UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, *et al.*,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:02cv2307 (JG) (SG)
	)	
	)	
JOHN ASHCROFT,	)	
Former Attorney General of the	)	
United States, *et al*.,	)	
	)	
Defendants.	)	
_____	)	

MEMORANDUM OF LAW IN SUPPORT OF FORMER ATTORNEY GENERAL JOHN ASHCROFT'S MOTION TO DISMISS

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THE FOURTH AMENDED COMPLAINT

Plaintiffs' claims in this action arise out of the attacks of September 11, 2001 – "a national and international security emergency unprecedented in the history of the American Republic." Iqbal v. Hasty, 490 F.3d 143, 179 (2d Cir. 2007) (Cabranes, J., concurring). In the chaotic and frightful hours, days, and weeks that followed the attacks, the former Attorney General of the United States was responsible for leading an extensive investigation designed to uncover the perpetrators of the attacks and to prevent subsequent strikes. As the Department of Justice's Office of Inspector General recognized in its comprehensive report ("OIG Report") – which plaintiffs incorporate into their complaint, Fourth Am. Comp. ("FAC"), ¶3 n.1[1] – "the Department was faced with monumental challenges" after the attacks. OIG Report, at 5.

I. THE INVESTIGATION

After the September 11th attacks, the Federal Bureau of Investigation ("FBI") first ensured that all air traffic in the United States had ceased, and then began a massive investigation dedicated "to locating those responsible for the terrorist attacks and preventing future attacks." OIG Report, at 10-11; FAC, ¶40. The enormity of the task facing federal law enforcement officials cannot be overstated:

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[1]Plaintiffs seek to temper the clear import of the OIG Report for their claims against the former Attorney General by "incorporat[ing the Report] by reference except where contradicted by the allegations of this Fourth Amended Complaint." FAC, ¶3 n.1. Their approach is backwards. "[I]n the event of a conflict between the bare allegations of the complaint and any exhibit attached [or incorporated] pursuant to [Rule] 10(c), *the exhibit prevails*." Fayetteville Inves. v. Comm'l Builders, Inc., 936 F.2d 1462, 1465 (4th Cir. 1991) (emphasis added) (quoting 2A MOORE'S FED. PRACTICE § 10.06, at 10-24). At the very least, one cannot incorporate into a complaint the portions of a document that one prefers, while eschewing the more inconvenient parts. See I. Meyer Pincus & Assocs. v. Oppenheimer & Co., 936 F.2d 759, 762 (2d Cir. 1991); see also Sturm v. Marriott Marquis Corp., 85 F. Supp. 2d 1356, 1366 (N.D. Ga. 2000) (holding that "the district courts cannot fulfill their gatekeeping role if plaintiffs are free to quote selectively or out of context from documents that they rely upon").

> By September 18, 2001, the FBI had received more than 96,000 tips or potential leads from the public, including more than 54,000 through an Internet site it established for the PENTTBOM case . . . .

Id. at 12; FAC, ¶40. To be sure, "[m]any of the leads . . . involved aliens . . . from countries with large Arab or Muslim populations." OIG Report, at 14; FAC, ¶¶40, 43. But from nearly 100,000 leads, all of which were investigated, FAC, ¶40, federal officials ultimately arrested and detained only 762 aliens, nearly all of which had violated federal immigration law. OIG Report, at 2; 5.

Plaintiffs' fifth complaint continues to focus upon the so-called "hold until cleared" policy, which – as plaintiffs describe it – led them to be "retained . . . in immigration custody until the [FBI] affirmatively cleared them of terrorist ties," despite the fact that "they could have been removed promptly from the United States." Id. ¶2. The Second Circuit, however, has already upheld the constitutional propriety of that policy. See Turkmen v. Ashcroft, 589 F.3d 542, 549-50 (2d Cir. 2009), aff'g in part, 2006 WL 1662663 (E.D.N.Y. June 14, 2006).

II. CONDITIONS UNDER WHICH ALIENS DETAINED PURSUANT TO THE SEPTEMBER 11TH INVESTIGATION WERE HELD

The balance of plaintiffs' complaint concerns the alleged conditions under which they were detained. The OIG Report found that those aliens that the FBI concluded to be "'of high interest' to its terrorism investigation" were generally held in facilities administered by the federal Bureau of Prisons ("BOP"), and those that the FBI considered only to be "of interest" to that investigation were held at lower-security contract facilities (*e.g.*, the Passaic County Jail). OIG Report, at 111. As such, the conditions under which aliens were detained differed significantly depending on the particular facility (and the component of that facility, in certain circumstances) in which the alien detained as a result of the FBI's investigation was ultimately housed. Id.; see also FAC, ¶66 (noting the differences between the conditions of confinement

present at the MDC and those at Passaic).

Notably absent from plaintiffs' averments is any well-pled allegation tying the former Attorney General to decisions on the specific conditions under which detainees would be held. Although plaintiffs allege in conclusory fashion that General Ashcroft "created many of the unreasonable and excessively harsh conditions" at issue here, FAC, ¶21, the complaint never identifies which specific "conditions" he created. Instead, plaintiffs opaquely aver that Ashcroft and other Department of Justice leaders "mapped out ways to exert maximum pressure" on those arrested as a part of the investigation and "to restrict the . . . ability to contact the outside world," id. ¶61; again, plaintiffs nowhere detail the "methods" that were "mapped out" by these senior officials. That is the extent of plaintiffs' fifth pleading attempt with respect to the role the former Attorney General played in fashioning specific conditions of immigration detention.

