Nos. 06-3745-cv, 06-3785-cv, 06-3789-cv, 06-3800-cv, 06-4187

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IBRAHIM TURKMEN, ASIF-UR-REHMAN SAFFI, SYED AMJAD ALI JAFFRI,
AKIL SACHVEDA, SHAKIR BALOCH, HANY IBRAHIM,
YASSER, EBRAHIM, ASHRAF IBRAHIM,
Plaintiffs-Appellees/Cross-Appellants,

v.

JOHN ASHCROFT, Former U.S. Attorney General, DENNIS HASTY, Former Warden of MDC, JAMES W. ZIGLAR, Commissioner, Immigration and Naturalization Service,
JAMES SHERMAN, ROBERT MUELLER,
Defendants-Appellants/Cross-Appellees,

UNITED STATES,
Defendant/Cross-Appellee,

JOHN DOES 1-20, MDC Corrections Officers, MICHAEL ZENK,
Warden of MDC, CHRISTOPHER WITSCHEL, CLEMETT SHACKS,
BRIAN RODRIGUEZ, JON OSTEEN, RAYMOND COTTON, WILLIAM BECK,
SALVATORE LOPRESTI, STEVEN BARRERE, LINDSEY BLEDSOE, JOSEPH CUCITI,
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SCOTT ROSEBERY,
Defendants. .

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS JOHN ASHCROFT AND ROBERT MUELLER

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Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANTS ASHCROFT AND MUELLER

PRELIMINARY STATEMENT

The decision of the district court was rendered by the Honorable John Gleeson, District Judge for the Eastern District of New York. See Special Appendix ("SA") SA1.

JURISDICTIONAL STATEMENT

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1346(b), 1350, and 2201-2202. On June 14, 2006, the district court denied in part and granted in part certain defendants' motions to dismiss. SA 495. Defendants Ashcroft and Mueller filed a timely notice of appeal (Joint Appendix ("JA") 576) from that order on August 14, 2006. See Fed. R. App. P. 4(a)(1).

Because the motions to dismiss filed by defendants Ashcroft and Mueller were based upon their entitlement to qualified immunity, the district court's order denying the motions is subject to immediate appeal pursuant to 28 U.S.C. § 1291. See Mitchell v. Forsyth, 472 U.S. 511 (1985). As we explain below (pp. 58-59), the district court's refusal to dismiss all claims against defendants Ashcroft and Mueller for want of personal jurisdiction presents an issue that is "inextricably intertwined" with the qualified immunity appeal, and this Court therefore has pendent appellate jurisdiction to consider the district court's ruling on that issue.

STATEMENT OF THE ISSUES PRESENTED

1. Whether plaintiffs stated claims that former Attorney General Ashcroft and FBI Director Mueller should be personally liable for money damages based on general allegations about constitutional deficiencies in the implementation by subordinates of policies that those defendants allegedly approved.

2. Whether plaintiffs stated a claim that defendants Ashcroft and Mueller should be personally liable for violating plaintiffs' due-process rights because plaintiffs were held in restrictive confinement pursuant to a policy allegedly approved by those defendants.

3. Whether plaintiffs stated claims that defendants Ashcroft and Mueller should be personally liable because plaintiffs were allegedly subjected to a temporary "communications blackout" while in custody.

4. Whether the district court erred in finding personal jurisdiction over defendants Ashcroft and Mueller.

STATEMENT OF THE CASE

A. September 11 Attacks And Law Enforcement Response.

1. On September 11, 2001, the al-Qaeda terrorist network used hijacked commercial airliners as part of a plan to destroy prominent targets in the United States, including the World Trade Center and the Pentagon. The attacks were the

most deadly foreign attacks on American soil in our history; approximately 3000 people were killed, and the Nation's economy seriously damaged. In the days following September 11, the President declared a national emergency, enabling him to invoke his authority under titles 10 and 14 of the United States Code. See September 14, 2001 Proclamation of National Emergency by Certain Terrorist Attacks, No. 7453, 50 U.S.C. § 1621 note (2003). Congress found that the attacks presented "an unusual and extraordinary threat to the national security * * * of the United States." Pub. L. No. 107-40, 115 Stat. 240 (2001).

The Department of Justice (DOJ), through the Federal Bureau of Investigation (FBI), thereafter launched one of the largest and most important law-enforcement investigations in the Nation's history to bring to justice all those who aided or planned the September 11 attacks and to disrupt and prevent any further attacks. JA 276-278 (outlining the massive scope of the Department's investigation into the September 11, 2001 attacks). Law-enforcement officials acted swiftly and decisively in pursuing the investigation into the attacks, and within three days, more than 4000 FBI Special Agents and 3000 support personnel were assigned to work on the investigation. By September 18, 2001, the FBI had received more than 96,000 leads from the public. Ibid.

Plaintiffs' claims against then-Attorney General John Ashcroft and FBI Director Robert Mueller are largely based on the allegation that, in the immediate aftermath of September 11th, Ashcroft, Mueller, and others approved a policy to hold persons who had been arrested on immigration charges, and who were additionally deemed by FBI investigators to be "of high interest" to the ongoing investigation, in restrictive confinement until they were cleared by the FBI. JA 278-279, 303-306. In all, some 762 persons were detained on immigration charges in connection with the ongoing-9/11 investigation. Detainees were held in numerous facilities "across the country," including Bureau of Prisons (BOP) and Immigration and Naturalization Services (INS) facilities in New York, Louisiana, Kansas, and Florida, as well as INS contract facilities in New Jersey. JA 268. Of these persons, 184 were identified by FBI investigators as being of "high interest" to the investigation and were held in high-security sections of Bureau of Prisons (BOP) facilities. JA 377. Eighty-four of the 184 detainees, including plaintiffs Balach, Ebrahim, Hany Ibrahim, Ashraf Ibrahim, Jaffri, and Saffi, were housed in the Metropolitan Detention Center (MDC) in Brooklyn, New York.[1] JA 377, 98-99 (¶¶ 16-20). Two other plaintiffs, Turkmen and Sachedeva, were deemed to be "of interest" to the investigation and housed in the

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[1] On July 10, 2006, plaintiff Jaffri later voluntarily dismissed his claims and he is no longer a party to the case. JA 71-72 (Docket entries).

general prison population at the Passaic County Jail (Passaic) in Paterson, New Jersey. JA 99-100 (¶¶ 21-22).

B. Plaintiffs' Allegations.

In their third amended complaint, plaintiffs allege that they are Arab or Muslim men of Middle Eastern or South Asian alienage who were concededly unlawfully present in the United States. JA 91 (¶ 1). They claim that they were arrested on immigration charges following the attacks, detained, and placed in removal proceedings by the INS. Further, each plaintiff alleges that he was classified as being "of high interest" or "of interest" to the FBI's international terrorist investigation, denied bond, and held until cleared by the FBI. JA 92 (¶ 2). They allege that six plaintiffs who were classified by FBI investigators as of "high interest" to the 9/11 investigation were, due to that classification, housed between 2½ and 8 months in maximum security at the MDC in an Administrative Maximum Special Handling Unit (ADMAX SHU). JA 63-64, 67, 71 (¶¶ 192, 199, 212)

Plaintiff assert their detention was in violation of various constitutional and statutory rights. JA 92 (¶1). They sought damages for delays in the service of the immigration charges (i.e., delay in the INS issuance of the notices to appear), for being held in the ADMAX SHU or the general prison population in Passaic, for being subjected to a communications blackout, for being held in custody longer than

plaintiffs believe was necessary to effect their removal, and for being denied a timely hearing to determine whether there was probable cause to detain them when plaintiffs believe they could have been removed or departed voluntarily. Ibid.

Each of the plaintiffs also complained of their specific treatment by guards and officials within the institutions of their confinement. JA 140-180 (¶¶ 149-286). According to plaintiffs, defendants other than Ashcroft and Mueller subjected them to "physical and verbal abuse, inhumane conditions of confinement, arbitrary and dehumanizing use of strip searches, disruption of sleep, deliberate interference with religious rights, unreasonable restrictions on communications, inadequate provision of medical attention, de facto denial of recreation, and denial of hygiene items and adequate food." JA 138-139 (¶ 139); see also JA 133-134, 138-139 (¶¶ 128, 143, 145-146). In addition, plaintiffs allege that various guards and officials (other than Ashcroft and Mueller) used excessive force (JA 138-139 (¶¶ 140, 144)), restricted "access to legal counsel, consulates, and the outside world generally" (JA 140 (¶ 148)), and confiscated personal items (JA 135 (¶132)).

In total, plaintiffs asserted 31 separate claims against Ashcroft, Mueller, former INS Commissioner Ziglar, 26 named guards and officials, additional unnamed guards, and the United States. Damages were sought from individual defendants under a Bivens theory and under the Alien Tort Statute, 28 U.S.C. § 1350. Damages were

also sought from the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346. Declaratory relief additionally was sought under 28 U.S.C. §§ 2201-2202.

