

Center for Constitutional Rights

Discrimination, Detention, and Deportation: Immigration & Refugees

<https://ccrjustice.org/home/blog/2016/10/11/are-bush-officials-above-law>

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The CCR blog

Today, nearly 14 years after the case began, the Supreme Court granted John Ashcroft and other Bush-era government officials requests to review CCRs class action challenge to the post-9/11 immigration detentions. In [Turkmen v. Ashcroft](#), the Supreme Court will directly confront, for the first time, whether the Constitution guarantees non-citizens the right to sue cabinet-level officials for clearly unconstitutional discrimination and abuse in a US prison.

In some ways, the answer seems obvious. In the wake of the 9/11 attacks, hundreds of Muslim, Arab, and South Asian men were arrested on civil immigration charges and treated as suspected terrorists based on nothing more than their race and religion. As a panel of the [Second Circuit Court of Appeals explained](#) last year, detaining individuals as if they were terrorists, in the most restrictive conditions of confinement available, simply because these individuals were, or appeared to be, Arab or Muslim exceeds [constitutional] limits. It might well be that national security concerns motivated the Defendants to take action, but that is of little solace to those who felt the brunt of that decision. The suffering endured by those who were imprisoned merely because they were caught up in the hysteria of the days immediately following 9/11 is not without a remedy.

And yet. Ashcroft, along with former-FBI director Robert Mueller, and former-INS Commissioner James Ziglar, are arguing that non-citizens injured in the name of national security, and pursuant to high-level policy, should not even be allowed in the courthouse door. A doctrine called qualified immunity already provides these Government actors with substantial protection, allowing them to be held personally liable only if they are shown to have violated *clearly established law* about which any reasonable official would have known. These defendants want more. Represented by the current Solicitor General of the United States, former government officials are asking the Supreme Court to grant them the right to violate clearly established constitutional rights at will. Perhaps even more troubling, they are also arguing that it is *not* clearly established that our Constitutional guaranty of equal protection prohibits the government from placing people in the most restrictive conditions of confinement that exist in the federal prison system based *only* on their race, religion, ethnicity and national origin, while *knowing* there is no non-discriminatory reason to suspect them of ties to terrorism.

This hubris has human consequences. [Ahmed Khalifa](#) is one of the plaintiffs whose case will be considered by the Supreme Court this year. Khalifa arrived in the United States on a student visa in July of 2001, with plans to return to his native Egypt in October to complete his final year of medical school at the University of Alexandria. He shared an apartment in Brooklyn with friends from Egypt and worked at a deli. After 9/11, the husband of a postal service worker called the newly created 9/11 FBI hotline, reporting that several Arabs who lived at Khalifa's address were renting a post-office box and possibly sending out large quantities of money. In response, a team of ten FBI, INS, and NYPD officers raided Khalifa's apartment. Khalifa and his roommates were all arrested for civil immigration violations, in Khalifa's case working without authorization. The roommates were transported to an INS facility in downtown Manhattan, and told they would be released in a day or so the normal course of events for a non-citizen arrested for a minor immigration offense. Instead, Khalifa was chained together with other detainees and transported in armed convoy by officers in riot gear to the Metropolitan Detention Center (MDC), a federal jail in Brooklyn.

On the ground floor of the MDC, he was slammed into the wall, and pushed and kicked by MDC guards. They took away his glasses, brought him to a special housing unit on the 9th floor, and left him in a wet cell with a mattress on the floor. His wrists were cut and bruised from his handcuffs, and he could hear other men moaning and gasping through the walls of his cell.

A few days later he was interviewed by the FBI, who asked how frequently he prayed and what mosques he visited in Egypt. A month later he was ordered removed from the United States for working unlawfully. He waived his right to appeal, eagerly awaiting deportation home. Instead, he was kept for months in solitary confinement. He was locked in a small cell 23 hours a day, moved only in handcuffs and shackles for an hour of recreation in a barren cage, denied access to lawyers and family, kept from phone calls and visits, and constantly harassed by MDC guards. The lights were left on in his cell all day and night, and guards banged on the bars, making sleep impossible. He started a hunger strike, seeking access to the Egyptian consulate, but access never came. Months later he was finally, officially, cleared of any connection to terrorism even though there was no reason to suspect him of any connection to terrorism to begin with, and *defendants knew* it and deported without apology or explanation.

Though he did not know it at the time, Khalifa was one of hundreds of Muslim, Arab, and South Asian men rounded up pursuant to a secret policy issued by former Attorney General John Ashcroft to arrest everyone law enforcement could who fit the profile of the 9/11 hijackers, on the theory that if they arrested and pressured as many people from those communities as possible, someone would have information about terrorism. Ashcroft ordered that the men swept up in this way be held until cleared of any connection to terrorism, even though the immigration law only allowed for detention until a person could be deported. Along with Mueller and Ziglar, Ashcroft worked with the Federal Bureau of Prisons to ensure that the men rounded up in this way would be isolated and held in ultra-restrictive confinement while they were investigated. Law enforcement officers were instructed that these were suspected terrorists, or men who

knew suspected terrorists, and should be encouraged in any way possible to cooperate. Ashcroft and his cronies knew there was no reason to suspect the men of any connection to terrorism beyond their race and religion, yet banned the detainees deportation or release even after the New York FBI field office cleared them of all possible suspicion, awaiting a second clearance from headquarters FBI and the CIA.

In April of 2002, while many men still languished in detention, CCR filed *Turkmen*. The case sought to end the detentions and also sought money damages from Ashcroft, Mueller, and Ziglar, and from others who implemented the round-ups. When five of the 9/11 detainee plaintiffs settled their claims with the United States in 2009 for \$1.26 million, six new plaintiffs stepped up to take their place, Khalifa included. They have now been seeking justice for 14 years. Instead of an apology, compensation, or an acknowledgment of error, the Obama administration has vigorously defended the Bush-era officials violations of fundamental constitutional rights.

And now the Supreme Court will decide. At a time when our public discourse is marred by bigotry and clearly unconstitutional policy proposals that would codify the same irrational and animus-based policing that occurred after 9/11, the importance of the Courts decision could not be clearer.

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