UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IBRAHIM TURKMEN, ET AL., CV-02-2307 (JG)

: Plaintiffs

-against- : U.S. Courthouse
Brooklyn, N.Y.

JOHN ASHCROFT, ET AL.

Defendants :
March 11, 2011

- - - - - - - - - - - - - - - - - X 10:00:00 o'clock a.m.

BEFORE:

TRANSCRIPT OF ORAL ARGUMENT
HONORABLE JOHN GLEESON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

for the Plaintiffs: RACHEL ANNE MEEROPOL, ESQ.
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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

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THE CLERK: Turkmen v. Ashcroft.

THE COURT: Okay. Good morning, everyone.

Would the people who intend to argue in support of and in opposition to the motions -- it has been awhile, welcome back, nice to see you all, a lot of water under the bridge -- for my benefit, starting with the defendants' table, people who are going to argue, just stand and say your name, please.

MR. BARGHAAN: Good morning, Your Honor.

Dennis Barghaan from the US Attorney's Office in Alexandria, Virginia, on behalf of Attorney General Ashcroft.

THE COURT: Good morning.

MR. LAWRENCE: Good morning, Your Honor.

Assistant United States Attorney Craig Lawrence on behalf of Director Muller.

THE COURT: Good morning.

MR. BELL: Good morning, Your Honor.

David Bell from Crowell Moring in Washington, on behalf of former warden Dennis Hasty, along with Michael Martinez, who is here as well.

THE COURT: Good morning.

MR. McDANIEL: Good morning, Your Honor.

William McDaniel on behalf of the defendant James Ziglar.

THE COURT: Good morning, sir.

MS. ROTH: Good morning.

Debra Roth on behalf the defendant James Sherman.

THE COURT: Good morning, Ms. Roth.

MR. KLEIN: Good morning, Your Honor.

Joshua Klein on behalf of the former warden Michael Zenk.

THE COURT: Say your last name again, sir.

MR. KLEIN: Klein, Your Honor.

THE COURT: Klein. Good morning, Mr. Klein.

MR. KLEIN: Good morning.

MS. MEEROPOL: Good morning, Your Honor.

Rachel Meeropol for the Center for Constitutional

Rights on behalf of plaintiffs.

THE COURT: Good morning.

All right. Who is going first?

MR. BARGHAAN: I'll volunteer, Your Honor.

THE COURT: Okay. Come on up.

MR. BARGHAAN: Good morning, Your Honor.

Once again, may it please the Court, my name is Dennis Barghaan. I am here on behalf of attorney -- former Attorney General John Ashcroft in his individual capacity.

Your Honor, the parties collectively I know have submitted something on the nature of 250 pages of briefing on these subjects and I certainly will not pretend that the Court has not read them, analyzed and digested them and that the Court needs me to recitate all of our arguments writ large to you this morning. If it pleases the Court, I will simply provide a précis of our motion on what I think is the most contentious position, that being personal involvement and the application of the teachings of Iqbal and the Supreme Court to the fourth amended complaint. I will do so very briefly.

Your Honor, Iqbal now teaches and explains that a government official may only be subjected to the burdens of suit given the qualified immunity doctrine that provides extensive protection from civil liability through, quote, his own actions and that those actions have to have violated the Constitution.

Nothing that the plaintiffs have alleged in this case with respect to the former Attorney General's own actions come close to meeting the significant hurdle. The only allegation that is with respect to the Attorney General's own actions that relates to the plaintiffs' remaining claims avers that the former Attorney General developed a policy, that the detainees who were -- the individuals who were detained as a part of the PENTTBOM investigation were to be subjected to maximum pressure to obtain their cooperation by any means possible. That is the extent of their complaint with respect to the Attorney General's own actions.

Plaintiffs do not even attempt in their opposition to suggest that this vague policy on its own violates the Constitution of the United States. Rather, they say that the true unconstitutional conduct, the specific conditions themselves, were developed by others at another time, at another place. Indeed, the inspector general's report which is attached and incorporated into the plaintiffs' complaint says the very same thing, that other individuals developed those conditions.

Indeed, plaintiffs even concede in their opposition that it was left to others to implement that vague policy. So, at bottom, Your Honor, the plaintiffs' complaint and the plaintiffs' position here is that it is acceptable to hold the Attorney General of the United States liable in his individual

capacity for a policy that is constitutionally neutral on its face, that was allegedly morphed into an unconstitutional application later on down the road. That, Your Honor, asks this Court to ignore Iqbal. It asks this Court to say good-bye to the Supreme Court and return to the Conley against Gibson any set of facts rubric, which the Supreme Court destroyed in Twombly and applied in the Bivens context in Iqbal. But not only does that violate the generic rubric of Rule 12 analysis, but it also runs afoul of what Iqbal requires this Court to do, which is to apply its own judicial experience and common sense to the allegations of the complaint.

Your Honor, what informs Iqbal is that leaders have to make -- be able to make general pronouncements and expect to rely on the constitutional oath, a similar oath that your clerk just provided to these attorneys, to uphold the Constitution of the United States. Otherwise, government grinds to a halt. It grinds to a halt because in order to avoid personal financial ruin, leaders, such as the Attorney General of the United States, will have to look over their shoulder at all times, to make sure that every minute detail of their policies is being applied in an appropriate fashion.

The Supreme Court has rejected that notion for well over a century. In Robinson against Sichel, in 1888, Your Honor, the Supreme Court said that the -- what would become

the qualified immunity doctrine ensured that individuals were not held liable because of things that they could not possibly, given the hours in the day, protect against.

At the end, Your Honor, that is exactly what the plaintiffs ask this Court to do, is to ensure that future leaders, our present Attorney General, our other present cabinet members and other leaders in government who are looking at this case, say when I give a general policy, apprehend this fugitive by any means possible, that the Attorney General of the United States can be held liable when a Deputy United States Marshal breaks into the wrong house.

THE COURT: What if the allegation here, and I am intending to quote from the complaint when I say that -- the complaint currently says that the people in the MDC needed to be -- quote -- needed to be encouraged in any way possible to cooperate. What if instead of saying that -- I understand your argument. Your argument is that that's not illegal, correct?

MR. BARGHAAN: Correct.

THE COURT: What if the allegation were, in any way possible, legal or illegal, would that change the outcome?

MR. BARGHAAN: I think it might. I think that it might.

THE COURT: When you argue -- when you say that Ashcroft and Mueller -- you are representing only Ashcroft?

MR. BARGHAAN: That is correct.

THE COURT: You say he could be held responsible only for his own actions. You don't mean he has to literally himself have subjected the detainees to the kinds of abuse that are alleged in this complaint?

MR. BARGHAAN: Not at all.

The case law that we cite in our reply memorandum I think bears that out. For instance, there is a case in the Tenth Circuit, I think it's called Minx, in which a prosecutor was alleged to have violated the Fourth Amendment when agents executed a search warrant at a house based upon an affidavit that lacked probable cause. The allegations were that the prosecutor had drafted the affidavit. The Tenth Circuit said, the prosecutor could be held liable for that, assuming, of course, no absolute immunity is applied, because they clearly were the cause, they clearly were -- their conduct was the reason for the constitutional violation. That is to say, that it was the affidavit that lacked probable cause that led to the search. Her own actions were unconstitutional seeking a warrant based upon no probable cause.

Here, we don't have that.

THE COURT: Just so I am clear, because I think there is -- it is possible to conflate two separate questions here, which is what Iqbal did to supervisory liability --

MR. BARGHAAN: Yes.

THE COURT: -- on the one hand, and whether the allegations here satisfy the new world of pleading requirements, Iqbal and Twombly, as opposed to Conley versus Gibson.

On the first of those two, it sounds to me like you are not subscribing to the view that others may subscribe to, that supervisory liability, and particularly the five ways that the Second Circuit's Colon case describe how a supervisor can be held liable, you are not saying all of that is eviscerated by Iqbal, I take it?

MR. BARGHAAN: I am not.

Let me clarify what I am saying so that the record is clear.

