

## Legal Sidebar

# Six Justice Court to Decide Liability of Officials for Post 9/11 Detention

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Following the September 11th terrorist attacks, federal authorities detained a number of foreign nationals on immigration charges. Several of the former detainees (detainees) sued individual former federal officials (officials) asserting that they had been unlawfully detained and subject to mistreatment during their detention. Their cases ([Ashcroft v. Abbasi](#), [Ziglar v. Abbasi](#), and [Hasty v. Abbasi](#)) are particularly distinct because they will be decided by a Supreme Court consisting of only six justices. Until the vacancy created by Justice Scalia's death is filled, only eight members of the Court will hear cases this term. Two of the remaining justices, Justices Kagan and Sotomayor, recused themselves presumably on the basis of their involvement with the litigation in the lower courts before they joined the Court.

The Court agreed to consider three issues: (1) whether the detainees have a right to sue the officials personally for damages under the Court's *Bivens* precedent; (2) whether the officials enjoy immunity from suit for the performance of their official supervisory duties; and (3) whether the detainees have complied with the pleading requirements identified in the Court's *Ashcroft v. Iqbal* decision.

The [detainees](#) are foreign nationals of Middle Eastern, North African, or South Asian origin, most of whom are Muslim. They contend that they were arrested, detained, and mistreated under a policy, which in the course of the post-9/11 terrorism investigation, targeted Muslim or Arab men who were allegedly in violation of federal immigration law. They seek to recover damages from each of former Attorney General John Ashcroft, former Federal Bureau of Investigation Director Robert Mueller, former Immigration and Naturalization Commissioner James Ziglar, former Metropolitan Detention Center (MDC) Warden Dennis Hasty, and former MDC Associate Warden James Sherman.

After series of procedural preliminaries, the U.S. Court of Appeals for the Second Circuit [held](#), among other things: (1) that the detainees had presented plausible *Bivens* claims of violations of the Fifth Amendment substantive due process and equal protection components of the Due Process Clause by various of the Justice Department officials and the MDC officials; (2) that the detainees had presented plausible *Bivens* claims of Fourth Amendment violations by the MDC officials; and (3) that the Justice Department officials and the MDC officials were not entitled to qualified immunity with respect to any of the claims. A dissenting member of the Second Circuit panel would have declined to recognize the *Bivens* claims and in any event would have found the officials entitled to qualified immunity.

[Bivens](#) refers to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Supreme Court case in which the Court held that federal agents might be personally liable for monetary damages as a consequence of their warrantless arrest of an individual, coupled with a "stem to stern" warrantless search of his apartment, threats to arrest his entire family, and a subsequent strip search. The question soon arose whether a comparable cause of action might attend constitutional violations in other contexts. The Court early on recognized extensions in a prison-conditions Eighth Amendment [case](#) and in a [case](#) of sex discrimination under the equal protection component of the Fifth Amendment Due Process Clause. Yet "the [Court](#) has been reluctant to extend *Bivens* liability to any new context or new category of defendants."

The [detainees](#) argue that the due process and Fourth Amendment claims recognized by the Second Circuit are not new,

but fall within the class of *Bivens* claims that the Court has already recognized. The [officials](#) counter that the case is distinct and that recognition of the claims would extend *Bivens* into a new context. If so, the [detainees](#) respond, it is appropriate given the absence of effective alternative remedies and the suitability of judicial common law development of a remedy. The [officials](#) answer, it is not appropriate, particularly here, given the post-9/11 public safety and national security concerns.

As for official qualified [immunity](#), it “shields federal and state officials from claims for money damages unless a plaintiff pleads facts showing that (1) the official violated a statutory or constitutional right, and (2) the right was clearly established at the time of the challenged conduct.” The immunity question may turn on whether clearly established constitutional law precluded, in the shadow of the 9/11 attacks, the detention of foreign nationals guilty of immigration violations until they had been cleared of terrorist involvement. It may also afford the Court to further delineate the bounds of qualified immunity enjoyed by supervisors for the misconduct of their subordinates.

Finally, there is the pleading issue. Eight years ago, the Court faced a comparable situation in [Ashcroft v. Iqbal](#). Iqbal, a Pakistani Muslim, arrested, detained, and subsequently convicted for an immigration offense, sued the correctional officers and supervisory officers up to and including the Attorney General, alleging mistreatment in conjunction with the post-9/11 terrorist investigation. The Court issued two critical pronouncements. First, an official could not be held liable under *Bivens* solely on the basis of the misconduct of his subordinates. Personal liability of senior officials depends on their personal conduct. Second, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it stops short of the line between possibility and plausibility of ‘entitlement to relief.’”

In the case before the Court, the [officials](#) contend that the case arose under the same facts as *Iqbal* and the pleadings correspond to those found insufficient in *Iqbal*. The [detainees](#) answer that the pleadings are couched in terms that permit sufficient inferences.

Regardless of the outcome, official qualified immunity is a creature of common law, which Congress is free to codify, modify, or replace with respect to federal officials.

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