UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN; ASIF-UR-REHMAN SAFFI; SYED AMJAD ALI JAFFRI, YASSER EBRAHIM; HANY IBRAHIM; SHAKIR BALOCH; AKHIL SACHDEVA; and ASHRAF IBRAHIM, on behalf of themselves and all others similarly situated, Plaintiffs, v. JOHN ASHCROFT, Attorney General of the United States; ROBERT MUELLER, Director Federal Bureau of Investigations; JAMES W. ZIGLAR, former Commissioner, Immigration and Naturalization Service; DENNIS HASTY, former Warden, Metropolitan Detention Center (MDC); MICHAEL ZENK, MDC Warden; MDC Associate Warden for Custody SHERMAN; MDC Captain SALVATORE LOPRESTI; MDC Lieutenants STEVEN BARRERE, WILLIAM BECK, LINDSEY BLEDSOE, JOSEPH CUCITI, HOWARD GUSSAK, MARCIAL MUNDO, DANIEL ORTIZ, STUART PRAY, and ELIZABETH TORRES, and MDC Correctional Officers PHILLIP BARNES, SIDNEY CHASE, MICHAEL DEFRANCISCO, RICHARD DIAZ, KEVIN LOPEZ, MARIO MACHADO, MICHAEL MCCABE, RAYMOND MICKENS, JOHN OSTEEN, BRIAN RODRIGUEZ, SCOTT ROSEBERY, and CHRISTOPHER WITSCHEL, MDC Counselors RAYMOND COTTON, CUFFEE, and CLEMMET SHACKS; JOHN DOES 1-20, Metropolitan Detention Center Corrections Officers; and the UNITED STATES, Defendants.	)	Civil Action No. 02 CV 2307 (JG) (Gleeson, J.)

REPLY MEMORANDUM IN FURTHER SUPPORT OF PARTIAL MOTION TO DISMISS ON BEHALF OF THE UNITED STATES AND MOTION TO DISMISS ON BEHALF OF DEFENDANTS JOHN ASHCROFT, ROBERT MUELLER, JAMES W. ZIGLAR DENNIS HASTY, AND MICHAEL ZENK

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 1

I. PLAINTIFFS HAVE WITHDRAWN THEIR REQUESTS FOR EQUITABLE RELIEF IN CLAIMS 1-7 AND 17-23. 1

II. THE INA PRECLUDES PLAINTIFFS' CLAIMS THAT ARISE OUT OF THE PROCEEDINGS TO REMOVE PLAINTIFFS (CLAIMS 1, 2, 5, AND 17-22) 2

A. This Court Lacks Jurisdiction Over Those Claims That Could Have Been Presented To The Administrative Agency In The First Instance And To The Court Of Appeals In A Petition For Review (Claims 17-19 And 21-22) 2

B. The INA Precludes Review Of The Discretionary Decisions Made In Plaintiffs' Cases 5

III. THE INA CONSTITUTES A SPECIAL FACTOR THAT MILITATES AGAINST JUDICIAL RECOGNITION OF A BIVENS REMEDY IN CLAIMS 1, 2, 4-7, AND 17-22. 6

IV. THE ABSENCE OF PERSONAL JURISDICTION HAS BEEN TIMELY ASSERTED AND WARRANTS DISMISSAL 6

V. EVEN IF THIS COURT REACHES THE MERITS OF PLAINTIFFS' CLAIMS, IT SHOULD DISMISS THOSE CLAIMS UNDER THE QUALIFIED IMMUNITY DOCTRINE 7

A. Plaintiffs' Generic Allegations Fail To State A Claim Of Supervisory Liability 7

1. Agency Heads 9

2. Wardens 12

B. Plaintiffs Fail To Show A Violation Of Any Clearly Established Constitutional Rights 14

1. Claims 1 And 2 (Post-Order Detention) 15

2. Claim 17 (Notices To Appear) 18

3. Claims 18 and 19 (Denial of Bond) 22

4. Claims 5 and 19 (Equal Protection) 24

5. Claim 7 (Free Exercise Of Religion) 25

6. Claims 3, 20 and 23 (Conditions Of Confinement) 26

a. Claim 3 (MDC Conditions) 26

b. Claim 20 (Assignment To The ADMAX SHU) 28

7. Claim 8 (Deprivation of Property) 30

8. Claims 21 and 22 (Communications Restrictions) 30

VI. THE UNITED STATES MUST BE SUBSTITUTED WITH RESPECT TO PLAINTIFFS' INTERNATIONAL LAW CLAIMS, WHICH THEN MUST BE DISMISSED BECAUSE THEY ARE BARRED BY SOVEREIGN IMMUNITY (CLAIMS 9, 10, 11) 33

VII. THE FTCA'S JURISDICTIONAL PROVISIONS NECESSITATE DISMISSAL OF CLAIMS 24, 25, 26 (IN PART), AND 30 34

A. Because Plaintiffs Were Lawfully Detained, Their Claim Of False Imprisonment Must Be Dismissed (Claim 24) 34

B. Because It Is Both Barred By Section 2680(a) And Not Cognizable Under Section 1346(b), Plaintiffs' Claim Of Negligent Delay In The Clearance Process Must Be Dismissed (Claim 25) 35

C. Plaintiffs' Claim Of Conversion Must Be Dismissed Under The Detention Of Goods Exception (Claim 30) 38

D. Because Plaintiffs Baloch, Saffi And A. Ibrahim Failed To Allege A Single Fact To Put BOP On Notice That They Sought And Were Denied Medical Care, Their Claims For Deprivation Of Medical Treatment Must Be Dismissed (Claim 26) 39

CONCLUSION 40

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

Adras v. Nelson,
917 F.2d 1552 (11th Cir. 1990) 36

Allen v. Coughlin,
64 F.3d 77 (2d Cir. 1995) 31

Anderson v. Recore,
317 F.3d 194 (2d Cir. 2003) 15

Arango-Aradondo v. INS,
13 F.3d 610 (2d Cir. 1994) 3, 25

Benjamin v. Fraser,
264 F.3d 175 (2d Cir. 2001) 27, 28, 33

Booth v. Churner,
532 U.S. 731 (2001) 4

Bowers v. Hardwick,
478 U.S. 186 (1986) 19

Brosseau v. Haugen,
125 S. Ct. 596 (2004) 14, 27

Bush v. Lucas,
462 U.S. 367 (1983) 6

Butenko v. United States,
494 F.2d 593 (3d Cir. 1974) 29

Butz v. Economou,
438 U.S. 478 (1978) 9

Caban v. United States,
671 F.2d 1230 (2d Cir. 1982) 36

Caban v. United States,
728 F.2d 68 (2d Cir. 1984) 35

Car Carriers, Inc. v. Ford Motor Co.,
745 F.2d 1101 (7th Cir. 1984),
cert. denied, 470 U.S. 1054 (1985) 34

Carlson v. Landon,
342 U.S. 524 (1954) 23

Center for National Security Studies v. DOJ ("CNSS"),
331 F.3d 918 (D.C. Cir. 2003) 27, 29

Chapa v. United States,
339 F.3d 388 (5th Cir. 2003) 39

Christopher v. Harbury,
536 U.S. 403 (2002) 32, 33

Clemente v. United States,
567 F.2d 1140 (1st Cir.), cert. denied,
435 U.S. 1006 (1978) 38

Coulthurst v. United States,
214 F.3d 106 (2d Cir. 2000) 35, 36, 37

County of Riverside v. McLaughlin,
500 U.S. 44 (1991) 16, 18, 19, 20

Deutsch v. United States,
2004 WL 633236 (E.D.N.Y. Mar. 19. 2004) 39

Doherty v. Thornburgh,
943 F.2d 204 (2d Cir. 1991) 16, 19, 22, 23

Ex Parte Hull,
312 U.S. 546 (1941) 32

Ford v. Moore,
237 F.3d 156 (2d Cir. 2001) 8

Garnay, Inc. v. M/V Lindo Maersk,
816 F. Supp. 888 (S.D.N.Y. 1993) 39

Gilmore v. Shearson/American express Inc.,
811 F.2d 108 (2d Cir. 1987) 6, 7

Graham v. Connor,
490 U.S. 386 (1989) 16

Grove Press, Inc. v. Angleton,
649 F.2d 121 (2d. Cir. 1981) 7

Hallock v. United States,
253 F. Supp. 2d 361 (N.D.N.Y. 2003) 39

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 30

Houghton v. FBI,
1999 WL 1133346 (S.D.N.Y. Dec. 10, 1999) 39

Ho v. Greene,
204 F.3d 1045 (10th Cir. 2000) 17

Ex Parte Hull,
312 U.S. 546 (1941) 31

INS v. Lopez-Mendoza,
468 U.S. 1032 (1984) 16, 19

INS v. St. Cyr,
533 U.S. 289 (2001) 3

J.G. v. Board of Education,
830 F.2d 444 (2d Cir. 1987) 5

Kiareldeen v. Reno,
71 F. Supp. 2d 402 (D.N.J. 1999) 19

Kleindienst v. Mandel,
408 U.S. 753 (1972) 31

Lattab v. Ashcroft,
384 F.3d 8 (1st Cir. 2004) 18

Marrero Pichardo v. Ashcroft,
374 F.3d 46 (2d Cir. 2004) 4

Matthews v. Eldridge,
424 U.S. 319 (1976) 28

McCarthy v. Madigan,
503 U.S. 140 (1992) 4

McKenna v. Wright,
386 F.3d 432 (2d Cir. 2004) 9

Miller v. Norris,
247 F.3d 736 (8th Cir. 2001) 5

Mitchell v. Forsyth,
472 U.S. 511 (1985) . . . . 14, passim

Palay v. United States,
349 F.3d 418 (7th Cir. 2003) 40

Parratt v. Taylor,
451 U.S. 527 (1981) 30

Poe v. Leonard,
282 F.3d 123 (2d Cir. 2002) 13, 14

Reading Intern., Inc. v. Oaktree Capital Management LLC,
317 F. Supp. 2d 301 (S.D.N.Y. 2003) 34

Reno v. American-Arab Anti-Discrimination Committee ("AADC"),
525 U.S. 471 (1999) . . . . 2, passim

Reno v. Flores,
507 U.S. 292 (1993) 21

Riley v. Dorton,
115 F.3d 1159 (4th Cir. 1997) 16

Robertson v. Sichel,
127 U.S. 507 (1888) 9

Salim v. Proulx,
93 F.3d 86 (2d Cir. 1996) 26

Saucier v. Katz,
533 U.S. 194 (2001) 14, 27, 31

Schlaebitz v. United States,
924 F.2d 193 (11th Cir. 1991) 39

Schrieber v. United States,
1997 WL 563338 (S.D.N.Y. Sept. 8, 1997) 39

Schweiker v. Chilicky,
487 U.S. 412 (1988) 6

Shields v. Citytrust Bancorp., Inc.,
25 F.3d 1124 (2d Cir. 1994) 6, 7

Simon v. Eastern Ky. Welfare Rights Organization,
426 U.S. at 40 18

Simpson v. Gallant,
231 F. Supp. 2d 341 (D. Me. 2002) 32

Straker v. Met. Transit Authority,
333 F. Supp. 2d 91 (E.D.N.Y. 2004) 8

Sunward Electronics, Inc. v. McDonald,
362 F.3d 17 (2d Cir. 2004) 7

Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) 7, 8

Tellier v. Fields,
280 F.3d 69 (2d Cir. 2000) 27

Turner v. Safely,
482 U.S. 78 (1987) 30, 31

United States ex. rel. Potash v. District Director of Immigration & Naturalization, New York,
169 F.2d 747 (2d Cir. 1948) 22, 23

United States v. Armstrong,
517 U.S. 456 (1996) 25

United States v. Duggan,
743 F.2d 59 (2d Cir. 1984) 29

United States v. Gaubert,
499 U.S. 315 (1991) 35, 36

United States v. Gonzalez-Roque,
301 F.3d 39 (2d Cir. 2002) 3

United States v. Perez,
330 F.3d 97 (2d Cir. 2003) 33

United States v. Stanley,
483 U.S. 669 (1987) 6

United States v. Varig Airlines,
467 U.S. 797 (1984) 36, 38

United States v. Yousef,
327 F.3d 56 (2d Cir. 2003) 33

Valencia v. Wiggins,
981 F.2d 1440 (5th Cir. 1993) 16

Vickers v. United States,
228 F.3d 944 (9th Cir. 2000) 35, 36, 37

Wilkinson v. Austin,
125 S. Ct. 686 (2004), granting cert. from
372 F.3d 346 (6th Cir. 2004) 28

Wolff v. McDonnell,
418 U.S. 539 (1974) 28

Wynder v. McMahon,
360 F.3d 73 (2d Cir. 2004) 7, 8, 9, 13

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 24, 25

Ysasi v. Rivkind,
856 F.2d 1520 (Fed. Cir. 1988) 39

Zadvydas v. Davis,
533 U.S. 678 (2001) . . . . 10, passim

DOCKETED CASES

Clark v. Martinez,
No. 03-878 (Jan. 12, 2005) 10, 16

STATUTES

The Immigration and Nationality Act of 1952, as amended:

Section 236(a),
8 U.S.C. § 1226(a) 9, 22

Section 236(e),
8 U.S.C. § 1226(e) 2

Section 241(b)(2)(C),
8 U.S.C. § 1231(b)(2)(C) 17

Section 241(g)(1),
8 U.S.C. § 1231(g)(1) 2

Section 242(a)(1),
8 U.S.C. § 1252(a)(1) 2

Section 242(a)(2)(B)(ii),
8 U.S.C. § 1252(a)(2)(B)(ii) 2, 5

Section 242(a)(2)(B)(e),
8 U.S.C. § 1252(a)(2)(B)(e) 5

Section 242(a)(2)(B)(g),
8 U.S.C. § 1252(a)(2)(B)(g) 5

Section 242(b)(9),
8 U.S.C. § 1252(b)(9) 2, 3

Section 242(d)(1),
8 U.S.C. § 1252(d)(1) 2

Section 242(g),
8 U.S.C. § 1252(g) 2, 5

OTHER STATUTES

28 C.F.R. § 541.22 . . . . 28, 29

28 U.S.C. § 1346(b) 35, 36, 38

28 U.S.C. § 2674 38

28 U.S.C. § 2675(a) 34, 39

28 U.S.C. § 2680(a) 39

28 U.S.C. § 2680(c) 39

28 U.S.C. § 2680(h) 39

REGULATIONS

8 C.F.R. § 236.1(d) 9

8 C.F.R. § 236.1(d)(1) 3

8 C.F.R. § 236.1(d)(3) 3

8 C.F.R. § 287.3 21

8 C.F.R. § 1003.19(d) 21

8 C.F.R. § 541.22 29

8 C.F.R. § 541.22(c) 29

MISCELLANEOUS

Federal Rule of Civil Procedure 8(a) 7

INTRODUCTION

Plaintiffs fail to cite a single case in which a federal court has ever held that illegal aliens have a constitutional right to be removed (or otherwise released from detention) as soon as possible. Nor do Plaintiffs cite any authority for the proposition that the detention of illegal aliens is unconstitutional unless the Government serves a Notice to Appear within 48 hours, provides an immediate individualized bond hearing assessing flight risk and danger, and detains all other aliens who may be similarly situated. Thus, Plaintiffs are unable to show a violation of a clearly established constitutional right.

Moreover, Plaintiffs fail to demonstrate that they have adequately alleged any personal involvement by the Original Defendants. Indeed, Plaintiffs do not plead any facts showing that the Attorney General, the FBI Director, or the INS Commissioner had any personal involvement with the alleged conditions of confinement. Nor do they demonstrate how the wardens could be held personally liable for alleged policies that were far beyond their control. Accordingly, all of the constitutional claims against these Defendants should be dismissed. And because Plaintiffs' international law claims and FTCA claims at issue fare no better, they should be dismissed as well.

ARGUMENT

I. PLAINTIFFS HAVE WITHDRAWN THEIR REQUESTS FOR EQUITABLE RELIEF IN CLAIMS 1-7 AND 17-23.

In its Partial Motion to Dismiss Plaintiffs' Third Amended Complaint, the Government argued that "[t]his Court lacks Article III jurisdiction over all requests for equitable relief in claims 1-7 and 17-23 because Plaintiffs lack standing to obtain such relief." Govt. Mot. to Dismiss 8. In response, Plaintiffs have withdrawn their requests for declaratory relief, Pl. Opp. 5 n.4, have not asserted any claim for injunctive relief, and have not presented a single argument in

opposition to the Government's position on standing. Accordingly, this Court should dismiss all requests in claims 1-7 and 17-23 for equitable relief. Govt. Mot. to Dismiss 8-16.

II. THE INA PRECLUDES PLAINTIFFS' CLAIMS THAT ARISE OUT OF THE PROCEEDINGS TO REMOVE PLAINTIFFS (CLAIMS 1, 2, 5, AND 17-22).

This Court should dismiss on jurisdictional grounds those nine claims[1] in which Plaintiffs allege violations of their rights at several stages in the removal process (claims 1, 2, 5, and 17-22). Every one of these claims: (1) could have been raised during administrative removal proceedings and further pursued, if necessary, in a petition for review as provided by the Immigration and Nationality Act's (INA) exclusive judicial review provisions; or (2) implicate or interfere with the Executive's discretion as it relates to the removal process. See 8 U.S.C. § 1252(a)(1); 8 U.S.C. § 1252(b)(9); 8 U.S.C. § 1252(a)(2)(B)(ii); 8 U.S.C. § 1252(g); 8 U.S.C. § 1226(e); 8 U.S.C. § 1231(g)(1); Reno v. American-Arab Anti-Discrimination Committee ("AADC"), 525 U.S. 471 (1999).