There is no doubt that Iqbal altered what we might have already known as supervisory liability. Nothing in Iqbal says that a supervisor can never be held liable simply because they are a supervisor.

What Iqbal says and what it does to Colon is to -- is to mandate that only a supervisor's own actions, only his own conduct, his own affirmative conduct, can give rise to individual capacity liability. So --

THE COURT: I had misunderstood your position on this. I am not sure that's right. If you look at this list of -- there is a list of five ways in which prior to Iqbal -- and a question before me is whether this remains

true -- prior to Iqbal a supervisor could be held liable. You know the list in Colon, correct?

MR. BARGHAAN: Sure.

THE COURT: What remains of that list according to John Ashcroft?

MR. BARGHAAN: I don't know the exact list off the top of my head, Your Honor. I apologize.

THE COURT: Directly participated in the violation, we can all agree that that remains.

MR. BARGHAAN: Certainly remains.

THE COURT: Failed to remedy the violation after being informed of it by report or appeal.

MR. BARGHAAN: I think that's -- I think that Iqbal causes the death knell of that.

THE COURT: Third, created a policy or custom under which the violation occurred. You agree that remains?

MR. BARGHAAN: I would agree, that that is -- assuming of course, Your Honor -- I apologize for interrupting you.

THE COURT: That's okay.

MR. BARGHAAN: Assuming, of course, that the policy itself was unconstitutional, not that there was a policy and that others applied it in an unconstitutional fashion.

THE COURT: Understood.

Your argument here is that what's alleged is that a

constitutional policy was implemented in an unconstitutional way.

MR. BARGHAAN: That is correct.

THE COURT: That's the essence of your pleading claim?

MR. BARGHAAN: That's exactly right, Your Honor.

THE COURT: All right.

Four, was grossly negligent in supervising subordinates who committed the violation.

MR. BARGHAAN: Gone.

THE COURT: Five, was deliberately indifferent to the rights of others by failing to act on information that constitutional rights are being violated.

MR. BARGHAAN: That is the most controversial of them all and I believe that Iqbal destroys that as well. I think that there are a number of decisions both in this Court and in the Southern District of New York that holds just that. We understand there are cases that go the other way.

THE COURT: If a warden is walking down the hallway of the prison and sees someone who is handcuffed behind his back, face down, being beaten by guards and doesn't intervene, there is no more supervisor liability?

MR. BARGHAAN: As a matter of law, I think the answer to that is yes. I do not believe --

THE COURT: You can't be serious when you say that.

A warden walks down the mall and sees someone being beaten and there is no longer supervisory liability for a failure to intervene when intervention is possible?

MR. BARGHAAN: I think there is --

THE COURT: You are saying that?

MR. BARGHAAN: In your hypothetical, the warden actually sees the conduct?

THE COURT: Yes.

MR. BARGHAAN: Yes. Then in that circumstance, where the warden sees the conduct, I would concede, that it is possible for supervisory liability present.

THE COURT: That doesn't fall under either of the two prongs of Colon that you say are left.

MR. BARGHAAN: I think that's right.

THE COURT: So which is it? What's your argument?

MR. BARGHAAN: I think -- Your Honor, I am struggling here because I haven't thought of that issue much in this case because I don't believe it's pressed with respect to my client. I don't believe that there is an allegation in this complaint that --

THE COURT: I am trying --

MR. BARGHAAN: I understand.

THE COURT: I am trying to see what the contours of your legal argument are though. You said two things that are irreconcilable.

MR. BARGHAAN: At bottom, what Iqbal says, and I am not trying to be squirrely with you, Your Honor, in any way, shape or form.

THE COURT: I believe you.

MR. BARGHAAN: I am struggling with where the end line is. I think the Courts are struggling with it.

THE COURT: There are other examples, right?

MR. BARGHAAN: Sure.

THE COURT: A credible threat that one inmate is going to kill another inmate, it's brought to the warden's attention. It's credible. The warden decides to do nothing about it. Under your theory, there is no liability if that threat is carried out and the inmate is killed. That can't be right.

MR. BARGHAAN: Your Honor, I -- I don't agree with the Court's analysis. Whether it is right as a matter of what the law should be or what the law shouldn't be, I believe that that is what Iqbal is saying.

THE COURT: Why isn't Iqbal just saying that when the underlying tort requires invidious discriminatory intent, the supervisor has to share that intent before there can be supervisor liability? That's what your adversary says. That's what Iqbal must mean. Why isn't that the sensible way of reading the supervisor -- I understand what Justice Scalia wrote. But as far as dissenters are concerned, the sky is

always falling. The majority opinion can easily be read to say that what was needed there was a sharing of the invidious discriminatory intent, nothing more; no hands-on activity in the tort.

MR. BARGHAAN: I wouldn't disagree with you. I don't think it harms my argument for my own client to say that perhaps Your Honor is right about that distinction. But at the end of the day I cannot, in my own mind, from a purely baldly legal perspective, square that with what the Iqbal majority specifically said, which is that it has to be the official's own actions, not the official's own misactions, not the official's own omissions, but the official's own actions that violate the Constitution.

But once again, Your Honor, I am not trying to circumvent your question, but for purposes of my own client's conduct that is alleged in this complaint, which is --

THE COURT: I understand that. You have a good argument, I think. That's why I think these are two separate issues. I think -- Ms. Meeropol will speak for herself on the sufficiency of the allegation that this pleading that just says any way possible gets her where she needs to get. Obviously, I don't think the limitations on supervisory liability advanced by the defendants, they can't be right.

MR. BARGHAAN: I accept Your Honor's view. I respectfully disagree.

Again, I would -- I would come back to whether or not that is right as a matter of where the law should be, I cannot square that with Iqbal's specific language that it has to be the official's own actions, not in actions, that cause the individual capacity liability.

THE COURT: Why couldn't the action be possessing the requisite discriminatory intent?

MR. BARGHAAN: I think that reads Iqbal too narrowly. Especially -- and I understand, Your Honor. I don't think I will make much headway here and I certainly don't want to beat my head up against the wall, nor be obstreperous. But I think I stated our position.

THE COURT: All right.

MR. BARGHAAN: Thank you. I thank the Court for its time today.

THE COURT: Thank you.

Who is next?

MR. LAWRENCE: May it please the Court, Assistant United States Attorney Craig Lawrence on behalf of Director Muller.

I have little to add to Mr. Barghaan's argument and the papers that have been filed. I would just like to make a couple of points.

First of all, the only independent things I believe that Director Muller is alleged to have done that haven't been

really covered by the direct pleadings, he ordered the -- that all tips be investigated. He ordered CIA name trace on those individuals, on individuals before they were either released or deported, and certainly neither of those elements are unconstitutional on their face, and in the context of qualified immunity, certainly there is no clearly established law that would say that Director Muller violated anyone's constitutional rights by ordering that all -- all individuals, all tips be investigated and that name traces be run on those individuals before they are cleared.

Beyond that, Your Honor, again, in the qualified immunity area, I would just point out that in the qualified immunity analysis, if the Court reaches that, in context of this case, the necessary predicate is context and the context has been deemed by the Supreme Court, and a very important element. That context as addressed in this case specifically by the Supreme Court endorsing, whether it was Judge Cabranes' opinion in the Second Circuit, that a national and international emergency unprecedented in the history of the American republic was what created the events here.

If that is context, it certainly -- if it is unprecedented in the eyes of the Supreme Court, then there is no clearly established law that would govern the processes which followed.

Now, that's fairly broad, but it is also the context

that both -- that Director Muller and the other individuals were operating in.

We join and urge the adoption of the special factors under the Immigration and Nationality Act, barring a Bivens suit, and we urge affirmance -- a dismissal on that ground and we also urge protection of qualified immunity.

I specifically join Mr. Barghaan's argument here this morning and in the briefs on the individual action that is required in order to get supervisory liability in the context of this case and we would ask that the claims against Director Muller be dismissed.