The remaining allegations of the complaint, along with the OIG Report – both of which squarely place responsibility for the creation of the conditions of confinement on other government officials[2] – support this conclusion. In particular, plaintiffs aver that conditions of confinement under which detainees were held at the MDC were developed at the MDC, and approved by BOP personnel. Id. ¶¶67; 75; 79; 96; OIG Report, at 112-25. General Ashcroft is not mentioned *once* in the allegations of the complaint that detail what plaintiffs term the "inhumane conditions of confinement" at the MDC, which includes the totality of plaintiffs' allegations regarding the interference with their religious practices. Id. ¶¶103-40.

[2]Nothing within this memorandum should be construed as an endorsement that plaintiffs have pled a plausible constitutional claim against any of the former Attorney General's colleagues and co-defendants.

III. PLAINTIFFS' CLAIMS AGAINST THE FORMER ATTORNEY GENERAL IN HIS INDIVIDUAL CAPACITY

Based on these sparse allegations, plaintiffs present six causes of action against the former Attorney General in his individual capacity. None of these claims, however, seeks relief against General Ashcroft alone (or even solely with other senior DOJ officials); rather, each and every claim that seeks individual-capacity relief from General Ashcroft simultaneously names each and every *other defendant* as well. Cf. Wynder v. McMahon, 360 F.3d 73, 80 (2d Cir. 2004) (explaining, even *before* Iqbal, the problematic nature of presenting claims that "accuse[] *all* of the defendants of having violated *all* of the listed constitutional and statutory provisions" (emphasis in original)). In order of their presentation in the complaint itself, plaintiffs' claims that implicate the former Attorney General are as follows:

1. All defendants violated the MDC plaintiffs' rights under the Due Process Clause "[b]y adopting . . . the policy and practice under which MDC plaintiffs and class members were unreasonably detained and subjected to outrageous . . . conditions of confinement." FAC, ¶278.

2. All defendants violated all plaintiffs' rights under the Equal Protection Clause "[i]n subjecting plaintiffs . . . to harsh treatment not accorded similarly-situated non-citizens." Id. ¶282.

3. All defendants violated certain plaintiffs' First Amendment rights when they "adopted, promulgated and implemented policies and practices intended to deny plaintiffs . . . the ability to practice and observe their religion." Id. ¶286.

4-5. All defendants violated the MDC plaintiffs' First and Fifth Amendment rights "[b]y adopting the policy and practice under which MDC plaintiffs . . . were subjected to a 'communications blackout' and other measures while in detention that interfered with their access to family, lawyers, and the courts." Id. ¶¶290-94.

7. Each and every defendant is liable pursuant to 42 U.S.C. § 1985(3) for "conspiring to deprive plaintiffs of the equal protection of the law" "by agreeing to implement a policy whereby plaintiffs" were subjected to each and every allegation presented in plaintiffs' over-eighty page complaint. Id. ¶305.

ARGUMENT

I. THE COMPREHENSIVE NATURE OF THE INA & SPECIAL FACTORS COUNSEL HESITATION IN THE JUDICIAL CREATION OF A *BIVENS* REMEDY

Plaintiffs primarily seek monetary relief from the former Attorney General in his individual capacity based upon the constitutional remedy first recognized by the Supreme Court in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). But unlike § 1983 claims, plaintiffs' remedy is not anchored in any congressional pronouncement; instead, it is one judicially *implied* in the Constitution itself. Id. at 392-94; see also Benzman v. Whitman, 523 F.3d 119, 125 (2d Cir. 2008). As such, the Bivens Court itself cautioned that this type of implied action would not be available in all circumstances – especially where there exist "special factors counseling hesitation" on the part of the judiciary in creating such a remedy. Id. at 396.

Since this Court issued its last opinion here, the Supreme Court and the Second Circuit have placed greater significance upon these limitations on the Bivens remedy. The Supreme Court has now explained that the existence of a Bivens remedy "is not an automatic entitlement . . . and in *most instances* we have held a Bivens remedy unjustified." Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (emphasis added). And the *en banc* Second Circuit has now noted that "[t]he Bivens remedy is an extraordinary thing" Arar v. Ashcroft, 585 F.3d 559, 571 (2d Cir. 2009) (en banc); see also Benzman, 523 F.3d at 125 (terming Bivens "a blunt instrument"). Even the Iqbal Court questioned the propriety of implying a Bivens remedy in this context. See Iqbal, 129 S. Ct. at 1947-48.

The threshold for concluding that a Bivens remedy should *not* be created in a given set of circumstances is therefore now exceedingly low. As the Arar *en banc* court put it:

The only relevant threshold – that a factor "counsels hesitation" – is remarkably low. It is

> at the opposite end . . . from the unflagging duty to exercise jurisdiction. Hesitation is a pause, not a full stop, or an abstention; and to counsel is not to require. "Hesitation" is "counseled" whenever thoughtful discretion would pause even to consider.

Arar, 585 F.3d at 574. The query before this Court is therefore whether one would have any reason "to pause even to consider" the suitability of *implying* a right of action – in the absence of congressional action – concerning the "treatment of aliens . . . in the immediate aftermath of the terrorist attacks of September 11, 2001," Turkmen, 2006 WL 1662663, at *1, "a national and international security emergency unprecedented in the history of the American Republic." Iqbal, 490 F.3d at 179 (Cabranes, J., concurring). This new philosophy on when "the Judiciary [should] stay its Bivens hand," Wilkie, 551 U.S. at 554, focuses not upon whether it is righteous to provide a plaintiff with a monetary remedy, but upon which branch of government – the Congress or the Judiciary – must furnish that remedy.

In Wilkie, the Supreme Court provided a "two-part inquiry," Arar, 585 F.3d at 572, to govern threshold questions about the availability of a Bivens remedy. In this respect, a court first looks to whether there is "an alternative, existing process for protecting the interest" at issue. Wilkie, 551 U.S. at 550. "But even in the absence of an alternative," a Bivens remedy should not be implied if there are "any special factors counseling hesitation." Id.

