No.

In the Supreme Court of the United States

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

v.

JAVAID IQBAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.

2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

PARTIES TO THE PROCEEDINGS

In addition to the parties identified in the caption, the following six individuals were parties in the court of appeals. Each of them was a defendant in the district court and an appellant in the court of appeals:

Dennis Hasty, former Warden of the Metropolitan Detention Center; Michael Cooksey, former Assistant Director for Correctional Programs of the Bureau of Prisons; David Rardin, former Director of the Northeast Region of the Bureau of Prisons; Michael Rolince, former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counter-terrorism Division; Kathleen Hawk Sawyer, former Director of the Federal Bureau of Prisons; Kenneth Maxwell, former Assistant Special Agent in Charge, New York Field Office, Federal Bureau of Investigation.

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The Solicitor General, on behalf of John D. Ashcroft, former Attorney General of the United States, and Robert Mueller, Director of the Federal Bureau of Investigation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-70a) is reported at 490 F.3d 143. The order of the district court dismissing some, but not all, of the claims against petitioners (App., *infra*, 71a-150a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2007. Petitions for rehearing were denied on September 18, 2007 (App., *infra*, 151a-152a). On December 7, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to January 16, 2008. On January 4, 2008, Justice Ginsburg further extended that time to February 6, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves civil claims brought by Javaid Iqbal (respondent), a citizen of Pakistan who was arrested by federal officials in New York City following the September 11, 2001 attacks and detained at the Metropolitan Detention Center (MDC) in Brooklyn pending trial on charges of conspiracy to defraud the United States and fraud in relation to identification documents. App., *infra*, 3a-4a & n.1. Respondent ultimately pleaded guilty and, after the period at issue in the complaint, was sentenced to a 16-month term of imprisonment and removed to Pakistan. *Id.* at 7a, 73a n.1.

In relevant part, respondent asserts that his detention in highly restrictive conditions of confinement from January to July 2002 resulted from unlawful racial and religious discrimination for which petitioners are personally liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and liable as co-conspirators under 42 U.S.C. 1985(3).[1] See App., *infra*, 201a-203a, 206a-209a (First Am. Compl. ¶¶ 231-236, 246-251 (Compl.)). He seeks compensatory and punitive damages from petitioners, as

[1] Respondent's remaining claims against petitioners were ordered dismissed on other grounds and are not at issue here.

well as attorney's fees and costs. *Id.* at 202a, 203a, 207a, 209a, 214a (Compl. ¶¶ 233, 236, 248, 251; Prayer for Relief). Respondent also asserts claims against various other Department of Justice officials allegedly responsible for the conditions of his confinement and other alleged mistreatment, including employees of the MDC, the Bureau of Prisons, and the Federal Bureau of Investigation (FBI). *Id.* at 7a n.3, 87a-91a (summarizing claims against each defendant).[2]

In support of his claims against petitioners, respondent alleges that, as Attorney General and FBI Director, they "approved" a policy of detaining suspects determined to be "of high interest" to the FBI's investigation into the September 11th terrorist attacks "in highly restrictive conditions of confinement until they were 'cleared' by the FBI." App., *infra*, 168a (Compl. ¶ 69). Respondent claims that two lower-level FBI officials responsible for implementing that policy selected him as a "high interest" suspect on the basis of discriminatory criteria. See *id.* at 164a-165a (Compl. ¶ 51) (alleging that respondent was selected by defendants Rolince and/or Maxwell as a "high interest" suspect because of his race or religion), 169a (Compl. ¶ 76) (alleging that defendants Rolince and Maxwell refused to clear detainees for release to the general population "based simply on the detainees' race, religion, and national origin").

Respondent also alleges that, "[i]n many cases," detainees were classified as "high interest" because of their "race, religion, and national origin" rather than "any evidence of the detainees' involvement in support-

[2] One of the other government officials sued by respondent, former Warden Dennis Hasty, has already filed a petition for a writ of certiorari seeking review of the judgment below. See Pet., *Hasty* v. *Iqbal*, No. 07-827 (filed Dec. 17, 2007).

ing terrorist activity," and that, "within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as 'of interest' to the post-September-11th investigation." App., *infra*, 164a, 165a (Compl. ¶¶ 49, 52). With regard to his own treatment, respondent alleges that, more than two months after he was arrested, he was classified as being "of high interest" to the September 11th investigation, and thus transferred from the general population at the MDC to the facility's "Administrative Maximum Special Housing Unit." *Id.* at 165a, 169a (Compl. ¶¶ 53, 80-81).

Apparently seeking to connect petitioners to his "high interest" classification, respondent asserts that, as Attorney General, petitioner Ashcroft had "ultimate responsibility for the implementation and enforcement of the immigration and federal criminal laws" and was "a principal architect of the policies and practices challenged here." App., *infra*, 157a (Compl. ¶ 10). Respondent also alleges that, as the Director of the FBI, petitioner Mueller "was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here." *Ibid.* (Compl. ¶ 11). Respondent further alleges that, "under the direction of [petitioner] Mueller," the FBI "arrested and detained thousands of Arab Muslim men" in the course of investigating the September 11th attacks. *Id.* at 164a (Compl. ¶ 47).

Finally, respondent makes a generalized allegation that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no le-

gitimate penological interest." App., *infra*, 172a-173a (Compl. ¶ 96).

2. Various defendants, including petitioners, moved to dismiss the claims against them. In relevant part, the district court refused to dismiss the *Bivens* and conspiracy claims against petitioners. App., *infra*, 133a-137a, 142a-146a, 150a. The court ruled that allegations that respondent was confined in significantly harsher conditions solely because of his race and religion were sufficient to state a violation of clearly established law, and that he had adequately alleged personal involvement by petitioners in the adoption of the detention policy for "high interest" detainees. *Id.* at 133a-137a, 142a-146a. The court acknowledged that personal involvement was "a closer question" for the defendants (including petitioners) who were higher in the chain of command than the Wardens. *Id.* at 116a. Nevertheless, in light of respondent's general allegations and the "unique context" of the Justice Department's investigation into the September 11th attacks, the court found, with respect to each of the relevant counts, that it could not conclude there is "no set of facts" on which respondent would be entitled to relief from petitioners. *Id.* at 136a-137a, 146a.

3. a. The court of appeals affirmed in relevant part. App., *infra*, 1a-70a. The court focused on "several issues concerning the defense of qualified immunity in the aftermath of the events of 9/11." *Id.* at 2a.

In addressing pleading requirements, the court of appeals specifically discussed four of this Court's decisions. App., *infra*, 15a-27a (citing and discussing *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993); *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002); *Crawford-El* v.

Britton, 523 U.S. 574 (1998); and *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955 (2007)). It observed that those decisions are "not readily harmonized," *id.* at 15a, and suggested that "[c]onsiderable uncertainty" exists under this Court's precedents concerning "the standard for assessing the adequacy of pleadings," *id.* at 19a. Nevertheless, the court interpreted this Court's precedents as requiring "a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Id.* at 25a.

The court stated that it saw "some merit" to the view that a more rigorous standard should be applied. App., *infra*, 25a. The court explained that "qualified immunity is a privilege that is essential to the ability of government officials to carry out their public roles effectively without fear of undue harassment by litigation." *Ibid.* Moreover, the court continued, "some of [respondent's] claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement," and allowing such claims to proceed "might facilitate the very type of broad-ranging discovery and litigation burdens that the qualified immunity privilege was intended to prevent." *Ibid.* However, the Court believed it was bound by this Court's precedents to apply the "more flexible 'plausibility standard'" it described. *Ibid.*; see *id.* at 25a-26a.

Applying that "plausibility" standard to the claims against petitioners, the court of appeals held that respondent had sufficiently pleaded valid claims against petitioners for racial or religious discrimination and for conspiring to violate his civil rights. App., *infra*, 62a-63a, 65a. The court held that allegations that respondent was deemed to be a "high interest" detainee solely because of his race and religion were sufficient to make

out claims of unlawful discrimination. *Id.* at 59a. The court relied on *Crawford-El* and *Swierkiewicz* for the proposition that conclusory allegations of discriminatory motive are sufficient to survive summary disposition. *Id.* at 61a. The court also relied on respondent's allegations that all Arab Muslim men arrested on criminal or immigration charges in the New York region in the course of the FBI's investigation into the September 11th attacks were initially classified as being "of interest." *Ibid.*

Moreover, the court of appeals held that the allegations against petitioners were sufficient to establish their personal involvement in or responsibility for the alleged discriminatory conduct. App., *infra*, 62a. The court cited respondent's allegations that petitioners "were instrumental in adopting the 'policies and practices challenged,'" that thousands of Arab Muslims were arrested "under the direction of [petitioner] Mueller," and that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [respondent] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Ibid.* Although the court acknowledged that officials other than petitioners were the ones who had selected respondent as a "high interest" detainee, it concluded that fact "does not necessarily insulate Ashcroft and Mueller from personal responsibility for the actions of their subordinates under the standards of supervisory liability." *Ibid.* Thus, the court held that "the allegation that [petitioners] condoned and agreed to the discrimination that [respondent] alleges satisfies [the court's] plausibility standard without an allegation of subsidiary facts." *Ibid.*

b. Judge Cabranes joined the panel's opinion but filed a separate concurrence to "underscor[e] that some of [the Supreme Court's] precedents are less than crystal clear and fully deserve reconsideration by the Supreme Court at the earliest opportunity." App., *infra*, 68a. In particular, Judge Cabranes highlighted the "uneasy" tension between this Court's interpretation of general civil pleading requirements and qualified-immunity doctrine. *Ibid.* Although most of the conduct complained of by respondent was alleged to have been carried out by lower-level officials, Judge Cabranes noted that it is nevertheless "possible that the incumbent Director of the Federal Bureau of Investigation and a former Attorney General of the United States will have to submit to discovery, and possibly to a jury trial, regarding [respondent's] claims." *Id.* at 69a.

Judge Cabranes also emphasized that concerns about discovery abuse are "all the more significant in the context of a lawsuit against * * * federal government officials charged with responsibility for national security and entitled by law to assert claims of qualified immunity." App., *infra*, 69a. In addition, he observed that "it seems that little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." *Id.* at 69a-70a. Nevertheless, Judge Cabranes ultimately deemed that troubling outcome to be compelled by the application of the "relevant precedents by a court of inferior jurisdiction." *Id.* at 70a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that cabinet-level officers and other high-ranking officials—in this case, a former Attorney General and the incumbent Director of the FBI—may be subjected to discovery and the demands of litigation (at least through the summary judgment stage) in this *Bivens* action based on bare and conclusory allegations that they knew about and condoned the allegedly discriminatory actions of much-lower-level officials in the Department of Justice in responding to an unprecedented national-security crisis. In addition, the Second Circuit's decision effectively holds that high-ranking officials—including Cabinet officers—may be held potentially liable in *Bivens* suits on a constructive notice theory that is tantamount to imposing *respondeat superior* liability.

This case thus presents two crucially important questions of concerning the scope of the protection afforded high-ranking government officials under qualified immunity principles. First, whether conclusory allegations that high-level government officials had knowledge of alleged wrongdoing by subordinate officials are sufficient to survive a motion to dismiss in an action brought under *Bivens*. And, second, whether high-level officials who lack actual knowledge of the risk that subordinates would engage in wrongdoing may nevertheless be held personally liable on the theory that their official positions gave them constructive knowledge. Those questions are important, and their importance is amplified in the context of high-ranking officials charged with responding to an extraordinary national-security crisis like the September 11 attacks.

Not only are the questions presented of vital importance, but the Second Circuit's decision conflicts with

decisions of this Court and of other courts of appeals. First, the decision conflicts with this Court's holdings on the pleading standards for evaluating claims and the requirements for holding supervisors personally liable under *Bivens* and 42 U.S.C. 1983. While not acknowledging the conflict with this Court's precedents, all the judges on the panel conceded difficulties in applying this Court's precedents and noted the value of clarification. See App., *infra*, 15a (panel decision) (the "guidance" provided by this Court's precedents "is not readily harmonized"); *id.* at 68a (Judge Cabranes) (this Court's precedents are "less than crystal clear and fully deserve reconsideration by [this] Court at the earliest opportunity"). Second, the Second Circuit's decision in this case deepens circuit splits on the questions presented.

Finally, the Second Circuit's decision could have significant, adverse practical consequences. The analysis employed by the court of appeals will significantly undermine the protections afforded by qualified immunity by potentially subjecting high-level government officials to discovery and even a trial based merely on conclusory allegations that such officials knew of or condoned alleged wrongdoing by subordinate officials. And, as this case underscores, it will do so even in the national-security context, where there is an obvious "national interest in enabling Cabinet officers * * * to perform their sensitive duties with decisiveness and without potentially ruinous hesitation." *Mitchell* v. *Forsyth*, 472 U.S. 511, 541 (1985) (Stevens, J., concurring in judgment); see *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (the qualified immunity "exists because 'officials should not err always on the side of caution' because they fear being sued"). Indeed, as Judge Cabranes observed, the decision below creates a "blueprint" for "plaintiffs claim-

ing to be aggrieved by national security programs and policies of the federal government * * * to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." App., *infra*, 69a-70a. This Court's review is therefore warranted.

I. Certiorari Is Warranted To Consider What Allegations Are Necessary To Vitiate The Qualified Immunity Of High-Ranking Government Officials From Suit

In holding that a motion to dismiss may be defeated by conclusory allegations that high-level government officials knew about the unlawful conduct of their subordinates, the court of appeals misconstrued this Court's prior decisions. The court of appeals candidly acknowledged that it struggled in interpreting this Court's decisions, App., *infra*, 15a (panel decision); *id.* at 68a (Judge Cabranes), and that there was at least "some merit" to imposing a more rigorous pleading standard than the one described by the court of appeals, *id.* at 25a (panel decision); *id.* at 69a-70a (Judge Cabranes). Nevertheless, the result reached by the court of appeals is inconsistent with a proper understanding of this Court's decisions in *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), and *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955 (2007). Moreover, further review is particularly warranted because the court of appeals' ruling creates a conflict with decisions of at least four other courts of appeals faced with similar facts, and its approach would largely eviscerate the important protections of the doctrine of qualified immunity in the circumstances in which those protections are most acutely needed.

a. The court of appeals relied on a handful of conclusory allegations as the purported basis for holding

petitioners potentially liable for alleged unlawful discrimination and conspiracy—through the acts of subordinate officials—to deprive respondent of his civil rights. Even at face value, those allegations do not show that respondent's right to relief against petitioners was anything more than speculative. As this Court stated in *Bell Atlantic*, to defeat a motion to dismiss, the allegations in a complaint must contain "more than labels and [legal] conclusions" and must "raise a reasonable expectation that discovery will reveal evidence" that the defendants engaged in unlawful conduct. 127 S. Ct. at 1965. Similarly, in *Crawford-El*, the Court contemplated that district courts will "protect[] the substance of the qualified immunity defense" by requiring plaintiffs to "'put forward specific, nonconclusory factual allegations' * * * in order to survive a prediscovery motion for dismissal or summary judgment." 523 U.S. at 598 (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)). Respondent's allegations against petitioners do not meet those burdens.

Respondent alleges that petitioners "approved" a policy of holding suspects deemed to be "of high interest" to the September 11th investigation in highly restrictive conditions of confinement pending clearance by the FBI, App., *infra*, 168a (Compl. ¶ 69), but he does not claim that the policy was itself discriminatory. Rather, he claims that the policy was implemented in a discriminatory fashion by two lower-level FBI officials, who were actually responsible for determining which suspects were "of high interest" to the terrorism investigation. See *id.* at 164a-165a, 169a (Compl. ¶¶ 51, 76). Thus, respondent alleges only that "[i]n many cases," detainees were classified—by persons other than petitioners—as being "of high interest" because of their

race, religion, and national origin, "not because of any evidence of the detainees' involvement in supporting terrorist activity." *Id.* at 164a (Compl. ¶ 49). Respondent also alleges that, "within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks * * * were immediately classified as 'of interest'" to the investigation. *Id.* at 165a (Compl. ¶ 52).

The underlying allegations do not support the conclusory allegations about petitioners' personal involvement and, if anything, they affirmatively suggest a lack of personal involvement. The complaint alleges that (1) respondents approved only of a general policy, App., *infra*, 168a (Compl. ¶ 69); (2) the general policy was not discriminatory on its face, but rather in application, *id.* at 164a (Compl. ¶¶ 48-49); and (3) other defendants made the individual determinations at issue, *id.* at 164a-165a (Compl. ¶¶ 50-51). Respondent does not allege that either petitioner participated in the classification decision, or that they knew which detainees were classified as being "of high interest," or even that they established the allegedly discriminatory criteria that were used by subordinate officials. Nor does respondent allege any communications between the individuals who allegedly made the classification at issue (Rolince and Maxwell) and petitioners, or that petitioners knew of any particular activities taken by the other defendants as to respondent.

Respondent also alleges that petitioners had supervisory authority over subordinate officials who implemented the confinement policy, as part of their ultimate responsibility for investigating and prosecuting violations of federal criminal law. See App., *infra*, 157a, 164a

(Compl. ¶¶ 10, 11, 47). As explained below (at pp. 26-29, *infra*), the mere fact of supervisory authority is not an adequate basis for holding petitioners personally liable for alleged wrongdoing committed by others, absent facts showing that they had actual knowledge of a substantial risk of wrongdoing and that their failure to take action was the proximate cause of respondent's alleged injuries. The allegations that petitioners had official authority over subordinates who were allegedly discriminatory in their selection of "high interest" detainees are thus fully consistent with lawful behavior on petitioners' part. See *Bell Atl. Corp.*, 127 S. Ct. at 1965-1966 (holding that a complaint must allege facts sufficient to make an inference of unlawful conduct plausible, and not merely possible, and that allegations that are fully consistent with lawful behavior do not "raise a right to relief above the speculative level").

The very language of the court of appeals' opinion underscores the extent to which it was premised on speculative inferences. The court simply assumed that, in light of the importance of the investigation into the September 11th attacks, there was a "likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies" for "high interest" suspects. App., *infra*, 62a; see also *id*. at 43a ("[I]t is plausible to believe that senior officials of the Department of Justice would be aware of policies concerning the detention of those arrested by federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies."). But the requirement that the actual allegations of the complaint be plausible, rather than speculative, is not an invitation to engage in speculation con-

cerning matters that the plaintiff himself did not allege. And this case shows the hazards of such speculation. As the district court noted, the investigation was nothing short of "massive." *Id.* at 76a n.4. "Within 3 days [of September 11, 2001], more than *4,000 FBI Special Agents* and *3,000 support personnel* were assigned to work on the investigation," and "[b]y September 18, 2001, the FBI had received more than *96,000 leads* from the public." *Ibid.* (emphases added). Given the unprecedented size of the investigation, there is every reason to assume that the Attorney General and the Director of the FBI did not personally do more than—as respondent specifically alleges—approve a general policy of using highly restrictive confinement for any "high interest" detainee until it could be established that he was not connected with terrorist activities.

Finally, respondent makes a conclusory allegation that petitioners "knew of, condoned, and willfully and maliciously agreed" to subject him to unlawful discrimination. App., *infra*, 172a (Compl. ¶ 96). But that is simply a legal conclusion and it is black-letter law that a court ruling on a motion to dismiss is not "bound to accept as true a legal conclusion couched as a factual allegation." *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986). This Court reaffirmed and elaborated on that proposition in *Bell Atlantic*, explaining that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"; rather, a plaintiff's factual allegations must do more than create a suspicion of actionable wrongdoing. 127 S. Ct. at 1964-1965. Because the subsidiary factual allegations in the complaint in this case do not show that a right of recovery against petitioners is any-

thing more than speculative, the courts below should have granted their motion to dismiss.

b. The court of appeals invoked this Court's decisions in *Crawford-El* and *Swierkiewicz* in holding that the allegations against petitioners—in particular the unsupported and conclusory allegation that they "knew of, condoned, and willfully and maliciously agreed" to discrimination—were sufficient to defeat summary disposition. App., *infra*, 61a-62a. Those cases lend no weight to the conclusion that an allegation of culpable mens rea, unsubstantiated by any predicate facts about the conduct that is the alleged basis for liability, is enough to defeat summary disposition.

In both *Crawford-El* and *Swierkiewicz*, the complaints provided clear notice to the defendant of the conduct alleged to give rise to liability (*i.e.*, the who, what, and when of the alleged wrongdoing). In *Crawford-El*, the plaintiff prisoner alleged that the defendant corrections officer had deliberately misdelivered his box of personal belongings by asking his relative to pick them up rather than ship them to his next destination, and that she had done so in retaliation for the plaintiff's participation in unfavorable press reporting about the prison. 523 U.S. at 578-579. The plaintiff also alleged specific statements by the defendant herself that provided circumstantial evidence of her discriminatory motivation. *Id.* at 579 n.1. Similarly, in *Swierkiewicz*, the plaintiff alleged that he was demoted by his employer's Chief Executive Officer and that the bulk of his former duties were transferred to a younger employee; that the CEO later said he wanted to "energize" his department and appointed the younger and less-qualified employee to the plaintiff's prior position; and that, following his demotion, the plaintiff was isolated by his supervisor

and excluded from business decisions. 534 U.S. at 508. After outlining his grievances, the plaintiff was given the choice of resigning without a severance package and, when he refused to do so, was fired. See *id.* at 509; see also *id.* at 514 (noting that the complaint "detailed the events leading to [the plaintiff's] termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination"). Thus, the only issue before this Court in both cases was the showing of discriminatory motive necessary to defeat summary disposition of the claims. See *Crawford-El*, 523 U.S. at 577-578; *Swierkiewicz*, 534 U.S. at 513-514; see also Fed. R. Civ. P. 9(b) (requiring that fraud or mistake must be pleaded with particularity but that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally").

Here, and in sharp contrast, respondent's allegations do not identify the specific conduct alleged to be the basis for petitioners' individual liability. He does not allege the *what* of liability (*i.e.*, any steps that the Attorney General or FBI Director took to approve, condone, or ratify the discriminatory selection of respondent as a "high interest" detainee). Respondent does not allege *when* this conduct took place, *who* was involved, or *where* it occurred. And respondent does not allege a factual basis for inferring that petitioners' allegedly culpable states of mind were the proximate cause of the allegedly discriminatory selection of respondent as a "high interest" detainee. The allegations against petitioners are therefore analogous to the hypothetical allegation of an unlawful agreement in *Bell Atlantic*, which this Court held could not satisfy Rule 8's notice requirements because it made no mention of any "specific time, place, or persons involved in the alleged conspiracies."

127 S. Ct. at 1970 n.10; see also *id.* at 1964 (holding that allegations in the complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" (quoting *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957)).

c. The decision of the court of appeals is not only erroneous, but also in conflict with decisions of at least four other courts of appeals holding that conclusory allegations that high-level government officials are culpable for wrongdoing by subordinate officials or the agency itself are inadequate to defeat a motion to dismiss.

Thus, in *Marrero-Gutierrez* v. *Molina*, 491 F.3d 1 (2007), the First Circuit addressed allegations that government supervisors had "performed, fostered, and encouraged the continuous persecution, harassment, transfers, reprisals and demotions" of the plaintiff "because of" her political affiliation, "and in reprisal for defending [her] rights in frivolous processes commenced against [her]." *Gutiérrez* v. *Molina*, 447 F. Supp. 2d 168, 175 (D.P.R. 2006). The court of appeals held that the plaintiff's allegations were insufficient to defeat a motion to dismiss on the pleadings, because they failed to "set forth any sort of causal connection between her demotion and the political animus that she alleges prompted it." 491 F.3d at 9-10. Although "such a connection" was concededly "one among a myriad of possible inferences" from the alleged facts, the court found that insufficient under *Bell Atlantic* because "it would be speculative to draw the forbidden inference from the range of possibilities." *Id.* at 10.

Similarly, in *Evancho* v. *Fisher*, 423 F.3d 347 (2005), the Third Circuit held that an allegation that the plaintiff's allegedly unlawful transfer "was carried out by underlings reporting directly to the [state] attorney gen-

eral and/or by the attorney general himself" did not suffice to show the attorney general's personal involvement in the challenged decision. *Id.* at 354. Emphasizing that liability could not be based on *respondeat superior*, the court refused to infer that the attorney general was involved in the challenged transfer simply because he had supervisory authority over the plaintiff. *Id.* at 353-354. The court also noted the difficulty that the attorney general would have in framing an answer to the complaint, given the lack of any allegation of a specific act by him relating to the transfer. See *id.* at 354; see also *ibid.* (explaining that court was not required to credit the "bald assertion" that the attorney general had carried out the plaintiff's transfer in deciding motion to dismiss).

In *Nuclear Transport & Storage, Inc.* v. *United States*, 890 F.2d 1348 (1989), cert. denied, 494 U.S. 1079 (1990), the Sixth Circuit affirmed the dismissal of *Bivens* claims brought against the Secretary of Energy and two other officials of the Department of Energy. The court held that allegations that the individual defendants "acted to implement, approve, carry out, and otherwise facilitate" allegedly unlawful conduct by the Department were insufficient to defeat a motion to dismiss. See *id.* at 1355 (quoting the complaint); see also *Nuclear Transp. & Storage, Inc.* v. *United States*, 703 F. Supp. 660, 667-668 (E.D. Tenn. 1988), aff'd, 890 F.2d 1348 (6th Cir. 1989), cert. denied, 494 U.S. 1079 (1990). As the Sixth Circuit noted, if the plaintiff's conclusory allegations against the individual defendants "were sufficient to state a claim, any suit against a federal agency could

be turned into a *Bivens* action by adding a claim for damages against the agency head." 890 F.2d at 1355.[3]

And in *Gonzalez* v. *Reno*, 325 F.3d 1228 (2003), the Eleventh Circuit held that conclusory allegations that federal agents executing an arrest warrant for Elian Gonzalez "acted under the personal direction of" Attorney General Janet Reno, INS Commissioner Doris Meissner, and Deputy Attorney General Eric Holder, and with those officials' "knowledge, agreement, approval, and acquiescence," were inadequate to survive a motion to dismiss. *Id.* at 1235. The Eleventh Circuit noted that the plaintiff had failed to allege any facts supporting these conclusory allegations, and held that it would be unreasonable to infer without additional support that the high-level officials had directed unconstitutional conduct. *Id.* at 1235-1236. Particularly in light of "the presumption of legitimacy accorded to official conduct," the reasonable inference from the facts alleged "is that the supervisory defendants ordered the execution of valid search and arrest warrants with the expectation that the agents on the scene would execute them in a lawful manner." *Ibid.*; see also *Dalrymple* v. *Reno*, 334 F.3d 991, 996-997 (11th Cir. 2003) (holding, in companion

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[3] Although *Nuclear Transport* was decided at a time when the Sixth Circuit applied a heightened pleading standard to civil-rights claims against government officials, the standard that the Sixth Circuit applied in that case is comparable to the standard articulated by this Court in decisions like *Bell Atlantic* and *Crawford-El*. See *Nuclear Transport*, 890 F.2d at 1355 (complaint "must contain more than 'mere conclusory allegations of unconstitutional conduct' " by government officials) (quoting *Chapman* v. *City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986)). In addition, the Sixth Circuit has subsequently described as "well-settled" the principle that a plaintiff must "allege that a specific defendant performed a specific act that suffices to state a claim." *Kesterson* v. *Moritsugu*, No. 96-5898, 1998 WL 321008, at *4 (June 3, 1998).

case, that allegations that Attorney General Reno "knew and intended" that subordinate officers carrying out a federal raid would subject bystanders to excessive force were insufficient to defeat a motion to dismiss), cert. denied, 541 U.S. 935 (2004).

d. By permitting unsubstantiated allegations of culpable knowledge to be the basis for discovery against high-level government officials, the court of appeals has substantially undermined the effectiveness of the doctrine of qualified immunity. This Court has long acknowledged the "social costs" of allowing *Bivens* claims against government officials, including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). The type of claims in this case—challenging as culpable the mens rea of high-level government officials—raises particularly serious problems in this regard, because such claims inevitably result in discovery into the subjective motivations and state of mind of senior officials. As the Court recognized in *Harlow*, such inquiries are "peculiarly disruptive of effective government" and "frequently could implicate separation-of-powers concerns." *Id.* at 817 & n.28. Moreover, the nature of the responsibilities of high-ranking officials means that, if conclusory allegations suffice, they could be subject to a high volume of disruptive suits that could divert the officials' attention from their important responsibilities.

Although this Court has rejected a heightened pleading standard for claims alleging improper motive that are subject to a qualified-immunity defense, it has nevertheless emphasized that a district court should "protect[] the substance of the qualified immunity defense"

by, *inter alia*, "insist[ing] that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal." *Crawford-El*, 523 U.S. at 597-598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in judgment)); see also *Bell Atl. Corp.*, 127 S. Ct. at 1973 n.14 (noting that "we do not apply any heightened pleading standard," but holding that the plaintiff failed to state a claim under a proper understanding of Rule 8) (internal quotation marks omitted).

By failing to require that level of specificity in this case, the court of appeals has effectively precluded petitioners from arguing that, in the circumstances in which they acted, their conduct was objectively reasonable and thus shielded by qualified immunity.[4] As a consequence, the decision below has, as Judge Cabranes observed, created a "blueprint" that can now be used by others "claiming to be aggrieved by national security programs and policies of the federal government" to "require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." App., *infra*, 69a-70a. For some plaintiffs, the opportunity to distract the attention of high-ranking officials in carrying out policies with which they disagree may itself be a strong incentive for filing suit.

The availability of such a blueprint is especially troubling in the national-security context—not only because

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[4] The specific context in which government officials act is always relevant to the qualified-immunity analysis. See, *e.g.*, *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam) ("The relevant, dispositive inquiry * * * is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.") (quoting *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001)).

"there surely is a national interest" in having government officials perform such "sensitive duties with decisiveness and without potentially ruinous hesitation," but also because "[t]he passions aroused by matters of national security * * * and the high profile of the Cabinet officers with functions in that area make them 'easily identifiable target[s] for suits for civil damages'" or even for "vexatious and politically motivated litigation." *Mitchell*, 472 U.S. at 541-542 (Stevens, J., concurring in judgment) (quoting *Nixon* v. *Fitzgerald*, 457 U.S. 731, 753 (1982)). Cf. *Wilson* v. *Libby*, 498 F. Supp. 2d 74, 96 (D.D.C. 2007) (refusing to infer a remedy under *Bivens* in part because of "the risks incurred by discovery into issues of national security"). Indeed, this case focuses on the actions of the highest-ranking Department of Justice officials in the immediate aftermath of the deadliest attack on American soil in the Nation's history. It is unlikely that the demands placed on those officials by such litigation will escape the notice of the individuals who occupy those positions in the event of any future national-security crisis. Cf. *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.) (to deny qualified immunity would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties"), cert. denied, 339 U.S. 949 (1950).

The fact that this case is at the dismissal stage does not alleviate the need for this Court's review. The qualified-immunity doctrine provides not merely immunity from liability but "*immunity from suit*." *Mitchell*, 472 U.S. at 526. And this Court has "repeatedly * * * stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter*, 502 U.S. at 227 (citing cases). As the Court has explained,

that proactive approach is warranted to "weed out suits * * * without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits." *Siegert*, 500 U.S. at 232; see also *Harlow*, 457 U.S. at 818 (until the "threshold immunity issue is resolved, discovery should not be allowed"). As Judge Cabranes observed, allowing suits, such as this, against high-ranking officials predicated only on conclusory allegations of general knowledge of the alleged actions of lower-level officials to proceed past the dismissal stage could "require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." App., *infra*, at 70a. Such "discovery would not only result in significant cost but would also deplete the time and effectiveness of current officials and the personal resources of former officials." *Id.* at 70a n.1.[5]

This Court's review is warranted to protect high-level officials from the burden of defending against unsubstantiated claims premised on little more than a conclusory allegation of a culpable state of mind.

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[5] The panel decision stressed that the district court should take care in allowing discovery against petitioners. App., *infra*, 67a. But, as this Court emphasized in *Bell Atlantic*, "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management,' given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." 127 S. Ct. at 1967 (citation omitted). Rather, the court's responsibility is to "tak[e] care to require allegations that reach the [requisite] level" in the first place before allowing any discovery to ensue. *Ibid.*

II. Certiorari Is Warranted To Consider Whether High-Ranking Officials May Be Held Liable In A *Bivens* Action Based On A Constructive Notice Theory

This Court's review is also warranted to consider whether high-level government officials may be held personally liable for wrongdoing of which they lacked actual knowledge on the theory that their official responsibilities gave them constructive notice of the actions of subordinate officials. The Second Circuit's refusal to dismiss the claims against petitioners was predicated on its holding that the Attorney General and FBI Director could be held liable for inadequate supervision of subordinates, even without any allegations that could support a finding of actual knowledge of a risk of unconstitutional conduct by others. That holding is inconsistent with the general presumption of regularity that applies to the actions of government officials, see *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996), and with this Court's decisions. It also implicates a clear circuit split on the important question whether actual knowledge is necessary for supervisory liability.

a. In holding that the allegations against petitioners were adequate to subject them to discovery, the court of appeals emphasized that, as agency heads, petitioners had ultimate responsibility over the policies and practices challenged in the lawsuit, and specifically that the FBI's arrest and detention of thousands of Arab Muslim men in the course of investigating the September 11th attacks took place "under the direction of [petitioner] Mueller." App., *infra*, 62a. Although, as discussed, the general policy alleged by respondent was not discriminatory on its face, and although the court of appeals recognized that other officials—and not petitioners—were in

fact responsible for the classification of respondent as a "high interest" detainee, the court reasoned that petitioners nevertheless could be held personally responsible "for the actions of their subordinates under the standards of supervisory liability." *Ibid.*

In the Second Circuit, those standards permit a supervisor to be held personally liable under Section 1983 or *Bivens* based not only on the supervisor's actual knowledge, but also on merely constructive knowledge, of a risk of wrongdoing by subordinate officials. See App., *infra*, 14a (holding that supervisor may be liable for, *inter alia*, gross negligence in supervising subordinates who commit constitutional violation); accord, *e.g.*, *Poe* v. *Leonard*, 282 F.3d 123, 141-142 (2d Cir. 2002); *Black* v. *Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996); *Meriwether* v. *Coughlin*, 879 F.2d 1037, 1048 (2d Cir. 1989); *McKinnon* v. *Patterson*, 568 F.2d 930, 934 (2d Cir. 1977), cert. denied, 434 U.S. 1087 (1978).[6]

b. The court of appeals' endorsement of supervisory liability on a theory of negligent supervision is contrary to the approach this Court has adopted in related contexts. In Section 1983 suits—the "analog" to *Bivens* for state actions, see *Hartman* v. *Moore*, 547 U.S. 250, 254 n.2 (2006)—the Court has foreclosed the imposition of Section 1983 liability on individual government officials on the basis that they had "constructive notice" of wrongdoing committed by third parties. In *Rizzo* v.

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[6] In light of established circuit precedent, petitioners did not brief the question of actual knowledge in the court of appeals. But petitioners "argue[d] that [respondent] failed to allege their personal involvement in any discrimination," and the court rejected that argument on the express assumption that they could have "personal responsibility for the actions of their subordinates" even in the absence of actual knowledge. App., *infra*, 62a.

Goode, 423 U.S. 362 (1976), the Court reversed a grant of injunctive relief under Section 1983 against the mayor, the city manager, the police commissioner, and other police supervisors in Philadelphia. It concluded that there could be no supervisory liability under Section 1983 when "unconstitutional exercises of police power" had been committed by individual police officers rather than their supervisors and "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [the supervisors]—express or otherwise—showing their authorization or approval of such misconduct." *Id.* at 371, 377. Although administrators may be liable when they deny rights "by their *own* conduct," that was not the case in *Rizzo*, because "the responsible authorities had played no affirmative part" in violating constitutional rights. *Id.* at 377.

The general restraint that this Court traditionally exercises in interpreting the scope of the *Bivens* cause of action (see *Wilkie* v. *Robbins,* 127 S. Ct. 2588 (2007)) at a minimum calls for adopting a standard of secondary liability that is at least as rigorous as the one that this Court has long applied in the Section 1983 context. And, indeed, in *Farmer* v. *Brennan*, 511 U.S. 825 (1994), the Court held that a supervisory-level prison official can be held liable for dangerous prison conditions alleged to violate the Eighth Amendment only if the supervisor "knows of and disregards an excessive risk to inmate health or safety" (*i.e.*, is subjectively aware of the risk to the prisoner and chooses to disregard it). *Id.* at 837-838. In adopting that requirement of *subjective* knowledge as the predicate for "deliberate indifference," the Court distinguished individual defendants from corporate mu-

nicipalities, for which an objective standard of knowledge is more appropriate. See *id.* at 841-842.

The Court has followed a similar approach in Section 1983 actions against municipalities. There, the Court has held that liability attaches only "when it can be fairly said that the city itself is the wrongdoer," *Collins* v. *City of Harker Heights*, 503 U.S. 115, 122 (1992), and not based on a theory of *respondeat superior* or vicarious liability. See *City of Canton* v. *Harris*, 489 U.S. 378, 386-387 (1989). Where a plaintiff seeks to hold a municipality liable for constitutional torts committed by its agents, the plaintiff must "demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." *Board of the County Comm'rs* v. *Brown*, 520 U.S. 397, 404 (1997); see also *id.* at 405 (explaining that "rigorous standards of culpability and causation must be applied"). Liability may not be imposed based on "simple or even heightened negligence," but instead requires a showing that the municipality itself manifested "deliberate indifference to the risk that a violation of a particular constitutional or statutory right" might occur. *Id.* at 407, 411. The plaintiff must also establish "a direct causal link" between the municipality's culpable conduct "and the alleged constitutional deprivation." *Harris*, 489 U.S. at 385.

No more lenient standard than the deliberate-indifference standard should apply where a plaintiff seeks to hold a supervisory official such as the Attorney General or the Director of the FBI personally liable under *Bivens* for unconstitutional conduct allegedly committed by a subordinate employee. The rationale for imposing liability is the same in both instances, as is the rule that liability must be predicated on the defendant's own cul-

pable conduct rather than vicarious liability or *respondeat superior*.

As applied to the allegations in this case, the standard articulated in *Farmer* for "deliberate indifference" would preclude liability unless petitioners had actual knowledge of the discriminatory selection of suspects as "of high interest" (or of a significant risk of discriminatory selections). See *Farmer*, 511 U.S. at 837-838; *Brown*, 520 U.S. at 414. But the factual allegations in respondent's complaint could not establish that petitioners knew of any serious risk that subordinates were engaged in unlawful discrimination, much less knew of the alleged unlawful conduct against respondent himself. Furthermore, respondent's factual allegations do not show any causal relationship between petitioners' own conduct and respondent's designation as a suspect "of high interest." Absent such allegations, respondent's right to relief was purely speculative.

c. The court of appeals' holding implicates a clear and well-developed split among the circuits on the question whether a government official may be held personally liable based on constructive notice of actual wrongdoing or the risk of wrongdoing by subordinates, or must instead have actual notice of the wrongdoing or risk of wrongdoing.

As one commentator has noted, "[t]he Second Circuit's test for supervisory liability is the most expansive and the least reconcilable with *Rizzo*." Michael S. Bogren, *Municipal Liability Under § 1983*, *in Sword & Shield Revisited* 215, 255 (Mary Massaron Ross ed., 1998) (Bogren). But other circuits—the First, Fourth, and Eighth Circuits—have also deviated from *Rizzo*'s requirement that a supervisor be liable only when he or she has some direct responsibility for the alleged consti-

tutional violation. See *ibid.*; *Rodriguez-Garcia* v. *Municipality of Caguas*, 495 F.3d 1, 10 (1st Cir. 2007) (holding that a plaintiff may establish supervisor liability by showing "that the official had actual or constructive notice of the constitutional violation"); *Carter* v. *Morris*, 164 F.3d 215, 221 (4th Cir. 1999) (stating that supervisor liability requires a showing of "actual or constructive knowledge of a risk of constitutional injury, deliberate indifference to that risk, and an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff") (internal quotation marks omitted); *Hall* v. *Lombardi*, 996 F.2d 954, 961 (8th Cir. 1993) ("[P]roof of actual knowledge is not an absolute prerequisite for imposing supervisory liability. We have consistently held that reckless disregard on the part of a supervisor will suffice to impose liability.") (internal quotation marks and citations omitted), cert. denied, 510 U.S. 1047 (1994).