THE COURT: I think one of the difficult things about these motions is figuring out how far this context that you rely on travels in the case. I mean, we are dealing now with conditions of confinement. There was a time in the past when we were dealing with hold until clear and other aspects of the initial pleadings and I am not so sure that the resolution of those claims really depended on context so much as on Supreme Court law that was formulated extrinsic of this context, Whren, the ability of law enforcement officers to take actions that are supported by undisputed facts.

Right here the fact that these detainees had overstayed their visas, which on an objectively reasonable basis allowed the -- allowed federal law enforcement officers to take them into custody, even though they were only

interested in whether they were terrorists. That's all behind us. But it seems like for their part the defendants seek to have that feature of the case, the post 9/11, permeate everything else in the case, including conditions of confinement. Hang on a second. Because this -- part of this is directed at Ms. Meeropol as well. She will speak later.

It looks to me like the defendants contend that these detainees have lesser rights than the people in the cell next door at the MDC because of the context. I can't tell for sure but it looks like the plaintiffs might be suggesting they even have greater rights, page 24 of the plaintiffs' briefs there is a reference to there not being any legitimate justification for holding civil immigration detainees, not accused of crimes or terrorism, for whom there is no evidence of dangerousness, in the most restrictive conditions authorized, even if those conditions might lawfully be imposed in other situations on other prisoners.

I don't think they are arguing -- Ms. Meeropol will correct me if I am wrong -- I don't think they are arguing that the detainees had greater rights than the other guests at the MDC, most of them are pretrial detainees, but it seems pretty clear to me the defendants are arguing they had lesser rights, at least when it comes to qualified immunity.

MR. LAWRENCE: I mean --

THE COURT: Let me finish.

MR. LAWRENCE: Certainly. Excuse me.

THE COURT: I think once they are in custody, once they are there in the MDC, I am having difficulty with any rubric except one that says they have exactly the same rights as the other people who are being detained in the MDC. I am finding it difficult because I recall from the Second Circuit's decision, this context you rely upon seeped into the qualified immunity I think on a procedural due process point.

Anyway, I don't think it is cut and dried, what you say. I am not sure what the boundaries of your qualified immunity argument are. Are they qualifiedly immune as long as there is a suspicion that these folks are either terrorists or no terrorists? Does qualified immunity that extends to all of these abusive practices that are alleged? What are the boundaries of your qualified immunity argument?

MR. LAWRENCE: Part of -- one boundary, Your Honor, is the fact that there is a distinction, obviously, in the qualified immunity analysis between what is clearly established in the context and whether it's unconstitutional. It may very well be, if it is determined to be unconstitutional, the question is whether it was clearly established that it was unconstitutional in that context.

So that it could still -- this Court could still find that the conditions of confinement and I will -- I will turn to briefly on that in just a minute, a little bit more,

but to find them unconstitutional but in the context not clearly established. The Supreme Court has done that in any number of cases as it goes through and reaches its analysis.

THE COURT: What do you mean by the context? You can always make the spotlight, you can always tinker with the breadth of the -- how tight the spotlight is in a way affects the qualified immunity analysis.

Are you saying that it has to be clearly established that you can't beat somebody's head against the wall after a couple of skyscrapers have been bombed by terrorists? Is that what you are saying?

MR. LAWRENCE: Your Honor, I don't believe it goes to that specific level. But what I am saying here, and it's the analysis the Supreme Court employed in Wilson against Layne that dealt with the right on with the -- of police officers executing search warrants. The Supreme Court had no problem concluding that the -- that practice was unconstitutional, but they further had no problem concluding that it was not clearly established at the time so that the -- there is no personal liability of the officers.

Now, one element -- let's look briefly to some of the facts here -- and one of the claims is that the witness security procedures that were put in place with regard to these individuals was unconstitutional.

Well, it's the same procedure that they use in

attempting to protect witnesses that they have in custody and certainly in the context of an international -- national, international investigation, limiting the contacts with outside people of individuals who are being investigated at this point for possible connection to the terrorist attacks, even were this Court to conclude that that would be unconstitutional, certainly in the context of 9/11 it would not be clearly so because there has been nothing approaching that kind of context to guide Director Muller, Attorney General Ashcroft and the senior officials who looked at ways to protect the investigation.

In the context here, what we really are getting at is that, especially for the senior officials, Director Muller in particular, my client, nothing that has been alleged that he has been engaged in got to the level, as Mr. Barghaan pointed out with regard to General Ashcroft, got to the level of what was going on on the ground in the prison. Instead, it was a step removed and it was the hold until cleared policy, which Your Honor has already pointed out we are not really dealing with here.

THE COURT: How many of these alleged abuses -- you picked the one where -- where you -- probably the strongest argument for you, the communication of evidence. How many of these other abuses are you claiming it wasn't sufficiently clearly established?

MR. LAWRENCE: Your Honor, for Director Muller we don't have to get down to that level because Director Muller is not alleged to have directed, gotten -- engaged in any acts at MDC.

THE COURT: I am asking you to get down there. I am asking you whether or not you think because of this setting, Director Muller, if he's otherwise in the case, allegations are sufficient, he's qualifiedly immune from charges that there were unnecessary strip searches or there was air-conditioning in the winter and heat in the summer, people were placed on the roof with T-shirts in the wintertime? Is he qualifiedly immune from all of those abuses?

MR. LAWRENCE: Your Honor, I don't believe those allegations are specifically factually directly tied to Director Mueller. He is not alleged --

THE COURT: I am asking you -- I am trying again to define the limits, the contours of the argument you are advancing. I am asking you whether in this setting, Mueller or Ashcroft or any of these defendants, will be qualifiedly immune because this happened post 9/11 from liability for those abuses?

MR. LAWRENCE: Your Honor, in the context of the factual allegations in this Fourth Amendment complaint, I believe they would be, whether you look at it in terms of personal involvement, which is not adequately pleaded for

those violations, or for -- no facts are alleged as far as Director Mueller is concerned.

THE COURT: Suppose personal involvement were adequately pleaded and facts were alleged. Your position is because this happened post 9/11, there would be no qualified immunity for the most egregious abuses alleged in this complaint?

MR. LAWRENCE: I am not sure that you can go quite that far with qualified immunity, Your Honor.

THE COURT: How far do you go? Where does it go?

MR. LAWRENCE: It's a difficult line to draw.

Obviously, our point is that for Director Muller we need not draw it because of the factual allegations here. But as you get down to those individualized allegations, the claim that goes along with them is one that has to be examined very carefully to make that determination, whether it is sufficiently unique in the context as not to be covered by any clearly established law.

THE COURT: Does a case that the plaintiff would say establishes the law clearly, that case has to involve like the aftermath of a terrorist attack? Is that your point?

MR. LAWRENCE: Not necessarily. I am not sure that it would have to be quite that close. But it is going to take an analytical look at where that line has to be parsed because of the nature and the extraordinary nature of the situation

post 9/11.

THE COURT: All right.

MR. LAWRENCE: For these reasons we would ask that Director Muller be dismissed.

Thank you.

THE COURT: Thank you, Mr. Lawrence.

MR. McDANIEL: Good morning, Your Honor.

THE COURT: Good morning.

MR. McDANIEL: May it please the Court, William McDaniel for defendant James Ziglar who was head of the Immigration and Naturalization Service.

I would like to focus on the -- with regard to Mr. Ziglar on the prong of Iqbal that Your Honor did not address with Mr. Barghaan, which is the adequate pleading of facts of Mr. Ziglar's involvement in these activities.

Mr. Ziglar tends to get lumped in in the pleadings and even in some of the opinions that have been issued in this case by the appellate courts with the Director of the FBI and the Attorney General. But he is sued individually for what he did individually and I ask the Court please to focus on the allegations in the latest complaint regarding what Mr. Ziglar did or did not do.

In the plaintiffs' opposition papers to our motion, they identified specific paragraphs where they claimed that they had alleged Mr. Ziglar's involvement personally. We

addressed each of those in our reply papers. I think when it comes to conditions of confinement, which is what we are focused on here with this complaint, Mr. Ziglar is far removed, the most removed from that and the implementation of that policy.

