UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, *et al.*, Plaintiffs, v. JOHN ASHCROFT, *et al.*, Defendants.	)	Case No. 1:02-cv-02307-DLI-SMG

DEFENDANT DENNIS HASTY'S MEMORANDUM ADDRESSING THE BIVENS QUESTION REMANDED BY THE SUPREME COURT OF THE UNITED STATES

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INTRODUCTION

This case returns to this Court on remand from the Supreme Court of the United States and the United States Court of Appeals for the Second Circuit. *Ziglar v. Abbassi*, 137 S. Ct. 1843 (2017); Mandate, ECF No. 799. Now on the Fourth Amended Complaint (ECF No. 726) (the Complaint), it is presented as a purported class action by six individuals arrested after 9/11, designated as "of interest" by the FBI, and detained in the specially-established Administrative Maximum Special Housing Unit (ADMAX SHU) of the Metropolitan Detention Center (MDC). Virtually all of the original claims have been dismissed. At issue now is the remaining claim against former Warden Dennis Hasty, a purported "*Bivens*" claim asking him to pay damages personally on the theory that he was "deliberately indifferent to" unauthorized abuse of detainees by various guards under his general supervision.[1] *Ziglar*, 137 S. Ct. at 1873. The Supreme Court remanded the question whether *Bivens* should be extended to allow damages remedies to be imposed personally on a government official in the context of this case.

The Supreme Court explained why any extension of *Bivens* is "disfavored," and held that plaintiffs' claim here would extend *Bivens* to a "new context" where no such action has heretofore been allowed. *Id.* at 1865. For nearly four decades, courts have refused to extend *Bivens* because judicial creation of damages remedies against individuals in government service usurps Congress's authority and defies separation of powers principles. *Id.* at 1876. Therefore, any *Bivens* extension must survive "special factors" analysis to determine whether the decision to create such an action is better left to Congress; whether there is reason to think that Congress might not want courts to create such a remedy; and whether alternative remedies are available. *See id.* Because the Circuit mistakenly held that plaintiffs' claim did *not* involve a "new context," it did not conduct that analysis.

[1] Two additional defendants, Captain Salvatore LoPresti and Lieutenant Joseph Cuciti, remain in the case. They did not pursue appeals of this Court's Order on Defendants' Motions to Dismiss. ECF No. 767 (filed Jan. 15, 2013).

Id. at 1859. The Court therefore remanded to the Circuit, which remanded to this Court, to do so. *Id. at* 1865.

As the Second Circuit explained, the threshold for finding special factors that militate against a *Bivens* extension is "remarkably low." *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009). The combination of special factors present here easily meets that threshold. Those factors include:

(a) A well-conceived process in place for investigating allegations of abuse, within which the warden's responsibility and role is purposely limited. A process that requires a warden to stay his hand would be undermined by threatening to impose personal damages liability on him for doing so.

(b) On matters of both deterrence and the investigation of misconduct, the warden's superiors—in BOP and OIG—had overriding authority and involvement, making this type of damages action against the warden inapt.

(c) Congress had many opportunities to create a constitutional damages remedy in circumstances like this, but declined to do so. It did not do so in the Prison Litigation Reform Act, nor when it looked specifically at constitutional violations in connection with terrorism investigations under the USA PATRIOT Act, nor in the face of OIG's extensive reports concerning allegations of abuse at the MDC.

(d) The proposed cause of action would differ from any previous *Bivens* action. It would require second-guessing various judgment calls, supplanting lines of authority, and attenuated determinations of causation.

(e) Plaintiffs not only had remedial mechanisms available to them through BOP procedures, but they also had available injunctive remedies and damages remedies implemented by Congress under the Federal Tort Claims Act and the Westfall Act.

STATEMENT

A. Factual Background

The facts recited here are from the Complaint, two lengthy OIG Reports expressly incorporated by reference into the Complaint,[2] and several documents attached as exhibits.

[2] Pursuant to Section 1001 of the USA PATRIOT Act, Pub. Law 107-56, OIG issued a "Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks," made public in June 2003 (OIG Rep.). OIG then issued a "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, NY" in December 2003 (Supp. OIG Rep.). Both Reports were incorporated by reference in the Complaint "except where contradicted." Complaint ¶¶ 3 n.1, 4 n.2.

The circumstances under which plaintiffs were detained at the MDC after 9/11, and the conditions of their confinement, are set forth in prior opinions, including two by the Supreme Court: *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Ziglar*, 137 S. Ct. at 1852-53. Plaintiffs were arrested by the FBI following 9/11. OIG Rep. at 1. Each was designated by the FBI for incarceration under the most restrictive conditions permissible, and held "until cleared" in the ADMAX SHU, a specially-created unit of the MDC. *See* OIG Rep. at 116, 118.

Dennis Hasty was the warden of the MDC when the ADMAX SHU was first created and until April 2002. *Id.* at 117. The MDC is an enormous facility, housing around 2,500 inmates with a staff of over 500 in 2001.[3] The ADMAX SHU was one small part of the institution. Before any 9/11 detainee arrived, the administrative structure in place at the MDC was applied to the ADMAX SHU. James Sherman, Associate Warden, was responsible for custody operations in the ADMAX SHU. Compl. ¶ 26. Below him, with "responsibility for supervising all MDC correctional officers, including those that worked in the ADMAX," was the Captain, Compl. ¶ 27, "the highest-ranking correctional officer with direct responsibility for custody operations in the ADMAX SHU." OIG Rep. at 118, n.95. Beneath him (and beneath the Deputy Captain) is the SHU Lieutenant, who "is directly responsible for supervision of the staff members assigned to the [ADMAX] unit." 9/14 Memorandum, at 1, attached as Ex. A. The warden thus stood at a significant administrative distance from the line-level guards actually working in the ADMAX SHU accused of abuse.

There is no dispute that as a matter of policy and regulation, mistreatment of prisoners is prohibited. The earliest memoranda concerning SHU policy reminded MDC officers that:

> The staff members must perform their assigned duties in a professional manner at all times. They must not attempt to humiliate or provoke the suspected terrorists in any way, shape or form. Professionalism must be demonstrated at all times by the staff members while assigned to the unit.

