UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, *et al.*,	:	
	:	
Plaintiffs,	:	02 CV 2307 (JG) (CLP)
- against -	:	
	:	
JOHN ASHCROFT, *et al.*,	:	
	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS THE THIRD AMENDED COMPLAINT

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INTRODUCTION

This action grows out of the events of September 11, 2001, a day that shocked the world and posed multiple challenges to this nation: on the one hand, a challenge to recover, and to respond forcefully to acts of war; on the other, a challenge to preserve our institutions and way of life, the central object of any defensive war. Plaintiffs come before this Court as the victims of public officials who, in their zeal to meet the first of these challenges, neglected the second, and sacrificed fundamental fairness and the rule of law.

As the Supreme Court reminded us last June, in such a crisis the nation depends on the courts to serve as a check against the improper exercise of executive power. Judicial review gains importance when secretive and unilateral executive measures are taken in the name of national security. In the words of Justice O'Connor: "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2647 (2004) (O'Connor, J., plurality).

Following September 11, Plaintiffs and the class they represent were rounded up, interrogated, thrown in prison, held for months on end, and abused, not because of anything they had done but because of who they were (or, in some cases, seemed to be): Muslim men of Middle Eastern or South Asian origin. Over 700 male non-citizens, perceived to be Arab or Muslim, were targets of this sweeping federal preventive detention campaign and criminal investigation. Third Am. Compl. ¶ 1.

None of Plaintiffs are terrorists; none have ties to terrorists; and there was never any evidence that any were tied to terrorism. Instead, they were arrested for minor immigration violations, on the pretext of which they were held in prolonged detention for the purposes of a

baseless criminal investigation; abused while in detention; and denied the panoply of constitutional rights which extend to citizens and non-citizens alike. Third Am. Compl. ¶¶ 64-76, 78-133. Individualized suspicion played little part in the resulting arrests, including those of the Plaintiffs. *Id.* at ¶ 65. As the June 2003 Report of the Justice Department Inspector General makes clear, many of these arrests happened "incidentally" based on as little as "anonymous tips called in by members of the public suspicious of Arab and Muslim neighbors who kept odd schedules."[1] "Some appear to have been arrested more by virtue of chance encounters or tenuous connections to a PENTTBOM lead rather than by any genuine indications of a possible connection with or possession of information about terrorist activity."[2] OIG Rep. at 41-42. In one instance people were arrested solely because of a tip that there were "too many [Middle Eastern men]" working in a grocery store. *Id.* at 17. The common thread underlying Defendants' arrest and treatment of Plaintiffs was the impermissible criteria of race and religion.

Defendants dispensed with due process of law during Plaintiffs' detention, which served no legitimate immigration purpose. "Individuals were deemed 'of interest' to the terrorism investigation even where Defendants had no affirmative evidence of a connection to terrorism, so long as the FBI could not immediately rule out any connection." Third Am. Compl. ¶ 2. Plaintiffs were not informed of their classification as "of interest" to the September 11

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[1] *See* U.S. Department of Justice, Office of the Inspector General, "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," April 2003 [released June 2, 2003] ("OIG Rep.") at 16. This report is attached to the Second Amended Complaint as Exhibit 1 and incorporated by reference in the Third Amended Complaint in ¶ 77. It is a part of the Third Amended Complaint under Fed.R.Civ.P. 10(c). *See Int'l Audiotext Network, Inc. v. AT&T*, 62 F.3d 69, 72 (2d Cir. 1995).

[2] PETTBOM refers to the massive investigation immediately initiated by the Federal Bureau of Investigation following the September 11 terrorist attacks. See OIG Rep. at 1.

investigations and were given no opportunity to challenge that designation, even though that designation triggered automatic detention without bond, continuing long after the expiration of any legitimate immigration need, for FBI "clearance." *Id*. ¶ 4. Six of the eight Plaintiffs were classified, without notice, as "of high interest" and held in a maximum-security federal prison in extremely restrictive conditions. *Id.* at ¶ 3; OIG Rep. at 111-12. As many of the INS, FBI, and Department of Justice officials who worked on these September 11 detainee cases told the OIG, "it soon became evident that many of the people arrested during the PENTTBOM investigation might not have a nexus to terrorism." OIG Rep. at 45. The OIG Report also "criticize[s] the indiscriminate and haphazard manner in which the labels of 'high interest,' 'of interest,' or 'of undetermined interest' were applied to many aliens who had no connection to terrorism." *Id.* at 70.

Plaintiffs' detention was unnecessarily prolonged at every step. They were held incommunicado for weeks, precluding their ability to obtain legal representation or communicate with their families. Third Am. Compl. ¶ 69. The government arrested them without charges, and delayed charging them for days and sometimes weeks. *Id.* at ¶ 78. Under the "no-bond" policy, Defendants categorically denied Plaintiffs and all "of interest" detainees release on bond without any evidence that they would pose a risk of flight or a danger to others. *Id.* at ¶ 79. Plaintiffs' access to legal counsel was purposefully curtailed. *Id.* at ¶¶ 69-72. All Plaintiffs were cleared of any ties to terrorism, but under the 'hold-until-cleared' policy Defendants treated Plaintiffs as guilty of terrorism until proven innocent, and detained them for long periods after their immigration cases were resolved, without any legitimate immigration purpose for detention. *Id*. at ¶ 68. The OIG Report indicates that of the 632 special interest detainees whose arrest and

clearance dates were available to the OIG, the FBI clearance process took over 90 days to complete for 193. OIG Rep. at 51-52.

As the December 2003 Report of the Justice Department Inspector General explains in detail, Plaintiffs were subjected to various forms of abuse while detained.[3] The MDC Plaintiffs were routinely victims of excessive force by MDC employees, including being slammed into walls and having their wrists and fingers bent or twisted while restrained; they were purposely deprived of sleep, subjected to incessant verbal abuse, denied the right to practice their religion, and subjected to arbitrary and excessive strip searching. Third Am. Compl. ¶¶ 102-33; Supp. OIG Rep. at 8-18, 28-30, 33-35. When Plaintiffs held at the MDC were finally permitted to meet with an attorney, their conversations were audiotaped and videotaped. Third Am. Compl. ¶¶ 97-99; Supp. OIG Rep. at 31-33. The Plaintiffs held at Passaic County Jail were threatened with menacing dogs, held in extremely overcrowded conditions, housed with the general prison population, and denied the ability to practice their religion. Third Am. Compl. ¶ 268.

In the midst of Plaintiffs' prolonged detention, Defendants received clear warnings that their actions violated the law, but continued to hold Plaintiffs arbitrarily. "[INS Deputy General Counsel Dea] Carpenter stated that the Department might be subject to '*Bivens* liability' if it did not release the New York detainees in a timely manner." OIG Rep. at 55. *See also id.* at 86 ("INS General Counsel [Bo] Cooper told the OIG that he met with [INS Executive Associate Commissioner for Field Operations Michael] Pearson in October 2001 to argue that his order [requiring his written authorization before any September 11 detainee was released] was creating

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[3] *See* U.S. Department of Justice, Office of the Inspector General, "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York," December 2003 ("Supp. OIG Rep."). This report is attached to the Third Amended Complaint as Exhibit 1 and incorporated by reference in ¶ 85.

potential legal liability for the INS, but the order remained in place."). Despite this, it was not until January 2002 that the Justice Department finally altered its illegal detention policies. *Id.* at 103-04. Notwithstanding these changes, the Plaintiffs remained in detention until dates ranging from February 25 to June 6, 2002. Third Am. Compl. ¶¶ 199, 272.

The campaign to deprive Plaintiffs of their constitutional rights came from the highest levels of government. Defendants Attorney General John Ashcroft, FBI Director Robert Mueller, INS Commissioner James Ziglar, and others designed and approved the policies and practices challenged here in what Defendant Ziglar described as a "continuous meeting" in the weeks and months after the September 11 attacks. OIG Rep. at 10-15, 37-40. According to Associate Deputy Attorney General Stuart Levy, the hold-until-cleared policy came from "at least" the Attorney General. *Id.* at 38.

In the interest of narrowing the issues, Plaintiffs now withdraw certain claims.[4] Otherwise, for the reasons set out in this memorandum, the motion to dismiss the Third Amended Complaint should be denied. This Court has subject matter jurisdiction over the claims presented in the Complaint and personal jurisdiction over the Defendants, and Plaintiffs have stated claims for relief that are not subject to a motion to dismiss.

[4] Plaintiffs withdraw their requests for declaratory relief (included in Claims 1-7 and 17-23), since the Court must in any case declare whether each count describes a violation of Plaintiffs' rights as the first part of its qualified immunity analysis under *Saucier v. Katz*, 533 U.S. 194, 200 (2001). Plaintiffs also withdraw Claim 4, alleging violations of the self-incrimination clause of the Fifth Amendment, in light of *Chavez v. Martinez*, 538 U.S. 760 (2003), and Claim 6, alleging violation of their 6th Amendment right to a speedy trial.

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS CHALLENGING THE CONSTITUTIONALITY OF THEIR DETENTION BECAUSE THESE CLAIMS ARE NOT SUBJECT TO THE INA'S EXCLUSIVE REVIEW SCHEME

Defendants contend that various provisions of the Immigration and Nationality Act ("INA") bar this Court's jurisdiction over Plaintiffs' claims that their detention was unconstitutional. (Claims 1, 2, 4-6, and 17-22). Defendants argue (1) that the exclusive avenue for judicial review of any claim arising from a removal proceeding is a petition for review of a removal order filed in the court of appeals, and (2) that in any event the INA bars review of many of Plaintiffs' claims.

Defendants' first argument fails because the exclusive review avenue to which Defendants point was unavailable. Plaintiffs do not challenge their removal, but their detention, and therefore could not have filed a petition for review from their removal orders. Their complaints arise not from *removal*, which they did not dispute, but from their *detention*. Moreover, even if they had filed petitions for review of their removal orders, the constitutional violations alleged here could not have been redressed on a petition for review, as they did not affect the validity of their removal orders. Thus, the "alternative" to which defendants would relegate Plaintiffs is no alternative at all. Since the claims here could not have been redressed in a petition for review of a removal order, they are not subject to the INA's exclusive review scheme.

Defendants' second argument mistakenly relies on INA provisions that bar judicial review of various exercises of discretion. Plaintiffs do not seek review of any lawful exercise of discretion, but challenge actions undertaken wholly beyond Defendants' discretionary authority. Defendants do not have any discretion to violate the Constitution, and therefore these provisions

do not preclude review of Plaintiffs' constitutional claims. To read them otherwise would violate the principle that jurisdictional statutes should not be construed to preclude review of constitutional claims absent the most explicit of directives from Congress.[5]

A. Section 8 U.S.C. § 1252(b)(9) Does Not Bar Jurisdiction Over Plaintiffs' Challenges to Their Unconstitutional Detention Because These Challenges Could Not Have Been Pursued in a Petition for Review

Defendants maintain that Plaintiffs should have pursued several of their challenges to their unconstitutional detention (Claims 17-19 and 21-22) by filing a petition for review of their removal orders in the court of appeals, and that under 8 U.S.C. § 1252(b)(9),[6] "if an issue is reviewable in a court of appeals on a petition for review, such a petition is the exclusive means of review." Defs. Br. at 20.

The flaw in this argument is that the issues raised by Claims 17-19 and 21 and 22 were not "reviewable in the court of appeals on a petition for review." First, Plaintiff Ibrahim Turkmen never even received a removal order, but was instead granted voluntary departure. He could not have filed a petition for review, as there was no removal order to review.

Second, while the other Plaintiffs did receive removal orders, they did not (and do not) dispute the validity of those orders. On the contrary, Plaintiffs' principal complaint is not that

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[5] *Demore v. Kim*, 123 S. Ct. 1708, 1714 (2003) ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.") (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)); *INS v. St. Cyr*, 533 U.S. 289, 299 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,'…we are obligated to construe the statute to avoid such problems.") (citations omitted); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974) ("clear and convincing evidence of congressional intent" required before a "statute will be construed to restrict access to judicial review.")

[6] 8 U.S.C. § 1252(b)(9) provides: "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 this title shall be available only in judicial review of a final order under this section."

they were ordered removed, but that the Defendants declined to remove them, and instead held them in detention without any legitimate immigration purpose. Their complaints arise from their detention, and from their treatment while detained. Since Plaintiffs did not challenge their removal, they could not have filed a petition for review. Therefore, the challenges presented here could not have been reviewed on a petition for review.

Moreover, even if Plaintiffs had challenged their removal orders, the challenges presented here could not have been addressed, as they are wholly collateral to the removal orders. Claims 17-19 challenge Plaintiffs' detention without bond and without prompt filing of charges, and Claims 21-22 challenge Defendants' communications blackout and interference with access to counsel. The validity of Plaintiffs' removal orders did not turn on the resolution of these issues, and therefore there would have been no basis for a court of appeals to resolve them. Moreover, a court of appeals could not have provided redress for Plaintiffs' injuries. Injunctive relief, even if it were available, would come too late in the day, and the petition process provides no occasion whatsoever for obtaining damages from individual officers. Accordingly, because the issues raised by Claims 17-19 and 21-22 were not "reviewable in the court of appeals on a petition for review," jurisdiction is proper here under 28 U.S.C. § 1331. [7] Nowhere in the INA or its legislative history is there any indication that Congress sought to

[7] This result is supported by *St. Cyr*, 533 U.S. at 313, which held that § 1252(b)(9) "does not bar habeas jurisdiction over removal orders *not* subject to judicial review under § 1252(a)(1)." In upholding habeas jurisdiction to hear the challenge of a "criminal alien" to his removal, the Court reasoned that the "purpose [of § 1252(b)(9)] is to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals, but that it applies only 'with respect to review of an order of removal under subsection (a)(1).'" *Id.* As a "criminal alien," St. Cyr could not obtain review of his removal order in a petition for review under § 1252(a)(1), and therefore the Court held that § 1252(b)(9) did not apply. *Id.* Here, too, Plaintiffs could not have obtained review of their detention claims on a petition for review, and therefore § 1252(b)(9) is equally inapplicable. *See also Calcano-Martinez v. INS*, 232 F.3d 328, 336 (2d Cir. 2000) (same), *aff'd*, 533 U.S. 348 (2001).

preclude *Bivens* actions to remedy unconstitutional policies and practices in connection with immigration detentions.[8]

B. No Other INA Provision Precludes Review of Plaintiffs' Constitutional Challenges to Defendants' Actions

Defendants also argue that certain of their actions are immune from all judicial review whatsoever – namely, the decision to "commence proceedings, adjudicate ases, or execute removal oders," Def. Br. 22, and all "discretionary decisions in the removal process." *Id.* at 23. These arguments share a common flaw – if accepted, they would bar judicial review of unconstitutional government action. As the Supreme Court has repeatedly stated, because preclusion of judicial review of unconstitutional actions would itself raise serious constitutional

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[8] For the same reasons, the INA's "exhaustion" requirement, 8 U.S.C. 1252(d)(1), is inapplicable here. That provision requires foreign nationals to exhaust their administrative remedies before filing a petition for review of a final removal order. But because Plaintiffs here do not challenge their removal orders, but instead challenge actions collateral to removal that could not have been addressed through appeal of their removal order, that requirement does not apply. In addition, exhaustion would have been futile; it is entirely fanciful to imagine that any of the practices challenged here—directed by the highest levels of the Justice Department pursuant to a nationally coordinated investigation into the attacks of September 11—would have been altered through an individual administrative appeal. *Gibson v. Berryhill*, 411 U.S. 564, 573 n.14 (1973) (exhaustion excused where futile). Moreover, the administrative remedies to which Defendants point could not have provided effective relief. Plaintiffs suffered constitutionally cognizable injuries from the moment they were detained, for which the administrative process could not provide damages or any other retrospective relief. In *McCarthy v. Madigan*, the Supreme Court excused exhaustion under analogous circumstances, where a convicted prisoner sought damages under *Bivens* that were unavailable through the administrative process. 503 U.S. 140, 149-52 (1992). Exhaustion is also excused because of Defendants' interference with the availability of administrative remedies. *See J.G. v. Bd. of Educ.*, 830 F.2d 444, 447 (2d Cir. 1987); *see also Johnpoll v. Thornburgh*, 898 F.2d 849, 850-51 (2d Cir. 1990) (exhaustion not required if administrative remedies are not reasonably available); *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) ("A remedy that prison officials prevent a prisoner from utiliz[ing] is not an available remedy…"). The vast majority of detainees in the ADMAX SHU at MDC were not given the MDC handbook that explains the Administrative Remedy Program. OIG Report at 148-49, and Defendants had an express policy of interfering with review of bond determinations by seeking continuances to hide the fact that they had no evidence to support detention. Third Am. Compl. ¶ 79. Several of the named Plaintiffs chose not to request bond or not to appeal denials of bond in reliance on false statements by federal officials that they would be allowed to voluntarily depart within days. *Id*. at ¶¶ 162, 188, 264

concerns, statutes should not be construed to have that effect unless Congress has unequivocally and expressly barred review of constitutional claims. "'[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.'" *Demore v. Kim*, 538 U.S. 510, 517 (2003) (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)). None of the provisions that Defendants cite even *mention* constitutional claims, much less expressly preclude judicial review thereof. In fact, none even apply here.

For example, 8 U.S.C. § 1252(g) merely underscores the exclusive nature of the petition for review process, by providing that except as otherwise provided in § 1252, decisions to "commence proceedings, adjudicate cases, or execute removal orders" are not reviewable. Defendants claim that this provision bars review of Claims 1, 2, 5, 6, and 17. But the Supreme Court has rejected any broad reading of § 1252(g) and has interpreted it narrowly to apply "only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders'"—all essentially "challenges to the Attorney General's exercise of prosecutorial discretion." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482, 485 n.9 (1999) (quoting § 1252(g)). Plaintiffs do not challenge the commencement of their proceedings or the execution of their removal orders, but rather their *detention*. Accordingly, § 1252(g) does not apply here. *See generally Medina v. United States*, 92 F. Supp. 2d 545, 553 (E.D. Va. 2000) (finding that 8 U.S.C. § 1252(g) does not bar a "claim for monetary damages for intentional torts and violations of constitutional rights … where the immigration proceedings have terminated"), *vacated on other grounds*, 259 F.3d 220 (4th Cir. 2001).

Defendants are similarly mistaken in contending that two other provisions of the INA, 8 U.S.C. §§ 1226(e) and 1252(a)(2)(B)(ii), bar judicial review of Claims 1-2 and 18-20. These

provisions, which limit judicial review of certain exercises of discretion in the context of removal proceedings, are inapplicable for two reasons. First, Plaintiffs do not contest how discretionary authority was exercised, but instead claim that Defendants were acting beyond their discretion, *ultra vires*, by violating the Constitution. As the Attorney General has no discretion to violate the Constitution, these provisions by their terms do not bar jurisdiction over Claims 1-2 and 18-20, all of which present constitutional challenges.[9]

The Supreme Court reached precisely this result in finding that § 1226(e) poses no jurisdictional bar to a constitutional challenge to the detention of "criminal aliens." *Demore*, 538 U.S. at 517. Similarly, in *Webster,* 486 U.S. at 603, the Court held that although Congress had precluded judicial review of CIA employment decisions by committing them to "agency discretion," this preclusion did not bar judicial review of *constitutional* claims. The same reasoning applies here.[10]

Second, these provisions apply only to claims arising from removal proceedings, and therefore do not apply to Plaintiffs' challenge to their detention or post-removal order treatment. *See Talwar v. INS*, 2001 WL 767018, at *3-*5 (S.D.N.Y. July 9, 2001) (holding jurisdiction is

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[9] *See United States Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988); *see also Berkovitz v. United States*, 486 U.S. 531, 536 (1988); *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C. Cir. 1986).

[10] *Chimbo v. Sec'y of the Dep't of Homeland Sec.*, 2004 WL 2713154, at *7 (D. Conn. Nov. 18, 2004) (upholding jurisdiction because petitioner was "not challenging a discretionary denial of bail, but rather the constitutionality of the statutory framework that permits detention without bail" (citation omitted)); *Bezmen v. Ashcroft*, 245 F. Supp. 2d 446, 448 (D. Conn. 2003) (exercising jurisdiction because petitioner does "not seek review of the Attorney General's exercise of discretion; rather, challenges the extent of the Attorney General's authority [under the stay provision]. And the extent of the authority is not a matter of discretion." (citation omitted)); *Oliva v. INS*, 1999 WL 61818, at *2-3 (S.D.N.Y. Feb. 10, 1999) (holding 8 U.S.C. § 1226(e) could not be relied on to bar jurisdiction where continued custody of the petitioner was alleged to be in violation of the Constitution or laws of the United States); *Abdul v. McElroy*, 1999 WL 58678, at *4-*7 (S.D.N.Y. Feb. 4, 1999) (same).

not barred since 1252(a)(2)(B) is limited to the context of removal proceedings); *Ncube v. INS Dist. Dirs.*, 1998 WL 842349, at *7 (S.D.N.Y. Dec 2, 1998) (holding jurisdiction-stripping provisions of 8 U.S.C. § 1226 "simply [] not applicable" where petitioner is subject to a final removal order and awaiting removal).[11]

II. CONGRESS HAS NOT EXPRESSLY PRECLUDED A *BIVENS* CAUSE OF ACTION FOR DAMAGES, NOR DO ANY "SPECIAL FACTORS" BAR SUCH A CAUSE OF ACTION

Defendants argue that even if none of the jurisdiction-limiting provisions of the INA bar a *Bivens* action, Plaintiffs cannot bring such an action because "special factors" counsel against it. Defs. Br. at 25-27. This argument fails, because Congress provided no alternative remedial scheme, nor is there any evidence that it sought to preclude damages actions against government officials who systematically violated the constitutional rights of foreign nationals by arbitrarily detaining them. A *Bivens* action is available for constitutional violations unless "defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective," or there are "special factors counseling hesitation in the absence of affirmative action by Congress." *Carlson v. Green*, 446 U.S. 14, 18-19 (1980). Defendants have made neither showing here.

