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.	)	
_____	)	

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

NEIL H. MacBRIDE
UNITED STATES ATTORNEY

DENNIS C. BARGHAAN, JR.
Assistant U.S. Attorney
Special Department of Justice Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314
Telephone: (703) 299-3891
Fax: (703) 299-3983
Email: dennis.barghaan@usdoj.gov

Attorneys for John Ashcroft, former Attorney General of the United States, in his individual capacity

DATE: January 12, 2011

TABLE OF CONTENTS

ARGUMENT

I. SPECIAL FACTORS COUNSEL HESITATION IN THE CREATION OF A *BIVENS* REMEDY GIVEN THE CONFLUENCE OF IMMIGRATION-RELATED DETENTION AND THE SEPTEMBER 11TH ATTACKS

This Court must first determine whether the novel circumstances underlying the plaintiffs' Fourth Amended Complaint present an appropriate occasion for the "extraordinary" invocation of judicial authority, see Arar v. Ashcroft, 585 F.3d 559, 571 (2d Cir. 2009) (en banc), cert. denied, 130 S. Ct. 3409 (2010), necessary to create a Bivens remedy. Ash. Mem. (Dkt. No. 736), at 5-11. The Supreme Court's own jurisprudence demonstrates that "in *most instances* . . . a Bivens remedy [is] unjustified." Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (emphasis added). Plaintiffs turn a blind eye to this binding authority, and essentially argue that the existence of a Bivens remedy is presumed unless certain legislative or other conditions are present. This Court should resist plaintiffs' invitation to ignore the presumption *against* inferring a remedy directly under the Constitution in the absence of congressional action.

A. PLAINTIFFS' *BIVENS* CLAIMS ARISE FROM A UNIQUE CONTEXT

As the Supreme Court has noted, federal courts have an *obligation* to "consider . . . Bivens request[s]" to ensure that allowing such a "freestanding damages remedy" is an appropriate exercise of judicial authority given the particular circumstances under which the "request" arises. Id. at 550. Plaintiffs initially advise this Court that it need not discharge this obligation here, because the vast majority of their claims are brought pursuant to a constitutional provision (*i.e.*, the Fifth Amendment), and generically concern allegations (*i.e.*, conditions of confinement), under which the courts have previously inferred a Bivens remedy. Opp. Mem., at

52-56.[1] Plaintiffs therefore argue that this Court need not bring Bivens into a new "context."

Plaintiffs misapprehend the relevant inquiry. The question is not whether a particular claim in general has previously been afforded a Bivens remedy, but whether such a remedy has been implied in a particular context. See, e.g., Idaho v. Coeur D'Alene Tribe of Idaho, 521 U.S. 261, 280 (1997). Indeed, the *en banc* Second Circuit has clearly warned against the convenient use of analogues to determine whether a Bivens remedy should be authorized:

> Context is not defined in the case law. *At a sufficiently high level of generality, any claim can be analogized to some other claim for which a Bivens action is afforded,* just as at a sufficiently high level of particularity, every case has points of distinction. We construe the word "context" as it is commonly used in law: to reflect a potentially recurring scenario that has similar legal and factual components.

Arar, 585 F.3d at 572 (emphasis added). Accordingly, the mere fact that plaintiff's claims – "[a]t a sufficiently high level of generality" – seek relief for the conditions under which they were detained, and thus can be analogized to allegations that the Supreme Court held cognizable under Bivens, see Carlson v. Green, 446 U.S. 14, 16 (1980), does not come close to ending the inquiry. In Chappell v. Wallace, 462 U.S. 296 (1983), plaintiff sought Bivens relief for race discrimination, see id. at 297, which is virtually indistinguishable from the gender discrimination claim for which the Supreme Court authorized a Bivens remedy in Davis v. Passman, 442 U.S. 278 (1979). See id. at 297. But the uniqueness of the military context in Chappell led the Supreme Court to *reject* a Bivens remedy for those identical allegations. See Chappell, 462 U.S. at 304. Put simply, in analyzing the propriety of inferring a Bivens remedy, material nuances in

---

[1]Plaintiffs concede that at least two of their claims (*i.e.*, those brought pursuant to the First Amendment) would require an expansion of the presently-applicable Bivens jurisprudence, and that as a result, this Court must analyze those claims under the pertinent "special factors" jurisprudence. Opp. Mem., at 52; see Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948 (2009) (observing that the Court has never extended Bivens to the First Amendment.

the circumstances giving rise to a cause of action matter.

