IN THE SUPREME COURT OF THE UNITED STATES

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JAMES W. ZIGLAR, :

Petitioner : No. 15-1358

v. :

AHMER IQBAL ABBASI, ET AL., :

Respondents; :

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and

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JOHN D. ASHCROFT, FORMER :

ATTORNEY GENERAL, ET AL., :

Petitioners : No. 15-1359

v. :

AHMER IQBAL ABBASI, ET AL., :

Respondents; :

- - - - - - - - - - - - - - - - - - - x

and

- - - - - - - - - - - - - - - - - - - x

DENNIS HASTY, ET AL., :

Petitioners : No. 15-1363

v. :

AHMER IQBAL ABBASI, ET AL.,:

Respondents. :

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Washington, D.C.

Wednesday, January 18, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

IAN H. GERSHENGORN, ESQ., Acting Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners in Nos. 15-1358 and 15-1359.

JEFFREY A. LAMKEN, ESQ., Washington, D.C.; on behalf of the Petitioners in No. 15-1363.

RACHEL MEEROPOL, ESQ., New York, N.Y.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in case 15-1358, Ziglar v. Abbasi.

Mr. Gershengorn.

ORAL ARGUMENT OF IAN H. GERSHENGORN

ON BEHALF OF THE PETITIONERS

IN NOS. 15-1358 AND 15-1359

GENERAL GERSHENGORN: Mr. Chief Justice, and may it please the Court:

This case marks the return of Iqbal as Plaintiffs seek to hold essentially the same defendants liable for the same actions arising in the same extraordinary circumstances in the wake of the September 11 terrorist attacks.

All of the judges below concluded that Plaintiffs' core theory is squarely foreclosed by Iqbal. But the Second Circuit majority then formulated its own list merger theory of liability, premising liability on the alleged decision of Attorney General Ashcroft to merge the New York list of detainees, which had not been fully vetted, with the INS list, thereby continuing the hold-until-cleared policy for detainees on both lists.

Bivens' liability does not attach here for at least three reasons.

First, the Bivens remedy should not be extended to national security and immigration policy decisions by senior officials in the wake of the September 11 attacks. If the damages remedy is to be imposed, it's for Congress, not this Court, to do so.

Second, the list merger theory suffers from the same pleading deficiencies that this Court identified in Iqbal itself. Among other things, there is an obvious alternative and noninvidious explanation of the list merger decision. Given the uncertainty about the status of detainees on the New York list, the list merger was undertaken to avoid the inadvertent or premature release of a dangerous terrorist.

And third, the defendants here violated no clearly established right. It would not have been clear to every reasonable defendant that merging the lists in the wake of the 9/11 attacks would be unconstitutional rather than risking premature release of a detainee on the New York list.

I think the easiest way for this Court to resolve this case is through the Iqbal pleading theory. But given this Court's admonition that the existence of the Bivens remedy is an antecedent question that the Court should address first, let me start there.

JUSTICE GINSBURG: But you -- you seem to be

assuming that the whole case is about the merging of the New York list with the other list, but I thought that this was -- this case was identified as a prison conditions case.

GENERAL GERSHENGORN: So, Your Honor, that broader theory was raised below. It was rejected by every judge to consider it below, the district court and the panel majority, and it -- it is also, I think, beyond the -- it's not within the scope of the question presented.

But even if -- if -- and I think the reason that it was barred below is because it squarely foreclosed by -- by Iqbal, both on the substantive due process claim and on the equal protection claim.

On the substantive due process claim, what we have is an -- a -- a facially-valid constitutional policy to -- to -- that could be applied to individuals with individualized suspicion of terrorism.

And if you look at the allegations in the complaint, and these are paragraphs 61 and 65 of the complaint, all that is alleged is that Ashcroft and Mueller met regularly with a -- this is on page 274A of the appendix to the petition -- that in the -- and this is paragraph 61 -- that Ashcroft and Mueller met with a small group of officials to exert maximum pressure on

the individuals arrested, and then in paragraph 65, on the next page, that the punitive conditions in which the MDC and class members were placed were the direct result of the strategy.

There is no allegation that Ashcroft and Mueller or Ziglar created the punitive conditions, or that they required the putative conditions. They had the right, as the Second Circuit itself held, and the district court held, to presume that the policy would be implemented lawfully.

The only real theory that survives, I think, Your Honor, really is the list merger theory, and that theory fails. I think it's critical to understand in that context how the case -- how the situation looked to the Attorney General -- to Attorney General Ashcroft who's alleged to be the decisionmaker.

I'll come back to the -- to the failure of the complaint to allege that he was the decisionmaker, but even taking that, what he faced was the New York list which involved aliens, all of whom were out of status, and had been picked up in the course of the Pent-Bomb investigation.

He knew that not all of those aliens had had individualized suspicion determinations, but that some may well have had ties nexus to terrorism, and he knew

that the conditions of confinement would be lawful. It is not disputed that those would be lawful as to those with individualized suspicion.

Faced with that situation, the Second Circuit majority found that the list merger decision could only explained by putative intent or by discriminatory intent.

But there is an obvious alternative explanation for the decision that Attorney General Ashcroft would have faced in deciding to merger the list, is that you couldn't tell who was and who was not had -- who did and who did not have a potential link to terrorism. And in that situation, a decision to hold everyone until cleared, to apply the hold-until-cleared policy is best explained, not by invidious intent, but by the desire to avoid the premature and inadvertent release of a dangerous terrorist.

JUSTICE BREYER: This went on for several months, eight months.

GENERAL GERSHENGORN: I think the list merger decision is early on in the --

JUSTICE BREYER: Yes, but weren't --

GENERAL GERSHENGORN: And that's where --

JUSTICE BREYER: -- weren't they held for eight months?

GENERAL GERSHENGORN: They were held longer, and there's no doubt that the clear --

JUSTICE BREYER: No I can --

GENERAL GERSHENGORN: -- longer than it should.