He is involved in the decision to hold until cleared and that is about as specific as they get in their pleadings regarding Mr. Ziglar.

We just ask the Court to focus please upon the specific allegations regarding him, and our primary reliance in this motion is on the failure to allege specific acts of involvement by Mr. Ziglar.

THE COURT: Okay. Thank you, sir.

MR. McDANIEL: Thank you, Your Honor.

MR. BELL: Good morning, Your Honor.

Again, David Bell for the former warden Dennis Hasty.

THE COURT: Good morning.

MR. BELL: We focus a lot here on the conditions of confinement and I want to speak about a few issues.

First I will say that I think the issues are well briefed. I will try not to repeat everything in our papers.

THE COURT: If you don't say so yourself, you wrote a great brief.

MR. BELL: I'm sorry, Your Honor. I meant the

collective briefing by all counsel.

THE COURT: I am just needling you.

MR. BELL: Fair enough.

I will incorporate the arguments that have been made already by my fellow defense counsel this morning. There are some issues that are more focused on the wardens and Mr. Hasty in particular. I would like to kind of highlight for some of those this morning.

THE COURT: Sure.

MR. BELL: We separate our motion to dismiss into sort of two categories of claims. The first category is those that are based on policies that were set above Mr. Hasty's level. They are actually set at the BOP level. Some of these claims -- some of these -- some of these claims are based on policy such as the decision to create an ADMAX SHU. The decision --

THE COURT: Can I ask a question? I know I can. I am going to ask you a question.

Part of the wardens' claims is, includes we should be off the hook because we are just doing what we are told to do; right?

MR. BELL: Not quite that simple. That's the basic gist of it. They have to be facially valid orders. You can't just follow anything.

THE COURT: Right. But we are following facially

valid orders.

MR. BELL: Yes, Your Honor.

THE COURT: Okay. The defendants above -- I don't mean above in any sense other than they are out of the facility.

MR. BELL: Chain of command.

THE COURT: The Washington defendants say, we will -- we didn't tell them to do this. We told him to do something lawful. They implemented it in an allegedly unlawful way. They haven't said it this way, but may be they are on the hook but we are not. If they are right about the insufficiency of the allegations, then the case is dismissed against them.

Are you making this argument because you are taking at face value the allegations of the complaint, or is it the position of the wardens that what -- of Warden Hasty, is it the position of Warden Hasty that he was told, he was in essence implementing a direction to treat these inmates, these detainees in this fashion?

Do you understand what I am saying?

MR. BELL: I think so.

I think there is a difference between the different types of claims. The claims I am referring to in this section of the brief are more of the, for example, claims four and five, communications blackout claims.

THE COURT: Let's go to the more egregious ones.

MR. BELL: Okay. So I think -- you are probably referring more to the physical abuse type claims.

THE COURT: Right.

MR. BELL: These we would assert -- in our brief we discussed that plaintiffs have not established Mr. Hasty's personal involvement as to these claims. We are not making the -- we are just following --

THE COURT: You are just doing that as to four and five?

MR. BELL: Four and five and part of one and two, the part that rely on kind of the strict conditions, not the abusive conditions.

THE COURT: Okay.

MR. BELL: And if I may just go back briefly?

The reason we state these were -- Hasty's entitled to qualified immunity because he was acting in an objectively reasonable manner following facially valid orders, we base this on the IG report, that June 2003 IG report which explicitly states who created these policies. They were created at the senior BOP level. That's Director Cathleen Hawk Sawyer, Assistant Director Michael Cooksey, one of the regional directors David Rardin.

The IG reports goes into great detail about this and even interviews them and they talk about these policies, for

example the communication blackout policy.

Now, plaintiffs for some reason have not sued any of those officials and, as you know, Your Honor, in the Elmaghraby case those officials were sued and they are not sued here. That creates a big gap in the chain of command. You have the Washington defendants and you have the Brooklyn defendants with nobody in-between. Plaintiffs would suggest that it was actually Hasty who created the decision to do a communications blackout. We would suggest that's completely contracted by the OIG report.

THE COURT: Do you think -- obviously you do. I am saying this so you can address my concern. I understand these arguments that are being advanced but it seems to me they are so bound up in what the actual facts were, precisely what the policies were that the warden was asked to implement, precisely what happened, how they were implemented, and sometimes issues regarding qualified immunity just can't be determined at the 12(b)(6) stage because you need to know precisely what was in the mind of the actor. It is hard to say whether people, reasonable folks, could disagree as to whether their conduct was lawful until you know exactly what the facts are.

That's my problem with the qualified immunity arguments that are advanced by the wardens.

MR. BELL: Right. It is an understandable concern.

But as we briefed in our briefs, there are a number of cases that have at the motion to dismiss level reached the objective reasonableness prong.

THE COURT: Understood.

I don't mean to suggest that qualified immunity is never available at this stage.

MR. BELL: Right.

THE COURT: But these strike me as not hopelessly but inevitably fact bound qualified immunity claims and I take it you want me to take as, not gospel but as our facts of the case what's in the IG report?

MR. BELL: We do, Your Honor.

The reason why is that they have been attached to the complaint. They are actually part of the pleadings in this case. It's not something that we have tried to submit as an exhibit. It is something they have put in.

THE COURT: Okay.

MR. BELL: Just briefly on that point, I do want to address the issue of how we -- how we use the OIG report in this case.

Plaintiffs have suggested that they can attach the complaint to their pleadings and then only adopt the facts that are good for them. We asserted that's not appropriate at all. They have attached them. They are part of the pleadings.

THE COURT: I understand.

MR. BELL: If you don't like them, you can take them as well. Just real briefly --

THE COURT: They don't have to take them but you can hold their feet to the fire.

MR. BELL: We assert the Court should adopt the facts that are in the IG report.

Counsel Barghaan addressed the personal involvement issue fairly well and fairly thoroughly. I don't want to go into it too far. But I just want to notify the Court that this --

THE COURT: Do you subscribe to that view, by the way, that -- you represent a warden. The warden can walk down the hall, observe a constitutional tort, not intervene even though he has the opportunity and now after Iqbal has got no liability?

MR. BELL: I think that would fall under Colon Category five which is the deliberate indifference?

THE COURT: What's the answer?

MR. BELL: And as the Bellamy case has held, and as eleven other cases in the Second Circuit have held, that factor is out the door after Iqbal.

THE COURT: So there is no liability if the warden walks down the hall, watches someone get beaten to a pulp, has a chance to intervene but decides not to? That's the --

MR. BELL: Your Honor, I would create a distinction between whether it's another inmate or whether it's a correctional officer. Because the reason why -- it might seem confusing. The reason why is there is no subordinate -- there is no supervisor-subordinate relationship between the warden and another inmate. So --

THE COURT: So the supervisor could be held liable if who is being beating up who?

MR. BELL: I think -- in our brief we said -- we don't have any -- any problem with -- with the Farmer case. We are not saying that Iqbal overruled farmer. They didn't say that they did and I am not sure that they did.

But in Farmer there was no supervisory liability at all. There was an inmate on inmate offense. Whereas Colon was not. Colon was a supervisor-subordinate relationship and the issue was whether the subordinate correctional officer committed an offense.

THE COURT: Which of the two fights, which of the two beatings, can the warden walk away from with impunity?

MR. BELL: Your Honor, I believe Iqbal and numerous other cases have said that if it's a supervisor-subordinate relationship, then the deliberate indifference prong of the Colon test has been eliminated.

THE COURT: What's the answer to my question?

MR. BELL: So if it's a correctional officer who is

the subordinate, you may be committing an offense because the -- because the warden is a supervisor over that individual, he doesn't have supervisory liability.

THE COURT: So to summarize, the warden is walking down the hall of a facility. A corrections officer is beating an inmate to a pulp. The warden can walk away from that even though he had an opportunity to intervene without liability? But if it is an inmate beating an inmate, he can't?

MR. BELL: Your Honor, I think that's correct under the law that's been established both by Iqbal and by a number of courts. The list keeps growing.