As relevant to the current appeal, plaintiffs asserted:

- Plaintiffs were subjected to inhumane conditions of confinement, including severe physical, verbal abuse and unreasonable and punitive strip searches, in violation of the Due Process Clause of the Fifth Amendment (Claims 3, 23). JA 93, 108-109.
- Plaintiffs were subjected to harsher treatment on the basis of their race, religion, and national origin, in violation of the Equal Protection Clause of the Fifth Amendment (Claim 5). JA 94-95.
- Plaintiffs were denied the ability to maintain their religious practices, in violation of the Free Exercise Clause of the First Amendment (Claim 7). JA 95-96.
- Plaintiffs' property was taken and not returned at the time of their removal or voluntary departure, in violation of the Due Process Clause of the Fifth Amendment (Claim 8). JA 96-97.
- Plaintiffs were held in maximum-security conditions pursuant to a policy approved by defendants, in violation of the Due Process Clause of the Fifth Amendment (Claim 20). JA 106-107.

- Plaintiffs were subjected to a "communications blackout," in violation of the Free Speech Clause of the First Amendment (Claim 21). JA 107.
- Plaintiffs were subjected to a "communications blackout" that interfered with their access to counsel and the courts, in violation of the Due Process Clause of the Fifth Amendment (Claim 22). JA 108.

Plaintiffs appended to their second amended complaint a copy of the April 2003 report from the Office of the Inspector General at the Department of Justice -- The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks ("OIG Report") (JA 260-477). Plaintiffs then incorporated the OIG Report by reference in the third amended complaint. JA 91n.1.

C. The District Court's Decision.

1. The United States and five individually sued defendants – Ashcroft, Mueller, Ziglar, and Wardens Hasty and Zenk – moved to dismiss the third amended complaint. On October 21, 2004, the district court permitted discovery to proceed on the claims involving conditions of confinement and the use of excessive force.

On December 3, 2004, the district court denied Wardens Hasty and Zenk's motions to dismiss; it later denied reconsideration of that decision. SA 5.

2. On June 14, 2006, the district court rendered its decision on the motion to dismiss with respect to defendants Ashcroft, Mueller, Ziglar, and the United States. Although the district court dismissed several claims, the district court refused to dismiss others claims, allowing those claims to proceed to discovery. SA 1-64. The court ordered that discovery proceed in this case in conjunction with a related case before the same court, Ehab Elmaghraby and Javaid Iqbal v. John Ashcroft, et al., Case 1:04-cv-01890-JG-SMG (E.D. N.Y.).[2]

a. As a preliminary matter, the district court rejected defendants' argument with regard to a number of the claims (Claims 5, 7, 20, 21, and 22) that the "comprehensive regulatory scheme" in the Immigration and Nationality Act (INA) counseled against creation of a damages remedy. SA 31-35. The court reasoned that, "[a]lthough * * * the INA provides a comprehensive regulatory scheme for

[2] In Elmaghraby, plaintiffs claim, inter alia, that defendants Ashcroft and Mueller, violated their due process rights by placing them as criminal pre-trail detainees in restrictive confinement (in the ADMAX SHU) until the FBI cleared them from the 9/11 investigation as to the defendants. Holding that plaintiffs had adequately alleged personal involvement of defendants Ashcroft and Mueller and had stated clearly established due process and equal protection claims, the district court rejected defendants' motion to dismiss. See Elmaghraby v. Ashcroft, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005). Defendants appealed to this Court. Those consolidated appeals (Nos. 05-5768-cv, 05-5844-cv, 05-6379-cv, 05-6352-cv, 05-6378-cv, 05-6368-cv, 05-6358-cv, 05-6388-cv) have been fully briefed and were argued on October 5, 2006. Another third related case, Silvan Kurzberg, et al. v. John Ashcroft, et al., No. 04CV3950 (JG) (SMG) (E.D. N.Y), recently was dismissed for failure to prosecute by effecting proper service.

managing the flow of immigrations in and out of the country, it is by no means a comprehensive remedial scheme for constitutional violations that occur incident to the administration of that regulatory scheme." SA 34. The court added that "the defendants point to no evidence that the Congress gave thought to what remedies should be available when immigration officials, for example, unconstitutionally detain an alien after he has been ordered removed." Ibid.

b. With regard to the conditions-of-confinement and strip-search claims (Claims 3 and 23), the district court reasoned that "[p]laintiffs' allegations permit the inference that the conditions imposed upon them constituted punishment" and therefore violated due process. SA 38. As for defendants' argument that plaintiffs failed sufficiently to allege their personal involvement, the court conceded that "ordinarily the bare assertion that high-level executive officials were responsible for an unconstitutional policy, without more, is insufficient to state a Bivens claim." SA 40. "[F]or the reasons I stated in Elmaghraby v. Ashcroft," however, the court concluded that "the MDC plaintiffs have alleged, principally through incorporation of the OIG report, sufficient facts to warrant discovery as to the defendants' involvement, if any, in [the] polic[ies] that subjected plaintiffs to lengthy detention in highly restrictive conditions while being deprived of any process for challenging that detention." SA 40-41. (internal quotation marks and citation omitted).

c. With regard to the equal protection claim (Claim 5), the district court permitted that claim to proceed insofar as it was based on plaintiffs' allegedly harsh treatment (as opposed to the length of their detention). SA 47-49. As to the former allegation, the court reasoned that "the motion to dismiss is denied for the reasons stated in Elmaghraby v. Ashcroft." SA 47.

d. With regard to the religious-practices claim (Claim 7), the district court noted that "[t]he defendants appear to concede that these allegations state a claim for violation of clearly established law under the Free Exercise Clause." SA 41-42. As for defendants' personal involvement, the court reasoned that "it cannot be said, without first permitting some discovery into the matter, that the plaintiffs can prove no set of facts that will entitle them to relief against the moving defendants on this claim." SA 42. The court added that "[t]he plaintiffs have alleged that high-level officials had knowledge or reasonably should have known that the religious rights of Muslim detainees were being intentionally violated, and that those officials were complicit in such treatment." Ibid.

e. With regard to the personal-property claim (Claim 8), the district court noted that "[p]laintiffs allege that they were deprived of their property pursuant to an established policy or practice." SA 50. On that basis, the court concluded that

"[t]hese allegations of a pattern are sufficient to withstand the defendants' motion [to dismiss]." Ibid.

f. With regard to the due process claim (Claim 20), the district court again relied on its reasoning from Elmaghraby in refusing to dismiss. SA 2, 42. Specifically, the court reasoned that plaintiffs had a liberty interest implicated by their assignment to the Special Housing Unit (SHU) at the MDC and that, "[t]aking as true the plaintiffs' allegation that they received no process at all before being assigned to the SHU (and kept there), they have stated a claim." SA 42. The court summarily concluded that "the plaintiffs have sufficiently alleged the defendants' personal involvement in this claim." Ibid.

g. Finally, with regard to the "communications blackout" claims (Claims 21 and 22), the district court first rejected defendants' argument that consideration of those claims was precluded by 8 U.S.C. 1252(b)(9). SA 30. The court recognized that, "to the extent the plaintiffs challenge the communications blackout as having prejudiced them in immigration proceedings, their claims could have been brought in a petition for review." Ibid. The court then stated, however, that "[w]hether the communications blackout was 'action taken * * * to remove an alien from the United States' presents a separate issue." Ibid. The court reasoned that the "communications blackout" did not constitute an "action taken * * * to remove an

alien from the United States," on the ground that "the purposes [of the 'communications blackout'] were to investigate the terrorist attacks of September 11, to prevent further attacks, and to preserve institutional security," not "'to remove' the plaintiffs." Ibid. On the merits of those claims, the court reasoned that the applicable standard for plaintiffs' free-speech claim was the "legitimate penological interest" standard from Turner v. Safley, 482 U.S. 78 (1987). SA 53-54. While acknowledging that "[t]he defendants argue that 'concern over communications between possible terrorists and potential escape and attack plans' after September 11, 2001 justified the communications blackout as reasonable," the court concluded, "it cannot be said at this stage that the defendants' justifications require dismissal." SA 54. Moreover, the court noted that, "for the reasons I have explained above, in light of the OIG report, it is too early to tell whether the plaintiffs will be able to prove the personal involvement of the moving defendants." Ibid. As to plaintiffs' access-to-the-courts claim, the court reasoned that "the plaintiffs are required to show some underlying claim or right that was prejudiced as a result of their having been denied access to the courts." SA 55. The court concluded, however, that the complaint "can be construed as alleging that the communications blackout prejudiced the plaintiffs in defending the immigration proceedings against them by limiting their access to counsel." Ibid.

3. By separate order, on August 18, 2006, the district court entered a partial final judgment pursuant to Federal Rule of Civil Procedure 54(b) as to some of the dismissed claims. SA 65.

4. Timely appeals were filed by plaintiffs and by the moving defendants, and those appeals have been consolidated. JA 512.

SUMMARY OF ARGUMENT

I. A. The district court erred in refusing to dismiss the claims against former Attorney General Ashcroft and FBI Director Mueller. Under the qualified immunity doctrine, a court should first examine whether the complaint states a constitutional claim against the particular defendant. If the court finds the violation of a constitutional right, it must then address the question of whether that right was "clearly established" at the time of the conduct alleged, and whether a reasonable official could have believed, in light of that clearly established law, that the challenged conduct was lawful.