A. This Court Lacks Jurisdiction Over Those Claims That Could Have Been Presented To The Administrative Agency In The First Instance And To The Court Of Appeals In A Petition For Review (Claims 17-19 And 21-22).

Plaintiffs do not dispute that they are precluded from asserting any claims that they could have, but did not, present to the administrative tribunal in the first instance and to the court of appeals in a petition for review. See 8 U.S.C. § 1252(b)(9), § 1252(d)(1). Nor do they dispute that they failed to exhaust claims 17-19 and 21-22. Instead, they contend, without any supporting authority, that they could not have raised these claims before the agency or the court of appeals. According to Plaintiffs, § 1252(a)(9) allows aliens only to "dispute the validity of

[1] Plaintiffs have withdrawn Claim 4 (alleging violations of the protections afforded under the Fifth Amendment with respect to self-incrimination) and Claim 6 (alleging a violation of the Sixth Amendment right to a speedy trial). Pl. Opp. 5 n.4.

th[eir removal] orders" and does not permit aliens to present the procedural "issues raised by Claims 17-19 and 21 and 22." Pl. Opp. 7. As demonstrated by the plain language of the INA and the case law in the Second Circuit, Plaintiffs' argument is meritless.

Section 1252(b)(9) of the INA provides for a broad scope of review, authorizing aliens to file a petition for review that challenges not only the validity of their removal order, but "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien." 8 U.S.C. § 1252(b)(9) (emphasis added). This encompasses due process claims alleging "procedural defects in deportation proceedings." United States v. Gonzalez-Roque 301 F.3d 39, 47-48 (2d Cir. 2002) (holding that alien's due process claims concerning government's failure to produce a document and the Immigration Judge's failure to grant a continuance were "essentially procedural" claims that the alien was required to present to Board of Immigration Appeals); see also AADC, 525 U.S. at 482-84. Claims 17, 18, and 19 assert that Plaintiffs were denied bond, a complaint that federal regulations specifically allow aliens to raise before the Immigration Judge and Board of Immigration Appeals. 8 C.F.R. § 236.1(d)(1), § 236.1(d)(3). And claims 17, 20, 21, and 22 assert that Plaintiffs were denied the effective assistance of counsel, an issue that the Second Circuit has squarely held can, and must, be presented to the agency in the first instance. Arango-Aradondo v. INS, 13 F.3d 610, 613-14 (2d Cir. 1994).

Plaintiffs cite only INS v. St. Cyr, 533 U.S. 289 (2001), Pl. Opp. 8 n.7, but St. Cyr is wholly inapposite. Influenced by Suspension Clause concerns, St. Cyr held that when the INA bars an alien from filing a petition for review in the court of appeals, the alien may file a habeas petition in certain circumstances. St. Cyr, 533 U.S. at 314-15. St. Cyr never addressed, much less authorized, aliens to bring Bivens claims to contest the procedures surrounding their

removal.

Plaintiffs' assertions that they were not subject to the INA's exhaustion requirement because review under the INA's procedures would have "come too late in the day," Pl. Opp. 8, or would have been futile, Pl. Opp. 9 n.8, are likewise unavailing. The INA's exhaustion requirement is mandatory and jurisdictional and thus not subject to judicially-created, common-law exceptions. See Booth v. Churner, 532 U.S. 731, 741 n.6 (2001) ("[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise."); see also Marrero Pichardo v. Ashcroft, 374 F.3d 46, 52-53 (2d Cir. 2004). Moreover, Plaintiffs' suggestion that the result of any immigration proceeding would have been pre-ordained is completely unsupported and speculative, especially given that Plaintiffs' INA claims would have been reviewed by the same federal court system in which they bring their current claims. See Pl. Opp. 9 n.8.

Nor can Plaintiffs evade the exhaustion requirement by arguing that they seek a damages remedy that is not allowed under the INA. Pl. Opp. 8. The Supreme Court has made clear that a statutory exhaustion requirement bars damages claims, even when those claims could not have been brought under the statute. Booth, 532 U.S. at 740-41 & n.6. The case Plaintiffs cite, McCarthy v. Madigan, 503 U.S. 140 (1992), based its holding on the fact that the statute required only that Plaintiffs exhaust those remedies that were "effective." Id. at 150. Where, as here, a plaintiff fails to comply with a statutory exhaustion scheme that includes no such qualification, the plaintiff is precluded from bringing a damages claim. See Booth, 532 U.S. at 740-41.[2]

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[2] Plaintiffs' allegations that Defendants interfered with the availability of administrative remedies are also insufficient to create an exception to the exhaustion requirement. See Pl. Opp. 9 n.8. The cases Plaintiffs cite involved either a statute that created a special exception to

B. The INA Precludes Review Of The Discretionary Decisions Made In Plaintiffs' Cases.

Plaintiffs' challenges to the Executive's actions to execute their removal orders, to assign them to particular detention facilities, and to deny them bond all implicate the Executive's discretion over immigration and foreign policy matters. Accordingly, these challenges are not judicially reviewable. See 8 U.S.C. § 1252(a)(2)(B)(ii), (e), (g); AADC, 525 U.S. at 486.

Plaintiffs contend that the plain language and intent of these judicial review provisions do not preclude consideration of their claims in this Court for, if they did, "they would bar judicial review of unconstitutional government action." Pl. Opp. 9. But Plaintiffs' argument misapprehends the streamlined judicial review procedures designed by Congress with respect to removal-related challenges, as set forth above. To the extent that Plaintiffs' claims are reviewable at all, they may be brought only by way of the express streamlining and channeling procedures provided under the INA. See AADC, 525 U.S. at 485. As the Supreme Court stated in AADC, they may not be "the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed." Id.; see also 8 U.S.C. § 1252(g). Plaintiffs should have pursued their claims as provided under the INA's exclusive judicial review scheme, and their failure to do so requires dismissal of their claims.

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exhaustion for the plaintiffs' claim, J.G. v. Bd. of Educ., 830 F.2d 444, 446-47 (2d Cir. 1987), or involved a plaintiff who claimed that he made repeated attempts to comply with the administrative process, but was never allowed to present his claims, Miller v. Norris, 247 F.3d 736, 738 (8th Cir. 2001) (plaintiff alleging that, despite his repeated requests, prison failed to provide him the requisite forms to file a complaint and thus denied him a forum to present his claims). Plaintiffs cite no statutory exception to exhaustion for their claim. And because Plaintiffs were provided notice of their rights and hearings before an Immigration Judge (during which Ebrahim and H. Ibrahim presented claims for bond, Th. Am. Cplt. ¶ 187), Plaintiffs cannot claim that they did not have a chance to present their claims.

III. THE INA CONSTITUTES A SPECIAL FACTOR THAT MILITATES AGAINST RECOGNITION OF A BIVENS REMEDY IN CLAIMS 1, 2, 4-7, AND 17-22.

Plaintiffs' argument that a Bivens remedy must be available because the INA does not provide "compensatory remedies" for constitutional violations, Pl. Opp. 13, ignores the Supreme Court's unequivocal holding in United States v. Stanley, 483 U.S. 669, 683 (1987): "[I]t is irrelevant to a 'special factors' analysis whether the laws currently on the books afford Stanley, or any other particular serviceman, an 'adequate' federal remedy for his injuries." What is important "is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion . . . by the judiciary is inappropriate." Id. This is precisely the point made in Bush v. Lucas, 462 U.S. 367 (1983). The special-factors-counseling-hesitation analysis looks to "who should decide whether a remedy should be provided," Congress or the Judicary. Id. at 380. Congress not only has developed "considerable familiarity" with the competing interests that arise in immigration and removal "but it also may inform itself through factfinding procedures such as hearings that are not available to the courts." Id. at 389. IIRIRA's judicial review construct by Congress represents "what it considers adequate remedial mechanisms," and "additional Bivens remedies" are not appropriate to augment the legislative scheme Congress has adopted. A federal court must decline to augment what Congress has provided. Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) (emphasis added).

IV. THE ABSENCE OF PERSONAL JURISDICTION HAS BEEN TIMELY ASSERTED AND WARRANTS DISMISSAL.

Citing Gilmore v. Shearson/American Express, Inc., 811 F.2d 108, 112 (2d Cir. 1987), Plaintiffs argue that lack of personal jurisdiction was waived as to Defendants Ashcroft, Mueller, and Ziglar. Cf., Shields v. Citytrust Bancorp., Inc., 25 F.3d 1124, 1128 (2d Cir. 1994) (failure to

comply with Rule 9 waived). Neither Gilmore nor Shields addressed whether the Federal Rules prohibit a defense of lack of personal jurisdiction from being asserted for the first time in response to a superceding, amended pleading. Unlike the defenses at issue in Gilmore and Shields, personal jurisdiction has constitutional footing, Sunward Electronics, Inc. v. McDonald, 362 F.3d 17, 24 (2d Cir. 2004), and is specifically addressed by Rule 12(h)(1), Fed.R.Civ.P. That Rule provides the defense is waived unless included in a motion under Rule 12(g). Rule 12(g), in turn, requires consolidation of defenses in a "motion under this rule" (unless the defense is one of those covered by Rule 12(h)(2, 3)).[3] Defendants' instant motion to dismiss is a motion made "under" Rule 12(b) in response to "any pleading," here an amended complaint permitted under Rule 15(a), and under the plain language of Rule 12 should be deemed timely.

V. EVEN IF THIS COURT REACHES THE MERITS OF PLAINTIFFS' CLAIMS, IT SHOULD DISMISS THOSE CLAIMS UNDER THE QUALIFIED IMMUNITY DOCTRINE.

A. Plaintiffs' Generic Allegations Fail To State A Claim Of Supervisory Liability.

Plaintiffs' argument that their allegations are sufficient to satisfy the notice pleading requirement of Federal Rule of Civil Procedure 8(a) applies the wrong standard to Defendants' motion. "[T]here is a critical distinction between the notice requirements of Rule 8(a) and the requirement, under Rule 12(b)(6), that a plaintiff state a claim upon which relief can be granted." Wynder v. McMahon, 360 F.3d 73, 80 (2d Cir. 2004) (discussing Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)). The fact that, under Rule 8(a), allegations that a "'common conspiratorial

[3] Discovery is not required to resolve personal jurisdiction. Plaintiffs have not pled any facts that government New York actors were "personal capacity" agents of the Attorney General, Director, or the Commissioner. Grove Press v. Angleton, 649 F.2d 121, 123 (2d Cir. 1981). And while Plaintiffs argue that defendants are estopped from asserting the defense after the limitations period expired, there has been no showing that Plaintiffs' action is time barred.

scheme'" can be inferred from "a wide array of acts and decisions by defendants," id at 75, does not mean that a plaintiff can survive a motion to dismiss under Rule 12(b)(6):

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

Id. at 80; see also Straker v. Met. Transit Auth., 333 F.Supp. 2d 91, 98-02 (E.D.N.Y. 2004).[4] This requirement not only embodies the basic predicate for Bivens claims – that the person sued violated the plaintiff's constitutional rights – but has special importance when a plaintiff sues officials from federal agencies. Plaintiffs cannot obscure the basic truism, reflected in the laws defining the authority and duties of federal agencies, that just as agency officials are charged with acting within their areas of responsibility, they must rely on others to act within their respective areas.[5] Mere incantations that violations resulted from 'policies and procedures' or "'common conspiratorial scheme[s]'" (as in Wynder, 360 F.3d at 75) are not sufficient to survive a Rule 12(b)(6) motion. Facts must be alleged from which it might be inferred that there were

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[4] We recognize that this Court's December 3, 2004 Order denying the motion to dismiss claims 3, 12-16, and 31 as to Defendants Hasty and Zenk relied on Swierkiewicz, 534 U.S. 506. The Court found that Plaintiffs had alleged with specificity facts regarding the wardens' responsibility for conduct at the MDC. See Dec, 3, 2004 Order 3.

[5] Even a cursory review of Plaintiffs' allegations make the point. A central focus of the complaint against the Original Defendants is Plaintiffs' assertion that they should not have been detained or treated as a special security risk housed in an ADMAX SHU when they could have been removed from the country. Yet, they do not allege that any of the Original Defendants were involved in the law enforcement judgment that individual Plaintiffs were of interest to the international terrorist investigation. See generally Ford v. Moore, 237 F.3d 156, 164 (2d Cir. 2001) (supervisory officer may rely on judgment of subordinates).

policies or procedures and that they may be attributed to the supervisor sued.[6] Plaintiff may not obfuscate the responsibilities of officers in different agencies by conclusory allegations. Plaintiffs are also incorrect when they argue that they have alleged specific allegations against each of the Original Defendants.

1. **Agency Heads.** Defendants Ashcroft, Mueller and Ziglar served as heads of the Department of Justice, the FBI and the INS, respectively. What strains credulity, to use Plaintiffs' phrase, is Plaintiffs' apparent suggestion that one may infer involvement or knowledge to an agency head in the execution of general policy by "a large body of subordinates." Robertson v. Sichel, 127 U.S. 507, 515 (1888). Contrary to Plaintiffs' contention, this Court in Wynder recognized that merely asserting a claim or allegation is "against" a defendant is a far cry from stating a claim upon which relief can be granted. See, e.g., Pl. Opp. 18 ("every allegation against 'Defendants' is against Ashcroft"). Plaintiffs' reliance on the OIG Report is similarly unavailing. Here, they argue that the Attorney General is the "likely architect of the no-bond and hold-until-cleared policies," Pl. Opp. 18, but Plaintiffs have not identified an 'unconstitutional policy' that would provide a basis for supervisory liability. Holding detainees without bond pending removal proceedings falls with the discretion Congress has given the Attorney General.[7] See 8 U.S.C. § 1226(a); see also Govt. Mot. to Dismiss 65-66 (citing cases). Similarly, detaining aliens under an order of removal for less than six months following the final

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[6] This Circuit's McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004), cited by Plaintiffs, expressly recognized that qualified immunity could be asserted on a Rule 12(b)(6) motion "as long as the defense is based on facts appearing on the face of the complaint."

[7] Insofar as Plaintiffs are claiming the Attorney General is responsible for actions of INS Trial Attorneys resisting bond in proceedings before Immigration Judges (Th. Am. Comp. ¶ 79; see 8 C.F.R. § 236.1(d)), they are attacking a quintessential advocate's function that is privileged conduct and protected by absolute quasi judicial immunity. Butz v. Economou, 438 U.S. 478, 516-17 (1978).

order of removal (as was the case here, see Govt. Mot. to Dismiss 40-41 n.18) does not state an 'unconstitutional policy,' even if attributed to the Attorney General. Zadvydas v. Davis, 533 U.S. 678, 699-702 (2001); accord Clark v. Martinez, No. 03-878, slip. op. (Jan. 12, 2005). Plaintiffs fare no better with arguing, this time without any citation, that the Attorney General is "clearly implicated in the policy of assigning special interest detainees to the ADMAX SHU and the communications blackout." Pl. Opp. 19. Even if Plaintiffs had alleged a set of facts that attributed this policy to the Attorney General (and they do not),[8] they are complaining of the implementation of 'policies' by persons in components of agencies within the Department of Justice. Plaintiffs may believe that they should not have been deemed a security concern, but this does not make the professional judgment of FBI officers, either directly or indirectly through the supervisory liability doctrine, an act of the Attorney General. Accordingly, they have failed to plead the personal involvement of the Attorney General.

Plaintiffs' claims against Director Mueller and Commissioner Ziglar similarly rest on their roles as agency heads. Plaintiffs cite Director Mueller's "daily oversight" as the head of the FBI, rather than facts showing personal involvement. Pl. Opp. 20.[9] In the aftermath of the

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[8] The section of the Report upon which Plaintiffs apparently rely reflects only that BOP ordered detainees placed in the "highest level of restrictive detention" and that there were subsequent discussions between the Director, BOP, and two officers at the Deputy Attorney General's staff who expressed concern about detainees' ability to communicate with persons outside and inside the detention facility and that specific pre-September 11 criminal inmates be placed on the "most secure conditions possible." OIG Rep. 112-13. Even with the benefit of the extensive Reports that resulted from the Inspector General's investigation, Plaintiffs do not point to facts that show the Attorney General was responsible for ordering a communications blackout, much less their placement in the ADMAX SHU.

[9] Plaintiffs cite only two references to the Director: a press conference September 14, 2001, in which he announced a watch list to identify potential hijackers and others who might be planning additional attacks (which does not form a part of Plaintiffs' claims) and his presence in meetings with officials where holding detainees with violations until cleared of terrorist connections was one of the subjects discussed. OIG Rep. 11, 39.

attacks, the professional men and women of the FBI were confronted with a daunting task, one vital to our very security, in investigating the leads and circumstances that potentially linked aliens unlawfully in our country to terrorist activities or persons involved in terrorist groups. Plaintiffs were in this country unlawfully, and their immigration violations – while perhaps "minor" to them, Pl. Opp. 1, – reasonably presented more serious concern to law enforcement and immigration officials after September 11. Plaintiffs' argument that the investigation should have cleared them more quickly does not state involvement by the Director.

As to Mr. Ziglar, Plaintiffs first allege that he directed the INS to hold September 11 detainees until the FBI cleared each detainee. Based on this single allegation, Plaintiffs seek to impose liability on Mr. Ziglar personally under Plaintiffs' nineteen preventive detention claims (claims 1-3, 5, and 7-22) and for what Plaintiffs call the "blanket no-bond" policy (claims 18 and 19). This single alleged action by Mr. Ziglar does not, given the sweeping nature of Plaintiffs' claims, establish the type of personal involvement in the wrongs alleged that gives rise to Bivens liability for a high-level official. Nor does this single allegation support their claims regarding the alleged no-bond policy, as they have pleaded no facts and pointed to nothing in the OIG Report that ties Mr. Ziglar into that policy, other than this allegation regarding Mr. Ziglar's directive, which did not mention any such policy.[10]

Second, Plaintiffs allege that Mr. Ziglar adopted a policy requiring that Notices to Apppear for all September 11 detainees be approved by INS headquarters before issuance, a policy adopted because of "glaring errors" in charging documents in early detainee cases. OIG

[10] Plaintiffs try to bolster the importance of this alleged directive by Mr. Ziglar by pointing to specific concerns that were raised that FBI clearance was taking too long and that liability might result. This reference has nothing to do with Mr. Ziglar and adds nothing to the analysis of the claims against him personally.