And despite plaintiffs' conclusory statement to the contrary, Opp. Mem., at 54, there are material differences between their allegations here and those giving rise to the Supreme Court's decision in Carlson. Carlson concerned an individual who had been convicted of bank robbery and was, at the time of the events giving rise to the civil litigation, serving a ten-year sentence at a federal prison facility. See Green v. Carlson, 581 F.2d 669, 670-71 (7th Cir. 1978), aff'd, 446 U.S. 14 (1980). The inmate passed away from respiratory problems while in custody, and his estate brought a Bivens action, alleging that prison authorities had violated (*inter alia*) the Eighth Amendment in failing to provide proper medical treatment. See id. at 671. Plaintiffs here, however, were not nearly similarly-situated. Far to the contrary, these plaintiffs were aliens unlawfully present in this country who were detained not to serve a generic criminal sentence, but pending removal from the United States for violating the Immigration and Nationality Act ("INA").[2] And more importantly, these individuals were detained as a part of the federal government's investigation into what has been recognized as "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). At the very least, the confluence of these two materially-different contexts require the rejection of plaintiffs' casual attempt to find a simple analogue in Carlson so as to avoid the "special factors" analysis.

[2]On this score, it is important to recall that the law recognizes the detention of aliens pending removal from the United States as a "distinct phenomenon," Arar, 585 F.3d at 572, especially when compared to detention pursuant to a criminal sentence. See, e.g., Zadyvdas v. Davis, 533 U.S. 678, 690 (2001) (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

B. THE LACK OF A REMEDY IN THE COMPREHENSIVE REMEDIAL SCHEME REPRESENTED BY THE IMMIGRATION AND NATIONALITY ACT EVINCES A DESIRE TO PRECLUDE A *BIVENS* REMEDY

Former Attorney General Ashcroft earlier reasoned that the INA – with all its attendant amendments – served as the quintessential comprehensive statutory scheme that precluded the inference of a Bivens remedy. Mem., at 6-9.[3] Plaintiffs note that this Court previously reasoned that "[a]lthough the INA provides a comprehensive *regulatory* scheme controlling the entry of removal of non-citizens, it is by no means a comprehensive *remedial* scheme for constitutional violations that occur incident to the administration of that regulatory scheme." Turkmen v. Ashcroft, 2006 WL 1662663, at *29 (E.D.N.Y. June 14, 2006) (emphasis in original). In Arar, however, the *en banc* Second Circuit stated with respect to the INA itself:

> Congress has established a substantial, comprehensive, and intricate *remedial scheme* in the context of immigration.

Arar, 585 F.3d at 572 (emphasis added). To the extent that this Court's previous order rested upon a distinction between "regulatory" and "remedial" schemes, it has therefore been abrogated.

Plaintiffs further err in arguing that "Bivens relief is only precluded where Congress creates a comprehensive scheme which addresses the type of violations alleged." Id. That is simply incorrect as a matter of law – especially as applied to the INA's comprehensive scheme.

As Arar makes clear, the INA creates a comprehensive remedial scheme with respect to

---

[3]Plaintiffs correctly note that they presently lack a cognizable alternate remedy to address the allegations giving rise to this action. But that also far from ends the inquiry, because "even in the absence of an alternative, a Bivens remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed . . . to any special factors counseling hesitation before authorizing a new kind of federal litigation.'" Wilkie v. Robbins, 551 U.S. 537, 500 (2007). "This, then, is a case for Bivens step two." Id. at 554.

the treatment of aliens in the United States – including the admission of aliens to, the residence of aliens in, and the (often-involuntary) removal of aliens from the United States. The detention of aliens pending removal (or during removal proceedings) is a critical part of this comprehensive scheme, and is not – as plaintiffs would ostensibly have this Court believe – a minor and collateral function of the process.[4] For well over a century, the Supreme Court has recognized the crucial role that immigration detention plays in the scheme Congress has developed (even *before* the promulgation of the modern INA) to govern the removal of aliens from the United States. See Demore v. Kim, 538 U.S. 510, 523 (2003) ("As we said more than a century ago, deportation proceedings 'would be vain if those accused could not be held in custody pending the inquiry into their true character.'" (quoting Wong Wing v. United States, 163 U.S. 228, 235 (1896)). As the former Attorney General further explained, Mem., at 6-7, the INA *itself* includes – as part of its comprehensive scheme – provisions regarding government officials' discretion to detain aliens who are believed to be removable from the United States, see id. § 1226(a), a mandate to detain removable aliens, see id. § 1226(c), including those believed to "be engaged in any [] activity that endangers the national security of the United States." See id. § 1226a(a)(3). Finally, despite the limitations it has placed on the use of the habeas writ during other parts of the immigration process, see REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 302 (May 11, 2005), Congress has retained the availability of habeas proceedings in Article III courts to challenge *certain aspects* of immigration detention. See, e.g., Monestime v. Reilly, 704 F. Supp. 2d 453, 456 (S.D.N.Y. 2010).

---

[4]The scholarly literature on this subject has recognized that detention – whether rightful or wrongful – is an inextricably-intertwined part of the INA's removal scheme. See, e.g., Anil Kalhan, Rethinking Immigration Detention, 110 COL. L. REV. SIDEBAR 42, 43-47 (2010).