Defendants first maintain that because the INA creates a "comprehensive regulatory scheme," it should be read to implicitly preclude a *Bivens* remedy for the constitutional violations alleged here. However, *Bivens* has only been found to be precluded where Congress

[11] In addition, § 1226(e) bars review only of exercises of discretion "regarding the application of [section 1226]," which mentions nothing about discretion to place non-citizens in administrative or disciplinary segregation, the action challenged in Claim 20. Moreover, the Third Amended Complaint alleges that in addition to INS officials, FBI and BOP officials played a role in placing Plaintiffs in the SHU without procedural protections, and nothing in the INA even arguably purports to bar review of Plaintiffs' claims against FBI and BOP officials.

has created a satisfactory alternative remedy for the violations alleged. Thus in *Schweiker v. Chilicky,* 487 U.S. 412 (1988), *Bivens* relief was denied to Social Security Disability recipients who claimed Fifth Amendment due process violations, due to the existence of "elaborate administrative remedies." *Id.* at 424. The Court explained, "[w]hen 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, we have not created additional *Bivens* remedies." *Id*. at 423 (emphasis added). Likewise, in *Bush v. Lucas*, 462 U.S. 367 (1983), *Bivens* relief was denied to a federal employee claiming violation of his First Amendment rights, because of "comprehensive … provisions *giving meaningful remedies*…" *Id. at* 368 (emphasis added).[12] The statutes in *Schweiker* and *Bush* both provided a compensatory scheme. Here, by contrast, as illustrated in Point I above, the INA provides *no* compensatory remedies whatsoever for the violations Plaintiffs allege, much less the sort of meaningful relief that could substitute for a *Bivens* action.

Nor do "national security and foreign policy concerns" warrant barring a *Bivens* action altogether. Defs. Br. at 27. As the Supreme Court's decisions in the enemy combatant cases made clear, "national security" is not a talisman that excuses government officials of any need to justify their conduct.[13] Defendants are free to argue on the merits that national security interests justified their incursions on Plaintiffs' constitutional rights. But there is absolutely no support

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[12] The cases cited by Defendants do not suggest a different rule. *Sugrue v. Derwinski*, 26 F.3d 8, 12 (2d Cir. 1994), denied *Bivens* relief because the administrative scheme at issue "provides meaningful remedies in a multitiered and carefully crafted administrative process." *Van Dinh v. Reno*, 197 F.3d 427, 435 (10th Cir. 1999), relied on the preclusive effect of two specific jurisdictional provisions. Both *United States v. Stanley*, 483 U.S. 669 (1987), and *Chappell v. Wallace*, 462 U.S. 296 (1983), involve unique concerns related to military service.

[13] *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

for the proposition that once Defendants invoke "national security," that *ends* the case at the *Bivens* threshold without any consideration of what Plaintiffs' rights are and whether they were violated.[14]

III. THE INDIVIDUAL DEFENDANTS ARE PROPERLY PART OF THE SUIT.

The individual Defendants who join in this motion ask to be excused on two grounds: Defendants Ashcroft, Mueller and Ziglar belatedly object that they are not subject to this Court's personal jurisdiction, and all individual Defendants claim that the Third Amended Complaint fails to allege their own personal involvement in the wrongs alleged. Both arguments fail.

A. This Court Has Personal Jurisdiction Over Defendants Ashcroft, Mueller, and Ziglar

More than two years after first moving to dismiss this action under Fed.R.Civ.P. 12, Defendants Ashcroft, Mueller and Ziglar belatedly assert that this Court lacks personal jurisdiction over them (Defs. Br. at 27-28). This new defense need not detain the Court, for Defendants waived it by failing to raise it in their original motion.

Federal Rules of Civil Procedure 12(g) and (h)(1) provide that if lack of personal jurisdiction is omitted from a motion to dismiss, it is waived. It is immaterial that Plaintiffs have amended the complaint since Defendants' first motion. "[D]istrict courts in this circuit have determined that the Rule 12 defenses of lack of personal jurisdiction, improper venue, insufficiency of process and insufficiency of service, if waived by defendant's failure to raise

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[14] The only cases Defendants cite, *Beattie v. Boeing Co.*, 43 F.3d 559 (10th Cir. 1994), and *Reinbold v. Evers*, 187 F.3d 348 (4th Cir. 1999), involved disputes over security clearances, which depend upon "an affirmative act of discretion on the part of the granting official." *Beattie*, 43 F.3d at 565 (quoting *Dep't of Navy v. Egan*, 484 U.S. 518, 528 (1988)). These cases do not suggest a general doctrine that the presence of any "national security" concerns precludes *Bivens* claims, and they have no relation to the wrongful detention and conditions-of-confinement claims asserted by Plaintiffs.

those objections in response to the original complaint, may not be resurrected merely because a plaintiff has amended the complaint." *Gilmore v. Shearson/American Express Inc*., 811 F.2d 108, 112 (2d Cir. 1987). "[A]n amendment to the pleadings permits the responding pleader to assert only such of those defenses which may be presented in a motion under Rule 12 as were not available at the time of his response to the initial pleading." *Rowley v. McMillan*, 502 F.2d 1326, 1333 (4th Cir. 1974).[15] Moreover, the Defendants' delay in asserting this defense until after expiration of the statute of limitations would estop them from asserting it now, even if Rule 12 did not expressly provide a waiver. *See Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1095-96 (2d Cir. 1990).[16]

B. Defendants Are Personally Responsible For Violating Plaintiffs' Constitutional Rights

The individual Defendants' arguments that they were not personally involved in depriving Plaintiffs of their constitutional rights suffers from four general flaws: they disregard the applicable decisional authority regarding personal involvement; they ignore the pleading rules delineated in the Federal Rules of Civil Procedure; they confuse the standards for a motion

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[15] *See also* 2 James Wm. Moore, Moore's Federal Practice (2004) § 12.21 ("[A]mending a complaint does not revive omitted defenses or objections that the defendant could have raised in response to the original complaint."); Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure (3d ed. 2004) § 1388 ("The filing of an amended complaint will not revive the right to present by motion defenses that were available but were not asserted in a timely fashion prior to the amendment of the pleading.").

[16] Even if the personal jurisdiction defense could be raised now, the proper course would not be dismissal, but discovery to determine the relation between Defendants and those in New York who carried out their scheme to deprive Plaintiffs of their constitutional rights. The leading Second Circuit authority, *Grove Press, Inc. v. Angleton*, 649 F.2d 121, 123 (2d Cir. 1981) (*see* Defs. Br. at 28), allows the assertion of personal jurisdiction based on the acts of collaborators acting as agents, and dismisses a claim against out-of-state government officers only because the plaintiffs failed to make the necessary factual showing.

to dismiss with the standards for summary judgment; and most tellingly, they simply ignore the inclusive allegations of the Third Amended Complaint.

First, as this Court has already noted, personal involvement of a supervisory official may be established by evidence that:

> the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of [others] by failing to act on information indicating that unconstitutional acts were occurring.

Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995). In addition, "anyone who 'causes' any citizen to be subjected to a constitutional deprivation is also liable." *Wong v. Beebe*, 2002 WL 31548486, at *14 (D. Or. Apr. 5, 2002) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)). "The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Johnson*, 588 F.2d at 743-44. S*ee also Prof'l Ass'n of Coll. Educators v. El Paso County Cmty. Coll. Dist.*, 730 F.2d 258, 266 (5th Cir. 1984) (holding college president liable for retaliatory termination of professor, although final action taken by trustees).

This is not a case in which Plaintiffs seek to hold high-level officials responsible for aberrant and isolated activities of remote local officials. The policies and practices complained of here were part and parcel of the September 11 investigation, which by Defendants' own public admission was their central and all-consuming occupation during the weeks and months after the attacks. It strains credulity to suggest that the Attorney General, the Director of the FBI, and the

Commissioner of the INS were somehow unaware of what was going on in New York and New Jersey, the vortex of the September 11 investigation. Yet that is what the Court would have to find to dismiss the claims against these officials for lack of personal involvement. The OIG Report makes clear that Defendants were not only aware, but engaged in almost constant supervision and oversight, of virtually every aspect of the detention policies and practices challenged here.

Second, Defendants ignore the liberal pleading rules delineated in the Federal Rules of Civil Procedure. Rule 8(a) requires only that the defendant be put on fair notice of a plaintiff's claim, "rel[ying] on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).[17]

Third, the Second Circuit has recently emphasized the difficulty of prevailing on a motion to dismiss (as distinct from a motion for summary judgment) based on qualified immunity for lack of personal involvement. In *McKenna v. Wright*, 386 F.3d 432 (2d. Cir. 2004), the court held that a supervisory official presenting a qualified immunity defense "on a Rule 12(b)(6) motion instead of a motion for summary judgment must accept the more stringent

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[17] Defendants cite numerous cases requiring heightened pleading standards which, to the extent that they reject "conclusory allegations" or "boilerplate statements," do not survive *Swierkiewicz*. Defs. Br. at 30-32; *see, e.g., Walker v. Thompson*, 288 F.3d 1005, 1008 (7th Cir. 2002) (Posner, J.) ("[those cases] which say 'conclusory allegations'… are not enough to withstand a motion to dismiss cannot be squared with… *Swierkiewicz*..."). For instance, Defendants cite *Patton v. Przybylski*, 822 F.2d 697, 701 (7th Cir. 1987), but fail to note that *Patton*'s heightened pleading requirement is no longer good law. *See Walker*, 288 F.3d at 1010 ("I am in complete agreement with my colleagues that there are no special pleading requirements for civil rights matters. The Supreme Court made that proposition clear in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit* and again recently in *Swierkiewicz v. Sorema N.A.*. These cases have worked a sea change in our circuit's earlier jurisprudence. Cf. *Patton v. Przybylski*, 822 F.2d 697 (7th Cir. 1987).") (internal citations omitted) (Ripple, J., concurring).

standard applicable to this procedural route.... Thus, the plaintiff [at the time of the Rule 12(b)(6) motion] is entitled to all reasonable inferences from the facts alleged." *Id.* at 436. Tellingly, almost every case Defendants cite in their argument on personal involvement arises out of a summary judgment motion, directed verdict, or a judgment from a trial on the merits, not a motion to dismiss.

Finally, Defendants' claims that insufficient allegations of personal involvement have been made simply ignore the allegations in the Third Amended Complaint specifying that all Defendants played significant supervisory and/or operational roles in the challenged policies. Third Am. Compl. ¶¶ 1-8, 23-27, 74-76, 81-83. As specified below, there are more than enough specific allegations to support liability against each Defendant.

1. John Ashcroft. Defendants' assertion that Ashcroft (with Ziglar and Mueller) is mentioned in only sixteen paragraphs in the Complaint, Defs. Br. at 32, misses the point that every allegation against 'Defendants' is against Ashcroft. Defendants also ignore the allegations against Ashcroft in the OIG Report, which Plaintiffs have incorporated by reference. *See* Third Am. Compl. ¶ 77.

Plaintiffs allege that Ashcroft was the "principal architect" of the government's preventive detention campaign that is the gravamen of the Complaint (including claims 1-3, 5, 7-11, and 17-22), maintaining direct personal involvement in supervising and directing the campaign since immediately after the September 11 attacks. *Id.* at 23. According to the OIG Report, Ashcroft himself is the likely architect of the no-bond and hold-until-cleared policies, OIG Rep. at 37-38, and was part of a "continuous meeting" in the months after September 11 during which the hold-until-cleared policy was discussed. *Id.* at 39-40. According to Associate Deputy Attorney General Stuart Levey the decision to hold post-September 11 detainees in

preventive detention "came from 'at least' the Attorney General." *Id*. at 38. Ziglar maintains that the Department of Justice was "fully aware" of the troubling ramifications caused by the length of the clearance process. *Id*. at 67. Ashcroft is also clearly implicated in the policy of assigning special interest detainees to the ADMAX SHU and the communications blackout challenged in Plaintiffs' Claims 21-22, as BOP director Kathy Hawk Sawyer stated that she was directed by high-up officials in the Deputy Attorney General's office to keep detainees in as restrictive conditions as possible and to curtail their ability to communicate with the outside world.

2. Robert Mueller. FBI Director Mueller played a role second only to Ashcroft in supervising and directing the September 11 investigation and related detentions. He is alleged to have been personally involved in every aspect of the conduct underlying Plaintiffs' claims and "instrumental in the adoption, promulgation and implementation of the policies and practices challenged here." Third Am. Compl. ¶ 24.

The OIG Report confirms that the FBI: (i) coordinated the terrorism investigation from its Strategic Information and Operations Center ("SIOC") at FBI Headquarters, OIG Rep. at 11; (ii) coordinated the New York aspects of the investigation through its New York Joint Terrorism Task Force, *id*. at 11-12; (iii) led the terrorism task forces pursuing investigative leads and determined who would be arrested and classified as September 11 detainees, *id*. at 15-16; (iv) made the assessment of detainees' possible links to terrorism and forwarded the assessment to the INS for its use in making housing determinations in the detention facilities, *id*. at 17; (v) requested that detainees of "high interest" be housed at BOP high security facilities, such as MDC, *id*. at 18, 25; (vi) instituted the process under which detainees were held until cleared by the FBI (even after the INS had ordered removal), *id.* at 25-26, 37-38, 42; (vii) sanctioned the

no-bond policy, *id.* at 39; (viii) implemented a policy under which detainees who had been found to be unconnected to the attacks or terrorism in general were nevertheless held for additional clearance, *id*. at 48; (ix) undertook the detainee clearance investigations, *id*. at 49-50; and (x) centralized the clearance process and required that all aspects of the clearance investigation be routed through FBI Headquarters, *id*. at 51. Given the centrality of the September 11 investigation to the work of the FBI and Mueller's direct daily oversight of it, his claim that he was not personally involved cannot be accepted on this motion to dismiss.

3. James Ziglar. Then-INS Commissioner Ziglar is alleged to have had "immediate responsibility for the implementation and enforcement of the immigration laws," was personally involved in every aspect of the conduct underlying Plaintiffs' claims, and "instrumental in the adoption, promulgation and implementation of the policies and practices challenged here." Third Am. Compl. ¶25.

The OIG reports contains direct allegations that Ziglar was at the center of the decision-making process regarding Plaintiffs' preventive detention challenged in Claims 1-3, 5, and 7-22. The INS Executive Associate Commissioner for Field Operation Michael Pearson, at Ziglar's request, issued the order directing Plaintiffs be held until they were cleared by the FBI and Pearson gave his written permission for their release. OIG Rep. at 77.

Specifically, from September 11-21, 2001, Pearson—who directly reported to Ziglar, *id.* at 38—made the decision regarding where to house post-September 11 detainees. *Id.* at 18. Thereafter, the INS created the Custody Review Unit at INS Headquarters and appointed three INS District Directors to make the detainee housing determinations. *Id*. at 18-19. Ziglar was responsible in a supervisory capacity for all of these decisions and is therefore implicated in Claims 20-22.

Ziglar's *own* policies contributed to the delay in the serving of NTAs on detainees challenged in Claim 17 and thwarted Plaintiffs' access to counsel and the courts, implicating Claims 21 and 22. OIG Rep. at 32, 35-36.

Finally, Ziglar played a significant role in the implementation of the blanket no-bond policy at issue in Claims 18 and 19. As the OIG Report makes clear, INS Commissioner Ziglar personally instructed Pearson to order all INS field offices to hold detainees until the FBI clearance procedure was complete. *Id.* at 38, 77. To effectuate this directive, Pearson issued an order on September 13, 2001 to INS field offices instructing them to hold detainees until they were individually cleared by the FBI. *Id*. at 77. This policy was implemented despite the specific concerns raised, in a meeting attended by Ziglar's Chief of Staff, Victor Cerda, and officials from the FBI and DOJ, that the full FBI clearance process was taking too long, and that the "Department might be subject to 'Bivens liability' if it did not release the New York detainees in a timely manner." *Id.* at 55.

4. Dennis Hasty.[18] Defendants' contention that Plaintiffs' allegations amount to an attempt to hold former MDC Warden Hasty responsible for the violation of their constitutional rights under a *respondeat superior* theory misconstrues both the facts and the law. Defendants also ignore Hasty's inclusion in the group "MDC Policy & Implementation Defendants" (Third Am. Compl. ¶ 135) and the allegations against that group.

Plaintiffs include Hasty in their allegations regarding free exercise of religion, the hold-until-cleared policy, the classification and assignment of detainees, the communications

[18] The Court has already denied in part motions of Wardens Hasty and Zenk to dismiss the Third Amended Complaint with respect to Claims 3, 12-16 and 31. (Order dated December 3, 2004). That order is the subject of a pending motion for reconsideration, and has been separately briefed. We address here Hasty's and Zenk's involvement in the other complained of practices.

blackout, and excessive strip-searches, in addition to the conditions claims already addressed by the Court. Third Am. Compl. ¶¶5, 318, 376, 381, 386, 391, 396, 401, and 405. In addition, the OIG Report makes clear that "MDC officials placed all incoming September 11 detainees in the ADMAX SHU without conducting the routine individualized assessment" and subjected them to "the most restrictive conditions of confinement authorized by BOP policy." OIG Rep. at 112. On September 12, 2001, David Rardin, the BOP's Northeast Region Director, directed the wardens in his region—including Hasty at MDC, *id*. at 113—not to release inmates classified by BOP as "terrorist related" "until further notice." *Id.* Five days later, according to the OIG Report, Rardin ordered the communications blackout for the detainees during a telephone conference call with the Northeast Region Wardens. *Id.* There can be no doubt that Hasty communicated and enforced the challenged policies relating to assignment to the ADMAX SHU, the hold-until-cleared, and the communications blackout.

Further, the Report documents that MDC officials, supervised by Hasty, did not follow the BOP's inmate security risk assessment procedures for determining where to house the detainees, but relied upon the FBI's assessment and placed them in the ADMAX SHU. *Id*. at 126-27. Even after detainees were "cleared" by the FBI, they were kept in the ADMAX SHU for "days or weeks after they were supposed to be transferred to the MDC's less restrictive general population." *Id*. at 127. These allegations plainly show Hasty's responsibility for implementation of the policies challenged here.

5. Michael Zenk. Defendants are similarly wrong that Plaintiffs are attempting to hold current MDC Warden Zenk liable on a *respondeat superior* theory, and also ignore Zenk's inclusion in the "MDC Policy & Implementation Defendants."

Defendants urge the Court to dismiss the claims against Zenk in his personal capacity because he became Warden "only one and one-half months before the last MDC Plaintiff was removed." Defs. Br. at 35-36. As Warden of the MDC facility, however, Zenk was legally responsible for the conditions of confinement under which Plaintiff Yasser Ebrahim and Hany Ibrahim (and other members of the class Plaintiffs seek to represent) were held, regardless of the duration of that confinement, and regardless of who initially instituted the unconstitutional practices. *See Poe v. Leonard*, 282 F.3d 123, 143 (2d Cir. 2002) ("In some cases, notice will also be imputed to an individual because of the particular duties he is assigned by virtue of his position"); *McCann v. Coughlin*, 698 F.2d 112, 125 (2d Cir. 1983) (Superintendent may be fairly viewed as having had "at least constructive notice" of the practices employed at the correctional center he controlled). After Zenk took over, Plaintiffs Ebrahim and H. Ibrahim continued to suffer under his adherence to unlawful policies. These policies included prolonging detainees' confinement in the ADMAX SHU even after they had been cleared by the FBI. OIG Rep. at 127. Zenk's knowing adherence to these unconstitutional policies renders him personally liable for the violations that resulted from them. *See Meriwether v. Coughlin*, 879 F.2d 1037, 1048 (2d Cir. 1989); *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir. 1986).