Rep. 32. Here again, the single allegation that Mr. Ziglar took steps to ensure that the notices to Appear were legally and factually correct before issuing them does not suffice to state a claim for supervisory liability for the extensive constitutional violations alleged in those three claims.

The balance of Plaintiffs' arguments regarding Mr. Ziglar have no weight. They argue that he is liable under claims 20-22 relating to the conditions of detention because he "was responsible in a supervisory capacity for all these decisions and therefore is implicated" in those claims. Pl. Opp. 20. By its very use of the words "responsible in a supervisory capacity" constitutes no more than an attempt to sidestep the prohibition on respondeat superior liability in Bivens actions. Plaintiffs' remaining references to Mr. Ziglar constitute the flimsiest type of makeweights that, even under Swierkiewicz, cannot state a claim against him under Bivens.

2. Wardens. Plaintiffs assert that they have properly pleaded the personal involvement of the wardens based on the fact that the wardens were "include[d]" in some of Plaintiffs' allegations. Pl. Opp. 22.[11] But, Plaintiffs' allegations against Wardens Hasty and Zenk relating to INS's delays in serving Notices to Appear, or a no-bond policy, or a hold-until-cleared policy, Th. Am. Comp. ¶¶ 376, 381, 386, 391, clearly involve determinations beyond the province and authority of a BOP Warden and thus do not state a claim against Hasty or Zenk under a supervisory liability – or any other – theory. Similarly, it strains the Bivens doctrine beyond its permissible limits to suggest that either warden could be held personally liable for the detainees being placed in ADMAX SHU based on the FBI's classification of them. Plaintiffs also argue that they state a claim because some inmates were kept in the ADMAX SHU after

[11] Plaintiffs concede that claims 1, 2, 5 and 8-11 do not lie against Hasty. Pl Opp. 22.

they were cleared by the FBI, but there is no allegation that this happened to Plaintiffs.[12] Further there are no allegations that Wardens Hasty or Zenk were given notice of this happening or notice of other alleged conduct that forms the basis of Plaintiffs' complaint. In this regard, it is noteworthy that the Inspector General, on whose reports Plaintiffs rely, found that "most MDC officers performed their duties in a professional manner." OIG Supp. Report 46. In short, no "set of facts has been identified that support a claim against" Wardens Hasty or Zenk on the claims that remain unresolved. Wynden, 360 F.3d at 80.

This failure to plead personal involvement is even more glaring with respect to Warden Zenk, who did not arrive at the MDC until April 2002, OIG Supp. Report 32 n.25, after all but two of the MDC Plaintiffs had been removed. Plaintiffs attempt to gloss over this fact by alleging that Ebrahim and H. Ibrahim "continued to suffer under his adherence to unlawful policies." Pl. Opp. 23. But this allegation is belied by the fact that nearly all of the harms Plaintiffs allege ended prior to Zenk's arrival, and by the fact that Ebrahim and H. Ibrahim were released only weeks after Zenk's arrival. Nor can Plaintiffs hold Zenk liable for actions that occurred before his arrival and of which he had no knowledge. "Supervisors cannot be expected to reinvent the wheel with every decision, for that is administratively unfeasible; rather, they are entitled to rely upon the decisions of their predecessors or subordinates so long as those decisions do not appear to be obviously invalid, illegal or otherwise inadequate." Poe v. Leonard, 282 F.3d 123, 144 (2d Cir. 2002); see also id. at 142 (incoming supervisor not liable for

[12] Plaintiff Baloch alleges he was released from the SHU to the general prison population upon being cleared. Th. Am. Comp. ¶ 212. The other MDC Plaintiffs were either in the SHU until their removal, id. ¶¶ 178 (Jaffee), 248 (A. Ibrahim), or do not address the issue.

"failing to review an inherited subordinate's personnel history upon assuming command").[13] Because Plaintiffs have asserted nothing more against Warden Zenk, their claims should be dismissed.

B. Plaintiffs Fail To Show A Violation Of Any Clearly Established Constitutional Rights.

Plaintiffs argue that the national emergency brought on by September 11 does not alter this Court's inquiry under the qualified immunity doctrine. Pl. Opp. 24. That is plainly false. The inquiry into whether a government actor violated clearly established law "'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) (per curiam) (citing Saucier v. Katz, 533 U.S. 194 (2001)). The "specific context" of this case involved the Executive's response to the most devastating attack in our nation's history perpetrated by an enemy hiding within our borders and determined to strike again. This Court must consider whether the pre-September 11 decisional law addressed the conduct plaintiffs' challenge in this specific context. This inquiry lies at the core of the Court's consideration of qualified immunity, as the Supreme Court's decision in Mitchell v. Forsyth, 472 U.S. 511 (1985) illustrates.

In any event, Plaintiffs would have failed to state a claim even if the alleged incidents had occurred in a time of repose. They fail to cite any authorities establishing that the Original Defendants violated any clearly established rights. Accordingly, this Court should dismiss all claims against the Original Defendants.

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[13] It is no argument that Poe was decided on summary judgment so the Court's reasoning has no application to a motion to dismiss. The Court of Appeals's decision informs the decisional law on deliberate indifference to the rights of others in order to impose supervisory liability, a standard Plaintiffs must satisfy with factual allegations and reasonable inferences in order to state a claim against a particular defendant.

1. Claims 1 And 2 (Post-Order Detention).

Plaintiffs contend that Zadvydas established a constitutional requirement that, in order to detain an alien after a removal order has issued, the Government must affirmatively show that the detention is "necessary to aid removal." Pl. Opp. 36. This assertion is meritless.

First, Zadvydas imposed no obligation on the Government to justify post-detention removal periods of less than six months. Rather, the Court held that a six-month period is reasonable and will not give rise to constitutional concerns. Zadvydas, 533 U.S. at 700-01. It is only "[a]fter this 6-month" period that the government must be prepared to justify continued detention. Id. at 701 (emphasis added). Plaintiffs cite no authority – in Zadvydas or otherwise – for their proposition that post-order detentions under six months can be unlawful or that the six-month safe-harbor is only a "rebuttable presumption." Pl. Opp. 38.[14] Further, allowing aliens to contest such detention would expose to litigation every post-order detention decision and require courts to engage in a thorny, fact-intensive inquiry into whether removal is possible – an inquiry that depends on considerations of foreign policy and that would undermine the "uniform administration of federal courts." Id. at 701. Thus, Plaintiffs have failed to demonstrate any clearly established rights under either the Fourth or Fifth Amendments.[15]

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[14] Contrary to Plaintiffs' contention, the Defendants are not required to prove that an alleged right does not exist. Pl. Opp. 47. Rather, Plaintiffs have the burden to produce a Supreme Court or Second Circuit case clearly establishing the right they assert. See Anderson v. Recore, 317 F.3d 194, 197 (2d Cir. 2003).

[15] The Zadvydas Court gave no indication that its holding would differ under a Fourth Amendment challenge, and Plaintiffs cite no case law and provide no analysis distinguishing Zadvydas on this ground. Indeed, Plaintiffs do not even dispute that if their Fifth Amendment claim fails, so does their Fourth Amendment claim.

Moreover, Plaintiffs' Fourth Amendment challenge fails for an additional reason: It is not clearly established that the Fourth Amendment applies at all to "continued detention . . . long after" the initial period of seizure and arrest. Pl. Opp. 45. Indeed, Plaintiffs seem to concede that the Supreme Court has not clearly established such a right. Pl. Opp. 47. As

Second, even if Zadvydas had recognized a right to challenge post-order detentions under six months, that right would not be a constitutional right. The Zadvydas Court explicitly declined to address the constitutional issues, instead basing its decision solely on statutory interpretation. Zadvydas, 533 U.S. at 700-01. Confirming that Zadvydas created no constitutional rights, the Court recently invited Congress to change the laws. Clark v. Martinez, No. 03-878, slip. op. at 14 & n.8 (Jan. 12, 2005).

Third, even if the Court had created constitutional rights, the Court expressly reserved the question of what temporal limits might apply when "terrorism or other special circumstances" are present. Zadvydas, 533 U.S. at 696. When the Supreme Court reserves decision on a constitutional issue, by definition, that issue is not clearly established. Mitchell v. Forsyth, 472

Plaintiffs note, Pl. Opp. 47, in Graham v. Connor, 490 U.S. 386 (1989), the Supreme Court specifically reserved the question of whether the Fourth Amendment continues to apply "beyond the point at which arrest ends and pretrial detention begins." Id. at 395. Nor did County of Riverside, 500 U.S. 44, answer the question. County of Riverside merely held that a "prompt probable cause hearing is necessary to justify warrantless arrest of a criminal suspect and said nothing about whether the Fourth Amendment continues to apply to subsequent detention. Moreover, it is well settled that rules of criminal procedure do not apply jot for jot in immigration proceedings, and thus Plaintiffs cannot rely on a criminal case to demonstrate a clearly established constitutional right in immigration proceedings. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984); accord Doherty v. Thornburgh, 943 F.2d 204, 210 (2d Cir. 1991).

Additionally, Plaintiffs cite no Second Circuit cases establishing that the Fourth Amendment applies to continued detentions (much less post-order detentions in the immigration context). Instead, Plaintiffs mischaracterize the case law from the Fourth and Fifth Circuits. Pl. Opp. 46 (citing Riley v. Dorton, 115 F.3d 1159, 1163-64 (4th Cir. 1997), and Valencia v. Wiggins, 981 F.2d 1440, 1444 (5th Cir. 1993)). In Riley and Valencia, the Fourth and Fifth Circuits noted only that the Second Circuit applies "the Fourth Amendment to the period between arrest and charge" and to the period before the suspect enters pretrial detention. Valencia, 981 F.2d at 1444 & nn.11-12; accord Riley, 115 F.3d at 1163-64. Neither of these holdings applies to claim 1, which challenges Plaintiffs' detention after arrest, charge, and final adjudication were completed, and in any event relates to immigration detention, not criminal detention.

U.S. 511, 542 (1985); see also Govt. Mot. to Dismiss 42-43.[16]

Recognizing that they have no substantive due process claim, Plaintiffs attempt to save claim 2 by asserting that it raises a valid procedural due process claim. Pl. Opp. 43-45. Plaintiffs assert, for the first time, that their post-removal detention was invalid because they were denied "notice of the reasons why they were det[ained]" and "a fair opportunity to contest their detention." Pl. Opp. 43. This claim, however, is entirely meritless. Like the substantive due process argument, it is predicated on the assertion that illegal aliens who have been ordered removed have a constitutionally cognizable liberty interest in being promptly removed or released from detention. That assertion is false. The final removal order "extinguishes" any such rights. Ho v. Greene, 204 F.3d 1045, 1058 (10th Cir. 2000), overruled on other grounds by Zadvydas, 533 U.S. at 700-01.[17] Plaintiffs cite no authority to the contrary.

To be sure, the Zadvydas Court did not resolve the constitutional issue, and instead allowed the constitutional "doubt" to remain. Zadvydas, 533 U.S. at 700-01. But that simply

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[16] Plaintiffs attempt to sidestep this caselaw by asserting that, at the time of Plaintiffs' detention, the Government had no national security interest in determining whether Plaintiffs had terrorist ties, because investigations later cleared Plaintiffs of any ties. Pl. Opp. 40. It is well settled that courts should evaluate Executive actions based on the evidence available at the time, not based on hindsight. E.g., Mitchell, 472 U.S. at 535. And it is indisputable that the Government had national security concerns in the wake of September 11. Additionally, Plaintiffs err in asserting that the Government's "sole" justification for detaining aliens after a removal-order is to conduct a security clearance. Pl. Opp. 37. After removal is ordered and all security clearances completed, the Government typically contacts the receiving country to verify the country will accept the alien. "[W]eighty considerations of foreign policy and national security [require providing] the fullest information possible to the receiving country to promote both its security and the security of the United States." OLC Op. 17-18 (attached). As a general matter, the Government allows the designated country at least 30 days to evaluate this information and to determine whether to accept the alien. 8 U.S.C. § 1231(b)(2)(C).

[17] Ho alleged a right to being released into the United States, as opposed to being removed. However, Plaintiffs have presented no case drawing a constitutional distinction, and there is no reason to expect that illegal aliens, who have refused to leave on their own, have a constitutional right to be removed as soon as they are discovered and detained.

confirms that there is no clearly established right. Moreover, even if there were a constitutionally protected liberty interest, Plaintiffs cite no authority for the notice-and-objection procedures that they claim are constitutionally required. Indeed, such procedures would be inconsistent with Zadvydas, which permits the Government to detain an alien for six months post-removal order, without having to justify that detention. At the very least, the issue is unresolved.

Finally, Plaintiffs cannot establish the requisite prejudice to sustain a procedural due process claim. See Lattab v. Ashcroft, 384 F.3d 8, 21 (1st Cir. 2004) ("It is beyond peradventure that before a petitioner in an immigration case may advance a procedural due process claim, he must allege some cognizable prejudice fairly attributable to the challenged process"). Plaintiffs have not alleged how notice of the reason for post-order detention would have resulted in their release from custody.

2. Claim 17 (Notices To Appear).

There is no merit to the claims by Plaintiffs Ebrahim, H. Ibrahim, Sachdeva, Jaffri, and A. Ibrahim that their Fifth Amendment rights were violated by waits of four to seventeen days[18] in receiving Notices to Appear. See Pl. Oppos. 26. Plaintiffs do not cite any Fifth Amendment cases to support their claim. Instead, they rely solely on one Fourth Amendment case, Pl. Oppos. 27 (County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991)), and contend that this Court should amend their complaint for them to recast claim 17 under the Fourth Amendment,

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[18] Plaintiffs' cannot piggy-back off the claim that unknown, "putative class members" suffered longer delays. Pl. Opp. 26. The named plaintiffs in a class action must possess independent standing to pursue each claim. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976).

despite the fact that Plaintiffs have already amended their complaint three times and, each time, have declined to assert claim 17 under the Fourth Amendment. See Pl. Opp. 28 n.23. Plaintiffs provide no valid authority for this contention. Indeed, recognizing that their contention is meritless, Plaintiffs cite the dissent in Bowers v. Hardwick, without representing that it is the dissent they are citing and without reporting the majority's contrary holding. Pl. Opp. 28 n.23 (citing Bowers v. Hardwick, 478 U.S. 186, 201(1986) (Blackmun, J., dissenting)). In fact, the Court in Bowers refused to do just what Plaintiffs ask of this Court – substitute alternate legal grounds in order to save the plaintiff's defective claims. Bowers, 478 U.S. at 196. Accordingly, this Court should dismiss claim 17.

In any event, even if Plaintiffs had pleaded claim 17 under the Fourth Amendment, the claim would still fail. The lone case on which Plaintiffs rely[19] is not an immigration case, but a criminal law case establishing a Fourth Amendment rule of criminal procedure. Pl. Oppos. 27 (citing County of Riverside, 500 U.S. 44). It is well settled that because immigration proceedings are civil in nature, "various protections that apply in the context of a criminal trial do not apply in a deportation hearing." INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984); accord Doherty v. Thornburgh, 943 F.2d 204, 210 (2d Cir. 1991) ("[T]he full trappings of legal protections that are accorded to criminal defendants are not necessarily constitutionally required in deportation proceedings." (internal quotation marks omitted)). The Supreme Court has emphasized that the Government's need for "streamlined" hearing system, "the quick resolution of very large numbers of deportation cases," and "mass arrests," indicate that it is generally not

[19] Plaintiffs make passing reference to Kiareldeen v. Reno, 71 F. Supp. 2d 402 (D.N.J. 1999), but the case is inapposite. Pl. Opp. 28, 30. Kiareldeen addressed whether the government could use "secret evidence" and hearsay testimony in immigration proceedings. Id. at 414-15. It did not address whether aliens in removal proceedings have a constitutional right to receive formal charging documents.

appropriate to import rules of criminal procedure into immigration proceedings. Id. at 1048 (holding that the Fourth Amendment exclusionary rule is not applicable in immigration proceedings). Thus, Plaintiffs cannot rely on a Fourth Amendment criminal case to demonstrate a violation of a clearly established right in immigration proceedings.

Even barring these difficulties, Plaintiffs' claim would fail for the simple reason that the sole case they cite, County of Riverside, is wholly irrelevant to their claim. County of Riverside held only that a criminal defendant must receive a judicial determination of probable cause within 48 hours of arrest. The purpose of this probable-cause hearing was to ensure that the arrest was not "based on incorrect or unfounded suspicion." County of Riverside, 500 U.S. at 52. The Court did not address the issue of whether a criminal suspect (much less an alien in immigration proceedings) has a right to prompt "issuance and service of charging documents." Th. Am. Cplt. ¶ 376. Accordingly, nothing in County of Riverside supports Plaintiffs' claim. Indeed, it is difficult to imagine how County of Riverside could be applied in immigration proceedings. The requirement that criminal defendants receive "prompt" judicial determination of probable cause has no application in the immigration context, where the Executive, not the judiciary, determines whether probable cause exists for arrest. Moreover, the requirement particularly has no application here, because Plaintiffs have conceded the probable cause for their arrests by conceding their removability.