Once immigration detention is properly defined as part and parcel of the comprehensive scheme, it requires "no great stretch," In re WTC Disaster Site, 414 F.3d 352, 377 (2d Cir. 2005), to explain that Congress's decision not to include a remedial mechanism within the INA to challenge the conditions of that detention precludes the inference of a Bivens remedy here. Where "Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," courts should eschew inferring a Bivens remedy. Schweiker v. Chilicky, 487 U.S. 412, 423 (1988). Put simply, given the role played by immigration detention in the removal process, plaintiffs' allegations about the conditions of that detention are clearly the type of "constitutional violation[]" that might "occur during the course of [the INA's] administration." As the District of Columbia Circuit has held, the need for federal courts to stay its Bivens hand are at their zenith in circumstances, like these, where Congress has withheld a remedy in an otherwise comprehensive scheme:

> The special factors analysis does not turn on whether the statute provides a remedy to the particular plaintiff for the particular claim he or she wishes to pursue. . . . Indeed, it is where Congress has intentionally withheld a remedy that we must refrain from providing one because it is in those situations that "appropriate judicial deference" is especially due to the considered judgment of Congress that certain remedies are not warranted.

Wilson v. Libby, 535 F.3d 697, 709 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 2825 (2009).

Nor is the sheer breadth of the INA – and the inclusion of immigration detention as a part of the pertinent remedial scheme – the only evidence of Congress' intentions on this score. As the former Attorney General noted in his opening memorandum, Mem., at 7, plaintiffs' allegations "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 v. Whitman, 523 F.3d 119, 126 (2d Cir. 2008)). Plaintiffs attempt to cast this aside in cursory fashion, again

arguing that although immigration has *generally* been a congressional focus, issues *specifically* related to immigration detention have not been part of the legislative discourse. Opp. Mem., at 58. At the outset, plaintiffs' factual statement is inaccurate, as bipartisan Members of Congress have introduced – but failed to pass – legislation regarding the conditions of immigration detentions in recent years. See, e.g., Secure and Safe Detention and Asylum Act, S. 3114, 108th Cong., § 6 (mandating that the Secretary of Homeland Security ensure certain minimal conditions in immigration detention). But even were this not true, that Congress would repeatedly take up immigration as a general subject for legislative debate and putative action – and *not* to create a remedy geared to the conditions of immigration detention – is revealing.

The comprehensive scheme authored by Congress – and its failure to impose a remedy for constitutional violations that might occur during the administration of immigration detention authorized pursuant to the INA – therefore precludes a Bivens remedy in the instant context.

C. PLAINTIFFS' OWN ALLEGATIONS DEMONSTRATE THE UNIQUE NATIONAL SECURITY IMPLICATIONS OF THEIR DETENTION

Even were this Court not to conclude that the INA served as a comprehensive remedial scheme in this context, other "special factors" should "counsel hesitation" in the creation of a Bivens remedy here. In this respect, Mem., at 9-11, the extraordinary national security challenges posed both by the investigation into the attacks of September 11th and the pressing need to prevent further assaults on the nation during that fragile time, serve as quintessential "special factors" that should preclude resort to Bivens. Plaintiffs correctly do not quibble with the notion that national security challenges can serve as a "special factor counseling hesitation" in the Bivens arena, see Arar, 585 F.3d at 573; instead, they reflexively characterize their claims as challenging nothing more than ordinary prison conditions which "do not implicate national

security or foreign relations concerns." Opp. Mem., at 60-61.

Perhaps prison conditions claims generally do not implicate national security concerns, but plaintiffs' claims hardly challenge prison conditions under ordinary circumstances. Plaintiffs understandably attempt to divorce their claims from the obvious context out of which they arose – the investigation into the September 11th attacks, which 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. Plaintiffs further ignore the reality that, as all three branches of our federal government have recognized, the law enforcement response in the aftermath of the September 11th attacks was undeniably imbued with national security concerns. See Authorization for Use of Military Force, 115 Stat. 224 (Sept. 18, 2001); Exec. Order 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001); Center for Nat'l Security Studies v. DOJ, 331 F.3d 918, 926 (D.C. Cir. 2003). The OIG Report repeatedly notes the national security interests at issue here – especially the restrictions on detainee communications in the immediate aftermath of the attacks – and the challenges that such interests posed in making those decisions. OIG Report, at 1-3, 10-20.

Plaintiffs' own complaint further demonstrates how their claims are imbued with national security implications, and will require this Court to evaluate the nature of investigatory information against potential danger to national security interests in hindsight. On repeated occasions, plaintiffs aver that there was insufficient information to support the conclusion that they were connected to terrorism, or otherwise a danger to national security – and that the national security concerns on which the restrictive conditions of their confinement were concededly-premised were fictional. FAC, ¶¶ 40-47. In order to resolve the veracity of that

contention, this Court would 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), an aspect of the former Attorney General's opening memorandum that plaintiffs ignore.