JUSTICE BREYER: So I can understand after a bomb attack. I can understand after a bomb attack and 3,000 people are killed. I can understand that the first reaction of the law enforcement authorities is, pick up anybody you might think is connected, and we'll worry about the rest of it later.

Now, eight months? Now, what they do allege is that Ashcroft and Mueller knew that the FBI had not developed any reliable evidence -- that's paragraph 67 -- tying the plaintiffs to terrorism, but authorized their prolonged detention, in restrictive conditions, and Mueller, it says, ordered that they be kept in INS custody, and including the restrictive conditions, even after local offices reported. Ah, they don't say reported to whom, so that is a point in your favor, but that there was no reason to suspect them of terrorism.

But I think, fairly read, they are saying -- they -- okay. They authorized it. They knew that some of these people had no information against them, but the

answer is pick up anybody who might have a connection, and then just keep them there? I mean, that's what's worrying me a lot. And why doesn't that at least state an allegation?

Suppose it had been five years. Suppose it had been ten years. I mean, we all know the problems with that and -- and if you know it, I can see it for a day, two days. Five years? Eight months? I mean, why isn't that an allegation that at least you have to real-deal with on discovery and so forth?

GENERAL GERSHENGORN: Your Honor, because I think the core of the allegation against Ashcroft and Mueller is not that they prolonged the -- prolonged the detention. The policy that they adopted in the list-merger decision was facially constitutional because it -- and it -- because it adequately dealt with and fully dealt with the dilemma that they faced.

JUSTICE BREYER: How long after 9/11 did they adopt that policy?

GENERAL GERSHENGORN: I believe it was in the -- within the first months after 9/11.

JUSTICE BREYER: First months.

GENERAL GERSHENGORN: Yeah.

JUSTICE BREYER: How many months?

GENERAL GERSHENGORN: Your Honor, I --

the -- I apologize. I don't have the exact --

JUSTICE BREYER: Was it more like eight months or more like --

GENERAL GERSHENGORN: No, Your Honor. No. It was in October -- I believe it's in October after the -- in October after the -- after the -- after the attacks. And so we're not talking -- this was not something that was done eight months down the road. This is something that was done as the officials are trying to sort through how to respond to the very difficult situation that the -- if you accept that the attorney general made the decision that he found themselves in. He had a list that was not fully vetted. Some of the people on the list had ties to terrorism -- may have had ties to terrorism. Some of them may well not have. And what -- what -- in that situation, application of the hold until it cleared policy. Take a breath. Let's figure out what's going on. Rather than releasing everyone is -- was not -- not only doesn't raise a discriminatory inference, but it does not violate any clearly established right to have done that.

Now, the second --

JUSTICE GINSBURG: But what about --

GENERAL GERSHENGORN: -- the second --

JUSTICE GINSBURG: -- what about the -- it's

one thing, as Justice Breyer pointed out, to say you initially hold these people. But you know from day one that many of them have nothing to do with terrorists, and yet you allow that system that might have been justified in October to persist for months and months when these people are being held in the worst possible conditions of confinement.

GENERAL GERSHENGORN: Your Honor, they -- well, they are being held in restrictive conditions of confinement, but those conditions are lawful as to folks with individualized suspicion.

Now, the -- the -- there is -- the -- the core of the claim that the Second Circuit saw against Attorney General Ashcroft was the decision to submit the individuals to the -- to the restrictive conditions in the first place. And what I would say to that is, it -- it understated -- it attempts to impose a 20/20 hindsight requirement on the attorney general and on Director Mueller and Ziglar, who are -- who are involved only as having, quote, "condoned the policy" that just doesn't exist.

The plaintiffs say, we had -- there were no allegations of terrorism ties against us, but, of course, the attorney general didn't know that at the time. What he had was a list that had some with ties

and some after. And the policy to merge the list and hold until cleared was facially constitutional if it took -- if there was -- in some instances took too long to clear. And certainly, the OIG report suggests that was the case, that things did not run as smoothly as they should have. That is not something that's attributable to -- to Attorney General Ashcroft, Director Mueller, or to -- to Commissioner Ziglar.

But --

CHIEF JUSTICE ROBERTS: Is the argument you're presenting a -- a Bivens argument or a qualified immunity argument?

GENERAL GERSHENGORN: So, Your Honor, the argument we've been discussing now is the qualified immunity, Iqbal argument. It's the personal participation. But we do think the Bivens remedy should not be extended here at all. It would be quite an extension of Bivens, unprecedented, to apply this to national security and immigration policy decisions, and we think all three of those factors work together.

With respect to national security, what this Court has recognized is national security is committed to congressional authority, that Congress is better placed to -- to decide the appropriate remedy. And the reason for that is not only a matter of institutional

competence, but that the risk of overdeterrence in the national security context is a real one. And it's one that Congress should make. And that's, I think, the core of this Court's decisions in Chappell and in Stanley.

I think the same is true with respect to policy decisions more broadly. Congress has provided a remedy to challenge policy decisions in the APA. And in addition to that, policy decisions are much more likely to receive attention as this set of policy decisions did from the OIG and from -- from Congress itself, and so --

CHIEF JUSTICE ROBERTS: Is -- is there -- the APA argument strikes me as -- as somewhat odd. I mean, the idea that the -- the people in prison are supposed to say, let's look at the Administrative Procedures Act.

What about habeas? Is that an available remedy for them?

GENERAL GERSHENGORN: It is an available remedy, and indeed it was used here by -- invoked by some and those folks were released. And it -- it does -- because the core of the complaint was you're holding us without bond; we should be essentially deported for the illegal remedies.

And so I do think that the availability both

of habeas here -- and I take Your Honor's -- I take Your Honor's admonition, but -- about the oddity of the APA here -- but if the APA doesn't apply here, it's because Congress provided it for policies and -- provided review for some policies, but not for all policies. And that is where -- that is the congressional judgment.

But it seems to me that --

JUSTICE GINSBURG: How could they have -- how could they have access to habeas when they were locked up without access to a lawyer, without access to a telephone?