A. THE INA SERVES AS A COMPREHENSIVE REMEDIAL SCHEME FOR PROTECTING THE INTEREST AT ISSUE

As the *en banc* Court in Arar cogently recognized, through (*inter alia*) the Immigration and Nationality Act ("INA"), "Congress has established a substantial, comprehensive, and intricate remedial scheme in the context of immigration." Arar, 585 F.3d at 572. The INA is extremely broad and, *inter alia*, governs the detention of aliens who – like plaintiffs here – are awaiting either final orders of removal or removal itself. The statute affords federal authorities

the discretion to detain aliens who are believed to be removable from the United States, see id. § 1226(a), and requires those authorities to detain removable aliens, see id. § 1226© – including those believed to "be engaged in any [] activity that endangers the national security of the United States." See id. § 1226a(a)(3).[3] The INA also dictates the circumstances of an alien's detention after a final order of removal, see id. § 1231(a), and speaks to the "places" where aliens are to be "detained pending removal or a decision on removal." See id. § 1231(f).

Plaintiffs' claims regarding the particular aspects of their detention "arise in a subject area that has 'received careful attention from Congress,'" El-Badrawi v. DHS, 579 F. Supp. 2d 249, 263-64 (D. Conn. 2008) (quoting Benzman, 523 F.3d at 126), and is "an area in which 'Congress [has] developed considerable familiarity.'" Benzman, 523 F.3d at 126 (quoting Bush v. Lucas, 462 U.S. 367, 378 (1983)). As one Second Circuit jurist has noted, "immigration . . . ha[s] consistently been on Congress's radar screen. Immigration is frequently in the news, and Congress has repeatedly legislated in this area." Lin v. DOJ, 494 F.3d 296, 323 (2d Cir. 2007) (Katzmann, J., concurring); see also Arar, 585 F.3d at 573 ("Congress has also regularly modified the various review mechanisms [in the INA] to account for perceived difficulties and complications.").[4] Nor is this at all surprising, as "the responsibility for regulating the

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[3]Of particular import, Congress has expressly limited judicial review over the Attorney General's decisions in this regard. See 8 U.S.C. §§ 1226(e); 1226a(b).

[4]Congress has not hesitated to legislate in the other arena out of which plaintiffs' claims arise – the September 11th attacks. In the wake of the attacks, Congress promulgated the Air Transportation Safety and System Stabilization Act ("ATSSSA"), Pub. L. No. 107-42, 115 Stat. 230, which "provided a statutory cause of action for claims 'arising out of' the airplane crashes that destroyed the WTC towers." Benzman, 523 F.3d at 125-26; see also in re WTC Disaster Site, 414 F.3d 352, 377 (2d Cir. 2005) ("'The intent here is to put all civil suits arising from the tragic events of September 11 in the Southern District.'" (quoting 147 Cong. Rec. A9592 (Sept. 21, 2001) (statement of Sen. Schumer)). Much like Benzman held in refusing to recognize a

relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government . . . over no conceivable subject is the legislative power of Congress more complete." Reno v. Flores, 507 U.S. 292, 305 (1993); see also Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) ("Such matters are . . . largely immune from judicial inquiry or interference.").

And as such, Congress' decision *not* to provide plaintiffs' with a monetary remedy concerning the policies that governed their detention pending removal "ordinarily draw[s] a strong inference that Congress intended the judiciary to stay its hand and refrain from creating a Bivens remedy in this context." Arar, 585 F.3d at 573; see also Guardado v. United States, – F. Supp. 2d – , 2010 WL 3909494, at *7 (E.D. Va. Sept. 30, 2010) (refusing to create First Amendment access claim arising out of removal as a result of the INA's comprehensive scheme). The mere fact that plaintiffs might be left without monetary compensation is irrelevant. See Schweiker v. Chilicky, 487 U.S. 412, 421-22 (1988).

The INA's comprehensive scheme for the treatment of aliens – both during the removal process and thereafter – therefore itself serves to preclude the creation of a Bivens remedy here. Given Congress's recent and repeated legislative forays into all aspects of the immigration arena (including detention), the "authority to create a remedy should remain with Congress because Congress can 'tailor any remedy to the problem perceived, thus lessening the risk of raising a tide

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Bivens claim, this is not to say that plaintiffs' claims fall within the ATSSSA, but the *existence* of this statutory scheme demonstrates that Congress has legislatively provided remedies for certain injuries arising from the September 11th attacks and their aftermath. Benzman, 523 F.3d at 126. The lack of any similar legislative remedy for plaintiffs' detention – which also indisputably arose out of the September 11th attacks – suggests the impropriety of a new judicially-created remedy.

of suits threatening legitimate initiative on the part of the Government's employees.'" Wilson v. Libby, 535 F.3d 697, 706 (D.C. Cir. 2008) (quoting Wilkie, 551 U.S. at 562).

B. SPECIAL FACTORS MOST CERTAINLY COUNSEL HESITATION IN THE CREATION OF A *BIVENS* REMEDY IN THIS CONTEXT

Leaving the INA aside, "a Bivens remedy is a subject of judgment . . . [in which] courts must . . . pay particular heed . . . to any special factors counselling hesitation before authorizing a new kind of federal litigation." Wilkie, 551 U.S. at 550, quoted in Arar, 585 F.3d at 573. "Such special factors are clearly present" here, and those factors – the extraordinary national security challenges that faced the former Attorney General after September 11th – "sternly counsel hesitation." Arar, 585 F.3d at 573.

The Second Circuit has recognized "national security concerns" as "[a]mong the 'special factors' that have 'counsel[ed] hesitation' and thereby foreclosed a Bivens remedy." Id. Even outside the disfavored Bivens context, the Supreme Court has been unflaggingly "hesitant" to entangle itself in issues relating the Executive Branch's duty to secure the Nation. See generally id. at 574-76; see also Dep't of the Navy v. Egan, 484 U.S. 518, 529-30 (1988) ("[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.").