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 (emphasis added). One can hardly question that the connection of national security issues to plaintiffs' allegations and claims is not *so* attenuated that one would not "pause even to consider" such implications in inferring a Bivens remedy under the instant circumstances.

II. PLAINTIFFS HAVE FAILED TO PLEAD A PLAUSIBLE CLAIM THAT THE FORMER ATTORNEY GENERAL VIOLATED THE CONSTITUTION THROUGH HIS OWN ACTIONS

A. CONDITIONS OF CONFINEMENT CLAIMS (COUNTS 1, 3-5)[5]

The Iqbal Court could hardly have been clearer about a Bivens plaintiff's pleading obligations:

> [A] plaintiff must *plead* that each government-official defendant, *through the official's own actions,* ***has violated the Constitution***.

Iqbal, 129 S. Ct. at 1949 (emphasis added). As will be explained *infra*, plaintiffs concede that their complaint is devoid of any averment to the effect that the former Attorney General ordered,

[5]Given page limitations, the former Attorney General will focus the qualified immunity arguments in this reply memorandum solely upon the question of personal involvement, and will rest on his opening memorandum with respect to whether plaintiffs' complaint averred a violation of clearly-established constitutional law.

devised, or approved any of the *particular* detention conditions they contend to have been unconstitutional. Nor do plaintiffs identify any allegation in their complaint to the effect that the former Attorney General specifically ordered any of his subordinates to ignore well-established constitutional strictures in implementing his generalized policy. Accordingly, plaintiffs seek to have this Court hold that government officials – especially those that choose to serve in high-ranking positions in the Executive Branch – are not entitled to rely upon their subordinates to implement policies in a constitutional manner without exposing themselves to *individual capacity* liability. To speak the proposition is to demonstrate its error.

1. Plaintiffs' Complaint Lacks Any Averment that the Former Attorney General's *Own* Actions Violated the Constitution

In his opening memorandum, the former Attorney General explained that the *only* factual allegation connecting him to the specific conditions of plaintiffs' confinement at the MDC in Brooklyn is that he desired to "exert maximum pressure" on those who had been "arrested in connection with the terrorism investigation." FAC, ¶61. In their complaint, plaintiffs never aver – other than in conclusory terms[6] – that the former Attorney General created any of the specific confinement conditions on which their claims arise. In particular, plaintiffs' complaint specifically avers that other individuals ordered the placement of plaintiffs into the ADMAX SHU, id. ¶¶24, 74, and "design[ed] extremely restrictive conditions of confinement." Id. ¶75.

[6]Despite plaintiff's statement to the contrary, Opp. Mem., at 22, a bald allegation to the effect that an official "created" conditions – in and of itself – is conclusory and should be ignored while engaging in the pertinent plausibility analysis. See Iqbal, 129 S. Ct. at 1951. In the context of plaintiff's newest complaint, that allegation serves as a "formulaic recitation of the elements" of *any* Bivens claim (*i.e.*, that the particular defendant was personally involved in the underlying conduct), especially when compared to the *remainder* of the complaint, which clearly identifies – through specific facts – other defendants as those who literally "created" the restrictive conditions. FAC, ¶75.

Moreover, plaintiffs' complaint provides extensive detail about what they categorize as the "inhumane conditions of [their] confinement" at the MDC, id. ¶¶103-40, but not a single averment to the effect that the Attorney General was engaged in developing or approving (or even had any knowledge whatsoever of) these specific confinement conditions. Plaintiffs do not seem to disagree with this assessment of the limits of their complaint. Opp. Mem., at 3-4, 23-24.

Instead, plaintiffs simply aver that the former Attorney General instructed that "maximum pressure" be placed upon the detainees in question, that the detainees be "isolated," and that they be encouraged to "cooperate" in "any way possible." FAC, ¶¶61, 65. Such is the extent of the former Attorney General's "own actions" that contributed to plaintiffs' claims of inhumane conditions of confinement, religious interference, and communications blackout. Whatever the wisdom or appropriateness of this alleged "strategy" from a policy standpoint, plaintiffs ostensibly (through their silence) do not argue that the policy allegedly-authored by the former Attorney General *itself* ran afoul of constitutional strictures. Opp. Mem., at 23 (recognizing that "it is possible to put lawful pressure on a detainee"). Rather, plaintiffs reason that the unconstitutional conditions created and designed by others – from 24-hour light in cells to denial of recreation to inadequate food,[7] FAC, ¶¶103-40 – "were the direct result of the strategy mapped out by [the former Attorney General and FBI Director's] small working group." Id. ¶65; Opp. Mem., at 2, 24 ("Taking as true plaintiffs' allegations that (1) Ashcroft ordered detainees held in a way to "exert maximum pressure" upon them; and (2) immediately thereafter, that same group

[7]It is noteworthy that rather than attempt to explain the plausibility of each of their "conditions of confinement" claims individually (*i.e.*, claim-by-claim), plaintiffs have grouped all such conditions claims together in their opposition memorandum. This only highlights plaintiffs' attempt to hold the former Attorney General liable without specific allegations tying him to the *unconstitutional* actions that form the basis of their claims.

of detainees was placed in unconstitutional conditions, it is plausible to infer that (1) led to (2).").