Recognizing that they have failed to allege a violation of a clearly established, substantive due process right, Plaintiffs attempt to recast claim 17 as a procedural due process claim. Pl. Opp. 30-31.[20] But this claim suffers from the same fatal defect as their substantive

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[20] Indeed, Plaintiffs' procedural due process claim is simply a verbatim recitation of their substantive due process claim. Compare Pl. Opp. 27 (complaining of "[p]rolonged detention without notice of the charges") , with Pl. Opp. 30 (complaining of "failure to provide the notice

due process claim. Plaintiffs do not cite any cases even discussing the formal notice procedures that they assert were clearly established at the time of their arrests, much less any case clearly establishing a right to receive these procedures within 48 hours. Moreover, Plaintiffs do not dispute that the Original Defendants complied with the procedural requirements in the regulations. See 8 C.F.R. § 287.3. Instead, their argument is essentially that those well-established regulatory procedures are clearly constitutionally inadequate, even though no court has ever said so.

Finally, even if Plaintiffs had alleged a violation of a clearly established right, their claim would fail because Plaintiffs have not pleaded prejudice. See Govt. Mot. to Dismiss 64-65. Plaintiffs do not dispute that they have not pleaded prejudice. Instead, they contend, without citing any authority, that they need not do so. Pl. Opp. 28-29. But this is plainly incorrect. See Govt. Mot. to Dismiss 64-65. Plaintiffs cannot demonstrate that the few days' wait in receiving Notices to Appear impaired their ability to "seek release on bond." Th. Am. Cplt. ¶ 376; Pl. Opp. 30. First, aliens may (and regularly do) seek bond before receiving a Notice to Appear. 8 C.F.R. § 1003.19(d). Second, such an assertion is plainly belied by the fact that even after receiving a Notice to Appear, three of the five Plaintiffs did not seek bond and the other two Plaintiffs had their requests denied. Th. Am. Cplt. 187. Thus, the Notices to Appear, which Plaintiffs claim were "crucial to [their] ability . . . to seek release," in fact had no effect on the length of their detention. Pl. Opp. 30.

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of the basis for detention at a meaningful time"). Accordingly, if this Court determines that Plaintiffs have failed to state a substantive due process claim, it should dismiss their procedural due process claim as well. Reno v. Flores, 507 U.S. 292, 308 (1993) ("This is just the "substantive due process" argument recast in "procedural due process" terms, and we reject it for the same reasons.").

3. Claims 18 and 19 (Denial of Bond).

Plaintiffs assert that their constitutional rights were violated when they failed to receive "prompt bond hearings" during their removal proceedings. Even if these claims had been exhausted and were properly before this Court, they would be meritless.

Contrary to Plaintiffs' contention, the Government does not assert that "due process [is] wholly irrelevant to immigration detention" or that the Executive may detain aliens based on nothing more than "a flip of the coin." Pl. Opp. 33. The Government merely argues that aliens have no constitutional right to release absent a showing of danger or flight risk, aliens have no constitutional right to individualized bond determinations, and, in any event, Plaintiffs received the procedural protections they now request.

First, Plaintiffs fail to demonstrate a clearly established, liberty interest to release absent a showing of "danger to the community or flight risk." Pl. Opp. 31. The statute governing immigration detentions plainly does not require the Executive to consider dangerousness or flight risk. 8 U.S.C. § 1226(a). And Plaintiffs do not cite any authority clearly establishing that the Executive must base bond determinations solely on these factors. Indeed, controlling Second Circuit case law provides just the opposite. In Doherty, it upheld detention of eight years based on the Executive's determination that granting bond might hinder "the government's ability to later carry out its broader responsibilities over immigration matters," harm relations with foreign nations who had an interest in the alien's detention, or pose a "general threat to national security." Doherty v. Thornburgh, 943 F.2d 204, 211 (2d Cir. 1991). Additionally, the Second Circuit has held that it is reasonable for the Executive to consider "the probability of the alien being found deportable, the seriousness of the charge against him, if proved," or any other factor that provides a "reasonable foundation" for denying bail. United States ex. rel. Potash v. District

Dir. of Immigration & Naturalization, New York, 169 F.2d 747, 751 (2d Cir. 1948). Given the Second Circuit's express instruction that the Executive may premise denial of bond on factors other than dangerousness or flight risk, Plaintiffs cannot demonstrate a clearly established liberty interest to release absent showing of danger or flight risk. They certainly cannot establish that consideration of factors the Second Circuit has approved so "shocks the conscience" as to constitutes a substantive due process violation. Doherty, 943 F.2d at 209 (internal quotation marks omitted).

Plaintiffs additionally fail to demonstrate a clearly established right to receive individualized determinations. The Supreme Court has long recognized the Government's constitutional authority to deny aliens release based on categorical presumptions. Carlson v. Landon, 342 U.S. 524, 535 (1954); see also Govt. Mot. to Dismiss 66-67 (citing cases). Indeed, in Carlson, the Supreme Court rejected claims nearly identical to Plaintiffs', holding that the Fifth and Eighth Amendments were not violated when the Government denied the plaintiffs bond during their removal proceedings based solely on their membership in a suspect group (Communist Party) and without any individualized inquiry into flight risk or danger. Id. at 533-34; see also id. at 528-29, 531-32. In fact, one of the aliens had been affirmatively found to pose no risk of danger or flight and was initially released on bond, until his Communist membership was discovered. Id. at 531-32 & n.17.

In any event, even if this Court were to find a clearly established substantive due process right to a finding of dangerousness or flight risk or a procedural due process right to an individualized hearing, Plaintiffs' claims would fail. Those protections were provided to Plaintiffs. Plaintiffs do not dispute that they were granted individualized hearings before an Immigration Judge where each could (and two did) request bond. Th. Am. Cplt. ¶ 187 (reporting

that Ebrahim and H. Ibrahim requested bond at their hearings before Immigration Judge). Nor do they dispute that the bond requests were denied after the Immigration Judge deemed Ebrahim and H. Ibrahim "disappearance risks." Th. Am. Cplt. ¶ 188. Plaintiffs essentially contend that they were constitutionally entitled to receive an individualized bond hearing before they could be detained at all. No court has rendered any such holding in any context. Indeed, a requirement for individualized bond hearings prior to detention is illogical on its face as it would frustrate any ability to detain illegal aliens. Accordingly, this Court should deny Plaintiffs' due process arguments in claim 18.[21]

4. Claims 5 and 19 (Equal Protection).

Plaintiffs do not dispute that the Nation's immigration laws can constitutionally make distinctions that, if applied to citizens, would violate the Equal Protection Clause. See AADC, 525 U.S. at 491. Nor do Plaintiffs dispute that among these permissible distinctions are those based upon nationality, which often bear a close correlation to distinctions based on race, ethnicity, and religion. Nonetheless, Plaintiffs claim that the Executive may never consider race, ethnicity, or religion in enforcing immigration laws. According to Plaintiffs, even when the Nation is confronted with an enemy that is racially and ethnically homogenous and that declares war on the United States on religious grounds, the Executive may not consider these characteristics. Plaintiffs provide no support for this proposition. Plaintiffs cite only Yick Wo v.

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[21] Recognizing that they have no valid, substantive due process claim for denial of bond, Plaintiffs attempt to conflate claim 18 with their Equal-Protection and communications-blackout claims. Pl. Opp. 32 ("On Defendants' theory, the Constitution would have nothing to say even if the government adopted a policy to deny bond to all foreign nationals with Arabic-sounding last names. . . ."); Pl. Opp. 34 (accusing Defendants of "imposing a communications blackout"). In the event a plaintiff has a valid claim for denial of Equal Protection or a "communications blackout," the proper course is for the plaintiff to assert those claims, not to ask the courts to manufacture a Fifth Amendment right for aliens to obtain bond.

Hopkins, 118 U.S. 356, 369 (1886), a case that did not involve enforcement of the immigration laws, Pl. Opp. 48, and point to the fact that the Supreme Court has not decided the issue, Pl. Opp. 49 (discussing AADC, 525 U.S. at 491-92). But the fact that the Supreme Court has not addressed the issue supports the Original Defendants' argument that there is no clearly established right. See Mitchell, 472 U.S. at 542.[22]

5. Claim 7 (Free Exercise Of Religion).

With respect to Plaintiffs' claim that actions taken by MDC officials violated their right to exercise their religion (claim 7), Plaintiffs now attempt to expand the nature of their complaint beyond its present boundaries. In retort to the defendants' arguments, Plaintiffs simply state that they have "challenge[d] a high-level policy adopted, promulgated, and implemented by Defendants, to disregard the Code of Federal Regulations." Pl. Opp. 74. Unfortunately for Plaintiffs, their Third Amended Complaint (¶ 128) alleges only that the MDC Defendants (i.e., not the Attorney General, Director, or Commissioner, Th. Am. Cplt. ¶ 134) adopted such policies.[23] Plaintiffs' inappropriate attempt to expand their allegations through an opposition

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[22] Additionally, claims 5 and 19 should be dismissed because Plaintiffs fail to plead the required elements for a selective prosecution claim. Plaintiffs do not dispute that, in order to state an Equal Protection claim based on selective prosecution, they must identify a similarly situated group that received preferential treatment. See Pl. Opp. 50. Instead, Plaintiffs attempt to recast their claims as discrimination claims having nothing to do with selective enforcement of the immigration laws. Pl. Opp. 50. This argument cannot stand. The only reason Plaintiffs were arrested and detained is that the Executive selected them for prosecution. Moreover, Plaintiffs' allegations that "'non-Arabs and non-Muslims'" were treated differently are not sufficient. Pl. Opp. 51 (quoting Th. Am. Cplt. ¶ 76). Such a response merely parrots the original, defective allegation that the law "is enforced solely and exclusively against persons of" Plaintiffs' race, religion, or ethnicity, without adding any new information. United States v. Armstrong, 517 U.S. 456, 466 (1996). Allowing such an end-run around the rule undermines the purpose of the pleading requirement – to place "a significant barrier to the litigation of insubstantial claims." Id. at 463-64.

[23] Similarly, each Plaintiffs' more specific allegations of free exercise deprivation is exclusively trained upon the MDC Defendants, Th. Am. Cplt. ¶¶ 155, 157-58, 193, 207, 229, and

brief should be summarily rejected. Additionally, as stated earlier, Plaintiffs' Third Amended Complaint fails to articulate any basis upon which this Court could find that any Original Defendant was personally responsible for these violations.

6. Claims 3, 20 and 23 (Conditions Of Confinement).

a. Claim 3 (MDC Conditions)[24]

The application of the qualified immunity doctrine is appropriate with respect to Plaintiffs' allegations supporting claim 3. Significantly, Plaintiffs' complaint makes no factual allegations that the conditions within these two institutions were directed or known by defendants Ashcroft, Mueller or Ziglar. See Salim v. Proulx, 93 F.3d 86, 90 (2d Cir. 1996).[25]

On this basis alone, defendants' qualified immunity requires dismissal. It bears noting, however, that Plaintiffs have not addressed the fundamental issue that their substantive due

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not upon the Attorney General, Director, or Commissioner. None of those allegations, however, names the wardens or specifically attributes any conduct to them.

[24]Claim 3 seeks damages for the conditions of confinement at both MDC and Passaic. This Court previously has denied the motion to dismiss as to Wardens Hasty and Zenk. Remaining for consideration is whether Plaintiffs have stated a claim against the Attorney General, the FBI Director and former INS Commissioner Ziglar. Not encompassed by the Court's order is claim 23, which also seeks damages from the MDC defendants for unreasonable strip searches. Plaintiffs argue that these searches violated BOP policy because they were used as a form of humiliation and punishment. This argument accords no deference to the need to preserve institutional security. See Govt. Mot. to Dismiss 56-57. Plaintiffs presented potentially highly dangerous persons associated with terrorists, who might have strong interests in getting information to and from confederates among the detainees. A judgment that frequent strip searches were necessary was not inappropriate in these circumstances.

[25] Indeed, in arguing that the Attorney General, the Director and the Commissioner should be liable under claim 3 (Pl. Opp. 67), plaintiffs cite portions of their pleading that make no reference to these officials but refer to BOP policies on treatment of detainees. Th. Am. Cplt. ¶¶ 104, 108. Given these policies, Plaintiffs cannot defeat defendant Ashcroft's immunity just because the MDC was an institution within the Department of Justice. Much less can they defeat the qualified immunity of the Director and Commissioner, who were heads of Department of Justice components apart from BOP.

process claim presents with respect to detention in the ADMAX SHU. Cases such as Tellier v. Fields, 280 F.3d 69 (2d Cir. 2000), and Benjamin v. Fraser, 264 F.3d 175 (2d Cir. 2001), addressed detention issues that arise in routine institution settings. This case involves something different.[26] Other courts have recognized that these detainees presented unique security concerns – in the immediacy of a potential threat and in the importance to Al Qaeda in knowing who had been detained and who had not yet been found. See Center for Nat'l Security Studies v. DOJ ("CNSS"), 331 F.3d 918, 928-33 (D.C. Cir. 2003). Plaintiffs' casual response that a motion to dismiss is not the vehicle for determining whether the "asserted 'security concerns'" justified detention in the ADMAX SHU, Pl. Opp. 67, ignores the qualified immunity inquiry that looks to the 'specific context" in which this case arose. Saucier, 533 U.S. at 210; see also Brosseau, 125 S. Ct. at 600 (decisional law law did not "squarely govern[] the case here"). Only months before the attacks, the Supreme Court left open the question of what liberty interests might apply to unlawful aliens where terrorism or national security are involved. Zadvydas, 533 U.S. at 696. The constitutional doctrines that govern how the executive responds in such extraordinary situations may well be hammered out, defined and redefined in the years ahead. But qualified immunity does not look to the present or the future. Qualified immunity looks to the past. And those officers who responded to FBI determinations that detainees were of interest to the September 11 investigation into the attacks and potential future attacks by placing detainees in the most restrictive conditions available did not engage in conduct that had been considered, much less violated, established law.

[26] Over 96,000 tips and potential leads were received the first week of the investigation. See Remarks of the Attorney General (September 18, 2001), made a part of the record as Attachment 2 to the July 2, 2003 Supplemental Memorandum in Support of Dismissing the Claims Against Attorney General John Ashcroft in His Individual Capacity, incorporated herein.

b. Claim 20 (Assignment To The ADMAX SHU).

Claim 20 seeks damages from the Original Defendants for being placed in the ADMAX SHU based on certain FBI classifications without being afforded procedural protections under BOP regulations, specifically 28 C.F.R. § 541.22. Specifically, Plaintiffs argue that they were not afforded any process whatsoever during their detention in the ADMAX SHU. Pl. Opp. 52-53, 56.[27] Due process "'is flexible and calls for such procedural protections as the particular situation demands.'" Benjamin, 264 F.3d at 190, quoting Matthews v. Eldridge, 424 U.S. 319, 334 (1976). This requires the Court to look at the "'precise nature of the government function involved as well as the private interest that has been affected.'" Benjamin, 264 F.3d at 190, quoting Wolff v. McDonnell, 418 U.S. 539, 560 (1974). Plaintiffs acknowledge that their status was reviewed periodically and that they were aware that the FBI was interested in them for involvement with terrorist organizations and activities. Th. Am. Comp. ¶¶ 152, 171, 183, 202, 224-25. Their complaint is that reports for detainees were "automatically annotated with the phrase 'continue high security,'" until the detainee was cleared by the FBI. (Th. Am. Comp. ¶ 80.) Defendants do not dispute a detainee's interest in being relieved of restrictive conditions of confinement. But at the same time, the government's interest could not have been more substantial – finding those responsible for the attacks and preventing future terrorist attacks within our country and against our citizens abroad. That detainees presented objectively reasonable national security concerns is evident. Even such basic information as the time and location of an arrest and the detention and

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[27] The Supreme Court's recent grant of certiorari to provide further clarity to the procedures required for placing inmates in prisons like the ADMAX SHU unit illustrates the uncertainty to this day over the liberty interests that arise with administrative detention, even where the executive's national security responsibilities are not a part of the constitutional equation. Wilkinson v. Austin, 125 S.Ct. 686 (2004), granting cert. from 372 F.3d 346 (6th Cir. 2004); see also 2004 WL 2308827 (petition for certiorari). See generally Mitchell, 472 U.S. at 534.

release of individuals "would provide a complete roadmap of the government's investigation" and alert terrorists as to "which cells had been compromised." CNSS, 331 F.3d at 933.

