

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

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

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

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

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

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

7 MS. MEEROPOL: Uh-huh.

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

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

18 JUSTICE BREYER: In a set of cases.

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

25 My -- my friend argued, both on reply and

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

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

18 Respondents allege in paragraph
19 47 that Petitioners received detailed daily reports of
20 the arrests and the detentions, and that they learned
21 that the FBI had no basis to suspect Respondents and the
22 class of ties to terrorism. There was no reason to
23 think that any of these individuals were -- had an
24 articulate -- that there was an articulated basis to
25 suspect them of ties to terrorism.

1 JUSTICE KENNEDY: We're talking about
2 adequate remedies. Can you tell me, as Justice Ginsburg
3 pointed out, we didn't -- these detainees didn't have
4 access to the outside. Were there any legal proceedings
5 filed, injunctive proceedings, after say month 2, month
6 3, and were -- were those remedies completely added to
7 district courts to look at this and say that we're not
8 going to give relief?

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

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

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

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

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

1 as to be arbitrary and punitive.

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

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

15 MS. MEEROPOL: Yes, absolutely.

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

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

20 JUSTICE KENNEDY: In your favor?

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

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

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

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

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

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

1 district.

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

11 JUSTICE KENNEDY: That's Carlson v. Green?

12 MS. MEEROPOL: Yes, exactly.

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

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

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

1 of Prisons. They created the actual conditions of
2 confinement.

3 There is nothing in the record to suggest
4 that the BOP ordered that all of the conditions that
5 Respondents were subjected to, lights on in their cells
6 24 hours a day while they were in solitary confinement,
7 that the solitary confinement continue without any
8 individualized review. There's nothing in the record.

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

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

17 JUSTICE ALITO: Is your argument dependent
18 on that?

19 MS. MEEROPOL: No --

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

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

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

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

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

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

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

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

1 institution.

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

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

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

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

9 MS. MEEROPOL: Well --

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

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

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

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

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

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

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

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

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

18 If there are no further questions.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 General Gershengorn, four minutes.

21 REBUTTAL ARGUMENT OF IAN H. GERSHENGORN

22 ON BEHALF OF THE PETITIONERS

23 IN NOS. 15-1358 AND 15-1359

24 GENERAL GERSHENGORN: Thank you, Mr. Chief
25 Justice.

1 A few quick points.

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

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

12 JUSTICE GINSBURG: What was --

13 GENERAL GERSHENGORN: I'd like to make --

14 JUSTICE GINSBURG: What was the date of
15 that?

16 GENERAL GERSHENGORN: That was September 20,
17 2001. And it's on page 224 of the Joint Appendix.

18 Three points on the law.

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

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

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

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

15 With respect to 1985(3), Justice Kennedy, I
16 want to make just one quick point, which is that the --
17 the -- the DOJ defendants would be -- and all the
18 defendants would be subject to qualified immunity for
19 1985(3) because it was not clear that officials within a
20 corporate unit could -- could conspire with each other.
21 There's case law suggesting they couldn't. And it was
22 unclear, specifically in the Second Circuit, whether
23 1985(3) applied at all to Federal officials. So
24 qualified immunity would eliminate the 1985(3) claim.

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

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

12 JUSTICE KENNEDY: Just one point on -- on
13 1985. The fact that it wasn't clear that there was a
14 remedy under 1985, it doesn't follow -- it wasn't clear
15 that there wasn't a right that was being violated.

16 GENERAL GERSHENGORN: That -- so --

17 JUSTICE KENNEDY: That's different.

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

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

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

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

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

23 If there are no further questions.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 General Gershengorn, before you leave the

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

4 GENERAL GERSHENGORN: Thank you.

5 CHIEF JUSTICE ROBERTS: The case is
6 submitted.

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

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