Judge Scheindlin in Bellamy was the first, and right after Iqbal she reaffirmed herself, just in November. Actually just a few weeks ago, on February 17th, was the first case in the Eastern District, Judge Matsumoto in Warrender v United States, 2011 WL 703927. She said, I agree with the courts which have found that most of the Colon categories have been superseded by Iqbal. She included in that category Colon number five. So it -- Bellamy is not --

THE COURT: It doesn't mean it is right.

MR. BELL: Fair enough. But Bellamy is not a total outlier. There have been six judges in the Second Circuit that have done it now, eleven different cases. We submit, that's the correct reading of Iqbal.

THE COURT: Okay.

MR. BELL: If I might add, one final thought is even if the five Colon factors still exist, we would submit that plaintiffs still have not established the personal involvement of Dennis Hasty. The reason why is that Iqbal teaches us that threadbare recitals of the elements of a cause of action supported by mere conclusory statements are not enough to create personal involvement.

If you look at, for example, claim six, which is the excessive strip search claim, they said, defendants were -- defendants referring to Hasty -- were grossly negligent and were deliberately indifferent in their supervision. This is classic recitation of the Colon factors. They basically cited the Colon factor number four, Colon factor number five. They just recited the elements of the case. Under Iqbal that's not enough.

We would assert that personal involvement has not been established.

THE COURT: Thank you.

MR. BELL: Thank you.

THE COURT: Your colleague wants to have you say something else.

(Pause.)

MR. BELL: A few final thoughts?

THE COURT: Go ahead.

MR. BELL: Even in that situation, the hypothetical

that seems to be troubling you a lot, which is understandable, there are a few other facets --

THE COURT: I am actually not troubled by it all. I think there is a very easy answer to it.

But go ahead. You can address it.

MR. BELL: Just a few final thoughts.

The government itself still could be held liable and the actual correctional officer who was committing the offense can be held liable.

THE COURT: That's good.

MR. BELL: That's --

THE COURT: I am happy to hear that.

MR. BELL: That is a difference. If another inmate is beating somebody up, there is no one else -- there is no government official that can be held responsible, whereas a correction officer can be.

Thank you.

THE COURT: Thank you, sir.

MR. KLEIN: Good morning, Your Honor.

THE COURT: Good morning.

MR. KLEIN: Joshua Klein on behalf of the former warden Michael Zenk.

Your Honor, I will be brief.

I just wanted to highlight one point which we have highlighted in our briefs, which is the fact that Warden

Zenk's tenure at the MDC began on April 22, 2002.

THE COURT: Understood.

A lot of that is admitted by the plaintiffs.

MR. KLEIN: It is admitted.

Plaintiff's counsel attached an appendix to their opposition which now clearly delineates which claims have been brought against -- by each individual plaintiff against which defendants. Unfortunately, those claims in the complaint itself are grouped together, either on behalf of all MDC plaintiffs or all plaintiffs, and I would just respectfully ask, Your Honor, that any decision issued here clearly set forth that those claims brought on behalf of those detainees who are either not housed at the ADMAX SHU at the time Warden Zenk began or never housed at the ADMAX SHU be dismissed with prejudice.

That's it, Your Honor.

THE COURT: Okay.

MR. KLEIN: Thank you very much.

MS. ROTH: Good morning, Your Honor.

Debra Roth for defendant Sherman.

THE COURT: Good morning.

MS. ROTH: At this point I am going to defer to the positions and arguments of my colleagues above me, including Warden Hasty and Warden Zenk.

THE COURT: Okay.

MS. ROTH: Thank you.

THE COURT: Thank you.

Is that it?

Ms. Meeropol?

MS. MEEROPOL: Good morning, Your Honor.

THE COURT: Good morning.

MS. MEEROPOL: I would like to begin by discussing the personal involvement of the Washington, DC defendants.

My opposing counsel correctly points to paragraph 61 as the key paragraph against the DC defendants with respect to the conditions of confinement. But there is one portion of that paragraph that he left out, which was the fact that the allegation that the DC defendants not only mapped out a plan for maximum pressure but ordered that the detainees be isolated, that their communications be restricted and their Immigration hearings delayed. That portion of the order, we argue, is unconstitutional on its face and that is because conditions of confinement, as this Court recognized in 2006, depend on context.

We are looking here at civil immigration detainees for whom there has been no individualized showing of dangerousness. Holding those individuals in restrictive confinement because restricting communication requires placement in a Special Housing Unit. You can't do it within the general population. That order is directly

unconstitutional on its face.

Now looking at the other half of the allegation, the allegation to place maximum pressure and to encourage that the detainees -- and to encourage and to have the detainees encouraged in any way possible to cooperate based on the fact that they were suspected terrorists, while not conclusively unconstitutional, one can imagine a situation in which lawful pressure is placed on detainees, but it does raise a reasonable inference of an order to encourage abuse.

THE COURT: I think that's the hardest part of your argument. The issues are well briefed by everyone. I am grateful for that.

But your argument seems to suggest to me that the causation is sufficient in this new world, this new pleading world, that Twombly and then this case itself has created. That if the Washington defendants say that these folks are suspected terrorists or know who terrorists are, know some terrorists, and that they needed to be encouraged in any way possible to cooperate, your argument suggests to me that even if there is nothing unconstitutional about that, and I am a former law enforcement officer, when I read this language I think well, that's wrong with that. You want people to cooperate.

Your argument suggests to me that -- because you used these words yourself -- as a direct result of this

language or in implementing this directive -- these are your phrases -- there were unconstitutional torts committed at the MDC.

I am not sure that's enough. I am not sure if causation is sufficient. You haven't -- your briefs haven't persuaded me otherwise.

MS. MEEROPOL: Your Honor, when we look -- the Colon factor that defendants agree still exists under Iqbal, creation of a policy under which unconstitutional acts occur, that considers the possibility right there that there is a policy that is created that can be implemented unconstitutionally or constitutionally.

THE COURT: What if the policy is, you know, we are going to reward the warden who has the least inmate complaints. We are tired of these inmate complaints. And then in implementing that policy the warden decides to put everybody in lockdown and take away their pens and papers and they can't do -- and they can't complain anymore.

Does that policy then put them on the hook because it caused a tort, put them on the hook for the tort?

MS. MEEROPOL: There are two requirements, Your Honor, causation and that the defendant has the sufficiently culpable state of mind.

So with respect to the state of mind, under Iqbal, the supervisory defendant still must -- must either intend

that the abuse occurs under his policy or be deliberately indifferent to the fact that the abuse will occur.

Then, of course, there is the causation requirement as well. Did this policy cause the harm or did some other intervening act that the defendant could not possibly be expected to know about cause the harm?

THE COURT: What's wrong with this policy, by the way, in and of itself, before it gets implemented?

MS. MEEROPOL: Sure, Your Honor.

In the context of 9/11, telling law enforcement agencies that the individuals before them were suspected terrorists, who need to be treated -- who need to be subjected to maximum pressure and encouraged in any way possible to --

THE COURT: Suspected terrorists or knew people who were terrorists.

MS. MEEROPOL: That is correct, Your Honor. That's the full policy.

THE COURT: That's the deal with these people. We want you to get them in any way possible to cooperate. What's wrong with that?

MS. MEEROPOL: It encourages abuse, Your Honor. Especially immediately after 9/11, where there was --

THE COURT: Do you think the words in any way possible connote including illegal means?

MS. MEEROPOL: I think it encourages illegal means,

yes, Your Honor.

THE COURT: That may be where we part company.

MS. MEEROPOL: And if we look at how it was implemented, of course we will see that illegal abuse did occur.

And I will submit, Your Honor, that much more neutral policies have survived a motion to dismiss stage. We cite Brock v Wright as well as Langford v Norris, which is an Eighth Circuit decision. Langford v Norris actually involved the prison grievance system. So the prisoner in that case alleged that there was deliberate indifference to his medical needs, based on the fact that the prison grievance policy was so complicated and so long that he couldn't get medical attention quickly.

And the Court there held that the supervisors who created that policy, if the policy caused the delay in medical care, the deliberate indifference to medical care, and if they knew or should have known that that would occur, that they could be held liable for the deliberate indifference to medical needs.