IV. THE INDIVIDUAL DEFENDANTS DO NOT HAVE QUALIFIED IMMUNITY FROM SUIT

Defendants correctly note that to overcome qualified immunity, Plaintiffs must show both a violation of their constitutional rights, and that the violated rights were "clearly established." Defs. Br. at 36. But Defendants' claim that there is some special protection "for our most senior officers" (Defs. Br. at 36) is wrong. For this proposition Defendants cite only the concurring opinion of Justice Stevens in *Mitchell v. Forsyth*, 472 U.S. 511, 541-42 (1985); but Stevens

concurred only in the judgment, because he disagreed with the majority on this precise point. It is the majority's view, not that of Justice Stevens, that governs.

Defendants are also wrong to suggest that "national security" alters the qualified immunity inquiry. Defs. Br. at 37-38. Here and elsewhere, Defendants call upon "national security" as though it could magically convert any particular legal question into a matter wholly reserved to executive discretion. There is no basis for applying a different qualified immunity analysis whenever a defendant asserts "national security" (a phrase of flexible meaning). To the contrary, in *Mitchell* the Supreme Court rejected a claim "for blanket immunization of [the Attorney General's] performance of the 'national security function,'" *Mitchell*, 472 U.S. at 521, insisting that judicial oversight is *more*, not less, important when national security is alleged to be at stake:

> National security tasks ... are carried out in secret; open conflict and overt winners and losers are rare. Under such circumstances, it is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation.

Id. at 522.

Defendants are entitled to qualified immunity only if "their [official] conduct does not violate clearly established ... constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Under this standard, the Court must apply a two-step analysis. It must first decide, "as a threshold matter," whether the facts alleged, liberally construed, show a violation of a constitutional right. If so, the Court then decides whether that right was "clearly established" at the time of the violation. *Poe*, 282 F.3d at 132. As Defendants acknowledge, these two questions must be addressed "in the proper sequence." *Saucier v. Katz*, 533 U.S. 194, 200 (2001); *see also Brousseau v. Haugen*, 125 S. Ct. 596, 598 n. 3 (2004).

A constitutional right is clearly established if "its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal citation and quotation omitted). Plaintiffs need not demonstrate that "the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). *See also Johnson v. Newburgh Enlarged School Dist.*, 239 F.3d 246, 251 (2d Cir. 2001) ("the absence of legal precedent addressing an identical factual scenario does not necessarily yield a conclusion that the law is not clearly established"). Nor need Plaintiffs identify legal precedent arising from "materially similar" facts to the case at bar. *Hope*, 536 U.S. at 739. Plaintiff need only show that prior decisions gave "fair warning" that official conduct depriving someone of that right would be unconstitutional. *Id.* at 740. Government officials may have such fair warning "even in novel factual circumstances." *Id.* at 741. Prior decisions may "clearly foreshadow" a ruling that the challenged conduct is unconstitutional, *African Trade & Info. Ctr., Inc. v. Abromaitis*, 294 F.3d 355, 362 (2d Cir. 2002) (internal citation and quotation omitted), or a previously announced "general constitutional rule" may apply "with obvious clarity to the specific conduct in question." *United States v. Lanier*, 520 U.S. 259, 271 (1997).

We show below that each of Plaintiffs' *Bivens* claims adequately alleges a violation of Plaintiffs' constitutional rights, and that these rights were clearly established at the time the violation took place.

A. Defendants' Detention of Plaintiffs Violated Clearly Established Due Process and Fourth Amendment Rights

As detailed in the Introduction, Plaintiffs allege that they were detained without timely service of charges, that they were categorically denied bond without evidence that they posed a danger or flight risk, and that they were held long after their immigration cases were resolved,

and long after they could have been removed, for illegitimate purposes. (Claims 1, 2, 17-19). In essence, these claims contend that Plaintiffs were subjected to arbitrary detention, in violation of both the Fifth Amendment Due Process Clause and the Fourth Amendment prohibition of unreasonable seizures.[19] Each claim rests on fundamental and well-established principles of law prohibiting arbitrary detention, and therefore states a claim for relief and is not subject to a defense of qualified immunity.

1. By Detaining Plaintiffs for Extended Periods Without Notifying Them of the Charges on Which They Were Being Held, Defendants Violated Plaintiffs' Clearly Established Rights under the Due Process Clause (Claim 17)

Defendants systematically delayed the service of INS charging documents, known as Notices to Appear ("NTAs"), on post-September11 detainees arrested without warrants. Third Am. Compl. ¶ 78; OIG Rep. at 29-30. Plaintiff Syed Amjad Ali Jaffri was arrested and detained for four days before he was served with an NTA; Plaintiff Akhil Sachdeva was arrested and detained for a week before he was served with an NTA; and Plaintiffs Yasser Ebrahim and Hany Ibrahim were arrested and detained for more than two weeks before they were served with NTAs. Third Am. Compl. ¶¶ 78, 185.[20] For 48 putative class members, detention without notice of charges extended beyond 24 days. OIG Rep. at 30-31.

As demonstrated below, Defendants' detention of Plaintiffs without prompt notice of the charges violated both the substantive due process right to freedom from arbitrary detention and

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[19] These rights are guaranteed to "all persons" in the United States, including non-citizens who entered the United States unlawfully and non-citizens who have been found deportable. *Zadvydas v. Davis*, 533 U.S. 678, 679-80 (2001).

[20] Furthermore, Plaintiff Ashraf Ibrahim was in custody for ten days before his first hearing before an immigration judge, and on information and belief Defendants unreasonably delayed issuing him an NTA. Third Am. Compl. ¶¶ 225, 234-36.

the procedural due process right to meaningful notice at a meaningful time of the charges on which one is detained.

a. Prolonged detention without notice of the charges on which one is being held amounts to arbitrary detention and constitutes a violation of substantive due process

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. Defendants seek to dismiss the four, seven, and seventeen days that Jaffri, Sachveda, and Ebrahim and H. Ibrahim were respectively held without notice of the grounds for their detention as "(at most) a few days,"[21] while ignoring altogether the even longer detention without notice suffered by other class members, and making the astonishing claim that no liberty interest was at stake. Defs. Br. at 63.[22]

In the criminal justice setting, the Supreme Court has imposed strict constitutional limits on the length of time that an individual may be detained before being afforded notice of the charges against him *and* a judicial determination as to whether the arrest was supported by probable cause. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). The Court in *County of Riverside* observed that "prolonged detention based on incorrect or unfounded suspicion may unjustly 'imperil [a] suspect's job, interrupt his source of income, and impair his family relationship,'" *id*. at 52 (citation omitted), and that "[a] State has no legitimate interest in

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[21] Plaintiff A. Ibrahim may have been held for as many as ten days without such notice, Third Am. Compl. ¶¶ 225, 234-36, and Defendants do not deny that he was, Defs. Br. at 64 n.32.

[22] Defendants cite *United States v. Lovasco* for the proposition that prosecutors are not required to "file charges promptly" or "as soon as they are legally entitled to do so." Defs. Br. at 63 (quoting *Lovasco*, 431 U.S. 783, 792 (1977)). Defendants miss the critical distinction: In *Lovasco*, the criminal suspects were not detained pending their charges. *See Lovasco*, 431 U.S. at 789 n.8 ("respondent was not arrested until after he was indicted").

detaining for extended periods individuals who have been arrested without probable cause." *Id.* at 55. The Court ruled that the Fourth Amendment presumptively requires a probable cause hearing within 48 hours of arrest, and that the government must prove that any delay beyond 48 hours was the result of a "bona fide emergency or extraordinary circumstance." *Id.* at 57. Significantly, the Court expressly held that any delay "for the purpose of gathering additional evidence to justify the arrest" was unconstitutional, even if it occurred within the initial 48-hour period. *Id.* at 56. Yet here, Defendants adopted an explicit policy of holding people without evidence in order to investigate them, and of seeking to delay bond hearings for the express (and illegal) purpose of gathering additional evidence to justify the detention. *See* OIG Rep. at 78-80; Third Am. Compl. ¶¶ 2, 79.

Whether stated as a Fourth Amendment or a Due Process principle,[23] the considerations that compel notice of charges within 48 hours of a warrantless criminal arrests apply with equal force to warrantless INS arrests. An INS detainee "has been removed from his community, his home, and his family, and has been denied rights that '[rank] high among the interests of the individual.'" *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 413 (D.N.J. 1999) (quoting *Landon v. Plasencia*, 459 U.S. 21, 34 (1982)). Service of an NTA provides the detainee with his first official notice of the INS's factual and legal bases for his arrest.

Defendants' suggestion that Plaintiffs must show that their detention without notice of charges prejudiced the outcome of their removal proceedings finds no support. On that view, if

[23] Because Plaintiffs have pleaded the essential facts underlying this violation, the Court is free to find a violation under either the Fourth or Fifth Amendments. "A complaint should not be dismissed [under Rule 12(b)(6)] merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Bowers v. Hardwick*, 478 U.S. 186, 201 (1986), *overruled on other grounds*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *see also* 5A C. Wright and A. Miller, Federal Practice and Procedure § 1357 at 336-37 (2d ed. 1990).

the INS detained a foreign national for three months without such notice, and then released him without ever bringing charges, he would have no claim, because he could show no "prejudice." Plaintiffs have suffered a direct constitutional injury from being held for extended periods without notice of the reason for their detention and are entitled to damages for this harm regardless of its impact on their removal.

Moreover, Defendants' argument ignores the reality that the NTA provides critical information to INS detainees.[24] The NTA notifies its recipient that he has the right to be represented by counsel in his removal proceeding; that he will be provided with an Immigration Judge hearing at which he may testify, submit evidence, present witnesses, and examine any evidence presented by the government; and that he will be given a reasonable opportunity to apply for voluntary departure at that hearing. Further, the NTA warns its recipient that any statement he makes may be used against him in his removal proceeding. Finally, the NTA is accompanied by a list of qualified attorneys and legal organizations that may be available to represent the detainee at no cost.[25]

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[24] A copy of the NTA form used by the INS at the time Plaintiffs were detained is provided in Appendix D of the OIG Report.

[25] Ashcroft's amendment of the INS custody regulation shortly after September 11 (cited in Defs. Br. at 63) is irrelevant. *See* 8 C.F.R. § 287.3(d). Plaintiffs allege a constitutional violation, and compliance with a regulation cannot cure such a violation. *See generally* Immigrant Rights Clinic, New York University School of Law, *Indefinite Detention Without Probable Cause: A Comment on INS Interim Rule 8 C.F.R. §287.3*, 26 N.Y.U. Rev. L. & Soc. Change 397 (2001).

Also, this regulation provides that a non-citizen may be held without issuance of an NTA for 48 hours or "in the event of an emergency or other extraordinary circumstance ... an additional reasonable period of time." The Government's brief makes new allegations on the basis of which the Government claims that "the events of September 11th and its aftermath constituted precisely such an 'emergency or other extraordinary circumstance.'" Defs Br. at 63. But these allegations are not in the Complaint, and cannot be considered on this motion to dismiss.

b. The failure to provide notice of the basis for detention at a meaningful time also violates procedural due process

Defendants' failure to provide Plaintiffs with prompt notice of the charges on which they were detained also violated procedural due process. "[N]otice at a meaningful time and in a meaningful manner" is an essential component of the "opportunity to be heard" guaranteed by procedural due process. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988).

Procedural due process claims are evaluated under a three-pronged balancing test that considers: 1) the interest of the individual affected by official action; 2) the risk of an erroneous deprivation of the interest and the value of additional safeguards or substitute procedures; and 3) the government's interest, including fiscal and administrative burdens, that additional or substitute procedures would entail. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). This analysis compels the conclusion that Defendants' failure to promptly provide Plaintiffs with NTAs violated procedural due process.

First, the private interest of an INS detainee in his fundamental right to physical liberty "must be accorded the utmost weight." *Kiareldeen*, 71 F. Supp. 2d at 413. For the reasons noted above, an INS detainee's prompt receipt of an NTA is crucial to his ability to obtain the assistance of counsel and to determine whether, when, and how to seek his release.

Second, the failure to issue an INS detainee with a timely NTA carries a dangerous risk of an erroneous deprivation of liberty, and the value of additional safeguards or substitute procedures is high. Keeping an INS detainee in the dark as to the charges against him and the procedures by which he can seek his release obstructs the fact-finding process and places the detainee in an untenable situation.

Third, the service of an NTA is far less burdensome than the probable cause hearing required within 48 hours of a criminal arrest. The government need only provide a piece of

paper with its reasons for an immigration arrest. The government has no legitimate interest in delaying service of notice of charges, and no fiscal or administrative burdens are entailed by ensuring that NTAs are timely served. The arresting officer is required to know the basis for arrest at the time the arrest is effectuated. *See* 8 U.S.C. § 1357(a)(2). Furthermore, NTAs may be issued by a wide range of qualified officers, including the arresting officer. *See* 8 C.F.R. § 239.1(a). And once issued, an NTA can be modified with ease. *See* 8 C.F.R. §§ 1003.30, 1240.10(e), 1239.2(a)-(c).

For the foregoing reasons, Defendants' failure to provide Plaintiffs with timely notice of the charges on which they were detained violated their clearly established rights to substantive and procedural due process.

2. Defendants' Policy and Practice of Detaining Plaintiffs Without Regard to Evidence of Danger or Flight Risk Violated Plaintiffs' Clearly Established Rights Under the Due Process Clause (Claim 18)

It is also clearly established that preventive detention is constitutionally permissible only in limited circumstances and only where there is some basis to believe that the detainee poses a danger to the community or a risk of flight.[26] Yet Defendants adopted an explicit policy and practice of holding "of interest" immigration detainees *without regard to evidence of danger or flight risk*. According to the OIG Report, foreign nationals were identified as "of interest" whenever the FBI could not positively rule them out as suspects, even if there was no basis other than their ethnicity or religion to suspect them at all. OIG Rep. at 16-18. As noted above, Defendants detained foreign nationals in the wake of September 11 on such evidence as a tip that "too many Middle Eastern men" were working at a grocery store, without any further basis to

[26] *See, e.g.*, *Kansas v. Crane*, 534 U.S. 407, 412-13 (2002); *Zadvydas v. Davis,* 533 U.S. 687, 688 (2001); *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997); *Salerno v. United States*, 481 U.S. 739, 751 (1987).

suspect them of involvement in terrorism. *Id.* at 17. Because this policy of blanket detentions without evidence of danger or flight risk was so patently unlawful, Defendants were compelled to develop strategies to obstruct the detainees from obtaining prompt bond hearings, which they did in two ways: (1) by interfering with their ability to obtain counsel, and (2) by delaying and continuing bond hearings with the express purpose of hiding the fact that they had no evidence to support the detentions. This policy plainly violated substantive due process, because to detain persons in the absence of evidence of dangerousness or flight risk is the very definition of arbitrary detention. It also violated procedural due process, as it was intentionally designed to deny "special interest" foreign nationals meaningful access to a prompt hearing on the legality of their detention.

Defendants do not dispute that their policy was to deny bond without regard to evidence of danger or flight risk, an allegation fully confirmed by the OIG Report. Instead, Defendants make the entirely unprecedented claim that foreign nationals have no due process right whatsoever to liberty pending their removal proceedings, and that therefore federal officials are free to deny bond for any reason or indeed no reason at all, and without any process at all. On Defendants' theory, the Constitution would have nothing to say even if the government adopted a policy to deny bond to all foreign nationals with Arabic-sounding last names, to all foreign nationals with last names beginning with A, or even to all foreign nationals who lost a flip of the coin. The breadth of this argument is its own refutation—if accepted, due process would be wholly irrelevant to immigration detention.

In fact, the Supreme Court has repeatedly affirmed that all persons in the United States are protected by the Due Process Clause, including foreign nationals illegally here. *Zadvydas*, 583 U.S. at 679-80. And the Court has made clear that a foreign national's right to be free of

bodily restraint stems directly from the Due Process Clause itself, and continues even after he has been ordered removed. *Id.* at 690. Defendants' argument that foreign nationals have no liberty interest in being free of detention pending removal cannot be squared with *Zadvydas, Demore*, or *Doherty v. Thornburgh*, 943 F.2d 204, 209 (2d Cir. 1991). In *Zadvydas*, the Court, in order to avoid due process concerns, imposed strict limits on detention even *after* a removal order had been issued and the non-citizen had no right to remain in the United States. *See id.* at 682.[27] In *Demore*, the Court did not adopt Defendants' view that foreign nationals have no liberty interest, but held that while due process applied, it was satisfied because Congress had relied on substantial evidence of flight risk by "criminal aliens" to justify identifying that class as posing a flight risk. 538 U.S. at 528. And in *Doherty,* the Second Circuit squarely acknowledged that foreign nationals illegally here have "a substantive due process right to be free of arbitrary confinement pending deportation proceedings." 943 F.2d at 209.

Defendants' contention is also refuted by the very cases it relies upon, *Reno v. Flores*, 507 U.S. 292 (1993), and *Carlson v. Landon*, 342 U.S. 524 (1952). Both cases, like *Zadvydas*, *Demore*, and *Doherty,* adjudicated due process challenges to the detention of non-citizens pending deportation proceedings. And both were decided, not on the theory that due process is irrelevant, but only after concluding that due process had been satisfied.

In *Carlson*, the Court held that due process was satisfied by a finding that the detained non-citizens posed a threat to national security based on their active participation in the

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[27] Indeed, directly contrary to its position here, the government conceded in *Zadvydas* that even foreign nationals facing final orders of removal have due process rights with respect to detention. *See* Brief for the Respondents in *Zadvydas*, at 34 ("Congress's plenary power over aliens does not, however, render the Due Process Clause of the Fifth Amendment altogether inapplicable to petitioner."); *id.* at 39 ("The fact that an alien is under a final deportation order does not mean that such an alien has no substantive due process rights at all.").

Communist Party. 342 U.S. at 541-42. As in *Demore*, the detention was justified by reference to a defined category found by Congress to pose particular risks warranting preventive detention. Here, by contrast, Congress made no such categorical determination, and the executive's *ad hoc* characterization of Plaintiffs as "of interest" was virtually arbitrary. OIG Rep. at 16-18. Finally, in *Flores* the Court found that due process was satisfied for the juveniles whose claims were at issue. 507 U.S. at 306. Indeed, Defendants cite no case that supports their assertion that Plaintiffs lack a liberty interest in being free of physical restraint.

In the alternative, Defendants argue that procedural due process was satisfied because Plaintiffs "were provided an individualized hearing." Defs. Br. at 67. This is wrong for two reasons. First, provision of a hearing is no answer to Plaintiffs' claim that Defendants' initial blanket decision to detain them violated *substantive* due process by its arbitrariness. A policy of detaining every third foreign national would not be saved by the availability of a hearing.

Second, Plaintiffs' Third Amended Complaint and the OIG Report make clear that Defendants did everything within their power to *deny* Plaintiffs access to hearings, from imposing an initial communications blackout, to interfering with Plaintiffs' ability to contact counsel even after the blackout had ended, to adopting a formal policy of continuing and delaying custody hearings in order to conceal the fact that the Government lacked any evidence to justify a detention. Third Am. Compl., ¶¶ 1, 3, 5, 78, 82, 87-91, 93-96, 136. *See also* OIG Rep. at 112-14. Defendants' actions thus violated Plaintiffs' clearly established procedural due process rights.

3. Defendants' Prolonged Detention of Plaintiffs After They Were Ready to Depart the United States Denied Them Substantive and Procedural Due Process (Claim 2)

In Claim 2, Plaintiffs contend that Defendants violated their clearly established due process rights by continuing to detain them long after their immigration cases were resolved, and

well beyond any reasonable period necessary to effectuate their removal, for the non-immigration purpose of criminal investigation. Even if there had been a basis for detaining Plaintiffs pending the resolution of their immigration proceedings—and as noted above, at Point IV.B.2., there was not—Defendants' only legitimate basis for detaining them after their immigration proceedings had been concluded and they had been ordered removed was to aid their removal. *Zadvydas*, 533 U.S. at 689; *see also Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (holding that detention of deportable aliens for punitive ends violates substantive due process); *Demore*, 583 U.S. at 532-33 (Kennedy, J., concurring) (suggesting that immigration detention is unlawful where its purpose is "not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons"). Such "investigative detention" violated Plaintiffs' substantive due process right to be free from arbitrary detention. Also, Defendants violated Plaintiffs' procedural due process rights by failing to provide them with notice of the reasons for their detention or an opportunity to contest those reasons.