By contrast, the Third Circuit does not impose liability on a supervisor unless the supervisor actually knew of the subordinate's conduct and either approved of it or acquiesced in it. See *Baker* v. *Monroe Twp.*, 50 F.3d 1186, 1194 (1995); *id.* at 1194 n.5 (noting "that other circuits have developed broader standards for supervisory liability under section 1983"); *id.* at 1200-1201 (Alito, J., concurring and dissenting) (stating test and concluding that actual knowledge of, and acquiescence in, an unlawful search could not be inferred under the circumstances). The Tenth Circuit has expressly followed the Third Circuit. See, *e.g.*, *Woodward* v. *City of Worland*, 977 F.2d 1392, 1400 (1992) ("We are persuaded that the proper articulation of the test for supervisory liability under section 1983 is that set forth by the Third Circuit * * * where * * * supervisor liability requires 'allega-

tions of personal direction or of actual knowledge and acquiescence.'") (internal citation and quotation marks omitted), cert. denied, 509 U.S. 923 (1993). The Seventh Circuit has similarly rejected liability for a supervisor who negligently fails to detect and prevent subordinate misconduct, see *Gossmeyer* v. *McDonald*, 128 F.3d 481, 495 (1997), and it has required plaintiffs to establish that supervisors were "personally involved or acquiesced in the alleged constitutional violation," *Kelly* v. *Municipal Courts*, 97 F.3d 902, 909 (1996).

As then-Judge Roberts explained for the D.C. Circuit, when "supervisors cannot be shown to have the requisite direct responsibility or to have given their authorization or approval of * * * misconduct," then "the effort to hold them personally liable fades into *respondeat superior* or vicarious liability, clearly barred under Section 1983." *International Action Ctr.* v. *United States*, 365 F.3d 20, 27 (2004) (internal quotation marks omitted). The principles of restraint that this Court applies in interpreting the scope of the *Bivens* cause of action compel the same conclusion here. And that is especially true in the context of this case, involving claims against high-ranking government officials arising out of the alleged conduct of inferior officials during an unprecedented national-security crisis.

d. The question of the level of knowledge needed to hold a supervisory official liable for wrongdoing committed by subordinate officials is of substantial importance and warrants clarification by this Court. Cf. Bogren 257-258 ("The divergence of the circuits on the issue of supervisory liability leads to the inescapable conclusion that the Supreme Court will have to revisit this issue. In the meantime, * * * there is no bright-line rule on which a practitioner can rely."). By permitting supervi-

sory officials to be held liable based on a theory of constructive notice, the court of appeals has inappropriately expanded the inferred *Bivens* remedy to encompass something approaching *respondeat superior* liability. That result poses a significant threat to high-level government officials of crippling personal liability, and accordingly exacerbates the practical harms of a *Bivens* claim against supervisory officials. Cf. *Robertson* v. *Sichel*, 127 U.S. 507, 515 (1888) ("Competent persons could not be found to fill [supervisory] positions * * * if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person."). Moreover, a high-ranking official without actual notice of wrongdoing by subordinates will necessarily have little control over where the wrongdoing occurs or where suit is brought. The divergence of authority among the circuits is therefore patently unfair to high-ranking officials.

In this case, the impact of the Second Circuit's broad conception of supervisory liability under *Bivens*, coupled with its lenient pleading standard, is startling. As Judge Cabranes observed, under the court of appeals' decision, the former Attorney General and current FBI Director "may be required to comply with inherently onerous discovery requests probing, *inter alia*, their possible knowledge of actions taken by subordinates at the Federal Bureau of Investigation and the Federal Bureau of Prisons at a time when [petitioners] were trying to cope with a national and international security emergency unprecedented in the history of the American Republic." App., *infra*, 69a. What is more, the court's decision establishes a "blueprint" for "other plaintiffs claiming to

be aggrieved by national security programs and policies of the federal government * * * to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery." *Id.* at 69a-70a. The court of appeals decision producing that unsettling result warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 05-5768-CV (L), 05-5844-CV (con), 05-6379-CV (con), 05-6352-CV (con), 05-6386-CV (con), 05-6358-CV (con), 05-6388-CV (con)

JAVAID IQBAL, PLAINTIFF-APPELLEE

v.

DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER, MICHAEL COOKSEY, FORMER ASSISTANT DIRECTOR FOR CORRECTIONAL PROGRAMS OF THE BUREAU OF PRISONS, JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, DAVID RARDIN, FORMER DIRECTOR OF THE NORTHEAST REGION OF THE BUREAU OF PRISONS, MICHAEL ROLINCE, FORMER CHIEF OF THE FEDERAL BUREAU OF INVESTIGATION'S INTERNATIONAL TERRORISM OPERATIONS SECTION, COUNTERTERRORISM DIVISION, KATHLEEN HAWK SAWYER, FORMER DIRECTOR OF THE FEDERAL BUREAU OF PRISONS, KENNETH MAXWELL, FORMER ASSISTANT SPECIAL AGENT IN CHARGE, NEW YORK FIELD OFFICE, FEDERAL BUREAU OF INVESTIGATION, DEFENDANTS-APPELLANTS

Heard: Oct. 4, 2006
Decided: June 14, 2007

Before: NEWMAN, CABRANES, and SACK, Circuit Judges.

JON O. NEWMAN, Circuit Judge.

These interlocutory appeals present several issues concerning the defense of qualified immunity in the aftermath of the events of 9/11. Several current and former government officials from the Department of Justice, the Federal Bureau of Investigation ("FBI"), and the Bureau of Prisons ("BOP") appeal from the September 27, 2005, Order of the District Court for the Eastern District of New York (John Gleeson, District Judge) denying in part their motions to dismiss on the ground of qualified immunity. *See Elmaghraby v. Ashcroft,* No. 04 CV 1409, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) ("*Dist. Ct. op.*"). Plaintiff-Appellee Javaid Iqbal alleges that the Defendants-Appellants took a series of unconstitutional actions against him in connection with his confinement under harsh conditions at the Metropolitan Detention Center ("MDC") in Brooklyn, after separation from the general prison population. We conclude that the defense of qualified immunity, to the extent rejected by the District Court, cannot be sustained as to any Defendants at this preliminary stage of the litigation except as to the claim of violation of procedural due process rights, and we therefore affirm in part, reverse in part, and remand.

Background

Parties. Iqbal is a Muslim Pakistani currently residing in Pakistan. Iqbal's co-plaintiff was Ehad Elmaghraby, a Muslim Egyptian. After Judge Gleeson's ruling on the motions to dismiss, the United States settled Elmaghraby's claims by payment of $300,000.

Four groups of Defendants have filed appeals from Judge Gleeson's order. The first group consists of former Attorney General John Ashcroft and current FBI Director Robert Mueller. The second group consists of Michael Rolince, former Chief of the FBI's International Terrorism Operations Section, Counterterrorism Division, and Kenneth Maxwell, former Assistant Special Agent in Charge of the FBI's New York Field Office (the "FBI Defendants"). The third group consists of former BOP officials: Kathleen Hawk Sawyer, former BOP Director; David Rardin, former Director of the Northeast Region of the Bureau of Prisons; and Michael Cooksey, former Assistant Director for Correctional Programs of the Bureau of Prisons (the "BOP Defendants"). The fourth appeal was filed by Dennis Hasty, former MDC Warden. Other Defendants include Michael Zenk, MDC Warden at the time the lawsuit was filed, other MDC staff, and the United States.

Factual allegations. The complaint alleges the following facts, which are assumed to be true for purposes of the pending appeals, as we are required to do in reviewing a ruling on a motion to dismiss. *See Hill v. City of New York,* 45 F.3d 653, 657 (2d Cir. 1995). The Plaintiff was arrested by agents of the FBI and the Immigra-

tion and Naturalization Service on November 2, 2001.[1] Following his arrest, he was detained in the MDC's general prison population until January 8, 2002, when he was removed from the general prison population and assigned to a special section of the MDC known as the Administrative Maximum Special Housing Unit ("ADMAX SHU"), where he remained until he was reassigned to the general prison population at the end of July 2002. On this appeal, we consider only claims concerning the Plaintiff's separation from the general prison population and confinement thereafter in the ADMAX SHU. We do not consider the legality of his arrest or his initial detention in the MDC.

The complaint further alleges that in the months after 9/11, the FBI arrested and detained thousands of Arab Muslim men as part of its investigation into the events of 9/11. The fact of their detention, its duration, and the conditions of confinement depended on whether those arrested were classified as "of high interest." Many of these men, including the Plaintiff, were classified as "of high interest" solely because of their race,[2] religion, and national origin and not because of any in-

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[1] The complaint does not identify the charges on which Iqbal was arrested, but Judge Gleeson's opinion states that he was charged with conspiracy to defraud the United States and fraud with identification. *Dist. Ct. op.* at *1 n.1.

[2] Iqbal is a Muslim and a Pakistani, but not an Arab. Nevertheless, his claim is fairly to be understood as alleging unlawful treatment based on his ethnicity, even if not technically on a racial classification. And his allegations of what was done to Arab Muslims are fairly understood to mean that unlawful actions were taken against him because officials believed, perhaps because of his appearance and his ethnicity, that he was an Arab.

volvement in terrorism. In the New York City area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was investigating a 9/11 lead were classified as "of high interest." The FBI Defendants were responsible for making these classifications for detainees arrested in the New York City area, including the Plaintiff.

The complaint further alleges that Ashcroft and Mueller approved a policy of holding detainees "of high interest" in highly restrictive conditions until they were "cleared" by the FBI. In early October, BOP Defendant Cooksey, with the knowledge of BOP Defendant Sawyer, directed that all detainees "of high interest" be held in the most restrictive conditions possible. FBI officials were aware that the BOP was relying on this classification to hold detainees in restrictive conditions.

The complaint further alleges that soon after 9/11, the MDC created within the MDC an ADMAX SHU, the BOP's most restrictive type of confinement, to house the detainees "of high interest." The procedures for handling ADMAX SHU detainees were developed by MDC staff, at the request of Defendant Hasty. ADMAX SHU detainees were permitted to leave their cells only one hour each day, and all legal and social interactions were non-contact. Movement outside their cells required handcuffs and leg irons and four-officer escorts. Movement inside their cells was monitored by video cameras. For many weeks, the detainees were subject to a communications blackout.

The complaint further alleges that the MDC did not conduct any review of the detainees' segregation in the ADMAX SHU. Instead, the detainees remained in the ADMAX SHU until the FBI approved their release to

the general population. As a result, numerous detainees were held in the ADMAX SHU for extended periods of time even though there was no evidence linking them to terrorism.

The complaint further alleges that the Plaintiff was transferred to the ADMAX SHU on January 8, 2002. He was kept in solitary confinement. Until March, the lights in his cell were left on almost 24 hours a day, and MDC staff deliberately turned on air conditioning during the winter and heating during the summer. MDC staff left the Plaintiff in the open-air recreation area for hours when it was raining and then turned on the air conditioner when he returned to his cell. Whenever the Plaintiff was removed from his cell, he was handcuffed and shackled. The Plaintiff was not provided with adequate food and lost 40 pounds while in custody. MDC staff called him, among other things, a "terrorist" and a "Muslim killer."

The complaint further alleges that the Plaintiff was brutally beaten by MDC guards on two occasions: upon his transfer to the ADMAX SHU in January 2002 and again in March. Following the March beating, the Plaintiff was denied medical care for two weeks even though he was in excruciating pain. He was also subjected to daily strip and body-cavity searches. The March beating was prompted by the Plaintiff's protestations to a fourth consecutive strip and body-cavity search in the same room. MDC staff interfered with the Plaintiff's prayers, routinely confiscated his Koran, and refused to permit him to participate in Friday prayer services. They also interfered with the Plaintiff's communications with his defense attorney, for example, by disconnecting the phone if the Plaintiff complained about his conditions of

confinement and delaying his receipt of legal mail for up to two months.

The Plaintiff pled guilty on April 22, 2002, and was sentenced on September 17, 2002. He was released from the ADMAX SHU at the end of July 2002, after pleading guilty but before sentencing. Judge Gleeson considered the Plaintiff to be a pretrial detainee throughout his entire time in the ADMAX SHU. *Dist. Ct. op.* at *15 n.14. The Plaintiff was released from the MDC on January 15, 2003, and thereafter was removed to Pakistan (a fact not in the complaint but undisputed).

Litigation in the District Court. The Plaintiff (and his co-plaintiff) commenced this action in May 2004. Their complaint asserted twenty-one causes of action, including both statutory claims and constitutional tort claims pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). The causes of action, and the Defendants against whom they were asserted, are set forth in the margin.[3]

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[3] The claims, in the order set forth in the complaint, are:

1. Fifth Amendment substantive due process claim based on the conditions of confinement: Hasty and MDC staff.

2. Fifth Amendment procedural due process claim based on confinement in the ADMAX SHU: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

3-4. Fifth and Eighth Amendments excessive force claims: Hasty and MDC staff.

5. Sixth Amendment interference with right to counsel claim: Hasty and MDC staff.

Ashcroft and Mueller, the FBI Defendants, the BOP Defendants, Hasty, the MDC Warden, and an MDC

6-7. Fifth and Eighth Amendments denial of medical treatment claims: MDC staff (not at issue on this appeal).

8. Eighth Amendment conditions of confinement claim: Hasty and MDC staff.

9. Fourth Amendment unreasonable search claim based on strip and body-cavity searches: BOP Defendant Sawyer (but not other BOP Defendants), Hasty, and MDC staff.

10. First Amendment claim based on interference with religious practice: Hasty and MDC staff.

11. First Amendment claim based on religious discrimination: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

12. Fifth Amendment race-based equal protection claim: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

13. Religious Freedom Restoration Act ("RFRA") claim based on conditions of confinement: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

14-15. RFRA claims based on interference with religious practice and excessive force: Hasty and MDC staff.

16-17. 42 U.S.C. § 1985(3) claims for conspiracy to deprive Plaintiff of equal protection on the grounds of religion, race, and national origin: Ashcroft and Mueller, BOP Defendants, Hasty, and MDC staff.

18-20. Federal Tort Claims Act ("FTCA") claims for assault and battery, negligent denial of medical treatment, intentional infliction of emotional distress: United States.

21. Alien Tort Claims Act ("ATCA") claim: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

medical assistant[4] filed motions to dismiss on the grounds that (1) a *Bivens* action was precluded by "special factors," (2) they were protected by qualified immunity, (3) the supervisory defendants were not alleged to have sufficient personal involvement, and (4) Ashcroft, Mueller, the FBI Defendants, and the BOP Defendants were not subject to personal jurisdiction in New York. In addition, the United States moved to be substituted as the defendant on the ATCA claim (Count 21) and for dismissal of that claim.

With a few exceptions, Judge Gleeson denied the motions to dismiss. He first rejected Ashcroft's argument that "special factors," namely the post-9/11 context, precluded a *Bivens* action in this case. *See Dist. Ct. op.* at *14. Judge Gleeson then turned to the substance of the Plaintiff's *Bivens* claims. He denied Hasty's motion to dismiss the conditions of confinement claims (Counts One and Eight), concluding that the Plaintiff had adequately alleged (1) illegitimate reasons for the conditions of his confinement and (2) Hasty's personal involvement. *See id*. at *15-*17. He also found adequate allegations of Hasty's personal involvement in the claims of excessive force (Counts Three and Four), interference with the Plaintiff's right to counsel (Count Five), unreasonable strip searches (Count Nine), and interference with the Plaintiff's exercise of religion (Count Ten). *See id*. at *22, *27, *28. However, he found the allegations insufficient to support the personal involvement of BOP Defendant Sawyer in the unreasonable strip searches and dismissed this claim against her. *See id*. at *27.

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[4] Zenk, the MDC Warden at the time the lawsuit was filed, and the MDC medical assistant are not appealing Judge Gleeson's ruling.

With respect to the procedural due process claim (Count Two), Judge Gleeson found that the Plaintiff had alleged both a deprivation of a liberty interest that involved "atypical and significant" hardships compared to the conditions in the general prison population and the absence of any due process protections, that the Plaintiff's right was clearly established, and that he could not assess the objective reasonableness of the Defendants' actions as a matter of law at this stage of the litigation. *See id.* at *18-*20. He also found that the Plaintiff had adequately alleged the personal involvement of all the Defendants, observing that "the post-September 11 context provide[d] support for [the P]laintiffs' assertions that [the D]efendants were involved in creating and/or implementing the detention policy under which [the P]laintiffs were confined without due process." *See id.* at *20-*21. Finally, with respect to the procedural due process claim, he limited the first stage of discovery to the issue of the Defendants' personal involvement in the alleged denial of due process. *See id.* at *21.

With respect to the Plaintiff's *Bivens* claims of race and religious discrimination (Counts 11 and 12), Judge Gleeson ruled that the Plaintiff's allegations that he was confined in significantly harsher conditions solely because of his race and religion were sufficient to state a cause of action. *See id.* at *29. He also concluded that the Plaintiff had adequately alleged the personal involvement of Ashcroft and Mueller, the FBI Defendants, and Hasty. *See id.* However, because the Plaintiff had not alleged that the BOP Defendants were involved in the challenged classification in any way, Judge Gleeson concluded that the Plaintiff had not alleged the personal involvement of the BOP Defendants, and he dismissed these claims against them. *See id.*

Turning to the Plaintiff's statutory claims, Judge Gleeson dismissed the RFRA claims against all the Defendants, concluding that they were entitled to qualified immunity because it was not clearly established that RFRA applied to federal government officials. *See id.* at *30-*31. He also dismissed the ATCA claim after first having substituted the United States for the individual defendants. *See id.* at *34-*35. Finally, he denied the motions to dismiss the section 1985(3) conspiracy claims, rejecting the Defendants' arguments that it was not clearly established that section 1985 applied to federal officers and concluding that the Plaintiff had adequately alleged the Defendants' personal involvement, except with respect to the allegation that the BOP Defendants had conspired to subject the Plaintiff to unreasonable strip searches. *See id.* at *32-*33.

Discussion

The Defendants appeal from the District Court's order denying their motions to dismiss on the ground of qualified immunity. Their arguments with respect to qualified immunity fall into several broad categories: (1) the Plaintiff's allegations do not allege the violation of a clearly established right, (2) do not allege sufficient personal involvement of the Defendants in the challenged actions, (3) are too conclusory to overcome a qualified immunity defense, and (4) the Defendants' actions were objectively reasonable. Permeating the Defendants' assertion of a qualified immunity defense is the contention that, however the defense might be adjudicated in normal circumstances, the immediate aftermath of the 9/11 attack created a context in which the defense must be assessed differently and, from their standpoint, favorably.

In addition, Ashcroft, Mueller, and FBI Defendant Rolince seek review of the denial of their motion to dismiss for lack of personal jurisdiction, arguing that the issue of personal jurisdiction is available for review on this interlocutory appeal because the issue is inextricably intertwined with that of qualified immunity.

Because many of the Defendants' grounds for asserting an immunity defense overlap with respect to several of the Plaintiff's allegations, it will be convenient to consider separately each of the Plaintiff's causes of action with respect to the one or more Defendants against whom it is asserted, rather than consider separately the claims asserted against each Defendant. Before turning to each of the Plaintiff's allegations, we first consider the legal standards that apply to nearly all of the Plaintiff's claims and to most of the grounds on which the Defendants assert their qualified immunity defense.

I. General Principles of Qualified Immunity

(a) *Standard of review.* When a district court denies qualified immunity on a Rule 12(b)(6) motion to dismiss, "we review the district court's denial *de novo,* accepting as true the material facts alleged in the complaint and drawing all reasonable inferences in plaintiffs' favor." *Johnson v. Newburgh Enlarged School District,* 239 F.3d 246, 250 (2d Cir. 2001).

(b) *Appealability.* A district court's denial of qualified immunity is appealable as a collateral order if it turns on an issue of law. *See Mitchell v. Forsyth,* 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Thus, a defendant may appeal a district court's ruling denying qualified immunity when, if a plaintiff's allegations are assumed to be true, the only question is whether the alleged conduct violated a clearly established

right. *See Locurto v. Safir,* 264 F.3d 154, 163 (2d Cir. 2001).

(c) *The qualified immunity defense.* Qualified immunity is an immunity from suit and not just a defense to liability. *See Saucier v. Katz,* 533 U.S. 194, 200, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). The first step in a qualified immunity inquiry is to determine whether the alleged facts demonstrate that a defendant violated a constitutional right. *See id.* at 201, 121 S. Ct. 2151; *see also Scott v. Harris,* —U.S.—, 127 S. Ct. 1769, 1774 & n.4, 167 L. Ed. 2d 686 (2007). If the allegations show that a defendant violated a constitutional right, the next step is to determine whether that right was clearly established at the time of the challenged action-that is, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *See Saucier,* 533 U.S. at 202, 121 S. Ct. 2151. A defendant will be entitled to qualified immunity if either (1) his actions did not violate clearly established law or (2) it was objectively reasonable for him to believe that his actions did not violate clearly established law. *See Johnson,* 239 F.3d at 250.

In determining whether a right was clearly established, the court must assess whether "the contours of the right [were] sufficiently clear in the context of the alleged violation such that a reasonable official would understand that what he [was] doing violate[d] that right." *Id.* at 250-51 (internal quotation marks omitted). To that end, the court should consider what a reasonable officer in the defendant's position would have known about the lawfulness of his conduct, "not what a lawyer would learn or intuit from researching case law." *Id.* at 251 (internal quotation marks omitted). Furthermore,

the court need not identify "legal precedent addressing an identical factual scenario" to conclude that the right is clearly established. *Id.*; *see also Tellier v. Fields*, 280 F.3d 69, 84 (2d Cir. 2000) (noting that a law is "clearly established" so long as a ruling on the issue is "clearly foreshadow[ed]" by this Circuit's decisions).

(d) *Personal involvement*. Many of the Defendants claim qualified immunity on the ground that the Plaintiff has failed to allege their personal involvement in the challenged actions. All of the appealing Defendants are supervisory officials. The personal involvement of a supervisor may be established by showing that he (1) directly participated in the violation, (2) failed to remedy the violation after being informed of it by report or appeal, (3) created a policy or custom under which the violation occurred, (4) was grossly negligent in supervising subordinates who committed the violation, or (5) was deliberately indifferent to the rights of others by failing to act on information that constitutional rights were being violated. *See Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (discussing section 1983 liability).

Although a lack of personal involvement may be grounds for dismissing a claim on the merits (a ruling that would not be subject to an interlocutory appeal), such a lack is also relevant to a defense of qualified immunity because it goes to the question of whether a defendant's actions violated a clearly established right. *See McCullough v. Wyandanch Union Free School District*, 187 F.3d 272, 280 (2d Cir. 1999) ("Where there is a total absence of evidence of [a violation], there is no basis on which to conclude that the defendant seeking qualified immunity violated clearly established law." (internal quotation marks omitted)). "[O]ur task is to

consider whether, as a matter of law, the factual allegations and all reasonable inferences therefrom are insufficient to establish the required showing of personal involvement." *Johnson,* 239 F.3d at 255.

(e) *Pleading requirements.* The parties dispute the extent to which a plaintiff must plead specific facts to overcome a defense of qualified immunity at the motion-to-dismiss stage. Although most of the Defendants disclaim requiring the Plaintiff to meet a heightened pleading standard, beyond the requirement of *Conley v. Gibson,* 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), that a complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," *see* Fed. R. Civ. P. 8(a)(2), all the Defendants make the somewhat similar argument that "conclusory allegations" will not suffice to withstand a qualified immunity defense, especially with respect to allegations of supervisory involvement, racial and/or religious animus, or conspiracy. BOP Defendant Cooksey explicitly urges us to adopt a heightened pleading standard in *Bivens* actions.

The pleading standard to overcome a qualified immunity defense appears to be an unsettled question in this Circuit. Four Supreme Court opinions provide guidance, although the guidance they provide is not readily harmonized. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993), the Court rejected a heightened pleading standard in a civil rights action alleging municipal liability, applying instead only the traditional requirement of "'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* at 168, 113 S. Ct. 1160 (quoting Fed. R. Civ.

P. 8(a)(2)). In reaching this conclusion, the Court distinguished between municipalities' immunity from *respondeat superior* liability and government officials' qualified immunity from suit. *See id*. at 166, 113 S. Ct. 1160. Arguably, this distinction could permit requiring a plaintiff to satisfy a heightened pleading standard of a cause of action in order to overcome a government official's defense of qualified immunity. However, the Court's opinion in *Leatherman* suggests that heightened pleading standards are never permissible except when authorized by Rule 9(b) of the Federal Rules of Civil Procedure. *See id*. at 168, 113 S. Ct. 1160 (noting that Rule 9(b) "do[es] not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983"). Indeed, the Court observed that, in the absence of amendment to Rules 8 or 9, the courts could rely only on control of discovery and summary judgment to "weed out unmeritorious claims." *Id*. at 168-69

A more pertinent precedent is *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002), which concerned the adequacy of pleading a Title VII complaint. The Court rejected what had been this Circuit's rule requiring employment discrimination plaintiffs to allege facts constituting a *prima facie* case of employment discrimination. *See id*. at 515, 122 S. Ct. 992. The Court again emphasized that the judicially imposed heightened pleading standard conflicted with Rule 8(a) and that a heightened pleading standard could be attained only "by the process of amending the Federal Rules, and not by judicial interpretation." *Id*. (internal quotation marks omitted).

Leatherman and especially *Swierkiewicz*—with their insistence that courts cannot impose heightened plead-

ing standards in the absence of statutory authorization—indicate that a court cannot impose a heightened pleading standard in *Bivens* (or other civil rights) actions against individual officials, a precept we have heeded since the Supreme Court's decision in *Swierkiewicz*. *See, e.g., Phillip v. University of Rochester,* 316 F.3d 291, 298-99 (2d Cir. 2003) (general allegation of racial animus); *Phelps v. Kapnolas,* 308 F.3d 180, 186-87 (2d Cir. 2002) (general allegation of knowledge).

However, a third Supreme Court case, decided between *Leatherman* and *Swierkiewicz,* cryptically suggests that, in some circumstances, a court could require "specific, nonconclusory factual allegations" at the pleading stage in claims against government officials. In *Crawford-El v. Britton,* 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998), the D.C. Circuit had recognized a heightened burden of proof in cases against government officials alleging unconstitutional motive. *See id.* at 582-83, 118 S. Ct. 1584. The Court observed that the D.C. Circuit had adopted the heightened standard in an attempt "to address a potentially serious problem: Because an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Id.* at 584-85, 118 S. Ct. 1584 (internal quotation marks omitted). Although the Supreme Court recognized this problem, it rejected the heightened standard of proof.

The Court held that the D.C. Circuit's rule was not compelled by either the holding or the reasoning of *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). In *Harlow,* the Court had stated

that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18, 102 S. Ct. 2727. However, as the Court explained in *Crawford-El,* this statement merely concerned a plaintiff's attempt to overcome a legitimate qualified immunity defense by alleging malicious intent; this holding was irrelevant to a plaintiff's burden in alleging a constitutional violation of which improper motive is an essential element. *See* 523 U.S. at 588-89, 118 S. Ct. 1584. Neither did *Harlow*'s reasoning require a heightened burden of proof: the Court observed that there existed other mechanisms for protecting officials from unmeritorious actions, such as the requirement that the officials' conduct violate clearly established law, the need to prove causation, and procedural protections. *See id.* at 590-93, 118 S. Ct. 1584.

The Court acknowledged that the usual pleading standard would sometimes not preclude at least limited discovery to amplify general allegations. The Court observed that *Harlow* only "sought to protect officials from the costs of 'broad-reaching' discovery" and that limited discovery is sometimes necessary to adjudicate a qualified immunity defense. *See id.* at 593 n.14, 118 S. Ct. 584. The Court concluded by observing that "broad discretion" in the discovery process is more "useful and equitable" than categorical rules such as that of the D.C. Circuit. *See id.* at 601.

What *Crawford-El* gave civil rights plaintiffs with respect to traditional notice pleading, however, it might have modified by permitting some post-complaint detailing of a claim. In discussing the procedural mechanisms available to judges in civil rights actions, at least those

alleging wrongful motive, the Court observed that, before permitting discovery, a court could require a plaintiff to "put forward specific, nonconclusory factual allegations that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598, 118 S. Ct. 1584 (internal quotation marks omitted). Perhaps significantly, the Court quoted the phrase "put forward specific, nonconclusory factual allegations" from Justice Kennedy's concurring opinion in *Siegert v. Gilley,* 500 U.S. 226, 111 S. Ct. 789, 114 L. Ed. 2d 277 (1991), in which he had explicitly advocated a heightened pleading standard for civil rights actions requiring a showing of malice. *See id.* at 235-36, 111 S. Ct. 1789 ("There is tension between the rationale of *Harlow* and the requirement of malice, and it seems to me that the heightened pleading requirement is the most workable means to resolve it.").

The First Circuit has remarked that "[w]hatever window of opportunity [it] thought remained open after *Crawford-El* has been slammed shut by the Supreme Court's subsequent decision in *Swierkiewicz.*" *Educadores Puertorriqueños en Acción v. Hernandez,* 367 F.3d 61, 65 (1st Cir. 2004). Most Circuits appear to have rejected a heightened pleading standard. *See Doe v. Cassel,* 403 F.3d 986, 988-89 & n.3 (8th Cir. 2005) (collecting cases); *Galbraith v. County of Santa Clara,* 307 F.3d 1119, 1125 (9th Cir. 2002) (same).

Considerable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly,* —U.S.—, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). If we were to consider only a

narrow view of the holding of that decision, we would not make any adjustment in our view of the applicable pleading standard. *Bell Atlantic* held that an allegation of parallel conduct by competitors, without more, does not suffice to plead an antitrust violation under 15 U.S.C. § 1. *See id.* at 1961. The Court required, in addition, "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 1965. However, the Court's explanation for its holding indicated that it intended to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since *Conley v. Gibson,* 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), was decided half a century ago. The nature and extent of that alteration is not clear because the Court's explanation contains several, not entirely consistent, signals, which we consider (not necessarily in the order set forth in the Court's opinion).

Some of these signals point toward a new and heightened pleading standard. First, the Court explicitly disavowed the oft-quoted statement in *Conley* of "'the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Bell Atlantic,* 127 S. Ct. at 1968 (quoting *Conley,* 355 U.S. at 45-46, 78 S. Ct. 99). *Bell Atlantic* asserted that this "no set of facts" language "has earned its retirement" and "is best forgotten." *Id.* at 1969

Second, the Court, using a variety of phrases, indicated that more than notice of a claim is needed to allege a section 1 violation based on competitors' parallel conduct. For example, the Court required "enough factual matter (taken as true) to suggest that an agreement was

made," *id.* at 1965; "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement," *id.*; "facts that are suggestive enough to render a § 1 conspiracy plausible," *id.*; "allegations of parallel conduct . . . placed in a context that raises a suggestion of a preceding agreement," *id.* at 1966; "allegations plausibly suggesting (not merely consistent with) agreement," *id.*; a "plain statement" (as specified in Rule 8(a)(2)) with "enough heft" to show entitlement to relief, *id.*; and "enough facts to state a claim to relief that is plausible on its face," *id.* at 1974, and also stated that the line "between the factually neutral and the factually suggestive . . . must be crossed to enter the realm of plausible liability," *id.* at 1966 n.5, and that "the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible," *id.* at 1973 n.14.

Third, the Court discounted the ability of "'careful case management,'" "to weed[ ] out early in the discovery process" "a claim just shy of a plausible entitlement." *Id.* at 1967 (quoting *id.* at 1975 (Stevens, J., dissenting)).

Fourth, the Court encapsulated its various formulations of what is required into what it labeled "the plausibility standard." *Id.* at 1968. Indeed, the Court used the word "plausibility" or an adjectival or adverbial form of the word fifteen times (not counting quotations).

On the other hand, some of the Court's linguistic signals point away from a heightened pleading standard and suggest that whatever the Court is requiring in *Bell Atlantic* might be limited to, or at least applied most rigorously in, the context of either all section 1 allegations or perhaps only those section 1 allegations relying on

competitors' parallel conduct. First, the Court explicitly disclaimed that it was "requir[ing] heightened fact pleading of specifics," *id.* at 1974, and emphasized the continued viability of *Swierkiewicz, see id.* at 1973-74, which had rejected a heightened pleading standard. *See also Erickson v. Pardus,* —U.S.—, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007) (citing *Bell Atlantic*'s citation of *Swierkiewicz*).

Second, although the Court faulted the plaintiffs' complaint for alleging "merely legal conclusions" of conspiracy, *Bell Atlantic*, 127 S. Ct. at 1970, it explicitly noted with approval Form 9 of the Federal Civil Rules, Complaint for Negligence, which, with respect to the ground of liability, alleges only that the defendant "negligently drove a motor vehicle against plaintiff who was then crossing [an identified] highway," Fed. R. Civ. P. App. Form 9. *See Bell Atlantic,* 127 S. Ct. at 1970 n.10. The Court noted that Form 9 specifies the particular highway the plaintiff was crossing and the date and time of the accident, *see id.*, but took no notice of the total lack of an allegation of the respects in which the defendant is alleged to have been negligent, *i.e.,* driving too fast, crossing the center line, running a traffic light or stop sign, or even generally failing to maintain a proper lookout. The adequacy of a generalized allegation of negligence in the approved Form 9 seems to weigh heavily against reading *Bell Atlantic* to condemn the insufficiency of all legal conclusions in a pleading, as long as the defendant is given notice of the date, time, and place where the legally vulnerable conduct occurred.

Third, the Court placed heavy emphasis on the "sprawling, costly, and hugely time-consuming" discov-

ery that would ensue in permitting a bare allegation of an antitrust conspiracy to survive a motion to dismiss, *see id.* at 1967 n.6, and expressed concern that such discovery "will push cost-conscious defendants to settle even anemic cases," *id.* at 1967. These concerns provide some basis for believing that whatever adjustment in pleading standards results from *Bell Atlantic* is limited to cases where massive discovery is likely to create unacceptable settlement pressures.

Fourth, although the Court expressed doubts about the ability of district courts to *"weed[] out"* through case management in the discovery process "a claim just shy of a plausible entitlement to relief," *id.* (emphasis added), the Court did not disclaim its prior statement that "federal courts and litigants must rely on summary judgment and control of discovery to *weed out* unmeritorious claims sooner rather than later." *Leatherman,* 507 U.S. at 168-69, 113 S. Ct. 1160 (emphasis added).[5] Leaving *Leatherman* and *Crawford-El* undisturbed (compared to the explicit disavowal of the "no set of facts" language of *Conley*) further suggests that *Bell Atlantic,* or at least its full force, is limited to the antitrust context.

Fifth, just two weeks after issuing its opinion in *Bell Atlantic,* the Court cited it for the traditional proposition that "[s]pecific facts are not necessary [for a pleading that satisfies Rule 8(a)(2)]"; the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson,* 127

[5] There is no possibility that the "weed out" language of *Leatherman* was overlooked; it was called to the Court's attention in Justice Stevens's dissent. *See Bell Atlantic,* 127 S. Ct. at 1982.

S. Ct. at 2200 (quoting *Bell Atlantic*'s quotation from *Conley*) (omission in original).

These conflicting signals create some uncertainty as to the intended scope of the Court's decision.[6] We are reluctant to assume that all of the language of *Bell Atlantic* applies only to section 1 allegations based on competitors' parallel conduct or, slightly more broadly, only to antitrust cases.[7] Some of the language relating generally to Rule 8 pleading standards seems to be so integral to the rationale of the Court's parallel conduct holding as to constitute a necessary part of that holding. *See* Pierre N. Leval, *Judging under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. Rev. 1249, 1257 (2006) ("The distinction [between holding and dictum] requires recognition of what was the question before the court upon which the judgment depended, how (and by what reasoning) the court resolved the question, and what role, if any, the proposition played in the reasoning that led to the judgment.").

After careful consideration of the Court's opinion and the conflicting signals from it that we have identified, we believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a

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[6] The parties, not surprisingly, view *Bell Atlantic* entirely differently. Defendant Hasty characterizes the Supreme Court's decision as a "sea change" in the pleading standard of Rule 8, *see* Letter from Michael L. Martinez, counsel for Defendant Hasty, to the Acting Clerk of this Court (May 25, 2007); the Plaintiff emphasizes the antitrust holding of the decision, *see* Letter from Alexander A. Reinert, counsel for Plaintiff Iqbal, to the Acting Clerk of this Court (May 22, 2007).

[7] For example, it would be cavalier to believe that the Court's rejection of the "no set of facts" language from *Conley*, which has been cited by federal courts at least 10,000 times in a wide variety of contexts (according to a Westlaw search), applies only to section 1 antitrust claims.

flexible "plausibility standard," which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*. We will say more about this approach as we apply it below to some of the Plaintiff's specific allegations.

Notwithstanding what we understand to be the essential message of *Bell Atlantic*, we acknowledge that we see some merit in the argument in favor of a heightened pleading standard in this case for two reasons. First, qualified immunity is a privilege that is essential to the ability of government officials to carry out their public roles effectively without fear of undue harassment by litigation. In this respect, the factors favoring a heightened pleading standard to overcome a qualified immunity defense are distinguishable from the purely prudential and policy-driven factors that the Supreme Court found inadequate to justify a heightened pleading standard in the Title VII context. *See Swierkiewicz,* 534 U.S. at 514-15, 122 S. Ct. 992.

Second, some of the allegations in the Plaintiff's complaint, although not entirely conclusory, suggest that some of the Plaintiff's claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement. Therefore, allowing some of the Plaintiff's claims to survive a motion to dismiss might facilitate the very type of broad-ranging discovery and litigation burdens that the qualified immunity privilege was intended to prevent.

Nevertheless, although *Swierkiewicz* was decided in the context of Title VII, we are mindful of the Supreme Court's statement in that decision that heightened pleading requirements "must be obtained by the process

of amending the Federal Rules, and not by judicial interpretation." *Id.* at 515, 122 S. Ct. 992 (internal quotation marks omitted). Absent any indication from the Supreme Court that qualified immunity might warrant an exception to this general approach and the explicit disclaimer of a heightened pleading standard in *Bell Atlantic,* reinforced by the reversal of the Tenth Circuit's use of a heightened pleading standard in *Erickson,* we conclude that a heightened pleading rule may not be imposed. However, in order to survive a motion to dismiss under the plausibility standard of *Bell Atlantic,* a conclusory allegation concerning some elements of a plaintiff's claims might need to be fleshed out by a plaintiff's response to a defendant's motion for a more definite statement. *See* Fed. R. Civ. P. 12(e). In addition, even though a complaint survives a motion to dismiss, a district court, while mindful of the need to vindicate the purpose of the qualified immunity defense by dismissing non-meritorious claims against public officials at an early stage of litigation, may nonetheless consider exercising its discretion to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff's claims and a plaintiff may probe such matters as a defendant's knowledge of relevant facts and personal involvement in challenged conduct. In a case such as this where some of the defendants are current or former senior officials of the Government, against whom broad-ranging allegations of knowledge and personal involvement are easily made, a district court might wish to structure such limited discovery by examining written responses to interrogatories and requests to admit before authorizing depositions, and by deferring discovery directed to high-level officials until discovery of front-line officials has been

completed and has demonstrated the need for discovery higher up the ranks. If discovery directed to current or former senior officials becomes warranted, a district court might also consider making all such discovery subject to prior court approval.

