

Director Robert Mueller of the Federal Bureau of Investigation hereby joins in the REPLY MEMORANDUM OF LAW IN SUPPORT OF FORMER ATTORNEY GENERAL JOHN ASHCROFT'S MOTION TO DISMISS. By motion and memorandum in support, former Attorney General Ashcroft filed a motion to dismiss plaintiffs' Fourth Amended Complaint in which Director Mueller joined. Following plaintiffs' opposition, he has filed a reply. The facts alleged and the claims against General Ashcroft and Director Mueller in the Fourth Amended Complaint (FAC) reflect no material differences. Consequently, the defenses advanced by General Ashcroft and further articulated in his reply apply equally to Director Mueller and he joins in General Ashcroft's Reply.

The only different allegations against Director Mueller contend that he ordered that all tips that the FBI received related to the September 11 attacks be investigated (FAC ¶ 41), and that he directed that CIA name traces be requested before clearing persons of interest (FAC ¶¶ 57, 168, 262). Otherwise, the allegations of the Fourth Amended Complaint generally treat General Ashcroft and Director Mueller together.

1. Special factors counsel against creation of a Bivens remedy in the unique context of the national emergency that arose as a result of the September 11th attacks. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). First, the comprehensive remedial scheme governing the situation of aliens that Congress created in the Immigration and Nationality Act constitutes a special factor that counsels against creation of a Bivens remedy. Second, in the unique national emergency situation created by the September 11th attacks, the issues dealing with the treatment of aliens in the context of that national emergency itself constitutes a special factor counseling

hesitation for courts in the creation of a Bivens remedy.

Consequently, this Court should decline to create a Bivens remedy in this unprecedented context. See Wilkie v. Robbins, 551 U.S. 537, 550 (2007); Arar v. Ashcroft, 585 F.3d 559, 571 (2d Cir. 2009)(en banc).

2. a. Director Mueller, along with General Ashcroft, is entitled to qualified immunity because, based on the facts alleged in the FAC, plaintiffs fail to plead the Director's personal involvement in the alleged constitutional violations. In none of the claims - -conditions of confinement, purposeful discrimination, restricting free exercise religion during confinement, communications blackout, and conspiracy- -do plaintiffs plead facts that allegedly establish Director Muller's personal involvement. Compare, Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009). At most the FAC alleges that Director Mueller, as FBI Director, headed the nationwide law enforcement investigation in the national emergency following the 9/11 attacks. See id.

b. Director Mueller is also protected by qualified immunity because in the unique and unprecedented circumstances of the national emergency and the nationwide investigation following the terrorist attacks of September 11, 2001, law enforcement confronted a context it had never before faced. Responding to the national emergency was uncharted territory. Therefore, claims that Director Mueller ordered that the nationwide investigation be run out of FBI Headquarters rather than independently out of each FBI Field Office (Plaintiff's Opposition to Defendants' Motions to Dismiss (Pl. Opp.) at 27) to keep it centralized, or that he ordered that all tips be investigated (Pl. Opp. at 33) is hardly surprising. It is certainly not a violation of plaintiffs' constitutional

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 12, 2011, I electronically filed the foregoing Defendant Robert Mueller's Memorandum Joining In Attorney General Ashcroft's Motion To Dismiss and Memorandum of Law In Support the Clerk of Court using the CM/ECF system which will send a notification of such filing ("NEF") to counsel as follows:

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