GENERAL GERSHENGORN: So, Your Honor, there were individuals who did file habeas petitions and -- and those individuals were largely released before the claims could be adjudicated. But the point here is that -- that the -- that Bivens -- the extension of Bivens would really be quite extraordinary to a national security and immigration policy context. The immigration concerns, I think, do raise the exact same concerns, Your Honor, as the national security ones.

JUSTICE BREYER: I suppose that in 1942, there was a president or a secretary of defense who decided let's take 140,000 people -- 60,000, 70,000 citizens and 60,000 noncitizens -- and lock them up for ten years or five years or four years.

All right. You go with habeas right at the time. You could understand how, in January of 1942, it would be pretty tough for a judge in a district court to start second-guessing people. But several years later, people had the time to develop the information. They understand what people knew then. And they might find, that in some of those instances, there was no justification whatsoever. And I look at the Bivens remedy and say, one, it has a cautionary effect. It doesn't deter where necessary, where necessary, and then where a big mistake was made, it has the possibility of compensation later. That's the whole argument, that beware of cutting off Bivens, you never know what will happen.

GENERAL GERSHENGORN: So, Your Honor, I guess I would say a few things to that. First of all, I recognize Your Honor is not suggesting that this is --

JUSTICE BREYER: No, not at all.

GENERAL GERSHENGORN: I --

JUSTICE BREYER: I used a historic example and I'm not worried about this case.

GENERAL GERSHENGORN: -- arrested for an immigration violation --

JUSTICE BREYER: Yeah, yeah.

GENERAL GERSHENGORN: -- in the context of a

specific investigation.

JUSTICE BREYER: Okay. I'm worried about --

GENERAL GERSHENGORN: Even with respect to Your Honor's hypo, I think it actually points up the problem with extending Bivens to national security policy decisions and to policy decisions in general. It should not be, in the national security policy context, that this Court should be calibrating the -- the deterrence and underdeterrence and overdeterrence in that situation. That is a judgment for Congress. And if Your Honor is serious about compensation -- and this is the problem with policies -- it should -- it can't really be the case that the right way to -- to get effective compensation is to put the attorney general, the director of the FBI, and the commissioner of the INS personally on the hook for the whole class.

The secretary of the treasury --

JUSTICE KENNEDY: But wasn't -- what's the best authority you have for saying that, assuming there's a Bivens action that has to be cut off at the lower level of officials, it can't be to the highest officials? What -- what authority do we have?

GENERAL GERSHENGORN: It's not the highest level of officials, Your Honor. It's when there's a broad national security policy, and I think that is what

this Court said on page 74 of Malesko, that the way we challenge policy decisions is not through Bivens. It's ordinarily through an injunction -- injunctive action.

If I could reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, General.

Mr. Lamken.

ORAL ARGUMENT OF JEFFREY A. LAMKEN

SUPPORTING PETITIONERS

IN NO. 15-1363

MR. LAMKEN: Thank you, Mr. Chief Justice, and may it please -- please the Court:

On behalf of Misters Hasty and Sherman, I wanted to begin with qualified immunity, in particular with respect to the official conditions. This case asks the Court to hold the individual jailers are responsible in damages for failing to overturn FBI terrorism classifications and the confinement conditions they produce. But a reasonable jailer could have understood and believed it lawful in the circumstances of this case to do as the BOP directed them, which is to hold detainees in restrictive conditions based on those FBI designations until the FBI cleared --

JUSTICE GINSBURG: Who determined the level of -- of restriction? This -- this was not just restriction. This is --

MR. LAMKEN: Your Honor, the answer is that the BOP directed that you would use the most restrictive conditions permissible. The specific implementation was left to Mr. Hasty and Sherman. But there's no allegation that the difference between -- that there's unconstitutional conduct based on the difference between what the BOP directed and what the -- and what Mr. Hasty and Sherman did.

The allegation here is that it was impermissible to impose these highly restrictive conditions because the FBI didn't actually have information connecting these individuals to terrorism. And as -- and Mr. Hasty and Sherman somehow knew that and as a result, it was impermissive -- impermissible to impose these conditions on these Respondents.

But that doesn't make any sense from a plausibility perspective and it doesn't make any sense from a qualified immunity perspective. Mr. Hasty and Sherman are jailers. They're expert in ensuring secure conditions. They are not trained in determining security classifications or connections to international terrorism. They cannot be held liable for failing to overturn the FBI's determinations.

After all, just last week, this Court held that there's no clearly established law that requires an

officer to overturn or second-guess the fellow officers' decisions made in a particular context. That just goes double when you're asking the jailers to overturn the determinations made by the FBI. The jailers don't get to release people because they decide the court system got it wrong and that the people are actually innocent. And --

JUSTICE GINSBURG: What about -- what about all the conduct that was not directed by the attorney general or the FBI?

MR. LAMKEN: Yes, Your Honor. I think that that -- the most -- you're referring to the unofficial conditions or the unauthorized abuses by individual guards.

JUSTICE GINSBURG: Yes. Am I right that as to those, the Second Circuit was unanimous?

MR. LAMKEN: Yeah. As to those, the Second Circuit was unanimous. But they -- I think they overlooked one critical thing, and they tended to read this complaint as if it were a complaint for injunctive relief. There are a lot of things wrong. They weren't being redressed. They should be redressed by the courts. But it's not. This is actually an action for individual damages against Mr. Hasty for conduct committed by others. In order to establish a plausible

claim to that sort of relief, liability that he pays damages for what others did, they would have to show that Mr. Hasty not only knew that there was this misconduct, not only knew that he needed to intervene, but that after he failed to intervene, then the plaintiffs were injured as a result of the failure to intervene; that their injuries were caused by what Mr. Hasty failed to do.

And that's what's missing from the Second Circuit's analysis and that's what's missing from the -- the -- the complaint. There's simply no temporal connection, no connection whatsoever between the --

JUSTICE GINSBURG: You're -- you're in charge of a detention facility, and all these things are going on. Prisoners are being knocked against walls, their arms are being twisted. There have been some complaints and nothing is done. It continues to go on.