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[3] *See, e.g.*, U.S. Dep't of Justice, Fed. Bureau of Prisons (BOP), State of the Bureau: Accomplishments and Goals (2001), at 31, *available at* https://www.bop.gov/resources/pdfs/sob01.pdf.

Id.; *see* 10/18 Memorandum, also attached as Ex. A.

MDC and BOP took "affirmative steps to prevent potential staff abuse by installing security cameras in each September 11 detainee's cell in the ADMAX SHU and by requiring MDC staff to videotape all movements of detainees to and from their cells." OIG Rep. at 149. BOP was initially concerned with possible falsely-asserted abuse claims because a training manual found by police in England urged terrorists to falsely claim mistreatment. *Id.* Thus, only days after 9/11, BOP ordered video cameras installed in each detainee's cell. *Id.* at 192. Shortly after, a 9/11 detainee claimed mistreatment on entering the MDC, and BOP directed that *all* 9/11 detainee movements be videotaped. *See* Supp. OIG Rep. at 39; *see also* OIG Rep. at 149. That policy served the dual purposes of "deter[ing] unfounded allegations of abuse . . . and to substantiate abuse if it occurred." OIG Rep. at 150.

These "proactive steps taken to prevent or document incidents of physical abuse" through videotaping were an effective deterrent that limited—though did not eliminate—mistreatment by the guards. OIG Rep. at 163; s*ee* Supp. OIG Rep. at 45 (observing "incidents and allegations of physical and verbal abuse significantly decreased" following the implementation of videotaping). Moreover, the videotapes later provided an evidentiary basis for disciplining guards that engaged in misconduct, notwithstanding the guards' vehement denials. Supp. OIG Rep. at 46-47; OIA Report.[4]

Because this case involves an effort to impose a legal responsibility on the warden personally for an alleged failure to investigate and discipline abuse by individual prison guards, *Ziglar*, 137 S. Ct. at 1863, it is important to bear in mind that as a matter of longstanding, official BOP policy, the warden has a precisely limited role in investigating prisoner complaints of abuse by guards. As set

[4] BOP's Office of Internal Affairs (OIA) issued an Investigative Report on 9/11 detainee allegations of abuse it had investigated after the closure of OIG's Report and the discovery of additional videotapes. OIA Investigative Report – OIA Case No. 2004-01960 (dated July 21, 2005) (OIA Rep.), attached as Ex. B. This report made specific findings of whether allegations of abuse against particular officers were substantiated or not. *Id.* at 1-4.

forth in BOP Program Statements,[5] upon becoming aware of allegations of physical abuse,[6] the proper procedure for the warden is to report it to OIA. Ex. C (P.S. 22) § 8.b(1)); Ex. D (P.S. 17) § 6. This procedure applies to all allegations of physical abuse, no matter their source. *See* Ex. C (P.S. 22) § 8.b (duty to report is triggered "upon becoming aware of any possible violation of the Standards of Employee Conduct (either through a report from staff or through personal knowledge)"); Ex. D (P.S. 17) § 6 (warden "shall immediately report all allegations and appearances of staff misconduct").

After reporting to OIA, the warden is barred from "question[ing] or interview[ing]" "[t]he subject of the allegation or complaint. . . ." Ex. C (P.S. 22) § 8.b.3; Ex. D (P.S. 17) § 6.g ("Allegations of staff misconduct must not be investigated locally until OIA approval is obtained."). OIA then elevates physical abuse allegations to OIG or Department of Justice (DOJ) Civil Rights Division ("CRT"), and "[i]f OIG or CRT accepts the case, no further action may be taken at the institution, regional, or Central Office level without OIG's or CRT's approval." Ex. C (P.S. 22) § 8.c; Ex. D (P.S. 17) § 6.f . Only if OIG defers the case may OIA investigate or refer the matter for local investigation. *See* Ex. C (P.S. 22) §§ 8.b(3), d; Ex. D (P.S. 17) §§ 6.c, g.

Even if a case is remitted for local investigation, the investigation is directed and monitored by OIA. Ex. C (P.S. 22) § 9; Ex. D (P.S. 17) § 8 ("OIA is responsible for the oversight of *all* investigations, whether OIA or non-OIA Bureau personnel actually investigate the case."). At the conclusion of an internal investigation, the investigator will prepare an Investigative Report that "include[s] the investigator's conclusions based on a review of the evidence and state whether the

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[5] BOP Program Statement 1210.22 ("P.S. 22"), U.S. Dep't of Justice, Fed. BOP, attached as Ex. C, *available at* https://web.archive.org/web/20021022125738/http://www.bop.gov:80/progstat/1210_22.html, replaced a prior version, BOP Program Statement 1210 ("P.S. 17"), U.S. Dep't of Justice, Fed. BOP, attached as Ex. D, *available at* https://web.archive.org/web/19990202040643/https://www.bop.gov/progstat/12100017.html, on October 1, 2001.

[6] Physical abuse is classified as misconduct that must be reported to OIA. *See* P.S. 22 § 7.a ("Classification 1" misconduct includes physical abuse); P.S. 17 § 6.a ("Significant incident" criteria include physical abuse).

allegation(s) is/are sustained." Ex. C (P.S. 22) § 12.b; *see* Ex. D (P.S. 17) § 11. OIA must review the Investigative Report "to ensure [it] address[es] the pertinent issues and that the conclusions are factually supported." *Id.* Thus, BOP—through OIA—is obliged to manage all investigations of allegations of physical abuse and determine whether those allegations are substantiated. *See id.*

In this case, the Complaint (and OIG Reports) do not identify any prisoner complaints of guard misconduct not processed in accordance with the controlling BOP Program Statement directing investigation up the chain to OIA and OIG. To the contrary, OIA was made aware of complaints at the ADMAX SHU, which were then elevated to OIG. Ex. B (OIA Rep.), at 5. OIG conducted half the investigations and deferred half back to OIA. *Id.* In fact, in the one specific instance that plaintiffs alleged that they complained to the MDC counselor of an incident of physical and verbal abuse, Compl. ¶ 110 (February 11, 2002 incident), that complaint was investigated by OIG. OIG Rep. at 144 (describing investigation of February 11, 2002 incident).

