when Barack Obama took office, 115 more have been released, reducing the present population to just over 120. Both of those Presidents have stated publicly that the entire facility should be closed. That is also the

view of Cliff Sloan, the State Department's former envoy who wrote a persuasive op-ed piece in the New York Times four months ago in which he quoted a high ranking security official from one of our staunchest allies as stating: "The greatest single action the United States can take to fight terrorism is to close Guantanamo." In that article, Cliff also described the cost of maintaining the facility as "eye-popping" - he estimated that it is around \$3 million per detainee as compared with roughly \$75,000 at a supermax prison in the United States. While I whole-heartedly agree with the view that we should put an end to our wasteful extravagance as promptly as possible, a sub-segment of the Guantanamo population is most directly relevant to a change in the law that I shall propose.

There are 50 detainees who were approved for transfer more than five years ago and an additional seven who were more recently approved. All of them received approval from six executive departments and agencies - the Department of Defense, the Joint Chiefs

of Staff, the Director of National Intelligence, the Department of Justice, the Department of Homeland Security, and the Department of State. These six agencies agree that none of the 57 detainees poses a significant security threat to the United States. Despite concluding that these 57 individuals should be transferred out of Guantanamo, the government continues to claim legal authority to detain them as unprivileged enemy belligerents.

One of the reasons that they remain in custody is that Congress has enacted a flat ban on the transfer of any Guantanamo detainee to the United States for any reason whatsoever. Another reason is that Congress has imposed restrictions on the President's ability to transfer detainees to foreign countries. Before such a transfer can occur, the Secretary of Defense must send congressional committees a letter thirty days beforehand explaining that the receiving country has taken or will take steps that "substantially mitigate the risk" that the individual will engage in

hostilities against the United States. The Secretary must further explain why the transfer is in the national security interest of the United States. These onerous provisions have hindered the President's ability to close Guantanamo, make no sense, and have no precedent in our history. Congress's actions are even more irrational than the detention of Japanese American citizens during World War II.

Just as the Congress ultimately recognized that the fear-inspired decision made at the outset of that war was mistaken, in time our leaders will acknowledge that some or all of those 57 detainees are entitled to some sort of reparation. Of course, I by no means suggest that every Guantanamo detainee, such as those who have been convicted by a military commission, is entitled to compensation. But detainees who have been deemed not to be a security threat to the United States and have thereafter remained in custody for years are differently situated.

II

The Supreme Court decision that I have described as a mistake was Justice Kennedy's opinion for the five-Justice majority in *Ashcroft v. Iqbal*, 556 U. S. 662 (2009). Iqbal was a citizen of Pakistan and a Muslim, who was arrested in the United States and detained by federal officials shortly after the terrorist attacks on September 11, 2001. He was found guilty of violations of our immigration laws and deported. Thereafter he brought suit against numerous federal officials alleging that he had been mistreated while he was incarcerated in a maximum security unit in Brooklyn. He was one of 184 "high interest" detainees suspected of complicity in the terrorist attacks. His complaint described unconstitutionally harsh treatment, motivated by hostility to his religion. Among the many officials whom he named as defendants were John Ashcroft and Robert Mueller, who had been the Attorney General of the United States and Director of the

Federal Bureau of Investigation while Iqbal was allegedly being abused. Assuming *arguendo* that Iqbal had been injured by unconstitutional conduct, Ashcroft and Mueller moved to dismiss the complaint against them on the ground that it had not adequately alleged their responsibility for the adoption of the policy. The District Court denied the motion and the Court of Appeals unanimously affirmed. The Supreme Court, however, reversed by a vote of five to four.

In his opinion for the majority, Justice Kennedy pointed out that Ashcroft and Mueller could not be held liable on a theory of *respondeat superior*; they were responsible for their own conduct, but not for that of their agents. And the opinion seems to suggest that the unconstitutionality of the policy depended on its having been motivated by hostility to Iqbal's race or religion. The Court held that his allegations had not "nudged" his claims of invidious discrimination "across the line from conceivable to plausible." In contrast, in his dissent Justice Souter discounted the importance

of the motive for the policy; he reasoned that Ashcroft and Mueller would be liable if they knew about the alleged harsh policy and were "deliberately indifferent" to its prevention. While I remain convinced by Justice Souter's dissent, I think the majority's decision may represent an understandable reluctance to impose personal liability on dedicated public officials attempting to minimize the risk of another terrorist attack.

If a policy of brutal interrogation of potential terrorists did violate their constitutional rights, the doctrine of respondeat superior should impose liability on the government for the wrongs committed by its agents. On the other hand, the law should also provide both those agents and their superiors with immunity from personal liability just as it provides such immunity to prosecutors who violate the Constitution. Even if Ashcroft and Mueller may have encouraged or tolerated improper efforts to obtain information about potential threats, we should presume that they were

motivated by their interest in protecting the public from harm and not subject them to the risk of personal liability. If Iqbal's allegations are true, the federal government, rather than individual executives, should make him whole.

III

The individuals who made the decision to intern loyal American citizens of Japanese ancestry made a terrible mistake but corrective action was, in due course, provided by the sovereign, not by any or all of the individuals responsible for the mistake. Mistakes that have been made at Guantanamo may ultimately be redressed by the government without the costs and burdens associated with litigation and without imposing individual liability on everyone who violated the law. And one day we may have the wisdom to change the law in two constructive ways. First, recognizing respondeat superior as a basis for requiring governments to provide appropriate remedies for constitutional wrongs

committed by their agents. And second, providing immunity from personal liability for those agents and their superiors, who - like prosecutors - should be able to perform their public responsibilities fearlessly. If they violate the law when trying to do their jobs, the sovereign - not the person injured by their misconduct - should determine the appropriate sanction for their misconduct. And the sovereign, rather than its individual agents, should be responsible for providing an appropriate remedy for their wrongs.

Thank you for your attention.