All three branches of our National Government have recognized the national security issues implicated by the September 11th attacks and their aftermath. In the immediate wake of the attacks, Congress, through a Joint Resolution, recognized "the threat to the national security . . . of the United States posed by these grave acts of violence," and that "such acts continue to pose an unusual and extraordinary threat to the national security . . . of the United States." Authorization for Use of Military Force, 115 Stat. 224 (Sept. 18, 2001). The President of the

United States similarly issued an Executive Order providing that "the continuing and immediate threat of future attacks on United States nationals or the United States constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States." Exec. Order 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001). The courts have held similarly, see Center for Nat'l Security Studies v. DOJ ("CNSS"), 331 F.3d 918, 926 (D.C. Cir. 2003), including the Second Circuit in upholding against equal protection challenge the Special Call-In Registration Program – instituted after the attacks to require aliens primarily from certain Muslim nations to register and be fingerprinted:

> There was a rational national security basis for the Program. The terrorist attacks on September 11, 2001 were facilitated by the lax enforcement of immigration laws. The Program was designed to monitor more closely aliens from certain countries selected on the basis of national security criteria.

Rajah v. Mukasey, 544 F.3d 427, 432, 438 (2d Cir. 2008) (citation omitted).

The same considerations pervade this case. As the Supreme Court found in the consolidated Iqbal litigation, the FBI investigation out of which plaintiffs' claims arise was one "of vast reach to identify the assailants and prevent them from attacking anew," and sought to question those "with suspected links to the attacks in particular or to terrorism in general." Iqbal, 129 S. Ct. at 1943. The OIG Report repeatedly notes the national security interests that animated the decisionmaking process in the aftermath of the attacks. OIG Report, at 1-3, 10-20. Plaintiffs' newest amended complaint itself recognizes the enormity of the task. FAC, ¶40.

Were this case to go forward, this Court would ultimately be required to weigh evidence regarding determinations made by senior Department of Justice officials who were "trying to cope with a national and international security emergency unprecedented in the history of the American Republic." Iqbal, 490 F.3d at 179 (Cabranas, J., concurring). As one district court has

cogently held, even divorced from the specific September 11th attacks, in refusing to create a Bivens remedy in the context of an alien's "arrest and subsequent detention":

> This case would require the court to intrude on the executive's authority to make determinations relating to national security. Notably, [plaintiff] specifically alleges that he was targeted for arrest and detention pursuant to a secretive ICE program that "targeted potential immigration violators claimed to be threats to national security." The judiciary is always hesitant to intrude into such core executive functions.

El-Badrawi v. DHS, 579 F. Supp. 2d 249, 263 (D. Conn. 2008). Regardless of whether it is within this Court's ability to entertain this type of second-guessing, the difficulties in doing so – and the limitations on judicial action in this area – at the very least would cause one to "pause" before creating a cause of action in this context against the former Attorney General. See Arar, 585 F.3d at 573. That itself is enough to meet the "remarkably low" hurdle. Id.

* * *

In the end, this litigation poses the fundamental question (one mandated by the Supreme Court) of which branch of government is entitled to decide in the first instance whether a remedy ought to be afforded in a particular context. Congress has shown great facility in creating remedies related to the detention of aliens and the September 11th attacks. If Congress wanted those in plaintiffs' position to have a remedy, it could have easily created one. It did not and this Court should "stay its hand" and not act in Congress' absence.

II. THE FORMER ATTORNEY GENERAL IS ENTITLED TO QUALIFIED IMMUNITY ON THE CLAIMS ALLEGED IN PLAINTIFFS' FOURTH AMENDED COMPLAINT

Even if plaintiff can assert Bivens claims in this context despite new jurisprudential authority that strongly counsels hesitation, General Ashcroft is entitled to qualified immunity.

A. THE QUALIFIED IMMUNITY DOCTRINE

1. General Tenets

Because this Court is familiar with the well-established tenets of the qualified immunity doctrine, the instant recitation will be brief. Qualified immunity protects government officials and employees from suit unless their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Behrens v. Pelletier, 516 U.S. 229, 305 (1996); see also Back v. Hastings on Hudson Free Sch. Dist., 365 F.3d 107, 129 (2d Cir. 2004).[5] Where there is a "legitimate question" as to which standards govern conduct in a particular circumstances, "it cannot be said" that "clearly established" rights were violated. Mitchell, 472 U.S. at 535 n.12.

2. An Individual-Capacity Defendant Can Only Be Held Liable for His "Own" Individual Actions

As the Supreme Court recently reaffirmed in Iqbal, the qualified immunity doctrine requires a Bivens plaintiff to plead that the individual-capacity defendant had the requisite degree of *personal* involvement in the alleged constitutional violation. The societal dangers in attempts to hold officials – especially those in positions of leadership – individually liable are not novel:

> Competent persons could not be found to fill positions . . . if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person.