We note that Rule 8(a)'s liberal pleading requirement, when applied mechanically without countervailing discovery safeguards, threatens to create a dilemma between adhering to the Federal Rules and abiding by the principle that qualified immunity is an immunity from suit as well as from liability. Therefore, we emphasize that, as the claims surviving this ruling are litigated on remand, the District Court not only may, but "*must* exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that officials [or former officials] are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El*, 523 U.S. at 597-98, 118 S. Ct. 1584 (emphasis added). In addition, the District Court should provide ample opportunity for the Defendants to seek summary judgment if, after carefully targeted discovery, the evidence indicates that certain of the Defendants were not sufficiently involved in the alleged violations to support a finding of personal liability, or that no constitutional violation took place. *See Harlow*, 457 U.S. at 821, 102 S. Ct. 2727 (Brennan, J., concurring) ("[S]ummary judgment will also be readily available whenever the plaintiff cannot prove, as a threshold matter, that a violation of his constitutional rights actually occurred."). We give these matters additional consideration below with respect to particular claims.

(f) *The post-9/11 context.* Several Defendants contend that even if the Plaintiff's complaint would survive

a motion to dismiss in the face of a qualified immunity defense under normal circumstances, the post-9/11 context requires a different outcome. This argument is advanced on three fronts. First, some Defendants contend that the Government was entitled to take certain actions that might not have been lawful before 9/11 because the Government's interests assumed special weight in the post-9/11 context. Second, some Defendants contend that, even if the law was clearly established as to the existence of a right claimed to have been violated, it was not clearly established in the extraordinary circumstances of the 9/11 attack and its aftermath. Third, some Defendants contend that the post-9/11 context renders their actions objectively reasonable, an argument we do not reach in view of our disposition of their second contention.

We fully recognize the gravity of the situation that confronted investigative officials of the United States as a consequence of the 9/11 attack. We also recognize that some forms of governmental action are permitted in emergency situations that would exceed constitutional limits in normal times. *See Home Building & Loan Association v. Blaisdell,* 290 U.S. 398, 425-26, 54 S. Ct. 231, 78 L. Ed. 413 (1934) ("While emergency does not create power, emergency may furnish the occasion for the exercise of power."). But most of the rights that the Plaintiff contends were violated do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination. The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times.

With some rights, for example, the right to be free from unreasonable searches, the existence of exigent circumstances might justify governmental action that would not otherwise be permitted. *See, e.g., Michigan v. Tyler*, 436 U.S. 499, 509, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978) (exigent circumstances permitted warrantless entry into home). But, as we discuss below, *see* Part VI, the exigent circumstances of the post-9/11 context do not diminish the Plaintiff's right not to be needlessly harassed and mistreated in the confines of a prison cell by repeated strip and body-cavity searches. This and other rights, such as the right to be free from use of excessive force and not to be subjected to ethnic or religious discrimination, were all clearly established prior to 9/11, and they remained clearly established even in the aftermath of that horrific event. To whatever extent exigent circumstances might affect the lawfulness of the Defendants' actions or might have justified an objectively reasonable belief that their actions did not violate clearly established law, we consider the argument in connection with a particular claim.

With these general principles in mind, we turn to the Plaintiff's specific claims.

II. Procedural Due Process

The Plaintiff alleges that Ashcroft and Mueller, the FBI Defendants, the BOP Defendants, and Hasty adopted a policy under which he was deprived of a liberty interest without any of the procedural protections required by due process of law. His allegation of the deprivation of a liberty interest, even while lawfully confined without bail on criminal charges, is based on his placement in solitary confinement, where he was subjected to needlessly harsh restrictions that were atypical

and significant when compared to those in the rest of the MDC population. The Defendants contend that (1) the Plaintiff did not allege that the confinement was punitive; (2) no procedural due process right was violated because the Plaintiff did not have a liberty interest in avoiding extended confinement in the ADMAX SHU and, even if he did, he received all the process that was due; (3) even if the Plaintiff's procedural due process right was violated, the contours of this right were not clearly established at the time of the events in question; (4) the Defendants' actions were objectively reasonable in the post-9/11 context; and (5) the Plaintiff has failed to allege personal involvement.

We are required by the Supreme Court's decision in *Saucier* to assess these arguments within a two-part framework, asking first whether the alleged facts show a violation of a constitutional right, *see Saucier,* 533 U.S. at 201, 121 S. Ct. 2151, and, if so, "whether the right was clearly established . . . in light of the specific context of the case," *see id.* The first, second, and fifth of the Defendants' arguments bear on the initial issue of whether a violation has been alleged; the third argument-whether the right was clearly established-is precisely the second issue under *Saucier*; and the fourth argument is often a further component of a qualified immunity defense because even if the law was clearly established, it might have been objectively reasonable, on the facts of a particular case, for a defendant to believe that the actions taken did not violate that established law, *see Johnson,* 239 F.3d at 250.

(a) Has a Violation of a Procedural Due Process Right Been Adequately Pleaded?

In assessing the adequacy of the Plaintiff's pleading of a procedural due process violation we first consider the basic question of whether the Plaintiff has pleaded the existence of a liberty interest and entitlement to procedures that were not provided and then consider the Defendants' arguments that punitive intent and personal involvement were not adequately pleaded.

(i) *The Plaintiff's procedural due process right.* In concluding that the Plaintiff had a protected liberty interest, Judge Gleeson relied on this Court's decision in *Tellier v. Fields,* 280 F.3d 69 (2d Cir. 2000). *See Dist. Ct. op.* at *17-*18. In *Tellier,* a federal inmate allegedly was placed in administrative detention in the SHU for more than 500 days without being informed of the reasons for his placement or receiving any hearings. *See* 280 F.3d at 74. The regulations governing administrative segregation, 28 C.F.R. § 541.22, entitle inmates to "an administrative detention order detailing the reasons for placing an inmate in administrative detention . . . provided institutional security is not compromised thereby." 28 C.F.R. § 541.22(b). Moreover, the regulations require a Segregation Review Officer to "hold a hearing and formally review the status of each inmate who spends seven continuous days in administrative detention, and thereafter . . . hold a hearing and review these cases formally at least every 30 days." *Id.* § 541.22(c)(1). The regulations specifically provide that administrative detention "is to be used only for short periods of time except . . . where there are exceptional circumstances, ordinarily tied to security or complex investigative concerns." *Id.*

In assessing whether a prisoner had a protected liberty interest in avoiding administrative segregation, *Tellier* looked to *Sandin v. Conner,* 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995), in which the Supreme Court held that state-created liberty interests of prisoners were limited to freedom from restraint that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 483-84, 115 S. Ct. 2293. Since *Sandin,* the rule in this Circuit has been that a prisoner has a protected liberty interest "'only if the deprivation . . . is atypical and significant and the state has created the liberty interest by statute or regulation.'" *Tellier,* 280 F.3d at 80 (quoting *Sealey v. Giltner,* 116 F.3d 47, 52 (2d Cir. 1997)) (omission in original); *see also Palmer v. Richards,* 364 F.3d 60, 64 & n.2 (2d Cir. 2004).

Numerous cases in this Circuit have discussed the "atypical and significant hardship" prong of *Sandin.* Relevant factors include both the conditions of segregation and its duration. *See Palmer,* 364 F.3d at 64. Segregation of longer than 305 days in standard SHU conditions is sufficiently atypical to require procedural due process protection under *Sandin. See id.* at 65 (citing *Colon v. Howard,* 215 F.3d 227, 231 (2d Cir. 2000)). When confinement is of an intermediate duration—between 101 and 305 days—"'development of a detailed record' of the conditions of the confinement relative to ordinary prison conditions is required." *Id.* at 64-65 (quoting *Colon,* 215 F.3d at 232).

Applying these standards, *Tellier* first observed that the prisoner had alleged confinement of more than 500 days "under conditions that differ markedly from those in the general population," finding this sufficient to al-

lege "atypical and significant" hardships. 280 F.3d at 80. Turning to the language of the regulations, the Court agreed that because the initial decision to place a prisoner in administrative detention is a discretionary one, the plaintiff did not have a "protected liberty interest that is violated when the Warden removes him or her from the general population." *Id.* at 82. However, the Court found, the regulations constrain the warden's discretion in maintaining a prisoner in detention and the procedures "are designed to ensure that a prisoner is kept in SHU for no longer than is necessary." *Id.* at 82-83. Accordingly, the Court concluded that section 541.22 "creates a protectable liberty interest when an official's failure to adhere to the [regulation] results in an atypical, significant deprivation." *Id.* at 83 (internal quotation marks omitted).

Relying on *Tellier,* Judge Gleeson concluded that the Plaintiff had a clearly established protectable liberty interest in avoiding continued detention in the ADMAX SHU. *See Dist. Ct. op.* at *18. On appeal, the Defendants contend that *Tellier* is no longer good law in light of the Supreme Court's recent opinion in *Wilkinson v. Austin,* 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005). In *Wilkinson,* the Supreme Court considered *Sandin*'s application to segregation in Ohio's Supermax facility. Inmates in the Supermax facility were detained in solitary confinement indefinitely, they remained in their cells 23 hours a day, the lights were turned on constantly, they could not go outside for recreation, and they were limited to non-contact visits. *See id.* at 214-15, 125 S. Ct. 2384. The Court confirmed *Sandin*'s holding that "a liberty interest in avoiding particular conditions of confinement may arise from state policies or regulations, subject to the important limitations set

forth in *Sandin*," *id.* at 222, 125 S. Ct. 2384, but observed that "the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves in relation to the ordinary incidents of prison life," *id.* at 223, 125 S. Ct. 2384 (internal quotation marks omitted). The Court recognized that the courts of appeals had struggled to identify a baseline for determining what constitutes an atypical and significant hardship, but it concluded that confinement in the Supermax facility "imposes an atypical and significant hardship under any plausible baseline." *Id.* Having found that the prisoner had a protected liberty interest, the Court concluded that Ohio's "informal, nonadversary procedures" were sufficient to satisfy due process requirements. *Id.* at 228-29, 125 S. Ct. 2384.

The Defendants argue that *Wilkinson* abrogates *Tellier* or that it at least renders the relevant standard unclear because it instructs courts to consider the nature of the conditions, not the requirements of the regulations. We disagree for two reasons. First, while *Wilkinson* instructs courts to focus on the nature of the conditions, it nonetheless explains that the "liberty interest in avoiding particular conditions of confinement . . . arise[s] from state policies or regulations." *Id.* at 222, 125 S. Ct. 2384. Following *Tellier*, Judge Gleeson looked to the duration and conditions of confinement, as instructed by *Wilkinson*. *See Dist. Ct. op.* at *18.

Second, and more significantly, for at least half (if not all) of the Plaintiff's confinement in the ADMAX SHU, he was a pretrial detainee, not a convicted pris-

oner.[8] This Court has said that *Sandin* does not apply to pretrial detainees and that, accordingly, pretrial detainees need not show that an imposed restraint imposes atypical and significant hardships to state deprivation of a liberty interest protected by procedural due process. *See Benjamin v. Fraser,* 264 F.3d 175, 188-89 (2d Cir. 2001) ("*Benjamin I*"). In *Benjamin I,* this Court affirmed the district court's ruling that the imposition of painful physical restraints during the movement of pretrial detainees required "reasonable after-the-fact procedural protections to ensure that such restrictions on liberty [would] be terminated reasonably soon if they [had] no justification." *Id*. at 188.

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[8] The Defendants do not seriously contest Judge Gleeson's characterization of the Plaintiff as a pretrial detainee, although Ashcroft and Mueller briefly contend that his private interest in avoiding detention in the ADMAX SHU after he pled guilty should be evaluated "within the context of the prison system," *i.e.,* under Eighth Amendment standards. The Plaintiff argues that he should be treated as a pretrial detainee until he was sentenced, citing *Fuentes v. Wagner,* 206 F.3d 335, 341 (3d Cir. 2000).

The circuits are divided as to whether to treat convicted, but unsentenced, inmates as pretrial detainees. *Compare id*. (treated as pretrial detainee) *with Resnick v. Hayes,* 213 F.3d 443, 448 (9th Cir. 2000) (treated as prisoner), *Whitnack v. Douglas County,* 16 F.3d 954, 956-57 (8th Cir. 1994) (same), *and Berry v. City of Muskogee,* 900 F.2d 1489, 1493 (10th Cir. 1990) (same). Because none of the Defendants seriously challenges Judge Gleeson's characterization of the Plaintiff as a pretrial detainee throughout his entire confinement in the ADMAX SHU, we will refer to him as a pretrial detainee, a status that plainly applies during the several months of confinement prior to the Plaintiff's plea. We do not consider the question of whether convicted, but unsentenced, inmates are pretrial detainees under the Supreme Court's jurisprudence establishing criteria for evaluating constitutional limits on conditions of confinement.

In sum, *Wilkinson* does not affect the validity of Judge Gleeson's ruling that the Plaintiff had a protected liberty interest because (1) he considered the Plaintiff's allegations of atypical and significant hardships and (2) the *Wilkinson* and *Sandin* analysis does not apply to the interval of the Plaintiff's pretrial detention. Under this Court's case law, the Plaintiff's confinement of more than six months fell in the intermediate range, thereby requiring inquiry into the conditions of his confinement, which he sufficiently alleges to have been severe. Even under *Wilkinson,* the conditions under which the Plaintiff alleges that he was confined—solitary confinement, repeated strip and body-cavity searches, beatings, exposure to excessive heat and cold, very limited exercise, and almost constant lighting—as well as the initially indefinite duration of confinement could be found to constitute atypical and significant hardships. *See* 545 U.S. at 223-24, 125 S. Ct. 2384. The Plaintiff has alleged a protected liberty interest in avoiding more than six months' detention in the ADMAX SHU, especially in light of his status as a pretrial detainee.

The Defendants also dispute the violation of a procedural due process right by arguing that, even if the Plaintiff had a protected liberty interest in avoiding extended detention in the ADMAX SHU, he received all the process that was due by virtue of the FBI's review. This argument is unavailing at this preliminary stage of the litigation. In *Wilkinson,* the Supreme Court applied the familiar balancing test of *Mathews v. Eldridge,* 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), to determine whether the plaintiff received adequate procedural protections. *See* 545 U.S. at 224-25, 125 S. Ct. 2384. Under the second prong of this test, the Court observed that inmates received "notice of the factual basis leading

to consideration for OSP placement and a fair opportunity for rebuttal," stating that "these are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations." *Id.* at 225-26, 125 S. Ct. 2384. After weighing all the relevant factors, the Court found that "[w]here the inquiry draws more on the experience of prison administrators, and where the State's interest implicates the safety of other inmates and prison personnel, . . . informal, nonadversary procedures" were sufficient. *Id.* at 228-29, 125 S. Ct. 2384. In the pending case, the Plaintiff alleges that he did not even receive notice of the factual grounds on which he was being detained in the ADMAX SHU nor did he have any opportunity for rebuttal.

We recognize that in the post-9/11 context the third *Mathews* factor—the gravity of the Government's interest—is appropriately accorded more weight than would otherwise be warranted. It might be that the combination of (1) the Plaintiff's interest in avoiding confinement under harsh conditions, (2) the risk of an erroneous determination of the need for such confinement, and (3) the Government's interest, accorded added weight in the post-9/11 context, would, on balance, lead to the conclusion that the Government need not have given the Plaintiff notice and a chance for rebuttal *before* placing him in the ADMAX SHU. However, once it became clear that the Plaintiff was going to be confined in the ADMAX SHU for an extended period of time, some process was required. We cannot say in the absence of a developed factual record whether the FBI's clearance procedure comported with the requirements of the Due Process Clause as interpreted in *Mathews* and subsequent cases. The sparse record thus far developed provides no indication as to what security-related

steps the Defendants were taking that might justify prolonged confinement. Nor does that record indicate in what respect providing the Plaintiff with some notice of the basis for his separation in the ADMAX SHU and affording some opportunity for rebuttal would have impaired national security interests or legitimate penological interests of the Government. The Government has not as yet had an opportunity to refute the Plaintiff's allegation that there was no evidence connecting him to terrorism. Accordingly, we cannot say whether the Government's national security interests rendered the clearance procedure sufficient to satisfy procedural due process requirements or whether more traditional procedural protections were required. Nevertheless, because we are required at this stage of the litigation to accept all of the Plaintiff's allegations as true and draw all reasonable inferences in his favor, we cannot say that the Plaintiff has failed to plead a viable claim under the procedural component of the Due Process Clause. Judge Gleeson dismissed the Plaintiff's procedural due process claim with respect to the initial confinement in the ADMAX SHU, *Dist. Ct. op*. at *17 n.18, but properly ruled that the Plaintiff had stated a procedural due process claim with respect to his continued confinement, *see id*. at *18-*19.

(ii) *Punitive intent*. Ashcroft, Mueller, and Hasty, citing *Bell v. Wolfish,* 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), contend that the Plaintiff has not stated a claim that the confinement in the ADMAX SHU violated his procedural due process rights because he has not alleged that the confinement was punitive. Preliminarily, we note that the complaint alleges that the Defendants designed a policy under which the Plaintiff was "arbitrarily designated to be confined in the

ADMAX SHU" and that "[k]eeping Plaintiff[ ] in isolation . . . amounted to the willful, malicious, and unnecessary infliction of pain and suffering." This is sufficient to allege that the confinement was punitive in nature.

More fundamentally, however, we deem unsupportable the Defendants' premise that the Plaintiff's procedural due process claim requires an allegation of punitive intent. Defendants Ashcroft and Mueller cite *Wolfish,* 441 U.S. at 535, 99 S. Ct. 1861, for the proposition that "in evaluating the constitutionality of conditions or restrictions of pretrial detention, the proper inquiry under the Due Process Clause is whether the conditions 'amount to punishment of the detainee.'" However, *Wolfish* did not involve a claim that inadequate procedures had been used to impose challenged conditions of confinement. The claim there was that the challenged conditions of confinement, being punitive, could not be imposed on pretrial detainees at all because they had not been convicted. Although the Court did not consider the challenged conditions punitive, it ruled that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* This ruling implements the substantive component of the Due Process Clause.[9]

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[9] Since *Wolfish* prohibited punishment prior to the process of adjudicating guilt, it could be considered a decision vindicating a procedural claim. However, as the Supreme Court's decisions in *Wolff v. McDonnell,* 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), *Hewitt v. Helms,* 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983), and *Sandin,* 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418, make clear, when the Court is truly considering a claim that restrictions were imposed within a prison without adequate procedures, it is focusing precisely on the procedural requirements of the Due Process Clause, and not what in reality is the substantive component that was at issue in *Wolfish*. *See*

By contrast, the relevant line of authority for the Plaintiff's procedural due process claim begins with *Wolff v. McDonnell,* 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), and continues through *Hewitt v. Helms,* 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983), and *Sandin,* 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418. *Wolff* outlined fairly extensive procedures that must be observed before a prisoner's liberty interest in retaining good time credits could be impaired because of disciplinary violations. 418 U.S. at 563-72, 94 S. Ct. 2963. *Helms* required only notice of charges and an opportunity to rebut in order to place a prisoner in administrative segregation pending an investigation of misconduct charges. 459 U.S. at 476, 103 S. Ct. 864. *Sandin* modified *Helms* by making the existence of a prisoner's liberty interest turn primarily on the atypical nature of the challenged conditions of confinement, 515 U.S. at 483-87, 115 S. Ct. 2293, but did not alter the basic requirement that where a prisoner's liberty interest exists, its impairment requires some procedural protections.

The Plaintiff's liberty interest, based primarily on a federal regulation, is entitled to some procedural protection regardless of punitive intent. To the extent that the interest derives directly from the Due Process Clause (and hence requires procedural protection only when punishment is imposed, *see Wolfish,* 441 U.S. at 535, 99 S. Ct. 1861), the harsh conditions set forth in the com-

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Block v. Rutherford, 468 U.S. 576, 591 & n.12, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984) (applying *Wolfish* to pretrial detainees' substantive due process claim and distinguishing it from a procedural due process claim).

plaint adequately meet the criteria for punishment, *see Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), whether or not such conditions were imposed with punitive intent.

(iii) *Lack of personal involvement*. Defendants Ashcroft and Mueller contend that the Plaintiff has not adequately alleged their personal involvement in the denial of procedural due process because the continued detention decision was made by FBI subordinates. Applying the standards applicable to personal involvement outlined above, we reject this claim at this stage of the litigation. Ashcroft and Mueller are alleged to have condoned the policy under which the Plaintiff was held in harsh conditions of confinement until "cleared" by the FBI. Since the complaint adequately alleges, for purposes of a motion to dismiss, that procedural due process required some procedures beyond FBI clearance, the allegation of condoning the policy of holding the Plaintiff in the ADMAX SHU until cleared suffices, at the pleading stage, to defeat dismissal for lack of personal involvement.

At the other end of the leadership chain, Defendant Hasty asserts his lack of personal involvement because the continued detention decision was made far above his level of responsibility. But this defense also cannot prevail at this stage of the litigation. *Cf. Anthony v. City of New York,* 339 F.3d 129, 138 (2d Cir. 2003) ("Plausible instructions from a superior . . . support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists (*e.g.*[,] . . . exigent circumstances)." (internal quotation marks omitted)). Hasty is

alleged to have known of the continued detention in the ADMAX SHU and the absence of procedural protections for the Plaintiff. Whether his conduct as a subordinate was objectively reasonable under all the circumstances is an issue distinct from the adequacy of the pleading of personal involvement.

Between these extremes in the official hierarchy, the lack of adequate allegations of personal knowledge of, or involvement in, the Plaintiff's continued detention is also asserted by the FBI Defendants and the BOP Defendants. However, the complaint at least implicitly alleges the knowledge of the FBI Defendants by stating that they "failed to approve post-September 11 detainees' release to general population." With respect to the BOP Defendants, the complaint alleges that BOP Defendant Cooksey "directed that all detainees 'of high interest' be confined in the most restrictive conditions possible until cleared by the FBI," that BOP Defendant Sawyer approved this policy, and that BOP Defendant Rardin, along with others, designed the policy of arbitrary confinement in the ADMAX SHU. The FBI Defendants also dispute their personal involvement in a procedural due process violation by arguing that they could not reasonably be expected to know about the BOP regulations. However, some factual development of this claim would have to precede its determination. Moreover, even absent the FBI Defendants' knowledge of the BOP regulation, the complaint can support the inference that the FBI Defendants understood that their alleged role in the clearance procedure was linked to a detainee's release to the general population. This suffices to overcome the defense of no personal involvement at this stage of the litigation.

It is arguable that, under the plausibility standard of *Bell Atlantic,* some subsidiary facts must be alleged to plead adequately that Ashcroft and Mueller condoned the Plaintiff's continued confinement in the ADMAX SHU, that Hasty had knowledge of that confinement, or that the mid-level Defendants knew the relationship between their clearance procedure and the Plaintiff's release to the general population. However, all of the Plaintiff's allegations respecting the personal involvement of these Defendants are entirely plausible, without allegations of additional subsidiary facts. This is clearly so with respect to Hasty and the mid-level Defendants. Even as to Ashcroft and Mueller, it is plausible to believe that senior officials of the Department of Justice would be aware of policies concerning the detention of those arrested by federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies. Sustaining the adequacy of a pleading of personal involvement in these circumstances runs no risk that every prisoner complaining of a denial of rights while in federal custody anywhere in the United States can survive a motion to dismiss simply by alleging that the Attorney General knew of or condoned the alleged violation. And, like the Form 9 complaint approved in *Bell Atlantic,* Iqbal's complaint informs all of the Defendants of the time frame and place of the alleged violations.

(b) Was the Plaintiff's Right to Procedural Due Process Clearly Established?

Although we conclude that the Plaintiff has adequately pleaded a violation of a procedural due process right, we also conclude that in this case "officers of rea-

sonable competence could [have] disagree[d]," *Malley v. Briggs,* 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986), whether their conduct violated a clearly established procedural due process right. Accordingly, the Plaintiff's right to additional procedures was not clearly established with the level of specificity that is required to defeat a qualified immunity defense. *See Brosseau v. Haugen,* 543 U.S. 194, 199-200, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004).

Several factors combine to create this lack of clarity in prior case law. First, some uncertainty exists in determining when administrative segregation procedures are required even in the ordinary criminal context. Our case law would require an officer in the Defendants' situation to consider various factors including the length of the Plaintiff's confinement, the extent to which the conditions of confinement were atypical, the text of relevant BOP regulations, and the Plaintiff's status as a pretrial detainee. *See, e.g., Tellier,* 280 F.3d at 79-83. As noted above, no single factor is dispositive in this case, which concerns administrative segregation of approximately six months. Although the harshness of the conditions alleged weigh in favor of requiring procedural protections, an officer could reasonably note that the Plaintiff's six-month continued confinement was comparable to the duration of confinements in cases that we characterized in *Tellier* as involving "relatively brief periods of confinement." *See id.* at 85.

Second, uncertainty in existing case law is heightened by the fact that, even on the facts alleged in the complaint, which specified that the "of high interest" designation pertained to the Government's post-9/11 terrorism investigation, the investigation leading to the

Plaintiff's separation from the general prison population could be reasonably understood by all of the Defendants to relate to matters of national security, rather than an ordinary criminal investigation. Prior to the instant case, neither the Supreme Court nor our Court had considered whether the Due Process Clause requires officials to provide ordinary administrative segregation hearings to persons detained under special conditions of confinement until cleared of connection with activities threatening national security. *Cf. Forsyth,* 472 U.S. at 534-35, 105 S. Ct. 2806 (granting Attorney General qualified immunity for warrantless wiretapping for national security purposes despite prohibitions of warrantless wiretapping in criminal context).

Third, the BOP regulation on which the Plaintiff relies itself contains potentially relevant exceptions that undermine certainty as to established requirements of law. "Administrative detention is to be used only for short periods of time except . . . where there are exceptional circumstances, *ordinarily tied to security or complex investigative concerns,*" 28 C.F.R. § 541.22(c)(1) (emphasis added), and inmates are entitled to "an administrative detention order detailing the reasons for placing an inmate in administrative detention . . . *provided institutional security is not compromised thereby,*" *id.* § 541.22(b) (emphasis added).

In sum, these factors, taken together, would suffice to raise "a legitimate question," *Forsyth,* 472 U.S. at 535 n.12, 105 S. Ct. 2806, among Government officials as to whether the Due Process Clause required administrative segregation hearings or any procedures other than the FBI's clearance system. *See id.* ("[W]here there is a *legitimate question* whether an exception to [a consti-

tutional requirement] exists," failure to abide by the requirement "cannot be said [to have] violate[d] clearly established law." (emphasis added)). Accordingly, we will direct dismissal of the portions of the Plaintiff's complaint alleging violations of procedural due process rights. *See* Compl. ¶¶ 204-06.

III. Conditions of Confinement

Hasty contends that Judge Gleeson should have dismissed the Plaintiff's conditions of confinement claims against him on the ground of qualified immunity because (1) the Plaintiff did not allege conditions amounting to a violation of substantive due process rights, (2) the Plaintiff failed to allege Hasty's deliberate indifference to the maintenance of the conditions of confinement, and (3) Hasty's actions were objectively reasonable under the circumstances.[10]

Because the Plaintiff was a pretrial detainee during his detention in the ADMAX SHU, his challenge to the conditions of his confinement arises from the substantive component of the Due Process Clause of the Fifth Amendment and not from the cruel and unusual punishment standards of the Eighth Amendment. *See Benjamin v. Fraser*, 343 F.3d 35, 49 (2d Cir. 2003) ("*Benjamin II*"). Pretrial detainees have not been convicted

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[10] There is some question as to whether Hasty sought to dismiss the substantive due process claim or the excessive force claim, *see* Part IV, *infra*, in the District Court on the ground of qualified immunity, as distinguished from the merits of the claim. However, the District Court understood all the Defendants to "seek dismissal of all claims against them on qualified immunity grounds," *Dist. Ct. op.* at *10, and we are satisfied that we have jurisdiction of an appeal from the rulings that are premised on that understanding.

of a crime and thus "may not be punished in any manner—neither cruelly and unusually nor otherwise." *Id.* at 49-50. Courts considering challenges to confinement brought by pretrial detainees must first consider whether the circumstances of the particular confinement render the confinement punitive; since some restraint is necessary to confine a pretrial detainee, not all uncomfortable conditions or restrictions are necessarily punitive. *Id.* at 50. In *Bell v. Wolfish, supra,* the seminal case on the substantive due process claims of pretrial detainees, the Supreme Court recognized the following factors as relevant to the determination of whether a condition of confinement is punitive:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter,* whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . ."

441 U.S. at 537-38, 99 S. Ct. 1861 (quoting *Mendoza-Martinez,* 372 U.S. at 168-69, 83 S. Ct. 554). A court may infer that a condition of confinement is intended as punishment if it is not reasonably related to a legitimate government objective. *See id.* at 539, 99 S. Ct. 1861.

The complaint alleges, among other things, that MDC staff placed the Plaintiff in solitary confinement, deliberately subjected him to extreme hot and cold tem-

peratures, shackled him every time he left his cell, and repeatedly subjected him to strip and body-cavity searches, and that these conditions were intended to be, and were in fact, punitive. Applying *Wolfish,* Judge Gleeson found these allegations sufficient to state a substantive due process claim, observing that whether the conditions were reasonably related to legitimate government objectives could not be determined on a motion to dismiss. *See Dist. Ct. op.* at *16.

Hasty contends that Judge Gleeson did not properly consider whether the Plaintiff alleged that he was "deprived of the minimal civilized measure of life's necessities" or whether Hasty was deliberately indifferent to the Plaintiff's health or safety. But this Court has never applied those standards in this context. In *Benjamin II,* we distinguished between challenges to disabilities imposed purposefully on pretrial detainees, which are analyzed under the *Wolfish* "punitive" inquiry, and pretrial detainees' challenges to prison environmental conditions. *See* 343 F.3d at 50. Recognizing that the "punitive" standard is neither required nor helpful in the context of environmental conditions, we adopted a modified version of the Eighth Amendment's deliberate indifference standard; we required a showing of deliberate indifference but stated that such indifference could be presumed from an absence of reasonable care. *See id.* We explicitly rejected analogies to the Eighth Amendment that would require a showing of wantonness on the part of the prison official, *see id.* at 51, or a showing that the alleged conditions were so inhumane as to constitute cruel and unusual punishment, *see id.* at 52 (citing *Estelle v. Gamble,* 429 U.S. 97, 103, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)).

The Plaintiff has alleged the purposeful infliction of restraints that were punitive in nature. Accordingly, the District Court need not have considered whether a Defendant was "deliberately indifferent" in inflicting the restraints or whether the restraints constituted cruel and unusual punishment. The right of pretrial detainees to be free from punitive restraints was clearly established at the time of the events in question, and no reasonable officer could have thought that he could punish a pretrial detainee by subjecting him to the practices and conditions alleged by the Plaintiff.

The Plaintiff alleges that Hasty (1) requested that certain officials develop procedures for the ADMAX SHU, (2) knew of the conditions of confinement to which Plaintiff was subjected, (3) approved the strip search policy, and (4) knew or should have known of the practice or custom of beating detainees. Under a notice pleading standard, reaffirmed in *Bell Atlantic* and *Erickson,* these allegations are sufficient to state a claim that Hasty failed to remedy constitutional violations of which he was aware. Moreover, the general allegations of knowledge, which are sufficient under *Phelps,* cited above, *see* Part I(e), are bolstered by the allegation that Hasty directed other officers to set up procedures for the ADMAX SHU.

Hasty's final argument is that, even if the Plaintiff has pled the violation of a clearly established right, Hasty's actions were objectively reasonable in the post-9/11 context. He argues that the actions were taken "in the immediate aftermath of September 11th during the course of a large-scale investigation of unprecedented scope in United States history, and Plaintiff was, at that time, considered to be possibly complicit in the terrorist

acts." As discussed above, *see* Part I(f), the post-9/11 context does not lessen the Plaintiff's right, as a pretrial detainee, to be free of punitive conditions of confinement.

IV. Excessive Force

The only argument of a Defendant directed to the claim of excessive force is Hasty's contention that the complaint does not allege his personal involvement.

The complaint alleges that Hasty knew or should have known of the MDC practice of beating detainees in the ADMAX SHU, that he knew or should have known of the propensity of his subordinates to beat the Plaintiff unnecessarily, and that he was deliberately indifferent in failing to take action to curtail the beatings. The complaint also alleges that Hasty chose the officers who worked in the ADMAX SHU.

Applying the standards for supervisory liability, outlined above, *see* Part I(d), the Plaintiff's allegations, on a notice pleading standard, *see* Part I(e), suffice to state a claim of supervisory liability for the use of excessive force against the Plaintiff. *See Phelps,* 308 F.3d at 187 n.6 ("[A] plaintiff's allegation of knowledge is itself a particularized factual allegation, which he will have the opportunity to demonstrate at the appropriate time in the usual ways." (internal quotation marks omitted)). The plausibility standard requires no subsidiary facts at the pleading stage to support an allegation of Hasty's knowledge because it is at least plausible that a warden would know of mistreatment inflicted by those under his command. Whether such knowledge can be proven must await further proceedings.

V. Interference with Right to Counsel

Hasty argues that the Plaintiff did not adequately plead a violation of his Sixth Amendment right to counsel because (1) the complaint does not state that he was charged with criminal (as opposed to immigration) offenses and (2) he failed to plead supervisory involvement. Although, as Judge Gleeson observed, "the complaint could have been more transparent regarding plaintiffs' status as pretrial detainees facing criminal charges," *see Dist. Ct. op.* at *23, the complaint does refer to interference with the Plaintiff's conversations with his "criminal attorney." This allegation was sufficient to give Hasty "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley,* 355 U.S. at 47, 78 S. Ct. 99. As for the issue of supervisory liability, the complaint alleges that Hasty "knew of and condoned the imposition of substantial restrictions on Plaintiff's right to communicate with counsel." The Plaintiff's allegations of knowledge are sufficient to state a claim of supervisory liability, and, for the reasons stated above, satisfy the plausibility standard without an allegation of subsidiary facts.

VI. Unreasonable Searches

Hasty challenges Judge Gleeson's conclusion that he is not entitled to qualified immunity at this stage on the Plaintiff's Fourth Amendment claim on the grounds that (1) the law on prisoners' Fourth Amendment right to be free from strip and body-cavity searches was not clearly established and (2) Judge Gleeson failed to explain why the searches of the Plaintiff did not serve legitimate penological interests.

As to whether the right to be free from strip and body-cavity searches was clearly established, Hasty argues that "the Circuits differ sharply on the existence of prisoner privacy rights under the Fourth Amendment outside of prison cells." This argument ignores the fact that it is this Circuit's law that determines whether a right is clearly established for purposes of a qualified immunity defense, *see Tellier*, 280 F.3d at 84, and Hasty does not reckon with the long line of Second Circuit cases on strip and body-cavity searches in prisons and jails. *See, e.g., Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001); *Covino v. Patrissi*, 967 F.2d 73 (2d Cir. 1992); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986).

Under the *Saucier* framework for considering a qualified immunity defense, discussed above, we must first decide whether, assuming the Plaintiff's allegations are true, his Fourth Amendment rights were violated, which will require determining the proper standard for his claim.

The Supreme Court has held that visual body-cavity searches of pretrial detainees and prisoners after contact visits are not unreasonable under the Fourth Amendment, even in the absence of probable cause. *See Wolfish*, 441 U.S. at 558, 99 S. Ct. 1861. Emphasizing that the Fourth Amendment prohibits only unreasonable searches, the Court instructed judges to consider "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* at 558-59, 99 S. Ct. 1861. Because of the potential for smuggling money, drugs, and weapons into prisons, the Court concluded that the practice of strip searching inmates after contact visits was not facially unconstitutional. *See id.*

at 559-60, 99 S. Ct. 1861. Applying *Wolfish,* this Court has concluded that, while it might be reasonable to strip search a prisoner before initially placing him in administrative detention, it would not be reasonable to conduct a second strip search shortly after the first search if the prisoner was under continuous escort the entire time. *See Hodges v. Stanley,* 712 F.2d 34, 35 (2d Cir. 1983).

Since *Wolfish* and *Hodges,* two lines of cases involving strip searches have evolved in this Circuit. In *Weber v. Dell,* jail officials conducted a visual body-cavity search on a woman arrested on misdemeanor charges. *See* 804 F.2d at 799. This Court ruled that

> the Fourth Amendment precludes prison officials from performing strip/body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest.

Id. at 802; *see Wachtler v. County of Herkimer,* 35 F.3d 77, 81 (2d Cir. 1994) (accepting *Weber* but upholding immunity defense on the basis of reasonable suspicion of contraband); *Walsh v. Franco,* 849 F.2d 66, 69 (2d Cir. 1988) (applying *Weber* to hold a search unconstitutional).

However, in *Covino v. Patrissi,* we applied the "legitimate penological interests" standard outlined in *Turner v. Safley,* 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), to assess the constitutionality of a strip search of a pretrial detainee held in a prison with sentenced inmates. The prison in which Covino was detained had a policy of random visual body-cavity

searches. *Covino,* 967 F.2d at 75. Observing that the Supreme Court applied *Turner*'s "legitimate penological interests" test to all claims that prison regulations violate constitutional rights, *see Washington v. Harper,* 494 U.S. 210, 223-24, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990), we analyzed the random search policy under the four factors of *Turner*:

> (i) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (ii) whether there are alternative means of exercising the right in question that remain open to prison inmates; (iii) whether accommodation of the asserted constitutional right will have an unreasonable impact upon guards and other inmates, and upon the allocation of prison resources generally; and (iv) whether there are reasonable alternatives available to the prison authorities.

Covino, 967 F.2d at 78-79 (citing *Turner,* 482 U.S. at 89-90, 107 S. Ct. 2254). Applying these factors, we concluded that the regulation was rationally related to legitimate security interests, there were no alternative means of exercising the detainee's right that would allow the prison to achieve the same level of effectiveness, the regulation accommodated the privacy rights of the detainee by conducting the search behind closed doors, and there was no "alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests." *Id*. at 79-80 (internal quotation marks omitted).

In 2001, we attempted to reconcile these two lines of cases in *Shain v. Ellison, supra.* Judge Pooler's opinion for the majority observed that the *Turner* test governs

the constitutionality of *prison* regulations. *See Shain,* 273 F.3d at 65. By limiting *Covino* to *prison* regulations, she reconciled *Covino* and the "reasonable suspicion" line of cases beginning with *Weber,* which all concerned events occurring in *jails*. *See id.* at 65-66. In concurrence, Judge Katzmann remarked that this Circuit's precedents required a distinction "either between misdemeanors and felonies or between jails and prisons," but observed that he did not find the distinction persuasive. *See id.* at 70. Judge Cabranes, in dissent, criticized the jail/prison distinction and argued that *Weber*'s "reasonable suspicion" rule was not good law in light of *Turner*. *Id.* at 71-74; *see also N.G. v. Connecticut,* 382 F.3d 225, 234-35 (2d Cir. 2004) (rejecting the *Turner* standard for strip searches in juvenile detention centers).

On this appeal, the parties assume, as did Judge Gleeson, *see Dist. Ct. op.* at *26, that the proper inquiry is whether the Plaintiff was housed at a jail or a prison. Finding that the MDC was most like a prison, Judge Gleeson applied the *Covino*/*Turner* standard. *See id.* This was correct. The Plaintiff was confined for an extended period of time in a prison-like environment, and it appears that he was charged with felonies, *see* 18 U.S.C. §§ 371, 1028. In the environment where the Plaintiff was held, the lesser reasonable suspicion standard would jeopardize prison officials' ability to maintain security.