In the present case, when the allegations are carefully examined, and the novel context presented by the 9/11 attacks is appropriately taken into account, all of plaintiffs' claims fail to overcome defendant Ashcroft and Mueller's right of immunity.

B. First, this Court has held that agency heads cannot be held liable for the wrongs committed by their subordinates in carrying their duties, absent a sufficient showing of personal involvement. The complaint here does not allege <u>any</u> direct involvement by defendants Ashcroft or Mueller in regard to any of the alleged violations of plaintiffs' constitutional rights. Instead, the complaint simply charges the former Attorney General was "a principal architect of the policies and practices challenged here;" that Director Mueller was "instrumental in the adoption, promulgation and implementation" of those policies; and that both the former Attorney General and the Director "authorized, condoned, and/or ratified the unreasonable and excessively harsh conditions" under which plaintiffs were detained. JA 100. The district court's reliance on such boilerplate allegations effectively imposed <u>respondeat</u> <u>superior</u> liability on senior officers of government, in derogation of the mandate of the Supreme Court and decisions of this Court. Where plaintiffs fail to satisfy the requirement of sufficiently alleging personal involvement, as here, the proper result is not to permit discovery, as the district court ruled; rather, it is to dismiss the claims.

C. Moreover, even if the Court were to uphold the erroneous findings that the plaintiffs sufficiently alleged personal involvement, defendants Ashcroft and Mueller would still be entitled to qualified immunity on plaintiffs' due process claim (Claim

20). The crux of this claim against Ashcroft and Mueller is that they approved a policy to hold persons who had been arrested on immigration charges, and who were additionally deemed to be "of high interest" to the ongoing investigation into the attacks, in restrictive confinement until they were cleared by the FBI. Plaintiffs contend that this policy caused them to be housed for a period of time in restrictive conditions, rather than being placed in the general prison population.

The alleged policy, however, did not violate any due process rights. A detainee may lawfully be held in restrictive conditions where, as here, the decision to do so is supported by legitimate, non-punitive reasons and where the restrictive conditions do not present an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. Indeed, in an earlier opinion, even the district court acknowledged that the decision to place validly detained individuals in the ADMAX SHU did not present atypical and significant hardship on the detainees, and that the initial placement there did <u>not</u> support a due process claim.

To the extent that the MDC plaintiffs challenge their <u>continued</u> detention in the ADMAX SHU and allege that BOP regulations requiring periodic hearings were violated, those claims involve the acts of subordinate officers and not the Attorney General or the FBI Director. Moreover, the district court's reliance upon the alleged

violation of the BOP regulations was error. The regulations, without more, do not grant plaintiffs a liberty interest.

Even if plaintiff possessed some liberty right in this context, plaintiffs received all of the process that was due as a matter of constitutional law. Although detainees undoubtedly have some degree of interest in not being confined in a maximum-security facility, the government had a substantial, and indeed paramount, interest in not providing the redundant and time-consuming BOP hearings to individuals whom the FBI already had determined were "of high interest" to the government's 9/11 investigation. The assigned FBI investigators were plainly better situated than BOP to assess whether plaintiffs posed a threat to national security, and the FBI investigators made that assessment, and cleared plaintiffs all within, at most, eight months—a reasonable time in light of the many demands on the FBI in the wake of the September 11 attacks. In the extraordinary context in which plaintiffs' detention arose, it cannot be said that the process that was provided to plaintiffs was constitutionally insufficient.

At a minimum, defendants were entitled to qualified immunity. The "dispositive inquiry" is whether it would have been clear to a reasonable official "that his conduct was unlawful in the situation he confronted.'" Brosseau v. Haugen, 543 U.S. 194, 199 (2004) (per curiam) (quoting Saucier v. Katz, 533 U.S. 194, 201

(2001)) (emphasis added). Defendants here were confronted with unprecedented law-enforcement and security challenges in the wake of the September 11 attacks. They were responsible for attempting to swiftly identify and apprehend members of a shadowy terrorist network in our own land, which had just committed the most deadly attacks on American soil in the Nation's history. There were no clear judicial precedents in this extraordinary context. This is not to say that defendants were not bound by the Constitution. Of course they were. Instead, it is simply to say that it did not violate clearly established law not to provide review by BOP officials in the face of unprecedented national-security concerns that the FBI was far better situated to consider and address—as the FBI did in an expeditious manner.

D. Likewise, plaintiffs' claims regarding an alleged communications blackout during the first weeks of detention (Claims 21 and 22) should have been dismissed, even setting aside the lack of personal involvement of defendants Ashcroft and Mueller. The alleged policy of temporarily limiting communications with those held on immigration charges and identified as being of high interest to the 9/11 investigation does not state a constitutional violation because the alleged policy "is reasonably related to legitimate penological interests." Turner v. Safely, 482 U.S. 78 (1987). If the security interest in Turner regarding communications among gang members was sufficient to support permanent restrictions on communications, then

the security interests in this case – concern over communications between possible terrorists and potential escape and attack plans – certainly support the temporary restrictions plaintiffs allege.

As for plaintiffs' claim concerning the denial of access to counsel, that claim also fails under Christopher v. Harbury, 536 U.S. 403, 413-14 (2002), because plaintiffs failed to identify what cause of action or defense they lost, as required by Harbury. In addition, that claim is barred under the Immigration and Nationality Act, 8 U.S.C. § 1252(b)(9), because it implicates "[j]udicial review of * * * questions of law and fact * * * arising from [an] action taken or proceeding brought to remove an alien from the United States." Moreover, even assuming, arguendo, that the bar in that section is not directly applicable, it is well established that a court should not provide a Bivens remedy where, as here, Congress has established an elaborate regulatory and remedial scheme to handle a particular category of disputes with the federal government.

II. Finally, the district court erred in refusing to dismiss the claims against Ashcroft and Mueller based upon the lack of personal jurisdiction. Under the applicable New York statute, personal jurisdiction cannot be based solely on a defendant's supervisory position. Because the claims here are properly viewed as

seeking to impose supervisory liability against defendants Ashcroft or Mueller, they should have been dismissed.

STANDARD OF REVIEW

The district court's ruling on the motion to dismiss is subject to de novo review by this Court. See Pena v. DePrisco, 432 F.3d 98, 107 (2d Cir. 2005).

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE CLAIMS AGAINST DEFENDANTS ASHCROFT AND MUELLER ON THE BASIS OF QUALIFIED IMMUNITY.

A. The Qualified Immunity Doctrine Mandates Dismissal Before Discovery When Plaintiffs Cannot Plead Clearly Established Constitutional Violations.

1. Pursuant to Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), plaintiffs assert money-damage claims against the former Attorney General and the FBI Director in their individual capacities. Although the Supreme Court has permitted such damage suits against public officials, the Court at the same time has recognized, and been acutely sensitive to, "the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability." Scheuer v. Rhodes, 416 U.S. 232, 239 (1974). That necessity serves as the basis for the doctrine of qualified immunity. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Qualified immunity is not merely immunity from liability, but "immunity from suit." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). The right to immunity is the right to avoid both "standing trial" and the "other burdens of litigation," including "such pretrial matters as discovery * * *, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" Id. at 526 (quoting Harlow, 472 U.S. at 817); see also Behrens v. Pelletier, 516 U.S. 299, 308 (1996). Thus, a ruling on the qualified-immunity issue should be made early in the proceedings so that the costs and expenses of trial are avoided where possible. See Saucier v. Katz, 533 U.S. 194, 200-201 (2001); Siegert v. Gilley, 500 U.S. 226, 232 (1991) (it is the task of the district court "expeditiously to weed out suits * * * without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits"). Indeed, until the "threshold immunity issue is resolved, discovery should not be allowed." Harlow, 457 U.S. at 818. It is for that reason that the denial of a motion to dismiss on grounds of qualified immunity is, unlike the denial of a motion to dismiss on most substantive grounds, immediately appealable.

The policies underlying qualified immunity are particularly implicated, and vigorous application of qualified immunity is particularly important, when actions

are brought against high-ranking officials, such as defendants Ashcroft and Mueller. The "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service," Harlow, 457 U.S. at 816, are amplified when the official's position includes the important responsibility of presiding over a federal agency. See also Robertson v. Sichel, 126 U.S. 507, 515 (1888) ("[c]ompetent persons could not be found to fill positions of the kind, if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates"). As the Harlow Court observed: "[e]ach such suit almost invariably results in these officials' and their colleagues' being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels." Harlow, 457 U.S. at 817 n.29 (internal quotations omitted). These concerns are even more pressing when government officials are required to respond to national crises that involve the application of rules in novel factual situations.

2. The necessary first step in determining whether an official has qualified immunity is to inquire whether plaintiffs have shown the violation of a constitutional right at all. See Saucier, 533 U.S. at 201. If the court finds the violation of a constitutional right, it must then address the question of whether that right was

“clearly established” at the time of the conduct alleged, and whether a reasonable official could have believed, in light of that clearly established law, that the challenged conduct was lawful. Ibid.