Indeed, on October 26, 2001, after 9/11, Congress itself had expanded OIG's role investigating civil rights complaints with enactment of the USA PATRIOT Act (Patriot Act). The Patriot Act *required* OIG to "review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice." Pub. L. No. 107-56, § 1001(1), 115 Stat. 272 (2001). Not long after passage of the Patriot Act, OIG was on the scene investigating abuse allegations by 9/11 detainees. *See* OIG Rep. at 144. Consequently, during the period in question, OIG's investigation of allegations of guard misconduct in the ADMAX SHU displaced any investigation of those allegations at the institution level per the BOP Program Statement. *See* Ex. C (P.S. 22) § 8.c; Ex. D (P.S. 17) § 6.f.

The Patriot Act specifically mandated OIG to make semi-annual reports to Congress about its investigations and findings of abuses. *Id.* at § 1001(3). Pursuant to that Act, OIG published the Reports, extensively detailing the treatment of the 9/11 detainees and OIG's findings and

recommendations. *See* OIG Rep. at 3. The first report focused on "official conditions" of confinement, but also examined the allegations of abuse. OIG Rep. at 164. OIG then published a Supplemental Report focusing entirely on abuse allegations. Supp. OIG Rep. at 1. OIG's investigations ultimately concluded that while many guards in the ADMAX SHU regularly behaved professionally, some guards were, in fact, guilty of misconduct and had falsely denied that they engaged in that misconduct. Supp. OIG Rep. at 43; OIG Rep. at 145. But it identified no complicity in abuse, or indeed any managerial failure by the warden. To the contrary, the first Report noted that OIG found no evidence that "anyone other than the correctional officers who committed it" condoned physical abuse. OIG Rep. at 162 n.130. And the Supplemental Report identified no managerial condonation of instances of abuse by correctional officers. Supp. OIG Rep. Notwithstanding having solicited these reports through the Patriot Act, Congress did not act to create any constitutional damages remedy to address the findings.

OIG's Supplemental Report contained specific recommendations for BOP and MDC to implement to curtail abuse, Supp. OIG Rep. 43-45, 47, and led to further investigation of abuse by OIA that resulted in substantiation of specific conduct violations against correctional officers (including physical abuse, conduct unbecoming a management official, failure to report a violation of rules/regulations, and inattention to duty). Ex. B (OIA Rep.), at 1-4.

B. Procedural History

This case was initially filed on April 17, 2002 by various individuals detained after the 9/11 terrorist attack challenging their continued custody following removal orders and the harsh conditions of their confinement. ECF No. 1 (filed Apr. 17, 2002). Between 2002 and 2004 the complaint was amended three times. The Third Amended Complaint named many correctional officers as defendants. ECF No. 109 (filed Sept. 13, 2004). Following this Court's partial grant of motions to dismiss, appellate proceedings in this and a companion case culminated in the Supreme

Court's decision in *Ashcroft v. Iqbal*, wherein the Court reaffirmed that *Bivens* liability could not be maintained against supervisors for the unconstitutional conduct of subordinates based on vicarious liability. *Iqbal,* 556 U.S. 662 (2009). On remand, the then-named plaintiffs who had been held at the MDC settled their claims. *See* Handler Letter, ECF No. 682 (filed Oct. 1, 2009). Settlement with the Government was possible because those plaintiffs, unlike these, alleged tort claims. *See* 28 U.S.C. § 2679(b)(2)(A) (excluding constitutional actions from the Westfall Act); (e) (authorizing settlement).

After that settlement, plaintiffs sought leave to file a further complaint "preserving class claims through intervention of new plaintiffs," ECF No. 683, which this Court allowed. Order, ECF No. 724 (filed Aug. 26, 2010). The Fourth Amended Complaint pleaded seven substantive claims (six *Bivens* claims and one claim under 42 U.S.C. § 1985), tendered collectively against "all MDC Defendants" or "all Defendants" in their individual capacities. ECF No. 726 (filed Sept. 13, 2010). Notably, all tort claims against the line-level correctional officers who were the perpetrators of abuse (either by name or as "Does") were abandoned. *See id.*

In addressing defendants' motions to dismiss the Fourth Amended Complaint, Judge Gleeson substantially reorganized the allegations. Among other things, he separated allegations concerning the guards' unauthorized abuse from policy-based claims. Order, ECF No. 767, at 32-33 (filed Jan. 15, 2013) (coining the terms "official conditions" and "unofficial abuse"). Judge Gleeson granted the motions of the senior executive branch officials, but granted in part and denied in part the motions of Warden Hasty, Warden Zenk and Associate Warden Sherman. ECF No. 767, at 62.

Hasty, Zenk and Sherman appealed; plaintiffs cross-appealed dismissal of their claims against senior officials. Over Judge Raggi's dissent, the Second Circuit panel ruled for plaintiffs on most issues. It held—erroneously—that plaintiffs' *Bivens* claims did not arise in a "new context" and most could proceed. *Turkmen v. Hasty*, 789 F.3d 218 (2d Cir. 2015). With respect to allegations that Hasty

and Sherman were responsible for the guards' unofficial abuse, the panel also held that plaintiffs pleaded enough to proceed against Hasty, but not Sherman. *Hasty*, 789 F.3d at 251. An evenly divided court denied *en banc* review. *Turkmen v. Hasty*, 808 F.3d 197 (2d Cir. 2015).

The Supreme Court granted certiorari. The Supreme Court held that plaintiffs' constitutional claims did, in fact, arise in a new *Bivens* context. *Ziglar*, 137 S. Ct. at 1864. It then held that *Bivens* should not be extended to the "policy detention claims," and rejected the statutory claim as barred by qualified immunity. *See id.* at 1863, 1869. The only claim not reversed outright, and instead vacated, was plaintiffs' "claim alleging that Warden Hasty allowed guards to abuse the detainees." *Id.* at 1859, 1869. The Court held that the Second Circuit erred in holding that claim did not extend *Bivens* to "new context." *Id.* at 1865. Therefore, it should have "analyzed whether there were alternative remedies available or other 'sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy' *in a suit like this one*." *Id.* (emphasis added) (internal citation omitted). Because the parties themselves had not made a "comprehensive presentation" on that issue, the Court chose not to rule on the issue itself, finding that the "better course is to vacate the judgment below, allowing the Court of Appeals or the District Court to do so on remand." *Id.* The Second Circuit directed that question to this Court. Mandate, ECF No. 799 (issued Nov. 15, 2017) (filed Dec. 1, 2017).