As Judge Gleeson recognized, even if the precise standard governing intrusive searches of the Plaintiff at the MDC might not have been clearly established in 2001, it was clearly established that even the standard most favorable to prison officials required that strip and

body-cavity searches be rationally related to legitimate government purposes. *Cf. Hodges*, 712 F.2d at 35 (holding that a plaintiff stated a Fourth Amendment claim where consecutive body-cavity searches were unnecessary). The complaint alleges that the Plaintiff was routinely strip searched twice after returning from the medical clinic or court and that, on one occasion, the Plaintiff was subjected to three serial strip and body-cavity searches in the same room. He also alleges that he was subjected to strip and body-cavity searches every morning. These allegations may reasonably be understood to claim that repeated strip and body-cavity searches were unrelated to legitimate government purposes and apparently were performed to punish. The Plaintiff has adequately alleged a violation of his clearly established Fourth Amendment rights. Of course, the success or failure of these claims will turn on the specific facts that are revealed after discovery or at trial.

Although exigent circumstances can justify some conduct that would otherwise violate Fourth Amendment standards, *see, e.g.*, *Tyler*, 436 U.S. at 509, 98 S. Ct. 1942 (exigent circumstances justify warrantless entry into a home), the post-9/11 context does not provide a basis for conducting repeated and needless strip and body-cavity searches of a pretrial detainee. *See* Part I(f), above.

VII. Interference with Religious Practices

Hasty also argues that Judge Gleeson should have dismissed the Plaintiff's First Amendment claim against him on qualified immunity grounds because (1) BOP regulations "conclusively establish" a lack of personal involvement and (2) the Plaintiff did not allege a violation of his First Amendment rights.

Both arguments lack merit. Hasty contends that the only "policy" on religion at the MDC was the official BOP policy, codified at 28 C.F.R. part 548, and that the Plaintiff has not indicated that these policies were suspended or that he availed himself of available complaint procedures, *see* 28 C.F.R. part 542. Hasty contends that he "was under no clearly established constitutional obligation to take affirmative steps to inquire whether Plaintiff observed particular religious practices, but as the BOP regulations instruct, Plaintiff had the responsibility to make his religious preferences known." Br. for Hasty at 47. But neither the complaint procedures nor the official policy governing religion allowed Hasty to ignore violations of detainees' First Amendment rights. If Hasty is arguing that the Plaintiff has forfeited his right to recover damages because he did not follow administrative complaint procedures, this may be relevant to the merits of the case, but it is not relevant to a qualified immunity defense.

Similarly without merit, Hasty argues that he could not be personally involved in any deprivations of religious freedom because BOP regulations establish that prison chaplains "are responsible for managing religious activities within the institution." 28 C.F.R. § 548.12. As the Plaintiff points out, however, Hasty ignores other regulations stating that the warden determines, among other things, what religious items may be used by prisoners, *see id.* § 548.16, and whether attendance at religious functions is open to all prisoners, *id.* § 548.15.

Hasty's second argument is that Plaintiff has not alleged a violation of his First Amendment rights. He relies on *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987), which applied

Turner's "legitimate penological interests" test to First Amendment claims, *see id.* at 348-49, 107 S. Ct. 2400. Though recognizing that a prison regulation precluded some Muslim prisoners from attending Friday prayers, *see id.* at 345, 107 S. Ct. 2400, the Supreme Court found the regulation justified under *Turner,* focusing on the officials' legitimate security objectives and the availability of other channels by which prisoners could exercise their religious rights, *see id.* at 350-53, 107 S. Ct. 2400. In the pending case, however, the Plaintiff alleges that he was not allowed to attend Friday prayers, that prison guards banged on his door when he tried to pray, and that his Koran was routinely confiscated.[11] These allegations suffice to preclude a qualified immunity defense at this stage of the litigation. In particular, consideration of Hasty's arguments—that "restrictions on movement and possessions . . . were a necessary part of the legitimate and proper functioning of the maximum security procedures in the ADMAX SHU" and that such restrictions were "justified by security concerns and other institutional needs," Br. for Hasty at 49-50—must await factual discovery so that the Government's asserted security interests can be assessed against a factual record of what restrictions actually existed and what purpose they served.

VIII. Racial and Religious Discrimination

The Defendants argue that they are entitled to qualified immunity on the Plaintiff's First Amendment claim of religious discrimination and Fifth Amendment claim

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[11] Hasty's arguments that the repeated banging on Iqbal's cell while he prayed shows that he was at least allowed to pray, and that the repeated confiscation of his Koran shows that he was at least permitted to have a Koran need no response

of racial or ethnic discrimination on three grounds: (1) the Plaintiff has failed to state a violation of clearly established rights, (2) the Plaintiff's allegations of discriminatory intent are too conclusory, and (3) the Plaintiff has not alleged the personal involvement of Ashcroft and Mueller.[12]

The arguments of Ashcroft and Mueller challenging the sufficiency of the Plaintiff's race, ethnic, and religious discrimination claims misunderstand his complaint. They contend that his "complaint amounts to an objection that most of those persons determined to be of high interest to the 9/11 investigation were Muslim or from certain Arab countries," which they justify by pointing out that the 9/11 hijackers were Muslims from Arab countries. However, what the Plaintiff is alleging is that he was deemed to be "of high interest," and accordingly was kept in the ADMAX SHU under harsh conditions, solely because of his race, ethnicity, and religion. The Plaintiff also alleges that "Defendants specifically targeted [him] for mistreatment because of [his] race, religion, and national origin." These allegations are sufficient to state a claim of animus-based discrimination that any "reasonably competent officer" would understand to have been illegal under prior case law. *See Malley,* 475 U.S. at 341, 106 S. Ct. 1092; *see also Hayden v. County of Nassau,* 180 F.3d 42, 48 (2d Cir. 1999) (stating that racial classifications violate Equal Protection Clause where motivated by racial animus and having a discriminatory effect). Accordingly, the Plaintiff's racial, ethnic, and religious discrimination claims

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[12] Judge Gleeson dismissed the discrimination claims against the BOP Defendants. *See Dist. Ct. op.* at *29.

cannot be dismissed on qualified immunity grounds at this stage of the litigation.

Hasty also argues that the Plaintiff has failed to state a claim of discrimination. Citing *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999) ("*AAADC*"), he argues that the Equal Protection Clause does not apply in the context of proceedings to remove illegal aliens and that the Government can permissibly deem nationals of a particular country to be a special threat. In *AAADC,* the Supreme Court concluded that a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252(g), deprived the federal courts of jurisdiction to consider an illegal alien's selective enforcement challenge to deportation. *See* 525 U.S. at 487, 119 S. Ct. 936. The Court rejected the argument that it nevertheless had jurisdiction to consider an alien's constitutional arguments, holding that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation," *see id.* at 488, 119 S. Ct. 936, even when the Government deports the alien "for the additional reason that it believes him to be a member of an organization that supports terrorist activity," *id.* at 492, 119 S. Ct. 936. *AAADC* affords the Defendants no relief. The Plaintiff is not challenging his deportation or even his arrest on criminal charges. Moreover, *AAADC* does not stand for the proposition that the Government may subject members of a particular race, ethnicity, or religion to more restrictive conditions of confinement than members of other races, ethnic backgrounds, or religions.

The Defendants argue that the Plaintiff's allegations of racial, ethnic, and religious animus are too conclusory. But, as discussed above, *see* Part I(e), *Crawford-El* indicates that courts cannot require a heightened pleading standard for civil rights complaints involving improper motive. In *Phillip,* 316 F.3d at 298-99, this Court held that *Swierkiewicz*'s notice pleading standard applied to a civil rights complaint alleging racial animus. Although recognizing that the complaint did not "contain many evidentiary allegations relevant to intent," *see id.* at 299, we found the allegations sufficient to state a claim, observing that the complaint alleged that the plaintiffs were African-American, described the defendants' actions in detail, and alleged that the plaintiffs were selected for maltreatment "solely because of their color," *id.* at 298.

The Plaintiff's allegations suffice to state claims of racial, ethnic, and religious discrimination. He alleges in particular that the FBI Defendants classified him "of high interest" solely because of his race, ethnic background, and religion and not because of any evidence of involvement in terrorism. He offers additional factual support for this allegation, stating that "within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as 'of interest' to the post-September 11th investigation." We need not consider at this stage of the litigation whether these allegations are alone sufficient to state a clearly established constitutional violation under the circumstances presented because they are sufficient to state a violation when combined with the Plaintiff's allegation that, un-

der the policy created and implemented by the Defendants, he was singled out for unnecessarily punitive conditions of confinement based on his racial, ethnic, and religious characteristics.

Finally, Ashcroft and Mueller argue that the Plaintiff failed to allege their personal involvement in any discrimination. However, the complaint alleges broadly that Ashcroft and Mueller were instrumental in adopting the "policies and practices challenged here." The complaint also alleges that the FBI, "under the direction of Defendant Mueller," arrested thousands of Arab Muslims and that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject Plaintiff[] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." The Plaintiff acknowledges that the FBI Defendants made the determination that Plaintiff was "of high interest," but this allegation does not necessarily insulate Ashcroft and Mueller from personal responsibility for the actions of their subordinates under the standards of supervisory liability outlined above, *see* Part I(d). As with the procedural due process claim, the allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the Plaintiff alleges satisfies the plausibility standard without an allegation of subsidiary facts because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated "of high interest" in the aftermath of 9/11. Whether or not the issues of personal involvement will be clarified by court-supervised discovery sufficient

to support summary judgment remains to be determined.

IX. Section 1985(3) Conspiracy

The Defendants contend that they are entitled to qualified immunity on the Plaintiff's conspiracy claims under 42 U.S.C. § 1985(3) because (1) it was not clearly established that federal officials were subject to liability under section 1985(3), and (2) the Plaintiff's allegations of conspiracy are too conclusory to state a violation of clearly established law.

Clearly established law. A conspiracy claim under 42 U.S.C. § 1985(3) has four elements: (1) a conspiracy, (2) for the purpose of depriving any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, (3) an act in furtherance of the conspiracy, and (4) whereby a person is injured in his person or property or deprived of a right or privilege of a citizen. *See United Brotherhood of Carpenters & Joiners of America, Local 610 v. Scott,* 463 U.S. 825, 828-29, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983). In addition, the conspiracy must be motivated by some class-based animus. *See Griffin v. Breckenridge,* 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971).

In *Gregoire v. Biddle,* 177 F.2d 579 (2d Cir. 1949), this Court considered a section 1985(3) claim against several federal officials stemming from an allegedly false arrest. The Court first held that the officials had absolute immunity from the false arrest claim. *See id.* at 580-81. Turning to the section 1985(3) claim, the Court rejected the plaintiff's argument that "this language creates a claim against any two persons who conspire to injure another for spite or other improper motives, apparently because to single out anyone for illegal

aggression is to deny him equal protection of the laws." *Id.* at 581. *Gregoire* has been interpreted by some lower courts to mean that section 1985(3) does not apply to federal officials. *See, e.g., Lofland v. Meyers,* 442 F. Supp. 955, 957 (S.D.N.Y. 1977); *Williams v. Halperin,* 360 F.Supp. 554, 556 (S.D.N.Y. 1973); *see also Hobson v. Wilson,* 737 F.2d 1, 19 (D.C. Cir. 1984) (criticizing *Gregoire*).

In *Griffin,* the Supreme Court held that section 1985(3) contains no requirement of state action and thus applies to private conspiracies. *See* 403 U.S. at 101, 91 S. Ct. 1790. Although this Court has had no occasion since *Gregoire* to consider whether section 1985(3) applies to conspiracies among federal officials, numerous courts of appeals, applying *Griffin,* have concluded that section 1985(3) applies to federal officials. *See, e.g., Hobson,* 737 F.2d at 20; *Jafree v. Barber,* 689 F.2d 640, 643 (7th Cir. 1982); *Gillespie v. Civiletti,* 629 F.2d 637, 641 (9th Cir. 1980); *Dry Creek Lodge, Inc. v. United States,* 515 F.2d 926, 931 (10th Cir. 1975).[13] We agree that the development of case law since *Gregoire* has eroded any basis for interpreting that decision to render section 1985(3) inapplicable to federal officials. And we also agree that, in the absence of prior Second Circuit case law on point, it was not clearly established in 2001 that section 1985(3) applied to federal officials. However, even without a definitive ruling from this Court on

[13] BOP Defendant Cooksey cites post-*Griffin* cases from the Fifth and Third Circuits stating that section 1985(3) does not apply to federal officials. *See, e.g., Mack v. Alexander,* 575 F.2d 488, 489 (5th Cir. 1978); *Bethea v. Reid,* 445 F.2d 1163, 1164 (3d Cir. 1971). However, these cases cite pre-*Griffin* cases for this proposition and neglect to consider *Griffin.*

the application of section 1985(3) to federal officials, federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws, at least where the officials' conduct, alleged to have accomplished the discriminatory object of the conspiracy, would violate the Equal Protection Clause. As we have recently held, "[T]he proper inquiry is whether the *right* itself—rather than its *source*—is clearly established." *Russo v. City of Bridgeport*, No. 05-4302-cv, 2007 U.S. App. LEXIS 16171, at *39 (2d Cir. June 12, 2007) (collecting cases), *amending* 479 F.3d 196 (2d Cir. 2007).

Adequacy of allegations. Applying the normal pleading rules previously discussed, *see* Part I(e), even as supplemented by the plausibility standard, we have no doubt that the Plaintiff's allegations of a conspiracy to discriminate on the basis of ethnicity and religion suffice to withstand a motion to dismiss. Unlike the situation in *Bell Atlantic,* we do not encounter here a bare allegation of conspiracy supported only by an allegation of conduct that is readily explained as individual action plausibly taken in the actors' own economic interests.

X. Personal Jurisdiction

The final issue is whether Judge Gleeson erred in denying the motions by Ashcroft, Mueller, and FBI Defendant Rolince to dismiss for lack of personal jurisdiction. Ordinarily, we would lack jurisdiction over this issue on this interlocutory appeal concerning qualified immunity. However, "[a] defendant who is entitled to immediate appellate review of a qualified immunity decision is also entitled to appellate review of pendant issues if those issues are inextricably intertwined with the

question of qualified immunity or are otherwise necessary to ensure meaningful review of it." *Toussie v. Powell*, 323 F.3d 178, 184 (2d Cir. 2003) (internal quotation marks omitted). "Whether issues are inextricably intertwined is determined by whether there is substantial factual overlap bearing on the issues raised." *Id.* (internal quotation marks omitted). Judge Gleeson recognized the overlap between the Defendants' personal jurisdiction arguments and personal involvement arguments pertaining to qualified immunity. *See Dist. Ct. op.* at *10.

Under New York's long-arm statute, a court may exercise jurisdiction over a non-domiciliary who "in person or through an agent . . . commits a tortious act within the state" so long as the cause of action arises from that act. *See* N.Y. C.P.L.R. § 302(a)(2). As the District Court observed, *see Dist. Ct. op.* at *9-*10, personal jurisdiction cannot be predicated solely on a defendant's supervisory position. *See Ontel Products, Inc. v. Project Strategies Corp.*, 899 F. Supp. 1144, 1148 (S.D.N.Y. 1995). Rather, a plaintiff must show that a defendant "personally took part in the activities giving rise to the action at issue." *Id.*

The same intertwining of the issue of personal involvement with the issue of personal jurisdiction that provides us with pendent appellate jurisdiction also demonstrates that the pleading of personal involvement suffices to establish personal jurisdiction, at least at this preliminary stage of the litigation.

Conclusion

For the foregoing reasons, the order of the District Court is affirmed as to the denial of the Defendants' motions to dismiss all of the Plaintiff's claims, except for the claim of a violation of the right to procedural due process, as to which we reverse. In affirming almost all of the District Court's ruling, we emphasize that we do so at an early stage of the litigation. We recognize, as did Judge Gleeson in ruling on the Plaintiff's procedural due process claim, *see Dist. Ct. op.* at *21, that carefully limited and tightly controlled discovery by the Plaintiff as to certain officials will be appropriate to probe such matters as the Defendants' personal involvement in several of the alleged deprivations of rights. We are mindful too that, for high-level officials, this discovery might be either postponed until discovery of front-line officials is complete or subject to District Court approval and additional limitations. We also recognize that the Defendants will be entitled to seek more specific statements as to some of the Plaintiff's claims and perhaps renew their claims for qualified immunity by motions for summary judgment on a more fully developed record.

In sum, the serious allegations of gross mistreatment set forth in the complaint suffice, except as noted in this opinion, to defeat the Defendants' attempt to terminate the lawsuit at a preliminary stage, but, consistent with the important policies that justify the defense of qualified immunity, the defense may be reasserted in advance of trial after the carefully controlled and limited discovery that the District Court expects to supervise.

Affirmed in part, reversed in part, and remanded.

JOSÉ A. CABRANES, Circuit Judge, concurring:

I concur fully in Judge Newman's characteristically careful and comprehensive opinion, which seeks to hew closely to the relevant Supreme Court and Second Circuit precedents, including the Supreme Court's decision in *Bell Atlantic v. Twombly,* —U.S.—, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). That said, it is worth underscoring that some of those precedents are less than crystal clear and fully deserve reconsideration by the Supreme Court at the earliest opportunity; to say the least, "the guidance they provide is not readily harmonized," Maj. Op. at 153.

Most importantly, the opinion's discussion of the relevant pleading standards reflects the uneasy compromise—forged partially in dicta by the Supreme Court in *Crawford-El v. Britton,* 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998)—between a qualified immunity privilege rooted in the need to preserve "the effectiveness of government as contemplated by our constitutional structure," *Harlow v. Fitzgerald,* 457 U.S. 800, 820 n.35, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), and the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

Here, that uneasy compromise presents itself in a case brought by Javaid Iqbal, a federally convicted felon now residing in his native Pakistan. Iqbal does not challenge his arrest in the aftermath of 9/11, his detention, his conviction, or his apparent subsequent deportation. Iqbal instead challenges his separation from the general prison population at the Metropolitan Detention Center and his treatment during that separation. He claims that his separation stemmed from a general policy authorized at the highest levels of government in the wake of 9/11. But most, if not all, of the assertedly unlawful

actions in his complaint—including the decision to place plaintiff in the ADMAX SHU and the abuses which purportedly ensued there—are alleged to have been carried out by defendants much lower in the chain of command.

Nevertheless, as a result of the Supreme Court's precedents interpreting Rule 8(a), even as modified by the "plausibility standard" established in *Bell Atlantic,* 127 S. Ct. at 1968, it is possible that the incumbent Director of the Federal Bureau of Investigation and a former Attorney General of the United States will have to submit to discovery, and possibly to a jury trial, regarding Iqbal's claims. If so, these officials—FBI Director Robert Mueller and former Attorney General John Ashcroft—may be required to comply with inherently onerous discovery requests probing, *inter alia,* their possible knowledge of actions taken by subordinates at the Federal Bureau of Investigation and the Federal Bureau of Prisons at a time when Ashcroft and Mueller were trying to cope with a national and international security emergency unprecedented in the history of the American Republic. In *Bell Atlantic,* the Supreme Court has quite rightly expressed concern that "careful case management" might not be able to "weed[ ] out early in the discovery process" an unmeritorious claim in private civil antitrust litigation, *see Bell Atlantic,* 127 S. Ct. at 1967, and might have limited success in "checking discovery abuse," *id.* This concern is all the more significant in the context of a lawsuit against, *inter alia,* federal government officials charged with responsibility for national security and entitled by law to assert claims of qualified immunity. Even with the discovery safeguards carefully laid out in Judge Newman's opinion, it seems that little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of

the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes.

The decision in this case may be required by the faithful application of the relevant precedents by a court of inferior jurisdiction. But a detached observer may wonder whether the balance struck here between the need to deter unlawful conduct and the dangers of exposing public officials to burdensome litigation—a balance compelled by the precedents that bind us—jeopardizes the important policy interest Justice Stevens aptly described as "a national interest in enabling Cabinet officers with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation." *Mitchell v. Forsyth,* 472 U.S. 511, 541, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (Stevens, J., concurring in the judgment).[1]

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[1] The Supreme Court's recognition in *Bell Atlantic* that "proceeding to . . . discovery can be expensive," *Bell Atlantic,* 127 S. Ct. at 1967 has particular resonance where, as here, discovery would not only result in significant cost but would also deplete the time and effectiveness of current officials and the personal resources of former officials. Indeed, as Justice Stevens noted, "[p]ersons of wisdom and honor will hesitate to answer the President's call to serve in these vital positions if they fear that vexatious and [in some cases] politically motivated litigation associated with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office." *Mitchell,* 472 U.S. at 542, 105 S. Ct. 2806 (Stevens, J. concurring in the judgment); *see also Harlow,* 457 U.S. at 814, 102 S. Ct. 2727 (noting the "danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties" (alteration in original) (internal quotation marks omitted)).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. 04-CV-01809-JG SMG

EHAB ELMAGHRABY AND JAVAID IQBAL, PLAINTIFF

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, MICHAEL ROLINCE, FORMER CHIEF OF THE FEDERAL BUREAU OF INVESTIGATION'S INTERNATIONAL TERRORISM OPERATIONS SECTION, COUNTERTERRORISM DIVISION; KENNETH MAXWELL, FORMER ASSISTANT SPECIAL AGENT IN CHARGE, NEW YORK FIELD OFFICE, FEDERAL BUREAU OF INVESTIGATIONS; KATHLEEN HAWK SAWYER, FORMER DIRECTOR OF THE FEDERAL BUREAU OF PRISONS; DAVID RARDIN, FORMER DIRECTOR OF THE NORTHEAST REGION OF THE BUREAU OF PRISONS; MICHAEL COOKSEY, FORMER ASSISTANT DIRECTOR FOR CORRECTIONAL PROGRAMS OF THE BUREAU OF PRISONS; DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER, MICHAEL ZENK, WARDEN OF THE METROPOLITAN DETENTION CENTER; LINDA THOMAS, FORMER ASSOCIATE WARDEN OF PROGRAMS OF THE METROPOLITAN DETENTION CENTER; ASSOCIATE WARDEN SHERMAN, ASSOCIATE WARDEN OF CUSTODY FOR THE METROPOLITAN DETENTION CENTER; CAPTAIN SALVATORE LOPRESTI; LIEUTENANT STEVEN BARRERE; LIEUTENANT WILLIAM BECK; LIEUTENANT LINDSEY

BLEDSOE; LIEUTENANT JOSEPH CUCITI; LIEUTENANT THOMAS CUSH; LIEUTENANT HOWARD GUSSAK; LIEUTENANT MARCIAL MUNDO; LIEUTENANT DANIEL ORTIZ; LIEUTENANT ELIZABETH TORRES; CORRECTIONS OFFICER REYNALDO ALAMO; CORRECTIONS OFFICER SIDNEY CHASE; CORRECTIONS OFFICER JAMES CLARDY; CORRECTIONS OFFICER RAYMOND COTTON; CORRECTIONS OFFICER MICHAEL DEFRANCISCO; CORRECTIONS OFFICER RICHARD DIAZ; CORRECTIONS OFFICER JAI JAIKISSON; CORRECTIONS OFFICER DEXTER MOORE; CORRECTIONS OFFICER JON OSTEEN; CORRECTIONS OFFICER ANGEL PEREZ; CORRECTIONS OFFICER SCOTT ROSEBERRY; UNIT MANAGER CLEMMETT SHACKS; NORA LORENZO, PHYSICIAN'S ASSISTANT; "JOHN DOE" CORRECTIONS OFFICERS NOS. 1-19, "JOHN DOE" BEING FICTIONAL FIRST AND LAST NAMES, AND THE UNITED STATES OF AMERICA, DEFENDANTS

Sept. 27, 2005

MEMORANDUM AND ORDER

GLEESON, J.

Plaintiffs Ehab Elmaghraby and Javaid Iqbal are Muslim men from Egypt and Pakistan, respectively, who were arrested on criminal charges in the months following September 11, 2001, and detained at the Metropoli-

tan Detention Center ("MDC") in Brooklyn, New York.[1] Plaintiffs allege that they and other Muslim men were arbitrarily classified as persons "of high interest" to the government's terrorism investigation following the September 11 attacks, and accordingly were housed in the Administrative Maximum Special Housing Unit (the "ADMAX SHU") of the MDC instead of in a general population unit of the facility. Neither plaintiff was afforded the opportunity to contest his classification or continued confinement in the ADMAX SHU. Elmaghraby remained confined there for the entire time he was detained in the MDC-from October 1, 2001 until August 28, 2002. Iqbal remained in the ADMAX SHU from January 8, 2002, when he was transferred there from the general population, until the end of July 2002, when he was returned to the general population.

Plaintiffs allege that during their confinement in the ADMAX SHU, they were subjected to, among other things, severe physical and verbal abuse; unnecessary and abusive strip and body-cavity searches; extended detention in solitary confinement; deliberate interference with the exercise of their religious beliefs; and de-

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[1] Elmaghraby was arrested on September 30, 2001. Charged with violating 18 U.S.C. § 1029 (producing/trafficking in a counterfeit device), Elmaghraby pleaded guilty on February 13, 2002, and was sentenced to a 24-month term of imprisonment on July 22, 2002. A criminal complaint was filed against Iqbal on November 5, 2001, charging him with violations of 18 U.S.C. §§ 371 & 1028 (conspiracy to defraud the United States and fraud with identification). He pleaded guilty on April 22, 2002, and was sentenced to a 16-month term of imprisonment on September 17, 2002. *See* Docket Reports for *United States v. Elmaghraby,* Docket No. 01-cr-1175 (ILG); *United States v. Iqbal,* Docket No. 01-cr-1318 (ILG).

liberate interference with their attempts to communicate with counsel. In addition, plaintiffs allege that they were denied adequate exercise, nutrition, and medical treatment. As a result of their treatment while in detention, plaintiffs allege that they suffered severe physical injuries, emotional distress and humiliation.

Plaintiffs further allege that they were subjected to these harsh conditions because of their race, national origin, and religion, and that their continued detention under these conditions stemmed from a discriminatory policy created by high-level officials in the executive branch of the federal government.

Plaintiffs allege violations of their constitutional rights under the First, Fourth, Fifth, Sixth, and Eighth Amendments and seek damages pursuant to principles set forth in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Plaintiffs also assert claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350; the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb; the civil rights conspiracy statute, 42 U.S.C. § 1985(3); and the Federal Tort Claims ("FTCA"), 28 U.S.C. § 2671 *et seq.*

In addition to bringing claims against the MDC officers with whom they had direct contact, plaintiffs name as defendants former Attorney General John Ashcroft; Robert Mueller, the Director of the Federal Bureau of Investigation ("FBI"); Michael Rolince, the former Chief of the Counterterrorism Division of the FBI's International Terrorism Operations Section; Kenneth Maxwell, the former Assistant Special Agent in Charge of the FBI's New York Field Office; Kathleen Hawk Sawyer, the former Director of the Bureau of Prisons ("BOP"); Michael Cooksey, the former Assistant Direc-

tor for Correctional Programs of the BOP; and David Rardin, the former Director of the Northeast Region of the BOP. These defendants have moved to dismiss all the claims against them, as have Dennis Hasty and Michael Zenk (the former and current Wardens of the MDC, respectively), and Nora Lorenzo (a physician's assistant at the MDC).[2] The United States has also moved pursuant to the Liability Reform Act, 28 U.S.C. § 2679, to be substituted as the sole defendant on the claims brought under the Alien Tort Statute and for dismissal of those claims.

For the following reasons, the motions to dismiss are granted in part and denied in part.

BACKGROUND

A. *Overview*

For the purposes of this motion, I assume, as I must, that plaintiffs' allegations are true.[3] On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States, including the World Trade Center. *See Hamdi v. Rumsfeld,* 124 S. Ct. 2633, 2635 (2004). Approximately 3,000 people were killed in those attacks. *Id.* In the months following September 11, the FBI arrested and detained thousands of Arab Muslim men

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[2] For ease of discussion, I refer to the individual defendants who have moved to dismiss as, collectively, "defendants." In addition, I refer to certain sub-groups of defendants as follows: Mueller, Rolince, and Maxwell as "the FBI Defendants"; Hawk Sawyer, Cooksey, and Rardin as "the BOP Defendants"; Hasty and Zenk as "the Wardens," and MDC officials other than the Wardens as "MDC Defendants."

[3] On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court must assume as true all factual allegations made in the complaint. *See Bolt Elec., Inc. v. City of New York,* 53 F.3d 465, 469 (2d Cir. 1995).

(designated herein as "post-September 11 detainees") as part of its investigation into the attacks.[4]

Plaintiffs allege that FBI officials Rolince and Maxwell classified them, along with many post-September 11 detainees, as persons "of high interest" to the government's terrorism investigation. Plaintiffs assert that they were classified as such based solely on their race, religion, and national origin, and not on any evidence of their involvement in supporting terrorist activities. Indeed, plaintiffs allege that within the New York area, "all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as 'of interest' to the post-September-11th investigation." (Compl. ¶ 52.)

Plaintiffs and other "of high interest" detainees were confined in the ADMAX SHU, a special housing unit at the MDC created specifically to house post-September 11 detainees in highly restrictive conditions ("Administrative Maximum" refers to the most restrictive type of

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[4] While motions to dismiss are evaluated based on facts alleged in the complaint, this does not mean that the complaint must be viewed in a factual vacuum. Following the attacks on September 11, 2001, the FBI immediately initiated a massive investigation into the attacks. *See* United States Department of Justice, Office of 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* 1 (April 2003) (the *"April 2003 OIG Report"*). Within 3 days, more than 4,000 FBI Special Agents and 3,000 support personnel were assigned to work on the investigation. *Id*. at 11-12. By September 18, 2001, the FBI had received more than 96,000 leads from the public. *Id*. at 12.

detention permitted under BOP procedures).[5] Plaintiffs allege that former Warden Hasty, Associate Warden Sherman, and Captain Salvatore Loprestri selected the officers to work in the ADMAX SHU. Further, plaintiffs allege that the procedures for handling detainees within this restrictive unit were developed by Sherman, Lopestri, and Lieutenant Joseph Cuciti at the request of Hasty.

As discussed below, the conditions in the ADMAX SHU were highly restrictive. Detainees were kept in solitary confinement. When they were moved, they were escorted by four officers and restrained with handcuffs and leg irons (a "four-man hold restraint policy"). Hand-held cameras were used to record detainee movements, and video cameras were placed in each cell.

For many weeks, Elmaghraby and other post-September 11 detainees were subjected to a communications blackout that barred them from receiving telephone calls, visitors, or mail. During this period, Elmaghraby and other detainees were unable to make contact with their attorneys or their families. In addition, MDC employees often turned away attorneys and family members by falsely stating that the individual detainee was no longer housed in the MDC. When detainees were allowed visitors, a clear partition separated the parties so that no physical contact was possible.

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[5] *See* 28 C.F.R. § 541.22 ("Administrative detention is the status of confinement of an inmate in a special housing unit in a cell either by self or with other inmates which serves to remove the inmate from the general population."). Prior to September 11, the MDC had a special housing unit, but it did not have one designated as Administrative Maximum, which provides more restrictive confinement than normal SHUs. *See* April 2003 OIG Report at 118-119.

Plaintiffs and other post-September 11 detainees were not provided with the periodic individual reviews required by BOP regulations to determine whether their continued detention in the ADMAX SHU was appropriate.[6] Instead, post-September 11 detainees were held in the ADMAX SHU until the FBI "cleared" them of connections to terrorist activity and approved their release to the general population. Post-September 11 detainees remained in the ADMAX SHU until Michael Cooksey, the Former Assistant Director for the Correctional Programs of the BOP, issued a memorandum approving the release of the individual detainee into the general population unit.

Plaintiffs allege that this "hold until cleared" policy was approved by former Attorney General Ashcroft and FBI Director Mueller "in discussions in the weeks after September 11, 2001." (Compl. ¶ 69.) Further, plaintiffs allege that (1) on October 1, 2001, Cooksey directed that all "of high interest" detainees be confined in the most restrictive conditions possible until cleared by the FBI; (2) former BOP Director Hawk Sawyer was aware and approved of this policy of restrictive detention for "of high interest" detainees; (3) Rolince and Maxwell were responsible for determining whether a post-September 11th detainee had been "cleared" of any connection to terrorist activities; (4) FBI officials in Washington, D.C. were aware that the BOP relied on the FBI's "high interest" classification to determine whether to detain prisoners in the ADMAX SHU of the MDC; (5) notwith-

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[6] *See* 28 C.F.R. § 541.22(c) (requiring formal reviews and hearings for each inmate in administrative detention to determine whether their continued administrative detention is warranted).

standing that awareness, Ashcroft, Mueller, and Rolince failed to impose deadlines for the clearance process; (6) as a result, numerous detainees, including plaintiffs, were held in the ADMAX SHU for extended periods of time although there was no evidence linking them to terrorist activity; and (7) Rolince and Maxwell failed to approve post-September 11th detainees' release to the general population because of the detainees' race, religion, and national origin, and not on any evidence that continued detention in the ADMAX SHU was important or relevant to the FBI's investigation of the events of September 11, 2001.

B. *Conditions of Confinement in the ADMAX SHU*

Elmaghraby was arrested on September 30, 2001 by local and federal law enforcement agents. On October 1, 2001, Elmaghraby was brought to the MDC and housed in the ADMAX SHU. He remained confined in this highly restrictive unit throughout his detention at the MDC, until August 28, 2002. Iqbal was arrested on November 2, 2001 by INS and FBI agents. On November 5, 2001, Iqbal was taken to the MDC and housed in the general population on the fifth floor. He was transferred to the ADMAX SHU on January 8, 2002, and remained in detention there until the end of July 2002, at which time he was released back to the general population.

Plaintiffs allege that while detained in the ADMAX SHU they were (1) kept in solitary confinement; (2) prohibited from leaving their cells for more than one hour each day with few exceptions; (3) verbally and physically abused; (4) routinely subjected to humiliating and unnecessary strip and body-cavity searchesl; (5) denied access to basic medical care; (6) denied access to legal

counsel; (7) denied adequate exercise and nutrition; (8) housed in small cells where the lights were left on almost 24 hours a day;[7] (9) deliberately subjected to air conditioning during the winter months and heat during the summer months; (10) deprived of adequate bedding or personal hygiene items;[8] and (11) they were deprived of adequate food, as a result of which Iqbal lost over 40 pounds (and suffers from persistent digestive problems) and Elmaghraby lost 20 pounds.

Plaintiffs further allege that they were subjected to continuous verbal abuse from the MDC staff. For example, Iqbal was called a terrorist by Zenk; "a terrorist and a killer," by Lieutenant Howard Gussak; a "Muslim bastard" by Officer Raymond Cotton; and a "Muslim killer" by Officer Perez. Elmaghraby was called a terrorist by Unit Manager Clemmett Shacks, was told that "a terrorist should not ask for anything" by Cotton, and, when he requested a pair of shoes, former Associate Warden of Programs Linda Thomas responded "no shoes for a terrorist."

Whenever plaintiffs were removed from their cells, they were handcuffed and shackled around their legs and waist. On the rare occasions when they were permitted to exercise, the officers subjected them to the harsh effects of the weather for purely punitive reasons. For example, during the winter months, MDC officers left Elmaghraby outside in the open-air recreation area for hours without a proper jacket or shoes. As the

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[7] The 24-hour lighting of the cells ended in March 2002. (Compl. ¶ 84.)

[8] For the first three months of his confinement, Elmaghraby was not given a blanket, pillow, mattress, or any toilet paper; Iqbal was never provided with pillows or more than one blanket.

weather became milder, he was permitted to remain outside for only 15 minutes. In the summer months, when it was extremely hot and humid, Elmaghraby was again left outside for hours. Iqbal was also not provided with proper clothing when permitted to exercise in the winter. In addition, on certain days when it rained, Iqbal was left out in the open-air recreation area for hours. When he was brought back to his cell, drenched, officers turned on the air conditioner deliberately, causing him severe physical discomfort.

During their confinement in the ADMAX SHU, plaintiffs were never afforded any individualized review to determine whether their continued detention under highly restrictive conditions was appropriate.

C. *Excessive Force*

1. *Elmaghraby*

Elmaghraby alleges that on the day he arrived at the MDC, officers threw him against a wall, subjected him to repeated strip searches and threatened him with death. Officers continually accused him of being a terrorist associated with Osama Bin Laden, Al Qaeda, and the Taliban. When Elmaghraby was transported to court on the same day, officers subjected him to repeated strip searches and dragged him on the ground while he was chained and shackled, causing him to bleed from his legs.

Later that day, upon his return to the MDC, Elmaghraby was brought to the ADMAX SHU by elevator (the unit is on the ninth floor of the MDC). In the elevator, MDC officers verbally and physically assaulted him, causing him to bleed from the nose. Although the

officers carried a video camera with them, they turned it off while assaulting Elmaghraby.

On approximately December 1, 2001, while returning from recreation, Elmaghraby was pushed from behind by an MDC officer. He hit his face on a hard surface as a result, and broke his teeth.

2. *Iqbal*

Iqbal was transferred from the general population of the MDC to the ADMAX SHU on January 8, 2002. On that day, he was told by an officer that he had a legal visit. He was then taken to a room where 15 officers were waiting for him. Several of these officers picked Iqbal up and threw him against the wall, kicked him in the stomach, punched him in the face, and dragged him across the room. The officers screamed at Iqbal, that he was a "terrorist" and a "Muslim." Iqbal was then taken —shackled and chained around his arms, legs and waist, bleeding from his mouth and nose—to the ADMAX SHU.

On March 20, 2002, several MDC officers subjected Iqbal to three strip and body-cavity searches, all while he was in the same room. Although the officers had a hand-held video camera, they turned it off while conducting the searches. When the officers ordered Iqbal to submit to a fourth search, he protested. In response, one officer punched him in the face while another punched and kicked him in the back and legs. As a result, Iqbal bled from the mouth. While escorting Iqbal back to the ADMAX SHU, the officers continued to physically and verbally harass Iqbal, kicking him and making racist and threatening comments about Muslims. When they arrived at the SHU, the officers pulled Iqbal's arm through the slot in his cell door, causing him

excruciating pain. An officer then urinated in the toilet in Iqbal's cell and turned the water off so the toilet could not be flushed until the next morning.

D. *Strip and Body-Cavity Searches*

1. *Elmaghraby*

During the first three or four months of Elmaghraby's detention, he was strip searched every morning. MDC officers ordered him to take off his clothes and inspected him through the slot in the door before they entered the cell. In addition to these searches, Elmaghraby was strip and body-cavity searched six times on days he went to court—three times before going to court, and three times on his return. On such days, Elmaghraby would be searched first in his cell in the ADMAX SHU, then in a different room in the ADMAX SHU, and a third time on the ground floor of the MDC before going to court. Elmaghraby remained in the custody of MDC officers between the three searches. When Elmaghraby returned from court, the searches took place in reverse order. During these searches, Elmaghraby was ordered to pass his clothes to an officer and bend over while an officer used a flashlight to search his body cavities.[9]

While the strip and body-cavity searches were being conducted, Elmaghraby was threatened, verbally abused, and regularly pushed and shoved. On many occasions, the searches were conducted in an outrageous manner. Lieutenant Barrere once displayed Elmaghraby, naked, to a female MDC employee. On October 1,

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[9] These searches took place on October 1 and 2, November 5 and 8, and December 11, 2001; and January 8, February 12 and 13, and July 22, 2002.

2001, Barrere inserted a flashlight into Elmaghraby's anal cavity. Elmaghraby saw blood on the flashlight when it was removed. On two occasions (involving two different officers), an MDC defendant pushed a pencil into Elmaghraby's anal cavity during a search. Other officers were present during all of these searches.