Defendants attempt to sidestep Claim 2 altogether with the comment that no court has held that non-citizens have "a constitutional right to be removed from the United States at the earliest possible time." Defs. Br. at 39. This misses the mark.[28] Claim 2 does not depend on the existence of so broad a right. Plaintiffs do not complain that their removal was delayed, but that

[28] Because Defendants rest their motion to dismiss on 8 U.S.C. § 1231 ("Detention and Removal of Aliens Ordered Removed"), it has no application to Plaintiff Turkmen, who was granted permission to depart voluntarily under 8 U.S.C. § 1229c. Non-citizens granted voluntary departure have not been "ordered removed," and, thus, even if Claim 2 were dismissed as to the other Plaintiffs, there would be no basis for dismissing it as to Turkmen.

they were *arbitrarily detained* for between 100 and 200 days after their removal orders had been issued and they were ready to return to their home countries.[29]

a. Claim 2 rests on the clearly established principle of substantive due process that the constitution permits post-removal order detention only to the extent that it facilitates removal

In *Zadvydas*, the Supreme Court affirmed the fundamental principle that detention following an order of removal is tolerated by the Due Process Clause only to the extent that it serves to facilitate removal. Recognizing that the indefinite detention of non-citizens admitted into the United States and ordered removed "would raise serious constitutional concerns," the Court construed the INA to "limit[] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States."[30] *Zadvydas*, 533 U.S. at 690. The Court further directed that reasonableness be measured "in terms of the statute's basic purpose, namely assuring the alien's presence at the moment of removal." *Id.* at 699. Thus, *Zadvydas* rests squarely on the principle that immigration detention is permissible only where necessary to aid removal.

In *Zadvydas,* the Court applied this principle to non-citizens who were ordered removed on the basis of criminal convictions and held in detention beyond the removal period because no

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[29] Defendants claim that each Plaintiff was detained for less than six months after receiving a removal order or permission to depart voluntarily. Defs. Br. at 40-41. In the case of Plaintiffs Ebrahim and H. Ibrahim, however, Defendants admit that their calculation is premised on the assumption that neither Plaintiff waived his right to appeal his removal order. Defs. Br. at 40 n.18. In fact, documents produced by the United States in discovery (bearing Bates Nos. 2834, 2837, 3506 and 3508) show that both Plaintiffs waived appeal on November 20, 2001, the very day they were ordered removed. Ebrahim and H. Ibrahim were not removed until June 6 and May 29, 2001, more than six months after they waived appeal.

[30] The *Zadvydas* Court considered only post-removal period detention statute, 8 U.S.C. 1231(a)(6), and not the removal period statute, 8 U.S.C. § 1231(a)(1)(A). But the due process principles the Court embraced apply to the entire period of detention following the issuance of a removal order.

country would accept them. The Court was presented with, on the one hand, the prospect of releasing potentially dangerous criminal aliens into the general population and, on the other hand, the prospect of detaining them indefinitely—and potentially permanently. The Court ultimately set six months as a "presumptively reasonable period of detention" to permit the government to pursue efforts at removal. *Id*. at 701.

By contrast, Plaintiffs remained ready, willing, and able to return to their home countries throughout their post-removal order detention. The sole ground ever offered for holding them was the requirement that—despite the absence of evidence that they had terrorist ties—they awaited affirmative FBI clearance. Third Am. Compl. ¶¶ 4, 84. Not only were all of the Plaintiffs cleared of terrorism, but at least three Plaintiffs were held for months beyond the time they were cleared.[31]

Defendants nonetheless ask the Court to import wholesale to this case the six-month detention period found presumptively reasonable in *Zadvydas*. Defendants boldly propose that "when an alien is detained for less than the six-month period, a court should defer to the Executive's judgment concerning that detention."[32] Defs. Br. at 40. But *Zadvydas* does not grant the executive *carte blanche* to hold every non-citizen who has been ordered removed for any fixed period of time, much less for a full six months. The six month period was crafted as a

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[31] Plaintiffs Asif Saffi, Yasser Ebrahim, and Hany Ibrahim were held for four to six months beyond the time they were cleared. Third Am. Compl. ¶¶ 163, 166, 190, 199. Even if the hold-until-cleared policy did not violate Plaintiffs' substantive due process rights, their detention *after* clearance plainly did. Moreover**,** additional discovery might well reveal that other Plaintiffs were held for substantial periods after they were cleared of terrorism.

[32] Even if the Court were to apply the six-month period in *Zadvydas* to this case, Plaintiffs Ebrahim and H. Ibrahim were detained for longer than six months. *See* n. 29 above.

rebuttable presumption, to deal with non-citizens who *cannot* be deported because no country will accept them and who thus face the prospect of indefinite detention.

The outcome in *Zadvydas* was driven by the Due Process Clause's demand that immigration detention serve a legitimate immigration purpose and that, once immigration proceedings have ended and removal has been ordered, this purpose is limited to the effectuation of removal. *See Zadvydas* at 689.[33] In the case of Plaintiffs, who were prepared to leave the United States but were prevented from doing so by Defendants, post-removal order detention served no legitimate immigration purpose and was, under the analysis set out in *Zadvydas*, entirely unreasonable.

The INS General Counsel's Office reached precisely this conclusion in a memorandum addressing the detention of the special interest detainees dated January 28, 2002 ("INS Memorandum"), at which time all of the Plaintiffs were still being held in post-removal order or post-voluntary departure order detention.[34] The INS Memorandum emphasized that "removal could not be delayed for the exclusive purpose of allowing the FBI to conduct an investigation to see if the person is a terrorist." OIG Rep. at 101. As the INS General Counsel explained to the

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[33] Defendant Ashcroft has recognized that Zadvydas limits detention to the period that is necessary to effectuate removal. The preamble to regulations issued by Ashcroft shortly after September 11, 2001 declares that *Zadvydas* "generally permits the detention of aliens who have been admitted to the United States and who are under a final order of removal, *only for a period reasonably necessary to bring about their removal from the United States*." 66 Fed. Reg. 56967, 56967-69 (Nov. 14, 2001) (emphasis added).

[34] To the best of Plaintiffs' knowledge, the INS Memorandum has never been released to the public. Portions of it, however, are described and quoted in the OIG Report.

OIG, "the INS had no authority to continue holding [a special interest] detainee if removal could otherwise be effectuated," because such a delay would not be "related to removal." *Id*. at 92.[35]

In direct conflict with the position taken by the INS General Counsel's Office, Defendants contend even more boldly that a court "should not second-guess whether the Executive's motives [for detaining a non-citizen for up to six months following his removal order] served legitimate immigration purposes." Defs. Br. at 40. On this proposal, the Executive could lock up, with complete impunity, any non-citizen who has been ordered removed for as long as six months based on arbitrary, capricious, and invidiously discriminatory reasons. In support of this extraordinary position, Defendants invoke the "plenary power" of the political branches over the immigration standards for the admission or exclusion of non-citizens. But this power is "subject to important constitutional limitations," *Zadvydas*, 533 U.S. at 695, and the post-removal period provision "contain[s] an implicit 'reasonable time' limitation … which is subject to federal court review." *Zadvydas*, 533 U.S. at 682. Moreover, no deference at all is due when the executive branch—without authorization from Congress, under a cloak of extreme

[35] "INS General Counsel Bo Cooper and Deputy General Counsel Dea Carpenter told the OIG that after September 11, the INS operated under the belief that legally it had 90 days (the 'removal period') within which to remove an alien who had a final order of removal. Cooper also said the INS believed it could only use the entire 90-day period if the full 90 days were being used to 'effectuate the removal.' In other words, Cooper believed the INS could not delay removal of an alien for a reason 'not related to removal.' For example, Cooper believed that if it took the INS 85 days to obtain travel documents and make flight arrangements for an alien, then the INS could use 85 days of the 90-day removal period. However, if an alien was ready to be removed on the 30th day after receiving a final order, but another agency conducting a criminal investigation of the alien seeks to delay his removal, Cooper said he believed the INS could not use the remaining 60 days in the removal period to delay the alien's departure." OIG Rep. at 92.

secrecy, and claiming immunity from judicial review—detains foreign nationals long beyond the time necessary to remove them for purposes wholly unrelated to the immigration power.[36]

Defendants also invoke the talisman of the national security in support of their plea for deference. However, as the Supreme Court has recently confirmed, even where national security is at issue, the judiciary—and the Constitution—continue to operate as a check on the abuse of government power. *Id.* In the words of Justice O'Connor:

> [A]s critical as the Government's interest may be in defining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.

Hamdi v. Rumsfeld, 124 S. Ct. at 2646 (O'Connor, J., plurality); s*ee also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963) ("It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process.").

Moreover, Defendants' invocation of the national security simply does not fit the facts of this case. While the attacks of September 11 constituted a national security threat, there was never any showing that *Plaintiffs* were in any way tied to those attacks, to Al Qaeda, or indeed to

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[36] There is irony in Defendants' claim that the removal statute authorized their secret determination to hold hundreds of "special interest" detainees for 180 days for criminal investigation, with no evidence of terrorist ties, when a statute adopted by Congress at the same time authorized the detention without charge of non-citizens on suspicion of terrorism, but for *seven* days, and even then, only after an individualized certification by the Attorney General or the Deputy Attorney General that there were "reasonable grounds" to believe that the person detained was an "alien terrorist" as defined in the INA. 8 U.S.C. § 1226a (adopted October 26, 2001, in the USA PATRIOT Act). Congress plainly recognized the due process problems raised by detention on suspicion, and did not authorize the detention for months of persons haphazardly labeled "of interest." Defendants' view that detention is reasonable for 180 days—a period derived directly from the Supreme Court's judgment in *Zadvydas* as to what Congress thought reasonable—has no support from Congress.

any terrorist group of any kind. They have never had any involvement in terrorism, nor have they ever been charged with terrorist crimes. *See* Third Am. Compl. ¶¶ 1, 16-20. Instead, each was charged with—and detained on the pretext of—routine, non-security related immigration violations. Defendants secretly labeled them "special interest" detainees, but as the OIG Report documented, the "special interest" label was applied haphazardly and without objective basis, often resting on no more than the fact that the FBI couldn't "rule out" a link to terrorism, but without any actual evidence of terrorist ties. OIG Rep. at 70. Indeed, the OIG Report notes, government officials knew at the time that "the 'overwhelming majority' [of the "special interest"] detainees were simple immigration violators and *had no connection to terrorism*." OIG Rep. at 65 n.50 (emphasis added).[37]

Nor are Plaintiffs' claims subject to dismissal on Defendants' belated suggestion that Plaintiffs may have been detained in furtherance of "foreign policy interests in determining [an] alien's background, especially when there is a suggestion of involvement with international terrorism," before sending him to another country. Defs. Br. at 41. This argument fails for procedural and substantive reasons.

As a threshold matter, Defendants' foreign affairs argument should be rejected because it rests on factual assertions not encompassed within the Complaint, and is therefore not cognizable

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[37] *See also* OIG Report at 41 ("Any illegal alien encountered by New York City law enforcement officers following up a PENTTBOM lead – whether or not the alien turned out to have a connection to the September 11 attacks or any other terrorist activity – was deemed to be a September 11 detainee."); *id.* at 45 ("A variety of INS, FBI, and Department officials who worked on these September 11 detainee cases told the OIG that it soon became evident that many of the people arrested during the PENTTBOM investigation might not have a nexus to terrorism."); *id.* at 47 ("Department officials acknowledged to the OIG that they realized that many in the group of September 11 detainees were not connected to the attacks or terrorism in general."); *id.* at 69 ("[I]n New York City we found that the FBI and the INS made little attempt to distinguish between aliens arrested as subjects of a PENTTBOM lead and those encountered coincidentally.").

on a motion to dismiss. The Complaint alleges that Plaintiffs were held in post-removal order detention solely for the purposes of criminal investigation—a purpose that *blocks* rather than effectuates removal and is therefore unauthorized under the analysis laid out in *Zadvydas*. For the Defendants now to suggest that if the FBI had uncovered evidence linking one of the Plaintiffs to the September 11 attacks, they would have foregone the opportunity to prosecute him, and instead would have been content to release him to a foreign government with a warning, not only strains credulity but relies on facts beyond, and contrary to, the Complaint.

In addition, Defendant's current effort to recast the FBI clearance process as an exercise of the Executive's foreign affairs powers raises fact questions as to whether these powers were actually exercised in the case of each Plaintiff and, if so, whether their exercise accounts for the full detention period. Defendants make no such claim in their brief, and it is difficult to see how they could make such a claim when none of the Plaintiffs had terrorist ties. Indeed, Plaintiff Turkmen was granted voluntary departure, a form of discretionary relief based on a finding that he was a person of good moral character who could be trusted to leave the United States voluntarily. *See* 8 U.S.C. § 1229c; Gordon & Mailman, *et al*., 5-63 Immigration Law & Procedure §§ 63.10(2)(c) and (4)(a) (2004). And Plaintiffs Saffi, Ebrahim, and H. Ibrahim were each cleared of terrorism just weeks after they were ordered removed but detained for between four and six months *after being cleared*. *See* note 31 above. Thus, on the face of the Complaint, Defendants' after-the-fact foreign affairs justification has no application here.

In any event, there is no "foreign relations" exception to the prohibition on investigative detention. Were Defendants' argument to be accepted, the executive branch would be free to place any removable non-citizen in indefinite detention merely on its "suggestion" of connection to terrorism—whether founded or not—in order to "forewarn the receiving country about

potentially dangerous aliens." Defs. Br. 41. If government officials are precluded under the Constitution from holding people for investigatory purposes to provide information to American law enforcement authorities, surely they cannot hold them to provide information to another country's law enforcement authorities.

The only support Defendants are able to muster for this unprecedented assertion of authority is an allusion to 8 U.S.C. § 1231(b)(2)(C)(iv), a narrow provision that allows the Attorney General to disregard a non-citizen's designation of a particular country for removal upon the Attorney General's decision that "removing the alien to the country is prejudicial to the United States." By its terms, this provision does not even come into operation unless a non-citizen opts to designate a particular country to which he wishes to be removed, and the Attorney General has not claimed that he invoked this provision as to any of the Plaintiffs.

Because Defendants detained Plaintiffs long beyond the point at which they could be removed, not for a legitimate immigration purpose, but for a criminal investigation, and in some cases long after they were "cleared" in that investigation, Defendants violated Plaintiffs' clearly established substantive due process rights by subjecting them to arbitrary detention.

b. In addition, Claim 2 rests on the clearly established procedural due process requirement that detainees must be given notice of the basis for detention and a hearing to contest the detention

Additionally, Defendants violated Plaintiffs' clearly established procedural due process rights by failing to provide them with notice of the reasons why they were detention after their immigration proceedings had ended, much less a fair opportunity to contest their detention. Defendants do not—and cannot—argue that Plaintiffs' procedural due process claim under Claim 2 should be dismissed.

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right

> they must first be notified." It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."

Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1864)).

An application of the balancing test for evaluating procedural due process claims that the Supreme Court laid out in *Mathews v. Eldridge*, 424 U.S. at 335, compels the conclusion that Plaintiffs were entitled to notice and an opportunity for a hearing. The "interest in being free from physical detention by one's own government" is "the most elemental of liberty interests." *Hamdi*, 124 S. Ct. at 2646. Plaintiffs were held by the INS for periods ranging from 100 to 200 days after their immigration proceedings had been adjudicated and, in some cases, long beyond the time they were cleared by the FBI. Without knowing why they were being detained or how they might obtain their release, Plaintiffs were left to languish in prison until Defendants completed their terrorism investigation and cleared them for departure.

Nor can Defendants identify any interest in depriving Plaintiffs of their fundamental right to liberty, where, as alleged here, there was no basis to suspect Plaintiffs of terrorism. A generic interest in national security cannot justify detaining persons who do not pose a security threat.

Finally, the cost to the government of providing Plaintiffs with notice and a hearing would have been negligible. The INS already had in place regulations providing for written notice and a formal administrative hearing in the case of non-citizens whose departure is blocked by the government because it has been "deemed prejudicial to the interests of the United States." *See* 8 C.F.R. §§ 215.3-.5.[38] Yet Defendants never invoked these processes in the case of the

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[38] These regulations do not address detention *in prison*, but only detention *in the United States*; but *a fortiori*, if Plaintiffs could not be detained in the United States without the procedural safeguards offered by these regulations, they could not be detained in prison without these safeguards. The regulations do not distinguish between non-citizens at liberty and those in (continued…)

Plaintiffs. Defendants can hardly claim that providing Plaintiffs with existing regulatory protections would constitute an impermissible "fiscal or administrative burden," much less one that would justify dispensing with process altogether.

4. Plaintiffs Prolonged Detention Without Legitimate Immigration Purpose or Probable Cause Violated the Fourth Amendment

Defendants' continued detention of Plaintiffs long after their immigration cases were resolved also violated the Fourth Amendment. The Fourth Amendment prohibits law enforcement authorities both from *arresting* individuals on mere suspicion that they have engaged in criminal activity, and from *continuing to detain* individuals already in lawful custody merely on suspicion of criminal activity:

> To continue [the defendants'] custody without presentment [before a judicial officer] for the purpose of trying to connect them with other crimes [than the ones for which they were lawfully arrested] is to hold in custody for investigation only, and that is illegal; its operative effect is essentially the same as a new arrest and, if not supported by probable cause, it is an illegal detention.

Adams v. United States, 399 F.2d 574, 577 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1067 (1969). *See also United States v. Perez*, 733 F.2d 1026, 1036 (2d Cir. 1984) ("[t]he AUSA's and DEA agents' desire to investigate other crimes is not a legitimate excuse for their failure to respect [defendant's] right to a prompt arraignment").[39] Whether or not the INS had grounds to detain

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detention. *See* 8 C.F.R. § 215.1-.5. Neither do they distinguish between non-citizens free to remain in the United States and those subject to a removal order, except that one category of non-citizens whose removal is deemed prejudicial to the United States excludes non-citizens who are under an order of removal. *See* 8 C.F.R. § 215.3(j).

[39] *Ricks v. United States*, 334 F.2d 964, 968 (D.C. Cir. 1964) ("the delay of a preliminary hearing [cannot] be justified on the ground that police activity for that period was required to investigate other unsolved crimes for which there was no probable cause to arrest the accused"); *Sanders v. City of Houston*, 543 F. Supp. 694, 701 (S.D. Tex. 1982) (same).

some class members initially pending their removal proceedings, it had no probable cause to *continue detaining* them long after they could have been removed from this country.

Defendants claim "[i]t is well established that the Fourth Amendment does not cover any period of detention that may ensue after a lawful arrest is made." Defs. Br. at 43. But the very cases Defendants rely on flatly refute this proposition. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Supreme Court held that the Fourth Amendment requires a prompt judicial determination of probable cause as a condition of any *prolonged pretrial detention*, recognizing that "[t]he consequences of [such] detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Id.* at 114; *see also County of Riverside*, 500 U.S. at 52 ("prolonged detention based on incorrect or unfounded suspicion may unjustly imperil [a] suspect's job, interrupt his source of income, and impair his family relationships") (internal quotations omitted). Moreover, both of the Circuit Court cases that Defendants cite, *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997), and *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir. 1993), acknowledge that Second Circuit law extends Fourth Amendment protections well beyond the moment of arrest. *See Riley*, 115 F.3d at 1163-1664 (citing *Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989) ("Fourth Amendment standard probably should be applied at least to the period prior to [charge, while] … in the custody (sole or joint) of the arresting officer"); *Valencia,* 981 F.2d at 1444 (noting that the Second Circuit is among a "number of circuits [that]… endorsed the extension of the Fourth Amendment" beyond arrest and charge).

The other cases Defendants rely on involved not fundamental challenges to detention, but rather whether the Fourth Amendment reached force and conditions claims; in each the Court left open the question of whether the Fourth Amendment was the proper authority for those

particular species of constitutional torts. In *Graham v. Connor*, 490 U.S. 386 (1989), the Supreme Court merely observed that "[o]ur cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection *against the deliberate use of excessive force* beyond the point at which arrest ends and pretrial detention begins." *Id.* at 395 n.10 (emphasis added). Similarly, in *Bell v. Wolfish*, 441 U.S. 520 (1979), Plaintiffs challenged the "conditions or restrictions" of their pretrial confinement; it was undisputed that their ongoing detention was lawful as they had each had "'a judicial determination of probable cause as a prerequisite to [the] extended restraint of [their] liberty.'" *Id*. at 536 (quoting *Gerstein*, 420 U.S. at 114).[40] Neither *Graham* nor *Bell* suggested, let alone held, that individuals ever lack Fourth Amendment rights to be free from prolonged detentions based on mere suspicion.

Defendants nonetheless claim that Plaintiffs were "lawfully arrested for their illegal presence in the United States," and therefore, because "their initial detention was permissible, they have failed to state a claim under the Fourth or Fifth Amendments" or a violation of clearly established rights. Defs. Br. at 43. As noted above, Defendants can cite no relevant authority refuting the notion that the Fourth Amendment continues to govern the legality of detentions for criminal investigation where there is no individualized suspicion of criminal wrongdoing.

From at least the point in time at which there was no longer any legitimate immigration purpose for their detentions, *i.e.*, when detention was no longer necessary to effect their removal, any further detention of Plaintiffs was illegal without probable cause and a prompt hearing. *County of Riverside*, 500 U.S. at 56-57. Plaintiffs have adequately alleged that the detention

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[40] The *Bell* Court left open whether pretrial detainees retain some Fourth Amendment rights even as to conditions of confinement, holding only that *body cavity searches* of the pretrial detainees in that case (individuals awaiting trials on serious federal charges) did not violate the Fourth Amendment. *Id.* at 558.

policy challenged here violated a clearly established constitutional right—the right to be free from investigatory detention without probable cause.