C. The Nature Of The Allegations

The only claim at issue here is whether "Warden Hasty violated the Fifth Amendment by allowing prison guards to abuse respondents." *Ziglar*, 137 S. Ct. at 1863.

Plaintiffs variously allege that MDC guards engaged in abuse at intake and later during their detention. *See e.g.*, Compl. ¶¶ 147, 162, 166, 177, 201, 207 (alleging slamming against walls, overtightened handcuffs and kicked shackle, pushing and kicking, and insults). One plaintiff alleges that he was beaten on arrival. *Id.* ¶ 147. Plaintiffs do not allege that Warden Hasty directed abuse, or

witnessed any and failed to intervene. Rather, they contend that liability may be imposed on him, for all misconduct, at any time, based on some variant of a deliberate indifference because he "ignore[ed]" and "avoid[ed]" evidence of misconduct and failed to stop it.[7] *Id.* ¶ 24. Plaintiffs urge that he subtly encouraged abuse by supposedly referring to detainees as "terrorists" (at unspecified times and circumstances) in unspecified documents, that he "stayed away from the Unit to avoid seeing abuse," but was "made aware of the abuse via 'inmate complaints, staff complaints, hunger strikes and suicide attempts," reflected in logs and records; and "took no action to rectify or address the situation." *See Ziglar*, 137 S. Ct. at 1864.

The Complaint notably does not distinguish between incidents, seemingly suggesting that the warden could be held responsible even for incidents in the very first days after 9/11, before any non-witness could have acquired knowledge of abuse, let alone before any remedy or deterrent could be put in place. It does not connect some particularized knowledge of misconduct by the warden at some specific time, to some specific proposed intervention by him that would have prevented a certain instance of subsequent abuse by a guard that caused harm to a particular detainee—elements of a successful tort claim. Moreover, the complaint proceeds as if mere knowledge of *complaints* of abuse can be equated with knowledge of abuse—even before the incident is investigated. Further, it assumes that the warden had duties to act—to investigate and substantiate allegations—that the warden simply did not have.

ARGUMENT

The Supreme Court's discussion of the history of *Bivens* actions in *Ziglar*, and the reasons it gave there why *any* extension of the *Bivens* remedy is "disfavored," provides the touchstone for

[7] Defendant Hasty does not agree that this is a complete statement of the Fifth Amendment liability standard. The Circuit emphasized "*deliberate* indifference" when it likened this context to the Eighth Amendment failure to provide medical treatment context. *Hasty*, 789 F.3d at 250 (requiring actual knowledge of "excessive risk" to health or safety that the supervisor failed to prevent). Even if liability can be imposed based on "inaction" or "indifference," the alleged constitutional deprivation must be traced to the specific injury suffered by defendant. *See McCann v. Coughlin*, 698 F.2d 112, 126 (2d Cir. 1983); *Dawson v. Williams*, No. 04-CV-1834, 2005 WL 475587, at *7-8 (S.D.N.Y. Feb. 28, 2005).

answering the question now presented to this Court: whether this court should create an action for damages against a warden personally for the misconduct of prison guards under his command based on the kind of "indifference" alleged in this case. In considering that question, it is important to bear in mind that *Bivens* provides no basis to hold a supervisor responsible for the acts of his subordinates. *See Iqbal*, 556 U.S. at 676. There is no vicarious liability under *Bivens*. *Id.* That lower-level federal employees abused their authority, and may have violated the Constitution in doing so, is not a basis for imposing liability on a supervisor. *Id.* To the contrary, a federal officer, including a supervisor, can only be held responsible if his or her own actions (or perhaps inactions) violated the Constitution, causing the injury to the plaintiff for which damages are sought. *Id.*

It is also important to reiterate the Supreme Court's observation that *Bivens* is not a mechanism for instigating policy changes, even salutary ones. *Ziglar*, 137 S. Ct. at 1849. The principal rationale for allowing a *Bivens* action is deterrence. *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70 (2001); *cf. Ziglar*, 137 S. Ct. at 1863. As shown below, deterrence was already being served by the investigative and disciplinary processes in place for addressing guard abuse, as well as other measures specially put in place by BOP to prevent abuse of the 9/11 detainees. For this reason, and many other special factors present in this case, the court should not create a damages remedy here.

I. The Supreme Court Has Established Strict Limits On Any Extension Of *Bivens* To New Contexts.

As the Supreme Court traced in *Ziglar*, the very idea of allowing the judiciary to create causes of action against government officials performing government service, thereby subjecting them personally to potentially crushing damages awards, is the product of a brief, and now bygone era of judicial activism. *Ziglar*, 137 S. Ct. at 1848. During what Supreme Court dubbed the "*ancien regime*" of judicially-created damages remedies for both statutory and constitutional violations, the Court found an implied damages remedy in exactly three constitutional contexts, beginning with *Bivens*. *See*

Id. at 1855, 1860. While the Court has declined to overrule its precedents (allowing *Bivens* actions to proceed in those three contexts), it has acknowledged that the earlier authorized *Bivens* actions are, at best, vestigial under modern case law, and the results even in those cases might well "have been different if they were decided today." *Id.* at 1856.

The Court has declared "that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Id.* at 1848 (quoting *Iqbal*, 556 U.S. at 675). That disfavor is reflected in 37 years of precedent during which the Court has steadfastly refused to extend *Bivens* to any new context, whether that new context involves a different constitutional right, a different group or type of defendant or liability, or simply a different organizational setting. *See id.* at 1848-49. For example, notwithstanding that it had allowed *Eighth* Amendment claims to proceed against prison officials for "failure to treat an inmate's asthma," *id.* at 1860, the Court refused to allow a parallel claim against a private prison operator, *Malesko*, 534 U.S. at 74, or even correctional officers at a private prison. *Minneci v. Pollard*, 565 U.S. 118, 120 (2012).