2. *Iqbal*

Each morning, MDC officers first searched Iqbal's cell. During this search, he was chained and shackled, and he was routinely kicked and punched by the officers. After the cell was searched, the officers would conduct a strip and body-cavity search of Iqbal. In addition to these daily strip and body-cavity searches, Iqbal was subjected to three strip searches whenever he visited the medical clinic for treatment—one before the visit and two afterwards. On days he went to court, Iqbal was searched four times: in his cell at about 5:30 a.m. (as was done each morning); at about 7:40 a.m. on the first floor of the MDC; and twice on his return from court.[10]

Iqbal too was often searched in an outrageous manner. For example, as described above, on March 20, 2005, several MDC officers conducted three strip and body-cavity searches of Iqbal on a single occasion, and when he protested against a fourth, he was punched and kicked in response.

E. *Interference with Religious Practice*

During the entire time plaintiffs were confined in the ADMAX SHU, MDC officers constantly interfered with their religious practices and beliefs. Such interference

[10] These searches occurred on February 19, March 6 and 20, and April 22, 2002.

included banging on plaintiffs' cells while they were praying, routinely confiscating their copies of the Koran, and refusing to permit plaintiffs to participate in Friday prayer services with fellow Muslims. When plaintiffs requested to join fellow Muslims for Friday prayers, officers made comments such as, "No prayer for terrorists," and "Why do you need to pray when you are in jail?" Elmaghraby complained about this interference to Hasty and Zenk, among others, and they refused to take any action to remedy the situation.

F. *Interference with Right to Counsel*

The MDC defendants deliberately interfered with plaintiffs' attempts to communicate with their criminal defense counsel. From October 1 to November 1, 2001, Corrections Officer Cotton, the ADMAX SHU counselor responsible for determining whether and when detainees were permitted visits or phone calls, prohibited Elmaghraby from speaking by telephone with his attorney. After November 1, 2001, Cotton stood near Elmaghraby when he spoke to his attorney by telephone, and disconnected the phone whenever Elmaghraby complained about the conditions of his confinement. When Elmaghraby's attorney tried to visit him, she often waited for hours without seeing him. When they were able to meet, a video camera recorded the visit, and when Elmaghraby returned to his cell, he would find that it had been ransacked. On these occasions, Elmaghraby would be strip searched after the legal visit even though the visit was non-contact,. [*sic*]

When Iqbal spoke to his attorney by telephone, Cotton would disconnect the phone if he complained about the conditions of his confinement. On several occasions, Iqbal's attorney was turned away from the MDC after

being falsely informed that Iqbal had been transferred to another facility. In addition, Defendant Shacks routinely delayed Iqbal's receipt of legal mail, sometimes by up to two months.

G. *Medical Care*

On December 1, 2001, Elmaghraby was shoved by an MDC officer into a hard object and broke his teeth. Nina Lorenzo, a physician's assistant, provided Elmaghraby with antibiotics for his injury, but they were confiscated by Lieutenant Ortiz when Elmaghraby returned to the ADMAX SHU. When Elmaghraby complained to Shacks about the confiscation, Shacks asked him why he needed his teeth. Plaintiffs also allege that Lorenzo misdiagnosed Elmaghraby's *hypothyroidism* as *asthma*. After Lorenzo prescribed *asthma* medicine, Elmaghraby's *hypothyroidism* became worse, and he had to undergo surgery as a result.

On March 21, 2002, the day after Iqbal was beaten by MDC officers, he requested medical assistance from Lorenzo. Shacks, however, told Lorenzo to leave the ADMAX SHU without providing any medical assistance, and Iqbal did not receive any medical care for two weeks after this assault, despite the fact that he was suffering excruciating pain.

H. *Personal Involvement*

Plaintiffs allege that all defendants were personally involved in creating or implementing the policy under which they were confined without recourse to procedures for challenging their confinement. Plaintiffs allege that defendants were not only aware of the conditions of their confinement, but agreed to subject plain-

tiffs to those conditions because of their race, religion, and national origin.

Plaintiffs allege that the physical and verbal abuse to which they were subjected, the unnecessary and abusive strip and body-cavity searches, the interference with religious practices, and the imposition of substantial restrictions on their ability to communicate with counsel were all components of a discriminatory policy for which high-level BOP and MDC officials bear personal liability. In general, plaintiffs assert that the BOP Defendants and the Wardens either (1) created or implemented these practices; (2) knew or should have known that their subordinates were engaging in the unlawful practices; or (3) knowing that these practices were taking place, failed to remedy them.

I. *Summary of Plaintiffs' Claims*

Plaintiffs bring the following claims:

1. The conditions of confinement in the ADMAX SHU, and the failure to take measures to remedy those conditions, violated their due process rights under the Fifth Amendment. Plaintiffs assert this claim against the Wardens and other MDC defendants.[11]

2. The policy of assigning plaintiffs to the ADMAX SHU without affording them the opportunity to chal-

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[11] Plaintiffs have withdrawn claims 1, 8, 12, and 13 against Lorenzo. *See* Opp'n Br. at 2 n. 2. Plaintiffs have also withdrawn claims 3, 4, 5, and 15 against Zenk. *See* letter from Alexander A. Reinert to the Court dated November 4, 2004; Opp'n Br. at 1 n. 1. Those claims against Lorenzo and Zenk are hereby dismissed.

lenge their continued administrative detention violated their due process rights under the Fifth Amendment. Plaintiffs assert this claim against Ashcroft, the FBI Defendants, the BOP Defendants, the Wardens, and other MDC defendants.

3-4. The intentional beatings to which plaintiffs were subjected, and the failure to take measures to prevent these beatings, violated plaintiffs' right to due process under the Fifth Amendment, and the Eighth Amendment's prohibition against cruel and unusual punishment. Plaintiffs assert these claim against Hasty and other MDC defendants.

5. The policy of interfering with plaintiffs' access to counsel violated plaintiffs' right to counsel under the Sixth Amendment. Plaintiffs assert this claim against Hasty and other MDC defendants.

6-7. The denial of adequate medical examination and care violated plaintiffs' right to due process under the Fifth Amendment and the Eighth Amendment's prohibition against cruel and unusual punishment. Plaintiffs assert these claims against Lorenzo and other MDC defendants.

8. The conditions of confinement that plaintiffs were subjected to in the ADMAX SHU, and the failure to take measures to remedy those conditions, violated the Eighth Amendment's prohibition against cruel and unusual punishment, Plaintiffs assert this claim against the Wardens and other MDC defendants.

9. The policy of subjecting plaintiffs to unreasonable strip and body-cavity searches, and the failure

to remedy such a policy, violated the Fourth Amendment's prohibition against unreasonable searches. Plaintiffs assert this claim against Hawk Sawyer, the Wardens, and other MDC defendants.

10. The policy of interfering with plaintiffs' religious practices, and the failure to remedy such a policy, violated plaintiffs' free exercise rights under the First Amendment. Plaintiffs assert this claim against the Wardens, and other MDC defendants.

11. The policy of subjecting plaintiffs to harsher conditions of confinement because of their religious beliefs, and the failure to remedy such a policy, violated plaintiffs' rights under the First Amendment. Plaintiffs assert this claim against Ashcroft, the FBI Defendants, the BOP Defendants, the Wardens, and other MDC defendants.

12. The policy of subjecting plaintiffs to harsher conditions of confinement because of their race, and the failure to remedy such a policy, violated plaintiffs' rights to equal protection under the Fifth Amendment. Plaintiffs assert this claim against all defendants.

13. The policy of subjecting plaintiffs to harsher conditions of confinement because of their religious beliefs, and the failure to remedy such a policy, substantially burdened their religious exercise, in violation of RFRA, 42 U.S.C. § 2000bb. Plaintiffs assert this claim against all defendants.

14. The policy of confiscating plaintiffs' religious materials, regularly interrupting their daily prayers,

and denying them access to Friday communal prayers, and the failure to remedy such a policy, substantially burdened plaintiffs' religious exercise and belief, in violation of RFRA. Plaintiffs assert this claim against the Wardens, and other MDC defendants.

15. By brutally beating and verbally abusing plaintiffs because of their religious beliefs, and by failing to take measures to remedy such abuse, defendants imposed a substantial burden on plaintiffs' religious exercise, in violation of RFRA. Plaintiffs assert this claim against Hasty and other MDC defendants

16-17. The agreements among various defendants to deprive plaintiffs of the equal protection and equal privileges and immunities of the laws because of their religious beliefs, race, and national origin violated the civil rights conspiracy statute, 42 U.S .C. § 1985(3). Plaintiffs assert that (1) Ashcroft, Mueller, the BOP Defendants and the Wardens, among others, agreed to subject plaintiffs to unnecessarily harsh conditions of confinement without due process; (2) the BOP Defendants and the Wardens, among others, agreed to subject plaintiffs to unnecessary and extreme strip and body-cavity searches as a matter of policy; and (3) the Wardens and other MDC defendants agreed to substantially burden Elmaghraby's religious practice while he was housed in the ADMAX SHU.

18-20. The beatings of Iqbal and the failure to prevent those beatings; the negligent medical care Iqbal received; and the brutal conduct that caused him to suffer extreme and lasting emotional distress constitute torts for which Iqbal seeks compensatory dam-

ages from the United States pursuant to the FTCA, 28 U.S.C. § 2671 *et seq*.

21. The cruel, inhuman and degrading treatment plaintiffs were subjected to violated international law. Plaintiffs assert a claim for this violation under the Alien Tort Statute, 28 U.S.C. § 1350, against all defendants.

DISCUSSION

A. *The Motion to Dismiss Standard*

In considering a motion to dismiss under Rule 12(b)(6), a federal court is required to accept as true the factual assertions in the complaint and construe all reasonable inferences in favor of the plaintiff. *Walker v. City of New York*, 974 F.2d 293, 298 (2d Cir. 1992). Dismissal may be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id*. (internal quotation omitted). Thus, a federal court's task in determining the sufficiency of a complaint is "necessarily a limited one." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The appropriate inquiry is "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id*.; *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) ("A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.") (internal quotation omitted).

B. *Personal Jurisdiction*

Those defendants who are not domiciled in New York State—Ashcroft, the FBI defendants, and the BOP defendants—have moved to dismiss under Rule 12(b)(2), asserting that this Court lacks personal jurisdiction over them.

Personal jurisdiction must be established under the law of the state where the federal court sits. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 171 F.3d 779, 784 (2d Cir. 1999); Fed. R. Civ. P. 4(k)(1)(A). Under New York's long-arm statute, a court may exercise jurisdiction over any non-domiciliary if "in person or through an agent," he "transacts any business within the state," or "commits a tortious act within the state" and the cause of action arises from those acts. *See* N.Y. C.P.L.R. § 302(a)(1), (2). The statute's purpose is to "extend the jurisdiction of New York courts over non-residents who have 'engaged in some purposeful activity [here] in connection with the matter in suit.'" *Padilla v. Rumsfeld,* 352 F.3d 695, 709 (2d Cir. 2003), *rev'd on other grounds,* 542 U.S. 426 (2004) (quoting *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.,* 15 N.Y.2d 443, 457 (1965)). One transaction is sufficient to support jurisdiction under § 302 "so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Kreutter v. McFadden Oil Corp.,* 71 N.Y.2d 460, 467 (1988); *cf. Kronisch v. United States,* 150 F.3d 112, 130 (2d Cir. 1998) (there must be an "articulable nexus" between the defendant's actions and the asserted claim). Personal jurisdiction cannot be based solely on a defendant's supervisory position. *See Ontel Prods. Inc. v. Project Strategies Corp.,* 899 F.

Supp. 1144, 1148 (S.D.N.Y. 1995). Instead, a plaintiff must show that defendant "personally took part in the activities giving rise to the action at issue." *Id*.

Here, plaintiffs allege that defendants were personally involved in the creation or implementation of unconstitutional policies that were directed at the post-September 11 detainees confined in the ADMAX SHU of the MDC. Such personal involvement, if established, satisfies § 302(a)(1)'s requirement that there be a substantial relationship or nexus between the defendant's action and the asserted claim.

As a defense on the merits of plaintiffs' claims, defendants assert that they were not personally involved in the alleged unconstitutional activity. This defense overlaps with defendants' jurisdictional argument, that is, a lack of personal involvement precludes both liability on the merits and the assertion of personal jurisdiction. *See Richardson v. Goord*, 347 F.3d, 431, 435 (2d Cir. 2003) (mere linkage in the prison chain of command insufficient to confer liability for constitutional torts); *Nwanze v. Philip Morris Inc.*, 100 F. Supp. 2d 215, 220 (S.D.N.Y. 2000) ("Mere supervision over the Bureau of Prisons, the reach of which extends into every state, is insufficient to establish a basis for the exercise of personal jurisdiction.").

Accordingly, motions to dismiss for lack of personal jurisdiction are properly granted where plaintiffs have failed to sufficiently allege defendants' involvement in any of the alleged violations of plaintiffs' rights. Where such involvement is adequately alleged and discovery is required to determine the extent of personal involvement, such discovery will likewise resolve the jurisdictional question as well. *See Newbro v. Freed*, 2004 WL

691392, at *3 (S.D.N.Y. March 31, 2004) (discovery to resolve question of personal jurisdiction proper where plaintiff has "established that his jurisdictional position is not frivolous.").

C. *Qualified Immunity Generally*

The defendants seek dismissal of all claims against them on qualified immunity grounds. Government officials performing discretionary functions enjoy qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). "As a general rule, [state actors] are entitled to qualified immunity of (1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights." *Oliveira v. Mayer,* 23 F.3d 642, 648 (2d Cir. 1994).[12]

Whether a right was clearly established at the relevant time is a question of law. *Kerman v. City of New York,* 374 F.3d 93, 108 (2d Cir. 2004). The inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen,* 125 S. Ct. 596, 599 (2004) (internal quotation omitted). Accordingly, a court must determine the level of generality of the relevant legal rule. *Cf. Wilson v. Layne,* 526 U.S. 603, 615 (1999) (it "could plausibly be asserted that any violation of the Fourth Amendment is 'clearly established' since it is clearly established that

[12] The qualified immunity standard in *Bivens* cases is identical to the standard employed in cases brought under 42 U.S.C. § 1983. *See Wilson v. Layne,* 526 U.S. 603, 609 (1999).

the protections of the Fourth Amendment apply to the actions of police."). The precise act challenged need not have previously been held unlawful in order to defeat qualified immunity, but, its unlawfulness must be "apparent" in light of pre-existing law. *Id.* at 615; *cf. Back v. Hastings on Hudson Union Free School Dist.*, 365 F.3d 107, 129 (2d Cir. 2004) (the right in question "must not be restricted to the factual circumstances under which it has been established.").

In contrast to the "clearly established" law inquiry, "the matter of whether a defendant's official conduct was objectively reasonable, *i.e.,* whether a reasonable officer would reasonably believe his conduct did not violate a clearly established right, is a mixed question of law and fact." *Kerman,* 374 F.3d at 109. If there is a genuine dispute as to material historical facts, those must be resolved by the factfinder before the court can properly make the ultimate legal determination of whether the defense is available. *Id.*; *see also Poe v. Leonard,* 282 F.3d 123, 133 (2d Cir. 2002) ("if the court determines that the only conclusion a rational jury could reach is that reasonable officers would disagree about the legality of the defendant's conduct under the circumstances, qualified immunity applies.") (internal quotation omitted).

The defense is not unavailable on a motion to dismiss. *See McKenna v. Wright,* 386 F.3d 432, 436 (2d Cir. 2004). However, a defendant asserting qualified immunity in a pre-discovery motion faces a "formidable hurdle":

> Not only must the facts supporting the defense appear on the face of the complaint, but as with all 12(b)(6) motions, the motion may be granted only

> where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Thus, the plaintiff is entitled to all reasonable inferences from the facts alleged, not only those that support his claim, but also those that defeat the immunity defense.

Id. at 434, 443 (internal citations and quotation omitted).

1. *Allegations of Personal Involvement*

A government official may not be held liable for a constitutional tort under a theory of *respondeat superior,* instead, a plaintiff must establish that the official was personally involved in the alleged violations. *Richardson,* 347 F.3d at 435 (discussing supervisory liability in the context of a § 1983 claim); *see also Wilson,* 526 U.S. at 609 (explaining that the qualified immunity analysis under *Bivens* is identical to the analysis under § 1983); *Poe,* 282 F.3d at 134 (qualified immunity analysis depends upon an individualized determination of the misconduct alleged). Here, the parties disagree about how specific and "nonconclusory" an allegation of personal involvement must be in order to survive a motion to dismiss where the defense of qualified immunity has been asserted. This disagreement exposes a tension between the liberal pleading standards under the Federal Rules and one of the core purposes of qualified immunity—protecting public officials from the burdens of discovery against unmeritorious claims.

To survive a motion to dismiss, a plaintiff need only provide a statement that gives the defendant "'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *See Swierkiewicz,* 534 U.S. at 512 (quoting *Conley v. Gibson,* 355 U .S. 41, 47 (1957)). Rule

8(a)'s simplified pleading standard applies to "all civil actions, with limited exceptions," such as Rule 9(b)'s requirement that allegations of fraud and mistake be pleaded with particularity. *See id.* at 513. Thus, whether the allegations in a complaint are too conclusory to survive a motion to dismiss depends upon whether they meet the permissive standard set forth in Rule 8(a). The expectation that a defendant will assert qualified immunity as a defense does not elevate a plaintiff's pleading requirements. *See McKenna*, 386 F.3d at 434 (defendant asserting qualified immunity at 12(b)(6) stage faces "formidable hurdle").[13]

Defendants argue, however, that a plaintiff must allege a quantum of nonconclusory facts to survive a motion to dismiss. In support of this standard, they rely primarily on dicta in *Crawford-El* that in order to protect "the substance of the qualified immunity defense," a court may insist at the pre-discovery stage that a

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[13] In recent years, the Supreme Court has repeatedly rejected judicially-created heightened pleading standards in favor of the liberal notice-pleading requirement of Federal Rule of Civil Procedure 8(a). *See Swierkewicz*, 534 U.S. at 514-15 (rejecting a heightened pleading standard for employment discrimination); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993) (same; municipal liability under § 1983); *Gomez v. Toledo*, 446 U.S. 635, 639-40 (1990) (plaintiff need not allege bad faith to state a claim against a public official who might be entitled to immunity if he acted in good faith); *cf. Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) (rejecting heightened evidentiary standard for § 1983 cases alleging unconstitutional motive). In *Swierkewicz*, the Court reiterated that a requirement of greater specificity at the pleading stage "is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" 534 U.S. at 515 (quoting *Leatherman*, 507 U.S. at 168).

plaintiff put forward "specific, nonconclusory factual allegations." 523 U.S. at 598, 600. To the extent that this dicta suggests a heightened pleading requirement, such a requirement is foreclosed by *Swierkewicz*. *See, e.g., Educadores Puertorriquenos en Accion v. Hernandez,* 367 F.3d 61, 65 (1st Cir. 2004) (although some courts post-*Crawford-El* required heightened pleading in civil rights cases in order not to erode the qualified immunity doctrine, "[w]hatever window of opportunity we thought remained open after *Crawford-El* has been slammed shut by the Supreme Court's subsequent decision in *Swierkiewicz*."); *cf. Phelps v. Kapnolas,* 308 F.3d 180, 186-87 (2d Cir. 2002) ("However unlikely it may appear to a court from a plaintiff's complaint that he will ultimately be able to prove an alleged fact such as mental state, the court may not go beyond FRCP 8(a)(2) to require the plaintiff to supplement his pleadings with additional facts that support his allegation of knowledge either directly or by inference.").

Second, while the *Crawford-El* Court stated that the question of qualified immunity should be resolved before permitting discovery, 592 U.S. at 598, it also recognized that such a pre-discovery determination may not be possible:

> [D]iscovery involving public officials is indeed one of the evils that *Harlow* aimed to address, but neither that opinion nor subsequent decisions create an immunity from *all* discovery. *Harlow* sought to protect officials from the costs of "broad-reaching" discovery, and we have since recognized that limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment on qualified immunity.

Id. at 592 n.14 (citation omitted); *Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 793 (2d Cir. 2002) (ruling on qualified immunity defense premature where issue "turns on factual questions that cannot be resolved at [the motion to dismiss stage]"); *cf. Gomez,* 446 U.S. at 641 (whether qualified immunity has been established "depends on facts peculiarly within the knowledge and control of the defendant.").

Where the qualified immunity question cannot be resolved at the motion to dismiss stage, a court "should give priority to discovery concerning issues that bear upon the qualified immunity defense, such as the actions that the official actually took, since that defense should be resolved as early as possible." *Crawford-El,* 523 U.S. at 600*; cf. Velez v. Levy,* 401 F.3d 75, 101 (2d Cir. 2005) (while defendant is not entitled to qualified immunity on motion to dismiss, the "factual basis for qualified immunity may arise as the proceedings develop."). The *Crawford-El* Court suggested ways for district courts to manage the process while attempting to protect officials from the burdens of litigation, such as limiting discovery under Federal Rule of Civil Procedure 26. 523 U.S. at 599-600*; see also Jacobs v. City of Chicago,* 215 F.3d 758, 775 (7th Cir. 2000) (Easterbrook, J., concurring) ("If immunity doctrines require decisions without discovery (or with limited discovery), then district judges must use their authority under Rule 26(b)(2) and (c) to curtail or eliminate discovery and decide on the basis of affidavits and other evidence that can be produced without compulsory process. Immunity does not justify decision on the basis of allegations instead of evidence (which is what judgment under Rule 12 entails) or a pretense that

a complaint . . . doesn't state a claim on which relief may be granted.").

In sum, *Crawford-El, Swierkewicz,* and *McKenna* suggest the following principles when evaluating qualified immunity at the motion to dismiss stage: (1) a complaint must meet Rule 8(a)'s requirements: fair notice of the claims asserted and the grounds upon which they rest; (2) the plaintiff is entitled to all reasonable inferences from the facts alleged in the complaint, including those that defeat the immunity defense; (3) where there is a factual dispute bearing on the qualified immunity question, that dispute should be resolved at the earliest opportunity; and (4) to resolve such a dispute, it may be appropriate to limit discovery in scope (to issues that bear on the qualified immunity defense) and manner.

D. Bivens *Actions Generally*

In *Bivens,* the Supreme Court held that a private cause of action under the Constitution was available to recover damages against federal officers for violations of Fourth Amendment rights. 403 U.S. at 389. This cause of action was later extended to allow recovery for other constitutional violations. *See, e.g., Davis v. Passman,* 442 U.S. 228, 248-49 (1979) (Fifth Amendment); *Carlson v. Green,* 446 U.S. 14, 20 (1980) (Eighth Amendment); *Bush v. Lucas,* 462 U.S. 367, 377-380 (1983) (refusing to allow a *Bivens* suit on the ground that Congress had created adequate alternative remedies, but generally recognizing the existence of such a cause of action for violations of the First Amendment). Courts generally treat *Bivens* claims as analogous to the cause of action created by 42 U.S.C. § 1983, which permits recovery for federal rights violations by state officials. *See Wilson,* 526 U.S. at 609 (qualified immunity analysis

identical for *Bivens* and § 1983 actions); *Butz v. Economou,* 438 U.S. 478, 498-99 (1978) (treating a *Bivens* claim as directly analogous to a § 1983 claim).

The Supreme Court has carved out two, potentially intersecting, exceptions to the availability of *Bivens* damages. A *Bivens* remedy is unavailable (1) "when 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," *Carlson,* 446 U.S. at 18-19 (emphasis in original); and (2) where there are "special factors counseling hesitation in the absence of affirmative action by Congress." *Id*. (internal quotation omitted); *see, e.g., United States v. Stanley,* 483 U.S. 669, 683-84 (1987) (holding that the unique disciplinary structure of the military constituted "special factors counseling hesitation" such that no *Bivens* remedy "is available for injuries that arise out of or are in the course of activity incident to service") (internal quotation omitted); *Bush,* 462 U.S. at 388-89 (refusing to extend a *Bivens* claim to a federal employee in light of the comprehensive scheme Congress had established over the field of federal employment).

Ashcroft argues that there are special factors present here that militate against the availability of a remedy under *Bivens.* Specifically, he argues that (1) to the extent plaintiffs are challenging their detention pending removal, the immigration statutes provide a comprehensive remedial scheme; and (2) plaintiffs' claims arise within the context of the September 11 attacks and their aftermath.

I reject the contention that these features of the case constitute "special factors" militating against the

provision of a *Bivens* remedy. First, while many post-September 11 detainees were held on immigration charges, plaintiffs here were detained on criminal charges. They challenge their treatment as criminal defendants, and not their detention pending removal. Second, our nation's unique and complex law enforcement and security challenges in the wake of the September 11, 2001 attacks do not warrant the elimination of remedies for the constitutional violations alleged here. *Cf. Hamdi v. Rumsfeld,* 124 S. Ct. 2633, 2648 (2004) ("it is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested."). This does not mean the context in which the challenged actions occurred is irrelevant. Rather, the qualified immunity standard takes that context into account, shielding officials from liability unless it is clear from preexisting law that the official's actions are unlawful under the circumstances. However, the qualified immunity

> standard will not allow the Attorney General to carry out his national security functions wholly free from concern for his personal liability; he may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of the *Harlow* standard: "Where an official could be expected to know that his conduct would violate statutory rights, he *should* be made to hesitate. . . ." *Harlow,* 457 U.S. at 819. This is as true in matters of national security as in other fields of governmental action.

Mitchell v. Forsyth, 472 U.S. 511, 524 (1985). The problems posed by issues of national security are not akin to

those posed by military service, where the need for a separate system of military justice precludes the provision of a *Bivens* remedy. *See Chappell v. Wallace,* 462 U.S. 296, 304 (1983); *Stanley,* 483 U.S. at 683-84.

As in § 1983 actions, there is no *respondeat superior* liability in a *Bivens* action. *Cuoco v. Moritsugu,* 222 F.3d 99, 110 (2d Cir. 2000). To hold a supervisory official liable under § 1983 (and thus under *Bivens*), a plaintiff must show one or more of the following:

> (1) actual direct participation in the constitutional violation, (2) failure to remedy a wrong after being informed through a report or appeal, (3) creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue, (4) grossly negligent supervision of subordinates who committed a violation, or (5) failure to act on information indicating that unconstitutional acts were occurring.

Richardson, 347 F.3d at 435; *see also Johnson v. Newburgh Enlarged School District,* 239 F.3d 246, 254 (2d. Cir. 2001). Mere linkage in the prison chain of command is insufficient to implicate a supervisory prison official. *Richardson,* 347 F.3d at 435.

With these general principles in mind, I turn to plaintiffs' claims in this case.

E. *Plaintiffs'* Bivens *Claims*

1. *Conditions of Confinement Claims*

a. *Substantive Due Process and Cruel and Unusual Punishment (Claims 1 & 8)*

Plaintiffs allege that the conditions of their confinement violated their substantive due process rights under

the Fifth Amendment and constitute cruel and unusual punishment under the Eighth Amendment. Wardens Hasty and Zenk contend that (1) the conditions of confinement did not violate plaintiffs' clearly established due process rights; and (2) plaintiffs have failed to allege sufficient personal involvement on the part of the Wardens in imposing those conditions to hold them liable under *Bivens* or to defeat their claims of qualified immunity.

The Due Process Clause protects pretrial detainees—persons who have been charged with a crime but have yet to be found guilty of the charge—from certain conditions and restrictions of pretrial detainment. *Bell v. Wolfish,* 441 U.S. 520, 535 (1979). Specifically, a pretrial detainee has the right to be free from punishment prior to an adjudication of guilt in accordance with due process of law.[14] *Id.* This does not mean, however, that a detainee may not be subject to significant restrictions. The maintenance of an institution's security and discipline are "essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Id.* at 546.

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[14] Once an inmate is sentenced he may be "punished," but that punishment may not be cruel and unusual. *Bell,* 441 U.S. at 535 n.16. To state a claim of unconstitutional conditions under the Eighth Amendment, an inmate must show that inhumane conditions were imposed with deliberate indifference. *See Wilson v. Seiter,* 501 U.S. 294, 303 (1991) ("deliberate indifference" standard articulated in *Estelle v. Gamble,* 429 U.S. 97 (1976), for a claim of inadequate medical care applies to claims of inhumane conditions of confinement). Here, the allegations concerning conditions of confinement stem largely from the period when plaintiffs were pretrial detainees. Elmaghraby was a pretrial detainee for almost 10 of the 11 months that he was confined in the ADMAX SHU; Iqbal was a pretrial detainee throughout the entire time he was confined in the ADMAX SHU.

Prison administrators are "accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id.* at 547. Thus, "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate government objective, it does not, without more, amount to 'punishment.'" *Id.* at 539. Conversely, where a condition is not reasonably related to a legitimate goal, "a court permissibly may infer that the purpose of the governmental action is punishment." *Id.*

Warden Zenk argues that plaintiffs have failed to state a claim primarily because the alleged conditions were reasonably related to legitimate penological goals and thus did not amount to punishment. Zenk argues, for example, that (1) segregating Muslims in the aftermath of the September 11 attacks "served the important non-punitive purpose of protecting [post-September 11 detainees] from possible assault in the general prison population;" (2) strip and body-cavity searches ensure that detainees do not carry contraband into their cells (and the Supreme Court expressly validated visual body-cavity searches of pretrial detainees after contact visits, *see Bell* at 558-560); and (3) restricting toilet paper is justified because it can be used to set fires and clog toilets. *See* Zenk Br. at 16-19.

Plaintiffs do not contend, however, that legitimate security interests could never justify some of the conditions which they were subjected to, such as strip and body-cavity searches. Instead, they allege that they were subjected to harsh conditions of confinement for purely punitive reasons. These conditions included:

verbal and physical abuse; purposeless and abusive strip and body-cavity searches; the denial of access to basic medical care and hygiene; the denial of proper exercise; and confinement in solitary confinement with the lights on almost 24 hours per day.

In short, while defendants posit legitimate reasons that might justify the conditions in the ADMAX SHU, plaintiffs assert illegitimate reasons for those conditions. A restriction or condition that under some circumstances has a legitimate justification cannot be inflicted upon detainees where no such justification exists. *See Bell,* 441 U.S. at 539 (where a restriction or condition is arbitrary or purposeless, a court may infer that the purpose of the governmental action is punishment). Here, the determination whether the conditions imposed upon plaintiffs were legitimate or punitive is not amenable to resolution on a motion to dismiss. In this procedural setting, I assume the truth of plaintiffs' allegations and draw all inferences in their favor. While a court will normally defer to a prison administrator's expert judgment on security matters, *see Bell,* 441 U.S. at 540 n.23, such deference is inappropriate "where there is substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations." *Id.; cf. United States v. Gotti,* 755 F. Supp. 1159, 1164 (E.D.N.Y. 1991) ("due deference does not mean blind deference"). Without such a record, a court may not be able to determine the reasonableness or legitimacy of an allegedly punitive condition of confinement. *See Bell* at 541-63 (evaluating reasonableness of restrictions, including strip searches conducted after contact visits, on a full evidentiary record). The cases cited by Zenk to support the legitimacy of the conditions of the ADMAX SHU are not to the contrary. *Morreale v.*

Cripple Creek, 113 F.3d 1246 (table), 1997 WL 290976 (10th Cir. May 27, 1997) (unpub. op.) (decision on summary judgment); *Keenan v. Hall,* 83 F.3d 1083 (9th Cir. 1996) (same); *Davenport v. DeRobertis,* 844 F.2d 1310 (10th Cir. 1988) (decision after full trial); *Hay v. Waldron,* 834 F.2d 481 (5th Cir. 1987) (review of denial of preliminary injunction); *Goff v. Nix,* 803 F.2d 358 (8th Cir. 1987) (review of grant of permanent injunction).

(i) *Personal Involvement*

The Wardens argue that plaintiffs have failed to allege sufficient personal involvement in the violation of their due process rights to state a *Bivens* claim or defeat a defense of qualified immunity. Hasty argues, for example, that the conditions of confinement claims are premised on supervisory liability, and that plaintiffs allege only "the most attenuated, superficial connection between Hasty's supervisory responsibilities at MDC and the alleged conduct of his subordinates." Hasty Reply Br. at 1-2.

The Wardens elide the difference between vicarious liability under the doctrine of *respondeat superior* (which is not available under *Bivens*) and the liability of a supervisor based on his own actions or inactions). Hasty's argument that he "had no meaningful contact with Plaintiffs" during their confinement, *see* Reply Br. at 1, misapprehends the type of personal involvement that must be alleged to state a claim of supervisory liability. An allegation, for example, that a supervisor was aware of a constitutional violation but took no action to remedy it may be sufficient to state a claim. *See Johnson,* 239 F.3d at 255 (denying motion to dismiss asserting qualified immunity where plaintiff alleged that supervisors failed to act on "information that unconstitu-

tional acts were occurring" at the hands of subordinates); *McKenna*, 386 F.3d at 437 (allegation that prison superintendents allowed the continuation of unlawful policies sufficient to defeat assertion of qualified immunity at motion to dismiss stage); *cf. Richardson*, 347 F.3d at 435 (supervisors may be liable for, among other things, creation of a policy that sanctioned unconstitutional conduct, grossly negligent supervision, or failure to act on information indicating that unconstitutional conduct was occurring).

Plaintiffs allege, among other things, that both Wardens were aware of the abusive conditions of the ADMAX SHU and allowed plaintiffs to be subjected to those conditions for purely punitive reasons. The Wardens contend otherwise, but that dispute may properly be resolved only on summary judgment or at trial.[15]

b. *Procedural Due Process (Claim 2)*

Plaintiffs allege that Ashcroft, the FBI Defendants, the BOP defendants, and the Wardens, among others, violated their right to due process by creating or implementing a policy of confining plaintiffs in highly restric-

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[15] Zenk argues that all claims against him should be dismissed because "substantially all" of the specific allegations of abuse are alleged to have occurred before he became warden on April 22, 2002. Zenk Reply Br. at 2. Plaintiffs concede that certain conditions—specifically the denial of basic hygiene items and inadequate lighting—took place prior to Zenk's tenure, and they do not assert claims against Zenk on those grounds. Plaintiffs allege, however, that Zenk was personally involved in subjecting plaintiffs to unconstitutional conditions of confinement and for failing to remedy those conditions. Zenk cannot, of course, be held liable for acts that occurred prior to his becoming warden. The extent of his personal involvement, if any, in the conditions alleged during the period he was warden is a matter for discovery.

tive conditions without making individual determinations as to the appropriateness of such confinement and without allowing plaintiffs to challenge their continued detention under those conditions. Defendants argue that they are entitled to qualified immunity because (1) there was no violation of a constitutionally protected right because plaintiffs cannot establish a protectable liberty interest; and (2) if there was a protectable liberty interest, it was not clearly established in the aftermath of the September 11 attacks; and (3) in any event, the defendants' actions were objectively reasonable. They also contend that plaintiffs have failed adequately to allege their personal involvement in the charged conduct.

(i) *Whether a Protectable Liberty Interest Existed*

In determining whether a prisoner has stated a claim for a procedural due process violation, a court evaluates: "(1) whether the plaintiff had a protected liberty interest in not being confined and, if so, (2) whether the deprivation of that liberty interest occurred without due process of law." *Tellier v. Fields,* 280 F.3d 69, 79-80 (2d Cir. 2000) (internal quotation and ellipsis omitted). Plaintiffs allege that they received no process at all with regard to their continued detention in the ADMAX SHU. Thus, the issue here is whether they assert a protectable interest. In *Tellier,* the plaintiff was held in a Special Housing Unit at the Metropolitan Correction Center ("MCC")[16] because he was considered a flight risk. *Id.* at 74. He remained in the SHU for 514 days without an opportunity to be heard regarding his continued confinement in segregated housing. *Id.* The defen-

[16] The MCC is the federal detention facility in Manhattan. The MDC, the facility in which plaintiffs were detained, is in Brooklyn.

dants, including the MCC's former and current wardens, moved to dismiss for failure to state a claim and for summary judgment based on qualified immunity. *Id.* at 73, 79. The Second Circuit held that Tellier had a protectable liberty interest because (a) the alleged SHU conditions were "atypical and significant";[17] and (b) the interest in not being subjected to those conditions was created by BOP regulations setting forth mandatory procedures to be followed whenever a prisoner was subjected to segregated housing.[18] *Id.* at 80-81.

As in *Tellier,* plaintiffs here have satisfied both requirements for establishing a protectable liberty interest. First, the highly restrictive ADMAX SHU conditions are "atypical and significant" in comparison to the conditions faced by prisoners in the general population. *See id.* at 80 (where plaintiff has alleged confinement "under conditions that differ markedly from those in the general population, . . . we cannot conclude as a matter of law that this confinement was not 'atypical and significant.'"). Second, the government "has created a liberty interest by statute or regulation." *Id.* at 81. BOP regulations, codified at 28 CFR § 514.22, require

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[17] Tellier alleged that the MCC conditions to which he was subjected to included: being confined to his cell for 23 hours per day (as opposed to six or seven hours per day for inmates in the general population), less access to the telephone, showers, recreation area and law library than general population inmates, and being handcuffed whenever removed from the cell. 280 F.3d at 74.

[18] The initial decision to place a prisoner in a SHU is discretionary under BOP regulations, and thus there is no protected liberty interest associated with that decision. *Tellier,* 280 F.3d at 82. To the extent that plaintiffs here are alleging a denial of due process based upon their initial assignment to the ADMAX SHU, that portion of the claim is dismissed. *See id.*

individualized determinations concerning the appropriateness of continued segregation.[19] *See id.* at 83 (§ 541.22 contains mandatory language that gives rise to a state-created right that requires a factual determination of the nature of confinement). The regulations also set forth the bases for administrative detention:

> Administrative detention is to be used only for short periods of time except where an inmate needs long-term protection (see § 541.23), 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. Provided institutional security is not compromised, the inmate shall receive at each formal review a written copy of the SRO's decision and the basis for this finding. The SRO shall release an inmate from administrative detention when reasons for placement cease to exist.

28 CFR § 514.22(c).

I reject Hawk Sawyer's argument that the statute does not create a protectable interest because § 541.22 is "designed to allow continued segregation, with fewer procedural protections, for a continuing complex investigation and/or security concerns." Hawk Sawyer Br. at[]

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[19] 28 CFR § 514.22(c) provides in part that: "[T]he Segregation Review Official will review the status of inmates housed in administrative detention. The SRO . . . shall hold a hearing and formally review the status of each inmate's placement in administrative detention, . . . and shall hold a hearing and review these cases formally at least every 30 days. The inmate appears before the SRO at the hearing unless the inmate waives the right to appear."

12. While administrative detention may be used in the context of a complex investigation, the regulations do not suggest that under such circumstances an inmate may be denied all process while confined under highly restrictive conditions for over ten months.

In addition, defendants assert that administrative segregation was proper to protect plaintiffs from assault in the general population. Such an assertion does not, however, eliminate an inmate's right to due process. *See* 28 C.F.R. § 541.23(b) ("Inmates who are placed in administrative detention for protection, but not at their own request . . . are entitled to a hearing, no later than seven days from the time of their admission.").

Defendants further argue that the context of plaintiffs' detention provided legitimate rationales for not following BOP procedures. Ashcroft argues that the post-September 11 context extinguishes any rights otherwise conferred by § 541.22: "Regulations written in peacetime cannot circumscribe the government's discretion at a time of national emergency from foreign threats." Ashcroft Mem. at 15. This proposition, which suggests that, as a matter of law, constitutional and statutory rights must be suspended during times of crisis, is supported neither by statute nor the Constitution. *Cf. Hamdi,* 124 S. Ct. at 2648 ("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.") (citing *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 164-65 (1963) ("The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional

history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with guarantees which, it is feared, will inhibit government action.")).

In addition, Ashcroft asserts that: (1) "high interest" detainees presented unprecedented security concerns; (2) "persons connected with terrorist activities . . . could provide Al Qaeda essential information about the scope of the government's investigation that could be gleaned simply from the identity of those detained and those who had not been found," and (3) disclosing information underlying the FBI's investigation to plaintiffs during hearings could compromise the FBI's investigation. *See* Ashcroft Br. at 12-13. These arguments may eventually prove persuasive. As discussed below, however, the inquiry into what actions defendants took and the reasonableness of those actions in the aftermath of the September 11 attacks is not one that can be made on a motion to dismiss.