JUSTICE KENNEDY: And the allegation is that he deliberately did not take a routine inspection of that particular portion of the prison in order to be willfully blind as to what was going on.

MR. LAMKEN: Well, there's -- there's no doubt that misconduct occurred and there's no doubt that Mr. Hasty actually sees the complaints, because that's part of the grievance process. But what's missing from

this is these individual plaintiffs being injured after this is brought to his attention. If you review the complaint, it doesn't have a moment where it says, this is when he learned and after that, we were injured. It's more of a blunderbuss that says, because there were a lot of bad things happening, Mr. Hasty must be liable for all of them.

JUSTICE GINSBURG: How could that pinpoint one particular moment in time when this is ongoing behavior?

MR. LAMKEN: And I think the answer is that you pinpoint his awareness and the injuries that these Respondents are claiming damages for.

JUSTICE BREYER: And you say it in paragraph -- in paragraph 74, it says, "Indeed, after a few months of interacting with the plaintiffs, the MDC defendants" -- I take it those are the people we're talking about -- "realized that they were not terrorists, but merely immigration detainees; yet the restrictive conditions and harsh treatment continued."

So what is that but an allegation that they did know about it and they did continue the harsh treatment?

MR. LAMKEN: So, Justice Breyer, referring specifically to the unofficial abuses by the guards as

opposed to the official conditions, temporarily, what's missing there is what happened afterwards. What were the -- what were the specific abuses he was aware of? Is this guard misconduct, or was it tapping the bars at night and keeping people awake? And in --

JUSTICE BREYER: It is their restrictive conditions and harsh treatment. And elsewhere --

MR. LAMKEN: That's true.

JUSTICE BREYER: -- in the complaint they have a list.

MR. LAMKEN: And that's exactly the difficulty, is that he's aware of harsh treatment generally and, therefore, he must be liable for all harsh treatment that occurs after that awareness.

You cannot say that here there is abuses generally with no particular time frame and then hold him liable for every intentional tort that occurs in the institution. And I think that paragraph 74 and 77, which the Second Circuit described as detailed, actually illustrate precisely the problem. They don't say which abuse he's aware of. They don't say when, whether it predates or postdates the claims that they have. They must prove facts that show that Mr. Hasty is personally responsible.

In fact, when they finally get to a date,

which is paragraph 110 of the complaint, they say February 11, 2002. Well, by February 14, 2002, four of the six Respondents are already outside of ad max. They never explain why awareness on a time, after they're out of the institution, is a basis for holding Mr. Hasty liable.

If I could go back, however, to the official conditions, Your Honor. With respect to the official conditions, qualified immunity must be granted. There's simply no basis for saying that it is -- that every reasonable jailer would understand that they had to make their own determination that these were not terrorism detainees and overturn what the FBI was telling them. And it's especially true given that the FBI was, throughout this process, making determinations and clearing people. There's no clearly established law that requires jailers to be making those decisions for the FBI. In fact, society would be ill served if we asked jailers to do that. They're not experts in international terrorism; they are experts in maintaining security.

Finally, if I can end up where the acting solicitor general began, and that is with respect to the scope of Bivens. Special factors in this case, counsel hesitation. Congress ran the court tested aside, what

are the consequences of saying that individual jailers, somebody all the way at the bottom of that food chain, must second-guess the FBI? What are the consequences for the government's ability to have a coherent response to a national terrorist attack? That is precisely the type of thing that Congress, rather than the courts, should decide.

In addition, the linchpin of the claims against the -- against these individuals is that the FBI had gotten these things wrong. That means that they're going to need to prove, plaintiffs want to prove that the FBI had things wrong. It implicates -- cases like this implicate the need to access sensitive --

CHIEF JUSTICE ROBERTS: So if the official policy that was adopted that we want to beat the prisoners, you know, every day and that was the FBI policy and it's communicated down, the prison administrator has no choice but to carry out that policy?

MR. LAMKEN: No, Your Honor. I think in terms of there being a facially unlawful command, that is where you don't have qualified immunity. But there's nothing facially unlawful that says impose the most restrictive conditions permissible based on FBI designations until the individual is cleared by the FBI.

And, boy, we all wish the FBI had been acting faster and these individuals could have been removed more quickly. But that's not at the feet of the individual jailers. Their job is to maintain secure conditions, and that's what they were doing.

And with respect to Bivens, Your Honor, the illegality or lawfulness of the conduct challenged isn't the determination of whether or not Bivens should be extended to a new location -- a new context or not. What determines that is whether or not this Court has the institutional competence to make the decision, or it is the sort of decision that Congress should make. And especially since cases like this one are turning on whether or not the FBI was right or not in its terrorism designations, that implicates potentially sensitive intelligence information. If that is going to be pulled into a lawsuit, courts should not be in the business of creating those lawsuits and creating possible risks for intelligence information. That is precisely the sort of decision that Congress rather than the courts should --

JUSTICE BREYER: Anything about the hypothetical I gave, of course, is a real one, not this case. But if you cut Bivens off totally, what prevents that from recurring?

MR. LAMKEN: Well --

JUSTICE BREYER: I mean --

MR. LAMKEN: I --

JUSTICE BREYER: -- that was a pure hypothetical -- you get my point.

MR. LAMKEN: No, Your Honor. I think, actually, this -- this case proves exactly what happens. We have an OIG report --

JUSTICE BREYER: This -- sometimes in Bivens, there are many, many remedies in the judicial system.

MR. LAMKEN: We have habeas, we have -- there's an FTCA claim that was brought by the predecessors of these plaintiffs in which they recovered money on in a settlement. There are lots of remedies that occur. And, indeed, in this case with respect to the individual guards, there was a lawsuit against them and a third amended complaint. The OIG report recommended discipline and discipline was meted out.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Meeropol.