Robertson v. Sichel, 126 U.S. 507, 515 (1888). The Iqbal Court breathed new life into this

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[5]Since this Court's earlier decision, the two-step analytical framework of Saucier v. Katz, 533 U.S. 194 (2001) is no longer mandatory. Instead, a court "may exercise [its] sound discretion" to dismiss an action on clearly-established grounds without opining on whether the conduct actually violated the Constitution. See Pearson v. Callahan, 129 S. Ct. 808, 818 (2009).

principle, unequivocally holding that "a plaintiff must plead that each Government-official defendant, *through the official's own individual actions*, has violated the Constitution." Iqbal, 129 S. Ct. at 1948 (emphasis added). Iqbal similarly held that individual-capacity liability could *not* be premised upon an official's "knowledge and acquiescence" in a subordinate's unconstitutional activity, id. at 1949 – a principle of utmost importance when evaluating the putative liability of a Cabinet-level officer who is responsible for literally thousands of subordinate employees and is (even outside the unique September 11th context) constantly receiving fragments of information about ongoing activities. The Iqbal Court therefore eliminated whatever viability the generic notion of "supervisory liability" may have previously enjoyed. See id. at 1955 (Souter, J., dissenting) (recognizing that the "majority's resolution of the case[] does away with supervisory liability under Bivens").[6] Careful adherence to these principles is of the utmost significance with respect to individual-capacity claims: "If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed." Iqbal,

[6]Prior to Iqbal, the notion of "supervisory liability" in a constitutional tort context – at least for purposes of § 1983 – in the Second Circuit was putatively explained in Colon v. Coughlin, 58 F.3d 865 (2d Cir. 1995), which listed five instances in which an individual who led others in a governmental organization could be held liable in their individual capacity. See id. at 873. To the extent that Colon authorizes liability for anything other than an individual's *own* constitutional violations, it is no longer good law after Iqbal. See, e.g., Bellamy v. Mount Vernon Hospital, 2009 WL 1835939, at *4 (S.D.N.Y. June 26, 2009), aff'd, 2010 WL 2838534 (2d Cir. July 21, 2010); Joseph v. Fischer, 2009 WL 3321011, at *15 (S.D.N.Y. Oct. 8, 2009). But even were Colon to retain some vitality after Iqbal, see D'Olympio v. Crisafi, 2010 WL 2428128, at *5 (S.D.N.Y. June 15, 2010), it provides plaintiffs little benefit here insofar as there is no well-pled allegation to the effect that the Attorney General knew of the specific conditions under which plaintiffs were detained and nevertheless eschewed action.

129 S. Ct. at 1953. This principle is at its zenith when applied to the crucial challenges facing General Ashcroft after a national security incident of September 11th's magnitude.

Iqbal also explained the degree of factual averment necessary to survive a motion to dismiss. The Iqbal Court held as follows with respect to the proper standard of review:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted to be true, to "state a claim to relief that is plausible on its face." A claim has factual plausibility when the plaintiff pleads factual content that allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Id. at 1949 (quoting Twombly, 550 U.S. at 570). Accordingly, although a court is required to adjudge the legitimacy of a complaint's allegations against the extant substantive law governing a particular claim, now "where the well-pleaded *facts* do not permit the court to infer more than the *mere possibility* of misconduct," the complaint fails. Id. at 1950 (emphasis added). A court appropriately begins by ignoring conclusory allegations that "amount to nothing more than a 'formulaic recitation of the elements'" of a claim. Id. at 1951 (quoting Twombly, 550 U.S. at 555); see also Hayden v. Patterson, 594 F.3d 150, 160-61 (2d Cir. 2010).

In short, courts now no longer are required to accept *any potential* inference from given allegations; to the contrary, courts have the obligation to determine – given their "judicial experience and common-sense" – whether the allegations "plausibly suggest" unlawful behavior, or whether those allegations are also "compatible with" other alternatives, including "lawful . . . behavior." Id. Where "lawful" alternatives exist, the complaint must be dismissed. See id.

B. PLAINTIFFS HAVE FAILED TO SUFFICIENTLY ALLEGE THE PERSONAL INVOLVEMENT OF THE ATTORNEY GENERAL IN THE CONSTITUTIONAL VIOLATIONS ALLEGED IN THEIR FOURTH AMENDED COMPLAINT

Despite five opportunities over a ten-year period, plaintiffs' latest complaint suffers from the same defects as their earlier complaints. Plaintiffs have failed to put forward any well-pled

allegation that the former Attorney General of the United States was personally responsible – "through his own actions" – for the allegedly-unlawful conduct. General Ashcroft is entitled to qualified immunity from a suit premised on actions that were, as plaintiffs specifically aver, initiated and carried out by his subordinates. Because plaintiffs have not sufficiently alleged General Ashcroft's personal involvement in these actions, see Dkt. 205-1, at 27-29, this Court lacks personal jurisdiction over General Ashcroft.

1. The Conditions of Plaintiffs' Confinement (Claim 1)

Plaintiffs' complaint fails under Iqbal because it still avers virtually *nothing* about General Ashcroft's role in establishing the conditions of confinement under which they were held. The *only* factual allegation connecting the former Attorney General to the specific conditions of plaintiffs' confinement[7] at the MDC in Brooklyn is that General Ashcroft desired to "exert maximum pressure" on those who had been "arrested in connection with the terrorism investigation." FAC, ¶61. But this hardly approaches a well-pled allegation that General Ashcroft created or otherwise controlled the specific conditions under which the MDC plaintiffs were detained. As Iqbal provides, an individual-capacity defendant such as General Ashcroft can be held liable only for his own unconstitutional actions, and there is a wide gulf between seeking to exert "maximum pressure" on detainees that (to General Ashcroft's understanding) were "of interest" to the FBI's investigation into the attacks, and a policy or direction to ensure that such

[7]To be sure, the beginning of plaintiffs' complaint includes averments that General Ashcroft was the "principal architect of the policies and practices challenged," "detained" plaintiffs "under unreasonable and excessively harsh conditions," and "created many of the unreasonable and excessively harsh conditions under which plaintiffs" were held. FAC, ¶¶7, 21. But these allegations are precisely the conclusory statements Iqbal holds must be ignored. See Iqbal, 129 S. Ct. at 1951.

detainees were held in unconstitutional conditions of confinement. An allegation that one sought to "exert maximum pressure" is not only conclusory (and thus should be ignored), but is also fully consistent with "lawful behavior" (*i.e.*, one can plausibly, as the OIG Report relates, exert pressure on detainees "within the reasonable bounds of its lawful [and thus constitutional] discretion," OIG Report, at 113; see also id. at 13; 20); plaintiffs' averments are thus "fully consistent" with "lawful behavior." Plaintiffs have therefore not included allegations to "nudge" their claims from possibly suggesting misconduct to plausibly pointing to illegal activity.