This brings plaintiffs' theory of liability into clear relief. Notwithstanding the fact that the former Attorney General's *own actions and directives* (as alleged in the complaint) do not *themselves* violate constitutional norms, plaintiffs seek to hold him liable in his individual-capacity because others allegedly implemented those directives unconstitutionally. This Court should reject such an expansion of Bivens liability.

2. Individual-Capacity Liability Must Be Premised Upon an Official's *Own* Actions

In seeking to impose liability upon the former Attorney General, plaintiffs cling to the notion that a government official can be held liable in his individual-capacity if he "'created a policy or custom under which unconstitutional practices occurred.'" Opp. Mem., at 20 (quoting Scott v. Fischer, 616 F.3d 100, 101 (2d Cir. 2010)). To be sure – either before or after Iqbal – a government official who creates or adopts a policy that is *itself* unconstitutional cannot escape liability simply because the policy was *applied* to the particular plaintiff by his or her own subordinates. As one court has cogently noted in this regard: "[T]he establishment or utilization of an unconstitutional policy or custom can serve as the supervisor's 'affirmative link' to the constitutional violation. . . . [W]here a official with policymaking authority creates a policy that which is constitutionally infirm, that official may face personal liability for the violations which result from the policy's application." Davis v. City of Aurora, 705 F. Supp. 2d 1243, 1263-64 (D. Colo. 2010) (emphasis added), as quoted in Dodds v. Richardson, 614 F.3d 1185 (10th Cir. 2010); see also Adeyi v. United States, 2010 WL 520544, at *8 (E.D.N.Y. Feb. 8, 2010) ("Supervisors can be sued individually without direct participation only if they promulgated unconstitutional policies or plans under which action occurred or otherwise authorized or

approved challenged misconduct.").[8] This decisional authority provides plaintiffs with little assistance here, however, because – as they must admit – the policy direction that their complaint attributes to the former Attorney General was not *itself* unconstitutional.

Nor does the Second Circuit's decision in Brock v. Wright, 315 F.3d 158 (2d Cir. 2003), stand for the proposition that a policy that generally is "susceptible to both constitutional and unconstitutional interpretations" raises a jury question on the policymaker's personal involvement. Opp. Mem., at 25. Brock concerned a prison policy for the treatment of a particular medical condition, which, unlike the vague "exert maximum pressure" direction that is the gravamen of plaintiffs' complaint, was interpreted *by its author* (the individual-capacity defendant) to preclude treatment even if the condition caused an inmate pain. See Brock, 315 F.3d at 166. Because the defendant's *own* interpretation of his own policy – and his recognition that his subordinates accurately applied the policy to plaintiff – could itself be considered unconstitutional, it did not matter that the medical policy as written was constitutionally-ambiguous. See id. Indeed, a close reading of Brock actually supports the former Attorney General's position – where a policy (or its proper interpretation) is not *itself* unconstitutional, the author of the policy directive cannot be held liable in his individual capacity.

Even were the question unclear prior to Iqbal, the notion that a government official can be held liable for the unconstitutional application of a constitutionally-neutral policy does not survive the Supreme Court's seminal decision. Under Iqbal, a "[p]laintiff must plead that each

---

[8]As an example, one court has applied this rubric to hold that a prosecutor who approved a warrant application that lacked probable cause was personally involved in unconstitutional conduct even though other individuals ultimately executed the search. See Minx v. Knox, 613 F.3d 995, 1002 (10th Cir. 2010).

Government-official defendant, through the officials' own actions, has *violated the Constitution*." Iqbal, 129 S. Ct. at 1948 (emphasis added). None of the former Attorney General's "own actions" – as averred in plaintiffs' newest complaint – "violated the Constitution." And that is the end of the inquiry under now binding Supreme Court precedent; indeed, if the former Attorney General's purported "knowledge and acquiescence" in his subordinates' actual unconstitutional conduct was insufficient to engender liability, id. at 1949, neither can a subordinate's decision to morph a constitutionally-ambiguous policy to illegality.[9]

In this respect, plaintiffs' theory of liability (*i.e.*, that the former Attorney General's "policy," while not itself unconstitutional, "directly result[ed]" in the constitutional violations) would allow the resurrection of *respondeat superior* through the proverbial "back door." Under plaintiffs' theory, supervisory government officials will constantly find themselves as individual-capacity defendants not for their "own actions [that] violated the Constitution," Iqbal, 129 S. Ct. at 1949, but rather, for the actions of their subordinates that "violated the Constitution." Id.