The government, moreover, had a legitimate interest in adapting § 541.22 to meet the extraordinary situation BOP confronted. Plaintiffs do not allege that senior officials of the Department were aware of the particular procedures that applied to placing a person in administrative detention, and for that reason alone qualified immunity is warranted. But equally important, when adopted, the procedures under § 541.22 (including a detainee's appearance at periodic hearings, § 541.22(c)) could not have anticipated the situation confronting BOP after September 11, where administrative detention is predicated on security concerns that are not unique to the detention facility itself, but rather are predicated upon domestic and foreign intelligence information regarding international terrorists who threaten agencies of government, institutions, and people beyond the MDC on a scale previously unimagined. Compare Butenko v. United States, 494 F.2d 593, 601 (3d Cir. 1974) (en banc) ("[i]n the absence of any indication that the legislators considered the possible effect of § 605 in the foreign affairs field" court would not construe the statute to extend to foreign security situations). Prison officials cannot be faulted for adapting procedures to meet a security situation that was beyond their professional experience and within the expertise of another agency. By analogy to the situation that confronted the court of appeals in Butenko, procedures designed for the routine prison setting cannot be said to have established clearly liberty interests that arise in a wholly different one where the executive's need to protect itself from potentially immediate danger is at stake. See generally United States v. Duggan, 743 F.2d 59, 72 (2d Cir. 1984) (discussing cases that read foreign security exception into Fourth Amendment's warrant requirement). At the least, given the situation before prison officials, adapting BOP's procedures to permit a terrorist threat analysis by the FBI in the face of

"extraordinary circumstances" – where government actors reasonably could not have known that regulations developed for routine prison detentions would govern the unprecedented threat to the nation's security before them – warrants qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

7. Claim 8 (Deprivation of Property).

Plaintiffs' own allegations belie any claim that "senior officials participate[d] in the deprivations" of their property. Pl. Opp. 75. No set of facts has been alleged that would give rise to any inference that any Original Defendant approved or was aware that property would not be returned upon a detainee's release from BOP custody and removal from the country. Absent such allegations, Plaintiffs' argument that there was an "established state procedure" fails. Parratt v. Taylor, 451 U.S. 527, 541 (1981).[28]

8. Claims 21 and 22 (Communications Restrictions).

With respect to the so-called "communications blackout," the explicit terms of Plaintiffs' opposition concedes that the standard by which such a purported policy is to be constitutionally-reviewed is far from clear. Specifically, Plaintiffs state that the standard articulated by the Supreme Court in Turner v. Safely, 482 U.S. 78 (1987), "may be an inappropriate guide." Pl. Opp. 70 (emphasis added).[29] Plaintiffs do not put forward an alternative standard by which

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[28] On information and belief, all of the property that is known to have been in the Government's possession as a result of the investigations and detentions of Plaintiffs, and which properly may be returned to Plaintiffs, has been or will be returned to Plaintiffs' counsel. Accordingly, the detention of Plaintiffs' property was temporary, and not permanent. (Property in the Government's possession that will not be returned to Plaintiffs includes: (1) documents that appear on their face to belong to individuals or entities other than Plaintiffs; (2) certain identification documents which, pursuant to DHS practice, will be returned to the respective issuing governments; and (3) a Sharp travel organizer, which is being withheld as evidence in an active investigation.).

[29] Claims 21 and 22 raise challenges to the Executive's exercise of its plenary powers over immigration matters. Accordingly, this Court should ask only whether the Executive has

restrictions on the communications sent to and received by individuals detained as a result of civil immigration violations is to be adjudged. See id. The inquiry into whether a particular right is clearly-established for purposes of qualified immunity looks to "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202 (emphasis added). Because, by Plaintiffs' own concession, neither the Supreme Court nor the Second Circuit has yet settled on a standard by which the constitutionality of communications restrictions on immigration detainees is to be determined, defendants are entitled to qualified immunity with respect to claims 21 and 22.

Plaintiffs also concede – by failing to argue otherwise – that the alleged communications policy at issue in this case did not cause them to forfeit any "non-frivolous" legal claim, and as such, they cannot demonstrate the "actual injury" required by the Supreme Court's "access to the courts" jurisprudence. Plaintiffs therefore now argue that they need not demonstrate such injury because their claim is not for a deprivation of derivative rights necessary to access the courts (*i.e.*,

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proffered "a facially legitimate and bona fide reason" for its actions, Kleindienst v. Mandel, 408 U.S. 753, 762 (1972), and dismiss claims 21 and 22. But even if this Court were to disregard Kleindienst, Plaintiffs' claims cannot stand.

Plaintiffs also take issue with defendants' claim that the communications restrictions pass constitutional muster under the Turner standard, mainly because defendants purportedly had no basis to believe that they were associated with terrorist activity. Pl. Opp.70-71. Initially, the Turner Court neither required prison officials to read each communication separately, nor did it express any constitutional need to examine the particular threat posed by each prisoner. See Turner, 482 U.S. at 93 n.*. Plaintiffs recognize that the FBI possessed interest in their potential involvement with terrorism. Th. Am. Cplt. ¶¶152, 171, 183, 202, 224-25. Given the undeniable tension at the time with the uncertainty of further terrorist incidents, it hardly requires jurisprudential citation to demonstrate that reasonable officials could disagree that a limited no-communication policy concerning those identified by the FBI as potential terrorism suspects (at least until the true identity of such individuals was realized) would be rationally-related to a legitimate government interest. Indeed, given the fact-specific nature of the Turner standard, even the two cases cited by Plaintiffs in support of their position held the involved officials entitled to qualified immunity – although Plaintiffs fail to disclose this key fact. See Allen v. Coughlin, 64 F.3d 77, 81 (2d Cir. 1995); Breland v. Goord, 1997 WL 139533, at *7-8 (S.D.N.Y. Mar. 27, 1997).

access to legal materials), but rather, one for not allowing them to access the courts "at all." Pl. Opp., at 71-73. Plaintiffs' new theory fails on many fronts. Initially, such a claim cannot be found within the four corners of their third amended complaint. Using Plaintiffs' terminology, a "direct" violation of one's right to court access is one in which government officials prevented those who are incarcerated from themselves filing relevant claims. Ex Parte Hull, 312 U.S. 546, 547-49 (1941). Once properly identified, Plaintiffs' Third Amended Complaint fails to aver that any Plaintiff himself sought to file legal claims with any court and they were refused,[30] or that the so-called "communications blackout" policy prohibited such activity.

The Court in Christopher v. Harbury, 536 U.S. 403 (2002) was rather clear in not limiting its "actual injury" requirement in access claims: Whether an access claim turns on a litigating opportunity yet to be gained or an opportunity already lost, the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." Id. at 414-15. The right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court. Id. (emphasis added).[31] In other words, no matter what their basis, all claims that allege that some

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[30]Plaintiffs' complaint concedes that when requested, they were brought before Immigration Judges. Th. Am. Cplt. ¶178 (Jaffri), ¶¶ 186, 188 (Ebrahim and H. Ibrahim). Indeed, Plaintiff A. Ibrahim contends that he was brought before an Immigration Judge within approximately one week of being arrested. Id. ¶234. Plaintiffs also allege that they were able to address some of their concerns with these jurists, id. ¶186, and as a result, although they may have been displeased with the response given by the particular Immigration Judge, Plaintiffs can hardly maintain that they were completely denied all access to the courts.

[31] The mere fact that the Supreme Court found its "access to the courts" jurisprudence sufficiently muddled "to warrant the exercise of its discretionary jurisdiction" and thus grant certiorari in Harbury is enough to warrant a finding that the law in this area was unsettled at the time of the events in question. See Mitchell, 472 U.S. at 534; see also Simpson v. Gallant, 231 F. Supp. 2d 341, 348 (D. Me. 2002) (explaining Harbury as a clarification by the Supreme Court). The Second Circuit's distinction between "direct" and "derivative" access claims – and the need to demonstrate "actual injury" in only the latter – does not survive the Supreme Court's exposition in Harbury, 536 U.S. 403.

form of government action deprived them of access to the courts must be accompanied by an allegation that the deprivation caused the loss of an independent, non-frivolous claim.

It is perhaps for this reason that Plaintiffs' opposition – like their Third Amended Complaint – focuses sharply not on their inability to file legal claims that they themselves drafted, but rather, on their inability to contact counsel to assist them with the same. In this respect, Plaintiffs' reliance on the Second Circuit's decision in Benjamin v. Fraser, 264 F.3d 175 (2d Cir. 2001), is misplaced. In Benjamin, the Second Circuit – before Harbury – held that a plaintiff need not establish "actual injury" from his inability to access the courts when his legal cause of action was based upon an entirely separate right guaranteed by the Constitution, such as the Sixth Amendment right to counsel. See id. at 186. As Plaintiffs conceded at an earlier stage of this litigation, Pl. First Opp., at 33 n.18, unlike a pretrial detainee, they – as civil immigration detainees – lack any Sixth Amendment right to counsel. See United States v. Perez, 330 F.3d 97, 101 (2d Cir. 2003); United States v. Yousef, 327 F.3d 56, 143 (2d Cir. 2003). Because Plaintiffs lack any independent right to counsel, Benjamin brings them no closer to alleging a violation of clearly established constitutional law without the loss of an independent, non-frivolous legal claim.

VI. THE UNITED STATES MUST BE SUBSTITUTED WITH RESPECT TO PLAINTIFFS' INTERNATIONAL LAW CLAIMS, WHICH THEN MUST BE DISMISSED BECAUSE THEY ARE BARRED BY SOVEREIGN IMMUNITY (CLAIMS 9, 10, 11).

For the reasons stated in the separate Reply Memorandum in Further Support of United States' Motion for Substitution, incorporated herein by reference, Plaintiffs' arguments against substituting the United States are meritless. Moreover, Plaintiffs do not dispute that sovereign immunity precludes them from asserting these claims against the United States. Accordingly, if this Court grants the Motion for Substitution, it should dismiss claims 9, 10, and 11.

VII. THE FTCA'S JURISDICTIONAL PROVISIONS NECESSITATE DISMISSAL OF

CLAIMS 24, 25, 26 (IN PART), AND 30.

A. Because Plaintiffs Were Lawfully Detained, Their Claim Of False Imprisonment Must Be Dismissed (Claim 24).

Plaintiffs apparently concede that the United States cannot be found liable under New York law for the BOP's conduct in detaining them. See Pl. Opp. 78. Because claim 24 alleges precisely that the MDC Defendants violated state law by falsely imprisoning plaintiffs, it must be dismissed for failure to state a claim upon which relief can be granted.

Plaintiffs attempt to stave off dismissal by re-pleading their complaint via their opposition brief to assert that it was employees of the INS, and not the BOP, who falsely imprisoned them. Id. at 78. This tactic is unavailing for at least two reasons. First, as a basic rule of Civil Procedure and a matter of fundamental fairness, "Plaintiffs may not amend their complaint through their opposition brief." Reading Intern., Inc. v. Oaktree Capital Management LLC, 317 F. Supp.2d 301, 318 n. 9 (S.D.N.Y. 2003); see also Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985).[32] Second, even if the Court were to construe claim 24 to include allegations against the INS, Plaintiffs would still fail to state a claim for false imprisonment. The INS "acted in conformance with the federal standards" governing Plaintiffs' detention, see supra Parts V.B.1 & 3; Govt. Mot. to Dismiss Part V.B.1., and therefore Plaintiffs cannot establish the elements of false imprisonment under New York law. See Caban v. United States, 728 F.2d 68, 74 (2d Cir. 1984) ("Caban II").

B. Because It Is Both Barred By Section 2680(a) And Not Cognizable Under Section 1346(b), Plaintiffs' Claim Of Negligent Delay In The Clearance

[32] Plaintiffs suggest that their failure to identify employees of the INS as the wrongdoers is of no legal moment because under the FTCA, liability – if found – is imposed upon the United States without regard to which federal agency employed the tortfeasor. Pl. Opp. 78. They overlook the fact, however, that the FTCA requires a plaintiff to present administrative claims to the appropriate federal agency. 28 U.S.C. § 2675(a). The threshold jurisdictional inquiry of whether a plaintiff has exhausted their administrative remedies cannot be accomplished, therefore, unless the agency whose conduct is at issue is correctly identified.

Process Must Be Dismissed (Claim 25).

Plaintiffs do not dispute that the first prong of the discretionary function exception applies, and argue only that the manner and time frame in which FBI[33] conducted its clearance investigations was not "susceptible to policy analysis." Pl. Opp. 79 (quoting Coulthurst v. United States, 214 F.3d 106, 109 (2d Cir. 2000). This is plainly incorrect.

First, Plaintiffs ignore the Supreme Court's instruction that where, as here, the challenged conduct is discretionary, courts should impose a strong presumption that the challenged conduct is also policy-based. United States v. Gaubert, 499 U.S. 315, 324 (1991). Second, it is beyond refute that law-enforcement investigations are policy-based. See Govt. Mot. to Dismiss 87-88. The Supreme Court has explained that where a program is policy-based, "actions taken in furtherance of the program [a]re likewise protected, even if those actions were negligent," Gaubert, 499 U.S. at 323, or are undertaken solely at the "operational or management level," id. at 325. Plaintiffs do not dispute that the actions to following-up leads, handling files, and communicating and organizing information were taken in furtherance of the investigation. Accordingly, these actions are covered by the exception.

The Ninth Circuit has applied the discretionary function to nearly identical allegations. Vickers v. United States, 228 F.3d 944 (9th Cir. 2000). The court dismissed claims that the INS was negligent in taking over one year to act on a recommendation to fire a potentially dangerous detention officer, even though it recognized that the delay may have resulted because "a recommendation was misfiled, forgotten in a pile of paper, or otherwise negligently treated."[34]

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[33] Plaintiffs do not dispute that claim 25, which challenges the pace of their clearance investigations, is directed only at the conduct of the FBI. See Govt. Mot. to Dismiss 83 n.41.

[34] Plaintiffs also cite Caban v. United States, 671 F.2d 1230 (2d Cir. 1982) ("Caban I"), which found that an INS agent's decision to question an alien at the border to determine his admissibility is not grounded in policy and thus not immunized under the discretionary function exception. Pl. Opp. 82. Claim 25, of course, challenges entirely different conduct – the FBI's

Vickers, 228 F.3d at 950. The court emphasized that where the overarching conduct – making "final termination decisions" – is policy-based, the Government is not required to provide proof that every underlying action taken in furtherance of that conduct is policy-based. See id.

The holding in Coulthurst, 214 F.3d 106, is not to the contrary. Indeed, Coulthurst confirmed that the discretionary function exception applies to decisions on timing, such as "how frequently the inspection should be conducted," and to decisions on the design and management of a program, such as whether "inspection procedures" are thorough enough to ensure the inspector will not "overlook, or fail to appreciate, a latent danger." Id. at 109. The only claims that the court allowed were those that presented such black-and-white questions as whether the inspector "failed to do the inspection" at all, or whether the inspector found a frayed cable and "failed to replace the cable." Id.

Vickers and Coulthurst confirm that Plaintiffs' allegations implicate the types of policy concerns the exception was designed to protect. Th. Am. Cplt. ¶ 419; see also Pl. Opp. 80. The decision over whether to "follow up on leads," Third Am. Cplt. ¶ 419, is equivalent to the decision of whether to investigate, which is indisputably covered by the discretionary function exception. Govt. Mot. to Dismiss 87. The question of whether agents "timely" followed-up leads, Third Am. Cplt. ¶ 419, implicates the questions of timing that Vickers and Coulthurst

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handling of an international terrorism investigation. In addition, Caban I pre-dates the Supreme Court's decisions in Varig Airlines, Berkowitz, and Gaubert, and is difficult to reconcile with these controlling authorities. Moreover, Plaintiffs' pronouncement that "[c]ourts have routinely held that decisions by law enforcement officers to detain individuals and the lengths of their detentions do not fall within the discretionary function exception" is belied by the six cases on which they rely, none of which analyzed the discretionary function exception, let alone held it inapplicable. Pl. Opp. 82; see also Adras v. Nelson, 917 F.2d 1552,1555-56 (11th Cir. 1990) (holding that discretionary function exception barred plaintiffs' challenge to their detention – including claim of false imprisonment – which resulted from "Attorney General's order requiring INS officials to hold without parole all aliens unable to establish a prima facie case for admission."). In any event, the United States has not argued in the instant case that the discretionary function exception bars Plaintiffs' false imprisonment claim (claim 24) challenging the validity of their detentions.

sought to protect. And the allegations that "communication" and "[]organization" could have been improved, Third Am. Cplt. ¶ 419, are simply challenges to the design and management of the investigation, which Coulthurst precludes. Additionally, because the improvements Plaintiffs request would have required additional manpower or resources, they implicate the "considerations of economy, efficiency, and safety" that the discretionary function exception protects. Coulthurst, 214 F.3d at 109. Finally, Plaintiffs cannot evade the discretionary function exception by alleging that "files" may have been "misplaced." Third Am. Cplt. ¶ 419. Plaintiffs do not indicate which Plaintiffs had their files misplaced or which agents may have misplaced files. In any program as large and complicated as the September 11th investigations, it is possible that there will be some administrative delays or errors. The only method to prevent such an outcome is through a massive increase in resources, a choice clearly protected by the discretionary function exception. Coulthurst, 214 F.3d at 109. Additionally, allowing every investigation to be subject to litigation based on boilerplate assertions of error is inconsistent with the United States's express reservation of its sovereign immunity for discretionary functions.

A second, independent reason necessitates dismissal of claim 25 for a lack of subject matter jurisdiction. As explained in the opening brief at pages 80-81, the United States may be found liable under the FTCA only in circumstances where a private party would be liable under the law of the state where the negligence took place. 28 U.S.C. §§ 1346(b), 2674. Thus, to establish the existence of subject matter jurisdiction, Plaintiffs must identify a duty owed to them in tort that would render a private person under New York law liable for conduct analogous to that of the FBI here – whether that conduct is characterized as a duty to investigate more quickly or a duty not to be lazy or careless.[35] The speed and attentiveness with which FBI performed its

[35] Unable to cite any legal authority under New York law, Plaintiffs invoke an amorphous "affirmative duty of dispatch." Pl. Opp 83. The United States' research has not revealed any New York law indicating the existence of such a tort duty owed to private parties in

responsibilities are not duties owed to Plaintiffs actionable in tort under New York law. See Clemente v. United States, 567 F.2d 1140, 1145 (1st Cir.) (A "duty to comply with the directives of their superiors is owed by the employees to the government and is totally distinguishable from a duty owed by the government to the public on which liability could be based."), cert. denied, 435 U.S. 1006 (1978). Because Plaintiffs have not and cannot identify an actionable state law duty, claim 25 should be dismissed for lack of subject matter jurisdiction.