The Supreme Court's refusal to extend *Bivens* is rooted in the separation of powers. Subjecting persons in Executive Branch service to potentially grave personal liability on account of their government service will dissuade many from such service, and will affect the way they perform their duties. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) ("[F]ear of being sued will dampen the ardor of all but the most resolute, or most irresponsible public officials, in the unflinching discharge of their duties."). Moreover, if Congress wishes to take the extraordinary step of authorizing damages claims personally payable by government officials for constitutional violations, it knows how to do so—witness 42 U.S.C. § 1983 (authorizing damages against *state* officers for constitutional violations). *See Ziglar*, 137 S. Ct. at 1854. But Congress has not created or endorsed any damages remedy against federal officials for constitutional violations. *Id.*

To the contrary, Congress allowed common law tort claims to proceed against the Government. 28 U.S.C. § 1346(b). And it allowed the Government to substitute for federal officers where tort claims are brought against the officers themselves. 28 U.S.C. § 2679(d)(1). That substitution, among other things, gives plaintiffs a realistic basis to recover damages or settle that would otherwise be unavailable in a suit against an officer personally. But, as the Supreme Court observed, Congress barred government substitution in actions "brought for a violation of the Constitution." 28 U.S.C. § 2679(b)(2)(A); *see Ziglar*, 137 S. Ct. at 1856. The Court's observation is especially pertinent here because the current plaintiffs, unlike the prior named plaintiffs in this case, did not assert tort claims. *Compare* Third Amended Complaint, ECF No. 109, at ¶¶ 422-40, (Sept. 13, 2004) *with* Compl., ECF No. 726 (Sept. 13, 2010). Thus, there is no statutory basis for the United States to settle this case.

In any event, it is Congress that has "substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government." *Ziglar*, 137 S. Ct. at 1856. Thus, before expanding *Bivens*, courts must inquire, among other things, whether special factors counsel hesitation. *Id.* at 1860, 1865. That inquiry does not require, or even allow, a court to balance the pros and cons of a damages remedy. "[W]hether a damages action should be allowed is a decision for the Congress to make, not the courts[.]" *Id.* at 1860. Rather, the mere existence of competing considerations signals that the decision whether to create a damages remedy belongs to Congress, not courts. *See id.* at 1865 ("[If] there are sound reasons to think Congress *might doubt* the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts *must* refrain from creating the remedy. . . .") (emphasis added). "Congress is in a far better position than a court to evaluate the impact of a new specifies of litigation," *Bush v. Lucas*, 462 U.S. 367, 389 (1983), and how it may impact "governmental operations systemwide." *Ziglar*, 137 S. Ct. at 1858.

Moreover, where Congress has had the issue before it and not created a damages action against individual federal officers, that itself weighs heavily against the courts doing so. *See id.* at 1863. "Congress' failure to provide a damages remedy might be more than mere oversight, and … congressional silence might be more than "inadvertent." *Id.* at 1862. Additionally,

> [I]f there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action. For if Congress has created 'any alternative, existing process for protecting the [injured party's] interest' that itself may 'amount[] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.'

Id. at 1858 (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)). Numerous special factors, Congress's refusal to create a cause of action, and alternative remedies present here strongly suggest that Congress would doubt the prudence of creating a *Bivens* remedy to impose personal liability on a prison supervisor in this context.

II. Special Factors And Alternative Remedies Here Preclude Extension Of The *Bivens* Damages Remedy To The New Context Of Plaintiffs' Claim Against Mr. Hasty.

The threshold for finding a special factor that bars extension of *Bivens* is "remarkably low." *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009). Any factor that provokes "hesitation," meaning "whenever thoughtful discretion would pause even to consider," suffices. *Id.* The special factors here that separately and cumulatively preclude the extension of *Bivens* to plaintiffs' claim against former Warden Hasty include (a) that a *Bivens* action in this setting would disrupt and be inconsistent with BOP policies for investigating guard misconduct and allocation of responsibility for deterring abuse; (b) Congress's refusal to create constitutional damages remedies despite having looked closely at prisoner complaints, the risk of constitutional misconduct following 9/11, and the specific circumstances at the MDC; (c) the difficulty constructing a workable cause of action based on alleged supervisory indifference to unauthorized actions of corrections officers in the absence of direct knowledge, and (d) alternative remedies that serve as deterrents and provide relief. Because

special factors and alternative remedies are present here, the Court must defer to Congress to determine whether to create a damages action and not extend *Bivens* to this context on its own.

A. Plaintiffs' Proposed *Bivens* Action Conflicts With The Investigative Structure Embedded in Federal Prison Policy.

In the context of this case, plaintiffs' proposed damages remedy—seeking to impose responsibility on the warden for failure to take action to investigate and discipline line-level officers that engaged in abuse—would impose responsibilities on the warden that *conflict* with his responsibilities under the existing investigative and remedial structure. The anomaly of imposing personal liability on a warden for not acting, where prison procedure tells him to stay his hand, is an extraordinarily strong reason for not extending *Bivens*. Congress would not wish to disrupt existing procedures, which reflect principles important to managing a prison. That there "is an alternative remedial structure present in a certain case, [may] alone … limit the power of the Judiciary to infer a new *Bivens* cause of action." *Ziglar*, 137 S. Ct. at 1858. Where that structure would actually be undermined by efforts to impose *Bivens* liability, the reason not to extend *Bivens* is greatly magnified.

The MDC's procedure for handling allegations of staff abuse at the time was set forth in P.S. 17 (before October 1, 2001) and P.S. 22 (after). Exs. C, D. Both versions *prohibit* the warden from engaging in any investigation of allegations of physical abuse until directed by OIA. Ex. C (P.S. 22) §§ 8.b.3 (barring questioning of the subject of a complaint of physical abuse "prior to OIG clearance and OIA's approval"; 8.c (prohibiting "[any] further action" by OIA or the warden if OIG accepts the case), 8.d (mandating OIA to notify the warden "when a case has been deferred back to the Bureau for investigation"); Ex. D (P.S. 17) § 6.g ("Allegations of staff misconduct must not be investigated locally until OIA approval is obtained."). Even if directed by OIA to investigate locally, this investigation is still overseen and directed by OIA. Ex. C (P.S. 22) § 9; Ex. D (P.S. 17) § 8 ("OIA is responsible for oversight of all staff investigations, whether they are conducted by OIA or non-OIA personnel."). Thus, BOP—through OIA—is obliged to direct the investigation and

review the findings of any case involving complaints of abuse not investigated by OIG or CRT. *See* Ex. C (P.S. 22) § 7-9, 12; Ex. D (P.S. 17) § 6, 8, 11.