Considered in this light, plaintiffs' conception of liability against the former Attorney General would have incredibly detrimental implications for the functioning of government –

---

[9]It does not appear that plaintiffs are attempting to hold the former Attorney General liable based upon a deliberate indifference theory. Compare Opp. Mem., at 40-42 (explaining plaintiffs' deliberate indifference theory as against the MDC defendants) with id. at 20-25. But were this assessment in error, the former Attorney General (as explained in his opening memorandum, Mem., at 13 n.6) joins his fellow defendants – and several courts, see, e.g., Rivera v. Metropolitan Transit Auth., 2010 WL 4545579, at *4 (S.D.N.Y. Nov. 11, 2010) – in arguing that liability on such grounds would run afoul of Iqbal's edict that "situations where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate" cannot justify supervisory liability. Bellamy v. Mount Vernon Hospital, 2009 WL 1835939, at *4 (S.D.N.Y. June 26, 2009), aff'd, 387 Fed. Appx. 55 (2d Cir. 2010). Nor is there any allegation that the former Attorney General knew of the allegedly specific (and unconstitutional) conditions of confinement.

dangers against which the Supreme Court intended the qualified immunity doctrine to protect. Plaintiffs cite no authority for the proposition that supervisory officials cannot rely upon their subordinates to administer their policy instructions in a legal manner. There is good reason for this omission. As courts have repeatedly identified, the very qualified immunity that supports Iqbal's emphasis on adequate allegations of personal involvement seeks to ensure that the "zealous performance of [a government officer's] official obligations" are not chilled by the prospect of individual-capacity litigation. Cartier v. Lussier, 955 F.2d 841, 844 (2d Cir. 1992); see also Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982). But this very chilling effect is inevitable unless government officials can rely upon their subordinates to implement their policy directives in a legal fashion. If government officials understand that they can be exposed to individual-capacity liability merely because their subordinates implemented a constitutionally-neutral policy in an illegal fashion, government would grind to a halt as officials repeatedly look over their shoulder to ensure that their policies are not being taken in unconstitutional directions at any level in the chain of command.

If the Article III courts "accord[]" a "presumption of legitimacy . . . to the Government's official conduct," Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 174 (2004), then government officials themselves are entitled to presume that, given the choice between implementing facially constitutional policies in a constitutional or an unconstitutional way, their subordinates will act constitutionally. Government officials should not be forced to risk their personal financial well-being by entertaining the same presumption of regularity that the courts have repeatedly accorded to government conduct. See United States Postal Serv. v. Gregory, 534 U.S. 1, 10 (2001); see also United States v. Chemical Found., 272 U.S. 1, 14-15 (1926)

("[C]ourts presume that [public officers] have properly discharged their official duties."). Indeed, the need to take such precarious risks with one's future would deter many from public service – another key concern of the qualified immunity doctrine. See Robertson v. Sichel, 126 U.S. 507, 515 (1888).

Framed in terms of the Iqbal pleading standard, it is simply not "plausible" – based on this complaint – that the Attorney General directed or even intended his subordinates to institute *unconstitutionally* restrictive conditions of confinement; that is, unless this Court is willing to hold that it is automatically plausible that policymaking officials intend for their subordinates to implement their general policy without concern over constitutional strictures. But that position would require this Court to ignore the central tenet of Iqbal's plausibility holding – that any analysis of whether a complaint states a "plausible" claim is "a *context-specific* task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 129 S. Ct. at 1950 (emphasis added). As such, the former Attorney General does not ask for the judicial acceptance of a "more likely" explanation for the creation of the putatively-unconstitutional conditions of confinement, as plaintiffs would have this Court believe. Quite to the contrary, there is *nothing* in this complaint to give rise to a reasonable inference that the former Attorney General's policy directed that detention conditions be manufactured without recognition of the Constitution.[10] Instead, plaintiffs ask this Court to ignore completely the very "context" out of

[10]And even if one could conjure some inference to this effect, the reality (one recognized both in plaintiffs' actual complaint and the OIG Report that they have incorporated into the same) that not all September 11th detainees – especially those who were detained at Passaic County Jail in New Jersey – suffered anything approaching the same type of restrictive conditions (*e.g.*, 24-hour lighting, etc.) destroys that very inference, as courts have now recognized in Iqbal's wake:

which their allegations arise – the aftermath of the September 11th attacks, with all of the necessary time demands on the former Attorney General. As Iqbal held, because plaintiffs' complaint is therefore simply "consistent" with the *possibility* of misconduct – and does not "contain facts plausibly showing that" the policy directive was itself unconstitutional – these claims must fail. Iqbal, 129 S. Ct. at 1949.