(ii) *Whether Plaintiffs' Right Was Clearly Established*

Defendants argue that even if the complaint states a due process violation, they are entitled to qualified immunity because the right was not defined with reasonable specificity at the time the challenged actions were taken.

There is little dispute that the right to due process for a detainee held in administrative detention was clearly established as of September 10, 2001. In November 2000, the Second Circuit held in *Tellier* that under BOP regulations, an inmate's right to process when held in atypically restrictive detention was clearly estab-

lished, and that "it [was] simply unreasonable for any official to believe" that § 541.22 permitted a detainee to be kept in the SHU for 514 days without a hearing. *Id.* at 85; *see also Wright v. Smith,* 21 F.3d 496, 500 (2d Cir. 1994) ("prison officials [could not] doubt that they have acted unconstitutionally where confinement . . . continued, without a hearing, for 67 days.").

The September 11 attacks placed an enormous burden on law enforcement and created unprecedented challenges for policy makers and their subordinates. *See generally* the April 2003 OIG Report. These events affected both the contours of detainees' due process rights and the objective reasonableness of the defendants' actions. *Cf. Mathews v. Eldridge,* 424 U.S. 319, 334 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.") (internal quotation omitted); *Zadvydas v. Davis,* 533 U.S. 678, 696 (2001) ("terrorism or other special circumstances" may provide special arguments for preventive detention and for "heightened deference to the judgments of the political branches with respect to matters of national security"). I reject, however, the argument that the post-September 11 context wholly extinguished, as a matter of law, a pretrial detainee's due process rights for almost a year while subjected to highly restrictive confinement because he had been flagged as "of interest" to the government's ongoing investigation.

Plaintiffs are not complaining of a brief deprivation of process in the immediate aftermath of September 11, but one that continued for more than 8 months in Iqbal's case and nearly 11 months in Elmaghraby's. Indeed, Judge Glasser stated in February 2002 (approximately

four months after Elmaghraby entered the ADMAX SHU) that "it appears that [Elmaghraby's] constitutional rights have been violated as to being housed in a special unit at MDC." *See USA v. Elmaghraby,* Docket No. 01-cr-1175, Docket Entry No. 42 (February 12, 2002 status conference entry).

(iii) *Objective Reasonableness of Defendants' Acts*

Defendants argue that they acted reasonably under the circumstances, and thus are entitled to qualified immunity. Generally, the question whether a defendant acted reasonably is a factual inquiry which is not amenable to resolution at the motion to dismiss stage. *See e.g., Johnson v. Meachum,* 839 F. Supp. 953, 958 (D. Conn. 1993) (Cabranes, C.J.) ("Whether the defendants can establish that their alleged conduct was nevertheless 'objectively reasonable' is a question which has its principal focus on the particular facts of the case," and thus resolution is inappropriate on a motion to dismiss where a court has no factual record before it.) (internal quotation omitted).

Here, there are factual disputes concerning the nature of the defendants' actions and the need for those actions in light of the investigative and security concerns at the time. Indeed, as discussed below, some defendants dispute that they were personally involved in the alleged deprivation of process at all. In these circumstances, the objective reasonableness of defendants' actions is a question that, in my view, is properly addressed only on a motion for summary judgment. *See McKenna,* 386 F.3d at 436.

(iv) *Personal Involvement*

Defendants argue that the allegations of their personal involvement are too conclusory to defeat their claims of qualified immunity. For the reasons discussed above concerning the substantive due process claims, plaintiffs have sufficiently alleged the personal involvement of the Wardens. Whether they have alleged sufficient facts concerning Ashcroft, the FBI Defendants or the BOP defendants presents a closer question.

Generally, the assertion that high-level executive branch members created an unconstitutional policy, without more, would be insufficient to state a claim. *See Nuclear Transp. & Storage, Inc. v. United States,* 890 F.2d 1348, 1355 (6th Cir. 1989) ("If a mere assertion that a former cabinet officer and two other officials acted to implement, approve, carry out, and otherwise facilitate alleged unlawful policies were sufficient to state a claim, any suit against a federal agency could be turned into a *Bivens* action by adding a claim for damages against the agency head and could needlessly subject him to the burdens of discovery and trial.") (internal quotation omitted) (footnote omitted). Here, however, the post-September 11 context provides support for plaintiffs' assertions that defendants were involved in creating and/or implementing the detention policy under which plaintiffs were confined without due process. *See generally* the April 2003 OIG Report.[20] In addition, plaintiffs

[20] The April 2003 OIG report, which discusses the detention of aliens held on immigration violations after September 11, 2001, suggests the involvement of Ashcroft, the FBI Defendants, and the BOP Defendants in creating or implementing a policy under which plaintiffs were confined in restrictive conditions until cleared by the FBI from involve-

have alleged that defendants were aware of the atypically restrictive conditions of their lengthy confinement. *See Richardson*, 347 F.3d at 435 (supervisory liability under *Bivens* may be shown by "creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue," or by the "failure to act on information indicating that unconstitutional acts were occurring.").

In addition, some of the defendants, in disclaiming responsibility, suggest that other defendants (who also disclaim responsibility) were personally involved.

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ment in terrorist activities. *See, e.g.*, 37-38 (Stuart Levey, an Associate Deputy Attorney General, stated that "the idea of detaining September 11 detainees until cleared by the FBI was 'not up for debate.' He said he was not sure where the policy originated, but thought the policy came from 'at least' the Attorney General."); 39 (Daniel Levin, Counselor to the Attorney General, "described a 'continuous meeting' for the first few months after the terrorist attacks involving the Attorney General, Deputy Attorney General, FBI Director, and [then Assistant Attorney General Michael] Chertoff, and said he was sure that the issue of holding aliens until they were cleared was discussed."); 112 ("MDC officials placed all incoming September 11 detainees in the ADMAX SHU without conducting the routine individualized assessment. BOP Director Kathy Hawk Sawyer told the OIG that this designation resulted from the FBI's assessment and was not the BOP's 'call.' "); 113 ("Rardin . . . directed wardens in his region not to release inmates classified by the BOP as 'terrorist related' from restrictive detention in SHUs until further notice."); 116 ("Cooksey's October 1, 2001 memorandum . . . directed all BOP staff, including staff at the MDC, to continue holding September 11 detainees in the most restrictive conditions of confinement possible" until cleared by the FBI); 42, 49, 60 (mentioning Rolince and Maxwell's roles in the clearance process) and 69-71 (criticizing the pace of the FBI clearance process, 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," and explaining that the delays in clearing detainees had "enormous ramifications" for those detainees).

Ashcroft states, for example, that the MDC officials were not responsible: "BOP's decision to place detainees in administrative segregation under § 541.22(a) until cleared by the FBI was driven by national security and foreign threat concerns which wardens and prison officials were in no position to second guess." Br. at. 13. Rolince argues that it was the BOP's decision, and not the FBI's, to detain plaintiffs in the ADMAX SHU, and there are "no nonconclusory factual allegations that Rolince . . . was personally aware that the BOP relied upon the FBI clearance process in designating plaintiffs to more restrictive housing units within the MDC." Rolince Br. at 4-5. For their part, the BOP defendants contend that they were not responsible, either. Cooksey states, for example, that the MDC defendants exercised independent judgment that "breaks the chain of causation" between the alleged deprivations and his actions. Cooksey Br. at 10.[21] *See also* fn.20, *supra.*

Plaintiffs should not be penalized for failing to assert more facts where, as here, the extent of defendants' involvement is peculiarly within their knowledge. *See Gomez,* 446 U.S. at 641. Plaintiffs have alleged sufficient facts to warrant discovery as to the defendants' involvement, if any, in a policy that subjected plaintiffs to lengthy detention in highly restrictive conditions while being deprived of any process for challenging that detention.

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[21] As discussed in footnote 2, "the BOP Defendants" is used here to refer to the defendants who were upper-level managers of that agency (Hawk Sawyer, Cooksey and Rardin), as distinct from the facility-based defendants (the Wardens and the MDC Defendants).

(v) *Discovery*

The issue of qualified immunity should be addressed at the earliest appropriate stage. Where, as here, there are factual disputes that bear on the availability of the defense, discovery may be structured accordingly. *See Crawford-El,* 523 U.S. at 599-600. Rule 26 of the Federal Rules of Civil Procedure "vests the trial judge with broad discretion to tailor discover narrowly and dictate the sequence of discovery." *Id.* The personal involvement, if any, of the non-MDC defendants should be the subject of the initial stage of discovery. Accordingly, discovery concerning Ashcroft, the FBI Defendants (Mueller, Maxwell, and Rolince), and the BOP Defendants (Sawyer, Cooksey, and Rardin) will be generally limited to inquiries into their involvement in the alleged denials of due process. Appropriate topics will include whether the individual defendant participated in the creation and implementation of the policy or policies under which plaintiffs were detained, whether he or she had knowledge of the conditions under which plaintiffs were detained, and the defendant's involvement in or knowledge of the clearance process and the alleged bypassing of BOP procedures for challenging administrative segregation of pretrial detainees. Any dispute about the precise form(s) and scope of discovery shall be resolved by Judge Gold. Once he determines that discovery related to the issue is completed, defendants may file a properly supported motion for summary judgment.

2. *Excessive Force (Claims 3 and 4)*

Plaintiffs allege that they were physically abused by MDC officers, and that Warden Hasty, among others, failed to take reasonable measures to prevent or remedy this abuse in violation of the Fifth and Eighth Amend-

ments. For the reasons discussed above in connection with plaintiffs' due process claims, I reject Hasty's argument that plaintiffs do not adequately allege his personal involvement in the alleged deprivations of plaintiffs' rights.

Hasty's motion to dismiss claims 3 and 4 is denied.

3. *Interference with Right to Counsel (Claim 5)*

Plaintiffs allege that Warden Hasty, among others, interfered with plaintiffs' right to counsel in violation of the Sixth Amendment. The unreasonable interference with an accused person's ability to consult counsel violates the Sixth Amendment. *Benjamin v. Fraser,* 264 F.3d 175, 185 (2d Cir. 2001). The right to counsel attaches "at or after the initiation of adversary judicial proceedings," whether by way of "indictment, information, or arraignment." *See Kirby v. Illinois,* 406 U.S. 682, 689 (1972). In evaluating whether a pretrial detainee's right to counsel was impaired, a court must determine whether the restrictions imposed unjustifiably obstructed the right of access to counsel or to the courts "in the light of the central objective of prison administration, safeguarding institutional security." *Benjamin,* 264 F.3d at 87 (internal quotation marks omitted).

Plaintiffs allege that while detained in the ADMAX SHU, MDC defendants substantially interfered with plaintiffs' ability to communicate with counsel by, among other things, preventing Elmaghraby from speaking over the telephone with his attorney for almost two months; subsequently disconnecting the phone when plaintiffs complained about the conditions of their confinement; videotaping Elmaghraby's meetings with his attorney; ransacking Elmaghraby's cell while he met with his attorney; subjecting Elmaghraby to strip sear-

ches after non-contact visits with his attorney; preventing Iqbal from meeting with his attorney by falsely telling the attorney that Iqbal had been transferred out of the MDC; and routinely delaying Iqbal's receipt of legal mail. Plaintiffs allege that this interference with counsel was pursuant to a discriminatory policy, and that Hasty and other defendants knew of this interference and did nothing to remedy it.

Hasty contends that plaintiffs' claim fails because they did not state in their complaint that adversarial judicial pleadings had been initiated such that the right to counsel would attach. Hasty contends that by leaving this critical fact out of their complaint, plaintiffs have "sandbagged" Hasty, who had apparently been operating under the assumption that plaintiffs were "held in mere administrative detention until their release." Hasty Br. at 9. Plaintiffs assert that this Court may take judicial notice of Elmaghraby and Iqbal's arraignment dates (October 1, 2001 and November 5, 2001 respectively).

While the complaint could have been more transparent regarding plaintiffs' status as pretrial detainees facing criminal charges, it states that plaintiffs were arrested, held in the MDC after their arrest, transported to court on numerous occasions, and interfered with when they sought to communicate with their "criminal defense" attorneys. Such statements were sufficient to alert Hasty to the allegation that plaintiffs were not being held in mere administrative detention. Hasty's motion to dismiss this claim is denied.

4. *Denial of Medical Treatment (Claims 6 and 7)*

Plaintiffs allege that they were denied adequate medical treatment in violation of the Fifth and Eighth

Amendments. Defendant Nina Lorenzo, a physician's assistant at the MDC while plaintiffs were confined there, contends that (1) plaintiffs fail to state a claim; and (2) she is entitled to qualified immunity.

To state a cause of action under the Eighth Amendment for denial of medical care, a plaintiff must allege that a defendant has exhibited deliberate indifference to his serious medical needs. *Estelle v. Gamble,* 429 U.S. 97, 106 (1976).[22] The deliberate indifference standard incorporates both an "objective" prong—that the alleged deprivation be sufficiently serious—and a "subjective" prong—that the defendant acted with "a sufficiently culpable state of mind." *Hathaway v. Coughlin,* 37 F.3d, 63, 66 (2d Cir. 1994) (*"Hathaway I"*).

a. *Objective Test*

There is "no settled, precise metric" for determining whether a prisoner's condition is "sufficiently serious" such that liability under the Eighth Amendment may

[22] The standard for alleging a due process violation grounded in the denial of adequate health care may be less rigorous than the Eighth Amendment standard. *See Bryant v. Maffucci,* 923 F.2d 979, 983 (2d Cir. 1991) ("Although a pretrial detainee's due process rights to adequate medical treatment are at least as great as the Eighth Amendment protections available to prison inmates, the Supreme Court has left unresolved what standard applies." (citation omitted)). Courts, however, have applied the same analysis to both claims. *See Davis v. Reilly,* 324 F. Supp. 2d 361, 367 (E.D.N.Y. 2004) (regardless of the "academic distinction," standard for analyzing pretrial detainee's due process claim is same as the standard under the Eighth Amendment); *Cuoco v. Moritsugu,* 222 F.3d 99, 106 (2d Cir. 2000) (applying Eighth Amendment deliberate indifference test to pretrial detainee's claim under the Due Process Clause of the Fifth Amendment). Because I find that plaintiffs state an Eighth Amendment claim, I need not determine here whether there is a less rigorous for stating a due process claim.

attach. *See Brock v. Wright,* 315 F.3d 158, 162 (2d Cir. 2003). Factors courts consider include whether a reasonable doctor would perceive the medical need in question as worthy of treatment; whether the condition significantly affects daily activities; and whether the condition results in chronic and substantial pain. *Id*.

Plaintiffs allege that (1) after Elmaghraby was pushed into a hard surface and broke his teeth, Lorenzo provided Elmaghraby with antibiotics, but those antibiotics were confiscated by Lieutenant Ortiz upon Elmaghraby's return to the ADMAX SHU; (2) after Lorenzo misdiagnosed Elmaghraby's *hypothyroidism* as *asthma*, the condition worsened, and Elmaghraby had to undergo surgery; and (3) after a severe beating by MDC officers, Iqbal requested medical assistance from Lorenzo, but she was told by Shacks, the Unit Manager, to leave the ADMAX SHU without providing medical assistance; Iqbal did not receive any medical care for two weeks after the assault, despite suffering from excruciating pain. The latter two allegations—which are the grounds upon which plaintiffs' claims against Lorenzo are based—state a sufficiently serious condition to satisfy the objective test. *See id*. ("the Eighth Amendment forbids not only deprivations of medical care that produce physical torture and lingering death, but also less serious denials which cause or perpetuate pain." (internal quotation omitted).

b. *Subjective Test*

Under the subjective test, deliberate indifference requires more than negligence: "a prison official does not act in a deliberately indifferent manner unless that official 'knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts

from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" *Hathaway I,* 37 F.3d at 66 (quoting *Farmer v. Brennan,* 511 U.S. 825, 837 (1994)). Defendants argue that plaintiffs allege, at most, negligence. *See Hathaway v. Coughlin,* 99 F.3d, 550, 553 (2d Cir. 1996) (*"Hathaway II"*) ("'mere medical malpractice' is not tantamount to deliberate indifference"). In particular, defendants assert that because Lorenzo made some efforts to treat plaintiffs (i.e., prescribing antibiotics and (erroneously) *asthma* medicine; and reporting to the ADMAX SHU to provide medical services to Iqbal), the allegations demonstrate direct attention to plaintiffs' needs which negate a possible finding of indifference. *See McGann v. Coombe,* 1997 WL 88719, *2 (E.D.N.Y. 1997) (prescription of improper gout medicine shows attention and not indifference to prisoner's needs). In addition, defendants argue that because plaintiffs allege that Shacks instructed Lorenzo to leave the ADMAX SHU without providing medical assistance to Iqbal, the claim must fail unless plaintiffs' can demonstrate a duty on Lorenzo's part to disregard or override Shacks's directions.

As demonstrated by virtually all of the cases cited by Lorenzo, determining whether her conduct is actionable will require some discovery. *See, e.g., Richardson,* 347 F.3d 431 (deciding issue on summary judgment); *Hernandez v. Keane,* 341 F.3d 137 (2d Cir. 2003) (affirming grant of judgment as a matter of law after jury trial); *see also Phelps v. Kapnolas,* 308 F.3d 180, 186 (2d Cir. 2002) (allegation that prison officials knew that diet was inadequate and likely to inflict pain and suffering sufficiently pleads the subjective element of the deliberate indifference test); *cf.* Fed. R. Civ. P. 9(b) ("Malice, in-

tent, knowledge, and other conditions of mind of a person may be averred generally."). Plaintiffs' allegations that Lorenzo was deliberately indifferent when she misdiagnosed Elmaghraby and failed to treat Iqbal (albeit after being instructed not to provide treatment at the ADMAX SHU) are sufficient to state a claim.

The deliberate indifference standard for a prisoner's Eighth Amendment claims was clearly established during the period of plaintiffs' confinement at the MDC in 2001 and 2002. *See Estelle,* 429 U.S. at 106. Lorenzo asserts that plaintiffs have not shown "that she should reasonably have known that her conduct fell short of meeting her legal duties" under that standard, and thus she is entitled to qualified immunity. Reply Br. at 6. Although Lorenzo may ultimately prevail on that ground and others as well, it is too early to make the determination. What Lorenzo knew; whether she in fact made a misdiagnosis; if so, whether it was mere negligence; whether she was bound to follow Shacks's direction; and whether she acted reasonably under the circumstances are among the questions that cannot be resolved at this early stage. Lorenzo's motion to dismiss Claims Six and Seven is therefore denied.

5. *Unreasonable Searches (Claim 9)*

Plaintiffs allege that they were subjected to unreasonable strip and body-cavity searches in violation of the Fourth Amendment. Specifically, they allege that there was a policy under which (1) they were subjected to daily strip and body-cavity searches for no legitimate penological reason and without reasonable suspicion; and (2) they were searched multiple times whenever transported to court or the medical department, despite remaining in continuous custody from one search to the

next. They further allege that Hawk Sawyer, Hasty, and Zenk were either instrumental in establishing the search policy or, knowing that the searches were being conducted in an unconstitutional manner, failed to prevent or remedy the practice.

Defendants contend that plaintiffs fail to state a violation of a clearly established right because the searches at issue served the legitimate goal of ensuring that detainees were not in possession of dangerous or unlawful contraband. They further assert that plaintiffs fail to sufficiently allege their personal involvement.

a. *The Legal Standard*

The Fourth Amendment prohibits "unreasonable" searches, "a somewhat amorphous standard whose meaning varies with the context in which a search occurs and the circumstances of the search." *N.G. v. Connecticut*, 382 F.3d 225, 230 (2d Cir. 2004). The Supreme Court has held that a policy of subjecting pretrial detainees to strip searches after contact visits did not violate the Fourth Amendment, *see Bell*, 441 U.S. at 546, but "*Bell* did not 'read out of the Constitution the provision of general application that a search be justified as reasonable under the circumstances.'" *Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001) (quoting *Weber v. Dell*, 804 F.2d 796, 800 (2d Cir. 1986); *see also Covino v. Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992) (pretrial detainees retain a limited right to bodily privacy, and thus have the right to be free from bodily searches that are unreasonable under the circumstances of their confinement); *cf. N.G. v. Connecticut*, 382 F.3d at 238 (Sotomayer, J., dissenting in part) ("Our caselaw consistently has recognized the severely intrusive nature of strip searches and placed strict limits on their use.").

The Second Circuit has evaluated the constitutionality of strip and body-cavity searches under two different tests: the *Covino/Turner* reasonable relation test and the *Shain/Weber* reasonable suspicion test. Here, plaintiffs assert that *Shain/Weber* provides the applicable standard, while Hawk Sawyer contends that plaintiffs' claim should be analyzed under the *Covino/Turner* reasonable relation standard. I agree with Hawk Sawyer.

In *Covino,* the Second Circuit evaluated whether a prison regulation permitting random visual body-cavity searches of a pretrial detainee violated the Fourth Amendment by analyzing whether the regulation was "reasonably related to legitimate penological interests." 967 F.2d at 75, 78. In making such a determination, the Second Circuit applied the four-factor test set forth in *Turner v. Safley,* 482 U.S. 78 (1987): "(i) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (ii) whether there are alternative means of exercising the right in question that remain open to prison inmates; (iii) whether accommodation of the asserted constitutional right will have an unreasonable impact upon guards and other inmates . . . ; and (iv) whether there are reasonable alternatives available to the prison authorities." *Covino,* 967 F.2d at 78-79 (citing *Turner,* 482 U.S. at 89-90). The *Covino* Court held that a random visual body-cavity search policy was not an unreasonable regulation, and affirmed the denial of a motion for a preliminary injunction. *Id*. at 80. The Court noted, though, that plaintiff's claim had not been dismissed because "it was not clear from the testimony at the preliminary injunction hearing whether the search procedure was being applied in a purely random

manner or if the searches were intended to harass, intimidate, or punish [the inmate]". *Id.* at 80.

In *Shain,* the Second Circuit reviewed its cases on the constitutionality of searching persons charged with misdemeanors,[23] and held that, in light of those decisions, "no law enforcement officer reasonably could have believed that it was permissible to perform [a strip search on an individual arraigned on misdemeanor charges] absent individualized reasonable suspicion." *Shain,* 273 F.3d at 59. *Shain* delineated a bright line between a prison, where convicted felons are housed, and a jail, "a place where persons awaiting trial or those convicted of misdemeanors are confined." *Id.* at 65 (internal quotation omitted). In a prison, the appropriate test for determining the constitutionality of a search policy was the *Covino/Turner* reasonable relation test. *Id.* at 65-66. In a jail, on the other hand, the determination should be made by whether there was reasonable suspicion for the search. *Id.*

Plaintiffs argue that the MDC is the federal equivalent of a jail, and thus the clearly established applicable law is *Shain/Weber* (*Shain* was decided on October 19, 2001). I conclude, however, that plaintiffs are much more closely situated to the pretrial detainee held in prison in *Covino* than the misdemeanants and minor offenders of *Shain/Weber.* The MDC holds both

[23] Those cases are *Weber v. Dell,* 804 F.2d 796 (2d Cir. 1986) (holding that the Fourth Amendment precludes prison officials from performing strip/body-cavity searches of arrestees charged with misdemeanors absent reasonable suspicion that the arrestee is concealing contraband); *Walsh v. Franco,* 849 F.2d 66 (2d. Cir. 1988) (reaffirming *Weber*); and *Wachtler v. County of Herkimer,* 35 F.3d 77 (2d Cir. 1994) (applying *Weber* to post-arraignment strip searches of a person charged with a misdemeanor

pre-trial detainees and convicted criminals of all security levels. Moreover, plaintiffs were pretrial detainees who had been flagged, legitimately or not, as being "of high interest" to the post[-]September 11 investigation and were being held in a maximum security unit.

At the very least, it was not clearly established in the fall of 2001 that pretrial detainees held in highly restrictive detention in a federal facility could be searched only upon reasonable suspicion. *Cf. N.G. v. Connecticut,* 382 F.3d at 235 ("Perhaps the *Turner* standard applies to a state facility confining juveniles . . . awaiting trial for [conduct that would be a crime if committed by an adult.]"). There is no dispute, however, that during the period in which plaintiffs were confined in the ADMAX SHU, it was clearly established that a strip and body-cavity search policy had to be reasonably related to legitimate penological goals. *See Bell,* 441 U.S. 576 [*sic*]; *Covino,* 967 F.2d at 76-78.

b. *Reasonable Relation*

Under the *Covino*/*Turner* reasonable relation standard, plaintiffs state a constitutional violation. Plaintiffs assert that they were subjected to a policy of serial and daily suspicionless strip and body-cavity searches, and that such a policy was unmoored from any legitimate penological interest. Plaintiffs do not dispute that there are legitimate justifications for strip or body-cavity searches—*see Bell,* 441 U.S. at 558-560 (upholding body—cavity searches after contact visits); *Covino,* 967 F.2d at 77-80 (upholding random searches)—but they allege that such justifications were not present here. *Cf. Covino,* 967 F.2d at 80 (random visual searches are constitutional, but plaintiff's claim not dismissed because it was unclear whether purportedly random search proce-

dure was being used to harass or punish the inmate); *Hodges v. Stanley,* 712 F.2d 34, 35 (2d Cir. 1983) (second search of administrative detainee appears to be unreasonable when detainee had been under continuous escort after initial search) (citing *Bono v. Saxbe,* 620 F.2d 609, 617 (7th Cir. 1980) (*Bell* rationale does not justify strip searches after noncontact, supervised visits absent a showing that there is some risk that contraband will be smuggled into the prison)). In sum, the success or failure of these claims as well will turn on the particular facts of the case.

c. *Personal Involvement*

Hawk Sawyer, Hasty, and Zenk all seek dismissal based on an asserted failure to allege their personal involvement in the allegedly unreasonable searches. Hasty argues that plaintiffs do not allege that he participated in or witnessed any challenged search. Zenk contends that the specific searches alleged by plaintiffs occurred prior to April 22, 2002, the day Zenk became warden, and Hawk Sawyer argues that plaintiffs have failed to allege that she participated in, or was even informed of, the alleged unconstitutional searches.

Plaintiffs have sufficiently alleged the personal involvement of the Wardens. *See McKenna,* 386 F.3d at 433-34. Zenk's claim that plaintiff's [*sic*] allegations pre-date his involvement is defeated by my obligation to draw all factual inferences from the facts alleged in plaintiffs' favor. Such a claim, if accurate, can be resolved at the Rule 56 stage after discovery has been completed.

I find, however, that plaintiffs' have failed to adequately allege the involvement of Hawk Sawyer in the challenged searches. To be sure, Hawk Sawyer's (and

the BOP Defendants')[24] involvement is alleged in conclusory fashion at two locations in the complaint. *See* ¶¶ 134, 142. But those boilerplate allegations conflict with the specific allegation in ¶ 58 that "[t]he procedures for handling detainees on the ADMAX SHU was developed by [certain MDC personnel] at the request of Defendant Hasty." Moreover, as compared to the alleged policy to deprive detainees of their due process rights, the strip search allegations against Hawk Sawyer draw less support from the context in which defendants' conduct occurred.[25] Accordingly, Hawk Sawyer's motion to dismiss the claim is granted.

6. *Interference with Religious Practices (Claim 10)*

Plaintiffs allege that, as a matter of policy, MDC officers interfered with their religious practices in violation of the Free Exercise Clause of the First Amendment. Specifically, plaintiffs allege that MDC officers banged on their cells while they were praying, routinely confiscated their copies of the Koran, and refused to permit plaintiffs to participate in Friday prayer services with other Muslims. Plaintiffs allege that the Wardens,

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[24] It is not clear from the complaint whether plaintiffs intended to assert this claim against Cooksey and Rardin, the other higher-level BOP Defendants. Plaintiffs have not alleged grounds to support a claim that Cooksey and Rardin were personally involved in the unreasonable search policy. To the extent that plaintiffs intended to assert such claims, those claims are dismissed.

[25] *See* Office of the Inspector General, *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York* 33-35 (December 2003) (discussing strip searches conducted by MDC staff, and stating that it did not appear that the MDC issued written policies for when detainees were to be strip searched, and to the extent there may have been a policy, it was applied inconsistently).

among others, were instrumental in the implementation of such a policy, or that they knew (or should have known) that their subordinates were unlawfully interfering with plaintiffs' religious practices but did nothing to curtail such actions. The Wardens assert, among other things, that plaintiffs should have complained through administrative channels, and that plaintiffs have failed to sufficiently allege their personal involvement. In addition, Hasty asserts that he reasonably deferred to the MDC chaplain on issues concerning the religious accommodation of inmates at the ADMAX SHU.

While inmates "clearly retain protections afforded by the First Amendment," there are limitations based on institutional security, among other things. *O'Lone v. Shabazz,* 482 U.S. 342, 348-49 (1987). A challenge to a prison policy on those grounds requires the court to determine whether the policy is reasonably related to legitimate penological interests. *Id.* at 349. In *O'Lone,* the Court held that regulations that may prevent Muslims from attending Jumu'ah (a weekly service held every Friday afternoon) were reasonably related to a legitimate concern for institutional safety.[26] *Id.* at 345, 350-51, 53.

Here, plaintiffs have stated a claim under the First Amendment. Whether the policy or policies that allegedly impinged on their rights existed, and if so whether they were reasonably related to legitimate objectives are not questions that can be resolved on a motion to

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[26] The challenged regulations in *O'Lone* concerned the prison's policies of assigning inmates to jobs outside the main building and preventing those inmates from returning to the main building during the day (where the Jumu'ah service was held). 482 U.S. at 355-47 [*sic*].

dismiss. *Cf. O'Lone,* 482 U.S. at 350-353 (the Supreme Court's determination that regulations were reasonably related to legitimate objectives was grounded in testimony by, among others, prison officials at a two-day hearing before the district court). Similarly, whether Hasty deferred to the MDC chaplain, and whether such deference was reasonable, are questions for summary judgment or trial.

Plaintiffs have also sufficiently alleged the Wardens' personal involvement. They need not allege that the Wardens themselves banged on cells or confiscated Korans to state a claim of supervisory liability. *Cf. Noguera v. Hasty,* 2001 WL 243535, at *3 (S.D.N.Y. March 12, 2001) (where "the parties dispute almost every fact relevant to the qualified immunity determination, particularly the extent of the information provided to [the supervisory defendants] . . . and the response of those officers to the information provided," summary judgment is not warranted). Plaintiffs have alleged that the Wardens had knowledge of the violations and allowed them to continue; their disavowal of such knowledge does not warrant dismissal of these claims.

7. *Racial and Religious Discrimination (Claims 11 and 12)*

Plaintiffs allege that harsher conditions of confinement were imposed upon them because of their religious beliefs and race, in violation of the First Amendment and the Equal Protection Clause of the Fifth Amendment, respectively. They claim that defendants created or implemented such a discriminatory policy, or failed to remedy the policy once it was imposed. Defendants assert that plaintiffs fail to state a constitutional violation

and have not sufficiently alleged their personal involvement[.]

"No person can be punished for entertaining or professing religious beliefs or disbeliefs." *People of State of Ill. ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign County, Ill.*, 333 U.S. 203, 210 (1948) (internal quotation omitted). While the protections afforded by the First Amendment may be limited in the prison setting for legitimate penological reasons, *see O'Lone v. Shabazz*, 482 U.S. at 348-49, a prisoner may not be punished because of his religious beliefs. *See, e.g., Cooper v. Pate*, 378 U.S. 546, 546 (1964) (prisoner's denial of privileges because of religious beliefs states a § 1983 claim) (citing *Pierce v. LaVallee*, 293 F.2d 233, 235 (2d Cir. 1961) (prisoner's allegation of punishment based upon religious beliefs states a First Amendment claim)); *Salahuddin v. Dalsheim*, 1996 WL 384898, at *12 (S.D.N.Y. July 9, 1996) (denying motion to dismiss where inmate alleged that his transfer to a new facility violated his free exercise rights). Nor can a prisoner be punished because of his race. *See, e.g., Turner*, 482 U.S. at 84 (prisoners protected against invidious racial discrimination by the Equal Protection Clause); *cf. Johnson v. California*, 125 S. Ct. 1141, 1146 (2005) ("all racial classifications" imposed by government, including those in the prison context, must be analyzed under strict scrutiny).

Defendants contend that plaintiffs cannot state an equal protection claim because they have not alleged sufficient facts to show that (1) defendants acted with discriminatory animus or (2) plaintiffs were treated differently than members of another protected class. I disagree.

Proof of racially discriminatory intent is required to establish a violation of the Equal Protection Clause. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). Such proof is not required, however, to survive a motion to dismiss. *See Phillip v. Univ. of Rochester,* 316 F.3d 291, 298 (2d Cir. 2003) (allegation that plaintiffs were singled out for maltreatment from a group that contained non-minorities is sufficient to survive a motion to dismiss). *Arlington Heights,* which defendants rely upon, is not to the contrary. There, the Court upheld a challenged zoning decision because the respondents, after trial, had "failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision." 429 U.S. at 270. The Court elaborated on the fact-specific nature of the inquiry: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id*. at 266. Such evidence may include the "historical background of the decision" and the "specific sequence of events leading up to the challenged decision." *Id*. at 267.

Here, plaintiffs allege that they were confined under significantly harsher conditions than other pretrial detainees because of their race and religion, and not because of any evidence that they were involved in terrorist activity. I cannot conclude as a matter of law that there is no set of facts consistent with plaintiffs' allegations that could entitle them to relief.

Defendants argue that plaintiffs fail to describe how defendants' treatment of other races was different than the treatment of plaintiffs. Plaintiffs are not required,

however, to plead such facts in order to proceed with their claim. *See Pyke v. Cuomo,* 258 F.3d 107, 110 (2d Cir. 2001) ("a plaintiff who . . . alleges an express racial classification . . . 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."). In any event, the allegation that plaintiffs were singled out for harsher treatment because of race and religion necessarily implies that other non-Muslim, non-Arab prisoners confined at MDC during the same period were not subjected to similarly harsh treatment. *See People United for Children, Inc. v. The City of New York,* 108 F. Supp. 2d 275, 297 n.15 (S.D.N.Y. 2000) (denying motion to dismiss equal protection claims; allegations imply that plaintiffs were treated differently).

a. *Personal Involvement*

Defendants argue that plaintiffs have failed to sufficiently allege their personal involvement. I agree with respect to the BOP Defendants but not with respect to Ashcroft, the FBI Defendants, or the Wardens. Plaintiffs assert that Ashcroft was the principal architect of the challenged policies (Compl. ¶ 10), and that Rolince and/or Maxwell classified them as "of high interest" because of their race, religion, or national origin. (Compl. ¶ 51.) In support of this assertion, plaintiffs allege that "all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as "of interest" to the post-September 11th investigation. (Compl. ¶ 52.) Taking those allegations as true, it cannot be said that there are [*sic*] no

set of facts on which the plaintiffs would be entitled to relief as against Ashcroft and the FBI Defendants. Though Plaintiffs assert that the BOP defendants were instrumental in the imposition of the challenged policies, they do not allege that those defendants were involved in the challenged classification. Accordingly, these claims are dismissed against the BOP Defendants. Although plaintiffs also have not alleged that the Wardens were involved in their initial classification, they have alleged that the Wardens were personally involved in imposing harsher conditions of confinement because of plaintiffs' race and religion. Such a challenge, combined with the allegations of their treatment at the MDC, is sufficient to state a claim against the Wardens and defeat the assertion of qualified immunity on a motion to dismiss.

F. *Plaintiffs' Statutory Claims*

1. *Religious Freedom Restoration Act (Claims 13-15)*

Plaintiffs allege violations of their rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"). Specifically, they allege that because of their religious beliefs, they were subjected to (1) harsher conditions of confinement; (2) interference with their religious practice; and (3) physical and verbal abuse, and that these actions imposed a substantial burden on their religious exercise and belief. Defendants assert, among other things, that they are entitled to qualified immunity because it was not clearly established in October 2001 that RFRA applied to federal officials. I agree.

RFRA prohibits government[27] from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court "invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial powers under the Fourteenth Amendment." *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2118 (2005).

Plaintiffs argue that RFRA's application to federal officials was clearly established during the relevant period because (1) *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999), implicitly holds that RFRA applies to federal officials; (2) other circuit courts that have considered the question post-*Boerne* have uniformly held that RFRA applies to federal officials; and (3) Congress amended RFRA post-*Boerne* (and prior to the alleged violations here) to eliminate references to state governments, and thus defendants could not have reasonably believed that RFRA did not apply to their actions. I find, however, that support for the proposition that it was clearly established in the Second Circuit that RFRA applied to federal officials during the 2001-2002 period

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[27] The term "government" includes "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." § 2000bb-2(1). RFRA accordingly reaches officials acting in their individual capacities[.] *See Solomon v. Chin*, 1997 WL 160643, at *5 (S.D.N.Y. April 7, 1997) (allowing claim under RFRA to proceed against prison officers in their individual capacities).

is too tenuous to provide a basis for denying qualified immunity. *Cf. Back,* 365 F.3d at 129-130 (clearly established analysis based on whether the decisional law of the Supreme Court and the applicable circuit court supports the existence of the right in question).

Neither the Supreme Court nor the Second Circuit has directly addressed the applicability of RFRA to federal officials post-*Boerne. See Cutter,* 125 S. Ct. at 2118 n.2 ("RFRA, Courts of Appeals have held, remains operative as to the Federal Government and federal territories and possessions. This Court, however, has not had occasion to rule on the matter.") (citations omitted); *Browne,* 176 F.3d at 26. In *Browne,* the Second Circuit affirmed the dismissal of a claim asserting that an IRS judgment violated RFRA. *Id.* The district court had questioned RFRA's continuing constitutionality post-*Boerne,* but assumed it was constitutional for the purposes of its decision. *See Browne v. United States,* 22 F.Supp.2d 309, 312 (D. Vt. 1998). On appeal, the Second Circuit did not discuss RFRA's constitutionality.[28] In comparison to the thorough discussion of the question by appellate courts that have directly addressed the issue (discussed below), the *Browne* court's silence does not

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[28] Following *Browne,* at least one district court in this circuit has noted that RFRA continues to apply to the federal government, *see Marrero v. Apfel,* 87 F. Supp. 2d 340, 348 (S.D.N.Y. 2000) (construing claim that *pro se* applicant was entitled to Social Security benefits on the ground that his religious faith prevents him from working a regular job as a claim under RFRA), while another district court assumed that RFRA continued to apply to the federal government where neither party challenged its continuing applicability. *United States v. Any and All Radio Station Equipment,* 93 F. Supp. 2d 414, 418 n.4 (S.D.N.Y. 2000).

provide strong support for the proposition that RFRA's applicability to the federal government was clearly established. Moreover, in *Ford v. McGinnis,* 352 F.3d 582 (2d Cir. 2003), the Second Circuit stated that the Supreme Court had "invalidated" RFRA:

> While it was still good law, we dutifully applied RFRA's substantial burden test to prisoners' free exercise claims, despite the Supreme Court's suggestion in [*Employment Div., Dep't of Human Res. v. Smith,* 494 U.S. 872 (1990)] that so doing puts courts in "the unacceptable business of evaluating the relative merits of differing religious claims." Now with RFRA invalidated, however, the Circuits apparently are split over whether prisoners must show a substantial burden on their religious exercise in order to maintain free exercise claims.

352 F.3d at 592 (quoting *Smith,* 494 U.S. at 887, other citations omitted). While the holding in *Ford* concerned RFRA's applicability to the states, the Second Circuit did not temper its language to make this distinction clear.