As the Supreme Court has recently reiterated, it is “important to emphasize” that the qualified-immunity doctrine requires that the alleged violations be examined in their particular context. Brosseau v. Haugen, 543 U.S. 194, 198-199 (2004) (per curiam); see Anderson v. Creighton, 483 U.S. 635, 640 (1987). “The relevant, dispositive inquiry in determining whether a [federal] right is clearly established is whether it would [have] be[en] clear to a reasonable officer that his conduct was unlawful in the situation he confronted.’” Brosseau, 543 U.S. at 198 (quoting Saucier, 533 U.S. at 201) (emphasis added). This inquiry “must be undertaken in light of the specific context of the case, not as a broad general proposition.” Ibid.; see also Wilson v. Layne, 526 U.S. 603, 614 (1999) (“the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established”).

In the present case, when the allegations are carefully examined, and the novel contexts presented after the 9/11 attacks is appropriately taken into account, all of plaintiffs claims fail to overcome defendant Ashcroft and Mueller’s right of immunity. As we discuss directly below in Section I.B., all of plaintiffs’ claims at

issue in this appeal are improper respondeat superior claims. This Court has made clear that when suing supervisor officials under § 1983 or Bivens, an essential part of any claim is the requirement of alleging personal involvement with the asserted violation. Absent such an allegation, plaintiffs fail to state a claim of a clearly established constitutional violation against these agency heads and the claims must be dismissed as part of the right to qualified immunity.

Next, in Section I.C., we demonstrate that, even if plaintiffs had properly alleged personal involvement, their Due Process Clause claim regarding confinement in the ADMAX SHU (claim 20) should have been dismissed because plaintiffs have not established any constitutional violation, let alone a clearly established one. Likewise, in Section I.D., we show that even if personal involvement was properly alleged, plaintiffs' claims regarding the temporary "communications blackout" (claims 21-22) should be dismissed because plaintiffs have not alleged a constitutional violation, much less a clearly established one.

B. The Former Attorney General and FBI Director Cannot Be Held Liable Because Plaintiffs Failed To Adequately Allege Their Personal Involvement.

The district court erred by refusing to dismiss the claims against defendants Ashcroft and Mueller because the complaint failed sufficiently to allege their personal involvement in the challenged conduct.[3]

"It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite" when asserting a Bivens claim. See Thomas v. Ashcroft, 470 F.3d 491, 496 (2d Cir. 2006) ("[b]ecause the doctrine of respondeat superior does not apply in Bivens actions, a plaintiff must allege that the individual defendant was personally involved in the constitutional violation"). While an agency head is "responsible" in some sense for all that takes place on his watch, a different standard applies when a plaintiff is attempting to hold the agency head monetarily responsible, in his personal capacity, for the acts of subordinates. As this Court has noted, agency heads cannot be "held personally responsible [in a money damage action] simply because" of their "high position[s] of authority" during time of the alleged constitutional violations. Black v. Coughlin, 76 F.3d 72, 74 (2d Cir. 1996). See also Leonhard v. United States, 633 F.2d 599, 621 n.30) (2d Cir.

[3] As detailed above, the district court's ruling regarding both the personal involvement and due process issues relied heavily upon its prior ruling in Elmaghraby. SA 2, 40-42. The appeals from that ruling were argued on October 15, 2006.

1980) ("[p]ublic officials may be held responsible only to the extent that they caused the plaintiff's rights to be violated; they cannot be held liable for violations committed by their subordinates or predecessors in office"). Agency heads (or former agency heads) therefore cannot be held liable for the wrongs committed by their subordinates in carrying their duties, absent a showing of "direct participation, or failure to remedy the alleged wrong after learning of it, or creation of a policy or custom under which unconstitutional practices occurred, or gross negligence in managing subordinates." Black, 76 F.3d at 74. Any other rule would deter qualified individuals from accepting high-level positions with the federal government, because it would subject them to vicarious and personal liability in Bivens-style suits for any missteps of their subordinates, no matter how far removed they were from those actions. See Robertson v. Sichel, 126 U.S. at 515.

Plaintiffs' claims at issue in this appeal fall into three categories. First, plaintiffs claim that defendants Ashcroft and Mueller violated their due process rights by adopting a policy of holding "high interest" aliens in restrictive confinement until cleared from the 9/11 investigation (claim 20). Second, plaintiffs seek to hold the high-ranking officials liable for the particular conditions of their confinement (claims 3, 5, 7, 8, 23). Finally, they argue that defendants Ashcroft and Mueller adopted a policy of imposing a temporary "communications blackout" during their plaintiffs'

initial detention (claims 21, 22). None of these claims sufficiently alleges wrongful acts by defendants Ashcroft and Mueller so as to hold them liable for the acts of their subordinates.

1. In claim 20, the MDC plaintiffs assert a procedural due process violation relating to their confinement in the high-security ADMAX SHU. Plaintiffs allege that defendants adopted and implemented a "policy and practice" under which plaintiffs were classified as "of high interest," and as a result "experienced unnecessary and unreasonable restrictions on their liberty." JA 195 (¶ 391). In this claim, plaintiffs generally refer to "all Defendants," and do not specify any actions taken by defendants Ashcroft or Mueller.

As a preliminary matter, while plaintiffs challenge the "unreasonable restrictions on their liberty," JA 195 (¶ 391), they do not contest that their presence in this country was unlawful; nor do they contest that they were properly ordered removed. Further, the district court expressly held that plaintiffs were lawfully detained and rejected their claim that they "were detained 'longer than necessary' to effectuate their removal * * *." SA 45. Thus, the only issue raised by claim 20 is plaintiffs' confinement in the ADMAX SHU instead of being detained in the prison's general population with less security.

The district court properly held that the decision to place plaintiffs in the ADMAX SHU in the first instance, based on an initial assessment of their links to the September 11 investigation, did not support a due process claim. SA 2, 42 (adopting the rationale of its prior ruling so holding, Elmaghraby v. Ashcroft, 2005 WL 2375202 at *17 n.18). The district court, however, erroneously contended that the MDC plaintiffs adequately stated a due process violation with respect to their continued detention in the ADMAX SHU. The district court based its conclusion on the fact that BOP did not provide formal periodic hearings as generally required by BOP regulations.

The district court erred in failing to dismiss this claim against defendants Ashcroft and Mueller. Nowhere do plaintiff assert in their complaint that defendants Ashcroft or Mueller ever ordered BOP to violate its regulation or to deny anyone a hearing. Nor do plaintiffs allege that Ashcroft or Mueller had any involvement in how long a particular immigration detainee was kept in the ADMAX SHU. There also is no allegation that either Ashcroft or Mueller had any involvement in the FBI field office investigation of these plaintiffs, in their individual classifications and clearance, or in their placement in particular detention facilities. These were matter decided by subordinates, for which plaintiffs now wish to improperly impose respondeat superior liability upon these defendants.

In finding the complaint adequate to subject defendants Ashcroft and Mueller to suit, the court relied upon plaintiffs' general allegation that former Attorney General Ashcroft was a "principal architect of the [challenged] policies and practices," that Mueller was "instrumental in the adoption, promulgation and implementation" of those policies; and that Ashcroft and Mueller "authorized, condoned, and/or ratified the unreasonable and excessively harsh conditions" under which plaintiffs were detained. JA 100-101 (¶¶ 23-24); see also JA 95 (¶ 6). The few other paragraphs of the complaint that name Ashcroft and Mueller are similarly conclusory, relying on generic allegations that plaintiffs' treatment resulted from policies approved by defendants. JA 94-96 (¶¶4-8), 111-112 (¶¶ 73-74), 117 (¶ 83).

The district court's reliance on such boilerplate allegations effectively imposed respondeat superior liability on senior officers of government, in derogation of the mandate of the Supreme Court and decisions of this Court. The complaint does not serve notice as to what particular policies and actions are attributable to these defendants. Even if such bare allegation could meet the standards of Rule 8, they cannot survive a motion to dismiss under Rule 12(b)(6), which this Court has held requires a plaintiff to identify facts that tie the general allegations to the particular defendant. See Wynder v. McMahon, 360 F.3d 73, 80 (2d Cir. 2004). This Court explained: "there is a critical distinction between the notice requirements of Rule

8(a) and the requirement, under Rule 12(b)(6), that a plaintiff state a claim upon which relief can be granted. Although, reading the complaint carefully, the individual defendants can discern which claims concern them and which do not, the complaint accuses all of the defendants of having violated all of the listed constitutional and statutory provisions. As a result, a series of 12(b)(6) motions to dismiss would lie to permit each particular defendant to eliminate those causes of action as to which no set of facts has been identified that support a claim against him." Ibid.

Plaintiffs' formal incorporation of the OIG report does not help their cause. Indeed, there is nothing in the OIG report that suggests that either Ashcroft or Mueller ordered BOP to violate its regulation or to deny anyone a hearing. To the contrary, the OIG Report explains that the officials who adopted the restrictive confinement policy believed that most of those arrested would be cleared within days or a few weeks, at most. JA 312. Thus, plaintiffs failed to adequately allege personal involvement of defendants Ashcroft and Muller with regard to claim 20.