B. EQUAL PROTECTION CLAIM (COUNT 2)

Many of these same principles require the dismissal of plaintiffs' equal protection claim, which similarly asserts that the unconstitutional conditions of their confinement were instituted by the former Attorney General simply on account of plaintiffs' membership in certain protected classes. FAC, ¶282. As the former Attorney General argued in his opening memorandum, this claim is – by necessity – inextricably intertwined with plaintiffs' conditions of confinement claims.[11] Mem., at 18. And especially given the fact that plaintiffs appear to premise their equal

---

> [I]t is clear that the occupants [of a house being searched] were not being treated uniformly. Plausibility is what matters. Allegations that are merely consistent with a defendant's liability or show the "mere possibility of misconduct" are not enough. Here, given the disparate treatment of the occupants of the home, one plausible interpretation is that the officers simply used their own discretion in determining how to treat each occupant. In contrast with that "obvious alternative explanation" for the allegedly excessive use of force, the inference that the force was planned is not possible.

Santiago v. Warminster Twp., 2010 WL 5071779, at *7 (3d Cir. Dec. 14, 2010). Given that the complaint specifically alleges that individuals at the MDC created the unconstitutional conditions that give rise to the MDC defendants' claims, FAC, ¶¶73-74; 103-40, and that the Passaic plaintiffs concede that they did not experience anything approaching the allegedly-"inhumane" conditions present at the MDC, id. ¶66, plaintiffs have simply not pled a plausible claim that the former Attorney General directed the creation of unconstitutional conditions in light of the "obvious alternative explanation" that subordinates exercised their own discretion in so doing.

[11]It bears repeating that this is so because the Second Circuit has already upheld the constitutionality of the arrest, detention, and continued detention of the detainees – including the focus of the investigation upon illegal aliens of Arab or Muslim descent. See Turkmen v.

protection claim upon the very same averments – *e.g.,* that the former Attorney General sought to "exert maximum pressure" on the detainees – the very same rationale as articulated above, see supra Part II.A, would apply to require the dismissal of plaintiffs' equal protection claim.

But plaintiffs also give rather short shrift to the former Attorney General's alternative argument. Succinctly reiterated, as both the OIG Report and the Supreme Court found, see Iqbal, 129 S. Ct. at 1943 – and plaintiffs' newest complaint concedes, FAC ¶66[12] – not *all* of the detainees (each of whom shared the same ethnicity and religion) were placed in restrictive conditions of confinement: only 184 of 762 aliens experienced restrictive conditions. It is simply 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. Mem., at 19; cf. Santiago, 2010 WL 5071779, at *7 (recognizing that disparate treatment amongst similarly-situated individuals destroys plausible inference of concerted action by policymakers). Instead, there is an "obvious alternative" inference that one can draw from the discrepancy identified in plaintiffs' complaint, the OIG Report, and by the Supreme Court: that the Attorney General relied on subordinate officers to determine those detainees who should be held in restrictive conditions of confinement pending clearance.

Ashcroft, 2006 WL 1662663, at *41-43 (E.D.N.Y. June 16, 2006), aff'd, 589 F.3d 542 (2d Cir. 2009). It is therefore more than passing strange that the vast majority of the averments to which plaintiffs refer in arguing the plausibility of their equal protection claim against the former Attorney General concern the very "hold-until-cleared" policy that can no longer be a part of this civil action. Opp. Mem., at 31-32 (citing FAC, ¶¶41, 47-51, 53, 60e).

[12]The text of plaintiffs' averment on this score is rather important – the detainees held at Passaic County Jail in New Jersey "were not held in isolation or otherwise placed in restrictive conditions of confinement." FAC, ¶66.

Plaintiffs attempt to mute this powerful discrepancy by offering an "explanation" for the fact that *less than a quarter* of all of the September 11th detainees were held in restrictive conditions of confinement – there was a lack of bed space at secure BOP facilities. Opp. Mem., at 32. But that explanation is itself implausible. At the threshold, plaintiffs *concede* that the Passaic detainees were not held in restrictive conditions of confinement, and have now articulated (albeit with reference to the MDC defendants) that the types of inappropriate conditions that the Passaic detainees experienced (*e.g.*, religious abuse, more secularized physical and verbal abuse, menacing through the use of dogs, FAC, ¶66) were not the result of the former Attorney General's supposed policy, but generally were the result of the individual prison atmosphere inculcated by local staff. Opp. Mem., at 40. Nor do plaintiffs provide any explanation as to why the lack of bedspace at a secure BOP facility would prevent the application of putative communications restrictions that were universally-directed at other less secure facilities.[13] Without their ready "explanation" for this disparity, plaintiffs have not pled a plausible equal protection claim against the Attorney General.[14]

---

[13]In other words, taking plaintiffs' complaint facially, if the former Attorney General had issued a policy that all detainees be held incommunicado (*i.e.*, from both family and attorneys), nothing about a facility's security level would prevent that facility from precluding attorney calls or family visits.