The question at the crux of claim 25 is not, as Plaintiffs urge, what degree of delay in performing the clearance investigations "is legally tolerable," Pl. Opp. 83, but rather whether the pace at which the FBI carried out those investigations can be a predicate for the imposition of tort liability. Under sections 1346(b) and 2680(a) of the FTCA, the answer is a resounding, "no."

C. Plaintiffs' Claim Of Conversion Must Be Dismissed Under The Detention Of Goods Exception (Claim 30).

According to Plaintiffs, the phrase "any other law enforcement officer" in 28 U.S.C. § 2680(c) does not encompass the BOP, INS, and FBI law enforcement officers here. But a majority of the circuits have rejected this counter-textual position. See Govt. Mot. to Dismiss 90-93. Consistent with the canon of statutory interpretation, in pari materia, these courts construe "any law enforcement officer" in 2680(c) as having the same meaning as it does in neighboring section 2680(h), where it is defined broadly as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal Law." See, e.g., Chapa v. United States, 339 F.3d 388, 390 (5th Cir. 2003). Moreover, the Federal Circuit has opined that to construe § 2680(c) as applying only to seizures made pursuant to the tax or customs laws "would render the phrase 'any other law enforcement officer' surplusage." Ysasi v. Rivkind, 856 F.2d 1520, 1524 (Fed. Cir. 1988). Finally, "the meager

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similar circumstances.

legislative history of section 2680(c)" is fully consistent with this interpretation of the statute. Id. at 1525. See also Schlaebitz v. United States, 924 F.2d 193, 194 (11th Cir. 1991).

Because the majority view is the better reasoned approach, the district courts within the Second Circuit have hewed to this position. See, e.g., Deutsch v. United States, 2004 WL 633236, at *8 (E.D.N.Y. Mar. 19, 2004); Hallock v. United States, 253 F. Supp.2d 361, 365-66 (N.D.N.Y. 2003); Houghton v. FBI, 1999 WL 1133346, at *4 (S.D.N.Y. Dec. 10, 1999); Schreiber v. United States, 1997 WL 563338, at *5, 7 (S.D.N.Y. Sept. 8, 1997); Garnay, Inc. v. M/V Lindo Maersk, 816 F. Supp. 888, 897 (S.D.N.Y. 1993).

D. Because Plaintiffs Baloch, Saffi And A. Ibrahim Failed To Allege A Single Fact To Put BOP On Notice That They Sought And Were Denied Medical Care, Their Claims For Deprivation Of Medical Treatment Must Be Dismissed (Claim 26).

Section 2675(a) requires dismissal of Plaintiffs Baloch, Saffi, and A. Ibrahim's claims under claim 26 because the administrative claims they presented failed to recite a single fact from which the BOP could deduce that the United States might be exposed to liability for the deprivation of medical treatment (and not because, as Plaintiffs suggest, they simply failed to "recite the particular legal theory" they ultimately chose to pursue). Pl. Opp. 89. Plaintiffs make no attempt to dispute the plain reading of their administrative claims. Pl. Opp. 88-90; see also Govt. Mot. to Dismiss 96 n. 44.

Contrary to Plaintiffs' contention, Pl. Opp. 89, the allegations in their administrative claims that they were assaulted and injured by BOP guards in no way gives notice that they were deprived of medical treatment by BOP medical staff. For example, Baloch's administrative claim contends that he "was physically injured by prison guards at the [MDC]" and "beaten and verbally abused." Govt. Mot. to Dismiss, Exh. C. This contention stands in sharp contrast to Baloch's current allegation that, as a result of two surgeries he underwent prior to his detention, he suffered from ear infections which a BOP employee refused to treat. See Third Am. Cplt. ¶ 127. See also

Palay v. United States, 349 F.3d 418, 425 (7th Cir. 2003) (holding that inmate plaintiff failed to exhaust his administrative remedies with respect to his claim of medical malpractice where claim presented to BOP "described the injuries he sustained [during his detention] and the physical effects – including the recurrent seizures – that he suffered, [but] . . . stated no facts suggesting that the prison medical staff had treated him inappropriately."). Thus, BOP received no notice of their claims for deprivation of medical treatment, and claim 26 should be dismissed.

CONCLUSION

For the foregoing reasons, this Court should dismiss claims 1-11, 17-25, 30, and (in part) 26 against the United States and all claims against the Original Defendants.

Respectfully submitted,

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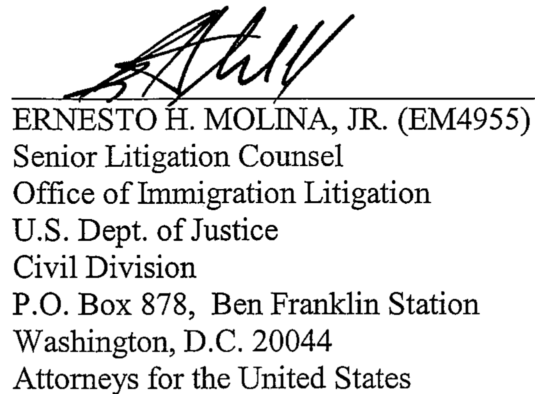

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ATTACHMENT

LIMITATIONS ON THE DETENTION AUTHORITY OF THE IMMIGRATION AND NATURALIZATION SERVICE

The Immigration and Nationality Act by its terms grants the Attorney General a full 90 days to effect an alien's removal after the alien is ordered removed under section 241(a) of the Act, and it imposes no duty on the Attorney General to act as quickly as possible, or with any particular degree of dispatch, within the 90-day period. This reading of the Act raises no constitutional infirmity.

It is permissible for the Attorney General to take more than the 90-day removal period to remove an alien even when it would be within the Attorney General's power to effect the removal within 90 days. The Attorney General can take such action, however, only when the delay in removal is related to effectuating the immigration laws and the nation's immigration policies. Among other things, delays in removal that are attributable to investigating whether and to what extent an alien has terrorist connections satisfy this standard.

February 20, 2003

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

Your Office has asked us to address two questions concerning the timing of removal of an alien subject to a final order of removal under section 241(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(a) (2000). First, your Office has asked us to determine whether the Attorney General is under an obligation to act with reasonable dispatch in effecting an alien's removal within the 90-day removal period established by section 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A). We conclude that the INA by its terms grants the Attorney General a full 90 days to effect an alien's removal after the alien is ordered removed and imposes no duty on the Attorney General to act as quickly as possible, or with any particular degree of dispatch, within the 90-day period. We also conclude that this reading of the Act raises no constitutional infirmity. In particular, even under the Supreme Court's recent decisions, such as *Zadvydas v. Davis*, 533 U.S. 678 (2001), the "substantive" component of the Due Process Clause does not impose a requirement that the Attorney General act with particular dispatch *within* the 90-day removal period. To the extent that the INS General Counsel's Office has issued advice to the contrary, suggesting that there is such a constitutionally based timing obligation, we disagree with that analysis. While the Attorney General's ability to delay removal of an alien within the 90-day period is not constrained by a particular timing requirement (*i.e.*, an obligation to act with dispatch), it is also not entirely unconstrained. We conclude that an express decision to postpone removal of an alien until later in the 90-day period likely must be supported by purposes related to the proper implementation of the immigration laws. We need not definitively resolve that question here because the delays in the particular case your Office inquired about were clearly supported by purposes related to proper implementation of the immigration laws.

Second, your Office has asked — in a situation where it would be logistically possible to remove an alien within the 90-day removal period — whether and for what purposes the Attorney General may nonetheless refrain from removing the alien within the removal period and instead detain him beyond the 90-day period with a view to removing him at a later time. We conclude, under each of two alternative readings of the statute, that it is permissible for the Attorney

General to take more than the 90-day removal period to remove an alien even when it would be within the Attorney General's power to effect the removal within 90 days. The Attorney General can take such action, however, only when the delay in removal beyond the 90-day period is related to effectuating the immigration laws and the nation's immigration policies.

This memorandum confirms oral advice we have given your Office over the course of the last three months.

Background

These issues arose in the context of the case of a particular alien who received a final order of removal on October 1, 2002, and whose 90-day removal period thus expired on December 30, 2002. This alien has significant connections to a known al Qaida operative who was seized in Afghanistan and who is now held at the naval base at Guantanamo Bay, Cuba. It was deemed a substantial possibility that the alien himself was a sleeper agent for al Qaida. Insufficient information existed at first, however, to press criminal charges or to transfer the alien to military custody as an enemy combatant. When it became apparent that it would be logistically possible to remove the alien very early within the 90-day removal period to the country that had been specified at the removal hearing (*i.e.*, travel documents were obtained), the question arose whether his removal could be delayed to permit investigations concerning his al Qaida connections to continue. Several avenues remained for developing further information about the alien, and such information would have been relevant for several purposes. For example, at first, your Office had been informed by the INS that the alien had designated a particular country of removal under section 241(b)(2)(A) of the INA, 8 U.S.C. § 1231(b)(2)(A). In that case, the Attorney General would have had statutory authority to disregard that designation if he determined that removing the alien to that country would have been "prejudicial to the United States." *Id.* § 1231(b)(2)(C)(iv). Obviously, in order for him to make that determination, it would have been important for the Attorney General to have the fullest information possible about the alien's terrorist connections, the extent of the threat he posed, and the ability (and willingness) of the law enforcement or security services of the destination country to deal appropriately with the alien. On further examination of the record, the INS later informed your Office that the alien had not, in fact, designated any country of removal. That situation raised unresolved questions of statutory interpretation concerning the Attorney General's authority under the statute to determine the country of removal — a decision that, again, depending upon the scope, if any, of the Attorney General's discretion, could obviously benefit from the fullest information possible about the alien's terrorist connections. In addition, even apart from the question of the country to which the alien would be removed, full information about the alien's terrorist connections was critical for ensuring coordination with the law enforcement and security services in the country of removal before removing the alien. Ensuring such coordination based upon the fullest information about the threat posed by the alien would have promoted both the national security interests of the United States (by perhaps providing a basis for law enforcement officials in the destination country to detain the alien) and the foreign

policy interests of the United States in maintaining good relations with the country. Other countries ordinarily would prefer not to have potential terrorists sent to their shores without adequate warning. Finally, if enough further information had been developed concerning the alien, a different course of action might have been taken with respect to him, such as criminal prosecution or detention as an enemy combatant.

These circumstances also raised the possibility that significant information might be developed concerning the alien at or near the end of the 90-day period. As a result, if it were lawful to do so, the Attorney General might have wanted to take more than 90 days to execute the removal order and thus to detain the alien beyond the 90-day removal period.

Analysis

I.

Whether the Attorney General is required to effect an alien's removal as quickly as possible within the 90-day removal period established by section 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A), is a question of statutory interpretation. In determining the meaning of a statute, we begin by examining its text. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978). "[W]e begin with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000) (quoting *Connectictut National Bank v. Germain*, 503 U.S. 249, 254 (1992)). Section 241(a)(1)(A) of the INA states that "[e]xcept as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period')." Section 241(a)(2) provides that "[d]uring the removal period, the Attorney General shall detain the alien." The meaning of the statute is plain on its face: the Attorney General is granted a full 90 days after an alien has been ordered removed to effect the alien's removal. During that period, the Attorney General is to detain the alien. The statute does not impose a duty on the Attorney General to remove aliens as quickly as possible within the 90-day removal period, nor does it purport to prescribe the reasons for which the Attorney General might decide to act more quickly or more slowly in effectuating a particular removal within the 90-day period.

Where, as here, the language of a statute is clear, there is no need to resort to legislative history to elucidate the meaning of the text. *See, e.g.*, *Hill*, 437 U.S. at 184 n.29. Nevertheless, we note that the legislative history here is consistent with the reading of the plain text given above — it confirms that Congress intended to give the Attorney General a full 90 days as a reasonable period of time within which to effect an alien's removal. The predecessor provision to the current section 241(a)(1) appeared at 8 U.S.C. § 1252(c) (1994), and provided that:

> When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of

> such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States . . . . Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the Untied States within such six-month period.

When Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, it shortened the removal period from six months to 90 days and eliminated any reference from the INA to a requirement that the Attorney General proceed with "reasonable dispatch" in effecting an alien's deportation. Congress seems to have viewed its newly-established 90-day time frame as a *per se* reasonable period of time in which to effect an alien's deportation, rendering judicial inquiry into the dispatch with which the Attorney General performed the duty unnecessary. Neither the text of the statute nor its legislative history provides any reason to believe that Congress intended to impose on the Attorney General an implicit requirement that he remove aliens from the country as quickly as possible within the 90-day removal period.

It might be argued that the plain-text reading outlined above raises constitutional issues that require a narrowing construction of the statute to limit the Attorney General's authority to use the full 90-day period for effecting removal. It is settled, of course, that where there are two or more plausible constructions of a statute, a construction that raises serious constitutional concerns should be avoided. *See, e.g.*, *Crowell v. Benson*, 285 U.S. 22, 62 (1932). There are two arguments that might be raised for a constitutional narrowing construction here.

First, in light of the Supreme Court's decision in *Zadvydas*, it might be claimed that the government is under an obligation, even within the 90-day statutory period, to act with reasonable dispatch to remove the alien as quickly as possible. The claim would be, in other words, that it would be unconstitutional for Congress to grant the Attorney General 90 days in which to effect an alien's removal without any obligation that he act quickly within those 90 days. We reject this view and conclude that the Constitution imposes no obstacle to such a grant of authority.

Second, also in light of the decision in *Zadvydas*, it might be argued that, if it becomes clear at a point during the removal period that an alien *can* be removed, the Constitution imposes some constraints on the *purposes* for which removal may nevertheless be delayed (and detention continued) until later in the 90-day period. The *Zadvydas* Court explained that detention under the INA must be related to the purpose for which detention is authorized — securing the alien's removal. It thus might be argued that an express decision to delay an alien's removal until the

end of the 90-day period must be based upon some purpose related to the proper execution of the immigration laws. As explained below, we conclude that the Constitution may require that the statute be read to include such a limitation. We need not definitively resolve the hypothetical question whether removal could be delayed for a reason wholly unrelated to executing the immigration laws, however, because in the instant case multiple bases existed for delaying the removal of the alien in question that were directly related to the broad considerations the Attorney General is charged with taking into account in enforcing the immigration laws.[1]

1. Reasonable dispatch. It is doubtful that the terms of section 241(a)(1)(A) could plausibly be construed to include a reasonable-dispatch requirement, particularly in light of Congress's explicit deletion of any such requirement from the statute when it enacted the IIRIRA in 1996. *Cf. Salinas v. United States*, 522 U.S. 52, 60 (1997) (principle of constitutional avoidance does not permit pressing statutory construction "to the point of disingenuous evasion"). We need not resolve that particular issue, however, because reading the statute not to include a reasonable-dispatch requirement — which, as we have outlined above, is the best reading of the text — does not raise any serious constitutional questions.

In *Zadvydas*, the Supreme Court held that the Constitution required reading an implicit limitation into section 241(a)(6) of the INA, 8 U.S.C. § 1231(a)(6), restricting the detention of an alien beyond the 90-day removal period "to a period reasonably necessary to bring about that alien's removal from the United States." 533 U.S. at 689. The Court read this limitation into the statute because, in its view, "[a] serious constitutional problem [would arise] out of a statute that . . . permits an indefinite, perhaps permanent, deprivation of human liberty without any [procedural] protection." *Id.* at 692. Thus, the Court ruled that if a habeas court determines that "removal is not reasonably foreseeable [during post-removal-period detention], the court should hold continued detention unreasonable and no longer authorized by statute." *Id.* at 699-700.

It could be argued that a constitutional limitation restricting the government's authority to detain an alien to a period "reasonably necessary to bring about that alien's removal" necessarily entails an obligation that the government proceed with reasonable dispatch in effecting removal and remove the alien as soon as reasonably practicable to do so. Even if that were a valid interpretation of the limitation imposed by *Zadvydas* on post-removal-period detention under section 241(a)(6) — an issue that we need not definitively decide in this portion of our analysis — that limitation is inapplicable to detention *within* the 90-day removal period established by section 241(a)(1)(A). The constitutional concerns that motivated the *Zadvydas* Court simply do not arise in the context of detention within the removal period.

[1] Of course, it is also implicit in the granting of any authority to an executive officer that it may not be exercised in a manner that is expressly constitutionally proscribed. Thus, the Attorney General could not, for example, delay the removal of an alien solely as a mechanism for imposing punishment on the alien. *See, e.g., Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

In *Zadvydas*, the Court made clear that the central concern informing its constitutional analysis was that the detention it was addressing was "not limited, but potentially permanent." 533 U.S. at 691. *See also id.* at 692 (stressing the "indefinite, perhaps permanent deprivation of human liberty" at stake). The 90-day removal period, by contrast, is of a fixed and relatively short duration. Indeed, the *Zadvydas* Court expressly distinguished detention during the 90-day removal period from the detention it was addressing on precisely this ground, stating that "importantly, post-removal-period detention, unlike detention pending a determination of removability or during the subsequent 90-day removal period, has no obvious termination point." *Id.* at 697. At least one lower court has ruled that *Zadvydas* is inapplicable to the 90-day removal period on precisely these grounds. *Shehata v. Ashcroft*, No. 02 CIV. 2490(LMM), 2002 WL 538845 at *2 (S.D.N.Y. April 11, 2002) ("Here, on the other hand, the 90 day period is quite limited in time, and serves a rational purpose, to allow INS to effect removal of a person already determined to be removable."); *see also Badio v. United States*, 172 F. Supp. 2d 1200, 1205 (D. Minn. 2001) ("*Zadvydas* does not apply to petitioner's claim because pre-removal-order proceedings do have a termination point.").