Now, the -- the key question here is intent. Did the defendant Ashcroft, did the defendant Muller, intend that our clients be abused, that they be treated more harshly than the law allows? I submit that that's not a question that can be answered on a motion to dismiss.

All that Iqbal requires us to do on a motion to dismiss is put forward allegations that raise a fair inference, and as for causation, as for intent, they will be proven down the line or we won't be able to prove them. But in Brock v Wright the Second Circuit allowed the question to go to the jury as to whether -- I see you want to ask a question.

THE COURT: As long as your conduct results in, causes unconstitutional conduct at the pleading stage, you can infer an intent that that happened?

MS. MEEROPOL: No. I think we have to -- we have to allege allegations that plausibly suggest both the requisite culpable state of mind and causation but that don't prove those because it is impossible to prove at the motion to dismiss stage.

THE COURT: I understand you don't have to prove it.

What if the marching orders from Washington were, needed to be encouraged in any way possible using all lawful means to cooperate, your case is done?

MS. MEEROPOL: I think that is a very different situation, yes, Your Honor.

THE COURT: So you lose?

MS. MEEROPOL: Any -- well, it depends on whether there is actual -- there is also a piece of the order that is specific.

THE COURT: So they have -- sorry.

MS. MEEROPOL: I am referring back --

THE COURT: I can't help myself. I am interrupting you.

They have to specifically point out they don't mean illegal methods? But once they do, then it is an insufficient pleading?

MS. MEEROPOL: Not if they never said anything. Of course, the Attorney General in the usual context can assume that his subordinates or her subordinates are going to implement, you know, are going to act lawfully.

THE COURT: Right.

MS. MEEROPOL: If General Ashcroft had said nothing here, had not ordered maximum pressure, had not ordered the detainees be encouraged in any way possible to cooperate and then abuses had occurred, we would have no case, or if he said something different. If he said, all lawful means without mapping out any of the actual unconstitutional policies.

And I do want to refer Your Honor back to the portion of our allegation which alleges that the DC defendants agreed to restrict our client's communications to the outside world. Because if that in itself is unconstitutional, then the order is unconstitutional and they can be held liable at least for that piece of our claims which placed our clients in the ADMAX SHU to restrict their communication.

THE COURT: I don't mean to jump around, and you will say all you want to say on all the issues. But on that issue about the communications, my question relates to qualified immunity. There is so much water under the bridge with this case, I kind of have forgotten how much I had written, how much the Circuit had written, and it went to the Supreme Court.

I was rereading Judge Newman's decision from 2007 and in connection with the administrative requirements that attend special housing within the MDC he wrote: Prior to the instant case, neither the Supreme Court -- this is at page 167 of the West version of the decision -- prior to the instant case, neither the Supreme Court nor our Court had considered whether the due process clause requires officials to provide ordinary administrative segregation hearings to persons detained under special conditions of confinement until cleared of connection with activities threatening national security.

So that's in a special setting, brought into the qualified immunity for procedural due process, right?

MS. MEEROPOL: Yes, Your Honor.

THE COURT: In a way that inured to the defendants' advantage.

Does that apply to this communications, to your communications allegations? The same sort of -- I mean, I am bound by this opinion and I certainly ought to follow its

logic. In that post 9/11 setting, should there be at least qualified immunity with respect to these communications blackouts that form the basis of a couple of your claims?

MS. MEEROPOL: You will be unsurprised to hear that my answer is no.

THE COURT: Right. I am really interested in the why.

MS. MEEROPOL: Yes, Your Honor.

You know, in looking at the Second Circuit's decision it is also important to see where they didn't grant qualified immunity, of course. That was with respect to the substantive due process claims regarding conditions of confinement. So really I read the procedural due process portion of the analysis to focus on what procedures are necessary in this new context. Might this new context suggest a need for different procedures that are not exactly the ones that the Bureau of Prisons has set out in the CFR?

But with respect to the actual conditions that can be imposed, the conditions that result regardless of what process was used, the Second Circuit was clear that the law which outlaws placing pretrial detainees, or here immigration detainees, in punitive conditions --

THE COURT: Fair enough.

MS. MEEROPOL: -- remains.

THE COURT: But why doesn't it follow, if a

reasonable officer in those circumstances could conclude, maybe even erroneously but reasonably, that the procedural due process requirements didn't have to be followed in that setting. Why wouldn't a reasonable officer also be able to conclude, maybe even erroneously, that they can cut off the telephone access or visits for those same folks?

It is not the same -- it's no accident when I broach this subject with you, you talk about physical abuse. When I broach the subject with your adversary, he talks about context.

Why doesn't it follow from the Second Circuit's opinion that there might be qualified immunity, not with regard to what I will call physical abuse but these communications blackouts and, as long as I am in the middle of my interruption, there is this other question that afflicts this setting which is whether this should be a Bivens remedy at all.

You might want to address that as well.

MS. MEEROPOL: Yes, Your Honor.

Turning first to the substance here, I think we can't -- we can't erase the context that plaintiffs allege here, which is that they were suspected of ties to terrorism, not based on any evidence of wrongdoing or dangerousness, but based on their race and religion. We also have factual allegations that the MDC defendants knew this was the case.

They were provided all the information the FBI had and that the DC defendants knew that this was the case as well.

THE COURT: All of that was true with regard to procedural due process waivers, the decision not to accord them their procedural due process rights regarding continued administrative segregation.

MS. MEEROPOL: I don't think those facts are alleged in the Iqbal complaint, Your Honor. The fact that -- that the MDC defendants and the DC defendants had the information about why our clients and all the detainees were held, that was not information that was available to us prior to discovery. We learned it in the discovery process and that's why it is a piece of the fourth amended complaint here.

So I will address Your Honor specifically to the information in the complaint about the attorney -- the daily Attorney General reports that went from defendant Ziglar to defendant Ashcroft, explaining who was being arrested and why, as well as the MDC intelligence reports, which listed the FBI's reasons for suspecting the 9/11 detainees. They listed sort of the information that the FBI had gathered and that information was the universe of facts.

Because of discovery we have been able to place before the Court the universe of facts here. The Court can see exactly why our clients were suspected. For example, that Mr. Bajracharya was perceived to be an Arab male videotaping

an office building that had an FBI office in it. Now, does that form a basis under -- with -- even in the context of 9/11, after 9/11, when, of course, immediately after 9/11 especially this is a rare situation. But does that information mean that the normal rules about when a federal prison can restrict a detainee's communication go out the window? Because of that type of suspicion, not real evidentiary based reasons to suspect that someone is dangerous, that someone might be about to communicate with other terrorists.

The federal prison system has many established ways to limit prisoner's communications with the outside world when there is a showing of evidence, when there is an individualized reason to assume that that is necessary.

THE COURT: How broad is this right if you are claiming communications blackout for months? Is it your claim that there ought to be a Bivens damage remedy?

Let me back up.

Do you agree they have the same rights as the other people in the facility, not larger rights?

MS. MEEROPOL: I think the Second Circuit has made it clear, that the deliberate indifference standard that applies to convicted prisoners with respect to conditions and abuse applies to civil detainees and pretrial detainees.

THE COURT: No. You are not suggesting that the

civil detainees in this case have a greater array of rights than do the other detainees in the MDC.

MS. MEEROPOL: It's a hard question to answer, Your Honor. I don't think as a matter of the legal standard the right is any different. So is the legitimate interests of the institution. They are all grouped in the institution together. So all of those general security interests will apply equally.

THE COURT: Okay.

MS. MEEROPOL: On the other hand, where there is a penological justification for a certain restraint, that may or may not be lawful against an immigration detainee for whom there can be no punishment because he is not convicted.

THE COURT: I understand.

I want you to tell me if it is true, not right now because I have a question for you, the extent to which you think these detainees as it relates to this case have rights that are greater in scope.

You are shaking your head. You don't think they do?

MS. MEEROPOL: I will let you finish your question, Your Honor.