[14]Additionally, plaintiffs now seem to concede that some of the detainees (again, all of which shared the same protected ethnicity and religious faith) were subjected to a FBI classification process that resulted in detention decisions – *i.e.*, that those classified as "of high interest" to the investigation were transferred to restrictive conditions of confinement, whereas others would generally housed in less restrictive confinement. Opp. Mem., at 32 n.11 (quoting OIG Report, at 25). But the mere fact that there *was* a classification process the result of which dictated the level of confinement for a particular detainee eliminates any inference of an overarching policy.

C. CONSPIRACY (CLAIM 7)

Finally, plaintiffs concede – as the former Attorney General argued in his opening memorandum, Mem., at 21-22 – that the adequacy of their pleading with respect to the personal involvement of the former Attorney General in their substantive Bivens claims is dispositive of their attempted resort to § 1985(3). Opp. Mem., at 44. And thus, for the very same reasons as articulated above, plaintiffs have not pled any actionable conspiracy involving the former Attorney General the purpose of which was to violate plaintiffs' constitutional rights.

One further note on this score is in order. Even if the law of conspiracy allows a plaintiff to proceed based upon a tacit agreement, id. at 74-75, plaintiffs appear to bring that concept to its logical breaking point here, suggesting that the MDC defendants' implementation of the former Attorney General's policy is itself sufficient to plead a tacit agreement. There is no averment whatsoever in plaintiffs' newest complaint that the policy directive in question was directed to the violation of plaintiffs' *constitutional* rights. See, e.g., Griffin v. Breckinridge, 403 U.S. 88, 102 (1971). Nevertheless, for the very reasons that support the former Attorney General position on the adequacy of plaintiffs' pleading on the substantive counts, see supra Parts II.A-B, the law cannot be such that the mere implementation by a subordinate government official of a policy adopted by a supervisory officer itself constitutes agreement. And *that* is the extent of plaintiffs' allegations with respect to any "agreement" between the Washington and MDC defendants; accordingly, plaintiffs' conspiracy claim should be dismissed.

CONCLUSION

For the foregoing reasons, this Court should dismiss plaintiffs' Fourth Amended Complaint.

Respectfully submitted,

NEIL H. MacBRIDE
UNITED STATES ATTORNEY

By: /s/

DENNIS C. BARGHAAN, JR.
Assistant U.S. Attorney
Special Department of Justice Attorney (28 U.S.C. § 515)
2100 Jamieson Avenue
Alexandria, Virginia 22314
Telephone: (703) 299-3891
Fax: (703) 299-3983
Email: dennis.barghaan@usdoj.gov

DATE: January 12, 2011

Attorneys for John Ashcroft, Former Attorney General of the United States, in his individual capacity

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing ("NEF") to counsel as follows:

Rachel Anne Meeropol
Center for Constitutional Rights
666 Broadway 7th Floor
New York, New York 10012
RachelM@ccrjustice.org

Michael Winger
c/o Center for Constitutional Rights
666 Broadway 7th Floor
New York, New York 10012
michael1winger@gmail.com

Craig Lawrence
United States Attorney's Office for the District of Columbia
555 4th Street, N.W.
Washington, D.C. 20001
craig.lawrence@usdoj.gov

William Alden McDaniel, Jr.
Law Office of William Alden McDaniel, Jr.
118 West Mulberry Street
Baltimore, Maryland 21201-3606
wam@wamcd.com

Debra L. Roth
Shaw Bransford Veilleux & Roth, P.C.
1100 Connecticut Avenue, N.W., Suite 900
Washington, D.C. 20036
droth@shawbransford.com

Michael L. Martinez
David Bell
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
mmartinez@crowell.com
dbell@crowell.com

Allan N. Taffet
Joshua C. Klein
Duval & Stachenfeld, LLP
300 East 42nd Street
New York, New York 10017
ataffet@dsllp.com
jklien@dsllp.com

James J. Keefe
1399 Franklin Avenue
Garden City, New York 11530
jkeefe@nylawnet.com

I further certify that I have transmitted a true and correct copy of the foregoing via first-class mail to the following "non-filing user":

Joseph Cuciti
3944 Howard Avenue
Seaford, New York 11783

Date: January 12, 2011

/s/

DENNIS C. BARGHAAN, JR.
Assistant U.S. Attorney
Special Department of Justice Attorney (28 U.S.C. § 515)
2100 Jamieson Avenue
Alexandria, Virginia 22314
Telephone: (703) 299-3891
Fax: (703) 299-3983
Email: dennis.barghaan@usdoj.gov

Attorneys for John Ashcroft, Former Attorney General of the United States, in his individual capacity