This process puts responsibility for investigation and substantiation of abuse allegations in the hands of OIG and OIA, not the warden. It balances the needs of detainees against the due process rights of guards accused of misconduct, who may face severe discipline if charges are sustained. *See* Ex. D (P.S. 22) § 8.b(3) (ensuring "against procedural error and safeguard the rights of the subject."). The reasons why the warden is removed from the front line of investigating and drawing conclusions with disciplinary ramifications about detainee abuse are evident. First, investigations are perhaps best conducted by experts, and the accused employee is entitled to due process. Second, such charges are not infrequent in a prison setting, and investigations can be time-consuming. Third, repeatedly placing the warden in the role of fact-finder may be managerially undesirable. Virtually every such claim will give rise to conflicting stories about the incident as told by guards and prisoners—as was the case here. Supp. OIG Rep. at 13, 15-19, 22 (discussing how correctional officers denied engaging in misconduct). Placing the warden in the repeated role of fact-finder, disbelieving staff and crediting prisoners, could create a difficult managerial situation. Congress would not want well-conceived investigative processes disrupted by supervisory officials seeking to avoid constitutional damages liability.

To be sure, the record here reflects that at an early stage of the ADMAX SHU, the detainees were impeded in their ability to make complaints by a mistake. Detainees should have been provided and allowed to retain a prison handbook that explained the procedure for filing a complaint. *See* OIG Rep. at 125-6, 148-9. But some guards misinterpreted the restrictions on reading materials in the ADMAX SHU to extend to those handbooks, OIG Rep. at 149, and

consequently detainees were not provided with, or were not allowed to keep, those handbooks.[8] Comp. ¶ 140; OIG Rep. at 148-9, 162. That the formal complaint-intake system temporarily broke down because of a misunderstanding – corrected by the warden -- does not change the basic fact that the basic investigative structure that was in place is fundamentally inconsistent with the effort to impose damages on the warden for his alleged failure to investigate and take disciplinary action.

This organized system of dealing with allegations of abuse—in which the warden's role was limited—would assuredly be disrupted if, as a supposed constitutional matter, the warden was held financially liable for not taking action not his to take. Any effort to hold a warden responsible in damages for failures to address abuse, where the prison policy seeks to remove the warden from the front lines of responsive action, can only be seen as a judicial interference and disruption of a "carefully-guarded" regulatory structure that Congress would be unlikely to approve.

B. BOP, OIA And OIG Were Acting To Deter Abuse And Address Detainee Allegations Of Abuse.

Aside from the general BOP procedure for investigating and disciplining abuse, the context of this case reflects BOP's, including OIA's, and OIG's active engagement with the issue of 9/11 detainee allegations of abuse at the MDC. This was true both with respect to investigating alleged misconduct, and for preventing such misconduct. Plaintiffs' proposed *Bivens* action seeks to impose responsibility upon the warden for matters in which OIG and BOP either had primary or shared responsibility.

From the outset, the specially-created ADMAX SHU was established subject to instruction, scrutiny and direction from BOP, including directions designed to curb guard abuse. It was well

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[8] According to the OIA Report, OIG suggested that MDC officers "failed to ensure that detainees received the . . . handbook upon their arrival at the MDC." Ex. B (OIA Rep.), at 47-49. One officer contested this, stating that they provided the handbooks but "custody staff had taken the handbooks from the detainees." *Id.* The officer "reported this to the Warden and he ordered the custody staff to allow the detainees to retain the handbooks." *Id.* OIA did *not* sustain the charge against the MDC officers for "inattention to duty" in failing to ensure that handbooks were distributed. *Id.* at 48-50.

understood that misconduct allegations were bound to arise, and they were addressed by BOP. From the outset, BOP was concerned with false allegations of abuse because it was understood that false allegations of abuse were part of the terrorist playbook. *See* OIG Rep. at 150. Therefore, "[s]hortly after the September 11 attacks, BOP Headquarters sent out a national directive to all regional directors to install video cameras in each September 11 detainee's cell." Supp. OIG Rep. at 39; *see also* 10/1 Memorandum, attached as Ex. E. That video recording would also deter abuse and document abuse if it occurred. The videotape policy was expanded soon after this initial directive. After a complaint was made in court by a detainee who claimed that he was injured by MDC correctional officers, BOP required officers to videotape all movements outside the cell by hand-held cameras and reaffirmed that "[BOP] policy requires all allegations of abuse to be immediately reported to [OIA]." Supp. OIG Rep. at 39; *see also* Oct. 9th Memorandum.

The videotaping policy was thus a response to the risk of abuse. And it was effective: "Once the MDC began videotaping all detainee movements, incidents and allegations of physical and verbal abuse significantly decreased." Supp. OIG Rep. at 45. Both of these directives, put in in place less than a month after 9/11 reflected that BOP and OIA were at the helm. To the extent Warden Hasty had a role, there was no allegation that he failed to implement BOP's policies and directives.

Moreover, OIG itself was on the scene as investigator – meaning the warden's investigators were displaced from that role. As detailed in the OIG Reports, OIG's investigation into abuse of 9/11 detainees at the MDC began following an October 30, 2001 news article. OIG Rep. at 144. OIG's investigation continued through February 2002 when it was provided with four additional complaints of mistreatment made on February 11, 2002. *Id.* The OIG's investigation continued throughout the remainder of Mr. Hasty's tenure. *See id.* (describing interviews conducted in May 2002 in connection with the OIG's investigation of abuse of 9/11 detainees). While the investigative and disciplinary processes concerning treatment of 9/11 detainees took time to

complete, they began early, were seriously pursued, were ongoing and ultimately effective in that they culminated in the substantiation of many of the charges. Ex. B (OIA Rep.); *see also* Supp. OIG Rep., Appendix A (Findings Related to Individual Staff Members), attached as Ex. F.

In sum, the purposeful allocation of responsibility in the specially-created ADMAX SHU, where much responsibility resided in the warden's superiors, makes this a singularly inappropriate context in which to authorize a *Bivens* suit against the warden. To create a *Bivens* remedy against the warden on the assumption that he has certain responsibilities would disrupt BOP procedures under which actual responsibility for investigating abuse lies significantly with the warden's superiors.