THE COURT: Greater in scope than the person in the next cell in the MDC who is awaiting trial on a fraud case?

MS. MEEROPOL: No. Once they are in the facility, they have the right just like all the other prisoners and

pretrial detainees to only be placed in conditions of confinement that are reasonably related to an individualized basis.

THE COURT: All right. Back to my question. Does someone who is subjected to a communications blackout for a day have a Bivens damage remedy against the people at the MDC?

MS. MEEROPOL: No.

THE COURT: That seems to trivialize Bivens a little bit.

MS. MEEROPOL: I don't think there would be a cause of action there, Your Honor. In the course of prison administration, things get interrupted for a day. There is an emergency lockdown. The case law is clear, that just wouldn't present a cause of action.

THE COURT: Where is the line between that case and this one?

MS. MEEROPOL: I think we are a looking -- we are in the land of Turner analysis here, Your Honor, and we are looking at a policy under Turner. We have to identify the policy first and then determine whether reasonably related to a legitimate penological interest.

When we look at the communications policy as related to our clients for whom there has been no showing of dangerousness or likelihood of communicating with terrorists, there simply is no reasonable relationship here. It fails on

the first prong of Turner.

To the extent the defendants are going to be able to come forward and provide evidence to this Court that there was a reason to fear that my clients, or if a class was certified in this case, other 9/11 detainees were trying to communicate with terrorists or there was a reason to believe they might, then perhaps we will lose on Turner in summary judgment. But we are not at that point yet.

For the Court to say as a matter of law that there was a reasonable relation here based only on our allegations that our clients were suspected because of their race and religion means that a federal prison can treat prisoners differently based on those suspect criteria, without evidence or other reason.

THE COURT: If there is -- there is no degree of suspicion that would warrant even a temporary suspension of their communication rights? They come into the MDC. I mean, these people are trying to run a prison. They come into the MDC. They are told say by the Attorney General, we think these people either are terrorists or they know terrorists. There is no policy with regard to any degree of temporary communications blackout that doesn't run afoul of the Constitution?

MS. MEEROPOL: No.

THE COURT: How do they run a facility?

MS. MEEROPOL: It's very hard to draw the line here, Your Honor. Because, of course, there has to be some deference at a certain point.

In the immediate aftermath of 9/11, all communication at MDC was shut down, general population, Special Housing Unit as well. This is not in the complaint but I'm sure the OIG mentions it.

THE COURT: Are these things cause for hesitation in imputing -- implying a Bivens damage remedy?

MS. MEEROPOL: Your Honor, if that is a cause for hesitation, then you can't just take the easiest case example there and say that causes hesitation. The special factors analysis requires the Court to determine is there a special factor here, and only upon finding that there is a special factor, that's when this relatively low standard of cause for hesitation kicks in. It's not that the Court should hesitate when the Court is unsure as to whether there is or is not a special factor.

When we look -- what the defendants had argued with respect to special factor here is that national security concerns are intrinsically interwoven with this case and that weighing whether our clients were treated reasonably will require the Court to look into national security issues.

THE COURT: Right.

MS. MEEROPOL: But because of the benefits of

discovery, we have the information. We've put forward the information in our publicly filed complaint about why our clients were suspected. I am confident that this Court can consider an allegation, an allegation from the FBI that someone was filming a building in Queens, an Arab, and consider whether that in itself warrants restrictions on communication for months on end, not a temporary restriction, but for months on end, and placement in the ADMAX SHU and all the attendant, you know, policy restrictions and abuse without delving into issues of national security.

THE COURT: How would you articulate a rule or decision that accommodates your -- I think your admirable acknowledgment that deference is needed to the prison so the folks who are coming in there in the first few days and there is a suspicion voiced by the Attorney General of the United States that they may be terrorists or no terrorists, we are going to defer there, but over a period of months, a communications blackout based on what you claim are these threadbare facts, that's an unconstitutional policy.

What rule of decision would you articulate to separate one from the other?

MS. MEEROPOL: The deference already exists in the context of prisoners rights law, Your Honor. I mean, looking at the substantive causes of action, that deference is built in. So at the motion to dismiss stage, if you can't allege

facts that show that, you know, that your rights have been violated and a temporary communications restriction just -- no federal Court is going to hold that that's a prisoner's rights violation.

THE COURT: Right.

MS. MEEROPOL: The case law is rather clear. it -- in the prison context there is a lot of deference built in and we have to exist in that context.

THE COURT: One of the things I find challenging about this motion is the principles that affect qualified immunity also affect whether there ought to be a Bivens remedy. The merits on the qualified immunity get blended for me and the -- the question whether there out to be -- one of the undecided, one of the few things that hasn't been decided already in this case is whether there is a Bivens remedy for your -- for these causes of action. Correct?

MS. MEEROPOL: Yes.

We were just speaking -- do you mean for the First Amendment causes of action?

THE COURT: Yes.

MS. MEEROPOL: Yes.

That's because, of course, defendants didn't raise last time around whether some of these claims were suitable for a Bivens remedy. Although actually the access to counsel claims arising out of the First Amendment, I could be

corrected if I am wrong, Your Honor, but I believe the defendants did challenge --

THE COURT: I ruled on that.

MS. MEEROPOL: Yes.

THE COURT: Is that still the same claim?

MS. MEEROPOL: So --

THE COURT: You changed this claim. It's not access to courts. It's access to counsel.

MS. MEEROPOL: Right. You changed the claim, Your Honor, because you dismissed the portion of the claim that was access to courts and we accepted that ruling as we had to.

THE COURT: Sounds like something I would do.

MS. MEEROPOL: Yes. It's an access to counsel claim, which the Court has already held last time around does state a Bivens cause of action.

And just looking back at the other claims with respect to Bivens, Your Honor, of course, our position there is that these claims require no extension of Bivens because they are similar in law and fact to claims for which courts frequently imply Bivens remedy and I'd be happy to answer any of the Court's question.

THE COURT: I understand, with respect to those other claims.

MS. MEEROPOL: Yes.

And I think, you know, really defendants primary

argument with respect to a Bivens cause of action for the First Amendment claims rests on the possibility of preclusion by the INA, which this Court already ruled on in 2006, and we submit has not been altered by the law since then. Looking at the INA, whether it's remedial scheme or regulatory scheme, all it remedies or regulates is entry, exit and detention of non-citizens.

THE COURT: What about on this communications issue, the BOP regs? Aren't there remedies that a detainee can pursue within the facility for denial of communication rights?

MS. MEEROPOL: Yes, there are internal remedies that, you know, any prisoner can -- actually must undertake for any constitutional violation.

THE COURT: Why shouldn't -- why doesn't that suggest, given the framework within which we either imply a Bivens right or not, that we shouldn't imply one here?

MS. MEEROPOL: First of all, Your Honor, those aren't -- those aren't Congressionally mandated. Those are internal -- internal prison regulations. So there is no reason here to think -- I mean, the inquiry in general when looking at whether to apply them as remedies, whether Congress has spoken and said that we either have already provided an adequate remedy or there is a reason to think that we chose not to provide a remedy.

And internal prison --

THE COURT: An adequate remedy provided administratively, that is not a reason to refrain from implying a Bivens damage action?

MS. MEEROPOL: Your Honor, there is a prison grievance system at issue in all of the Supreme Court cases that implied a Bivens remedy for convicted federal prisoners. Farmer v Brennan was a Bivens suit. Certainly the BOP regulations on internal grievance processes didn't just spring into being. The PLRA requires that prisoners follow these grievance procedures. So I see no reason to distinguish these claims or these clients.

If one does that, it's like saying that a prisoner who is held at the exact same facility -- it's as Your Honor's questioning pointed out earlier, that a prisoner in the next cell has the right to a Bivens claim. The Supreme Court has held this clearly, has a right to a Bivens claim for the abuse that he or she experiences. But because these individuals are civil Immigration detainees, haven't yet had the benefit of Court process, they have lesser rights. That simply makes no sense. They both have the same internal grievance remedies available to them. These, of course, aren't administrative processes that really have the potential to weigh a constitutional claim. That simply is not part of the internal grievance process.