Plaintiffs argue that all other circuit courts that have squarely addressed the issue have held that RFRA continues to apply to the federal government[29] and that even where there is no Second Circuit or Supreme Court authority directly on point, decisions of other circuits

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[29] *See Madison v. Riter,* 355 F.3d 310, 315 (4th Cir. 2003); *O'Bryan v. Bureau of Prisons,* 349 F.3d 399, 401 (7th Cir. 2003); *Guam v. Guerrero,* 290 F.3d 1210, 1220-22 (9th Cir. 2002); *Kikumura v. Hurley,* 242 F.3d 950, 958-60 (10th Cir. 2001); *In re Young,* 141 F.3d 854, 858-863 (8th Cir. 1998).

may warrant the conclusion that a right was clearly established. In fact, the Second Circuit's decisions have sent "conflicting signals" on the latter issue, *see African Trade & Information Center, Inc. v. Abromaitis,* 294 F.3d 355, 361 (2d Cir. 2002), but I need not resolve it here, as the cases plaintiffs rely on suggest that during the 2001-2002 period in question here, RFRA's applicability to the federal government was unclear. For example, in 2003, prior to its holding in *O'Bryan,* the Seventh Circuit stated only that *Boerne* had "left open the possibility" that RFRA still applied to the federal government. *See United States v. Israel,* 317 F.3d 768, 770-71 (7th Cir. 2003) (assuming RFRA's constitutionality as applied to the federal government where neither party contested it). Similarly, the Ninth Circuit explained in *Guam v. Guerrero* that it previously had "not definitively held RFRA constitutional as applied in the federal realm." 290 F.3d at 1220. And *Kikumura* reversed a district court's holding that *Boerne* had rendered RFRA claims against federal prison officials unconstitutional as well. 242 F.3d at 958-60. Thus, the legal landscape in which the actions challenged in this case occurred differs markedly from that of *Varrone v. Bilotti,* 123 F.3d 75, 79 (2d Cir. 1997) (finding reasonable suspicion standard for strip searching prison visitors was clearly established where three other circuits had so held prior to the search at issue and second circuit decisions had "foreshadowed" that standard); and *Weber,* 804 F.2d at 803-04 (relying on eleven decisions from other circuit courts, three of which antedated questioned search, in finding law clearly established).

I find that it was not clearly established in October 2001 that RFRA applied to the federal government. Ac-

cordingly, defendants are entitled to qualified immunity and the motions to dismiss these claims are granted.

2. *Conspiracy Under 42 U.S.C. § 1985(3) (Claims 16 and 17)*

Plaintiffs claim that the defendants conspired to deprive them of equal protection of the laws and of equal privileges and immunities of the laws because of plaintiffs' religious beliefs, race, and national origin, in violation of 42 U.S.C. § 1985(3). Specifically, plaintiffs claim that (1) Ashcroft, Mueller, the BOP Defendants, and the Wardens, among others, agreed to subject plaintiffs to unnecessarily harsh conditions of confinement without due process; (2) the BOP Defendants and the Wardens, among others, agreed to subject plaintiffs to unnecessary and extreme strip and body-cavity searches as a matter of policy; and (3) the Wardens and other MDC defendants agreed to substantially burden Elmaghraby's religious practice while he was housed in the ADMAX SHU. Defendants assert that (1) they are entitled to qualified immunity because it is not clearly established law in the Second Circuit that 42 U.S.C. § 1985(3) applies to suits against federal officers; and (2) plaintiffs fail to sufficiently allege facts establishing their personal involvement in the alleged deprivations.

42 U.S.C. § 1985(3) reads, in pertinent part:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be

> done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

To make out a violation of 42 U.S.C. § 1985(3), a plaintiff "must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *United Brotherhood of Carpenters v. Scott,* 463 U.S. 825, 828-29 (1983). With respect to the second element, a plaintiff must show that the conspiracy was motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Id*. (internal quotation omitted); *see also Posr v. Court Officer Shield No. 207,* 180 F.3d 409, 419 (2d Cir. 1999); *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 7 F.3d 1085, 1087 (2d Cir. 1993).

a. *Clearly Established Law*

Defendants argue that the Second Circuit has never recognized that [§] 1985(3) is available for suits against federal officials sued in their individual capacities. In *Gregoire v. Biddle,* 177 F.2d 579 (2d Cir. 1949), the Second Circuit held that the United States Attorney General had absolute immunity from civil actions for malicious prosecution. 177 F.2d at 581. In reaching its deci-

sion, the court implied that § 1985(3) required state action. *Id.* In *Griffin v. Breckenridge,* 403 U.S. 88 (1971), the Supreme Court held that § 1985(3) did not contain a state action limitation. 403 U.S. at 101. The Court stated that instead, a plaintiff was required to establish "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102.

Like other district courts in this circuit, I conclude that the "holding in *Griffin* necessarily extends section 1985(3) to reach racially motivated conspiracies involving federal officers." *Li v. Canarozzi,* 1997 WL 40979, at *4 (S.D.N.Y. Feb. 3, 1997). As Judge Sand reasoned:

> Although the Second Circuit has yet to adopt this broader reading of 1985(3), its most recent authority to the contrary, *Gregoire v. Biddle,* preceded not only the Supreme Court's decision in *Griffin* but also the evolution of the doctrine of qualified immunity. . . . The *Gregoire* Court's holding followed a discussion of the danger of allowing federal officials to be sued for conduct in the course of their official duties. Many of those concerns are now addressed by the various immunities available to federal officials, including those arising pursuant to the FTCA and qualified immunity.

1997 WL 40979, at *3 (citations omitted); *see also Moriani v. Hunter,* 462 F. Supp. 353, 356 (S.D.N.Y. 1978) ("Unless there is a rationale, unknown to the past cases, for holding that federal officers are not 'persons' under § 1985(3), there is no longer any reason to exclude from coverage federal officers acting under color of federal law."); *Hobson v. Wilson,* 737 F.2d 1, 44 (D.C. Cir. 1984) (*Gregoire* effectively overruled by *Griffin;* apply-

ing § 1985(3) to FBI agents); *Jafree v. Barber*, 689 F.2d 640, 643 (7th Cir. 1982) (§ 1985(3) action available against federal officials). I conclude that, after *Griffin*, it was clearly established that § 1985(3) applied to federal officers.

b. *Personal Involvement*

To survive a motion to dismiss on a conspiracy claim, a plaintiff "must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end." *Webb v. Gourd*, 340 F.3d 105, 110 (2d Cir. 2003) (internal quotation omitted). Plaintiffs are also required to allege "with at least some degree of particularity, overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy." *Thomas v. Roach*, 165 F.3d 137, 147 (2d Cir. 1999).

Plaintiffs assert that they have met these standards by alleging that various defendants agreed to deprive plaintiffs of their rights, and by alleging that defendants adopted and implemented policies which deprived plaintiffs of these rights. As discussed in connection with plaintiffs' Fourth Amendment claim, plaintiffs have not sufficiently alleged the personal involvement of the BOP Defendants in subjecting them to "unnecessary and extreme strip and body-cavity searches," and the BOP Defendants' motions are granted as to that alleged agreement. In all other respects, defendants motions to dismiss the § 1985 claims are denied. As discussed above, I am mindful of the fact that cabinet-level and other high-ranking government officials may not properly be burdened by litigation based on conclusory allegations that they are responsible (through policy-making or fail-

ing to supervise) the alleged torts of federal employees. Nevertheless, I am not convinced, given the particularized allegations in paragraphs 249-51 and the virtually unique context in which the alleged actions occurred, that there is no set of facts consistent with those allegations on which plaintiffs will be entitled to relief against the defendants.

3. *Alien Tort Statute (Claim 21)*

Plaintiffs allege that the moving defendants engaged in acts which "had the intent and the effect of grossly humiliating Plaintiffs, forcing them to act against their will and conscience, inciting fear and anguish, and breaking their physical and moral resistance." Compl. ¶ 267. Plaintiffs assert that these acts constituted cruel, inhuman, or degrading treatment in violation of international law, and bring a claim under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS").

The United States moves to be substituted for the individual defendants pursuant to the Liability Reform Act, 28 U.S.C. § 2679, and for dismissal of the ATS claim on the ground of sovereign immunity. In addition, defendants assert that they are entitled to qualified immunity because, among other things, it was not clearly established during the relevant period what acts fall within the ambit of the ATS.

Plaintiffs concede that if the motion for substitution is granted, then the ATS claims should be dismissed because the United States has not waived its sovereign immunity from claims for money damages brought pursuant to the ATS. *See* Pl.'s Opp'n. Mem. at 5.

a. *Liability Reform Act*

The Liability Reform Act provides that for civil actions based on the wrongful conduct of federal employees acting within the scope of their employment, the only available remedy is a claim under the Federal Tort Claims Act against the government itself. 28 U.S.C. § 2679(b). There are two exceptions to this exclusive remedy provision. It does not apply to actions against an employee of the government "brought for a violation of the Constitution of the United States, or . . . for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(A), (B).

Although the question is not free from doubt, I find that because it is "international law *cum* common law" *see Sosa v. Alvarez-Machain,* 124 S. Ct. 2739, 2754 (2004), that defines the claims for which the ATS provides jurisdiction, the statute does not fall into the § 2679(b)(2)(B) exception to the Liability Reform Act.

The ATS reads in its entirety as follows: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The statute, although "in terms only jurisdictional," enables "federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa,* 124 S. Ct. at 2754. In *Sosa,* the Court concluded that although the ATS did not create new causes of action, "[t]he jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with

a potential for personal liability at the time." *Id.* at 2761.

Plaintiffs argue that because the ATS authorizes a limited category of actions, it falls within the § 2672(b)(2)(B) exception for violations of a statute. The ATS does not, however, impose any duties or obligations on an individual. *See United States v. Smith,* 499 U.S. 160, 174 (1991) (holding that the § 2679(b)(2)(B) exception did not apply to the Gonzalez Act, 10 U.S.C. § 1089, which immunized federal employees from individual medical malpractice suits). In *Smith*, the Court concluded that the § 2679(b)(2)(B) exception did not apply because the Gonzalez Act itself could not be violated: Nothing in the Gonzalez Act imposes any obligations or duties of care upon military physicians," and therefore "a physician allegedly committing malpractice under state or foreign law does not 'violate' the Gonzalez Act." 499 U.S. at 174. Similarly, the ATS itself cannot be "violated." *See Bancoult v. McNamara,* 370 F. Supp. 2d 1, 10 (D.D.C. 2004) ("The plain language of AT[S], however, does not confer rights nor does it impose obligations or duties that, if violated, would trigger the § 2672(b)(2)(B) exception. . . . A claim brought pursuant to the AT[S], therefore, is based on violation of rights conferred under international law, not the AT[S]."); *Alvarez-Machain v. United States,* 331 F.3d 604, 631-32 (9th Cir. 2003) (en banc), *reversed on other grounds sub nom., Sosa v. Alvarez-Machain,* 124 S. Ct. 2739 (2004); *Schneider v. Kissinger,* 310 F. Supp. 2d 251, 266-67 (D.D.C. 2004); *Bieregu v. Ashcroft,* 259 F. Supp. 2d 342, 353 (D.N.J. 2003).

Because the ATS is not a statute that itself can be violated, it does not fall within the § 2679(b)(2)(B) excep-

tion. Accordingly, the government's motion for substitution is granted. Because the United States has not waived its sovereign immunity from suits seeking money damages under international law, its motion to dismiss the ATS claim is granted. *See Federal Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 474 (1994) (absent an express waiver of sovereign immunity, a plaintiff may not sue the United States in federal court).[30]

CONCLUSION

For the foregoing reasons, the motions to dismiss are granted in part and denied in part:

Claim 1:	The Wardens' motions to dismiss are denied.
Claim 2:	Defendants' motions to dismiss are denied.
Claims 3-4:	Hasty's motion to dismiss is denied.
Claim 5:	Hasty's motion to dismiss is denied.
Claims 6-7:	Lorenzo's motion to dismiss is denied.
Claim 8:	The Wardens' motions to dismiss are denied.

[30] Because I find that the ATS does not fall within an exception to the Liability Reform Act and grant the United States' motions for substitution and dismissal of the ATS claims, I need not decide whether it was clearly established that the alleged violations of international law fell within the ambit of the ATS during the relevant period.

Claim 9:	The Wardens' motions to dismiss are denied. Hawk Sawyer's motion to dismiss is granted.
Claim 10:	The Wardens' motions to dismiss are denied.
Claims 11-12:	The Wardens' motions to dismiss are denied. Ashcroft and the FBI Defendants' motions to dismiss are denied. The BOP Defendants' motions to dismiss are granted.
Claims 13-15:	Defendants' motions to dismiss are granted.
Claims 16-17:	The BOP Defendants' motions to dismiss are granted with respect to the alleged agreement to subject plaintiffs to unnecessary and extreme strip and body-cavity searches. In all other respects, Defendants' motions to dismiss are denied.
Claim 21:	The United States' motions for substitution and dismissal are granted. The claim is dismissed as to all defendants.

So Ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Docket Number: 05-5768-cv
Short Title: Elmaghraby v. Ashcroft
DC Docket Number: 04-cv-1809
DC: EDNY (BROOKLYN)
DC Judge: Honorable John Gleeson

JAVID [*sic*] IQBAL, PLAINTIFF-APPELLEE

v.

DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER, MICHAEL COOKSEY, FORMER ASSISTANT DIRECTOR FOR CORRECTIONAL PROGRAMS OF THE BUREAU OF PRISONS, JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, DAVID RARDIN, FORMER DIRECTOR OF THE NORTHEAST REGION OF THE BUREAU OF PRISONS, MICHAEL ROLINCE, FORMER CHIEF OF THE FEDERAL BUREAU OF INVESTIGATION'S INTERNATIONAL TERRORISM OPERATIONS SECTION, COUNTERTERRORISM DIVISION, KATHLEEN HAWK SAWYER, FORMER DIRECTOR OF THE FEDERAL BUREAU OF PRISONS, KENNETH MAXWELL, FORMER ASSISTANT SPECIAL AGENT IN CHARGE, NEW YORK FIELD OFFICE, FEDERAL BUREAU OF INVESTIGATION, DEFENDANTS-APPELLANTS

[Filed: Sept. 18, 2007]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 18 day of September two thousand seven.

A petition for panel rehearing and petition for rehearing en banc having been filed herein by the appellees Ehab Elmaghraby and Javaid Iqbal, appellants John Ashcroft and Robert Mueller, and appellants Kenneth Maxwell and Michael Rolince. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court:

Catherine O'Hagan Wolfe, Clerk

By: /s/ ILLEGIBLE
Motion Staff Attorney

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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04 CV 1809 (JG)(JA)

EHAB ELMAGHRABY AND JAVAID IQBAL, PLAINTIFFS

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES; ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION; MICHAEL ROLINCE, FORMER CHIEF OF THE FEDERAL BUREAU OF INVESTIGATION'S INTERNATIONAL TERRORISM OPERATIONS SECTION, COUNTERTERRORISM DIVISION; KENNETH MAXWELL, FORMER ASSISTANT SPECIAL AGENT IN CHARGE, NEW YORK FIELD OFFICE, FEDERAL BUREAU OF INVESTIGATION; KATHLEEN HAWK SAWYER, FORMER DIRECTOR OF THE FEDERAL BUREAU OF PRISONS; DAVID RARDIN, FORMER DIRECTOR OF THE NORTHEAST REGION OF THE BUREAU OF PRISONS; MICHAEL COOKSEY, FORMER ASSISTANT DIRECTOR FOR CORRECTIONAL PROGRAMS OF THE BUREAU OF PRISONS; DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER; MICHAEL ZENK, WARDEN OF THE METROPOLITAN DETENTION CENTER; LINDA THOMAS, FORMER ASSOCIATE WARDEN OF PROGRAMS OF THE METROPOLITAN DETENTION CENTER; ASSOCIATE WARDEN SHERMAN, ASSOCIATE WARDEN OF CUSTODY FOR THE METROPOLITAN DETENTION CENTER; CAPTAIN SALVATORE LOPRESTI; LIEUTENANT STEVEN BARRERE; LIEUTENANT

WILLIAM BECK; LIEUTENANT LINDSEY BLEDSOE; LIEUTENANT JOSEPH CUCITI; LIEUTENANT THOMAS CUSH; LIEUTENANT HOWARD GUSSAK; LIEUTENANT MARCIAL MUNDO; LIEUTENANT DANIEL ORTIZ; LIEUTENANT ELIZABETH TORRES; CORRECTIONS OFFICER REYNALDO ALAMO; CORRECTIONS OFFICER SYDNEY CHASE; CORRECTIONS OFFICER JAMES CLARDY; CORRECTIONS OFFICER RAYMOND COTTON; CORRECTIONS OFFICER MICHAEL DEFRANCISCO; CORRECTIONS OFFICER RICHARD DIAZ; CORRECTIONS OFFICER JAI JAIKISSON; CORRECTIONS OFFICER DEXTER MOORE; CORRECTIONS OFFICER JON OSTEEN; CORRECTIONS OFFICER ANGEL PEREZ; CORRECTIONS OFFICER SCOTT ROSEBERRY; UNIT MANAGER CLEMMETT SHACKS; NORA LORENZO, PHYSICIAN'S ASSISTANT; "JOHN DOE" CORRECTIONS OFFICERS NOS. 1-19, "JOHN DOE" BEING FICTIONAL FIRST AND LAST NAMES; AND THE UNITED STATES OF AMERICA, DEFENDANTS

FIRST AMENDED COMPLAINT AND JURY DEMAND

Plaintiffs EHAB ELMAGHRABY and JAVAID IQBAL, by their attorneys, the Urban Justice Center and Koob & Magoolaghan, allege upon knowledge as to themselves and upon information and belief as to all other matters as follows:

NATURE OF ACTION

1. This is an action brought by Plaintiffs EHAB ELMAGHRABY and JAVAID IQBAL to remedy the brutal mistreatment and discrimination each Plaintiff

suffered while in the care, custody, and control of Defendants. Plaintiffs ELMAGHRABY and IQBAL are Muslim men from Egypt and Pakistan, respectively. In the months after September 11, 2001, Plaintiffs were detained at the Metropolitan Detention Center ("MDC") in Brooklyn, New York. Plaintiffs were arbitrarily classified as being "of high interest" to the government's terrorism investigation after September 11th, and accordingly were housed in the MDC's Administrative Maximum ("ADMAX") Special Housing Unit ("SHU").

2. While in the ADMAX SHU, Plaintiffs were subjected to a pattern and practice of cruel, inhuman, and degrading treatment in violation of the First, Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution, federal statutory law, and customary international law. Among other things, they were deliberately and cruelly subjected to numerous instances of excessive force and verbal abuse, unlawful strip and body cavity-searches, the denial of medical treatment, the denial of adequate nutrition, extended detention in solitary confinement, the denial of adequate exercise, and deliberate interference with their rights to counsel and to exercise of their sincere religious beliefs. They were placed in tiny cells for more than 23 hours per day, and strip-searched, manacled and shackled when removed from their cells. Plaintiffs were housed in the ADMAX SHU in the absence of adequate standards or procedures for determining that such a classification was appropriate, or that the classification should continue, in violation of the Fifth Amendment to the United States Constitution.

3. Plaintiffs were singled out for such mistreatment because of their race, national origin, and religion.

Defendants, by creating, participating in, and endorsing Plaintiffs' systematic mistreatment, violated the principles enunciated in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, the Religious Freedom Restoration Act ("RFRA"), 42 USC § 2000bb, the civil rights conspiracy statute, 42 U.S.C. § 1985(3), and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq.

4. As a result of Defendants' misconduct, Plaintiffs suffered severe and permanent physical injuries, and severe emotional distress and humiliation. Plaintiffs now bring this lawsuit to redress these wrongs and to seek just and fair compensation.

JURISDICTION AND VENUE

5. This action is brought pursuant to *Bivens*, under the First, Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution, 28 U.S.C. § 1346(b), 28 U.S.C. §1350, and 42 U.S.C. §§ 1985(3) and 2000bb.

6. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1346(b), and 1350.

7. Venue is proper in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1391(b), as the events giving rise to this action occurred within this district.

PARTIES

8. Plaintiff EHAB ELMAGHRABY is a native and citizen of Egypt, where he currently resides. He was detained in the MDC from on or about October 1, 2001 to on or about August 28, 2002.

9. Plaintiff JAVAID IQBAL is a native and citizen of Pakistan, where he currently resides. He was detained in the MDC from on or about November 5, 2001 to on or about January 15, 2003.

10. Defendant JOHN ASHCROFT is the Attorney General of the United States. As Attorney General, Defendant ASHCROFT has ultimate responsibility for the implementation and enforcement of the immigration and federal criminal laws. He is a principal architect of the policies and practices challenged here. He authorized, condoned, and/or ratified the unreasonable and excessively harsh conditions under which Plaintiffs were detained.

11. Defendant ROBERT MUELLER is the Director of the Federal Bureau of Investigation ("FBI"). As FBI Director, he was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here.

12. Defendant MICHAEL ROLINCE was at all relevant times the Chief of the FBI's International Terrorism Operations Section, Counterterrorism Division, and as such was instrumental in the implementation of the policies and practices challenged here.

13. Defendant KENNETH MAXWELL was at all relevant times the Assistant Special Agent in Charge, New York Field Office, FBI and as such was instrumental in the implantation [*sic*] of the polices [*sic*] and practices challenged here.

14. Defendant KATHLEEN HAWK SAWYER was at all relevant times the Director of the Federal Bureau of Prisons. As such, Defendant SAWYER was responsible for the custody, care and control of the

individuals detained in the MDC, including Plaintiffs, and was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here. She authorized, condoned and/or ratified the unreasonable and excessively harsh conditions under which Plaintiffs were detained.

15. Defendant DAVID RARDIN was at all relevant times the Director of the Northeast Region of the Bureau of Prisons. As such, Defendant RARDIN was responsible for the custody, care and control of the individuals detained in the MDC, including Plaintiffs, and was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here. He authorized, condoned and/or ratified the unreasonable and excessively harsh conditions under which Plaintiffs were detained.

16. Defendant MICHAEL COOKSEY was at all relevant times the Assistant Director for Correctional Programs of the Bureau of Prisons. As such, Defendant COOKSEY was responsible for ensuring a safe and secure institutional environment for the individuals detained in the MDC, including Plaintiffs, and was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here. He authorized, condoned and/or ratified the unreasonable and excessively harsh conditions under which Plaintiffs were detained.

17. Defendant DENNIS HASTY was at some relevant times the Warden of the MDC. While Warden, Defendant HASTY was responsible for the terms and conditions under which Plaintiffs were confined at the MDC, and for supervising, hiring, and training officers who brutalized and mistreated Plaintiffs. While Ward-

en, Defendant HASTY subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

18. Defendant MICHAEL ZENK is currently the Warden of the MDC. As Warden, Defendant ZENK was responsible at some relevant times for the terms and conditions under which Plaintiffs were confined at the MDC, and for supervising, hiring, and training officers who brutalized and mistreated Plaintiffs. As Warden, Defendant ZENK subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

19. Defendant LINDA THOMAS is the former Associate Warden of Programs of the MDC and was at all relevant times the Associate Warden of Programs of the MDC. While Associate Warden, Defendant THOMAS was responsible for the terms and conditions under which Plaintiffs were confined at the MDC, and for supervising, hiring, and training officers who brutalized and mistreated Plaintiffs. As Associate Warden, Defendant THOMAS subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

20. Defendant SHERMAN is the Associate Warden of Custody of the MDC and was at all relevant times the Associate Warden of Custody of the MDC. While Associate Warden, Defendant SHERMAN was responsible for the terms and conditions under which Plaintiffs were confined at the MDC, and for supervising, hiring, and training officers who brutalized and mistreated Plaintiffs. As Associate Warden, Defendant SHERMAN subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

21. Defendant Captain SALVATORE LOPRESTI is and was at all relevant times employed at the MDC. While Captain, Defendant LOPRESTI was responsible

for the terms and conditions under which Plaintiffs were confined at the MDC, and for supervising and training officers who brutalized and mistreated Plaintiffs. As Captain, Defendant LOPRESTI subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

22. Defendant Lieutenant STEVEN BARRERE is and was at all relevant times a federal corrections officer employed at the MDC. Defendant BARRERE subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

23. Defendant Lieutenant WILLIAM BECK is and was at all relevant times a federal corrections officer employed at the MDC. Defendant BECK subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

24. Defendant Lieutenant LINDSEY BLEDSOE is and was at all relevant times a federal corrections officer employed at the MDC. Defendant BLEDSOE subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

25. Defendant Lieutenant JOSEPH CUCITI was at all relevant times a federal corrections officer employed at the MDC. Defendant CUCITI subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

26. Defendant Lieutenant THOMAS CUSH is and was at all relevant times a federal corrections officer employed at the MDC. Defendant CUSH subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

27. Defendant Lieutenant HOWARD GUSSAK was at all relevant times a federal corrections officer employed at the MDC. Defendant GUSSAK subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

28. Defendant Lieutenant MARCIAL MUNDO is and was at all relevant times a federal corrections officer employed at the MDC. Defendant MUNDO subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

29. Defendant Lieutenant DANIEL ORTIZ is and was at all relevant times a federal corrections officer employed at the MDC. Defendant ORTIZ subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

30. Defendant Lieutenant ELIZABETH TORRES is and was at all relevant times a federal corrections officer employed at the MDC. Defendant TORRES subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

31. Defendant REYNALDO ALAMO is and was at all relevant times a corrections officer employed at the MDC. Defendant ALAMO subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

32. Defendant SYDNEY CHASE is and was at all relevant times a corrections officer employed at the MDC. Defendant CHASE subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

33. Defendant JAMES CLARDY is and was at all relevant times a corrections officer employed at the MDC. Defendant CLARDY subjected Plaintiffs to un-

reasonable and excessively harsh conditions of confinement.

34. Defendant RAYMOND COTTON is and was at all relevant times a corrections officer employed at the MDC. Defendant COTTON subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

35. Defendant MICHAEL DEFRANCISCO was at all relevant times a federal corrections officer employed at the MDC. Defendant DEFRANCISCO subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

36. Defendant RICHARD DIAZ is and was at all relevant times a federal corrections officer employed at the MDC. Defendant DIAZ subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

37. DEFENDANT [*sic*] JAI JAIKISSON is and was at all relevant times a federal corrections officer employed at the MDC. Defendant JAIKISSON subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

38. Defendant DEXTER MOORE is and was at all relevant times a federal corrections officer employed at the MDC. Defendant MOORE subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

39. Defendant JON OSTEEN was at all relevant times a federal corrections officer employed at the MDC. Defendant OSTEEN subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

40. Defendant ANGEL PEREZ is and was at all relevant times a federal corrections officer employed at the MDC. Defendant PEREZ subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

41. Defendant SCOTT ROSEBERRY is and was at all relevant times a federal corrections officer employed at the MDC. Defendant ROSEBERRY subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

42. Defendant CLEMMETT SHACKS is and was at all relevant times a federal corrections officer employed at the MDC. Defendant SHACKS was the Unit Manager for the ADMAX SHU. Defendant SHACKS subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

43. Defendant NORA LORENZO is and was at all relevant times a physician's assistant employed at the MDC and was at all relevant times responsible for the delivery of medical care to Plaintiffs.

44. Defendants "JOHN DOE" CORRECTIONS OFFICERS NOS. 1-19, "John Doe" being fictional first and last names, are and were at all relevant times federal corrections officers employed at the MDC. Defendants DOE Nos. 1-19 subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

45. Defendant UNITED STATES OF AMERICA, by virtue of the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., is liable for the tortuous conduct of the individual Defendants named herein, including assault, battery, negligence, and intentional infliction of emotional distress.

46. All Defendants named herein acted under color of federal law and within the scope of their office or employment.

STATEMENT OF FACTS

General Background

47. In the months after September 11, 2001, the Federal Bureau of Investigation ("FBI"), under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men, designated herein as "post-September 11th detainees," as part of its investigation of the events of September 11.

48. Many of these men, including Plaintiffs, were classified as being "of high interest" to the government's post-September-11th investigation by the FBI without specific criteria or a uniform classification system.

49. In many cases, including Plaintiffs', the classification was made because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees' involvement in supporting terrorist activity.

50. Defendants ROLINCE and/or MAXWELL were responsible for making the initial determination as to whether detainees arrested within the New York area in the weeks and months after September 11 were classified as "of high interest" to the government's investigation.

51. Defendants ROLINCE and/or MAXWELL classified Mr. Elmaghraby and Mr. Iqbal as "of high interest" to the post-September-11th investigation because of their race, religion, and national origin, and not

because of any evidence that Plaintiffs were involved in terrorist activity.

52. Indeed, within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as "of interest" to the post-September-11th investigation.

53. Those post-September 11th detainees classified by the FBI as being "of high interest" were confined at the MDC in Brooklyn, New York, in the ADMAX SHU, which is the Federal Bureau of Prisons' ("BOP") most restrictive type of confinement.

54. The ADMAX SHU was quickly created on MDC's ninth floor to house post-September 11th detainees.

55. Prior to September 11, 2001, the MDC had a SHU, but not an ADMAX SHU.

56. The MDC had as many as 60 detainees housed in the ADMAX SHU at one time.

57. The officers who worked on the ADMAX SHU were selected by Defendants HASTY, SHERMAN, and LOPRESTI.

58. The procedures for handling detainees on the ADMAX SHU were developed by Defendants SHERMAN, LOPRESTI, and CUCITI, at the request of Defendant HASTY.

59. The ADMAX SHU enforced a four-man hold restraint policy, the use of hand-held cameras to record

detainee movements, cameras in each cell to monitor detainees, and physical security enhancements.

60. Post-September 11th detainees in the ADMAX SHU were subjected to highly restrictive conditions of confinement. They were not permitted to move about the unit, use the telephone freely, nor were they permitted any electronic equipment in their cells, such as small radios. Post-September 11th detainees moved outside their cells only when they were restrained with handcuffs and leg irons and escorted by four staff members.

61. For many weeks, post-September 11th detainees in the ADMAX SHU were subjected to a communications blackout that barred them from receiving telephone calls, visitors, mail, and from placing telephone calls. During this period, the post-September 11th detainees, including Plaintiff ELMAGHRABY, were unable to make any contact with their attorneys or families.

62. Compounding this situation, MDC employees often turned away lawyers and family members who came to visit individual post-September 11th detainees by falsely stating that the individual detainee was no longer detained in the MDC.

63. Markedly different from the conditions in the MDC 's [*sic*] general population, detainees in the ADMAX SHU were permitted to leave their cells for only one hour a day, at most, and their legal and social visits were non-contact, with a clear partition between the parties.

64. Because of the highly restrictive nature of the ADMAX SHU, BOP regulations require an employee

known as the Segregation Review Official to conduct a weekly review of the status of each inmate housed in the SHU after he has spent seven days in administrative detention or disciplinary segregation. The Segregation Review Official is also required to conduct a formal hearing every 30 days assessing the inmate's status. The Segregation Review Official's finding must be approved by the Reviewing Authority.

65. Although Defendants BLEDSOE, BECK, and ORTIZ were assigned to be Segregation Review Officials while Plaintiffs were held within the ADMAX SHU, Defendants BLEDSOE, BECK, and ORTIZ never conducted the individual reviews required by regulation to ensure that placement of Plaintiffs in ADMAX SHU was necessary to vindicate the safety and security interests of the MDC.

66. During the time that Defendants BLEDSOE, BECK, and ORTIZ worked as Segregation Review Officials, Defendant LOPRESTI was the Reviewing Authority. Defendant LOPRESTI approved BLEDSOE, BECK, and ORTIZ'S recommendation to continue holding Plaintiffs in the ADMAX SHU although LOPRESTI was aware that the required review procedures had not been followed.

67. The appropriate review processes were never provided to the post-September 11th detainees, including Plaintiffs. Instead, the detainees were held in the ADMAX SHU until the FBI approved their release to the general population unit.

68. Until the FBI approved the release of a particular detainee, MDC policy was to automatically annotate the detainee status with the phrase "continue high security." The post-September 11th detainees were not

afforded any hearings, and they remained under restrictive detention in the ADMAX SHU as a matter of policy until defendant COOKSEY issued a memorandum approving their release to general population.

69. The policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were "cleared" by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.

70. Consistent with this policy, on or about October 1, 2001, defendant COOKSEY directed that all detainees "of high interest" be confined in the most restrictive conditions possible until cleared by the FBI.

71. Defendant SAWYER was aware of and approved of the policies enunciated by Defendant COOKSEY with regard to the confinement of detainees "of high interest" in BOP facilities.

72. Defendants ROLINCE and MAXWELL, after mid-September 2001, were jointly responsible for determining whether a detainee had been "cleared" of any connection to terrorist activity.

73. Officials at FBI Headquarters in Washington, D.C., were aware that the BOP relied on the FBI classification to determine whether to detain prisoners in the ADMAX SHU at the MDC.

74. Nonetheless, Defendants ASHCROFT, MUELLER, and ROLINCE never imposed deadlines for the "clearance" process, and many detainees were held in the ADMAX SHU even after they were approved for release to the general population unit by the FBI.

75. As a result numerous detainees, including Plaintiffs, were held in ADMAX SHU for extended periods of time, although there was no evidence linking them to terrorist activity.

76. Moreover, defendants ROLINCE and MAXWELL failed to approve post-September 11 detainees' release to general population based simply on the detainees' race, religion, and national origin, and not based on any evidence that continued detention in ADMAX SHU was important or relevant to the FBI's investigation of the events of September 11, 2001.

Cruel and Inhumane Conditions of Confinement in the ADMAX SHU

77. MR. ELMAGHRABY was arrested on or about September 30, 2001 by local and federal law enforcement agents.

78. On or about October 1, 2001, MR. ELMAGHRABY was brought to the MDC and housed in the ADMAX SHU.

79. Mr. ELMAGHRABY was housed in the ADMAX SHU the entire time he was detained at the MDC from on or about October 1, 2001 to on or about August 28, 2002.

80. Mr. IQBAL was arrested on or about November 2, 2001 by INS and FBI agents.

81. On or about November 5, 2001 Mr. IQBAL was taken to the MDC and housed in the general population unit on the fifth floor. Mr. IQBAL was housed in the ADMAX SHU from on or about January 8, 2002 until approximately the end of July 2002, at which time he was released back to the general population unit.

82. While detained in the ADMAX SHU, Plaintiffs were kept in solitary confinement, not permitted to leave their cells for more than one hour each day with few exceptions, verbally and physically abused, routinely subjected to humiliating and unnecessary strip and body-cavity searches, denied access to basic medical care, denied access to legal counsel, denied adequate exercise and nutrition, and subjected to cruel and inhumane conditions of confinement.

83. The conditions of Plaintiffs' confinement incited fear and anguish, exacerbated their physical pain and emotional distress, and subjected them to embarrassment and humiliation.

84. Plaintiffs were housed in small cells with the lights on almost 24 hours per day until in or about March 2002. MDC staff deliberately turned on the air conditioner throughout the winter months, and turned on the heat during the summer months.

85. Plaintiffs were not provided with adequate bedding and personal hygiene items. Until in or about January 2002, Mr. ELMAGHRABY was not given a blanket, pillow, mattress, or any toilet paper. Similarly, Mr. IQBAL was never provided with pillows or more than one blanket.

86. Whenever Plaintiffs were removed from their cells, they were hand cuffed and shackled around their legs and waist.

87. Plaintiffs were subjected to continuous verbal abuse from the MDC staff, demonstrating their animus towards Plaintiffs. Such statements included Mr. IQBAL being called "a terrorist" by Defendant ZENK, "a terrorist and a killer" by Defendant GUSSAK, a "Mus-

lim bastard" by Defendant COTTON, and a "Muslim killer" by Defendant PEREZ. Mr. ELMAGHRABY was called a ["]terrorist" by Defendant SHACKS; when Mr. ELMAGHRABY requested a pair of shoes, Defendant THOMAS responded with a statement, "No shoes for a terrorist"; Defendant COTTON expressed the same animus when he said, "a terrorist should not ask for anything" to Mr. ELMAGHRABY.

88. Plaintiffs were rarely permitted to exercise, and the conditions under which they were permitted to exercise were punitive in effect and intent. For instance, when permitted to exercise in the winter, Plaintiffs were taken to the recreation areas in the ADMAX SHU, which were on the top floor of the MDC in the open-air, in early winter mornings without proper jackets and shoes.

89. On certain days when it rained, MDC officers took Mr. IQBAL to the recreation areas for exercise, and left him in the open-air for hours until he was completely drenched. When Mr. IQBAL was brought back to his cell, the officers deliberately turned on the air conditioner, causing him severe physical discomfort.

90. As the weather became milder, MDC officers permitted Mr. ELMAGHRABY to go to the recreation areas for his exercise. However, the officers permitted him to remain outside for only 15 minutes, in contrast to the cold winter months where the officers left Mr. ELMAGHRABY in the open-air for hours. In the summer months, when it was extremely hot and humid, MDC officers again left Mr. ELMAGHRABY outside for hours.

91. Moreover, Plaintiffs were not provided with adequate food. As a result of the harassment they exper-

ienced in the ADMAX SHU, and nutritionally inadequate food, Plaintiffs lost a significant amount of weight. While in custody, Mr. IQBAL lost over 40 pounds, and Mr. ELMAGHRABY lost over 20 pounds. Furthermore, as a result of not having adequate food for a prolonged period of time, Mr. IQBAL currently suffers from persistent digestive problems, causing him to require medical treatment.

92. Such conditions of confinement were punitive in intent and effect.

93. Such conditions of confinement were not related to any legitimate penological interest.

94. Such conditions of confinement were imposed without any individualized determination as to whether they were appropriate for Plaintiffs.

95. Indeed, the MDC's Segregation Review Officials, Defendants BLEDSOE, BECK, and ORTIZ, never conducted a weekly review of Plaintiffs' status regarding whether or not it was appropriate to continue to detain them in the ADMAX SHU. In addition, during the entire time Plaintiffs were housed in the ADMAX SHU, they never received a formal hearing to determine whether such confinement was appropriate. The MDC's Reviewing Authority, Defendant LOPRESTI, nonetheless continued to approve Plaintiffs' confinement in ADMAX SHU.

96. Defendants ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS each knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to these conditions of confinement as a matter of policy, solely on account of their religion, race,

and/or national origin and for no legitimate penological interest.

97. Defendants ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI willfully and maliciously designed a policy whereby individuals such as Plaintiffs were arbitrarily designated to be confined in the ADMAX SHU without providing any individual determination as to whether such designation was appropriate or should continue.

98. Keeping Plaintiffs in isolation for nearly 24 hours per day, without access to fresh air and light, adequate bedding, adequate heat, and without adequate recreation or exercise, bore no relationship to legitimate security concerns, constituted unjustified punishment, deprived Plaintiffs of their right to liberty, and amounted to the willful, malicious, and unnecessary infliction of pain and suffering.

99. As a result of Defendants' imposition of unlawful conditions of confinement, Plaintiffs suffered permanent physical injury and emotional distress.

Use of Excessive Force on Ehab Elmaghraby

100. Mr. ELMAGHRABY'S brutal mistreatment by MDC staff began on the first day he arrived at the facility on or about October 1, 2001, in the early morning hours, when Defendants BLEDSOE, ALAMO, CLARDY, JAIKISSOON, and MOORE willfully and maliciously threw Mr. ELMAGHRABY against a wall of the MDC, subjected him to repeated strip searches, including leaving him naked for approximately 40 minutes, and threatened him with death. Defendants BLEDSOE, ALAMO, CLARDY, JAIKISSOON, and MOORE contin-

ually accused Mr. ELMAGHRABY of being a terrorist and being associated with Osama bin Laden, Al Qaeda, and the Taliban. Moreover, when Mr. ELMAGHRABY was transported to court on the same day, Defendants BECK, CHASE, DEFRANCISCO, and DIAZ subjected Mr. ELMAGHRABY to repeated strip searches and willfully and maliciously dragged him on the ground while he was chained and shackled, causing him to bleed from his legs, and. [*sic*]

101. Upon Mr. ELMAGHRABY's return to the MDC, officers brought Mr. ELMAGHRABY up to AD-MAX SHU in an elevator. In the elevator, several officers, including Defendants BARRERE, BECK, ORTIZ, MUNDO, and OSTEEN willfully and maliciously physically and verbally assaulted him, causing him to bleed from his nose.