C. Congress's Failure To Create A Damages Remedy Provides A Strong Indication That The Court Should Not Do So.

As the Supreme Court observed in *Ziglar*, in any "inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant." *Ziglar*, 137 S. Ct. at 1862. And where Congress has looked at an issue but failed to create a damages remedy, Congress's silence is a strong indicator that courts should not create a *Bivens* remedy. Here, the record reveals that "[c]ongressional attention" to the constitutional violations alleged has been "frequent and intense." *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (finding the level of congressional attention to an issue probative of the interpretation of Congress's omission of a private damages remedy). Yet "[a]t no point did Congress choose to extend . . . the kind of remedies that respondents seek in this lawsuit." *Id.* at 426.

First, Congress looked directly at the potential for *constitutional violations* by DOJ employees immediately after 9/11. Section 1001 of the Patriot Act, enacted while the events here were ongoing, mandates OIG to investigate complaints of constitutional violations at the hands of prison officials. *See* Pub. L. No. 107-56, § 1001, 115 Stat. 272 (2001). Moreover, Congress created a process by which it would be kept informed of such abuses and OIG's related investigatory activities. Section 1001(3) requires OIG to:

> submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on a semi-annual basis a report on the implementation of this subsection and detailing any abuses …

Pub. L. No. 107-56, § 1001(3), 115 Stat. 272 (2001). While Congress was considering *the exact issue* of abuses of civil rights by DOJ employees in the aftermath of 9/11, it assuredly could have created a private damages action to remedy these constitutional violations—but it did not. Congress instead chose to address this type of misconduct by requiring and funding investigation and reporting. This same decision was repeated each of the five times portions of the Patriot Act were reenacted. *See Hasty*, 789 F.3d, at 279 n. 24 (Raggi, J. Dissenting). OIG continues to this day to investigate abuses of civil rights pursuant to the Patriot Act, s*ee e.g.*, Semiannual Reports available at https://oig.justice.gov/semiannual/, yet Congress has not created a constitutional damages remedy.

Second, the Supreme Court found it "telling" that "at Congress' behest, [OIG] compiled a 300-page report documenting the conditions in the MDC in great detail." *Ziglar*, 137 S. Ct. at 1862. Yet in the face of that specific Report on the MDC, "at no point did Congress choose to extend to any person the kind of remedies" that plaintiffs seek here. *Id.* And what was "telling" for the detention policy claims is even more telling for the allegations of abuse because they were *doubly* investigated and reported upon—and still Congress did not create a damages remedy. Verbal and physical abuse was covered in the initial 300-page OIG Report. But it was explored again, after an even more thorough investigation—involving more than 100 interviews—in a detailed 80-page Supplemental Report.[9] Supp. OIG Rep. at 6. Congress thus had studies of the exact issues here but created no damages remedy. It is evident that Congress viewed the OIG's investigation, reporting and recommendations—not a damages remedy—as the proper response to the allegations, believing

[9] It bears noting again that these Reports do not suggest that Warden Hasty allowed or contributed to the physical abuse. To the contrary, the first Report concluded that "[t]o date, our investigation has not uncovered any evidence that the physical or verbal abuse was engaged in or condoned by anyone other than the correctional officers who committed it." OIG Rep. at 162 n.130. The Supplemental Report identified no failings on his part. Supp. OIG Rep.

that deterrence is effectively fostered by knowledge that allegations of abuse would be investigated, and discipline meted out, if the allegations proved true.

Third, as the Supreme Court itself pointed out, Congress looked squarely at the issue of prisoner abuse claims when, post-*Bivens,* it enacted the Prisoner Litigation Reform Act of 1995 (PLRA). 42 U.S.C. § 1997e. With the PLRA, Congress "made comprehensive changes to the way prisoner abuse claims must be brought in federal court." *Ziglar*, 137 S. Ct. at 1865. The PLRA directly addresses prison condition litigation, providing that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Yet Congress did not codify a *Bivens* remedy. This refusal to do so, when Congress "had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs," reinforces the lack of congressional intent to expand *Bivens* in that context. *See Ziglar*, 137 S. Ct. at 1865. While the PLRA does not apply to alien detainees, Congress would presumably be even less inclined to provide a *Bivens* remedy to non-citizens: "It is well established that immigrants' remedies for vindicating the rights which they possess under the Constitution are not coextensive with those offered to citizens." *Mirmehdi v. United States*, 689 F.3d 975, 981 (9th Cir. 2012).

D. Plaintiffs' Claim Intrudes On Federal Prison Supervision And Would Require Second-Guessing The Judgments Of Prison Officials On How Quickly And Effectively BOP's Protective Measures And Processes Were Deterring Abuse.

An important part of the evaluation of any proposal to extend *Bivens* is consideration of how the new cause of action compares with prior actions and whether a truly workable line can be drawn between lawful and unlawful conduct. *See Wilkie*, 551 U.S. at 555 (considering workability of a cause of action part of special factors analysis). Review of the allegations and background here demonstrates that plaintiffs' proposed cause of action, seeking to impose liability on a supervisory

official at some distance from line-level officers that engaged in abuse, involves second-guessing difficult judgment calls in a range of circumstances.

As this case demonstrates, it also entails difficult causation issues: *Bivens* is a damages action. Unlike a pattern and practice injunction case, it requires a showing of specific harm to plaintiff resulting from the alleged wrongful conduct. *See* Memorandum and Order, ECF No. 767, at 21-22 (dated Jan. 15, 2013) ("One element of any recognized constitutional tort is that the defendant caused the plaintiff's injury."). Plaintiffs would have to show that some specific degree of knowledge, after a certain period of time, gave rise to a duty to take some specific form of action (unspecified here) that was not undertaken, thereby resulting in a specific instance of a guard's violation of a particular plaintiff's constitutional rights.

It is therefore useful to contrast the allegations here with previously-allowed *Bivens* claims. *Bivens* itself, of course, involved intentional misconduct in a concrete setting. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (search and forcible arrest without a warrant or probable cause). There is no such allegation here. There is no allegation that Warden Hasty abused any detainees or directed abuse of any detainees. There is no allegation that Warden Hasty witnessed specific misconduct or mistreatment as it was occurring, and failed to intervene and stop it. There is not even an allegation that he knew of an intention to engage in misbehavior and did not intervene. The lack of concrete circumstances distinguishes this from any prior *Bivens* case.