Although this alone is enough to require dismissal, the remaining allegations in the complaint, along with the incorporated OIG Report, confirm that plaintiffs are attempting – in direct contravention of Iqbal – to hold the former Attorney General liable for actions allegedly taken by his subordinates. General Ashcroft is glaringly absent from each and every particularized allegation concerning the development of the specific conditions under which detainees (whether at MDC *or* Passaic[8]) were held, as well as the nature of the alleged "inhumane conditions" experienced. FAC, ¶¶75-78; 103-40. Indeed, plaintiffs introduce the MDC's ADMAX SHU – a main part of their contention regarding the conditions of their confinement – without so much as mentioning General Ashcroft. Id. ¶43.

Most importantly, plaintiffs indicate that others were responsible for creating (and/or causing) the specific conditions under which they were detained – for ensuring that regulations concerning the use of administrative segregation were ignored, id. ¶67, and for "design[ing] extremely restrictive conditions of confinement" at the MDC. Id. ¶75. The OIG Report found

[8]In sharp contrast to plaintiffs' allegations regarding the MDC, the complaint contains no allegations concerning the development of confinement conditions at Passaic, let alone the other facilities at which detainees were held.

similarly. OIG Report, 112-25; 158-64. Although plaintiffs speculate that these other officials undertook this activity because of a desire from General Ashcroft and others to "exert maximum pressure," plaintiffs' complaint does not aver that General Ashcroft was involved in designing the allegedly unconstitutional conditions. Because, as Iqbal provides, one can only be held liable for their own unconstitutional behavior, and plaintiffs' complaint attributes no such behavior to General Ashcroft, this Court must dismiss plaintiffs' initial claim against him.

The application of this Court's "judicial experience and common sense," see Iqbal, 129 S. Ct. at 1951, only confirms this result. The Attorney General of the United States, who was attempting to grapple with the implications of the single worst attack ever on American soil (and potential subsequent attacks), would simply not have the time to involve himself in the details of specific confinement conditions. Moreover, plaintiffs' own complaint concedes that the conditions under which detainees considered to be "of interest" to the FBI's investigation were held were *not* uniform throughout the nation; indeed, the MDC and Passaic plaintiffs ostensibly experienced substantially different conditions. FAC, ¶66. Both the Supreme Court's decision in Iqbal and the OIG Report confirm this. See Iqbal, 129 S. Ct. at 1943 (noting that of the 762 aliens that were held on immigration charges, only "a 184-member subset of that group was deemed to be of high interest to the investigation," and thus "held under restrictive conditions of confinement"); OIG Report, at 17-20, 115-18, 126-29 (finding that conditions of aliens' confinement differed based on facility, which was itself a function of the level of FBI interest); 184-86 (explaining why Passaic detainees experienced "significantly less harsh" conditions than those housed at MDC). If the particular conditions under which plaintiffs were held came directly from the former Attorney General, "experience and common sense" dictates that those

conditions would not differ according to location.

2. Purposeful Discrimination in Conditions of Confinement (Claim 2)

Plaintiffs also maintain that they were singled out for "harsh treatment" as a result of their race, religion, ethnicity, or national origin.[9] FAC, ¶282. But plaintiffs' failure to adequately plead that General Ashcroft was personally involved in creating the allegedly-unlawful conditions of confinement forecloses this claim. See supra Part II.B.1. Simply put, whatever animus General Ashcroft may have allegedly harbored toward the plaintiffs is irrelevant if he was not personally responsible for causing the allegedly "harsh treatment."

Even leaving this aside, plaintiffs' newest complaint does not otherwise provide sufficient averments to "nudge" their equal protection claim against the former Attorney General beyond merely "possible" to "plausible." The Iqbal Court reaffirmed that an equal protection plaintiff "must plead and prove that the defendant acted with discriminatory purpose," which requires "a decisionmaker's undertaking a course of action "'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." Iqbal, 129 S. Ct. at 1948 (quoting Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979)). The "course of action" at issue here is not the arrest and detention *itself*, but the conditions under which plaintiffs were held.

As the Supreme Court has already held, plaintiff's contention that unlawful animus motivated the former Attorney General's purported decisions regarding the conditions under

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[9]Plaintiffs have no choice but to focus their equal protection claim on the conditions of their confinement because this Court and the Second Circuit have already upheld the constitutionality of the investigation's focus upon illegal aliens of Arab or Muslim descent – as well as the continued detention of such illegal aliens before their removal until such time as they were cleared of any involvement in terrorist activity. See Turkmen v. Ashcroft, 2006 WL 1662663, at *41-43 (E.D.N.Y. June 16, 2006), aff'd, 589 F.3d 542 (2d Cir. 2009).

which detainees would be held is not "plausible," especially given "more likely explanations":

> The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al-Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim – Osama bin Laden – and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims . . . .

Iqbal, 129 S. Ct. at 1951. Accordingly, plaintiffs' allegations do not plausibly demonstrate that the former Attorney General acted with invidious animus – "[a]ll it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." Id.; see also Brown v. City of Oneonta, 221 F.3d 329, 337-38 (2d Cir. 2000) (holding that questioning as suspects those with similar racial characteristics as criminal perpetrators does not violate Equal Protection Clause).