102. Although the officers carried a video camera with them while abusing Mr. ELMAGHRABY, they deliberately turned it off during the entire time the officers physically and verbally abused Mr. ELMAGHRABY.

103. The treatment by Defendants BARRERE, BECK, BLEDSOE, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, and OSTEEN on October 1, 2001, caused Mr. ELMAGHRABY to suffer excruciating pain and emotional distress.

104. Mr. ELMAGHRABY was assaulted a second time, on or about December 1, 2001, when he was willfully and maliciously pushed from behind by DOE No. 1 upon Mr. ELMAGHRABY's return from recreation.

105. As a result of being shoved, Mr. ELMAGHRABY hit his face on a hard surface and broke his teeth, causing him excruciating pain and emotional distress.

106. The beatings of Mr. ELMAGHRABY were motivated by Defendants' animus against Mr. ELMAGHRABY on account of his race, religion, and/or national origin.

107. There was no legal justification for the assaults and verbal abuse suffered by Mr. ELMAGHRABY.

108. The beatings of Mr. ELMAGHRABY by MDC staff were all pursuant to the customs and practices of the MDC. Such unlawful customs and practices were known or should have been known to Defendants HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

109. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to inflict unnecessary and assaultive beatings upon Mr. ELMAGHRABY, and Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

110. As a result of said willful, malicious, and unlawful conduct by Defendants, Mr. ELMAGHRABY suf-

fered severe and permanent physical injury and extreme emotional distress.

Use of Excessive Force on Javaid Iqbal

111. Consistent with Mr. ELMAGHRABY'S experience of physical abuse, Mr. IQBAL was subjected to brutal mistreatment from the very day he was transferred from general population to the ADMAX SHU on or about January 8, 2002, after he was brought back to the MDC from court.

112. On the day he was transferred to the ADMAX SHU, he was told by an officer on the fifth floor that he had a legal visit.

113. Mr. IQBAL was then taken to a room where Defendants DOE Nos. 2-16 were waiting for him. Several of these officers picked him up and threw him against the wall, kicked him in the stomach, punched him in the face, and dragged him across the room. In addition, the officers screamed at him, saying that he was a "terrorist" and a "Muslim."

114. Mr. IQBAL was then taken to the ADMAX SHU. While he was being moved, he was shackled and chained around his arms, legs, and waist.

115. From this incident, Mr. IQBAL suffered serious physical injuries, including bleeding from his mouth and nose, as well as severe emotional distress.

116. Mr. IQBAL was again assaulted on or about March 20, 2002, when Defendants CUSH, DEFRANCISCO, OSTEEN, and DOE Nos. 17-18 ordered Mr. IQBAL to submit to a strip and body-cavity search.

117. The officers conducted three serial strip and body-cavity searches of Mr. IQBAL in the same room.

Although the officers had a handheld video camera, they turned it off while they conducted the searches.

118. Mr. IQBAL peacefully protested when the officers willfully and maliciously ordered him to submit to a fourth search.

119. In response, Defendant DEFRANCISCO punched Mr. IQBAL in the face and Defendant CUSH punched Mr. IQBAL in the back and his legs and kicked him in the back. As a result, Mr. IQBAL bled from his mouth. There was no legal justification for Defendants' brutal assault of Mr. IQBAL.

120. The officers next took Mr. IQBAL to the ADMAX SHU. En route to the ADMAX SHU, the officers continued to kick, physically harass, and verbally harass him by making racist and violent comments about Muslims.

121. When they arrived at the ADMAX SHU, Defendants DEFRANCISCO, CUSH, OSTEEN and DOE Nos. 17-18 willfully and maliciously pulled Mr. IQBAL's arm through the slot in his cell door, causing him excruciating pain.

122. Defendant DEFRANCISCO willfully and maliciously urinated in the cell in Mr. IQBAL'S toilet, and then turned the water off in the cell so that he could not flush the toilet. Mr. IQBAL was not able to flush the toilet until the next morning.

123. The beatings of Mr. IQBAL were motivated by Defendants' animus against Mr. IQBAL on account of his race, religion, and/or national origin.

124. The beatings of Mr. IQBAL by MDC staff were all pursuant to the customs and practices of the MDC.

Such unlawful customs and practices were known or should have been known to Defendants HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

125. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to inflict unnecessary and assaultive beatings upon Mr. IQBAL, and Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

126. As a result of said willful, malicious, and unlawful conduct by Defendants, Mr. IQBAL currently suffers permanent physical and emotional injuries, including but not limited to limited hearing, permanent injury to his right leg, gastrointestinal problems, and depression.

Strip and Body Cavity Searches of Mr. Elmaghraby

127. Mr. ELMAGHRABY was subjected to numerous unreasonable, unnecessary and extreme strip and body-cavity searches while confined in the ADMAX SHU.

128. During the first three or four months of his detention, Mr. ELMAGHRABY was strip searched every morning. The officers ordered him to take off his clothes and inspected him through the slot in the door before

they entered the cell. Defendants BECK, GUSSAK, ORTIZ, BARRERE, DIAZ, MUNDO, OSTEEN, and ROSEBERRY willfully and maliciously subjected Mr. ELMAGHRABY to these strip searches, although they were not related to any legitimate security or penological interest.

129. Along with being strip searched every morning for the first several months of his detention, every time Mr. ELMAGHRABY went to court, and each time he returned to court, he was strip and body-cavity searched three times.

130. Upon leaving for court, the first search occurred in Mr. ELMAGHRABY'S cell in the ADMAX SHU, the second search in a different room in the ADMAX SHU, and the final search on the ground floor of MDC. When Mr. ELMAGHRABY returned from court, the searches occurred in reverse order. These searches occurred on or about the following dates: October 1, October 2, November 5, November 8, and December 11, 2001, and January 8, February 12, February 13, and July 22, 2002. During these searches, Mr. ELMAGHRABY was ordered to pass his clothes to a corrections officer and bend over while a corrections officer used a flashlight to search his body cavities.

131. None of these searches vindicated any legitimate security or penological interest. Indeed, the second and third searches were particularly egregious, because they were conducted even though Mr. ELMAGHRABY was in the custody of MDC employees from the moment he was first searched until after he was searched for the third time.

132. While the strip and body cavity-searches were conducted, Mr. ELMAGHRABY was threatened,

mocked and verbally abused. In addition, he was regularly pushed and shoved.

133. Defendants BECK, GUSSAK, ORTIZ, BARRERE, MUNDO, DIAZ, OSTEEN, and ROSEBERRY willfully and maliciously participated in and conducted the strip searches of Mr. ELMAGHRABY.

134. Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS willfully and maliciously approved of, endorsed, and/or ordered that the searches take place as a matter of policy.

135. On many occasions, Defendants conducted the strip searches in an extreme and outrageous manner. For instance, on one occasion, Defendant BARRERE willfully and maliciously displayed Mr. ELMAGHRABY while naked to a female employee of the MDC. On or about October 1, 2001, while Defendants BECK, ORTIZ, MUNDO, and OSTEEN were present for a body-cavity search of Mr. ELMAGHRABY, Defendant BARRERE willfully and maliciously inserted a flashlight into Mr. ELMAGHRABY'S anal cavity. Mr. ELMAGHRABY noticed blood on the flashlight when it was removed from his anal cavity. On or about November 8, 2001, while Defendant DEFRANCISCO conducted a strip-search of Mr. ELMAGHRABY with other MDC officers, Defendant DEFRANCISCO inserted a pencil into Mr. ELMAGHRABY's anal cavity. Additionally, on or about January 8, 2002, Defendants MUNDO, COTTON, DEFRANCISCO, and OSTEEN conducted a strip search of Mr. ELMAGHRABY in which Defendant COTTON willfully and maliciously pushed a pencil into Mr. ELMAGHRABY'S anal cavity.

Strip and Body Cavity Searches of Mr. Javaid Iqbal

136. As with Mr. ELMAGHRABY, Mr. IQBAL was also subjected to numerous unreasonable, unnecessary and extreme strip and body-cavity searches while confined in the ADMAX SHU.

137. Each morning, MDC corrections officers first searched Mr. IQBAL'S cell. During this search, Mr. IQBAL was chained and shackled and was routinely kicked and punched by MDC officers.

138. After the cell search, Mr. IQBAL was subjected to a strip and body-cavity search.

139. In addition to the daily strip and body-cavity searches, each time Mr. IQBAL visited the medical clinic for treatment, he was subjected to three strip searches, once before the medical visit and twice after the visit.

140. On days when he appeared in court, Mr. IQBAL was strip searched twice before he even left the building. As usual, Mr. IQBAL was subjected to a strip and cavity-search on or about 5:30 am. Mr. IQBAL was strip searched including a cavity search right before the MDC officers escorted him from his cell to the first floor of the building. The second search occurred on or about 7:40 am. When Mr. IQBAL returned from court, he also was subjected to two strip searches. These searches occurred on or about the following dates: February 19, 2002, March 6, 2002, March 20, 2002, and April 22, 2002.

141. Defendants BECK, BARRERE, ORTIZ, OSTEEN, PEREZ, ROSEBERRY, and DOE No. 19 willfully and maliciously participated in and conducted these strip searches.

142. Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS willfully and maliciously approved of, endorsed, and/or ordered that these searches take place as a matter of policy.

143. On many occasions, Defendants conducted the strip searches in an extreme and outrageous manner. For instance, on or about March 20, 2002, Defendants CUSH, DEFRANCISCO, OSTEEN, and DOE Nos. 17-18 ordered Mr. IQBAL to submit to a strip and body-cavity search.

144. The officers conducted three serial strip and body cavity searches of Mr. IQBAL in the same room. Although the officers had a handheld video camera, they turned it off while they conducted the searches.

145. Mr. IQBAL peacefully protested when the officers willfully and maliciously ordered him to submit to a fourth and completely unnecessary search.

146. In response Defendants assaulted Mr. IQBAL, as described in Pars. 116-122.

147. The strip search policy established and implemented by Defendants did not vindicate any legitimate security or penological interest.

148. Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS each knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to unreasonable, unnecessary and extreme strip and body-cavity searches.

149. The imposition of unreasonable, unnecessary and extreme strip and body-cavity searches were all

pursuant to the customs and practices of the MDC. Such unlawful customs and practices were known or should have been known to Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

150. Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to conduct unreasonable, unnecessary and extreme strip searches, and Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

151. Plaintiffs were subjected to unreasonable, extreme and unnecessary strip and body-cavity searches because of their race, religion, and/or national origin and for not [*sic*] legitimate penological purpose.

152. As a result of Defendants' actions, Plaintiffs suffered physical injury, extreme emotional distress, humiliation, and embarrassment.

Interference with Religious Practice

153. During the entire time that Plaintiffs were confined in the ADMAX SHU, their sincere religious practices and beliefs were constantly burdened and met

with interference. Such interference included banging on the cells when they were praying, routinely confiscating their Koran, and refusing to permit Plaintiffs to participate in Friday prayer services with fellow Muslims.

154. When Plaintiffs asked for Friday prayer services with fellow Muslims, they were met with comments such as, "No prayers for terrorists" by Defendant THOMAS and "Why do you need to pray when you are in jail? Go to sleep," by Defendant SHACKS.

155. Said interference was an undue burden on Plaintiffs' sincere religious practice and belief.

156. Moreover, the targeting of Plaintiffs for physical and verbal harassment and the imposition of restrictive conditions of confinement constituted an undue burden on Plaintiffs' sincere religious practice and belief.

157. Although Mr. ELMAGHRABY complained to Defendants THOMAS, HASTY, ZENK, SHACKS, COTTON, and BARRERE about the interference with his religious practice, said Defendants willfully and maliciously refused to take any action to remedy the situation.

158. Defendants SHACKS, PEREZ, DEFRANCISCO, TORRES, and COTTON were each aware of the interference with Mr. IQBAL's religious practice, and nonetheless each Defendant agreed to, endorsed, and willfully and maliciously participated in the routine confiscation of his Koran.

159. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS each knew of, con-

doned, and willfully and maliciously failed to prevent this interference with Plaintiffs' religious practice.

160. The interference with Plaintiffs' religious practice by MDC staff were all pursuant to the customs and practices of the MDC. Such unlawful customs and practices were known or should have been known to Defendants HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

161. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to interfere with Plaintiffs' religious practice, and Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

162. Defendants did not similarly interfere with the religious practice of non-Muslims.

163. As a result of Defendants' intentional interference with Plaintiffs' religious practice, each Plaintiff suffered extreme emotional distress.

Interference with Right to Counsel

164. Defendant COTTON was the counselor for the ADMAX SHU and determined whether and when detainees were permitted visitation or phone calls.

165. While in the ADMAX SHU, Plaintiffs' communication with their legal counsel was substantially interfered with by Defendants COTTON and SHACKS.

166. For instance, from on or about October 1, 2001, until in or about the last week of November 2001, Defendant COTTON prohibited Mr. ELMAGHRABY from speaking by telephone with his criminal defense attorney.

167. After in or about November 2001, on those occasions when Mr. ELMAGHRABY was permitted to speak with his criminal attorney, Defendant COTTON stood nearby and disconnected the phone when Mr. ELMAGHRABY complained about any of the conditions of his confinement in the ADMAX SHU.

168. Similarly, on those occasions when Mr. IQBAL was permitted to speak with his criminal attorney, Defendant COTTON stood nearby and disconnected the phone if Mr. IQBAL complained about any of the conditions of his confinement in the ADMAX SHU.

169. When Mr. ELMAGHRABY's attorney tried to visit him at the MDC, she often waited for hours without seeing Mr. ELMAGHRABY.

170. On those occasions when Mr. ELMAGHRABY was able to meet with his attorney at the MDC, a video camera recorded the visit and when he returned to his cell, he would find that it had been ransacked. On these occasions, even though his legal visit was non-contact, Mr. ELMAGHRABY was forced to submit to a strip search.

171. Mr. IQBAL's attorney was turned away from the MDC several times, being falsely informed that Mr. IQBAL had been transferred to another facility. Addi-

tionally, Defendant SHACKS routinely delayed Mr. IQBAL's receipt of legal mail, sometimes by up to two months.

172. As a result, Plaintiffs' communication with counsel was substantially interfered with.

173. Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, COTTON and SHACKS each knew of and condoned the imposition of substantial restrictions on Plaintiffs' right to communicate with counsel.

174. The imposition of these restrictions was all pursuant to the customs and practices of the MDC. Such unlawful customs and practices were known or should have been known to Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

175. Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to substantially interfere with Plaintiffs' right to counsel, and Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

176. Plaintiffs' right to communicate with counsel was interfered with because of their race, religion, and/or national origin.

177. As a result of Defendants' actions, Plaintiffs suffered extreme emotional distress.

Deliberate Indifference to Serious Medical Needs

178. Both Plaintiffs also were denied access to constitutionally adequate medical care.

179. On or about December 1, 2001, Mr. ELMAGHRABY was pushed from behind by Defendant DOE No. 1, upon Mr. ELMAGHRABY's return from recreation.

180. As a result of being shoved, Mr. ELMAGHRABY hit his face on a hard object and broke his teeth.

181. Defendant LORENZO provided Mr. ELMAGHRABY with antibiotics for his injury, but they were confiscated by Defendant ORTIZ when Mr. ELMAGHRABY returned to the ADMAX SHU.

182. Mr. ELMAGHRABY complained to Defendant SHACKS, who asked Mr. ELMAGHRABY why he needed his teeth.

183. As a result of Defendants' mistreatment, Mr. ELMAGHRABY suffered extreme pain and emotional distress.

184. Moreover, while Mr. ELMAGHRABY was confined in the ADMAX SHU, Defendant LORENZO erroneously diagnosed him with asthma and prescribed him with asthma medication.

185. As a result of Defendant LORENZO's misdiagnosis, Mr. ELMAGHRABY's actual condition, hypothyroid, became worse and he had to undergo surgery to correct the problem.

186. As a result of this cruel and inhuman treatment, Mr. ELMAGHRABY suffered and continues to suffer severe emotional distress, as well as persistent physical injuries.

187. On or about March 21, 2002, the day after Mr. IQBAL had been beaten by Defendants CUSH and DEFRANCISCO, as described in Pars. 116-122, Mr. IQBAL requested medical assistance from Defendant LORENZO. Defendant SHACKS, however, told Defendant LORENZO to leave the ADMAX SHU without providing any medical assistance, and Defendant COTTON also refused Mr. IQBAL's requests for medical assistance.

188. Mr. IQBAL did not receive any medical care for two weeks after he was brutally assaulted, despite the fact that he was experiencing excruciating pain and suffering.

189. Defendants LORENZO, COTTON, ORTIZ, and SHACKS willfully and maliciously failed and refused to provide adequate medical care to Plaintiffs. Said deficiencies in the provision of adequate medical care include but are not limited to the following: Defendants LORENZO, COTTON, and SHACKS's refusal to provide treatment to Mr. IQBAL until about two weeks after he was assaulted on or about March 20, 2002; Defendant LORENZO's failure to properly diagnose Mr. ELMAGHRABY's hypothyroid condition; and Defendants ORTIZ and SHACKS's confiscation of the antibiotics prescribed by Defendant LORENZO as a result of the brutal assault of Mr. ELMAGHRABY on or about December 1, 2001.

190. Defendants LORENZO, COTTON, ORTIZ, and SHACKS, acting under color of federal law, by their ac-

tions and/or omissions, willfully and maliciously demonstrated deliberate indifference to Plaintiffs' life and safety and/or serious medical needs.

191. Defendants LORENZO, COTTON, ORTIZ, and SHACKS, acting under color of federal law, by their actions and/or omissions, willfully and maliciously denied Plaintiffs' life, liberty, and/or property without due process of law.

192. Defendants LORENZO, COTTON, ORTIZ, and SHACKS each knew or should have known of the deficiencies alleged herein which were within his/her jurisdiction.

193. Defendants LORENZO, COTTON, ORTIZ, and SHACKS each knew or should have known that there was a foreseeable risk of serious harm as a result of the deficiencies alleged herein.

General Allegations

194. Defendants BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19 each knew of, participated in, and willfully and maliciously subjected Plaintiffs to the mistreatment described herein.

195. Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY,

SHACKS, LORENZO, and DOE Nos. 1-19 were aware of, approved of, and willfully and maliciously created these unlawful conditions of confinement.

196. The repeated beatings and mistreatment of Plaintiffs were pursuant to the policy and practice of the MDC. Such unlawful customs and practices were known or should have been known to Defendants HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

197. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to subject Plaintiffs to the beatings and other mistreatment described herein, and Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

198. Defendants specifically targeted Plaintiffs for mistreatment because of Plaintiffs' race, religion, and/or national origin.

199. Defendants' conduct imposed an undue burden on Plaintiffs' sincere religious belief and practice.

200. As a result of Defendants' malicious, willful, and unlawful conduct, Plaintiffs suffered severe and permanent physical injuries and severe emotional distress.

FIRST CAUSE OF ACTION

(Conditions of Confinement—Fifth Amendment Due Process)

201. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 200.

202. By willfully and maliciously subjecting Plaintiffs to outrageous, excessive, cruel, inhuman and degrading conditions of confinement, including the denial of adequate nutrition, the denial of adequate exercise, the imposition of unnecessary and unlawful strip and body-cavity searches, extended detention in solitary confinement, and subjection to unprovoked and unjustified physical and emotional abuse, Defendants BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, acting under color of law and their authority as federal officers, have deprived Plaintiffs of liberty and/or property without due process of law in violation of the Fifth Amendment to the United States Constitution. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by failing to take reasonable measures to prevent and/or to remedy Plaintiffs' mistreatment, have deprived Plaintiffs of liberty and/or property without due process of law in violation of the Fifth Amendment to the United States Constitution.

203. As a result of Defendants' unlawful conduct, Plaintiffs have suffered severe pain and suffering, including physical injuries, emotional distress, humiliation, and embarrassment, and accordingly each Plaintiff

is entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

SECOND CAUSE OF ACTION

(Assignment to ADMAX SHU—Fifth Amendment Due Process)

204. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 203.

205. By willfully and maliciously adopting, promulgating and implementing the policy and practice under which Plaintiffs were confined to solitary confinement in the ADMAX SHU in an arbitrary and unreasonable manner, without any defined criteria, contemporaneous review, or process of any sort, and by which classifications Plaintiffs experienced unnecessary and unreasonable restrictions on their liberty that were atypical and significant departures from the restrictions imposed upon detainees in general population, Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BECK, BLEDSOE, ORTIZ, and SHACKS, acting under color of law and their authority as federal officers, have intentionally or recklessly deprived Plaintiffs of liberty without due process

of law in violation of the Fifth Amendment to the United States Constitution.

206. As a result of Defendants' unlawful conduct, Plaintiffs suffered emotional distress humiliation, and embarrassment, and accordingly each Plaintiff is entitled to compensatory damages against ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BECK, BLEDSOE, ORTIZ, and SHACKS, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

THIRD CAUSE OF ACTION
(Excessive Force—Fifth Amendment Due Process)

207. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 206.

208. The unprovoked, unjustified, willful, and malicious intentional beatings of Plaintiffs by Defendants BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, and DOE Nos. 1-18 deprived Plaintiffs of their right to liberty and property in violation of the Fifth Amendment to the United State [*sic*] Constitution. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by failing to take reasonable measures to prevent and/or to remedy their subordinates' abuse of Plaintiffs, deprived Plaintiffs of their right to liberty and property in violation of the Fifth Amendment to the United States Constitution.

209. As a proximate result of the excessive force wielded against them, Plaintiffs sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiffs great pain and suffering, both mental and physical, and accordingly each Plaintiff is entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, and DOE Nos. 1-18, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

FOURTH CAUSE OF ACTION
(Excessive Force—Eighth Amendment Cruel and Unusual Punishment)

210. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 209.

211. The unprovoked, unjustified, willful, and malicious intentional beatings of Plaintiffs by Defendants BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, and DOE Nos. 1-18 constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by failing to take reasonable measures to prevent and/or to remedy their subordinates' abuse of Plaintiffs, violated the Eighth Amendment's prohibition against cruel and unusual punishment.

212. As a proximate result of the excessive force wielded against them, Plaintiffs sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiffs great pain and suffering, both mental and physical, and accordingly each Plaintiff is entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, and DOE Nos. 1-18, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

FIFTH CAUSE OF ACTION
(Interference with Right to Counsel—Sixth Amendment)

213. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 212.

214. By willfully and maliciously adopting, promulgating, failing to prevent, failing to remedy, and/or implementing the policy and practice under which Plaintiffs' access to counsel was substantially interfered with, Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, and COTTON violated Plaintiffs' right to counsel guaranteed by the Sixth Amendment of the United States Constitution.

215. As a result of Defendants' unlawful conduct, Plaintiffs have suffered emotional distress, humiliation, and embarrassment, and accordingly each Plaintiff is entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS,

and COTTON jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

SIXTH CAUSE OF ACTION
(Denial of Medical Treatment—Fifth Amendment Due Process)

216. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 215.

217. By denying Plaintiffs their right to adequate medical examination and care, Defendants LORENZO, COTTON, ORTIZ, and SHACKS deprived Plaintiffs of their liberty and property without due process of law in violation of the Fifth Amendment to the United States Constitution.

218. As a result of Defendants' unlawful conduct, Plaintiffs sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiffs great emotional distress and physical pain and suffering, and accordingly each Plaintiff is entitled to compensatory damages against LORENZO, COTTON, ORTIZ, and SHACKS jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

SEVENTH CAUSE OF ACTION
(Denial of Medical Treatment—Eighth Amendment Cruel and Unusual Punishment)

219. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 218.

220. By denying Plaintiffs their right to adequate medical examination and care, Defendants LORENZO, COTTON, ORTIZ, and SHACKS exhibited deliberate indifference to Plaintiffs' serious medical needs in violation of the Eighth Amendment to the United States Constitution.

221. As a result of Defendants' unlawful conduct, Plaintiffs sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiffs great emotional distress and physical pain and suffering, and accordingly each Plaintiff is entitled to compensatory damages against LORENZO, COTTON, ORTIZ, and SHACKS jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

EIGHTH CAUSE OF ACTION
(Conditions of Confinement—Eighth Amendment Due Process)

222. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 221.

223. By willfully and maliciously subjecting Plaintiffs to outrageous, excessive, cruel, inhuman and degrading conditions of confinement, including the denial of adequate nutrition, the denial of adequate exercise, the imposition of unnecessary and unlawful strip and body-cavity searches, extended detention in solitary confinement, and subjection to unprovoked and unjustified physical and emotional abuse, Defendants BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON,

MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, and DOE Nos. 1-19, acting under color of law and their authority as federal officers, subjected Plaintiffs to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by failing to take reasonable measures to prevent and/or to remedy Plaintiffs' mistreatment, subjected Plaintiffs to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

224. As a result of Defendants' unlawful conduct, Plaintiffs have suffered severe pain and suffering, including physical injuries, emotional distress, humiliation, and embarrassment, and accordingly each Plaintiff is entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

NINTH CAUSE OF ACTION
(Unreasonable Strip and Body Cavity-Searches—Fourth Amendment)

225. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 224.

226. By willfully and maliciously adopting, promulgating, failing to prevent, failing to remedy, and/or im-

plementing the policy and practice under which Plaintiffs were repeatedly subjected to unreasonable and unjustified strip and body-cavity searches, Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, CUSH, GUSSAK, ORTIZ, BARRERE, COTTON, DEFRANCISCO, DIAZ, MUNDO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 17-19 subjected Plaintiffs to unreasonable searches and seizures in violation of the Fourth Amendment to the United States Constitution.

227. As a result of Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, CUSH, GUSSAK, ORTIZ, BARRERE, COTTON, DEFRANCISCO, DIAZ, MUNDO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 17-19's unlawful conduct, Plaintiffs suffered physical injuries, emotional distress, humiliation, and embarrassment. Plaintiffs are therefore entitled to compensatory damages against SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, CUSH, GUSSAK, ORTIZ, BARRERE, COTTON, DEFRANCISCO, DIAZ, MUNDO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 17-19 jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

TENTH CAUSE OF ACTION
(Interference With Religious Practice—First Amendment)

228. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 227.

229. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, and SHACKS, by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of interfering with Plaintiffs' religious practices, violated Plaintiffs' rights under the First Amendment to the United States Constitution.

230. As a result, Plaintiffs suffered extreme emotional distress and accordingly are entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, and SHACKS, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

ELEVENTH CAUSE OF ACTION
(Discrimination Against Muslims—First Amendment)

231. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 230.

232. Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, and SHACKS, by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of imposing harsher conditions of confinement on Plaintiffs because of Plaintiffs' sincere religious beliefs violated Plaintiffs' rights under the First Amendment to the United States Constitution.

233. As a result, Plaintiffs suffered extreme physical injuries and emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, and SHACKS, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

TWELFTH CAUSE OF ACTION
(Race Discrimination—Fifth Amendment Equal Protection)

234. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 233.

235. Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of imposing harsher conditions of confinement on Plaintiffs because of Plaintiffs' race violated Plaintiffs' rights under the Fifth Amendment to the United States Constitution.

236. As a result, Plaintiffs suffered extreme physical injuries and emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against ASHCROFT, MUELLER, ROLINCE,

MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

THIRTEENTH CAUSE OF ACTION
(Conditions of Confinement—RFRA)

237. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 236.

238. Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of imposing harsher conditions of confinement on Plaintiffs because of Plaintiffs' sincere religious beliefs, substantially burdened Plaintiffs' religious exercise and belief, without any legitimate justification, in violation of 42 U.S.C. §§ 2000bb-1.

239. As a result, Plaintiffs suffered extreme physical injuries and emotional distress, including permanent injuries, and accordingly are entitled to compensatory

damages against ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

FOURTEENTH CAUSE OF ACTION
(Interference With Religious Practice—RFRA)

240. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 239.

241. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, and SHACKS, by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of confiscating Plaintiffs' religious materials, regularly interrupting Plaintiffs' daily prayers, and denying Plaintiffs access to Friday prayers, substantially burdened Plaintiffs' religious exercise and belief, without any legitimate justification, in violation of 42 U.S.C. §§ 2000bb-1.

242. As a result, Plaintiffs suffered extreme emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, SHACKS, and COTTON jointly and severally in an amount to be determined at trial and punitive damages

against each Defendant in an amount to be determined at trial.

FIFTEENTH CAUSE OF ACTION
(Excessive Force—RFRA)

243. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 242.

244. Defendants BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, and DOE Nos. 1-18, by brutally beating and verbally abusing Plaintiffs because of Plaintiffs' sincere religious beliefs, imposed a substantial burden on Plaintiffs' religious exercise and belief, without any legitimate justification, in violation of 42 U.S.C. §§ 2000bb-1. Defendants, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by failing to take reasonable measures to prevent and/or to remedy their subordinates' abuse of Plaintiffs, acted in violation of 42 U.S.C. §§ 2000bb-1.

245. As a result, Plaintiffs suffered extreme physical injuries and emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, SHACKS, and DOE Nos. 1-18, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

SIXTEENTH CAUSE OF ACTION
(Religious Discrimination—42 U.S.C. § 1985(3))

246. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 245.

247. Defendants, by engaging in the following conduct, agreed to deprive Plaintiffs of the equal protection of the laws and of equal privileges and immunities of the laws of the United States because of Plaintiffs' sincere religious belief, resulting in injury to Plaintiffs' person and property, in violation of 42 U.S.C. § 1985(3): Defendants ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS's agreement to subject Plaintiffs to unnecessarily harsh conditions of confinement in ADMAX SHU without due process of law; Defendants BARRERE, BECK, BLEDSOE, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, and OSTEEN's agreement to brutally mistreat Mr. ELMAGHRABY on or about October 1, 2001; Defendants DOE Nos. 2-16's agreement to brutally assault Mr. IQBAL on or about January 8, 2002; Defendants CUSH, DEFRANCISCO, OSTEEN, and DOE Nos. 17-18's agreement to subject Mr. IQBAL to unnecessary strip and body-cavity searches on or about March 20, 2002, and brutally beat him in response to his peaceful protest of the searches; Defendants BECK, ORTIZ, BARRERE, MUNDO, and OSTEEN's agreement on or about October 1, 2001 to conduct an extreme and cruel body-cavity search of Mr. ELMAGHRABY during which Defendant BARRERE willfully and maliciously inserted a flashlight into Mr. ELMAGHRABY's anal cavity; Defendants MUNDO,

COTTON, DEFRANCISCO, and OSTEEN's agreement on or about January 8, 2002 to conduct an extreme and cruel strip search of Mr. ELMAGHRABY in which Defendant COTTON willfully and maliciously pushed a pencil into Mr. ELMAGHRABY's anal cavity; Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS's agreement to subject Plaintiffs to unnecessary and extreme strip and body-cavity searches as a matter of policy; Defendants SHACKS, PEREZ, DEFRANCISCO, TORRES, and COTTON's agreement to routinely confiscate Mr. IQBAL's Koran; and Defendants THOMAS, HASTY, ZENK, SHACKS, COTTON, and BARRERE's agreement to substantially burden Mr. ELMAGHRABY's religious practice while he was housed in ADMAX SHU.

248. As a result, Plaintiffs suffered extreme physical injuries and emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, SHACKS, and DOE Nos. 2-18 jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

SEVENTEENTH CAUSE OF ACTION
(Race and National Origin Discrimination—42 U.S.C. § 1985(3))

249. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 248.

250. Defendants, by engaging in the following conduct, agreed to deprive Plaintiffs of the equal protection of the laws and of equal privileges and immunities of the laws of the United States because of Plaintiffs' race and/or national origin, resulting in injury to Plaintiffs' person and property, in violation of 42 U.S.C. § 1985(3): Defendants ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS's agreement to subject Plaintiffs to unnecessarily harsh conditions of confinement in ADMAX SHU without due process of law; Defendants BARRERE, BECK, BLEDSOE, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, and OSTEEN's agreement to brutally mistreat Mr. ELMAGHRABY on or about October 1, 2001; Defendants DOE Nos. 2-16's agreement to brutally assault Mr. IQBAL on or about January 8, 2002; Defendants CUSH, DEFRANCISCO, OSTEEN, and DOE Nos. 17-18's agreement to subject Mr. IQBAL to unnecessary strip and body-cavity searches on or about March 20, 2002, and brutally beat him in response to his peaceful protest of the searches; Defendants BECK, ORTIZ, BARRERE, MUNDO, and OSTEEN's agreement on or about October 1, 2001 to conduct an extreme and cruel body-cavity search of Mr. ELMAGHRABY during which Defendant BARRERE willfully and maliciously inserted a flashlight into Mr.

ELMAGHRABY's anal cavity; Defendants MUNDO, COTTON, DEFRANCISCO, and OSTEEN's agreement on or about January 8, 2002 to conduct an extreme and cruel strip search of Mr. ELMAGHRABY in which Defendant COTTON willfully and maliciously pushed a pencil into Mr. ELMAGHRABY's anal cavity; Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS's agreement to subject Plaintiffs to unnecessary and extreme strip and body-cavity searches as a matter of policy; Defendants SHACKS, PEREZ, DEFRANCISCO, TORRES, and COTTON's agreement to routinely confiscate Mr. IQBAL's Koran; and Defendants THOMAS, HASTY, ZENK, SHACKS, COTTON, and BARRERE's agreement to substantially burden Mr. ELMAGHRABY's religious practice while he was housed in ADMAX SHU.

251. As a result, Plaintiffs suffered extreme physical injuries and emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, SHACKS, and DOE Nos. 2-18 jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

EIGHTEENTH CAUSE OF ACTION
(Assault and Battery—FTCA)

252. Plaintiff IQBAL repeats and reallege [*sic*] as if fully set forth herein the allegations contained in paragraphs numbered 1 through 251.

253. Defendants BARRERE, BECK, CUSH, GUSSAK, ORTIZ, DEFRANCISCO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 1-18, by kicking, punching, and beating Plaintiff IQBAL without consent, intentionally caused offensive and harmful contact with Plaintiff IQBAL, so as to constitute battery under the laws of New York State, where the relevant acts took place. The batteries committed upon Plaintiff IQBAL were not related to any penological interest. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by negligently failing to take reasonable measures to prevent and/or remedy their subordinates' abuse of Plaintiff IQBAL, violated the laws of New York State.

254. In committing the unprovoked and unjustified batteries upon Plaintiff IQBAL in a willful and malicious manner, Defendants BARRERE, BECK, CUSH, GUSSAK, ORTIZ, DEFRANCISCO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 1-18 placed Plaintiff IQBAL in imminent apprehension of offensive and harmful contact, so as to constitute assault under the laws of New York State.

255. Defendants ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, CUSH, GUSSAK, DEFRANCISCO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 1-18 were acting within the scope of their employment by the United States when Plaintiff IQBAL was subjected to the batteries

and were working as law enforcement officers as defined by 28 U.S.C. § 2680(h).

256. Pursuant to 28 U.S.C. § 2675(a), the claims set forth herein were timely presented to the Bureau of Prisons on November 3, 2003 and the said claims were denied on April 27, 2004.

257. As a proximate result of the assault and batteries committed against him, Plaintiff IQBAL sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiff IQBAL great pain and suffering, both mental and physical, and accordingly he is entitled to compensatory damages against the UNITED STATES OF AMERICA in an amount to be determined at trial.

NINTEENTH [*sic*] CAUSE OF ACTION
(Negligent Denial of Medical Treatment—FTCA)

258. Plaintiff IQBAL repeats and realleges as if fully set forth herein the allegations contained in paragraphs numbered 1 through 257.

259. By refusing to provide Plaintiff IQBAL with adequate medical examination and care, Defendants LORENZO, COTTON, SHACKS, acting under color of federal law and their authority as federal officers, have breached their duty under 18 U.S.C. § 4042(a)(2) to take ordinary diligence or reasonable care to keep Plaintiff IQBAL safe and free from harm, so as to constitute negligence under the laws of New York State, where the relevant actions took place.

260. Pursuant to 28 U.S.C. § 2875(a), the claims set forth herein were timely presented to the Bureau of Prisons on November 3, 2003 and the said claims were denied on April 27, 2004.

261. As a result of Defendants' unlawful conduct, Plaintiff IQBAL sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiff IQBAL great emotional distress and physical pain and suffering, and accordingly Plaintiff is entitled to compensatory damages against the UNITED STATES OF AMERICA in an amount to be determined at trial.

TWENTIETH CAUSE OF ACTION
(Intentional Infliction of Emotional Distress—FTCA)

262. Plaintiff IQBAL repeats and realleges as if fully set forth herein the allegations contained in paragraphs numbered 1 through 261.

263. Defendants BARRERE, BECK, CUSH, GUSSAK, ORTIZ, DEFRANCISCO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 1-18, acting under color of law and their authority as federal officers, maliciously subjected Plaintiff IQBAL to outrageous conduct of repeated instances of assault and batteries, extreme strip and body cavity-searches, the denial of medical treatment and adequate nutrition, extended detention in solitary confinement, deliberate interference with their rights to counsel and to exercise of their religious beliefs and practices with the intent to causing [*sic*] and reckless disregard of a substantial probability of causing several emotional distress and physical pain and suffering. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, by negligently failing to take reasonable measures to prevent and/or to remedy their subordinates' abuse of Plaintiff IQBAL violated the laws of New York State.

264. Pursuant to 28 U.S.C. § 2875(a), the claims set forth herein were timely presented to the Bureau of

Prisons on November 3, 2003 and the said claims were denied on April 27, 2004.

265. As a result, Plaintiff IQBAL suffered extreme and lasting emotional distress, humiliation, embarrassment, and permanent physical injuries, and accordingly is entitled to compensatory damages against the UNITED STATES OF AMERICA in an amount to be determined at trial.

TWENTY-FIRST CAUSE OF ACTION
(Cruel, Inhuman, or Degrading Treatment—Customary International Law[])

266. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 265.

267. The acts described herein had the intent and the effect of grossly humiliating Plaintiffs, forcing them to act against their will and conscience, inciting fear and anguish, and breaking their physical and moral resistance.

268. The acts described herein constituted cruel, inhuman or degrading treatment in violation of the law of the nations under the Alien Tort Claims Act, 28 U.S.C. § 1350, in that the acts violated customary international law prohibiting cruel, inhuman or degrading treatment as reflected, expressed, and defined in multilateral treaties and other international treatments, international and domestic judicial decisions.

269. Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE,

CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19 are liable for said conduct in that Defendants, acting under the color of law and their authority as federal officers, directed, ordered, confirmed, ratified and/or conspired to cause cruel, inhuman or degrading treatment of Plaintiffs.

270. Plaintiffs were forced to suffer severe physical and psychological abuse and emotional distress and are entitled to monetary damages.

JURY DEMAND

Plaintiffs demand a trial by jury. Plaintiff IQBAL does not demand trial by jury for his claims arising under the FTCA.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs respectfully request that a judgment be granted as follows:

a. Awarding compensatory and punitive damages to Plaintiffs for Defendants' violations of constitutional law, federal statutory law, customary international law, and local law, which caused Plaintiffs to suffer physical and emotional harm, in an amount that is fair, just, reasonable and in conformity with the evidence;

b. Awarding Plaintiffs attorney's fees and costs pursuant to 42 U.S.C. § 1988 and N.Y.C. Code § 8-502; and,

c. Such other relief as this Court deems just and proper.

Dated: New York, New York
September 30, 2004

THE URBAN JUSTICE CENTER
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