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Civil Procedure

9/11 FBI Abuse Decision Could Help Trump Travel Ban

A longstanding suit alleging discriminatory and abusive confinement of Muslims and Arabs following the Sept. 11 terrorist attacks came to an end after a ruling by the U.S. Supreme Court June 19 (*Ziglar v. Abbasi*, 2017 BL 208400, U.S., No. 15-1358, 6/19/17).

Former detainees can't sue top George W. Bush administration officials for damages arising from the alleged unconstitutional confinement because Congress didn't authorize that remedy, the court ruled in a 4-2 decision by Justice Anthony M. Kennedy. He was joined by Chief Justice John G. Roberts Jr. and Justices Clarence Thomas and Samuel A. Alito Jr.

The decision could affect President Donald Trump's efforts to have the high court revive a ban on travel from six mostly Muslim countries, Charles J. Dunlap Jr., a professor at Duke Law School, Durham, N.C., and executive director of the school's Center on Law, Ethics and National Security, told Bloomberg BNA by email June 19.

''Let me be very clear, this case and the travel ban case are quite different in most ways, but a key issue in both seems to be the degree to which courts should defer to the elected branches of government on national security matters,'' Dunlap said.

Here, the court declined to extend the scope of ''*Bivens* claims,'' which seek damages for violations of constitutional rights by federal officials, to national security policy decisions.

The decision ''mostly went along traditional lines with respect to deference to the Executive and Congress in national security matters,'' he said.

Travel ban supporters ''may be somewhat heartened by'' the court's deference on national security ''if the Supreme Court decides to take the travel ban case, which is by no means certain,'' Dunlap said.

''For me it's a bit of a reach'' to see implications for the travel ban here because the cases are so different, Norman Abrams, a professor at UCLA Law School, Los Angeles, who teaches about anti-terrorism law, told Bloomberg BNA June 19.

Breyer, Ginsburg Dissent The court reversed the U.S. Court of Appeals for the Second Circuit's 2015 holding that a remedy was available under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, in *Turkmen v. Hasty*.

The decision ''is consistent with a long-standing trend of the Court not to create new civil remedies where Congress could have done so, but hasn't,'' Dunlap said.

But allowing the suit was consistent with *Bivens*, Justice Stephen G. Breyer said in dissent, joined by Justice Ruth Bader Ginsburg.

Breyer feared that the ruling ''would significantly shrink the existing *Bivens* contexts, diminishing the compensatory remedy constitutional tort law now offers to harmed individuals,'' he said.

Short-Staffed SCOTUS Justices Sonia Sotomayor, Elena Kagan, and Neil M. Gorsuch didn't take part in the decision.

It's noteworthy that only four justices signed the decision, Abrams said.

However, it's likely that Gorsuch would have been a fifth vote for the decision if given the opportunity, he said.

Sotomayor and Kagan ''might well have favored the dissent,'' Dunlap said.

Abuse Alleged The plaintiffs here alleged that they were confined based on a government policy of detaining immigrants who appeared to be Arab or Muslim and had overstayed their visas.

They argued that the detentions violated their right to equal protection under the Fifth Amendment, the court said.

They alleged that they suffered in harsh conditions including tiny cells, strip searches, and inadequate access to ''basic hygiene products,'' the court said.

The defendants included former FBI Director Robert Mueller—who is now special counsel investigating whether the Trump campaign colluded with the Russian government—former Attorney General John Ashcroft, and former Immigration and Naturalization Service Commissioner James Ziglar.

Special Factors Allowing the lawsuit would extend *Bivens* remedies into a new context, unlike the three previously allowed by the court, the court said. The plaintiffs' claims were unlike the three past *Bivens* claims allowed by the court, it said.

Those claims involved a man being handcuffed without a warrant, a Congressman who fired his female secretary and ''a claim against prison officials for failure to treat an inmate's asthma,'' the court said.

The Second Circuit below should have applied the ''special factors analysis'' applicable to new types of *Bivens* claims, the court said.

Under that analysis, if there are ''special factors'' indicating that courts shouldn't act without authorization from Congress, then courts should refrain from doing so, the court said.

Special factors counseled against extending *Bivens* remedies here, the court said.

The claims challenged a policy decision by executive branch officials, and allowing them could prevent future officials ''from devoting the time and effort required for the proper discharge of their duties,'' the court said.

''The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy,'' the court said.

There is ''a balance to be struck'' between ''deterring constitutional violations and freeing high officials to make'' such decisions, the court said.

But that balance ''is one for the Congress, not the Judiciary, to undertake,'' the court said.

***Korematsu* Reference** Breyer wrote in his dissent that the high court found that even the U.S. attorney general wasn't ''entitled to absolute immunity in a damages suit arising out of his actions related to national security'' in its 1985 decision, *Mitchell v. Forsyth*.

Further, ''there may well be a particular need for *Bivens* remedies when security-related Government actions are at issue,'' Breyer said.

Damages remedies have a benefit that injunctive remedies, which seek to force the government to stop taking an action, don't, Breyer said.

When there's an emergency, decisions about injunctive remedies ''typically come during the emergency itself,'' Breyer said.

He cited the internment of ''more than 70,000 American citizens of Japanese origin'' during World War II, which the high court refused to stop in *Korematsu v. United States*.

''I was struck'' by the *Korematsu* reference, Abrams said.

Breyer ''uses this as an argument in favor of having after the fact, even long-after the fact, damages liability,'' Abrams said.

A damages action ''is typically brought after the emergency is over, after emotions have cooled, and at a time when more factual information is available,'' Breyer said.

That gives courts ''more time to exercise such judicial virtues as calm reflection and dispassionate application of the law to the facts,'' Breyer said.

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