The details of the process by which illegal aliens discovered as a part of the FBI's investigation were detained are also significant in this respect. As the Supreme Court recognized, the conditions of these aliens' detention were not uniform – only 184 of 762 aliens experienced restrictive conditions, Iqbal, 129 S. Ct. at 1943, and those detained at Passaic "were not held in isolation or otherwise placed in restrictive confinement." FAC, ¶66. Per plaintiffs' complaint, each of these illegal aliens shared the same protected characteristics (*i.e.*, Arab or South Asian extraction; Muslim (or perceived Muslim) faith). Id. ¶29. It is therefore not "plausible" that the former Attorney General created a broad policy to subject all Arab and South Asian detainees of the Islamic faith to unduly restrictive conditions of confinement when a large percentage of those very same aliens did not experience restrictive conditions.

3. Restrictions on the Free Exercise of Religion (Claim 3)

Plaintiffs also have not sufficiently alleged *any* involvement by General Ashcroft in any restriction on their religious practices during their confinement. Plaintiffs' allegations concerning religious restrictions do not mention any specific involvement by the former Attorney General in ordering, creating, or otherwise mandating the same. Id. ¶¶65, 131-39. Rather, they squarely place responsibility for these restrictions upon other subordinate officials within the Department of Justice. Id. And as Iqbal recognizes, even in the most normal of circumstances, the Attorney General (as the head of a major Executive Branch agency) must rely on subordinate offices and employees within component agencies to see that applicable regulations – including those designed to protect detainees' religious rights, see 28 C.F.R. §§ 548.15-20 – are enforced.

4. Communications Blackout/Interference with Counsel (Claims 4-5)

Much the same can be said for what plaintiffs term the "communications blackout" that they experienced, mostly in the first few weeks after the attacks. Much like the lack of allegations concerning the Attorney General's involvement in the development of the conditions under which the detainees would be held, plaintiffs' newest complaint simply alleges that the Attorney General sought to "restrict" or "limit" the detainees' ability to communicate with the outside world. FAC, ¶¶61;79. Such generic allegations are too conclusory to survive dismissal after Iqbal. Moreover, a mere "restriction" or "limitation" on communication does not violate the Constitution. Recognizing this deficiency, plaintiffs identify *others* as those who created – and subsequently approved and/or implemented – the specific policies and practices that comprise plaintiffs' allegations of unconstitutional conduct on this score. Id. ¶¶79-97. These allegations highlight the lack of any similar averments of the Attorney General's involvement.

The OIG Report confirms the former Attorney General's limited (if any) role in any so-called "communications blackout." The OIG Report found that the specific policies regarding the MDC detainees' ability to communicate with others were initially developed and approved by BOP officials without any DOJ involvement. OIG Report, at 112. And even when DOJ officials – those, it bears mentioning, *other* than the Attorney General himself – became tangentially involved in that issue, BOP officials confirmed that their instructions were to ensure that any such policy or practice remained within well-established legal boundaries. Id. at 113-14.

5. Conspiracy (Claim 7)

Perhaps recognizing the paucity of their allegations against the former Attorney General individually, plaintiffs maintain – pursuant to 42 U.S.C. § 1985(3) – that General Ashcroft conspired with *all* of the remaining defendants (from the FBI Director to Cuciti) to deprive plaintiffs of constitutional rights. FAC, ¶305. Despite the structure of their specific factual averments, plaintiffs actually allege that all of the individual-capacity defendants "agree[d] to implement a policy and practice" to subject plaintiffs to each and every constitutional violation averred in the complaint. Id. This sole conclusory allegation of a conspiracy is insufficient to allow plaintiffs' § 1985 claim to survive. See Twombly, 555 U.S. at 565-67; see also Seymour's Boatyard, Inc. v. Town of Huntington, 2009 WL 1514610, at *10-11 (E.D.N.Y. June 1, 2009).

The only plausible "agreement" including the former Attorney General that plaintiffs' complaint even potentially avers involves only General Ashcroft, FBI Director Mueller, and former INS Commissioner Ziglar. FAC, ¶¶39-59. But for the very same reasons identified above with respect to the "individual" claims against General Ashcroft, plaintiffs have not (and could not, in any event given the OIG's findings) sufficiently alleged that the goal of any putative

"agreement" was to compromise plaintiffs' constitutional rights, let alone with unlawful animus. Without unconstitutional purpose, plaintiffs cannot benefit from § 1985. See, e.g., Griffin v. Breckinridge, 403 U.S. 88, 102 (1971); Spencer v. Casavilla, 903 F.2d 171, 174 (2d Cir. 1990).

The gravamen of plaintiffs' claims here – including the specific nature of their conspiracy claim, FAC, ¶305 – concern the conditions of their confinement, the details of which plaintiffs' complaint assigns to other subordinate officials within the Department of Justice. See supra Parts II.B.1-4. But plaintiffs' complaint does not contain a single allegation (aside from those of a conclusory variety) to the effect that the Attorney General of the United States even met or spoke with any of these subordinate officers at the time of the events in question, let alone entered into an agreement with them. Without that kind of specific factual allegation – one that avers both "agreement and concerted action," Seymour's Boatyard, 2009 WL 1514610, at *10-11 – plaintiffs have not presented a viable § 1985 claim that meets Iqbal's plausibility standard.