B. Defendants' Reliance on Plaintiffs' Race, Ethnicity, and Religion in Targeting Them for Detention Violated Equal Protection of the Law (Claims 5 and 19)

Plaintiffs' Claims 5 and 19 allege that Defendants violated Plaintiffs' equal protection rights, which the Supreme Court held over one hundred years ago belong to non-citizens as well as citizens. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Plaintiffs claim that they were detained for criminal investigations, denied bond, and abused while in detention, "based on their race, religion, and/or ethnic or national origin" (¶ 76, 309, 386).[41]

Defendants' motion to dismiss these claims misses the point. Nowhere in their brief do Defendants rebut Plaintiffs' claim that discrimination based on religion, or race, or ethnicity is unconstitutional. Instead, Defendants seek to avoid the pleaded allegations, and argue that immigration officials may discriminate based on "national origin, ideology, affiliations, or on other criteria related to terrorism and the potential perpetrators" Defs. Br. at 46. Notably absent from the criteria Defendants defend are the ones Plaintiffs have alleged were used here —race, religion, and ethnicity.

None of the cases cited by Defendants allows discrimination by law enforcement officials on the basis of race, religion, or ethnicity. Defendants' cases are mostly limited to discrimination based on national origin, and principally involve challenges to deportation or

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[41] Further basis for the equal protection claims appears in OIG Rep. at 15-17, showing the role of religion and ethnicity in arrests of non-citizens such as Plaintiffs after September 11 ("anonymous tips called in by members of the public suspicious of Arab and Muslim neighbors who kept odd schedules," OIG Rep. at 16; "Arabs" who rented a truck, *id*. at 17; "Middle Eastern men" who operated a grocery store, *id*.). When government officials base their actions on the private biases of individuals, they violate equal protection. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

denial of entry, rather than the incarceration for the purpose of investigation. Thus *Rojas-Reyes v. INS*, 235 F.3d 115 (2d Cir. 2000), *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), and *Carlson v. Landon*, 342 U.S. 524 (1952), involved deportation; *Fiallo v. Bell*, 430 U.S. 787 (1977), involved entry to the United States, as do the three statutes Defendants cite (Defs. Br. at 44).[42]

Defendants give greatest attention to *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) ("*AADC*"), also a deportation case, and one in which the discrimination at issue was not based on race, religion, or ethnicity, but on affiliation with an alleged terrorist group.[43] Defendants erroneously contend that *AADC* holds "that the Equal Protection Clause is generally inapplicable in the context of proceedings to remove illegal aliens." Defs. Br. at 45. In fact, the issue in *AADC* was selective enforcement of the deportation provisions of the immigration laws; the Court declined to recognize a selective prosecution defense to deportation on the facts before it, emphasizing that permitting such a defense would countenance a continuing violation of law by permitting an illegal alien to remain here. 525 U.S. at 491-92.

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[42] All of these cases, but especially specific Acts of Congress, present different issues than the secretly adopted practices of government law enforcement agents underlying Plaintiffs' equal protection claims. *See Bertrand v. Sava*, 684 F.2d 204, 212 n.12 (2d Cir. 1982) ("[T]he constitutional authority of the political branches of the federal government to adopt immigration policies based on criteria that are not acceptable elsewhere in our public life would not permit an immigration official, in the absence of such policies, to 'apply neutral regulations to discriminate on [the basis of race and national origin].'") (quoting the court below; brackets in the original).

[43] Other cases are even more remote from this action. *Narenji v. Civiletti*, 617 F.2 745 (D.C. Cir. 1980), involved a registration requirement for Iranian students. *Mathews v. Diaz*, 426 U.S. 67 (1976), involved eligibility for Medicare, and did not uphold any of the distinctions alleged here, but rather a requirement of admission for permanent residence and actual residence of five years.

Here, Plaintiffs do not claim selective prosecution; they do not challenge the decision to deport them for their immigration violations; and they do not seek to remain here in a continuing violation of the law. Instead, they challenge their detention, and the seek damages, relief that does not pose the problems identified in *AADC*.

It is no defense that Plaintiffs and those detained with them tended to be from certain countries, for this is a natural consequence of discrimination against Arabs and Muslims, who tend to come from certain countries. Moreover, the suggestion (devoid of evidentiary support) that "foreign policy concerns" were implicated by the decision to detain persons from certain countries (Defs. Br. at 44) is implausible to say the least. The OIG Report (at 21) shows that by far the largest number of persons detained was from Pakistan; then Egypt; then Turkey; then Jordan—none of them countries with whom the United States is at war or at odds, all of them our *allies*. It is plain from the OIG Report that Plaintiffs were not detained for foreign policy reasons at all. They were detained as part of a massive campaign of detention for criminal investigation, and were rounded up in substantial part on the basis of impermissible criteria of race, religion, and ethnicity.

Finally, Defendants' assertion that Plaintiffs are required to "identify other similarly situated aliens who allegedly received preferential treatment" (Defs. Br. at 46) is limited—as Defendants' own language acknowledges—to claims of selective prosecution, as in *U.S. v. Armstrong*, 517 U.S. 456 (1996), which is not alleged here. Outside that narrow range of claims, this requirement has been rejected by the Second Circuit in the very cases Defendants cite:

> We now clarify—a plaintiff who, as in *Brown [v. City of Oneonta*, 221 F.3d 329 (2d Cir. 2000)] alleges an express racial classification, or alleges that a facially neutral law has been applied in an intentionally discriminatory race-based manner, or that a facially neutral statute or policy with an adverse effect was motivated by discriminatory animus, *is not obligated to show a better-treated,*

> *similarly situated group of individuals of a different race in order to establish a claim of denial of equal protection*.

Pyke v. Cuomo, 258 F.3d 107, 110 (2d Cir. 2001) (emphasis added). Like this case, *Brown* involved a challenge on equal protection grounds to an investigation which singled out a particular racial group (black males), not for prosecution but for investigation. The Second Circuit said, "[I]t is not necessary to plead the existence of a similarly situated non-minority group when challenging a law or policy that contains an express, racial classification." 221 F.2d at 337. While the court affirmed summary judgment dismissing the equal protection claim, this was based on the factual ground that defendants' policy was to seek out persons matching a crime victim's description, and therefore was race-neutral.

In any event, the Third Amended Complaint does allege that similarly situated persons were not subjected to the same treatment as Plaintiffs. Plaintiffs allege that after their arrests for immigration violations, they were detained for investigation without probable cause, and abused while detained, because they were "Arab or Muslim or perceived to have been Arab or Muslim," and that "similarly situated non-Arabs and non-Muslims" arrested for immigration violations were not subjected to this treatment. Third Am. Compl. ¶ 76 At the motion to dismiss stage, no more is required.

C. Plaintiffs' Detention and Treatment at MDC and Passaic County Jail Violated the First, Fourth, and Fifth Amendments

In Claims 3, 7, and 20-23, Plaintiffs allege that they were subjected to abusive and unconstitutionally restrictive conditions while detained at MDC and Passaic. They claim: 1) that they were assigned to the extremely restrictive conditions of the ADMAX SHU at MDC without any process whatsoever; in violation of procedural due process; 2) that they were subject to unnecessarily restrictive and punitive conditions of confinement, in violation of substantive due process; 3) that Defendants' interfered with their freedoms of speech and religion and right of

access to the courts; in violation of the First Amendment and the Due Process clause; and 4) that Defendants permanently deprived them of their property without due process.

As shown below, Defendants' arguments for dismissal of each of these claims fails.

1. Defendants' Arbitrary Assignment of Plaintiffs to the ADMAX SHU at MDC Without any Procedures Whatsoever Violated Procedural Due Process (Claim 20)

Plaintiffs' Claim 20 maintains that assignment to the ADMAX SHU at MDC deprived them of liberty, and that such an assignment without any notice or hearing violated clearly established principles of procedural due process. Plaintiffs placed in the ADMAX SHU were locked down in their cells for at least 23 hours a day, subjected to a four-man hold restraint policy when moved from their cells, monitored by camera at all times, and subjected to an initial communications blackout and severely limited contact with the outside world thereafter. Third Am. Compl. ¶¶ 81-82. These conditions are worse than those faced by the vast majority of convicted criminals in the federal prison system and were inflicted upon MDC Plaintiffs without any procedural protections.[44]

As established below, Plaintiffs have a liberty interest in being free of the restrictive confinement of the ADMAX SHU arising directly from the Due Process Clause and from the mandatory terms of the BOP's regulations. The fundamental nature of this liberty interest requires that Plaintiffs be afforded the protections guaranteed prisoners in disciplinary hearings, set out in *Wolff v. McDonnell*, 418 U.S. 539 (1974). For purposes of this motion, however, the

[44] Plaintiffs also argue that the conditions of their confinement at MDC and Passaic County Jail violated substantive due process. (Claim 3). The bulk of Defendants' argument—that Plaintiffs' potential dangerousness required their segregation in the ADMAX SHU (Defs. Br. at 58-60)—may relate to Plaintiffs' *substantive* due process conditions claim, discussed in section IV.C.2 below, but is of little relevance to the issue of procedural due process.

Court need not specify the precise level of procedures required, because Plaintiffs were assigned to the ADMAX SHU without *any procedural protections whatsoever*.

a. Placement in the ADMAX SHU under extremely restrictive conditions infringed on Plaintiffs' liberty under the Due Process Clause itself

Plaintiffs' confinement in the harshly restrictive conditions of the ADMAX SHU plainly triggers a liberty interest. *Cf. Benjamin v. Fraser*, 264 F.3d 175, 188 (2d Cir. 2001) (pretrial detainee has a liberty interest in avoiding special restraints). Even where incarceration is justified by a criminal conviction, and the inmate has forfeited his general liberty interest, the Due Process Clause requires additional procedural protections before an individual may be subjected to conditions or treatment "qualitatively different" from the punishment characteristically suffered by a person convicted of a crime.[45]

Defendants' classifications of Plaintiffs as "high interest," "witness security," and "Management Interest Group 155" triggered a dramatic departure from basic conditions of immigration detention and subjected Plaintiffs to atypically restrictive confinement. Third Am. Compl. ¶¶ 81-82. The ADMAX SHU was specifically created to provide the most restrictive

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[45] *See, e.g., Vitek v. Jones*, 445 U.S. 480, 491-94 (1980) (state prisoner has a liberty interest in not being transferred involuntarily to a state mental hospital for treatment because it is not within the range of conditions of confinement to which a prison sentence subjects an individual); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (individual held incompetent to stand trial has a liberty interest in not being held longer then necessary to determine if he could be cured and become competent); *Baxstrom v. Herold*, 383 U.S. 107, 113-14 (1966) (convicted criminal nearing end of term has a liberty interest in avoiding civil commitment).

Plaintiffs' situation is easily distinguishable from Supreme Court precedent holding that a convicted prisoner's transfer to a less favorable prison does not implicate a liberty interest under the due process clause. *See Olim v. Wakinekona*, 461 U.S. 238 (1983); *Meachum v. Fano*, 427 U.S. 215, 225 (1976). Such transfers result in confinement different "[in] degree, not [in] kind." *Olim*, 461 U.S. at 248. By contrast, Plaintiffs here were never even accused, much less convicted, of a crime, and their detention was indeed different *in kind* than that which is reasonably expected of immigration detention.

conditions available at a federal facility—conditions that are rarely used against convicted criminals, much less against persons never even *accused* of a crime. *Id*. at ¶ 81, OIG Rep. at 118-19. As the Second Circuit has ruled, assignment to such restrictive conditions before a criminal conviction directly implicates a detainee's liberty interest. *See Benjamin*, 264 F.3d at 188 (pretrial detainees have a liberty interest in avoiding "restraint" and "Red I.D." status, because both classifications, while allegedly "non-punitive safety measures," have a "severe and deleterious effect" tantamount to punishment). As another district court has already held in an analogous circumstance involving another September 11 detainee, Plaintiffs' "conditions of confinement arguably were so severe, and were such a departure from the ordinary conditions of pretrial detention, that they implicated a liberty interest arising directly from the Due Process Clause." *Adnan v. Santa Clara County Dep't of Corr.*, 2002 WL 32058464, at *7 (N.D. Cal. Aug. 15, 2002).[46]

Defendants appear to argue that because Plaintiffs are "unlawful aliens" suspected of "ties to terrorists" they have a reduced liberty interest in being free from prolonged, ultra-restrictive detention. Defs. Br. at 60. There is no support for that proposition. Foreign nationals in the United States have the same liberty interest in being free of physical confinement as all other persons. And at most, Defendants' asserted national security concerns only affect the

[46] Defendants also placed at stake Plaintiffs' "good name, reputation, honor, and integrity…" *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). The label "high interest" and the resulting placement decisions attached a "badge of infamy" to Plaintiffs, the efficacy of which was proved all too clearly by the systematic brutality exhibited by MDC guards. *Id.*; Third Am. Compl. ¶¶ 102-109, 153-54, 174, 176, 194-95, 197, 205, 214-16, 226-28, 233-35, 237-38, 241-42. Plaintiffs' stigmatic injuries are cognizable as a liberty interest because they were tied to an accompanying loss of physical liberty and change in legal status. *See Paul v. Davis*, 424 U.S. 693, 708-709 (1976).

weight placed on the governmental interest in detention; it does not reduce the detainees' liberty interest in freedom from detention and restraint.

b. Under 28 CFR § 541.22, Plaintiffs have a state-created liberty interest in not being placed in the SHU without adequate procedural protections

Plaintiffs also have a protected liberty interest in not being placed in the ADMAX SHU arising from BOP regulations. A liberty interest arises when "statutes or regulations require, in language of an unmistakably mandatory character, that a prisoner not suffer a particular deprivation absent specified predicates." *Tellier v. Fields*, 280 F.3d 69, 81 (2d Cir. 2000) (citations omitted); *Hewitt v. Helms*, 459 U.S. 460, 469 (1983).[47] Under 28 C.F.R. § 541.22, detainees[48] placed in administrative segregation are entitled to substantial protections of an "unmistakably mandatory character":

> (b) The Warden shall prepare an administrative detention order detailing the reasons for placing an inmate in administrative detention, with a copy given to the inmate… within 24 hours …unless this delivery is precluded by exceptional circumstances.
>
> (c) … [T]he Segregation Review Official ["SRO"] shall conduct a record review within three work days of the inmate's placement in administrative detention and shall hold a hearing and review these cases on the record (in the inmate's absence) each week, and shall hold a hearing and review these cases formally at least every 30

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[47] In *Sandin v. Conner*, the Supreme Court held that, in the context of lawful incarceration pursuant to a criminal conviction, a prisoner may only rely on a state-created liberty interest whose deprivation would result in an "atypical and significant hardship." 515 U.S. 472, 484 (1995). However, *Sandin* does not apply to pretrial or immigration detainees who have not been convicted and sentenced. *Benjamin*, 264 F.3d at 189-90 (affirming district court holding that *Sandin* does not apply to pretrial detainees because their liberty interests have not yet been extinguished by a lawful conviction). Moreover, even if *Sandin* applied to pretrial and immigration detainees, the conditions of Plaintiffs' detention represent a significant and atypical hardship. Third Am. Compl. ¶¶ 81-82.

[48] 28 C.F.R. § 551.101 states that "an inmate committed for civil contempt, or as a deportable alien … is considered a pretrial inmate." Pretrial inmates are subject to the same classification regulations as convicted prisoners under the authority of the BOP. 28 C.F.R. § 551.105.

> days. The inmate appears before the SRO at the hearing unless the inmate waives the right to appear. … Administrative detention is to be used only for short periods of time except where an inmate needs long-term protection … or where there are exceptional circumstances ordinarily tied to security or complex investigative concerns. An inmate may be kept in administrative detention for longer term protection only if the need for such protection is documented by the SRO ….

Because § 541.22 is "replete with words such as 'shall,' 'unless,' and 'only,'" and is "intended to guide the decision making power of prison officials by requiring that certain prerequisites be met and certain procedures followed whenever a prisoner [is] subjected to segregated housing," it gives rise to a constitutionally protected liberty interest that triggers due process. *Tellier*, 280 F.3d at 81.[49]

c. Plaintiffs were denied any procedural protections upon being assigned to the ADMAX SHU

The Second Circuit has ruled that pretrial classifications leading to serious deprivations of liberty such as those imposed here require at a minimum the procedural protection set out by the Supreme Court in *Wolff*, 418 U.S. at 561-70—namely, a hearing with written notice, adequate time to prepare a defense, a written statement of the reasons for the actions taken, and some ability to present witnesses and evidence. *Benjamin,* 264 F.3d at 189-90, (citing and applying *Wolff).* This case does not require the Court to specify precisely what level of process is due, because Plaintiffs were held for up to six months in the ADMAX SHU without any process whatsoever. Third Am. Compl. ¶ 80. Unless the Court were to find that *no process* was

[49] This precedent is clearly established in the Second Circuit, and thus contrary precedent in other circuits has no impact. *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (A rule is clearly established if there is controlling authority in the relevant *jurisdiction* at the time of the incident).

required, a holding foreclosed by *Benjamin*, Claim 20 must survive this motion to dismiss.[50]

Plaintiffs' liberty interest in not being placed in the ADMAX SHU without opportunity for a hearing was clearly established more than a decade ago. *Tellier*, 280 F.3d at 84 (holding that plaintiff's "procedural due process rights in defendants' adhering to [Section 541.22] were clearly established" in 1992)*;* see also *United States v. Gotti*, 755 F. Supp. 1159, 1164 (E.D.N.Y. 1991) (holding in 1991 that prison officials cannot place a "pretrial detainee in administrative detention for a stated reason without providing any basis for the reason ...") (internal citations omitted). "Prison authorities are not afforded unbridled discretion because the detainee is either notorious or newsworthy or both." *Id*. Indeed, as early as 1983 "prison officials [could not] doubt that they have acted unconstitutionally where confinement… continued, without a hearing, for 67 days." *Tellier*, 280 F.3d at 84 (citing *Wright v. Smith*, 21 F.3d 496, 500 (2d Cir. 1994)). Defendants never had any reasonable basis to suspect Plaintiffs of any connection to terrorism; and the events of September 11, while certainly devastating and unique, do not alter the fundamental precept that liberty may not be deprived without due process. *See, Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963) ("The imperative necessity for safeguarding [the right] to procedural due process under the gravest of emergencies has existed throughout our

[50] Defendants' implication that Plaintiffs may have been placed in the ADMAX SHU for their own safety does not advance their defense. Defs. Br. at 60 n. 30. There is absolutely no evidence before the Court that this was the case, and consideration of such a factual dispute is clearly inappropriate upon a motion to dismiss. Moreover, 28 C.F.R. 541.23 (b) states that inmates involuntarily placed in administrative detention for protection are entitled to a hearing no later than seven days from the time of their admission. The hearing shall include written notice, staff representation, the right to make a statement and present documentary evidence, to request witnesses, to be present and advance advisement of inmate rights.

constitutional history, for it is then … that there is the greatest temptation to dispense with fundamental constitutional guarantees….).[51]

2. Defendants' Detention of Plaintiffs in Cruel and Degrading Conditions of Confinement Violated Substantive Due Process (Claim 3)

Plaintiffs' allegations regarding their treatment at Passaic and MDC also state a claim for violation of substantive due process. Plaintiffs have plainly alleged conditions (taken individually, or as a whole) sufficiently serious to amount to punishment in violation of the Due Process Clause. Punitive measures may not be imposed prior to a determination of guilt. *Bell*, 441 U.S. at 535. Poor conditions rise to the level of "punishment" when either the disability is imposed for a punitive purpose or (absent an express intent to punish) the measure is not reasonably related to a legitimate goal (because it is arbitrary, purposeless, or excessive). *Id.* at 537-39, 548. As the Court explained,

> loading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.

Id. at 539 n. 20.

The Eighth Amendment sets the floor for the rights due to detainees under the Due Process Clause. *Lareau v. Manson*, 651 F.2d 96, 108-109 (2d Cir. 1981). Prison officials have a

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[51] Defendants' erroneously state that *Booth v. Turner*, 532 U.S. 731 (2001), requires dismissal of Plaintiffs' procedural due process claim for failure to exhaust administrative remedies. Defs. Br. at 61. *Booth*, however, is an interpretation of the statutory exhaustion requirement of the Prison Litigation Reform Act, and neither that statute nor the cases interpreting it apply to immigration detainees. *See LaFontant v. INS*, 135 F.3d 158, 165 (D.C. Cir. 1998).

duty under the Eighth Amendment to take reasonable measures to protect prisoners' safety and to ensure that they receive adequate food, clothing, shelter, and medical care. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). For a prison condition to violate the Eighth Amendment (and thus *a fortiori* the more protective Due Process Clause used to analyze conditions claims by those who have not been convicted of crimes), plaintiffs must show two elements. First, each condition must, on its own or in combination, constitute a deprivation of the "minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Second, there must be "deliberate indifference" to a substantial risk to the plaintiff's health or safety on the part of the defendant official. This standard implies a degree of culpability equivalent to criminal recklessness in that the official must be aware of facts from which an inference as to potential harm could be drawn, and the official must actually draw that inference. *Farmer*, 511 U.S. at 837.[52]

Plaintiffs have alleged facts sufficient to make out both prongs of this Eighth Amendment test; however, they need not. Deprivations permissible for convicted prisoners are not permissible for civil or pretrial detainees because the baseline of typical conditions is different. *Benjamin v. Fraser*, 264 F.3d 175, 189 (2d Cir. 2001). This is because "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Plaintiffs were detained under the purported authority of the immigration code, and it is that detention purpose that must support Plaintiffs' treatment. As civil detainees, Plaintiffs retain greater liberty protection than individuals detained as criminal suspects or convicts and are thus entitled to

[52] As explained below, immigration detainees do not have to allege subjective deliberate indifference under the Due Process Clause. Plaintiffs have, however, made this showing.