Your Honor, I would like to spend a few minutes

talking about our equal protection claim, if you are done with questioning on this area.

THE COURT: If I am not done, you will hear from me.

MS. MEEROPOL: I guess I will.

Of course, in Iqbal, Mr. Iqbal advanced -- also advanced a purposeful discrimination claim. So it's most important here to point out for the Court the way in which our case is different from Iqbal and the allegations that we advanced that Mr. Iqbal didn't.

So in Iqbal the Supreme Court found that the only factual allegation that suggested discrimination here was the fact that so many of the individuals rounded up were Muslin and Arab and that, of course, this was consistent with discrimination but on that fact alone is not enough to suggest discriminatory intent.

We don't allege a neutral policy to investigate individuals, to question and place pressure on individuals suspected of involvement in the terrorist attacks that had a disparate impact. Rather, we allege that the policy was to question and place pressure on Muslims and Arabs specifically. This is an affirmative policy of targeting on which we assert factual allegations.

Now, the other primary point that the Supreme Court was concerned about with respect to Iqbal was that Mr. Iqbal alleged that he was discriminated against in his high interest

classification, that he was determined to be of high interest to the terrorism investigation based on his race and religion, that BOP officials and FBI officials, not the DC defendants but other officials made that determination, and that the DC defendants condoned the making of that determination for impermissible -- on impermissible reasons. That was where the Court said, you know, the fact that they condoned that discrimination is not enough to give rise to a plausible inference of their own discriminatory intent.

But here, Your Honor, we don't allege a neutral policy. We don't allege that the high interest designation had anything to do with our client's placement in the ADMAX SHU. In fact, four of our six plaintiffs were never classified as high interest by anyone and one of the two who was received that classification months after he was already placed in the ADMAX SHU.

So our claim is that the -- the policy to find and place pressure in any way possible on Muslims and Arabs was implemented against our clients in the ADMAX SHU without respect to the intervening act of any individual not before the Court in terms of deciding whether they were of high interest, of some interest, interest unknown.

We assert many factual allegations, subordinate facts, within the complaint that show just how that policy was carried out. The fact that people were treated differently

who weren't Muslim and Arab, the fact that when an issue arose in New York as to whether individuals for whom the FBI had not yet enunciated any basis of suspicion, whether they were -- they were to be subject to this policy of maximum pressure or not and Ashcroft ordered that yes, they be subject to the policy, they be treated as 9/11 detainees, with full knowledge of the complete lack of any FBI statement of interest at all, much less high interest.

Your Honor, we also put forth the facts regarding how the head of the FBI in New York interpreted this policy, which was that race and religion mattered when you were looking at suspects. For example, that individuals, that Russian tourists filming the Midtown Tunnel were not of interest to the terrorism investigation but Egyptians filming the Midtown Tunnel were.

Moving on from our equal protection allegations, unless Your Honor has any questions about them, I would like to spend just one moment on supervisory liability, just to -- just to point the Court's attention to the statement in Iqbal itself, that a federal official's liable -- liability can result from his neglect in not properly superintending the discharge of his subordinates' duties.

One moment, Your Honor, please.

(Pause.)

Unless the Court has any other questions with

respect to the equal protection claim -- I'm sorry. I am just reviewing my notes here. I apologize, Your Honor.

THE COURT: Take your time.

(Pause.)

MS. MEEROPOL: No, Your Honor. Unless the Court has any more questions?

THE COURT: If I agree with the DC defendants, that the pleading is insufficient under the Iqbal standard and they are dismissed, but then your discovery implicates them again -- not again but implicates them because of the statements made by the, for example, MDC wardens, is the Statute of Limitations a barrier to bringing them back in or is it tolled by the pendency of this lawsuit?

Do you understand my question?

MS. MEEROPOL: Yes.

My understanding is that the Statute of Limitations for those defendants would kick in again once they are dismissed from the case.

THE COURT: Yes.

MS. MEEROPOL: And that it would depend on how quickly we could get to discovery, which given that the wardens have already shown once that they intend to take -- to take -- that they intend to take interlocutory appeal on any denial of qualified immunity, I think it's extremely unlikely that we would get to that discovery within

the Statute of Limitations.

THE COURT: This is a three year limitations period?

MS. MEEROPOL: It is, Your Honor.

THE COURT: How much has run of it already?

MS. MEEROPOL: Approximately one year.

THE COURT: Okay. Thanks.

MS. MEEROPOL: Actually, I apologize, Your Honor, not even quite a year. We brought the case initially against the DC defendants in April of 2002.

Thank you, Your Honor.

THE COURT: Thank you.

Could you come up?

MR. BARGHAAN: Yes, sir.

THE COURT: What's your take on that?

MR. BARGHAAN: Your Honor, it's actually something I hadn't thought about. It was a striking question that I did not expect and I don't know the answer about what would happen in those circumstances.

I will tell you that if we were dismissed there is a possibility that my client -- I can't speak for him, I don't know what the answer will be -- would seek a rule 52 -- 54(b) certification to go to the circuit immediately.

He has been in this litigation now for going on nine years. He has been out of public service for seven. I think he's ready to have this behind him and I think he would want

definitive closure from the circuit or a judgment that if the plaintiff sought appeal they would be able to do so.

I would note though, Your Honor, that whether there is discovery, whether discovery might show something different or whether it will or will not is something that the Iqbal Court specifically addressed, that the question about whether the DC defendants should be dismissed is based, of course, solely on the complaint and that the possibility of discovery showing something else is antithetical to the qualified immunity doctrine.

THE COURT: I read Iqbal. My question pertains to something different altogether.

MR. BARGHAAN: I apologize if I missed it.

THE COURT: If they are out of the case.

MR. BARGHAAN: Correct.

THE COURT: But then -- you know, I've got the wardens saying in part, and I am not sure -- the testimony hasn't been taken, correct?

MR. BARGHAAN: That is correct. I believe that's correct. I can't -- I don't recall because we were not terribly involved in discovery.

Warden Hasty's testimony was not taken. Warden Zenk's was.

THE COURT: Okay. It's not outside the realm of possibility, given all the allegations here, that people in

the MDC or elsewhere might provide the facts, that even if you are right now, might warrant bringing Ashcroft and Muller back into the case.

MR. BARGHAAN: I don't like answering this question, but I guess it's not out of the realm of possibility, no.

THE COURT: Of course it is not.

MR. BARGHAAN: Yes.

THE COURT: If that happens, and they are brought back into the case, what happens with regard to Statute of Limitations?

MR. BARGHAAN: Without having done the research on the question, Your Honor, and I apologize for not knowing the answer off the top of my head, my knee jerk reaction would be to agree with Ms. Meeropol. I cannot say that definitively, and I certainly don't want to concede the question.

I will say, however, that if we were to seek a Rule 54(b) judgment, that this Court granted that judgment and we went to the Court of Appeals and the Court of Appeals -- and the plaintiffs took an appeal and we obtained an affirmance from the Second Circuit, then that would be a judgment that could not be -- that would not be alterable at that point. The plaintiffs would have to reopen the judgment and -- after affirmance, which is very difficult standard to meet in those circumstances.

THE COURT: All right. Anything else any of

the -- you or any of the defense counsel want to say?

MR. BARGHAAN: Unless Your Honor has any particular questions, I will -- we have been here long enough. I don't want to bother you any further.

Thank you.

THE COURT: What, Ms. Meeropol? You look like you want to speak again. You may briefly, yes.

MS. MEEROPOL: I would just like to point Your Honor to language from Dura Pharmaceutical v Bruno, which is the Supreme Court case that -- the precursor to Twombly, which states that the central question with regard to pleading as to whether the complaint leaves the Court with a reasonably founded hope that discovery will enable us to prove the defendant caused plaintiffs' injuries.

Thank you.

THE COURT: There is no rebuttal to that, I take it?

Thank you all.

I will take the motions under advisement.

MS. MEEROPOL: Thank you, Your Honor.

THE COURT: Have a good day.

(Matter concludes.)

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