ORAL ARGUMENT OF RACHEL MEEROPOL

ON BEHALF OF THE RESPONDENTS

MS. MEEROPOL: Mr. Chief Justice, and may it please the court:

Under Petitioners' theory, any Muslim or

Arab noncitizen present in this country could be placed for months in solitary confinement for violating the immigration law. But this Court has a historic role to play in ensuring that race and religion do not take the place of legitimate grounds for suspicion and in deterring future Federal officials from creating government policy to do the same. But what --

CHIEF JUSTICE ROBERTS: Does that role include the shaping and an announcement, really, of private damages remedies? We've been very explicit about the restraint in extending the Bivens action beyond its original contours.

MS. MEEROPOL: That's correct, Mr. Chief Justice. And we don't believe that this requires any extension of Bivens whatsoever. When this Court heard Iqbal, the Court distinguished between Mr. Iqbal's claim of religious discrimination, which the Court assumed would have required an extension of Bivens, and the Court assumed that it would be so extended because the issue was not directly argued before the Court.

But the Court treated differently Mr. Iqbal's claim for an equal protection violation, noting that the Court had allowed Bivens claims for equal protection violations under Davis. And there's no way to read the distinction between those two claims in

Iqbal, other than that an equal protection claim, such as the one these Respondents have, arises in a familiar Bivens context. The Court has, in the past, allowed prison conditions claims for -- under Bivens. There is nothing new here.

Now, what Petitioners are --

JUSTICE KENNEDY: That -- that was -- that was failure to give medical treatment.

MS. MEEROPOL: That's correct in Carlson.

JUSTICE KENNEDY: And there's -- there's been Bivens, the gender discrimination case, and Coleman v. Miller, I think, the -- the medical -- denial of medical treatment.

MS. MEEROPOL: Carlson, yes.

JUSTICE KENNEDY: But the -- but -- yes. But we've been very careful in subject and places to say, we go no further. This is for the Congress.

I think you're asking us to go further. I think what you're asking for is a legitimate argument with many valid points to it, but you're asking for us to create a new Bivens cause of action.

MS. MEEROPOL: Well, if it is a new Bivens cause of action, Your Honor, I submit that it is an appropriate one here.

Now, what the DOJ Petitioners argue is that

Bivens should not be extended because they were setting national security and immigration policy. But the core of our complaint is that there was no sensitive national security judgments being exercised. No one was being vetted. No one was determined to be a threat.

This is not a situation where the Court would have to look into sensitive national security determinations that were made. Rather, if there was national security judgment exercised, it was the judgment that, in this case, race or religion could play the part of legitimate suspicion; could play a proxy, and exploring that --

CHIEF JUSTICE ROBERTS: I'm not sure I understand your point. It was -- it was the implementation of national security policy in response to the 9/11 attacks, and the -- it was to detain people. Every one of the individuals detained was in violation of their immigration status; right?

MS. MEEROPOL: That's correct, your Honor.

CHIEF JUSTICE ROBERTS: It was to detain those individuals until they were properly cleared and could be -- could be released. Now, you may disagree with that approach to the policy, but what concerns me and why the restraint is appropriate in the Bivens context, is that it is a way of challenging national

policy through damages actions against the individuals implementing it. And I think that is an extraordinary departure from where we have recognized Bivens remedies in the past.

MS. MEEROPOL: This does arise in a national security context. Mitchell v. Forsyth also arose in a national security context. The question is whether the national security context of these detentions, the type of determinations that were being made, are determinations that are unsuited for Bivens because either they should be left to Congress or they are outside of this Court's core competence. And I would submit that this is precisely the kind of examination that is within this Court's core competence.

CHIEF JUSTICE ROBERTS: I guess my point is -- is a different one. I understand the argument that there are constitutional violations. But the question that you're asking the Court to do is to shape a remedy for that, a remedy that Congress has not provided. And to look at it in the simplest terms, I mean, it has been 40-whatever years since we adopted an approach to implied rights of action under statutes where we say if Congress wants people to be allowed to bring individual damages actions, they pretty much have to say so.

And it seems to me that it's the same approach here except, of course, you're dealing with the Constitution. And the idea that the Court lacks the institutional competency, okay, there's -- there's a constitutional claim against a national policy. We think the best way to consider that constitutional challenge is to allow people to sue individuals responsible for implementing it for damages.

You shape the policy, the national government in response to 9/11, therefore, you have to pay money because it's been a determination that that was unconstitutional.

MS. MEEROPOL: Well, it is certainly true that the Court has stepped back from freely implying private causes of action. But in every Bivens case that has come before this Court, the Court has still engaged in the two-step inquiry, looked to see whether there are special factors that should keep the Court from staying its hand and weighed the -- the interest on the other side of the equation, too. And each time, the Court has reemphasized that Bivens is about deterring individual Federal officer misconduct.

Now, when a -- when a Federal official creates an unconstitutional policy, he's creating policy, but he is also acting as an individual to

violate what in this case would have to be clearly-established constitutional norms.

CHIEF JUSTICE ROBERTS: I understand that. But the point made by your friend on the other side, though, of overdeterrence, when you have the attorney general, the director of the FBI, the director of INS sitting down and making -- what are we going to do to respond to this crisis, and -- and people in the -- were of -- old enough, 9/11, sort of have a better sense of what that crisis was like.

And if you imply a Bivens actions, one of the things they're going to enter into, what is best, what is appropriate, and presumably also, what's constitutional. They're going to say, well, gosh, if, you know, I'm wrong, I'm going to -- I'm going to be sued, not because I'm the attorney general, but as an -- as an individual. And -- and part of the policy that we've announced is that we don't want people forming policy to have to worry about they're going to have to -- to pay if the -- if the policy is found infirm.

MS. MEEROPOL: I have two responses to that, Mr. Chief Justice.

First of all, qualified immunity creates a powerful protection for Federal officials who are undertaking a good-faith effort to protect our national

security, which everyone agrees is of paramount concern, but who do so believing their actions to be lawful, even if they are mistaken. There is already that incredibly substantial protection.

Second, I don't believe that it would be a threat to the republic to provide the attorney general with incentives to not create policy that violates clearly-established law. I see the threat coming from the other side.