2. The conditions, discrimination, and property claims similarly cannot withstand scrutiny under this Court's precedents. The claims, themselves, do not specifically name Ashcroft and Mueller and contain no allegation regarding any act or omission that they committed for which they should be held liable.

a. In claims 3, 5, 7, and 23, the plaintiffs contend that, while they were detained, guards and other prison officials subjected them to inhumane conditions of confinement, treated them more harshly based on their religion, race and national origin, and interfered with their religious practices. JA 93-96, 108-109. The complaint specifies by name the officers who allegedly committed these offenses (e.g., JA 40-51, 53, 65, 71), but it never identifies defendants Ashcroft or Mueller. As to Ashcroft, all the complaint has is a boilerplate statement that Ashcroft "authorized, condoned, and/or ratified the unreasonable and excessively harsh conditions" under which plaintiffs were detained. JA 100 (¶¶ 23-24). That cannot be sufficient to state a claim and force a cabinet-level official to endure discovery. In essence, plaintiffs presume the head of the Department of Justice must be legally culpable for every act and misdeed by a prison guard. That view has been repeatedly rejected by this Court, and, if adopted, would open the door to harassing suits by the thousands against the Attorney General and other cabinet and agency heads. Indeed, this case presents a particularly stark example of why high-ranking officials should not be subjected to discovery and potential liability for the actions of low-level subordinates. As plaintiffs recognize in their complaint, any incidents of abuse "were completely against BOP policy." JA 36 (¶ 104). Were, as here, there is a proper

policy in place, the Attorney General should not be subject to suit for low-level officials' violations of that policy.

Plaintiff make the same boilerplate allegation against defendant Muller. JA 100-101. Permitting this claims to proceed against Director Mueller, whose Bureau has no responsibility for detainee housing at all, makes even less sense.

b. In claim 8, some plaintiffs allege that they were denied property without due process when confiscated property was not returned. JA 96-97. The district court recognized that under Hudson v. Palmer, 468 U.S. 517 (1984), the availability of a post-deprivation remedy precludes the Bivens claim. The court, however, distinguished Hudson on the ground that plaintiffs had alleged "that they were deprived of their property pursuant to an established policy or practice." SA 56. The claimed policy on its face does not appear to be a policy at all. Even under plaintiffs' allegation, only some of the named plaintiffs were deprived of property and even as to those, only part of the claimed property was not returned.[4] SA 50-51 n.40. More

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[4] In the consolidated briefing filed below, the United States advised that on information and belief, all of the property that is known to have been in the Government's possession as a result of the investigations and detentions of plaintiffs, and which properly may be returned to plaintiffs, has been or will be returned to plaintiffs' counsel. Accordingly, the detention of plaintiffs' property was temporary, and not permanent. Property in the Government's possession that will not be returned to plaintiffs includes: (1) documents that appear on their face to belong to individuals or entities other than plaintiffs; (2) certain identification documents that, pursuant to DHS practice, will be returned to the respective issuing governments; and (3) a travel (continued...)

fundamentally, there is no allegation whatsoever of any involvement or action by defendants Ashcroft or Mueller. It defies logic to suggest that the Attorney General or the head of the FBI would have any policy regarding the confiscation and return of plaintiffs' personal property. Accordingly, this claim should have been dismissed as against those defendants.

3. Finally, the temporary "communications blackout" claims also fail to implicate defendants Ashcroft and Mueller. In claims 21 and 22, plaintiffs alleged that they were subjected to a "communications blackout," in violation of their First Amendment and due process rights. JA 107-108. Those claims were based on allegations that range from holding particular detainees incommunicado until late October 2001, to difficulties that arose with the initial attempts by prison administrators to adapt existing categories (such as BOP's procedures for housing witness security inmates) for classifying detainees, to actions of individual officers and guards that included deliberately dialing the wrong number for a detainee's attorney or only permitting a detainee to call before the attorney's office hours. SA 23-24.

These claims, again, speak only generally of "Defendants," and do not specify Ashcroft or Mueller. The only thing tying these defendants to this charge in the

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[4](...continued)
organizer that is being withheld as evidence in an active investigation.

complaint is another general boilerplate assertion of a policy: accusing defendants Ashcroft, Mueller, and others of "adopting, promulgating, and implementing this policy and practice" in violation of the constitution. JA 95 (¶ 5). Based on this conclusory statement, the court here held that "it is too early to tell whether the plaintiffs will be able to prove the personal involvement of the moving defendants." SA 54.

As discussed above, however, it is established that, in seeking money damages for personal liability on a constitutional claim, a plaintiff must specify the personal involvement of the defendant. See Black, 76 F.3d at 74. Where a plaintiff fails to do so, as here, the proper result is not discovery, but dismissal. See, e.g., Davis v. New York, 316 F.3d 93, 101 (2d Cir. 2002). Dismissal of these respondeat superior claims is also wholly consistent with the broader principle that the right to immunity is the right to be immune from discovery and trial. See Mitchell, 472 U.S. at 526. That right would be vitiated if high-level government officials, such as the former Attorney General and current FBI director, could be forced to undergo discovery based on the current allegations.

C. The Alleged Act Of Adopting A Restrictive Confinement Policy Was Not Unconstitutional And Did Not Violate Any Clearly Established Rights.

Even if the MDC plaintiffs had sufficiently alleged the personal involvement of Ashcroft and Mueller, the district court still should have dismissed the claim that they violated anyone's due process rights when plaintiffs were detained in the ADMAX SHU. The alleged policy to detain the MDC plaintiffs in the ADMAX SHU was not unconstitutional, and, even if it was, it certainly did not violate any clearly established rights.

1. It is well established that a pre-trial detainee (or, a fortiori, an immigration detainee who does not challenge his violation of the immigration laws) may be placed in more restrictive conditions than exist in the general institution population without triggering any right to a due process hearing. There is no right to such a hearing when the decision to do so is supported by legitimate, non-punitive reasons, see Bell v. Wolfish, 441 U.S. 520, 539, 547 & n.28 (1979); Rapier v. Harris, 172 F.3d 999, 1005 (7th Cir. 1999); Benjamin v. Fraser, 264 F.3d 175, 190 (2d Cir. 2001), and where the restrictive conditions do not present an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." See Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (quoting Sandin v. Conner, 515 U.S. 472, 483-484 (1995)).

In this case, placement in restrictive conditions of confinement was fully justified because (1) "high interest" detainees presented unprecedented security concerns; (2) any persons connected with terrorist activities could provide Al Qaeda essential information about the scope of the government's investigation that could be gleaned simply from the identity of those detained and those who had not been found, and (3) information underlying the FBI's investigation could not be disclosed to detainees during hearings could compromise the FBI's investigation. While the district court questioned the reasonableness of some of the conditions of plaintiffs' confinement, the court did not provide any basis to question the reasonableness of the asserted general restrictive confinement policy, or that it was rationally related to legitimate non-punitive purposes.

Moreover, restrictive confinement in a special housing unit does not, by itself, present an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. While some extreme forms of restrictive confinement may themselves trigger a right to a due process hearing before a detainee can be placed there, even the district court recognized that was not the case here. The court previously acknowledged, in its opinion in Elmaghraby, that the decision to place persons in the ADMAX SHU in the first place, based on an initial assessment of their links to the September 11 investigation, did not support a due process claim.

Elmaghraby, 2005 WL 2375202 at *17 n.18. As the court held, non-punitive placement of a detainee in more restrictive housing, pending further assessment, was not atypical and did not, by itself, implicate a protected liberty interest. Ibid.

That conclusion is well supported. Placement of an inmate in such restrictive confinement is hardly atypical or a significant hardship on the inmate in relation to the ordinary incidents of prison life. In fact, under standard BOP practice, newly arrived inmates are generally placed in "administrative detention" in a special housing unit, while they are assessed for security risks, before they are placed in the general prison population. See 28 C.F.R. 541.22(a); JA 212 (OIG Report 127). Administrative detention is also employed when new security risks are brought to the attention of BOP officials, as was the case here. See 28 C.F.R. 541.22(a). Thus, the placement of plaintiffs in the ADMAX SHU did not violate any constitutional due process rights.

2. In finding a due process violation, the district court relied heavily on the failure by BOP officials to grant periodic (30 day) reviews of plaintiffs' detention, as generally required by BOP's own regulations, see 28 C.F.R. 541.22. SA 42. As discussed above, however, plaintiffs failed to allege that defendants Ashcroft or Mueller gave any direction to BOP officials concerning the periodic reviews allegedly required under their regulations, or that they were even aware of the alleged

violations of those regulations. Even if that pleading failure could be ignored, the district court still erred in holding that the regulation gives rise to a protected liberty interest under the Due Process Clause.

The district court relied on this Court's decision in Tellier v. Fields, 280 F.3d 69 (2d Cir. 2000), for the proposition that mandatory prison regulations, without more, create such an interest. That reasoning cannot be squared with the Supreme Court's recent decision in Wilkinson v. Austin, which forecloses precisely such an approach. See, e.g., id., 545 U.S. at 223. In Wilkinson, the Court explained, "it is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves 'in relation to the ordinary incidents of prison life.'" (emphasis added). The Court recognized that evaluating whether regulatory procedures were mandatory would erroneously constitutionalize those procedures and create "a disincentive for States to promulgate procedures for prison management, and as involving the federal courts in the day-to-day management of prisons." Id. at 222; see also Holcomb v. Lykens, 337 F.3d 217, 224 (2d Cir. 2003).