"more considerate treatment," and "reasonably nonrestrictive conditions of confinement." *Youngberg v. Romeo*, 457 U.S. 307, 321-24 (1982).

Defendants wish to have it both ways: they would rely on the lesser procedural protections inherent in immigration detention to justify holding Plaintiffs, while simultaneously subjecting them to conditions intended for dangerous and/or uncontrollable convicted felons. Holding civil detainees in such restrictive conditions is inappropriate, and clearly punitive. For example, in *Jones v. Blanas*, 2004 WL 2979743, at *10, 11-12 (9th Cir. Dec. 27, 2004) the Ninth Circuit held that civil detainees who are confined in conditions equally or more restrictive than their criminal counterparts are entitled to a rebuttable presumption that their detention is punitive in nature, in violation of the Due Process clause.[53] In addition, Plaintiffs fall within the presumption outlined in *Jones* to this case. Plaintiffs have stated a claim under the less protective Eighth Amendment standard and each claim is analyzed accordingly below.

Defendants argue that: (1) the various restrictions suffered by plaintiffs are not sufficiently serious to raise a constitutional claim; (2) Plaintiffs have not adequately alleged deliberate indifference to these conditions; and (3) even if the conditions are sufficiently serious, such restraints are valid because they are "reasonably related to the institution's interest" in maintaining security. Defs. Br. at 53-62. Defendants are wrong on all counts.

a. Plaintiffs were subjected to conditions sufficiently serious to state a claim for a constitutional violation

The conditions alleged in the Third Amended Complaint, considered in combination or independently, are sufficiently serious to state a claim for unlawful punishment under the Eighth

[53] *See also Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1122-23 (9th Cir. 2003) (detaining mentally incapacitated criminal defendants in county jails violated substantive due process) *Lynch v. Baxley*, 744 F.2d 1452, 1461 (11th Cir. 1984); (detaining individuals held pending civil commitment in jails violated substantive due process).

Amendment. These conditions included: prolonged solitary confinement in the ADMAX SHU without adequate recreation, food, hygiene supplies, warmth, and opportunity to sleep; unnecessary and unreasonable use of strip searches and physical restraints; detention in overcrowded dorms; exposure to dangerous dogs; and commingling with dangerous convicted criminals**.** Third Am. Compl. ¶¶ 110, 111-124, 268, 281. Defendants apparently concede that some of these conditions are sufficiently serious, as they contest only Plaintiffs' complaints about limited soap and towels, cold cells, limited recreation, barely edible food, 24-hour lighting, and overcrowding. Defs. Br. at 54. Yet even these conditions have previously been found to be sufficiently serious to violate the Eighth Amendment's "minimal civilized measure of life's necessities" standard. *Campbell v. Meachum***,** 1996 U.S. App. LEXIS 29456, at *11 (2d Cir. Nov. 4, 1996) (holding that failure to provide an inmate with "adequate toiletry articles" violates both the Eighth and Fourteenth Amendments);[54] *Gaston v. Coughlin*, 249 F.3d 156, 164-65 (2d Cir. 2001) (holding that exposure to the cold states a claim for an Eighth Amendment violation);[55] *Williams v. Greifinger*, 97 F.3d 699, 704 (2d Cir. 1996) (the Eighth Amendment requires that prisoners have meaningful opportunity for exercise);[56] *Robles v. Coughlin*, 725 F.2d 12, 15-16 (2d Cir. 1983) (failure to provide nutritionally adequate food states a claim for an

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[54] For other cases recognizing a potential constitutional violation for unsanitary conditions or failure to provide hygiene supplies, see: *Gaston v. Coughlin*, 249 F.3d 156, 166 (2d Cir. 2001); *Wright v. McMann*, 387 F.2d 519, 526 (2d Cir. 1967); *Divers v. Dep't. of Corr.*, 921 F.2d 191, 194 (8th Cir. 1990); *Walker v. Mintzes*, 771 F.2d 920, 928 (6th Cir. 1985).

[55] *See also Corselli v. Coughlin*, 842 F.2d 23, 27 (2d Cir. 1988) (reversing summary judgment where there was evidence that plaintiff prisoner was purposefully exposed to cold in his cell); *Dixon v. Godinez*, 114 F.3d 640, 643-45 (7th Cir. 1997).

[56] For more cases recognizing prisoners' right to adequate recreation, see: *Anderson v. Coughlin*, 757 F.2d 33, 35 (2d Cir. 1985); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (en banc).

Eighth Amendment violation);[57] *LaMaire v. Maass*, 745 F. Supp. 623, 636 (D. Or. 1990) *vacated on other grounds*, 1993 U.S. App. LEXIS 18322 (9th Cir. July 21, 1993) (continuous lighting in cells violates the Eighth Amendment);[58] *Lareau v. Manson*, 651 F.2d 96, 103-104 (2d Cir. 1981) (recognizing an Eighth Amendment violation based on overcrowding).[59] With respect to the rest of Plaintiffs' complaints, Defendants apparently agree that they are sufficiently serious to meet the Eighth Amendment test, and *a fortiori* the conditions alleged in the Complaint in combination meet that standard as well.

b. Plaintiffs need not plead deliberate indifference by Defendants, but they have done so adequately should the court disagree

Because Plaintiffs were immigration detainees and are alleging a due process violation, Plaintiffs need not allege subjective deliberate indifference. The deliberate indifference standard cited by Defendants was developed in *Farmer v. Brennan*, 511 U.S. 825, 837 (1994), and rests on the text of the Eighth Amendment, which prohibits cruel and unusual "punishments," not cruel and unusual "conditions." *Id*. The Due Process Clause, however, is not limited to protection against "punishment," and therefore the deliberate indifference standard does not apply to conditions challenges under due process by civil detainees and pretrial detainees. *See,*

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[57] *See also Phelps v. Kapnolas*, 308 F.3d 180, 186 (2d Cir. 2002) ("the alleged treatment—that prison officials deprived Phelps of a nutritionally adequate diet for fourteen straight days—is not as a matter of law insufficiently serious to meet the objective requirement" under the Eighth Amendment).

[58] *See also Keenan v. Hall*, 83 F.3d 1083, 1090-91 (9th Cir. 1996). *C.f., Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999) (holding that sleep "undoubtedly counts as one of life's basic needs," and that "[c]onditions designed to prevent" it may violate the Eighth Amendment).

[59] Defendants seem to concede that overcrowding can amount to a sufficiently serious deprivation, but take issue with Plaintiffs' failure to allege adequate facts about the crowding. Defs. Br. at 54. As this Court has already held, however, under notice pleading Plaintiffs need not allege facts sufficient to establish their claims, rather, they are merely required to outline their claims to a degree sufficient to provide the Defendants with fair notice. *See*, Gleeson Order dated Dec. 3, 2004, at 3, *citing Swierkiewicz*, 534 U.S. at 512.

e.g., Benjamin v. Fraser, 343 F.3d 35, 51 (2d Cir. 2003) (pretrial detainee challenging conditions of confinement need not make the same subjective deliberate indifference showing required for Eighth Amendment challenges); *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1121-22 (9th Cir. 2003) (mentally incapacitated criminal detainees bringing substantive due process claims about detention conditions in county jail need not allege deliberate indifference); *Patten v. Nichols*, 274 F.3d 829, 838 (4th Cir. 2001) (civil committees challenging medical care need not show deliberate indifference).

In any event, Plaintiffs have pled sufficient facts to show deliberate indifference to their welfare. The conditions Plaintiffs suffered were widespread, notorious, and continuous over a long period of time (up to nine months from arrest to release)—factors which provide evidence that the prison official had the requisite degree of knowledge. *Farmer*, 511 U.S. at 842; *Wilson v. Seiter*, 501 U.S. 294, 300 (1991).[60] Plaintiffs' allegations of knowledge and complicity are adequate to surmount a motion to dismiss. *See Phelps*, 308 F.3d at 186 ("The district court erred by holding that on the subjective element of his Eighth Amendment claim Phelps was required to plead other facts in addition to and in support of his allegation of the Defendants' knowledge."); *Weyant v. Okst*, 101 F.3d 845, 856 (2d Cir. 1996) ("[T]he state of the defendant's knowledge is normally a question of fact to be determined after trial.").

c. Defendants' reliance on the *Turner* standard is erroneous

Finally, Defendants argue that the restrictions to which they subjected Plaintiffs were valid because they were "reasonably related to legitimate penological interests." Defs. Br. at 55-

[60] A prison official cannot escape liability by refusing to verify underlying facts he strongly suspects to be true. *Farmer*, 511 U.S. at 843 n.8. *See also Brice v. Virginia Beach Correctional Ctr.*, 58 F.3d 101, 106 (4th Cir. 1995) (subjective awareness includes willfully or intentionally contrived obliviousness to a medical need shown to be so obvious that it must be known unless willfully blocked out).

62, *quoting Turner v. Safley*, 482 U.S. 78, 89 (1987). This is not the correct standard. *Bell* makes clear that penological goals may not be imposed upon individuals who are not convicted criminals; rather, restrictions may only be justified to the extent that they represent a non-exaggerated response to the institution's interest in maintaining jail security. *Bell*, 441 U.S. at 539-540. Because Plaintiffs are not criminal detainees, the government may not rely on the penological justifications that courts routinely accept to excuse deprivations faced by convicted felons. Rather, Defendants must justify the extremely restrictive and punitive conditions applied to these civil detainees, for whom Defendants had no rational basis to suspect any violent, illegal, or even discourteous behavior.

For example, the use of restraints against a prisoner without a legitimate penological justification violates the Eighth Amendment, *Hope*, 536 U.S. at 737,[61] and a system of restraint used against a pretrial detainee as punishment presents a due process violation. *Fuentes v. Wagner*, 206 F.3d 335, 343 (3d Cir. 2000) (denying judgment as a matter of law due to the existence of disputed facts as to whether restraint chair was used against pretrial detainee as punishment or to restore order). Plaintiffs have alleged that they were routinely transported with shackles, waist chains, and leg chains, without any basis for believing that they were dangerous. Third Am. Compl. ¶¶ 110, 155, 174, 194, 199, 232. Although such restraints may be appropriate when transporting dangerous felons, Plaintiffs were never charged with or convicted of *any* crime or *any* disciplinary offense. Nor did they ever offer resistance or threaten jail security. *Id.*

[61] Defendants cite *Morreale v. City of Cripple Creek*, 1997 WL 290976 (10th Cir. May 27,1997) and *Keenen v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996) for the proposition that use of restraints during transport is constitutional. Defs. Br. at 56 n. 23. However, both these cases involved motions for summary judgment, at which the dangerousness of the detainee or prisoner and the utility of the restraint was not in dispute. *See Morreale,* 1997 WL 290976 at *5; *Keenan,* 83 F.3d at 1092 ("for the protection of staff and other inmates, prison authorities may place *a dangerous inmate* in shackles and handcuffs when they move him from his cell")(emphasis added).

at ¶ 105. These facts, and others, must be analyzed at trial so the fact-finder may determine whether the restraint policy was intended as punishment or represented an unlawfully exaggerated response to a security need.

Similarly, Plaintiffs have sufficiently pled Due Process and Fourth Amendment violations based on repeated and unnecessary strip searches (Claim 23). Plaintiffs allege that they were repeatedly strip searched in situations where they had not had any contact visits or other opportunity to obtain contraband. Third Am. Compl. ¶¶ 111-16, 154-55, 173-74, 193, 207, 228-29, 232, 234, 239. Defendants argue that MDC's "policy" to allow strip searching without probable cause furthers legitimate security goals, and thus can be applied to all inmates, including "pretrial detainees." In fact, MDC policy does not allow the strip searches alleged by Plaintiffs.[62] Plaintiffs allege that their strip searches were actually carried out not according to BOP policy, but as a form of punishment and humiliation in violation of the Fifth Amendment. *Id.* at ¶¶ 111-116; *Bell*, 441 U.S. at 561.

Moreover, Plaintiffs allege that these searches were unreasonable under the Fourth Amendment. Prisoners and detainees retain an expectation of bodily privacy, albeit in limited form. *Convino v. Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992). Strip searches are only constitutional if they are reasonable, which is determined by balancing the need for a particular search against the invasion of personal rights that the search entails. *Bell*, 441 U.S. at 558-59. This principle forbids strip searching individuals repeatedly, or in situations where they could not have obtained contraband. *See, e.g., Hodges v. Stanley*, 712 F.2d 34, 35 (2d Cir. 1983) (holding that one strip

[62] Under 28 C.F.R. § 552.11 (b)(1) strip searches may be conducted "where there is reasonable belief that contraband may be concealed on the person, or a good opportunity for concealment has occurred." Examples of "reasonable belief" situations include, but are not limited to, entry into a special housing unit, re-entry into an institution after contact with the public, and after a contact visit. *Id.*

search followed "shortly after" by a second strip search when the inmate had been "under continuous escort" was unreasonable and unconstitutional). Second Circuit precedent is clear that individuals who are not charged with serious crimes (much less no crime at all) may not be subjected to strip searches without reasonable suspicion. *See Shain v. Ellison*, 273 F.3d 56, 66 (2d Cir. 2001); *Wachtler v. County of Herkimer*, 35 F.3d 77, 81-82 (2d Cir. 2001); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986). [63]

Plaintiffs have also adequately alleged a violation of their due process rights based on their confinement in extremely restrictive, solitary cells.[64] Third Am. Compl. ¶¶ 81, 120, 121, 155, 156, 173, 175, 192, 193, 206, 207, 229. Prolonged imprisonment in isolation, without opportunity for human contact or exercise, deprives inmates of the minimal civilized measure of life's necessities and puts their mental health at serious risk. *See Jolly v. Coughlin*, 76 F.3d 468, 480 (2d Cir. 1996).[65] Defendants assert that Plaintiffs fail to state a claim because they did not

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[63] Defendants cite *Covino v. Patrissi*, 967 F.2d 73 (2d Cir. 1992) for the proposition that detainees held in prisons, rather than jails, are subject to the *Turner* reasonable relation standard. Defs. Br. at 57. That case, however, involved a pretrial detainee who was charged with a felony and commingled with the prison population. *See Shain* 273 F.3d at 65, 66 n.3. Plaintiffs here have not been charged with *any* crime, much less a felony. At MDC, where the complained of strip searches occurred, they were not commingled with the general population. Third Am. Compl. ¶¶ 111-16.

[64] Defendants fail to recognize that Plaintiffs advance two distinct due process claims based on their detention in the MDC ADMAX SHU. Plaintiffs' conditions claim, Claim 3, challenges the conditions to which Plaintiffs were subjected (including 23 hour lockdown in the SHU) as punitive detention in violation of their rights under the substantive due process clause. Claim 20 is a separate procedural due process claim challenging the way in which Plaintiffs were assigned and retained at the MDC ADMAX SHU. Defendants advance several arguments addressing these two claims. *See* Def. Br. at 58 – 61. The question of whether conditions in the SHU amounted to unlawful punishment, under substantive due process, is addressed here. Defendants' related argument, addressing the procedures used to place the detainees in the ADMAX SHU, is addressed with respect to Claim 20, in IV.C.1, above.

[65] *See also Covino v. Vermont Dep't. of Corr.*, 933 F.2d 128, 130 (2d Cir. 1991) ("at some point … the administrative necessity for involuntary lock-up begins to pale. Indeed, after nine months it smacks of punishment").

allege "that the Original Defendants made any decision in order to punish them." Defs. Br. at 58. To the contrary, the constant and systematic verbal and physical abuse to which Plaintiffs were subjected betrays the punitive intent behind Plaintiffs' conditions of confinement. Third Am. Compl. ¶¶ 102-109. Moreover, the entirety of the Third Amended Complaint alleges conditions and treatment that were punitive because they were "excessive," or not rationally related to a non-punitive purpose. *Bell*, 441 U.S. at 538 – 539. Whether Defendants' asserted "security concerns" were indeed rationally served by Plaintiffs' ultra-restrictive confinement is a disputed matter of fact, inappropriate for determination on a motion to dismiss. Def. Br. at 58-59.

Similarly, Plaintiffs Turkmen and Sachdeva have sufficiently pled a due process violation based on their confinement with convicted criminals and their exposure to dangerous dogs.[66] Third Am. Compl. ¶¶ 268, 281-282. The indiscriminate confinement of pretrial detainees (and by extension, immigration detainees) with convicted persons is unconstitutional unless such a practice is reasonably related to the institution's interest in maintaining jail security, or unless its physical facilities do not permit their separation. *Jones v. Diamond*, 636 F.2d 1364, 1374 (5th Cir. 1981) *overruled on other grounds by*, *Int'l. Woodworkers of Am. v. Champion Int'l. Corp.*, 790 F.2d 1174 (5th Cir. 1986); *Ryan v. Burlington County*, 889 F.2d 1286, 1293 (3d Cir. 1989) (Detainees have right to be housed separately from dangerous and convicted inmates). Contrary to Defendants' statements, Defs. Br. at 61-62, constant exposure to violence or potential violence is a cognizable constitutional injury in itself. *Jones,* 636 F.2d at 1374; *see also Helling v.*

[66] Defendants only question Turkmen's claim on this issue. Apparently, they concede that Plaintiff Sachdeva's assault while at Passaic properly stated a claim for commingling. Third Am. Compl. 281; Def. Br. at 61-62.

McKinney, 509 U.S. 25, 33-34 (1993) (exposure to unsafe conditions states a claim for an Eighth Amendment violation whether or not an injury has yet occurred).

3. Defendants' Interference With Plaintiffs' Ability to Access the Courts, Counsel, and the Outside World, and to Practice their Religion, Violated Plaintiffs' First And Fifth Amendment Rights (Claims 7, 21, and 22)

Defendants undertook a wide variety of measures to restrict Plaintiffs' ability to contact the outside world, including an initial communications blackout, highly restrictive limits on phone calls and visits with attorneys, family members, and friends thereafter, false denials that individuals were in Defendants' custody at all, and surveillance of privileged attorney client communications. Third Am. Compl. ¶¶ 87-99; OIG Rep. at 112-116. Defendants also implemented policies making it impossible for Plaintiffs to practice their Islamic faith. Third Am. Compl. ¶¶ 128. Taken together, these measures violated Plaintiffs' clearly established First Amendment right to freedom of speech and religion and First and Fifth Amendment rights to access to counsel and the courts.

Defendants urge the Court to apply an extremely deferential standard of review to Defendants' actions because Plaintiffs are non-citizens held for immigration violations. But the deferential "facially legitimate and bona fide" standard utilized in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), does not apply to conditions of detention. It governs only judicial review of decisions to admit or exclude non-citizens. 408 U.S. at 766 (recognizing that "[p]olicies pertaining to *the entry of aliens and their right to remain here* are peculiarly concerned with the political conduct of government … and entrusted exclusively to Congress") (emphasis added, citations omitted).