I -- I would like to make sure to take the time to correct --

JUSTICE BREYER: I'll ask you one other thing, which is, has this been fully argued out below? I mean, I think it is an enormously important and very open question. And we can say on the one hand, just what was said. I think everything the Chief Justice said is true. There is a problem, in this time, of real national emergency, to overdeter people from doing what they reasonably think is necessary. And they have the authority for security, not the judges.

At the same time, the law of this Court correctly, I think is, but there's no blank check even for the President. And if there's no blank check, that means sometimes they can go too far. And if they have gone too far, it is our job to say that.

Now, there are considerable advantages, as I pointed out, saying, at the time they're going to say yes, because there's a big frightening thing happening. But maybe they went too far too fast, and then this offers a remedy later and maybe the deterrence is good. Okay? You see both sides.

MS. MEEROPOL: Uh-huh.

JUSTICE BREYER: Has that been fully argued in this case? If I go and look in the record, can I find a question that I have wondered about for quite a long time fully answered?

MS. MEEROPOL: I -- I don't believe so. I -- I think the question you're posing is whether damages would actually be a less intrusive remedy in this situation than allowing for an injunctive relief claim at the outset, if I understand your -- your question correctly.

JUSTICE BREYER: In a set of cases.

MS. MEEROPOL: And -- and yes. No. I don't believe that that has been fully addressed below. The circuit, of course, found that no extension of Bivens was required. So the circuit didn't engage in the analysis of whether, if an extension is required, one in this situation would be called for.

My -- my friend argued, both on reply and

from the podium, that -- that even -- that -- that this case cannot be distinguished from Iqbal. But what distinguishes this case from Iqbal is that we -- Respondents have a factual allegation that the DOJ Petitioners' policy was to target Muslims and Arabs for harsh treatment, and that they imposed this treatment knowing there was no reason to suspect Respondents of ties to terrorism.

Now, my friend argued that even if Petitioners, DOJ Petitioners, had known that there was -- that -- had known that many were arrested without an articulable tie to terrorism, that the Petitioners had reason to believe that some among that group might have potential ties to terrorism, and that explains the harsh treatment without raising an inference of discriminatory intent, but I don't believe that is a fair reading of the complaint or the OIG report.

Respondents allege in paragraph 47 that Petitioners received detailed daily reports of the arrests and the detentions, and that they learned that the FBI had no basis to suspect Respondents and the class of ties to terrorism. There was no reason to think that any of these individuals were -- had an articulate -- that there was an articulated basis to suspect them of ties to terrorism.

JUSTICE KENNEDY: We're talking about adequate remedies. Can you tell me, as Justice Ginsburg pointed out, we didn't -- these detainees didn't have access to the outside. Were there any legal proceedings filed, injunctive proceedings, after say month 2, month 3, and were -- were those remedies completely added to district courts to look at this and say that we're not going to give relief?

MS. MEEROPOL: There were some habeas petitions filed. In general, the government's response to those petitions being filed was to move the detainee up to the front of the list, to clear him so that he could be removed from the country and from the restrictive conditions of confinement before a court could have the opportunity to rule on the legality of the detention. And importantly, those habeas petitions were about the -- the right to detain these people in itself, not about conditions of confinement.

It is still not clear today that one can use a habeas petition to challenge conditions of confinement, and it wasn't clear in the Second Circuit at the time either. So while habeas petitions were filed eventually, when some detainees finally had access to counsel, although restricted access, those -- those petitions were not actually ruled on by a court. The

court -- no court had the opportunity to determine whether what was happening to the detainees was lawful or not, and that was part of DOJ Petitioners' entire policy of harsh treatment. It was not just to impose maximum pressure. It was also, as we allege in paragraph 61, to keep the detainees from accessing the outside world.

Now, my friend argued that the DOJ Petitioners cannot be on the hook for the substantive due process claim in this case, a claim which was not presented in Iqbal. There was no conditions claim in Iqbal, just the equal protection claim, because the -- because the DOJ Petitioners did not set all the details of the restrictive conditions of confinement.

But their order itself, paragraph 61, requires keeping individuals in solitary confinement, in isolation. That is the way within the prison system people are kept from accessing the outside world. It cannot be done in a general population unit. So an order that requires solitary confinement for individuals who are arrested in connection with the terrorism investigation, but whom the attorney general and the other DOJ Petitioners know there is no nondiscriminatory reason to suspect of any ties to terrorism, that states the substantive due process claim. That is so excessive

as to be arbitrary and punitive.

This is what the panel found so compelling, I believe, about the merger of the New York list and the national list, that it was not a situation where some of the men on that list perhaps hadn't been vetted. Rather, the entire list, 300 men, were people for whom the FBI had not stated any interest or lack of interest. And it was this list of men who we allege Attorney General Ashcroft ordered should be treated as of interest to the 9/11 investigation.

JUSTICE KENNEDY: If -- if we -- if we hold that our previous cases instruct that we should not go further with Bivens, you still have Section 1985(3). Can officials conspire with each other?

MS. MEEROPOL: Yes, absolutely.

JUSTICE KENNEDY: Is there -- is there -- I was thinking of the -- is -- is there precedent on that in your point?

MS. MEEROPOL: It -- in this case --

JUSTICE KENNEDY: In your favor?

MS. MEEROPOL: Yes. What the circuit held as to that is that the question of whether officials can conspire with each other is so fact-intensive and had been so inconclusively briefed in the district court, yet it was required to remand back to the district to

determine sort of how they might have conspired with each other, whether -- what their positions were vis-à-vis each other such that a 1985 claim would be appropriate.

JUSTICE KENNEDY: Is there precedent in your favor on this point that there can be this conspiracy if -- if it's established by the facts?

MS. MEEROPOL: Yes. And I believe the case is cited by the Second Circuit, by the panel, our precedent in our favor for that.

CHIEF JUSTICE ROBERTS: What -- what is so fact-intensive about the argument that government officials -- the government is the entity and officials within that same entity don't conspire among themselves, they're just doing their -- doing their jobs?