Moreover, in Wilkinson, the Supreme Court upheld the detention of an inmate in the Ohio "Super-Max" facility. The Court held that the State had complied with

due process by providing formal reviews every 12 months. 545 U.S. at 213-219, 224-229. In this case, plaintiffs were detained in the ADMAX SHU, under conditions far less restrictive than those at issue in Wilkinson. Given that 12-month review satisfied due process in Wilkinson, it was plain error to find that 30-day periodic formal hearings were mandated in the MDC context. Likewise, it was error to hold that plaintiffs were constitutionally entitled to any formal hearing at all, considering the fact that the longest detention in the ADMAX SHU at issue here is eight months[5] — far less than the year without periodic review in Wilkinson. Indeed, the eight month period is particularly reasonable in light of the many demands on the FBI in the wake of the September 11 attacks.

3. Even if plaintiffs were entitled to some review process, the Constitution did not entitle them to formal BOP reviews. During the time period at issue, there was a process in place under which FBI officials were seeking to determine whether or not plaintiffs could be cleared from the 9/11 investigation. JA 115 (¶ 80).[6] The absence

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[5] Plaintiffs' placement in the ADMAX SHU ranged from 2½ months for Hany Imbraim (JA 152 (¶192)) to 8 months for Ibrahim (ibid., JA 156 (¶199)). Two MDC plaintiffs were moved to the general prison population after initial assignment to the SHU (JA 152, 160 (¶¶ 192, 212), and both Passaic plaintiffs were placed in the general prison population.

[6] According to the complaint, rather than hold formal hearing regarding whether a 9/11 detainee had been cleared by the FBI, the prison's policy was "automatically annotate the detainee status" as "continue high security." JA 115 (¶
(continued...)

of a more formal BOP hearing in this context does not amount to a constitutional violation, and indeed, as we explain below, it caused plaintiffs no injury.

In assessing a Due Process Clause whether a plaintiff with a protected liberty interest received sufficient process, a court is required to consider (1) the private interest affected by the challenged action; (2) the risk of an erroneous deprivation and the value of additional safeguards; and (3) the government's interest, "including the function involved and the fiscal and administrative burdens [of additional procedures]." Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Again, the appropriate question is not whether the detainee was afforded the process mandated by regulation, but instead whether the process that was in fact afforded was reasonable in light of the particular context. See Magluta v. Samples, 375 F.3d 1269, 1279 n.7 (11th Cir. 2004) (rejecting the proposition that all of the procedures mandated by the BOP regulations were constitutionally required); see also Holcomb, 337 F.3d at 224. As this Court has explained, "regardless of state procedural guarantees, the only process due an inmate is that minimal process guaranteed by the Constitution." Shakur v. Selsky, 391 F. 3d 106, 119 (2d Cir. 2004).

Particularly when considered in context, as it must be, the process afforded to plaintiffs was sufficient under Mathews and its progeny. Plaintiffs' private interest

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[6](...continued)
80), 384.

(if it constitutes a liberty interest at all) was limited because plaintiffs were lawfully arrested and detained on immigration charges, as the district court held. Each plaintiff was "held in lawful confinement." Wilkinson, 545 U.S. at 224. Their interest in avoiding detention in ADMAX SHU must be evaluated "within the context of the prison system and its attendant curtailment of liberties." Ibid. At the same time, the government unquestionably had a significant interest in detaining high-security suspects that it determined to be "of high interest" in its ongoing 9/11 investigation -- an investigation seeking to apprehend those responsible for the 9/11 attacks and to disrupt and prevent future attacks.

In particular, the government had a paramount interest in not wasting its limited and already-strapped resources by providing formal BOP hearings to individuals whom the FBI had already determined to be "of high interest" to the government's 9/11 investigation. The BOP regulations cited by the district court themselves recognize that longer administrative detention is appropriate "where there are exceptional circumstances, ordinarily tied to security or complex investigative concerns." 28 C.F.R. 541.22(c)(1). The detention of MDC plaintiffs in more restrictive conditions plainly falls within the ambit of "exceptional circumstances." As the OIG Report recognized and common sense confirms, persons whom the FBI

had determined were "of high interest" to the September 11 investigation posed unique security concerns. JA 285, 381.

In the usual case, the decision whether to utilize administrative segregation is a matter within BOP's discretion, based on security issues within BOP's expertise. In such cases, it makes sense for BOP officials to hold periodic hearings in order to ensure that the security concerns are ongoing make sense. See 28 C.F.R. 541.22. In this context, however, the BOP had no particular expertise to assess the justifications underlying the continued detention of detainees such as plaintiffs in restrictive conditions. To the contrary, the FBI was plainly better situated to assess whether plaintiffs and other detainees posed a threat to national security. BOP officials were simply in no position to second-guess the FBI's initial determination that those detainees were "of high interest" to the FBI's ongoing investigation—a determination that was necessarily driven by exceptional national security and foreign threat concerns within the FBI's particular expertise. Nor would it have been appropriate for BOP to require the FBI to produce, in the context of a BOP hearing, evidence supporting the continued detention of the September 11 detainees. Indeed, disclosing such evidence to plaintiffs could seriously have compromised the FBI's ongoing investigation, as well as the broader national response to the September 11 attacks. Thus, a BOP hearing in this context would have been limited to inquiring as to

whether or not a detainee had been cleared by the assigned FBI agents. The hearing would have been a mere formality and a waste of government resources. In this unique context, any alleged violation of BOP's regulations by the failure to provide such a formal hearing caused no real injury, and thus did not, by itself, violate plaintiffs' due process rights.

4. Finally, even if the denial of a formal BOP hearing to plaintiffs in this context is both attributable to these defendants and deemed to violate plaintiffs' constitutional rights, that violation was not clearly established at the time. As noted above, government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. The doctrine of qualified immunity "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent and those who knowingly violate the law.'" Hunter v. Bryant, 502 U.S. 224, 229 (1991) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)). If at the time in question "officers of reasonable competence" could disagree on whether the alleged action violated the plaintiff's constitutional or statutory rights, "immunity should be recognized." Malley, 475 U.S. at 341.

In undertaking the immunity analysis here, the question is not whether the established BOP regulation was violated. The Supreme Court has explained that the violation of a regulation, by itself, is insufficient to reject a claim of qualified immunity. See, e.g., Davis v. Scherer, 468 U.S. 183, 194 (1984) (noting that officials "do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision"). The question is rather whether it was clearly established that the provision of formal BOP hearings was mandated, even though the only relevant inquiry at the time was whether the plaintiffs had been cleared by the FBI from the post-9/11 investigation.

In applying the Mathews test, the Court in Wilkinson characterized the government's interest as the "dominant consideration." 545 U.S. at 227. In the hours, weeks, and months after September 11, that interest could not have been greater. The qualified immunity inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition," Saucier, 533 U.S. at 201; see also Brosseau, 543 U.S. at 199. In the unique and unprecedented context facing these defendants, the necessary conclusion is that the provision of formal BOP hearing was not so clearly mandated by the Constitution that reasonable officials could not, at the time, disagree.

In judging in hind-sight what a reasonable official should have known, it must be recalled that the former Attorney General and the FBI Director were facing, at the time, unparalleled challenges. Those challenges included locating and apprehending those responsible for planning and assisting in carrying out these domestic terrorist attacks, uncovering other related terrorist cells, and disrupting the planning and execution of additional deadly attacks. These defendants therefore launched the largest investigation in the Bureau's history to find those involved in the attacks and to discover and prevent any future attacks. An important component of that investigation was detaining individuals related to the September 11 investigation on criminal or immigration violations. JA 85, 277-278.

Applying qualified immunity to the judgment of whether restrictive confinement should be employed for those identified as "of high interest" to the 9/11 investigation, is fully consistent with the purposes of the immunity doctrine. The Supreme Court has recognized the immunity based upon the injustice "of subjecting to liability an officer who is required, by legal obligation, to exercise discretion," and "the danger that the threat of such liability would deter his willingness to execute his office with decisiveness and the judgment required by the public good." Scheuer, 416 U.S. at 239-240; see also Kendall v. Stokes, 44 U.S. (3 How.) 87, 98 (1845). A government official's immunity from suit is not "a badge or emolument of exalted

office," but rather is grounded on principles of public policy—"a policy designed to aid in the effective functioning of government." Scheuer, 416 U.S. at 242. Qualified immunity seeks to avoid, where appropriate, the "costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." Mitchell, 472 U.S. at 526. As Judge Learned Hand explained, to deny such immunity would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).