C. PLAINTIFFS' ALLEGATIONS AGAINST THE FORMER ATTORNEY GENERAL DO NOT STATE A VIOLATION OF CLEARLY-ESTABLISHED LAW

Even if this Court were to conclude that plaintiffs' fifth complaint plausibly alleges the former Attorney General's personal involvement, those allegations do not state the violation of clearly-established constitutional law of which a reasonable officer would have known. And as such, General Ashcroft is entitled to qualified immunity.[10]

1. Conditions of Confinement (Claims 1 and 2)

In order to state a claim for unconstitutional conditions of confinement against an

[10]The former Attorney General recognizes that this Court has – in its earlier rulings in either this action or Elmaghraby – largely rejected these arguments. General Ashcroft respectfully believes that this Court's ruling was in error and should be reconsidered. In any event, he presents them here to preserve them for appellate review.

individual officer, a plaintiff must allege, at the very least, that he was denied "the minimal civilized measure of life's necessities," Kost v. Kozakiewicz, 1 F.3d 176, 188 (3d Cir. 1993), and these deprivations posed an "excessive risk" to his health or safety. See Brown v. Bargery, 207 F.3d 863, 867 (6th Cir. 2000). Plaintiffs do not claim that any of the privations they allege in their complaint – handcuffing, the use of cameras to monitor activity, limited quantity of soap and towels, limitations on the materials that they could keep in their cells, and 24-hour lighting – created an "excessive risk" to them or any other inmate at MDC. Cuoco v. Moritsugu, 222 F.3d 99, 107 (2d Cir. 2000). Moreover, as the Supreme Court made clear in Bell v. Wolfish, 441 U.S. 560 (1979), all restrictions in detention facilities that are "reasonably related to the institution's interest in maintaining jail security" are constitutionally permissible. Id. at 540. The important security interests served by fingerprinting, confiscation of personal items, handcuffing and shackling, restrictions on communication with other detainees, the use of guard dogs, and restrictions on paper and eating utensils, are all facially obvious and warrant no specific discussion. Finally, to the extent that plaintiffs seek to press a *procedural* due process claim, the Second Circuit's Iqbal decision, see Iqbal, 490 F.3d at 167-68, cogently explained (despite its vacatur by the Supreme Court) General Ashcroft's entitlement to qualified immunity.

The invocation of qualified immunity in this circumstance is especially appropriate given the contextual nature of the inquiry. As the Supreme Court has held, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." Saucier, 533 U.S. at 202 (emphasis added); see also Iqbal, 490 F.3d at 167 (highlighting the national security aspects of the September 11th investigation in finding constitutional law unclear).

Plaintiffs' allegations ignore the unprecedented task that confronted federal officials in the aftermath of the attacks. There was no "definitive answer" in the caselaw that told federal officials acting under the nation's chief law enforcement officer how to detain hundreds of unlawful aliens who were being investigated by the FBI for possible ties to international terrorist activities – especially, as this Court has noted, given the characteristics of the perpetrators. Mitchell v. Forsyth, 472 U.S. 511, 535 (1985); see also Brown, 221 F.3d at 338. Indeed, the threshold question of what constitutional strictures applied to unlawful aliens where national security concerns were involved, even where their indefinite detention was at stake, had not been judicially addressed prior to this Court's earlier ruling – a fact that *itself* counsels strongly in favor of qualified immunity. The Supreme Court's recognition that the constitutional rights implicated by an alien's detention could be affected by national security interests further compels entitlement to qualified immunity. See Zadvydas v. Davis, 533 U.S. 678, 696 (2001).

2. The Temporally-Limited Communications Blackout and Lack of Access to Counsel (Claims 4 and 5)

As this Court's earlier ruling recognized, "the applicable legal standard for [First Amendment] claims brought by pretrial and immigration detainees is not quite clear." Turkmen, 2006 WL 1662663, at *47. This itself warrants qualified immunity. Plaintiffs also concede that any general policy to restrict their communications (Claim 4) was, at best, temporally short-lived. FAC, ¶¶79-83. Plaintiffs can hardly dispute that the United States had at the very least "a facially legitimate and bona fide reason" for *temporarily* restricting plaintiffs' communications. Kleindienst v. Mandel, 408 U.S. 753, 770 (1972). After the attacks, officials had strong national security concerns that aliens with putative terrorist ties might reveal vital information. Several courts have held that security concerns surrounding September 11th justified restrictions on

information. See CNSS, 331 F.3d at 926-32 (explaining that potential communications regarding "which . . . members were compromised by the investigation" justified restrictions); N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 217-18 (3d Cir 2002).

Nor can plaintiffs avoid this conclusion by morphing their claim into one seeking relief for denial of access to counsel (Claim 5). Whatever right to counsel plaintiffs may have enjoyed for purposes of their removal proceedings, see Montilla v. INS, 926 F.2d 162, 166 (2d Cir. 1991), there is no violation of the Due Process Clause without concomitant prejudice to the "fairness" of those proceedings. See Romero v. INS, 399 F.3d 109, 112 (2d Cir. 2005). Plaintiffs fail to aver that the "blackout" at all affected the outcome of their removal proceedings. FAC, ¶¶79-97. Finally, because any right to counsel is inextricably-tied to plaintiffs' removal proceedings, this Court lacks subject-matter jurisdiction over this claim pursuant to 8 U.S.C. § 1252(b)(9).[11]

3. Conspiracy (Claim 7)

Understanding that the Second Circuit rejected the position in its now-vacated Iqbal decision, see Iqbal, 490 F.3d at 176-77, General Ashcroft seeks to preserve his argument that the application of § 1985(3) to the instant context was not clearly-established law in his circuit in 2001. See, e.g., Hayes v. FBI, 562 F. Supp. 319, 321 n.3 (S.D.N.Y. 1983) (holding that "it is not altogether clear" that a § 1985(3) action could "be brought against federal officials").

CONCLUSION

For the foregoing reasons, this Court should dismiss all claims against the former Attorney General in his individual capacity.

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[11]Plaintiff's cryptic suggestion in this claim for declaratory relief, FAC, ¶295, is precluded by the well-established principle that one cannot obtain equitable relief against an official in his individual capacity. See, e.g., Frank v. Reim, 1 F.3d 1317, 1327 (2d Cir. 1993).

Respectfully submitted,

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CERTIFICATE OF SERVICE

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