MS. MEEROPOL: Well, I think it depends on the role of the high-level officials vis-à-vis the low-level officials at the Metropolitan Detention Center. Certainly, we argue that officials at such disparate levels of the federal government, which is vast, could -- could be held to have conspired with each other. But I don't think it is an argument that was fully developed before the district court, and that was what the circuit held, and that's why it should be remanded to the circuit and that -- remanded to the

district.

I want to make sure to address the arguments by the MDC Petitioners, because, really, their argument about extending Bivens -- about not extending Bivens for the claims against those officials is very different from the argument by the DOJ Petitioners. Every judge who has considered the issue has agreed that the claims that Hasty and Sherman were deliberately indifferent to months of physical and verbal abuse arise in a familiar Bivens context and should be allowed to go forward.

JUSTICE KENNEDY: That's Carlson v. Green?

MS. MEEROPOL: Yes, exactly.

JUSTICE GINSBURG: I thought the -- the Second Circuit majority said yes as to Hasty, Hasty, deliberate indifference, but not as to Sherman.

MS. MEEROPOL: That's correct. I must have misspoke. I apologize.

Yes. The deliberate indifference claim goes forward against Hasty, and then there were the claims against Hasty and Sherman for the official conditions of confinement at the Metropolitan Detention Center. These are claims that the men were held in solitary confinement for months, deprived of sleep, deprived of exercise. This is not just the MDC Petitioners in -- following the orders from their superiors in the Bureau

of Prisons. They created the actual conditions of confinement.

There is nothing in the record to suggest that the BOP ordered that all of the conditions that Respondents were subjected to, lights on in their cells 24 hours a day while they were in solitary confinement, that the solitary confinement continue without any individualized review. There's nothing in the record.

JUSTICE ALITO: Well, would that -- were they -- were those conditions constitutional as to individuals about whom the FBI had reasonable suspicion of a connection with terrorism?

MS. MEEROPOL: That would depend. Placement in solitary confinement, if it is incredibly prolonged and incredibly restrictive, may be unconstitutional for anybody. We don't concede that the conditions --

JUSTICE ALITO: Is your argument dependent on that?

MS. MEEROPOL: No --

JUSTICE ALITO: The proposition that it would be unconstitutional even as to those who have -- with respect to whom the FBI had reasonable suspicion?

MS. MEEROPOL: No. And that brings up an incredibly important point that I want to make sure to get out, which is that we disagree with the MDC

Petitioners' statement that there was a terrorism designation here, that there was reason to believe that any of the 9/11 detainees had ties to terrorism.

There was no designation. What there was is the fact that some men were arrested in connection to the terrorism investigation.

JUSTICE ALITO: The whole position as I understand it, the way it was presented today, was that the FBI had a list and the -- there was no way they could determine what degree of information the FBI had as to any particular person.

MS. MEEROPOL: But they were told what information the FBI was relying on. That's in paragraph 70, it's 71 through 74 of our complaint, that actually a liaison to the headquarters investigation was providing the MDC with information about all the men.

JUSTICE ALITO: With all the information? Do you -- you think that the FBI in a -- in a sensitive -- investigation of something sensitive like this about terrorism would necessarily have told people at MDC every bit of information they had connecting people with -- with terrorism?

MS. MEEROPOL: Well, our factual allegation was that they were told all the information that was relevant to the threat that the men posed to the

institution.

And also important here is what the OIG has explained about the meaning of the -- of the of-interest designation. Being determined by the FBI to be of interest to the 9/11 investigation meant only that they were not, not of interest. This is not just something that was happening in New York. The OIG quotes the head of the national security unit of the INS, who explains that if the FBI could not state whether or not it had an interest in an individual, that individual was held as of interest to the 9/11 investigation.

So even if there is word being sent out that, you know, these men are of interest to the investigation, we have to be careful with them, what the MDC Petitioners received was that of-interest designation, which meant very little based on the policy being applied here. And then they received the detailed information; for example, that Ahmed Khalifa was arrested -- was encountered by the FBI in the context of the 9/11 investigation, had violated the immigration law, and that the FBI might be interested in him. This is the actual information that was provided that we have made available in the complaint.

JUSTICE BREYER: The FBI goes into a rooming house after having information there's a nuclear weapon

on the floor. They find it. And there might be another. Would they be justified in taking into custody every single person in that rooming house and looking into it? I mean, for how long? Would you say to them, no, you can't do it because we don't know, there are people on the floor, they knew nothing about them, actually. They admit it. We knew nothing about them. All we know is they're in the rooming house.

MS. MEEROPOL: Well --

JUSTICE BREYER: And we also know there was a nuclear weapon. And that isn't totally fanciful; it could happen. And -- and so what are they supposed to do and how long?

MS. MEEROPOL: Well, we don't challenge the fact that these men were detained at all. And we don't challenge that they were investigated while they were detained. So even if they had been detained -- you know, some of them were up to eight months, which is a long period of time, and there's no challenge to that detention in this case. The challenge is to the way they were treated while they were detained. That if you need to investigate after a national security emergency, there are a lot of tools at the government's disposal to do so.

What you cannot do is single out a group of

people whom you know there is no basis to suspect them of any ties to terrorism beyond sharing racial and religious characteristics with the 9/11 hijackers, and to decide that that group of people poses such a threat that they must be placed in the most restrictive conditions of confinement that exist in the Federal system while we take the time, eight months, up to eight months, to determine whether there actually is any basis to suspect them of anything other than an immigration violation. And at the end of the day, oh, actually, there wasn't. Everybody was cleared and deported, as one would expect from a policy that is not based on investigating based on actual suspicion, but is rather a blunderbuss attempt to gather all of the Muslim and Arab noncitizens whom one has authority over by virtue of their immigration detentions, and -- and hold them in restrictive conditions of confinement while they are treated as suspected terrorists.

If I could get back for a moment to one of the Bivens questions, and that's about whether Bivens is appropriate for altering policy. I don't know if I was able to get this point out as well as I'd like to before. To -- to explain, I don't think that there is really any precedent for the idea that you can't use Bivens to deter creation of a clearly unconstitutional

policy. And if -- if the Court did rule in that way, what would there be to deter the creation of unconstitutional policies in the future? Now, of course, policies can be stopped as they are ongoing, but that does not protect the individual against whom, you know, potential serious law enforcement action has been taken.