Despite repeated invitations from the government, the Supreme Court has never applied the *Kleindienst* standard in reviewing constitutional challenges to immigration detention. *See*

Zadvydas, 533 U.S. at 690; *Demore*, 538 U.S. at 547. The *Kleindienst* standard is wholly inapplicable outside the arena of Congress's plenary power to make rules governing admission and exclusion of non-citizens. *Demore,* 538 U.S. at 547. The *Kleindienst* standard has never been extended to actions, like the communications blackout and the other policies challenged in this suit, which are unrelated to the power to admit or exclude non-citizens at the border.[67] *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 687 (6th Cir. 2002) ("Although acknowledging the political branches' plenary power over all substantive immigration laws and non-substantive immigration laws that do not implicate constitutional rights, the Supreme Court has repeatedly allowed for meaningful judicial review of non-substantive immigration laws where constitutional rights are involved. *Kleindienst* did not change these long-standing traditions.").

a. The communications blackout violated Plaintiffs' First Amendment right to freedom of speech (Claim 21)

It is well-established that even after being convicted of crime, "a prisoner does not shed … basic First Amendment rights at the prison gate. Rather, he retains all the rights of an ordinary citizen except those expressly, or by necessary implication taken from him by law." *Procunier v. Martinez*, 416 U.S. 396, 422-23 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989), (Marshall, J., concurring, citations omitted). In urging this Court to dismiss Plaintiffs' First Amendment claims, Defendants invoke *Turner,* 482 U.S. at 84, which sets forth the standard applicable to First Amendment challenges by convicted prisoners:

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[67] The primary cases relied on by Defendants involve decisions squarely within Congress's plenary power to regulation admission or exclusion of non-citizens. *See* Defs. Br. at 68-69, citing *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (applying deferential standard of review to government's decision to deny entry to Belgium Marxist); and *Fiallo v. Bell*, 430 U.S. 787 (1977) (applying deferential standard to uphold statute regarding admission of relatives of United States citizens and residents). *Mathews v. Diaz*, 426 U.S. 67 (1976), involved the legitimacy of distinguishing between citizens and non-citizens in federal benefits, and has nothing to do with affirmative intrusions on First Amendment or due process rights. *See Demore*, 538 U.S. at 547.

infringements must be reasonably related to a legitimate penological interest. *See* Defs. Br. at 70-71. Plaintiffs are not convicted prisoners, but immigration detainees, and therefore *Turner*'s reasonableness standard may be an inappropriate guide. However, even under the *Turner* standard urged by Defendants, Plaintiffs have clearly stated a claim for relief. *Benjamin v. Fraser,* 264 F.3d 175, 187 n.10 (2d Cir. 2001) (recognizing the potential inapplicability of the *Turner* standard to analysis of the First Amendment rights of pretrial detainees, yet upholding plaintiffs' claims because the challenged policies could not survive scrutiny even under *Turner* analysis).[68]

Defendants argue that "concern over communications between possible terrorists and potential escape and attack plans" supported the communications blackout and other restrictions on speech and communication. Defs. Br. at 71. But they proffer no evidence that Plaintiffs, *who they had no basis to believe had any connection to terrorists,* posed that threat. Security is certainly a legitimate governmental interest, but courts will not accept conclusory assertions of danger or threat, nor do such assertions end the *Turner* inquiry (especially at the motion to dismiss stage). Rather, Defendants must demonstrate a "valid and rational connection" between the specific restriction imposed and a legitimate administrative goal.[69]

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[68] Under *Turner*, reasonable relation is determined through analysis of four factors: (1) whether there is a valid and rational connection between the regulation and a neutral and objective governmental interest; (2) whether there are alternative means of exercising the constitutional right; (3) whether the asserted right will have an impact on other inmates, prison guards, or the allocation of prison resources; and (4) whether the regulation represents an exaggerated response to prison concerns, evidenced by the availability of ready alternatives to the regulations. *Turner*, 482 U.S. at 89-91.

[69] *See, e.g., Allen v. Coughlin*, 64 F.3d 77, 80 (2d Cir. 1995) (reversing summary judgment because regulation applying publisher-only rule to newspaper clippings was not substantiated by evidence that clippings are any more threatening to prison security than ordinary correspondence); *Breland v. Goord*, 1997 WL 139533, at *3 (S.D.N.Y. Mar. 27, 1997) ("defendants cannot merely brandish the words 'security' and 'safety' and expect that their (continued…)

Plaintiffs have alleged that they posed no threat to prison security, and that Defendants had no objective basis to assume otherwise. Third Am. Compl. ¶¶ 16-22, 65; 105; OIG Rep. at 14, 16, 18-19. The question, then, is whether it is reasonable to restrict the communications of persons whom the Defendants had *no objective basis to believe posed any threat whatsoever.* That question answers itself. It is not reasonable to limit communications of a person on security grounds where one has no basis for believing that the individual poses any security threat. Moreover, even if Defendants could point to some threat posed by Plaintiffs, they would still have to show that the threat justified the extremely strict restrictions on Plaintiffs' freedom of speech and communication. Prison restrictions may be "no more intrusive than reasonably necessary in order to effectuate legitimate policies and objectives." *Lawrence v. Goord*, 2000 WL 1448672, at *3 (E.D.N.Y. Sept. 19, 2000), citing *Procunier*, 416 U.S. at 412.

b. The communications blackout violated Plaintiffs' First and Fourth Amendment right to access to the courts (Claim 22)

Plaintiffs have also adequately pled a violation of the right of access to the courts. The right of access to the courts is "well-established." *Lewis v. Casey*, 518 U.S. 343, 350 (1996). Indeed, it is "the right conservative of all other rights, [which] lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). The Supreme Court recognized an inmate's right of access to the courts more than fifty years ago in *Ex Parte Hull*, 312 U.S. 546, 549 (1941), holding that prison officials cannot impose themselves as barriers between prisoners and the courts when inmates are seeking to challenge their criminal

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actions will automatically be deemed constitutionally permissible conduct …. There must be some showing that the regulation does promote the claimed penological objective."), citing *Campos v. Coughlin*, 854 F. Supp 194, 207 (S.D.N.Y. 1994).

convictions. In *Bounds v. Smith*, 430 U.S. 817, 828 (1971), the Court held that the right of access to the courts is so fundamental that prison officials have an affirmative obligation to ensure that it is maintained.

At its core, the constitutional right protects against governmental action "actively interfering" with a person's ability to press a legal claim in the courts. *Lewis*, 518 U.S. at 349-50; *Procunier*, 416 U.S. at 419-20. Depriving a prisoner of access to legal counsel is tantamount to denying him access to the courts. *Procunier*, 416 U.S. at 419. Thus, in *Bounds,* the Court invalidated a ban on prisoners' provision of legal assistance to their fellow inmates because it "effectively prevented prisoners who were 'unable themselves, with reasonable adequacy, to prepare their petitions,' from challenging the legality of their confinements." 430 U.S. at 823 (quoting *Johnson v. Avery*, 393 U.S. 483, 489 (1969)).

Plaintiffs have alleged a violation of their fundamental right of access to the courts, not a violation of their access to derivative rights.[70] For this reason, Defendants are incorrect in asserting that to prevail, Plaintiffs must show that a non-frivolous legal claim was prejudiced. *Benjamin,* 264 F.3d at 185 ("…where the right at issue is provided directly by the Constitution or federal law, a prisoner has standing to assert that right even if the denial of that right has not produced an 'actual injury.'"). In *Lewis*, 518 U.S. at 350, the Supreme Court held that a Plaintiff who complains only of violation of a *derivative right* (such as access to the law library) must allege some harm to a non-frivolous legal claim or some other hindrance to establish the

[70] The constitutional right of access to the courts gives rise to a number of derivative rights, including the right to access legal materials needed to prepare certain cases, and to send and receive legal mail. *Amaker v. Goord,* 2002 WL 523371, at *11 (S.D.N.Y. Mar. 29, 2002) (distinguishing a violation of the First Amendment right to access the courts from violations of derivative rights); *see also, Benjamin v. Fraser*, 264 F.3d 175, 185 (2d Cir. 2001) (explaining distinction between constitutional right to court access and derivative rights).

"actual injury" necessary for standing to sue. *Id.* at 350-51; *Benjamin*, 264 F.3d at 185. But the Court also noted that meaningful access to the courts is provided for directly by the Constitution, and thus its infringement is actual injury in itself. *Lewis,* 518 U.S. at 350; *Benjamin,* 264 F.3d at 184-85; s*ee also Amaker,* 2002 WL 523371, at *11.[71]

Christopher v. Harbury, 536 U.S. 403 (2002), does not disturb the distinction between direct constitutional violations and derivative violations. Like the other cases relied on by defendants, *Christopher* does not involve a direct violation of the constitutional right of access to the courts. Rather, the case involved allegations that the defendants' lies and concealments left Harbury without the proper information (or reason to seek information) to access the courts to save her husband's life. *Id.* at 405. Her claimed entitlement to truthful information is a *derivative right,* just as a prisoners' right to access the law library is derivative. Harbury did not and could not claim that defendants actually obstructed her access to the courts, but only that defendants denied her information that in turn might have been useful had she filed a legal claim. Here, by contrast, Defendants' actions in physically detaining Plaintiffs and blocking their access to attorneys and the outside world affirmatively interfered with their ability to access courts at all. [72]

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[71] None of the cases cited by Defendants in support of their "actual injury" argument are based on the direct denial of the right of access to the courts. *See* Def. Br. at 71-73. In *Davis v. Goord,* for example, a prisoner complained that on two occasions his legal mail was opened by guards in his absence, and these incidents constituted a violation of his right of access to the courts. 320 F.3d 346 (2d. Cir. 2003). This is not a denial of the right to counsel, much less the complete blackout of attorney-client and all other forms of communication revealed in the OIG Report. OIG Rep. at 18, 113-114.

[72] Defendants' statement that "a few weeks delay" is "as a matter of law" insufficient to state a constitutional violation misreads both the law and Plaintiffs' factual allegations. Defs. Br. at 73. It is true that a short period of delay may not violate the Constitution if the court determines that the policy causing the delay is reasonably related to a legitimate penological interest, but that determination cannot be made on the allegations of the complaint, which must be accepted as (continued…)

c. Defendants' actions violated Plaintiffs' First Amendment right to freedom of religion (Claim 7)

Plaintiffs have also adequately stated a claim for interference with their freedom of religion. Among other things, Defendants inflicted verbal and physical religious-based abuse upon Plaintiffs, denied them Halal food and access to the Koran, and obstructed their daily prayers. Third Am. Compl. ¶¶ 128, 155, 157-58, 193, 207, 229, 268. Absent justification, such practices violate clearly established First Amendment rights. *Benjamin v. Coughlin*, 905 F.2d 571, 576-77 (2d Cir. 1990).

Defendants complain that Plaintiffs' claims of a "high-level policy" to deprive them of their religious liberty is inconsistent with Plaintiffs' allegations that Defendants' actions violated "federal policy." Defs. Br. at 52. But this is not a case challenging the adequacy of BOP regulations protecting prisoners' freedom of religion. Rather, Plaintiffs challenge a high-level policy adopted, promulgated, and implemented by Defendants, to *disregard* the Code of Federal Regulations and deprive them of their freedom of religion. Finally, since Plaintiffs were not allowed to see the MDC handbook explaining their rights (Third Am. Compl. ¶130, OIG Rep. at 148-49) as required and implemented by the C.F.R., they can hardly be blamed if they did not

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true at this stage. Moreover, Plaintiffs have alleged more than a few weeks delay. The MDC Plaintiffs have alleged that they were initially held absolutely incommunicado, with no ability to contact family, friends, or lawyers. Third Am. Compl. ¶ 87, 155, 173, 207, 229. They were not allowed to place any phone calls for over a month, and then only allowed use of the phone very infrequently. *Id.* at ¶¶ 90-92, 95. Plaintiff Baloch, for example, was not able to use the phone, or otherwise contact an attorney for six weeks. *Id.* at ¶ 220. Plaintiff A. Ibrahim was similarly restricted, despite having scheduled court dates. *Id.* at ¶¶ 230-31, 243-44, 246. When Plaintiffs Ebrahim, H. Ibrahim, Baloch and Jaffri were finally able to meet with their attorneys, those meetings were videotapes and recorded, interfering with their ability to speak candidly. *Id.* at ¶¶ 99, 220. At Passaic, Plaintiff Turkmen was also kept from communicating with family members and attorneys. *Id.* at ¶¶ 267, 269.

request religious accommodations "appropriately." *See* Def. Br. at 52. The adequacy of Plaintiffs' specific requests is an issue of fact inappropriate for determination on this motion.[73]

4. Plaintiffs' Claim Challenging the Policy of Permanently Confiscating Personal Property from Plaintiffs and Class Members, is Supported by Sufficient Allegations and Is Not Foreclosed by Postdeprivation Remedies under the FTCA (Claim 8)

Defendants argue that Plaintiffs' due process claims for confiscation of personal property fail because the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 ("FTCA"), provides adequate postdeprivation corrective process, allowing compensation for intentional as well as inadvertent losses of property. Defs. Br. at 53. Where, as here, a deprivation of property is not random and unauthorized, but is the result of an "established state procedure," *Parratt v. Taylor*, 451 U.S. 527, 541 (1981),[74] such as where senior officials participate in the deprivations, post-deprivation procedures will not satisfy due process.[75]

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[73] *C.f., Omar v. Casterline*, 288 F. Supp. 2d 775, 782 (W.D. La. 2003) (declining to dismiss post September 11 detainee's allegations of violations of his freedom of religion due to existence of material issues of fact regarding whether the detainee requested a specific diet, informed the chaplain of his dietary needs, and had ways to tell the time of day in his cell).

[74] Susan Bandes, Monell, Parratt, Daniels, and Davidson, *Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 Iowa L. Rev. 101, 111 n.80 (1986) ("When the government acts pursuant to statute, custom, or policy, its acts are authorized, and thus not barred by *Parratt*.").

[75] *Dwyer v. Regan*, 777 F.2d 825, 832 (2d Cir. 1985), *modified*, 793 F.2d 457 (2d Cir. 1986), citing *Burtnieks v. City of New York*, 716 F.2d 982, 988 (2d Cir. 1983) ("decisions made by officials with final authority over significant matters, which contravene the requirements of a written municipal code, can constitute established state procedure" for purposes of the analysis required by *Parratt*); *see also R.R. Village Assoc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1204 (2d Cir. 1987).

Other circuits have also held that deprivations effected by a conspiracy of officials are not subject to postdeprivation redress under *Parratt*. *See Labov v. Lalley*, 809 F.2d 220, 223 (3d Cir. 1987) (*Parratt* does "not apply to charges of intentional conspiratorial conduct under color of state law."); *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc) ("by definition, a conspiracy ... cannot be a random act, even if it was accomplished without the endorsement of the state governmental apparatus.").

In the case at hand, Defendant prison wardens Hasty and Zenk would certainly qualify as sufficiently high level officials, as would Ashcroft, Mueller, and Ziglar.[76] The associate warden, captain and lieutenants, are also plainly "more senior officials" (under *Dwyer*, 777 F.2d at 832) than the mail clerk and guard in *Parratt* and *Hudson*.

Plaintiffs allege that personal identification documents and other items were confiscated as part of a policy and practice in which the highest level defendants were complicit. "By adopting, promulgating and implementing this policy and practice, Defendants Ashcroft, Mueller, and Ziglar, and others have intentionally violated" Plaintiffs' Fifth Amendment rights. Third Am. Compl. ¶6. Where, as here, an intentional practice of which high-level officials were aware is alleged, no post-deprivation remedy will suffice to satisfy due process,[77] and *Parratt* is inapplicable.

There are sufficiently specific facts pled in the Complaint to indicate that an organized policy was at work in the deprivations of property. One would ordinarily expect the government to have safekeeping procedures for tracking important personal possessions, such as identity documents. Yet here, the Plaintiffs never got back important possessions including identity

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[76] *See Clow v. Deily*, 953 F. Supp. 446, 452-53 (N.D.N.Y. 1997) (Police Commissioner's actions not "random or unauthorized" under *Dwyer*); *Dworkin v. City of New York*, 1996 WL 673815 (S.D.N.Y. 1996) (actions foreseeable under *Parratt*, *Dwyer* where taken by officials with final authority over deprivation); *Cifarelli v. Village of Babylon*, 894 F. Supp. 614, 620 (S.D.N.Y. 1995) (same).

[77] Essentially, this is because it deprives a plaintiff of a *substantive* due process right to be free of such intentional deprivations, so that the adequacy of the post-deprivation remedial procedures as a matter of *procedural* due process is irrelevant. *Cf. Parratt*, 451 U.S. at 545 (Blackmun, J., concurring); *id*. at 552-53 (Powell, J., concurring in result). Notice to the Defendants is therefore irrelevant to these claims, as no postdeprivation corrective process may remedy these due process violations. *Cf.* Defs. Br. at 53 (alleging plaintiffs failed to file claims with agency under 28 C.F.R. § 543.30 before instituting this suit).

documents.[78] Deprivations of identity documents might facilitate the continuing investigation, and limit Plaintiffs' mobility in their home countries,[79] supplying a motive. Defendants continue to hold identity documents and other possessions for several pLaintiffs, and, to date, have refused repeated requests to return these items, despite the fact that many of them were found in the FBI and INS's custody as early as December 13, 2002.

V. PLAINTIFFS' INTERNATIONAL LAW CLAIMS ARE PROPERLY ASSERTED AGAINST THE INDIVIDUAL DEFENDANTS.

Defendants' challenge to Claims 9, 10 and 11, all based on international law, is based entirely on the proposition that the United States should substituted as defendant in place of all individual defendants on these claims. Defs. Br. at 74-79. Plaintiffs demonstrate that there should be no substitution in their separate memorandum submitted in opposition to the motion of the United States for substitution.

VI. PLAINTIFFS HAVE STATED CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT

Plaintiffs pursue claims under the FTCA for false imprisonment, negligent delays in their release as a result of the slow clearance process, conversion, and denial of medical treatment. The Unites States moves to dismiss these claims for a variety of reasons, none of which bear scrutiny.

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[78] *See* Third Am. Compl. ¶¶ 153, 166 (Saffi), ¶¶ 172, 180 (Jaffri), ¶¶ 203, 213 (Baloch), ¶¶ 284, 286 (Sachdeva).

[79] *See, e.g.*, Third Am. Compl. ¶ 167 (Saffi had difficulty traveling due to deprivation of identity papers).

A. Plaintiffs Have Stated a Claim for False Imprisonment Under the FTCA (Claim 24)

Defendants argue that Plaintiffs were not falsely imprisoned for two reasons: first, the MDC Defendants who had physical custody of Plaintiffs acted under facially valid commitment papers from the INS, Defs. Br. at 81-83, and second, the INS, which had legal custody, was authorized to detain them for their immigration violations, *id.* at 83 n.40. Neither argument provides a basis for dismissal.

It is no defense that one United States employee rather than another was at fault.[80] As shown in Point IV.A above, Plaintiffs' INS detention was not only unlawful but unconstitutional. Detention pending removal proceedings is authorized only where there is evidence of dangerousness or flight risk, and detention after issuance of an order of removal is authorized only where necessary to effectuate removal. Here, Plaintiffs were detained without evidence of danger or flight risk, and well beyond the point necessary to effectuate their removal. Their detention was therefore without privilege and unlawful.[81] *See Broughton v. State*, 37 N.Y.2d 451, 456 (N.Y. 1975) (stating elements for unlawful imprisonment).

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[80] Although only the MDC Defendants are specifically identified under the heading "Twenty-Fourth Claim" (*see* ¶ 415), that claim is specifically asserted under the Federal Tort Claims Act, and is therefore asserted against the United States. 28 U.S.C. § 1346(b)(1); Third Am. Compl. ¶ 13. The false imprisonment claim also incorporates all prior allegations (¶ 414), which outline in detail how Plaintiffs came to be detained beyond the time necessary for their deportation. *See*, *e.g.*, Third Am. Compl. ¶¶ 1(e); 2; 54(e). In determining whether Plaintiffs have stated a claim for false imprisonment, the Court is not limited to one particular paragraph of the Third Amended Complaint but should consider it as a whole. *See*, *e.g.*, *In re Boesky Securities Litig.*, 882 F. Supp. 1371, 1375-76 (S.D.N.Y. 1995) (finding complaint stated claim for RICO and Exchange Act violations against two defendants not specifically mentioned in paragraph of complaint setting forth violations, where paragraph incorporated by reference all previous allegations of the complaint and earlier allegations described a course of conduct by those defendants entitling plaintiffs to relief against them).

[81] Neither can Defendants rely on Operational Orders promulgated by Michael Pearson of the INS. OIG Rep. at 43-45. Internal agency guidelines are advisory only and have no force of law. *See*, *e.g.*, *Fano v. O'Neill*, 806 F.2d 1262 (5th Cir. 1987).

B. Plaintiffs Have Stated a Claim for Negligent Delay of Their Clearance (Claim 25)

In Claim 25, Plaintiffs challenge their extended detention, alleging that their lengthy post-removal detentions were caused by undue delay and negligence on the part of those charged with completing their clearance checks. Third Am. Compl. ¶¶ 418-421. Defendants seek to dismiss this claim for negligent clearance of Plaintiffs and delay of their release on the ground that the United States had discretion to delay clearance. Defs. Br. at 83-90.

This argument rests on a misreading of the "discretionary function exception" to FTCA liability contained in 28 U.S.C. § 2680(a). That exception applies only to discretionary*, policy-based judgments intended to further policy objectives*, and not to negligence within the scope of an agent's responsibility but not grounded in policy objectives.

In *Coulthurst v. United States*, 214 F.3d 106 (2d Cir. 2000), the Second Circuit set forth the governing *Berkovitz-Gaubert* test for applying the discretionary function exception to particular conduct. *Id.* at 108-09. The exception bars suit only if: "(1) the acts alleged to be negligent [are] discretionary, in that they involve an 'element of judgment or choice' and are not compelled by statute or regulation and (2) the judgment or choice in question [is] grounded in 'considerations of public policy' or susceptible to policy analysis." *Id.* at 109 (*quoting United States v. Gaubert*, 499 U.S. 315, 322-23 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988)). "It is not enough to establish that an activity is not mandated by statute and involves some element of judgment or choice; to obtain dismissal of the suit, the United States must also establish that the decision in question was grounded in considerations of public policy." *Coulthurst*, 214 F.3d at 110. "There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary

function exception because those acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish." *Gaubert*, 499 U.S. at 325 n.7.