To be sure, in the Eighth Amendment context, the Court has allowed inaction in the form of a deliberate indifference claim—there, to a prisoner's medical needs—to proceed. *See Carlson v. Green*, 446 U.S. 14, 19 (1980). But Eighth Amendment claims invariably involves knowledge of some specific continuing, observable circumstance that calls for some clear form of intervention. *See, e.g.*, *Thomas v. Ashcroft*, 470 F.3d 491, 497 (2d Cir. 2006) (failure to provide glaucoma medication that officials knew plaintiff needed, causing plaintiff's blindness); *Walker v. Schult*, 717 F.3d 119 (2d

Cir. 2013) (failure to address extreme temperatures, unsanitary conditions and overcrowding). Thus, under the Eighth Amendment, the deliberate indifference standard is well-developed. *See Ziglar*, 137 S. Ct. at 1864. In contrast, as the Court observed in *Ziglar*, however, the claim here is different, "and the judicial guidance available to this warden, with respect to his supervisory duties, was less developed." *Ziglar*, 137 S. Ct. at 1864.

In contrast with the concrete circumstances in classic *Bivens* cases, the context here involves intermittent incidents of abuse perpetrated by particular correctional officers (among many) not directly observed by Mr. Hasty, and any number of alleged judgment calls along the way before any action or inaction by the warden could produce injury to a particular detainee.

For example, Plaintiffs urge that the warden should have interpreted hunger strikes or suicide attempts as the product of physical or verbal abuse by guards, rather than in protest of being unjustly detained and subject to the extremely harsh official conditions of confinement (for which the Supreme Court found no *Bivens* liability can be imposed) or some other cause. *Cf.* Ex. B (OIA Rep.), at 16-17. Likewise, plaintiffs' claim would require a determination by the warden that some or all of the detainee claims of abuse—which were typically vehemently denied by the guards—were meritorious, even though BOP policy restricted his ability to investigate. *See infra* Part II.A.

In this context, a *Bivens* claim would involve second-guessing the means actually implemented to deter abuse at the ADMAX SHU—the videotaping. Supp. OIG Rep. at 45 ("Once the MDC began videotaping all detainee movements, incidents and allegations of physical and verbal abuse significantly decreased."). And a *Bivens* claim would require the pinpointing of when someone in authority should have realized that *additional*, but still unspecified, steps should have been taken.

Where the action that a situation requires is ambiguous, a government official ought not be motivated by how his or her decisions will be second-guessed later, at the risk of ruinous personal debt when judged in hindsight. That may cause the official to make decisions in the public interest

that are less than optimal because of the risk that other decisions would be erroneously characterized and portrayed in a future damages action brought against that official personally. Just as Congress is unlikely to want such fear to affect the judgment of officials with critical policy responsibility, *see Ziglar*, 137 S. Ct. at 1863, Congress is unlikely to want fear of personal financial liability, and burdensome litigation, to affect difficult judgments in a prison management setting.

Unlike other types of *Bivens* claims, the chain of causation in this context is complex – and perhaps unworkable. Unlike the concrete circumstances presented in Eighth Amendment *Bivens* claims, the gravamen of Plaintiffs' claim is that from various circumstances—mostly reports of abuse—Warden Hasty should have inferred that there was an excessive risk to inmate health and safety not *already* being adequately addressed by (1) the videotape policies that were being implemented in order to deter abuse, (2) BOP's regulations on complaint investigation and resolution, and (3) OIG's and OIA's ongoing presence and involvement in investigation into complaints of abuse. Rather, at some point in time, Warden Hasty should have inferred that some unspecified type of *additional* intervention, within his authority and budget to undertake, was required on his part. And then it would have to be proved that the failure to undertake that action at that point in time led to some specific incident of abuse to a particular detainee at some later time. The attenuated nature of the causation inquiry makes this context very different from prior *Bivens* cases.

The difficulty drawing lines—both with respect to judgment calls and causation—strongly militates against creation of a *Bivens* action for this type of alleged managerial misconduct at issue here, particularly in a prison setting. *See generally Turner v. Safley*, 482 U.S. 78, 85 (1987) (the "inordinate" difficulty of running a detention facility counsels judicial restraint).

E. Plaintiffs Had Alternative Remedies.

As pointed out in *Ziglar*, the availability of alternative forms of relief usually precludes expansion of *Bivens* to a new context. *Ziglar*, 137 S. Ct. at 1858. The administrative remedies have

been described above. Such remedies, which can result in severe disciplinary action against abusive guards, can be an effective deterrent. And while the process of investigating complaints inevitably took a great deal of time, it is also clear that the process was treated seriously and resulted in specific findings against a number of officers. *See* Ex. B (OIA Rep.).

Moreover, as the Supreme Court noted, given that what is alleged here is a pattern and practice of failure to comply with regulations barring the use of excessive force, plaintiffs could have brought claims for injunctive relief to stop it. *Ziglar*, 137 S. Ct. at 1865. Of course, the answer likely would have been that the abuse was not being ignored: the videotaping policy was effectively mitigating it, and the OIG, OIA and MDC were doing what was required of each to investigate abuse. But the fact remains that on these pattern and practice allegations, injunctive relief, including various forms of immediate injunctive relief, may well have been available and effective.

But the remedies available here go beyond reports, disciplinary action and injunctive relief. Even if concerned solely with *damages*, plaintiffs could have—but did not—bring tort claims against the United States or against the officers who committed abuse under the Westfall Act, at which point the United States would substitute itself in for the defendant. *See* 28 U.S.C. § 2679(d)(1). The record of this very case reveals that many detainee claims, presented earlier in this very case, were settled by the United States. Meeropol Letter, ECF No. 683 (filed Nov. 2, 2009) (notifying the court of plaintiffs' settlement of their claims). But the Westfall Act does not allow for the United States to step in and settle constitutional claims. 28 U.S.C. § 2679(b)(2)(A), (e). Here, Plaintiffs elected not to bring tort claims that could be settled by the United States. Suffice it to say that in so doing, they effectively disavowed at least one potential alternative means to obtain compensatory damages.

CONCLUSION

The remaining claim against Dennis Hasty should be dismissed.

Respectfully submitted

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