

For constitutional decisions, does it matter who - Oregonian, The: Web Edition Articles (Portland, OR) - March 4, 2017

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The U.S. Supreme Court will soon decide whether federal officials can sometimes be immune from personal liability for intentionally violating people's constitutional rights. The argument is made on behalf of former Attorney General John Ashcroft and FBI Director Robert Mueller, who are sued (along with a few other federal officials) by former federal detainees in a case titled *Ashcroft v. Abbasi*.

The former detainees, all undocumented Muslim immigrants who were since deported, were arrested and held in harsh conditions in the wake of 9/11. Their lawsuit does not challenge the constitutionality of their detentions, only the constitutionality of the conditions under which they were held. Those conditions allegedly included months-long solitary confinement, deprivation of food and sleep, denial of access to basic hygiene items like toilet paper, soap, or eating utensils, repetitive and unnecessary strip searches, and a variety of other physical and verbal abuses. The lawsuit doesn't claim these conditions would be unconstitutional if applied to terrorism suspects. Instead, it claims these abusive conditions persisted for up to eight months, lasting long after officials realized that the detainees were not suspected of terrorism and were held solely for immigration violations.

Generally speaking, federal officials can be held personally liable for acts violating constitutional rights only if "every reasonable official" would have realized that the action was unconstitutional. Thus, liability arises only when officials engage in clear -- and therefore mostly intentional -- constitutional violations. But attorneys for Ashcroft and Mueller argue that their clients should not be liable even if they intentionally violated the Constitution. Their claim is that undocumented aliens should not be allowed to sue officials who set national security policy, no matter how egregious or intentional the violations may be. The remedy for such constitutional violations, they say, can only come in the form of injunctive relief: a court order requiring the government to stop violating the Constitution.

That is a dangerous argument. As a lawyer for the detainees argued recently before the Supreme Court, injunctions to cease and desist constitutional violations do not provide deterrence against future violations. Only monetary awards can do that. Moreover, courts may be especially reluctant to stop the enforcement of national security policies. Think, for example, of internment camps for people of Japanese ancestry during World War II. Only monetary damages allow for after-the-fact recompense for intentional constitutional violations that may go unaddressed in real time.

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The identity of our new president is crucial for the resolution of this case. As a candidate and then as president, Trump displayed disregard for constitutional restrictions on issues ranging from torture to free speech to government ethics. He is known to act impulsively, and to rely on false information, including in the area of national security. And he has made statements displaying hostility to Islam, whereas constitutional violations often depend on the presence of discriminatory intent. Indeed, one of the recent injunctions blocking President Trump's travel ban was based on the claim that Trump's executive order may have been motivated by discriminatory intent against Muslims.

In short, the identity of the new president greatly increases the likelihood of constitutional violations, particularly those based on national security and directed at undocumented immigrants. This is not the time to shut down the ability of vulnerable minorities to vindicate their constitutional rights, nor to block courts' ability to deter intentional constitutional violations.

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