In *Coulthurst*, a federal inmate sued the United States for injuries sustained when the cable on a prison exercise machine he was using snapped. 214 F.3d at 107. Plaintiff alleged that prison officials had negligently failed to maintain the machine in safe condition despite an internal BOP guideline requiring periodic inspections. *Id.* at 108. The district court construed the complaint as challenging "decisions establishing the procedures and frequency of inspection—decisions themselves involving elements of judgment or choice and a balancing of policy considerations," satisfying both prongs of the discretionary function exception. *Id.* at 109. The Second Circuit vacated and remanded, finding that plaintiff's allegations could be read to challenge not the policies or procedures governing the frequency or manner of inspection of the machines, but rather the negligent failure (because of "laziness or haste") to conduct any inspections whatsoever; or negligence in having conducted inspections while "distracted or inattentive," such that the frayed cable went unnoticed; or negligently failing to repair the frayed cable in spite of an awareness of its condition because of a desire not to have to make the repairs or complete the necessary paperwork. *Id.* The court held that such actions, though discretionary, would not be protected under the discretionary function exception.

To invoke the discretionary function exception here, Defendants must show that each Plaintiff's prolonged detention was not the result of negligence, but of (1) a deliberate decision (2) grounded in or informed by some policy objective. *See Coulthurst*, 214 F.3d at 109. Generalized neglect, disorganization, poor inter-agency communication, or the simple failure to follow up on leads in a timely manner, do not fall within the exception. Because Plaintiffs allege

precisely this sort of non-immunized, non-policy-based negligence, they have stated a claim for negligent delay. *See Coulthurst*, 214 F.3d at 110-11.

There is ample evidence that the delays were often due to FBI and INS negligence. The OIG Report recounts a pattern of negligence in connection with the handling of the "clearance" investigations by both the INS and the FBI. For example, with respect to detainees "arrested on PENTTBOMB leads but who had no additional indications of a connection to terrorism"—a category including Plaintiffs—clearances that were supposed to take only "a few days" or at most, a few weeks, OIG Rep. at 46, took an average of 80 days, and as long as 244 days, *id.* at 46, 51-52, Table 3. Although FBI Headquarters notified the New York Office about upcoming detainee bond hearings, this information was not communicated to the agents doing the clearance investigations. *Id.* at 57. The New York Field Office of the INS failed to comply with eleven Operational Orders issued by INS Executive Associate Commissioner for Field Operations Michael Pearson regarding the procedures for handling of the September 11 detainees, including the sharing of information about detainees between the New York Field Office and INS Headquarters, which contributed to delays in clearing detainees. *Id.* at 43-45, 53-57. Delays in CIA name checks were caused by "a failure by the FBI or INS to submit complete information." *Id.* at 59.

The OIG Report also details unexplained delays long after the completion of clearance investigations: three-and-a-half months in one case, *id.* at 62-64, two-and-a-half months in another, *id.* at 64, and three months "due to an administrative oversight" in another, *id.* at 64-65. There was evident negligence in each of these cases, which the OIG Report presents as "examples." *Id.* at 62. Similarly, Plaintiff Saffi was held for four months after FBI clearance, and Plaintiffs Ebrahim and H. Ibrahim for nearly six months. Third Am. Compl. ¶¶ 163, 166,

190, 199. Overall, the OIG Report "criticize[s] the *indiscriminate* and *haphazard* manner in which the labels of 'high interest,' 'of interest,' or 'of undetermined interest' were applied to many aliens who had no connection to terrorism"—language clearly indicating negligence, and not a policy-based discretionary judgment. OIG Rep. at 70 (emphasis added).

Courts have routinely held that decisions by law enforcement to detain individuals and the lengths of their detentions do not fall within the discretionary function exception. *See Dawoud v. United States*, 1993 U.S. Dist. LEXIS 2682, *7-*8 (S.D.N.Y. 1993) (immigration officials); *Velez v. United States*, 693 F. Supp. 51, 57-58 (S.D.N.Y. 1988) (Customs service); *Nguyen v. United States*, 2001 WL 637573, *7-*10 (N.D. Tex. 2001) (immigration officials); *Caban v. United States*, 728 F.2d 68, 75 (2d Cir. 1984) ("*Caban II*") (immigration officials); *Hyatt v. United States*, 968 F. Supp. 96, 108-10 (E.D.N.Y. 1997) (DEA agents) (government grossly negligent for 99-day detention of plaintiff based on "absolutely unreasonable" mistaken identity; awarding $297,000 to plaintiff for false imprisonment under FTCA); *Gallegos v. Haggerty*, 689 F. Supp. 93, 105 (N.D.N.Y. 1988) (denying summary judgment for defendants in false imprisonment suit based on actions of border control agents in searching and detaining plaintiffs).

The Second Circuit has explicitly found that the activities of INS agents who detain applicants at the border "are not the kind that involve weighing important policy choices," and therefore do not fall within the discretionary function exception. *Caban v. United States*, 671 F.2d 1230 (2d Cir. 1982 ("*Caban I"*)at 1233. Reversing summary judgment for the government based on the discretionary function exception and finding subject matter jurisdiction, the court explained,

> While it is true that the pertinent statutes and regulations vest immigration officials with broad discretion by defining an

> applicant's entry rights in terms of how he "appear[s]" to the immigration officer, § 1225(b), and whether the INS agent is "satisfy[ied]" with his proof of entitlement to enter, 8 C.F.R. § 235.1 (1980), that language only goes to the standard of care by which the INS employees' behavior is judged. The quoted language does not convert the discharge of responsibilities into decisions which involve a choice between competing policy considerations….

671 F.2d at 1233 (internal quotation marks omitted).

Defendants' cases involving lengthy delays in clearance investigations, Defs. Br. at 87-90, are readily distinguishable. They concern situations in which the target of a criminal investigation remains *at liberty* for a long period of time while under a "cloud of suspicion," as law enforcement authorities attempt to gather evidence. Under those circumstances, there is no duty to promptly arrest or indict. But it does not follow that where individuals are detained, any amount of delay, inefficiency, or negligence in performing "clearance" investigations is legally tolerable. At a minimum, the government owed Plaintiffs an affirmative duty of dispatch, to work diligently to investigate whether there was any basis to detain Plaintiffs.

The Court should reject Defendants' attempt to elevate the pedestrian responsibilities of law enforcement officers following up on leads and entering names into databases into weighty decisions fraught with policy implications such that they should be immunized from judicial review. Its efforts to cloak an "indiscriminate and haphazard" pattern of abuse with the garb of a "policy" decision should be rejected.

C. Plaintiffs Have Stated a Claim for Conversion Under the FTCA (Claim 30)

Claim 30 asserts that Defendants unlawfully converted Plaintiffs' property. Seeking to avoid this conversion claim, Defendants read the FTCA's "detention of goods" exception to immunize any seizure of property whatsoever, by any law enforcement officer whatsoever. Defs. Br. at 90-93. While some courts have moved in this direction, it is not the law in the

Second Circuit. Indeed, Defendants' construction would "preclude[] a broader spectrum of suits to redress injury to property inflicted by federal law enforcement officers, whenever and wherever they are acting, than … Congress ever intended." *Formula One Motors Ltd. v. United States*, 777 F.2d 822, 825 (2d. Cir. 1985) (Oakes, J., concurring). "[S]uch a broad reading of § 2680(c)'s exception would swallow up Congress' waiver of immunity, given the potential number of federal law enforcement officials in our government's alphabet soup—i.e., the DEA, EPA, FBI, FDA, FTC, INS, OSHA, SEC or USDA, to name a few." *Ortloff v. United States*, 335 F.3d 652, 659 (7th Cir. 2003).

Section 2680(c) excepts from the FTCA's waiver of sovereign immunity:

> Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer ….

The question posed by this language is whether the tag-line "or any other law enforcement officer" converts a provision specifically addressed to the detention of property for customs or tax assessments into a provision covering essentially any government seizure of property.[82] Neither the Supreme Court nor the Second Circuit has ever held that "any other law enforcement officer" applies to agents of the FBI, INS, or BOP, or to the circumstances at bar. In *Kosak v. United States*, 465 U.S. 848, 853 n.6, 852-62 (1984), the Supreme Court expressly declined to decide "what kinds of 'law-enforcement officer[s],' other than customs officials, are covered by the exception." In *Formula One*, the Second Circuit held that § 2680(c) applies to DEA agents engaging in a "customs-like" search of vehicle in transit from overseas for narcotics, finding the agents' actions "sufficiently akin to the functions carried out by Customs officials to place

[82] If the only limit is a connection to "law enforcement," there is effectively no limit; if a seizure is authorized at all it will be related to the "enforcement" of some "law."

[them] within the scope of section 2680(c)"; but it expressly declined to decide "whether the exemption would apply to searches by law enforcement officers with no relationship to the customs or excise functions." 777 F.2d at 823-24. Concurring in the judgment, Judge Oakes argued persuasively for the exception's limitation to the tax and excise context. Noting that the DEA agents in question were "acting in a border or customs search," he stated, "[W]here no nexus exists between customs activity and the act complained of, I would hold that § 2680(c) does not bar recovery. Otherwise, the detention exception, as expansively read in *Kosak*, precludes a broader spectrum of suits to redress injury to property inflicted by federal law enforcement officers, whenever and wherever they are acting, than I believe Congress ever intended." *Id.* at 825.

The same view has been taken by the Sixth, Seventh and D.C. Circuits, relying on the text of the statute and the interpretive doctrines of *ejusdem generis* ("[o]f the same kind, class, or nature") and *noscitur a sociis* ("[i]t is known from its associates").[83] *Ortloff*, 335 F.3d at 657-60; *Buzuaye v. United States*, 83 F.3d 482, 483-86 (D.C. Cir. 1996); *Kurinsky v. United States*, 33 F.3d 594, 596-98 (6th Cir. 1994). In *Buzuaye*, the D.C. Circuit also invoked the historical context of § 2680(c), holding that it exempts "only those claims arising from the actions of a federal law enforcement officer who, while not officially a customs or tax officer, is acting under the authority of the tax or customs laws." 83 F.3d at 483-86 In *Kurinsky*, the Sixth Circuit called attention to the use of the word "detention" rather than "seizure," holding that § 2680(c) is

[83] Under the doctrine of *ejusdem generis*, "a general term should be understood in light of the specific terms that surround it." *Kurinsky*, 33 F.3d at 596-97 (citing *Hughey v. United States*, 495 U.S. 411, 419 (1990)). Similarly, under the principle *noscitur a sociis*, "a general term is interpreted within the context of the accompanying words 'to avoid the giving of unintended breadth to the Acts of Congress.'" *Id.* at 597 (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

limited to the detention of goods by law enforcement officers acting in a tax or customs capacity. 33 F.3d at 596-98 *See also Hydrogen Technology Corp. v. United States*, 831 F.2d 1155 (1st Cir. 1987), *aff'g* 656 F. Supp. 1126 (D. Mass. 1987) (finding § 2680(c) inapplicable because examination of hydrogen generator that rendered it unusable was conducted by FBI and was unrelated to any customs or excise function); *A-Mark, Inc. v. United States Secret Service*, 593 F.2d 849, 850-51 (9th Cir. 1978) (Tang, J., concurring) ("The 'any other law-enforcement officer' phrase should be viewed as Congress' recognition of the fact that federal officers, other than customs and excise officers, sometimes become involved in the activity of detaining goods for tax or customs purposes.").

As the court in *Kurinsky* noted, many of the courts reaching a contrary result have done so with little or no analysis of the exception and without articulating a clear rationale. 33 F.3d at 598 (*citing Halverson v. United States*, 972 F.2d 654 (5th Cir. 1992); *Cheney v. United States*, 972 F.2d 247 (8th Cir. 1992); *Schlaebitz v. United States Dep't of Justice*, 924 F.2d 193 (11th Cir. 1991); *Ysasi v. Rivkind*, 856 F.2d 1520 (Fed. Cir. 1988); *United States v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481 (10th Cir. 1984); *United States v. Lockheed L-188 Aircraft*, 656 F.2d 390 (9th Cir. 1979)); *see also Ortloff*, 335 F.3d at 659-60 ("While the quantity of circuits favors the government's position, the quality of decisions favors Ortloff's view: The circuits that have held that § 2680(c) applies to all other law enforcement officers have failed to consider the 'any other law enforcement officer' language in context or in light of the principles of *ejusdem generis* and *noscitur a sociis*.").[84]

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[84] Contrary authority includes *Bramwell v. U.S. Bureau of Prisons*, 348 F.3d 804, 806 (9th Cir. 2003) (BOP officials within § 2680(c)); *O'Ferrell v. United States*, 253 F.3d 1257, 1271 (11th Cir. 2001) (holding without discussion that "any other law enforcement officer" as provided in § 2680(c) applies to "officers in other agencies performing their proper duties"), and, within the (continued…)

Many of the cases cited by Defendants are simply inapposite or do not apply § 2680(c) to law enforcement officers functioning outside of a tax, customs, or excise capacity. For example, *Frederick v. United States*, 2003 WL 21738597, *3 (E.D.N.Y. 2003), and *Adeleke v. United States*, 355 F.3d 144, 153 (2d Cir. 2004), involved property detained by Customs officers, and *Rufu v. United States*, 876 F. Supp. 400, 405-06 (E.D.N.Y. 1994), cited by Defendants, involved DEA agents conducting a "routine customs inspection" of "goods seized while still in transit from abroad." Defs. Br. at 92.

Section 2680(c)'s limitation to law enforcement officers acting in a tax, customs or excise capacity is confirmed by the exception's legislative history. *See* Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 3d Sess. 38 (1940) (testimony of Alexander Holtzoff, Special Assistant to Attorney General) ("The exception … relates to claims arising in respect of the assessment or collection of any tax or customs duty …."), quoted in *Formula One*, 777 F.2d at 825 (Oakes, J., concurring); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945) (House Judiciary Committee Report) (exception intended to cover "the assessment or collection of taxes or assessments; [and] the detention of goods by customs officers"), quoted in *Kosak*, 104 S.Ct. at 1525; S.Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946) ("These exemptions cover claims arising out of the loss or miscarriage of postal matter; the assessment or collection of taxes or assessments; [and] the detention of goods by customs officers …."), quoted in *A-Mark*, 593 F.2d at 852 (Tang, J., concurring), and cited in *Formula One*, 777 F.2d at 825 (Oakes, J., concurring); H.R. Rep. No.

Second Circuit, *Deutsch v. United States*, 2004 WL 633236, *7-*8 (E.D.N.Y. 2004); *Hallock v. United States*, 253 F. Supp. 2d 361, 364-66 (N.D.N.Y. 2003); *Garnay, Inc. v. M/V Lindo Maersk*, 816 F. Supp. 888, 897 (S.D.N.Y. 1993); *Schreiber v. United States*, 1997 WL 563338, *6-*7 (S.D.N.Y. 1997). None are binding here.

2245, 77th Cong., 2d Sess. 10 (1942) (same), *cited in Formula One*, 777 F.2d at 825 (Oakes, J., concurring).

Finally, even if § 2680(c) applies to "law enforcement officers" without limitation, it should not apply to the type of conduct at issue here: the permanent deprivation of Plaintiffs' property for no legitimate law enforcement purpose. On this motion Defendants offer no excuse for its retention of Plaintiffs' property; to the contrary, the defense asserted here is that it need not account for it. Section § 2680(c) was not intended to immunize the government's permanent appropriation of personal property by fiat.

D. Plaintiffs Baloch, Saffi, and A. Ibrahim Have Exhausted Their Administrative Remedies With Respect to Their Claim Of Denial Of Medical Treatment (Claim 26)

Defendants argue that the FTCA claims of Plaintiffs Baloch, Saffi, and A. Ibrahim for denial of medical treatment (Claim 26.) should be dismissed for failure to exhaust administrative remedies. Defs. Br. at 94-97. They claim that while Plaintiffs filed administrative claims, they failed to specify that they were complaining about denial of medical treatment.

This elevates form over substance. The statutory requirement is that an action may not be brought against the United States for money damages under the FTCA "unless the claimant shall have first presented the claim to the appropriate Federal agency in writing and his claims shall have been finally denied by the agency in writing . . . ." 28 U.S.C. § 2675. The Second Circuit has held that the purpose of § 2675 is to "provide a procedure under which the government may investigate, evaluate, and consider settlement of a claim. This purpose requires that the Notice of Claim provide sufficient information both to permit an investigation and to estimate the claim's worth." *Keene Corp. v. United States*, 700 F.2d 836, 842 (2d Cir. 1983). "Section 2675(a) does not require formal pleading … but only the basic elements of notice of accident and injury and a sum certain representing damages so that the agency may investigate it." *Johnson v. United*

States, 788 F.2d 845, 849 (2d Cir. 1986) (internal quotation marks and citations omitted); *Murrey v. United States*, 73 F.3d 1448, 1452 (7th Cir. 1996) (Posner, J.) (fact that failure to file a timely administrative claim has fatal consequences "argues for greater liberality in determining whether the administrative claim is adequate"); *Lopez v. United States*, 758 F.2d 806, 809 (1st Cir. 1985) ("[T]he law was not intended to put up a barrier of technicalities to defeat … claims.").

Thus a claimant need not recite the particular legal theory under which he ultimately pursues relief or invoke a particular statute, so long as the agency has "enough information that it may reasonably begin an investigation of the claim." *Santiago-Ramirez v. Sec'y of Dep't of Defense*, 984 F.2d 16, 19-20 (1st Cir. 1993) (claimant's letter fulfilled statutory notice requirement despite fact that it did not "mention either the FTCA, negligence or tort" where it "state[d] the identity of appellant, the date of the incident, the location of the incident, the government agents involved, and the type of injury alleged"; noting precedents support "saving a claim that is flawed when the government's investigatory needs are satisfied."); *Sovulj v. United States*, 2003 WL 21524835, *3 (E.D.N.Y. 2003) (holding that letter of widow of Bureau BOP inmate to the BOP claiming only that her husband's "death was caused by the negligence of your faculty and staff" and claiming five million dollars in damages sufficient notice to the BOP to permit it to begin to investigate).

The administrative claims filed by Baloch, Saffi, and A. Ibrahim (*see* Defendants Exhibit C) describe the relevant circumstances leading to and occurring during Plaintiffs' detentions, and provide, as best they can, approximate dates and times and, where possible, the identities of the agents and officers in question. *See Santiago-Ramirez*, 984 F.2d at 19-20. Each claim specifically alleges physical injury to the Plaintiffs by Defendants. In investigating claims of physical injury, the government would necessarily review Plaintiffs' medical records while in

detention. Those medical records in turn are relevant to Plaintiffs' claims concerning medical treatment. Accordingly, Plaintiffs' administrative complaints are adequate to exhaust their claims with respect to their medical treatment because the "government's investigatory needs have been satisfied" by the notices. *See Santiago-Ramirez*, 984 F.2d at 19; *see also Dawoud*, 1993 U.S. Dist. LEXIS 2682 at *8- *9 (S.D.N.Y. 1993) (administrative claim alleging "false arrest, false imprisonment and personal injuries arising out of an unlawful arrest" sufficient was to exhaust claim for negligent infliction of emotional distress even though claim was not mentioned in administrative complaint); *Sciolino v. United States*, 2001 WL 266024, *3 (W.D.N.Y. 2001) (administrative claim by wife of patient treated in Veterans Affairs Medical Center after inadvertent overdose of medication allegedly caused by error by Veterans Affairs pharmacy in dispensing medication that "[w]ithin 24 hours of being admitted to [Veterans Affairs hospital], [claimant's husband] developed complications and had to be resuscitated" was sufficient to permit claim for medical malpractice against hospital in addition to claim of negligence by pharmacy even though complaint did not allege malpractice in connection with patient's treatment at hospital).

The administrative complaints of Baloch, Saffi, and A. Ibrahim gave Defendants sufficient notice of the particular incidents in question and the subject matter of the claims for them to initiate a proper investigation for purposes of settling the claims. This Court should not permit Plaintiffs' claims to be defeated by "technicalities." *Lopez*, 758 F.2d at 809.

CONCLUSION

Defendants' partial motion to dismiss the Third Amended Complaint should be denied, except as to Claims 4 and 6 and the requests for declaratory relief.

Dated: January 10, 2005
New York, New York

Respectfully submitted,

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Certificate of Service

I, Nancy Chang, certify that on January 10, 2005, I caused the foregoing Memorandum In Opposition To The Original Defendants' Motion To Dismiss The Third Amended Complaint in Turkmen v. Ashcroft, 02 CV 2307 (JG) (E.D.N.Y.) to be served electronically on the counsel for defendants listed below.

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