When facing novel challenges to national security, in the wake of a multifaceted and savage attack on the Nation's infrastructure and key government facilities by international terrorist cells embedded in our country, government officials must be able to respond in a vigorous and unhesitating manner. See Center for National Security Studies v. Department of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) (noting that, in al Qaeda, "America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore"). Although officials such as defendants must stay within the confines of clearly established law, they must be granted immunity where, as here, a national crisis forces them to determine how the law applies in an unprecedented and unforeseen

context. See Zieper v. Metzinger, __ F.3d __, 2007 WL 122016 at *9 (2d Cir. Jan. 19, 2006) ("[t]he very purpose of qualified immunity is to protect officials when their jobs require them to make difficult on-the-job decisions"). Thus, even if plaintiffs had adequately alleged the personal involvement of Ashcroft and Mueller, plaintiffs' claim regarding their placement in the ADMAX SHU would still have to be dismissed based on qualified immunity.

D. The Alleged "Communications Blackout" Did Not Violate Clearly Established Law.

Likewise, this Court should reject plaintiffs' claims regarding the alleged temporary "communications blackout" (Claims 21 and 22) on the basis of qualified immunity. The actual allegations underlying those claims are varied,[7] and as we have explained above, plaintiffs failed in their complaint to connect Ashcroft or Mueller

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[7] The actual allegations of the plaintiffs are varied. As to the Passaic plaintiffs, Turkmen alleges he was allowed to call a friend, but not allowed to call family in Turkey. JA 171-175 (¶¶ 256-258, 261, 269). Sachdeva only alleges that he was not allowed to contact the Canadian Consulate. JA 179 (¶ 283). As to the MDC plaintiffs, Baloch alleges he was not given phone access until over a month after his arrival (JA 161 (¶ 219)) and A. Ibrahim alleges his requests to make phone calls were obstructed or denied by specifically named MDC officers (JA 165 (¶ 230), 120-121 (¶¶ 91, 93)) so that he was not able to contact family members or a lawyer until more than three weeks after his arrest. JA 161 (¶ 230). The other plaintiffs do not make specific allegations, although plaintiffs generally allege that they were permitted to make social calls about the end of October 2001, with one attorney call a week and one social call per month. JA 120 (¶ 90). In an earlier pleading, plaintiffs Ebrahim and H. Ibrahim admitted that on October 14, 2001, they were each given a list of phone numbers for free legal services and were permitted to place numerous phone calls. Second Am. Complaint. ¶¶ 113, 117.

to those alleged violations. Even if that fatal flaw is overlooked, however, the claims still must be dismissed.

1. In regard to both claims, the alleged policy of temporarily limiting communications with those held on immigration charges and identified as being of interest to the 9/11 investigation does not state a constitutional violation because it "is reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78 (1987). In Turner, the Court upheld prison restrictions on "correspondence between inmates at different institutions." Turner, 482 U.S. at 81, 91. The Court explained that the trial and circuit courts had erred in searching for "a less restrictive way of solving the problem," id. at 89, and rejected their suggestions that "officials could effectively cope with the security problems [by] scanning the mail of potentially troublesome inmates," id. at 83. The Court held that "the risk of missing dangerous communications, taken together with the sheer burden on staff resources required to conduct item-by-item censorship * * * supports the judgment of prison officials," and upheld the policy. Id. at 93.

If the security interest in Turner – concern over "communications among gang members" and potential escape and attack plans – supported permanent restrictions, id. at 91, then the security interests in this case – concern over communications between possible terrorists and potential escape and attack plans – certainly support

the temporary restrictions plaintiffs allege.[8] While plaintiffs contend that there was no legitimate security reason for the alleged policy, the reality is that in the wake of September 11, the Government had strong concerns that aliens with possible terrorist ties might reveal information vital to national security. Indeed, several courts have held that national security concerns surrounding September 11th justified restrictions on information.[9] Additionally, the possibilities that one terrorist might communicate to another "which of their members were compromised by the investigation, and which were not," or might convey "the substantive and geographic focus of the investigation" were dangers that the Government had an obligation to guard against. Center of Nat'l Security Studies, 331 F.3d at 928. As even the district court here

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[8] The district court cites allegations that conversations with attorneys may have been video and/or audio taped. Plaintiffs' own complaint recognized both that Ashcroft placed strict conditions on the monitoring of attorney-inmate meetings, including a requirement for his approval, and that this authority was never utilized. JA 122 ¶ 97. Plaintiffs also allege that family members and attorneys who went to MDC falsely were told plaintiffs were not there and that guards purposely dialed incorrect phone numbers for detainees trying to reach attorneys and families. These specific allegations attribute this conduct, however, to other defendants, and not Ashcroft or Mueller. JA 139-140 ¶¶ 146, 148; id. 120 ¶91.

[9] See, e.g., Center of Nat'l Security Studies, 331 F.3d at 926, 932 (upholding Government's right to withhold names of persons detained for immigration violations in wake of September 11, names of their attorneys, and dates and locations of their arrests on national security grounds); North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 217-18 (3d Cir. 2002) (rejecting First Amendment challenge to closure of "special interest" deportation hearings involving INS detainees with alleged connections to terrorism).

recognized: "In the immediate aftermath of these events, when the government had only the barest of information about the hijackers to aid its efforts to prevent further terrorist attacks, it determined to subject to greater scrutiny aliens who shared characteristics with the hijackers, such as violating their visas and national origin and/or religion * * *. As a tool fashioned by the executive branch to ferret out information to prevent additional terrorist attacks, this approach may have been crude, but it was not so irrational or outrageous as to warrant judicial intrusion into an area in which courts have little experience and less expertise." SA 48.

Significantly, before September 11, this Court recognized the extraordinary concerns an al Qaeda pretrial detainee presented to our national security in United States v. El-Hage, 213 F. 3d 74, 80-81 (2d Cir. 2000) and concluded that restrictions placed on El-Hage to prevent him from "communicating with his unconfined co-conspirators" were "reasonably related to the government's asserted security concerns." Id. at 81-82. That rationale applies with even greater force regarding suspects detained after the 9/11 attacks. Thus, the alleged policy of temporarily restricting communications did not violate plaintiffs' clearly established rights.

2. With regard to plaintiffs' claim that the alleged "communications blackout" interfered with their right of access to counsel and the courts (Claim 22), that claim fails for the additional reasons that plaintiffs failed to show some underlying claim

or right that was prejudiced as a result of the alleged denial of access, as is required under Christopher v. Harbury, 536 U.S. 403, 413-14 (2002). Indeed, the district court recognized that plaintiffs failed to satisfy this requirement. SA 54 (plaintiffs have not identified "a particular affirmative claim for legal redress that the communications blackout is presently keeping them from asserting or any claim 'that cannot now be tried (or tried with all material evidence)'"). Nonetheless, the court held that this does not mean "plaintiffs are out of luck," reasoning that, "[r]eading the complaint liberally, it can be construed as alleging that the communications blackout prejudiced the plaintiffs in defending the immigration proceedings against them by limiting their access to counsel." SA 55. Under Harbury, however, abstract "prejudice" is not enough to support a claim. A plaintiff must describe the lost underlying cause of action "in the complaint." Harbury, 536 U.S. at 414. Here, at a minimum, plaintiffs would be required to articulate what defense to the removal charges or claim for relief from removal were impaired in their immigration cases. Plaintiffs, however, allege no lost defense or claim. Notably, plaintiffs did not deny that they were subject to removal. JA 107 (¶ 57). The district court's reliance upon speculation of prejudice is obviously erroneous under Harbury.

Moreover, the district court's speculation of prejudice in plaintiffs' defense to immigration proceedings due to their inability to hire counsel also overlooks that four

plaintiffs (Ebrahim, H. Imbrahim, Baloch, Al Ibrahim) acknowledge having counsel in immigration and/or judicial proceedings. JA 151 (¶ 187), 159 (¶ 210), 170 (¶ 248). Another plaintiff, Turkmen, alleges he was given a list of phone numbers for free legal services and was able to communicate those numbers to a friend. JA 175 (¶ 269). Thus, the reliance upon speculations of prejudice was both legally erroneous and factually unsupported.

Finally, Harbury was decided after the events at issue, and it cannot be properly be read to establish "clearly established" law at the time of the alleged acts in this case. See Wilson, 526 U.S. at 614.

4. In addition, Claim 22 is barred by the INA to the extent plaintiffs are alleging prejudice from the denial of access to counsel (as the district court speculates).

a. As part of the 1996 amendments to the INA, Congress enacted 8 U.S.C. § 1252(b)(9). Section 1252(b)(9), the so-called "zipper" clause, consolidates in the courts of appeals judicial review of all legal and factual questions arising from actions taken to remove an alien. That paragraph provides as follows:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under [8 U.S.C. §§ 1151-1379] shall be available

> only in judicial review of a final order under this section 242 [8 U.S.C. § 1252].

8 U.S.C. § 1252(b)(9) (emphasis added). Section 1252(b)(9) goes on to provide that "[e]xcept as otherwise provided in this section, no court shall have jurisdiction * * * by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law."[10]

The impact of the INA's "zipper" clause on a district court's § 1331 federal question jurisdiction was addressed in Calcano-Martinez v. INS, 232 F.3d 328 (2d Cir. 2000), aff'd, 533 U.S. 348 (2001):

> Before INA § 242(b)(9), only actions attacking the deportation order itself were brought in a petition for review while other challenges could be brought pursuant to a federal court's federal question subject matter jurisdiction under 28 U.S.C. § 1331. Now, by establishing "exclusive appellate court" jurisdiction over claims "arising from any action taken or proceeding brought to remove an alien," all challenges are channeled into one petition.