CHIEF JUSTICE ROBERTS: Well, I suppose one answer would be the normal injunctive action would challenge the constitutionality of the policy, which would seem, at least at first blush, to be a more appropriate way of doing it than to -- than individual damages actions against officials responsible.

MS. MEEROPOL: But an injunctive -- an injunctive claim, while it could stop, currently, current unconstitutional conduct cannot deter future unconstitutional conduct from occurring. It doesn't deter the future attorney general from creating an unconstitutional policy. And if national security policy is somehow insulated from judicial review without even a determination that this is the type of national security policy where we could expect there could -- there should be sensitive judgments made, if -- if in that situation there is no Bivens remedy, then there are times when the Court will play no -- will be able to

play no role in reviewing what has occurred, because the -- the individuals simply can't get into court fast enough. Maybe in a situation like this, they're denied from getting into court for a period of time. And then when they finally do, the claim that the way that they've been treated is stopped. You know, they're released; someone else is picked up instead. There's never a chance to actually undertake judicial analysis of what has been occurring.

If qualified immunity justifies what was done here, or if Petitioners have not plausibly alleged a claim, those are bases to affirm the circuit. But if there is no cause of action at all, if individuals who are the subject of clearly unconstitutional national security policy don't even have the opportunity to get into the court, then there is nothing to deter even more excessive exercises of government power in the future.

If there are no further questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

General Gershengorn, four minutes.

REBUTTAL ARGUMENT OF IAN H. GERSHENGORN

ON BEHALF OF THE PETITIONERS

IN NOS. 15-1358 AND 15-1359

GENERAL GERSHENGORN: Thank you, Mr. Chief Justice.

A few quick points.

First, a few short corrections of the record, although I apologize for the confusion about the date. It's not in the complaint, the date of the list-merger decision. The OIG report suggests it was on November 2nd.

And then just, Justice Ginsburg, you had asked about the warden visits. J.A. page 224, it says on September 20, 2001, various wardens, including MDC Warden Zenk, reestablished legal visits, legal telephone calls, and legal mail for the September 11 detainees.

JUSTICE GINSBURG: What was --

GENERAL GERSHENGORN: I'd like to make --

JUSTICE GINSBURG: What was the date of that?

GENERAL GERSHENGORN: That was September 20, 2001. And it's on page 224 of the Joint Appendix.

Three points on the law.

First, this would be a massive extension of Bivens. Malesko said, Justice Kennedy, you had asked, that unlike a Bivens remedy, which we have never considered a proper vehicle for altering an entity's policy, injunctive relief has long been recognized as the proper means for doing so. That makes good sense. It cannot be that the secretary of the treasury, who

promulgates a policy that's later found unconstitutional, could be liable personally to all the banks for the unconstitutional policy.

Bivens is not -- Justice Breyer, absence of Bivens is not lawlessness. It is not a blank check, and it is incorrect as -- to say that there's no way to get into court. The way to get into court to challenge a policy is through an APA; it's through injunctive relief.

And although my friend on the other side suggests that a damages remedy is not a threat to the republic or a less-intrusive remedy, that's exactly the -- the judgment that this Court is ill-equipped to -- to make, and that Congress should make.

With respect to 1985(3), Justice Kennedy, I want to make just one quick point, which is that the -- the -- the DOJ defendants would be -- and all the defendants would be subject to qualified immunity for 1985(3) because it was not clear that officials within a corporate unit could -- could conspire with each other. There's case law suggesting they couldn't. And it was unclear, specifically in the Second Circuit, whether 1985(3) applied at all to Federal officials. So qualified immunity would eliminate the 1985(3) claim.

And then if I could close with the -- the --

the Iqbal pleading and what we're talking about here. The -- the other side has made clear they're not talking about the initial treatment and they're not even talking about the length of time. They're talking about the conditions of confinement and the fact that conditions that could lawfully be imposed with people in individualized suspicion were imposed on a much broader group. But I submit that that ignores the perspective that the attorney general, even assuming that he was the person who made the policy decision, which, as Judge Raggi suggested, we should not assume --

JUSTICE KENNEDY: Just one point on -- on 1985. The fact that it wasn't clear that there was a remedy under 1985, it doesn't follow -- it wasn't clear that there wasn't a right that was being violated.

GENERAL GERSHENGORN: That -- so --

JUSTICE KENNEDY: That's different.

GENERAL GERSHENGORN: With respect to the interagency conspiracy, I think that suggests even the right wasn't involved. And if the statute doesn't -- it's not clear the statute applies at all to them, we do think that's a situation in which qualified immunity would attach.

But just to close what -- with what the attorney general knew. The attorney general knew that

he had aliens who were legally detained as out of status and had been arrested in connection with Pent-Bomb, that restrictive conditions of confinement -- not the unlawful -- the unofficial conditions which have no connection to my clients, but the restrictive conditions of confinement were okay for some with individualized suspicion, but he had no way to know which ones were and which ones were not subject to that condition.

In that situation, he made the decision to subject the whole group to a hold-until-cleared policy until they could figure it out.

The idea that because in 20/20 hindsight we can identify the particular individuals who were not -- had not -- were not connected at all to terrorism and thus wrongly detained does not change the reasonableness of his judge -- of his judgment. The fact that you can't infer putative intent and discriminatory content and the -- intent -- and the fact that it was not clearly established at the list-merger decision, which is what -- a core of what the Second Circuit decided, that the list-merger decision was unconstitutional when made.

If there are no further questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

General Gershengorn, before you leave the

podium, I'd like to note that the Court thanks you for your service to the Court as acting Solicitor General over the past many months.

GENERAL GERSHENGORN: Thank you.

CHIEF JUSTICE ROBERTS: The case is submitted.

(Whereupon, at 12:02 p.m., the case in the above-entitled matter was submitted.)