The relatively short detention period under section 241(a)(1)(A) makes a critical difference because the holding in *Zadvydas* rests upon considerations of substantive due process. Although the Court did not expressly label its decision as one based on "substantive due process," it made it clear that this was the foundation of its reasoning as it explicitly invoked the Fifth Amendment's Due Process Clause, *see Zadvydas*, 533 U.S. at 690, and at the same time disavowed any concern with procedural deficiencies:

> [W]e believe that an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, *irrespective of the procedures used*, the Constitution permits detention that is indefinite and potentially permanent.

Id. at 696 (citation omitted) (emphasis added). The grounding of the decision in substantive due process is important because, as a general rule, government conduct violates substantive due process constraints only when it is so extreme and intrusive that it can be said to "shock the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952). The prospect of "indefinite and potentially permanent" detention may shock the conscience of the courts, *Zadvydas*, 533 U.S. at 696, but detention for a limited period of 90 days clearly does not. In fact, several courts called upon to review early immigration statutes that did not specify a fixed period for the government's detention authority settled upon similar time frames in specifying the permissible length of a "reasonable" detention. *See, e.g., United States ex rel. Janavaris v. Nicolls*, 47 F. Supp. 201, 202 (D. Mass. 1942) ("The period of time which judges have found to be appropriate in peace-time varies from one month . . . to four months."); *United States ex rel. Ross v. Wallis*, 279 F. 401, 404 (2d Cir. 1922) (holding that four months is a reasonable time); *Caranica v. Nagle*, 28 F.2d 955, 957 (9th Cir. 1928) (holding that two months is a reasonable time); *Saksagansky v. Weedin*, 53 F.2d 13, 16 (9th Cir. 1931) (authorizing the detention of an alien already held for five months for an additional 30 days).

More important, the *Zadvydas* Court expressly held that the detention of an alien for a period of up to six months is presumptively constitutionally reasonable and does not violate substantive due process constraints. *See Zadvydas*, 533 U.S. at 701. If detention for a period of six months to effect removal is presumptively reasonable and does not violate an alien's substantive due process rights, it follows *a fortiori* that detention during the shorter 90-day removal period cannot be constitutionally problematic. *See Borrero v. Aljets*, 178 F. Supp. 2d 1034, 1039 (D. Minn. 2001) ("*Zadvydas* confirms that a legally admitted alien can always be detained during the 90-day 'removal period' contemplated by the statute. But after that, the Court held, the alien can be held for only a 'reasonable period,' which is presumed to be six months . . . ."). Where conduct that "shocks the conscience" is the ultimate touchstone for constitutional analysis, if six months' detention is reasonable, detention for 90 days is simply below the threshold for substantive due process constitutional concerns. Indeed, *Zadvydas* makes the constitutionality of detention during the 90-day removal period even clearer than this, because the six-month "presumptively reasonable" period established by that decision may very well not begin to run until *after* an alien has already been detained for the 90-day removal period.[2] Substantive due process constraints thus do not afford any basis for reading a "reasonable dispatch" requirement into section 241(a)(1)(A).

In addition, because this particular case involves removal of an alien with demonstrated ties to members of a terrorist organization with which the United States is currently at war, it is even plainer that detention for 90 days without any obligation on the government to act quickly cannot be a concern of constitutional dimensions under the reasoning in *Zadvydas*. In outlining the constitutional problems with potentially indefinite detention, the Supreme Court made it express that the principles it was applying might very well not apply to the government's actions dealing with aliens suspected of involvement in terrorism. The Court distinguished that context, saying that "we [do not] consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." 533 U.S. at 696. Indeed, the Court implied that the government's interest in preventing terrorism is sufficiently great that detention measures specifically targeting "suspected terrorists" are deserving of heightened judicial deference. *See id.* at 691. Thus, the Court suggested that, in the context of an

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[2] *Zadvydas* does not make it clear whether the six month "presumptively reasonable" period begins at the end of, or encompasses, the 90-day removal period. *Zadvydas*, 533 U.S. at 700-01. The lower courts appear to be split on the issue. *Compare Borrero v. Aljets*, 178 F. Supp. 2d 1034, 1040-41 (D. Minn. 2001) ("As interpreted by the Supreme Court in *Zadvydas*, § 1231(a)(6) authorizes the INS to detain aliens for six months *after the expiration* of the 90-day removal period.") (emphasis added) *with Malainak v. INS*, No. 3-01-CV-1989-P, 2002 WL 220061 at *2 (N.D. Tex. Feb. 11, 2002) ("the Court opined that a presumptively reasonable period of detention was *between* the ninety days provided for by the IIRIRA and six months") (emphasis added). In November 2001, the Department issued regulations reflecting an assumption that the presumptively reasonable six-month period from *Zadvydas* includes the 90-day removal period. *See* 8 C.F.R. § 241.13(b)(2)(ii) (2002). The choice to treat the six-month period in that fashion in the regulation, of course, is not definitive on constitutional *requirements* for measuring the six-month period.

alien suspected of involvement in terrorism, detention might well be justified beyond the six-month period of detention that the Court deemed presumptively constitutionally reasonable for any case. As a result, where as here, investigation to determine whether an alien is connected to a terrorist organization is part of the justification for prolonging detention and the detention remains confined *within the 90-day removal period,* there can be no basis for concluding that substantive due process constraints are implicated.

Although we conclude, based on the reasoning of *Zadvydas*, that the Constitution does not require that a "reasonable dispatch" obligation be read into section 241(a)(1)(A), one line of lower court decisions regarding the substantive due process implications of prolonged detention should be briefly distinguished. Certain lower courts addressing pretrial detention in the criminal justice system have held that lengthy detention may violate substantive due process constraints under certain circumstances and that evaluating a claimed violation "requires assessment on a case-by-case basis, since due process does not necessarily set a bright line limit for length of pretrial confinement." *United States v. Gonzales Claudio*, 806 F.2d 334, 340 (2d Cir. 1986). *See also United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986). It might be thought that those cases call into question our blanket conclusion that detaining aliens for a period of 90 days does not violate substantive due process guarantees, even where the Attorney General fails to act with reasonable dispatch. The purpose for the case-by-case inquiry engaged in by the courts in those cases, however, is to examine factors *other* than length of confinement that the courts deemed relevant to the substantive due process inquiry — such as which party is primarily responsible for any delays. *See, e.g., Gonzales Claudio*, 806 F.2d at 340 ("we also consider the extent to which the prosecution bears responsibility for the delay that has ensued"). If the factor of length of confinement is viewed in isolation, applicable case law makes it crystal clear that a 90-day detention period is not constitutionally objectionable, and that no case-by-case inquiry into the length of confinement is therefore required. As we have already mentioned, *Zadvydas* explicitly states that civil detention for a period of six months in the context of deportation is presumptively constitutionally reasonable, *see* 533 U.S. at 701, and even cases examining the constitutionality of prolonged pretrial detention have typically begun their analysis by presuming that the 90-day period established by the Speedy Trial Act is a reasonable detention period. *See, e.g., Gonzales Claudio*, 806 F.2d at 340-41 (citing 18 U.S.C. § 3164(b)).

Moreover, precedents relating to preventive pretrial detention in criminal cases are not directly applicable to the context of detention incident to removal. In distinguishing its own pretrial detention precedent from the context of immigration proceedings, the Second Circuit noted that "a deportation proceeding is not a criminal proceeding . . . and the full trappings of legal protections that are accorded to criminal defendants are not necessarily constitutionally required in deportation proceedings." *Dor v. INS*, 891 F.2d 997, 1003 (2d Cir. 1989). In a later decision, the Second Circuit elaborated on this distinction:

> It is axiomatic, however, that an alien's right to be at liberty during the course of deportation proceedings is circumscribed by considerations of the national interest.

> Control over matters of immigration and naturalization is the "inherent and inalienable right of every sovereign and independent nation." *Fong Yue Ting v. United States*, 149 U.S. 698, 711, 13 S.Ct. 1016, 1021, 37 L.Ed. 905 (1893). . . . In exercising its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews*, 426 U.S. at 80, 96 S.Ct. at 1891. Governmental conduct that may be considered "shocking" when it serves to deprive the life, liberty or property of a citizen may not be unconstitutional when directed at an alien.

Doherty v. Thornburgh, 943 F.2d 204, 209 (2d Cir. 1991) (citations omitted), *cert. dismissed*, 503 U.S. 901 (1992). Thus, the Second Circuit considers the detention of an alien prior to removal to be constitutionally permissible unless the alien can show that "his continuing detention was the result of an 'invidious purpose, bad faith or arbitrariness.'" *Ncube v. INS*, No. 98 Civ. 0282 HB AJP, 1998 WL 842349, at *16 (S.D.N.Y. Dec. 2, 1998), *citing Doherty*, 943 F.2d at 212. Especially where the Supreme Court has already established that detention of an alien for a period of six months is presumptively constitutionally reasonable, detention for a period of 90 days in itself cannot possibly satisfy that exacting standard for establishing a violation. Thus, lower court decisions that have examined the substantive due process implications of pretrial detention do not call into question our conclusion that the Constitution does not require that the Attorney General act with reasonable dispatch during the 90-day removal period.

Finally, we note that in January 2002, the INS General Counsel's Office issued an opinion in which it advised that, during the 90-day removal period, the INS is constitutionally required to "proceed[] with reasonable dispatch to arrange removal." *See* Memorandum for Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations from Dea Carpenter, Deputy General Counsel, *Re: Authority to Detain During the 90-Day Removal Period* at 1 (Jan. 28, 2002) ("*INS Memorandum*"). Based on the analysis outlined above, we disagree with the INS's conclusion.

The INS derived the reasonable-dispatch requirement from language in *Zadvydas* construing section 241(a)(6) and stating that "the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." *INS Memorandum* at 2, *citing Zadvydas*, 533 U.S. at 689. The INS reasoned that, "while the *Zadvydas* opinion is technically limited to post-removal period detention, and while the statute provides authority to detain an alien with a final order of removal for up to the 90-day removal period, the INS should not continue to detain an alien during the removal period beyond the point at which the alien could be removed except to the extent that the INS is taking necessary actions to process the alien for removal." *INS Memorandum* at 3. In our view, this conclusion was in error because it mistakenly applies the limitations on post-removal period detention under section 241(a)(6) to removal-period detention under section 241(a)(1)(A). As explained above, neither the plain

language of section 241(a)(1)(A) nor its legislative history allows any inference that Congress intended to impose a reasonable-dispatch obligation on the INS during the 90-day removal period. Moreover, the constitutional concerns that impelled the Supreme Court to read such an obligation into section 241(a)(6) simply are not applicable to detention during the 90-day removal period. In *Zadvydas*, the Supreme Court reasoned that because indefinite civil detention of lawfully admitted aliens would raise serious constitutional questions, detention must be limited to a period reasonably necessary to effect removal. The *Zadvydas* court expressly distinguished the 90-day removal period, however, on the grounds that it has a defined termination point. *See* 533 U.S. at 697. Lower courts, accordingly, have held that *Zadvydas*'s constitutional reasoning is inapplicable to detention during the removal period. *See Shehata*, 2002 WL 538845, at *2. In short, we disagree with the INS's reading of *Zadvydas*, and reaffirm our conclusion that the Constitution does not impose a reasonable-dispatch obligation during the 90-day removal period.[3]

2. Purposes for which removal may be delayed. The second argument that might be raised for a constitutionally based narrowing construction of section 241(a)(1)(A) would rest on the theory that, once all of the mechanical steps that are necessary to effectuate an alien's removal have been taken, the Constitution imposes some limitations on the purposes for which it is permissible to further delay the alien's removal while keeping the alien in detention. In *Zadvydas*, the Supreme Court explained that the reasonableness of an alien's detention must be measured "primarily in terms of the statute's basic purpose," which the Court identified as

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[3] The *INS Memorandum* also cites at length several decisions addressing the impact of INS detention on triggering the Speedy Trial Act where it appears that the INS has held an alien solely for the purpose of allowing a criminal investigation (into the same conduct that forms the basis for deportation) to proceed. *See INS Memorandum* at 3-4. It is unclear to what extent, if at all, the INS intends to rely on these cases for the proposition that the INS must act with reasonable dispatch. Instead, the INS relies on them primarily for the proposition that the INS can detain an alien solely for purposes of effecting removal, an issue we address below. *See infra* pp. 10-14. In any event, the Speedy Trial Act cases provide no support for any general obligation on the INS to act with dispatch. Rather, they establish solely that, when an alien is prosecuted for the same conduct that formed the basis for the immigration violation on which he was held and when the INS has delayed deportation (and prolonged detention) solely to permit the criminal investigation to proceed, the INS detention may trigger the deadlines of the Speedy Trial Act. That, in turn, may lead to a Speedy Trial Act violation that may be raised *in the criminal trial* to seek dismissal of the indictment. *See, e.g.*, *United States v. Garcia-Martinez*, 254 F.3d 16 (1st Cir. 2001); *see also United States v. De La Pena-Juarez*, 214 F.3d 594, 598-99 (5th Cir.), *cert. denied* 531 U.S. 983 (2000) *and cert. denied*, 531 U.S. 1026 (2000). That consequence for the criminal trial does not mean by any stretch that the INS lacks *power* to detain the alien for the full 90 days prior to removal or that the INS has a general obligation to act with dispatch during that time. It is true that, in explaining how INS detention solely for purposes of criminal investigation may trigger the Speedy Trial Act, one district court stated in dicta that "[i]n essence, the INS has an obligation to act with all deliberate speed to remove from the United States a detained alien who has been finally determined to be deportable." *United States v. Restrepo*, 59 F. Supp. 2d 133, 138 (D. Mass. 1999). In context, it is clear that all the court was indicating was that, when the sole purpose of detention is providing time for criminal investigation, there may be consequences under the Speedy Trial Act for the prosecution. To the extent that this dicta might be construed to suggest anything further concerning a general obligation to act with dispatch, there is no support in the court's Speedy Trial Act analysis for such a conclusion and it is not a correct statement of the law.

securing the alien's removal. *Zadvydas*, 533 U.S. at 699. Similarly, in the wake of *Zadvydas*, the Third Circuit has stated that "[t]he requirements of substantive due process are not met unless there is a close nexus between the government's goals and the deprivation of the interest in question." *Patel v. Zemski*, 275 F.3d 299, 311 (3d Cir. 2001). Thus, the INS has taken the position, both in the *INS Memorandum* and in some instances of prior litigation, that it does not have the power to detain aliens for any purpose other than the effectuation of removal.[4] *See INS Memorandum* at 1; *United States v. Restrepo*, 59 F. Supp. 2d 133, 138 (D. Mass. 1999).[5] Even before *Zadvydas*, in fact, several district courts had expressed the view that, once it has become apparent that an alien cannot be deported, his detention can no longer be said to be for purposes of effecting his removal. *See United States ex rel. Blankenstein v. Shaughnessy*, 117 F. Supp. 699, 703-04 (S.D.N.Y. 1953) ("courts have the power to release on habeas corpus an alien held for deportation on a showing . . . that the detention cannot in truth be said to be for deportation"); *United States ex rel. Kusman v. INS*, 117 F. Supp. 541, 544-45 (S.D.N.Y. 1953); *Rodriguez v. McElroy*, 53 F. Supp. 2d 587, 591 n.6 (S.D.N.Y. 1999) ("[d]etention is intended for the sole purpose of effecting deportation"); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 793 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981); *Williams v. INS*, No. 01-043 ML, 2001 WL 1136099, at *4 (D.R.I. Aug. 7, 2001).

There is support in the cases for the general principle suggested by the INS to this extent: the detention of an alien — perhaps even during the 90-day removal period — likely must be related to enforcing the immigration laws and properly effecting the alien's removal in accordance with the nation's immigration laws and policies. Thus, in the abstract, it might raise difficult constitutional questions if the Attorney General were expressly to delay the removal of an alien (and thereby prolong his detention) solely for a purpose that was — by hypothesis — entirely unrelated to any legitimate interest in the enforcement of the immigration laws.[6] We need not definitively decide whether such a hypothetical scenario would raise constitutional

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[4] In coming to this conclusion, the INS relies heavily on several cases holding that when aliens detained by the INS are held solely for the purpose of facilitating a criminal investigation, the detention triggers the provisions of the Speedy Trial Act. *See INS Memorandum* at 3-4. As noted above, however, those cases merely interpret the Speedy Trial Act and the guarantees it provides a defendant *in the context of his criminal case*. It might well be the case that if the INS were to hold an alien solely for the purpose of permitting a criminal investigation to proceed there would be a Speedy Trial Act problem in the criminal prosecution. That does not mean, however, that the INS lacked legal authority to detain the alien while the criminal investigation proceeded. We therefore do not view those cases as useful for determining the scope of the INS's authority under section 241(a)(1) of the INA to delay removal of an alien during the 90-day removal period.

[5] *See also INS Memorandum* at 5 ("While nothing in the language of the statute requires that the INS expedite an alien's removal during the 90-day removal period, or that the INS remove an alien at the very earliest point at which travel arrangements can be made . . . detention beyond that point must be related to removing the alien.").

[6] Of course, as noted above, *see supra* n.1, it is also clear that the INS could not prolong an alien's detention for a constitutionally impermissible purpose.

infirmities, however, because in the present case there are reasons directly related to the enforcement of the immigration laws that justify any delay in the alien's removal.[7] Of course, acknowledging (as we do for purposes of analysis here) that the reason for an alien's detention must be related to legitimate interests in enforcing the immigration laws does not in itself provide much concrete guidance for determining precisely what activities meet that test. Rather, it merely frames the next step of the inquiry. Here, we cannot purport by any means to provide a comprehensive assessment of all the tasks or all the inquiries that may meet that standard in the myriad scenarios that may arise. Given the numerous broad objectives that underlie the nation's regulation of immigration — many of which relate to protecting our citizens from harm at the hands of aliens — there are potentially a vast array of interests legitimately related to policing immigration that may have a bearing on the Attorney General's decision (effected through the INS) concerning exactly when during the removal period an alien should be removed.[8] For present purposes, we limit our discussion to the interests relevant in this case.