Id. at 340 (internal citations omitted) (emphasis added); see also St. Cyr, 533 U.S. at 313-14. As a result, those "other challenges" may no longer be brought "pursuant to a federal court's federal question jurisdiction under § 1331." Calcano-Martinez,

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[10] This latter provision was added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Title I, § 106(a)(2), 119 Stat. 23, and made applicable to cases that led to final orders before, on, or after Division B's effective date. Id. at § 106(b).

232 F.3d at 340. And this includes Bivens claims. Merritt v. Shuttle, Inc., 187 F.3d 263, 270 (2d Cir. 1999).

b. Significantly, the district court found the "zipper" clause was applicable to Claim 22. The court explained: "[C]laims by an alien that the right to counsel has been denied may properly be presented to the BIA and then to the court of appeals on a petition for review. See Michel v. INS, 206 F.3d 253, 258 (2d Cir.2000) (reviewing alien's claim that he was denied the right to counsel in immigration proceedings). Therefore, to the extent the plaintiffs challenge the communications blackout as having prejudiced them in immigration proceedings, their claims could have been brought in a petition for review." SA 36 (emphasis in original).[11]

Having reached that conclusion, the district court should have dismissed Claim 22. The court nevertheless allowed Claim 22 to proceed on the ground that plaintiffs asserted that the alleged policy was for security and law enforcement purposes, not immigration purposes. The critical point, however, is that plaintiffs' claim alleged an inability to consult with counsel in immigration proceedings. Regardless of the purpose of the policy, therefore, plaintiffs' claim implicated "[j]udicial review" of a question of law or fact "arising from" a removal proceeding, and therefore was

[11] Judicial review of a final order by petition for review rests solely in the courts of appeals. See 8 U.S.C. § 1252(a) (providing that review is governed by chapter 158 of Title 28, which in § 2342 vests jurisdiction in the courts of appeals).

subject to the terms of the "zipper" clause. Accordingly, plaintiffs were precluded from bringing that claim in the district court in the first instance, instead of before an immigration judge.

c. Beyond the express terms of Section 1252(b)(9), it is well established that a court should not provide a Bivens remedy where, as here, Congress has established an elaborate regulatory and remedial scheme to handle a particular category of disputes with the federal government. See Schweiker v. Chilicky, 487 U.S. 412, 425 (1988); Bush v. Lucas, 462 U.S. 367 (1983).

The Supreme Court has explained that, because the exercise of the power to imply a new constitutional tort is "not expressly authorized by statute," Correctional Services Corporation v. Malesko, 534 U.S. 61, 519 (2001), if it is to be exercised at all, it must be undertaken with great caution, id. at 523. Consistent with that admonition, the Supreme Court and this Court have consistently refused to imply a Bivens remedy where Congress has established a statutory remedial scheme to handle a particular category of disputes with the federal government, even where a claimed constitutional injury would otherwise "go unredressed." Chilicky, 487 U.S. at 425. "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," the Supreme Court has held that it is

inappropriate for a court to afford "additional Bivens remedies." Id. at 423. The detailed and exhaustive remedial scheme of the INA is properly deemed to preclude Claim 22 to the extent that claim rests on prejudice in the immigration proceedings.

Here, the district court erroneously sought to distinguish Chilicky based on the fact that Congress did not see fit to include a private cause of action for monetary damages for constitutional violations in the INA. As this Court recently observed, however, the same was true in Chilicky. See Dotson v. Griesa, 398 F.3d 156, 166-167 (2d Cir. 2005) (under Chilicky, "it is the overall comprehensiveness of the statutory scheme at issue, not the adequacy of the particular remedies afforded, that counsels judicial caution in implying Bivens actions"). In Chilicky, the plaintiff was limited to obtaining back benefits, and the Social Security scheme offered no monetary remedy for the alleged due process violations. As noted above, the Court nonetheless held that the comprehensive nature of the scheme created by Congress, itself signaled that it was inappropriate for a court to supplement the scheme with a monetary remedy. That reasoning is fully applicable here and should bar Claim 22. See also Dotson, 398 F.3d at 160.

II. THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE CLAIMS AGAINST DEFENDANTS ASHCROFT AND MUELLER FOR WANT OF PERSONAL JURISDICTION.

A. This Court's Should Exercise Pendent Appellate Jurisdiction Over This Issue Because It Is Inextricably Intertwined With The Issues Presented In The Qualified Immunity Appeal.

The district court further erred in refusing to dismiss the claims against Ashcroft and Mueller based upon the lack of personal jurisdiction.[12] While that issue is not generally subject to appeal, by itself, before final judgment, this Court should accept jurisdiction under the doctrine of "pendent appellate jurisdiction." To qualify under that doctrine, an issue must be deemed "inextricably intertwined" with the question of qualified immunity. Toussie v. Powell, 323 F.3d 178, 184 (2d Cir. 2003). This Court holds that issues can be considered "inextricably intertwined" when there is "substantial factual overlap bearing on the issues" that are appealable as a matter of right. Freeman v. Complex Computing Co., 119 F.3d 1044, 1050 (2d Cir. 1997).

This Court has exercised pendent jurisdiction in other cases where the personal jurisdiction issue presented similar factual and legal issues as those properly on appeal before final judgment. For example, this Court asserted jurisdiction over a personal jurisdiction issue when immunity under the Foreign Sovereign Immunity Act

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[12] In rejecting defendants' personal jurisdiction arguments, the district court appears to have relied upon its prior ruling in Elmaghraby. SA 2. As noted above, the appeals from that ruling are pending.

was properly before the court and the two issues were "inextricably intertwined." Hanil Bank v. PT. Bank Negara Indonesia, 148 F.3d 127, 130 (2d Cir. 1998). The Court later explained that pendent jurisdiction was proper in Hanil Bank because "the issues of subject matter jurisdiction and personal jurisdiction were inextricably intertwined, because the court could not have answered the former without saying everything that was required to answer the latter." Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 760-761 (2d Cir. 1998).

In this case, the personal jurisdiction issue is "inextricably intertwined" with the qualified immunity arguments. The same facts and rationale supporting the arguments set forth above that the complaint only states a respondeat superior claim against defendants Ashcroft and Mueller and does not sufficiently allege their personal involvement, similarly support a dismissal based on want of personal jurisdiction. Thus, this Court should exercise jurisdiction over the personal jurisdiction issue.

B. Supervisory Liability Cannot Support Personal Jurisdiction in New York Over Defendants Ashcroft and Mueller.

As this Court has explained, "[p]ersonal jurisdiction of a federal court over a non-resident defendant is governed by the law of the state in which the court sits—subject, of course, to certain constitutional limitations of due process." Robinson v.

Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir.1994). Under the relevant portions of New York's long-arm statute, personal jurisdiction may be asserted over a non-domiciliary who, in person or through an agent, "transacts any business within the state." N.Y.C.P.L.R. § 302(a)(1) (McKinney's 1990). Further, "a court may exercise personal jurisdiction over any nondomiciliary * * * who * * * through an agent * * * commits a tortious act within the state." § 302(a)(2). This subsection does not provide personal jurisdiction over a defendant in his individual capacity based on an agent's tortious act within the state unless the agent was representing the defendant in his individual capacity. Green v. McCall, 710 F.2d 29, 33 (2d Cir. 1983). Thus, the statute does not provide jurisdiction over defendants Ashcroft and Mueller "in their individual capacities on the basis of tortious acts of agents within [New York] * * * unless the agents represented the defendants in their individual, as contrasted with their official, capacities." Ibid.

The district court did not discuss its refusal to dismiss for want of personal jurisdiction over Ashcroft and Mueller, but presumably relied on its decision in Elmaghraby in finding personal jurisdiction. SA 2. In that decision, the district court recognized that, under the New York statute, personal jurisdiction cannot be based solely on a defendant's supervisory position. Elmaghraby, 2005 WL 2375202 at *9. Instead, a plaintiff must show that defendant "personally took part in the activities

giving rise to the action at issue." Ibid. The court in Elmaghraby found, however, that plaintiffs sufficiently alleged defendants were personally involved in the creation or implementation of unconstitutional policies that were directed at the post-September 11 detainees confined in the ADMAX SHU. Id. at 10. The court explained that this issue "overlaps" with defendants' argument that their "lack of personal involvement precludes both liability on the merits." Ibid.

For the same reasons set forth above, the district court erred because, in the court's view, the allegations here present a claim of supervisory liability. Such claims cannot support personal jurisdiction for Bivens liability as to defendants Ashcroft or Mueller.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed insofar as qualified immunity claims raised by defendants Ashcroft and Mueller were denied.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Second Circuit Rule 32(a)(2), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 13,650 words (which does not exceed the applicable 14,000 word limit).

____
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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2007, I filed and served the foregoing reply brief by causing an original and fourteen copies to be delivered to the Court via FedEx overnight delivery (and e-mail delivery) and to counsel of record via FedEx overnight delivery (and e-mail delivery):

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