At a bare minimum, of course, administrative tasks such as making transportation arrangements, securing travel documents, communicating with domestic and foreign law enforcement agencies, and making internal administrative arrangements for escorts and security are all legitimately related to removal. *Accord INS Memorandum* at 4.

In our view, moreover, there is a substantially broader range of immigration-related considerations that the Attorney General is permitted to take into account in effecting the removal of an alien, and thus deciding whether and exactly when to remove an alien. For example, as the Supreme Court acknowledged in *Zadvydas*, the immigration policy of the United States is inextricably intertwined with complex and important issues of foreign policy. *Zadvydas*, 533 U.S. at 700. *See also Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with

[7] Even if other motivations exist in addition to the need to develop information relevant to decisions in the deportation process, to our knowledge it has never been suggested that the existence of additional governmental motivations can undermine or invalidate a detention that is supported by a lawful purpose. *See, e.g., United States ex rel. Zapp v. INS*, 120 F.2d 762, 764 (2d Cir. 1941) (ongoing criminal investigations do not affect the INS's removal authority); *cf. Whren v. United States*, 517 U.S. 806, 811-13 (1996) (holding that subjective motive of officers for traffic stop is irrelevant where stop is supported by probable cause and thus rejecting "any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved"); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 491 (1999) (explaining that where an alien's presence in this country is a violation of the immigration laws, he may be deported and the possible existence of additional reasons for the government's focus of enforcement efforts on him is irrelevant; indeed the "Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat").

[8] For example, 8 U.S.C. § 1231(c)(2)(A)(ii) makes it express that the Attorney General may stay the removal of an alien stopped upon arriving at a port of entry (who otherwise would be removed "immediately," *id.* § 1231(c)(1)) if the "alien is needed to testify in [a criminal] prosecution." A similar need for an alien's presence in a criminal or civil trial may well be a legitimate concern justifying a delay in removal. We need not decide such questions here.

contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."). Every removal of an alien necessarily involves an act affecting foreign policy because it requires sending the alien to another country. In some cases, the foreign policy implications of that act may be significant. As the Supreme Court has recognized, enforcement priorities in the immigration context may reflect "foreign-policy objectives" and it is even possible that the Executive might wish "to antagonize a particular foreign country by focusing on that country's nationals." *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 491 (1999). *See also Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (noting that decisions relating to immigration "may implicate our relations with foreign powers"); *cf. Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) (grounding federal control over ingress and egress of aliens in part in federal government's "entire control of international relations"). More importantly here, releasing criminal or terrorist aliens into another country without providing adequate warning to the appropriate law enforcement or other officials in the receiving country can have adverse consequences for the security of that country, which can lead to the souring of diplomatic relationships or other negative results for foreign policy. Similarly, releasing aliens from United States custody who are suspected of involvement with terrorism can have a profound impact on our own national security. National security is also a concern inherently relevant to policing the flow of persons across our borders under the immigration laws. *See generally Carlson v. Landon*, 342 U.S. 524, 534-36 (1952).

It is not only common sense that makes clear the inherent relationship between enforcing the immigration laws and considerations of both foreign policy and national security; rather, those considerations are embedded in the text of the immigration laws themselves. For example, the fact that an alien's presence in the United States could result in "adverse foreign policy consequences" is *in itself* a grounds for removal under the INA. *See* INA § 237(a)(4)(C)(i), 8 U.S.C. § 1227(a)(4)(C)(i) (2000). Similarly, in certain circumstances, the Attorney General may block the departure of an alien from the United States when it would be deemed prejudicial to national security interests to permit him to depart. *See* 8 C.F.R. § 215.3(b), (c) (2002).

More importantly here, the INA expressly gives the Attorney General authority in many instances to make discretionary decisions bearing upon the removal of an alien based on broad considerations of policy. For example, section 241(b)(2)(C)(iv), provides that "[t]he Attorney General may disregard [an alien's designation of a country to which he would like to be removed] if the Attorney General decides that removing the alien to the country is prejudicial to the United States." Similarly, section 241(b)(2)(E)(vii) provides that the Attorney General is not to remove an alien to certain countries, even if they are willing to accept the alien, if he determines that it is "impracticable" or "inadvisable." By granting the Attorney General authority to make such determinations, Congress made it clear that the broad considerations of foreign policy or national security that might underlie such decisions are directly related to — indeed, are an integral part of — the enforcement of the immigration laws. Where more time is needed for the Attorney General to receive further information bearing on such decisions, the investigation to generate such information is legitimately related to enforcing the immigration

laws and can justify delaying the alien's departure.

Thus, at a minimum, where the Attorney General has a statutorily prescribed decision to make concerning the removal of an alien — such as whether it would be "prejudicial to the United States" to remove him to a particular country — developing the information needed for the Attorney General to make that determination wisely is a task that is related to proper implementation of the immigration laws. It would thus be justifiable to delay an alien's removal while an investigation to develop that information (including information about whether the alien has terrorist or criminal connections) is pursued.

In addition, even where the Attorney General does not have such an express statutory determination to make, we conclude that efforts to investigate an alien's background to determine, for example, ties to terrorist organizations are legitimately related to the process of removal. Full information on such aspects of an alien's background may be critical for a number of purposes. It permits the United States to coordinate appropriately with law enforcement officials in the receiving country to ensure that they are aware of any threats the alien might pose and might potentially benefit the national security interests of both the United States and the receiving country by providing officials in the receiving country a basis for arresting upon arrival an alien who poses a serious threat. Taking such steps to coordinate with the receiving country is part and parcel of the proper implementation of the immigration laws. Delaying departure of an alien until later in the 90-day period in order to continue pursuing such investigations into terrorist ties is thus entirely permissible.[9] It is true that, as a purely mechanical matter, the physical removal of an alien and his transportation might be arranged without thoroughly investigating his background and without taking the time to appropriately inform countries that may be willing to accept him about the results of our investigations. But there can be no question that time spent on such efforts is nevertheless reasonably related to the enforcement of the

[9] We note that the INS appears to agree in principle with the understanding we have outlined here concerning the factors that are legitimately considered in effecting an alien's removal. In discussing "critical aspects of the removal process," the INS has stated as follows:

> It is clearly a legitimate governmental interest that the INS communicate with other law enforcement agencies, both domestic and foreign, and make sure that a particular alien is not wanted for prosecution or needed as part of an investigation, in which case the alien could be transferred into the legal custody of another law enforcement agency. In the context of the investigation into the September 11, 2001 attacks on the Pentagon and the World Trade Center, the United States and the country of removal also have a legitimate interest *in ensuring to the extent possible that a particular alien has no connection with any terrorist organization or activity.*

INS Memorandum at 4 (emphasis added). The full scope of the conclusions that the INS drew from this analysis is not entirely clear. As the text above explains, we conclude that if investigations into an alien's terrorist connections are ongoing during the 90-day removal period, postponing removal until later in the period in order to permit such investigations to continue is permissible. Such investigations are legitimately related to effectuating the removal properly under the immigration laws.

immigration laws.

II.

Your Office has also asked us to determine whether (and under what circumstances) the Attorney General may decide to take longer than the 90-day removal period to remove an alien even where it would be logistically possible to accomplish the removal before the expiration of the 90 days. We conclude, under either of two alternative readings of the statute, that at least certain categories of removable aliens may be held by the INS beyond the 90-day removal period, at least where there are reasons for the delay that are related to carrying out the immigration laws. We note, however, that under the Supreme Court's decision in *Zadvydas*, an obligation to act with "reasonable dispatch" will attach at some point after the expiration of the 90-day removal period.

A.

Section 241(a) of the INA directs that the Attorney General "shall remove" aliens within 90 days of the date on which they are ordered removed. INA § 241(a)(1)(A). It also indicates, however, that section 241 elsewhere provides exceptions to that general rule. *Id.*[10] Section 241(a)(6) on its face provides such an exception. It states that "[a]n alien ordered removed who is inadmissible under section 212 [1182], removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) [1227] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period."

The plain text of the provision expressly states, in language indicating a grant of authority, that listed classes of aliens "may be detained beyond the removal period." By its terms it thus grants the Attorney General the power to refrain from removing an alien — and instead to keep him in detention — after the removal period has expired. The statute does not provide any preconditions for the exercise of this authority, other than that the alien must belong to one of the listed categories. Thus, in the *Zadvydas* litigation the United States took the position that "by using the term 'may,' Congress committed to the discretion of the Attorney General the ultimate decision whether to continue to detain such an alien and, if so, in what circumstances and for how long." Brief of the United States in *Ashcroft v. Kim Ho Ma*, 2000 WL 1784982 at *22 (Nov. 24, 2000).

Nothing in the Supreme Court's decision in *Zadvydas* casts any doubt on the validity of the plain-text reading of section 241(a)(6) as an express authorization for the Attorney General to detain — and thus refrain from removing — the listed classes of aliens beyond the removal

[10] The provision reads: "Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days . . . ."

period. The *Zadvydas* Court held that it would raise serious constitutional questions for Congress to authorize the *indefinite* detention of aliens falling into the listed classes. It thus read into the statute an implicit limitation on the allowable *duration* of post-removal-period detention. 533 U.S. at 689 ("the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States"). The Court also implied that detention beyond the 90-day removal period must be in furtherance of removal-related purposes, as it stated that the reasonableness of a detention should be measured "primarily in terms of the statute's basic purpose, namely assuring the alien's presence at the moment of removal." *Id.* at 699. Nothing in the Court's decision, however, calls into question the central point that section 241(a)(6) constitutes an express source of authority to detain aliens in the listed classes beyond the removal period, albeit subject to the above limitations.

This plain-text reading, moreover, does not lead to an absurd or an unconstitutional result. The statute limits the authority to prolong detention beyond the removal period to particular classes of aliens designated by Congress. The aliens listed in the statute include aliens who were never legally admitted to the country, *see* INA § 212, aliens who violate their nonimmigrant status or their conditions of entry, *see* INA § 237(a)(1)(C), criminal aliens, *see* INA § 237(a)(2), aliens who are a potential threat to national security, *see* INA § 237(a)(4), and aliens deemed by the Attorney General to constitute a flight risk or a danger to the community. *See* INA § 241(a)(6). Congress could reasonably have anticipated that in many instances additional time beyond the 90-day removal period would be required to remove these classes of aliens, perhaps because of heightened security concerns, the need to conduct especially thorough background investigations, or the difficulty that might be encountered in finding foreign countries willing to accept such aliens. *Zadvydas* confirms the constitutionality of holding such aliens beyond the 90-day removal period, and establishes that it is constitutionally permissible to hold aliens in confinement "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701. Our plain text reading of section 241(a)(6) is thus constitutionally unproblematic.

It might be argued that section 241(a)(6) does not itself constitute an exception to the 90-day rule, but rather merely empowers the Attorney General to *detain*, rather than *release*, aliens who *happen*, for some other reason, to still be in the country at the expiration of the 90-day removal period (for example, because no country would accept them or because their removal was delayed based upon some other source of authority that provides an exception to the command to remove aliens within 90 days). Under this view, section 241(a)(6) would be understood as a parallel provision to section 241(a)(3). Section 241(a)(3) gives authority to impose supervised release when it happens that an alien has not been removed within the 90-day period. Section 241(a)(6), the argument would go, should be understood as simply a parallel authority to detain the alien in the same circumstance. The difficulty with that approach to the statute is that the two sections are not drafted in parallel terms. Congress demonstrated in enacting section 241(a)(3) that it knows how to phrase language that does not grant an authority

to delay removal of an alien beyond the 90-day period, but at the same time does give a power that can be exercised when it happens (for some other reason) that an alien has not been removed by the deadline. Section 241(a)(3) empowers the Attorney General to impose terms of supervised release on an alien "[i]f the alien does not leave or is not removed within the removal period." The quoted language makes it clear that section 241(a)(3) does not itself constitute authorization to delay removal beyond the removal period, but rather merely establishes an authority to impose supervised release in a certain situation — the situation where it happens that alien has not been removed within the 90 days. The reasons *why* the alien has not been removed are not specified, and presumably could include the impossibility of removal or the exercise of some *other* authority to delay removal. The absence of similar conditional language triggering the application of section 241(a)(6) — just three paragraphs later in the same subsection — is a strong textual indication that section 241(a)(6) is not similarly limited. Instead, it was intended to serve as a general authorization for the Attorney General to refrain from removing the listed classes of aliens and to detain them beyond the removal period. It is well settled, after all, that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

Finally, we note that there is further textual support for the conclusion that section 241(a)(6) cannot properly be read as applying solely to a situation where it has proven impossible to remove an alien within the 90-day removal period. Here again, Congress knows how to express such a limitation when it wants to impose one, and it did so in the very next subsection of the statute. Section 241(a)(7) allows the Attorney General to authorize employment for those aliens who, although ordered removed, "cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien." That provision explicitly limits a grant of employment authorization to situations where it is impossible to remove an alien because no country is willing to accept him. The absence of similar language from section 241(a)(6) demonstrates that Congress did not intend similarly to limit the Attorney General's discretion in determining when and under what circumstances to detain aliens falling within the listed classes beyond the 90-day removal period.

B.

Even if section 241(a)(6) did *not* authorize the Attorney General to delay removal of an alien beyond the removal period and instead provided solely authority to detain aliens who happen, for some other reasons, to still be in the country after the removal period, we would still conclude that the Attorney General has statutory authority to delay removal of at least some aliens until beyond the 90-day deadline.

We start with the observation that the text of section 241 makes it clear that Congress did not intend to obligate the Attorney General to remove aliens within the removal period in *all* instances. Despite the mandatory language directing that the Attorney General "shall remove"

aliens within the removal period, numerous provisions in section 241 expressly contemplate that aliens who have been ordered removed will still be in the country after the expiration of the removal period. For example, as noted above, section 241(a)(3) establishes standards for supervised release of aliens that apply "[i]f the alien does not leave or is not removed within the removal period." Similarly, under the reading of section 241(a)(6) that we are assuming for this portion of our analysis, that provision provides authority for the Attorney General to detain an alien who has not been removed within the removal period. Both of these provisions assume a situation in which an alien has not been removed by the end of the removal period. They would make no sense if the INA imposed an ironclad legal obligation to effect the removal of all aliens before the removal period ended. Similarly, section 241(a)(7) permits the Attorney General to grant work authorizations to aliens who have been ordered removed and applies only in limited circumstances (such as where no country will accept the alien) that suggest the alien will be in the country well beyond the 90 days.

Other provisions in section 241 reinforce the conclusion that Congress understood that, in at least some instances, aliens would not be removed within the removal period. Section 241(b) establishes a detailed decision tree that the Attorney General must follow in determining to which country an alien should be removed. In some instances, the statute contemplates that the Attorney General may have to negotiate sequentially with as many as nine or more separate countries to secure permission to remove an alien, with each round of negotiations taking as many as 30 days.[11] *See* INA § 241(b)(2). It might simply be impossible to complete this entire process within the 90-day removal period, even without taking into account the time that the Attorney General and his agents must devote to such administrative tasks as securing necessary

[11] For example, an alien who is to be removed under section 241(b)(2) first has the opportunity to designate the country to which he would like to be removed. *See* INA § 241(b)(2)(A). Once the alien has designated a country, that country is accorded a minimum of 30 days to decide whether to accept the alien. *See* INA § 241(b)(2)(C)(ii). The Attorney General may also override the alien's designation if he determines that removing the alien to the designated country would be "prejudicial to the United States." *See* INA § 241(b)(2)(C)(iv). If the designated country declines to accept the alien, or if the Attorney General overrides the designation, the Attorney General is instructed by the statute to attempt to remove the alien to the country of his nationality or citizenship. *See* INA § 241(b)(2)(D). That country is then accorded a presumptive 30 days by the statute to decide whether to accept the alien, but here the Attorney General is further vested with discretion to alter that time period, raising the possibility that this step could take even longer. *See* INA § 241(b)(2)(D)(i). If the country of the alien's citizenship or nationality declines to accept the alien, the Attorney General is instructed to attempt to remove the alien to one of six listed countries, including the country in which the alien was born and the country from which the alien was admitted to the United States. *See* INA § 241(b)(2)(E)(i)-(vi). Each of those countries, of course, would have to be separately negotiated with by the United States, and would also have to be given an appropriate amount of time — presumably 30 days — to decide whether to accept or reject the alien. Finally, if none of the six listed countries is willing to accept the alien, or if the Attorney General decides that it would be "inadvisable" to send the alien to any of the listed countries that is willing to accept him, the Attorney General is instructed to remove the alien to any country of the Attorney General's choice whose government is willing to accept the alien. *See* INA § 241(b)(2)(E)(vii). Needless to say, following this decision tree through to its very last step — which Congress must have contemplated would be necessary in at least some cases — would take considerably longer than the 90 days allotted to the Attorney General by section 241(a)(1)(A).

travel documents and making appropriate security arrangements. Thus, as the Supreme Court acknowledged in *Zadvydas*, "we doubt that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time." 533 U.S. at 701.

While the text of section 241 thus makes it clear that there may be instances in which an alien is not removed within the removal period, that in itself does not explain the circumstances that would make it permissible for the Attorney General to fail to accomplish removal within the allotted time. The discussion above does suggest one such circumstance — namely, the situation where it is simply not possible to remove an alien within 90 days because a country has not yet been found that will accept him. As explained above, the detailed decision tree established in section 241(b) sets out a process for finding a country of removal that has various timing provisions built in and that may very well take more than 90 days to complete in some cases. And section 241(a)(7), in permitting the Attorney General to grant employment authorization in some circumstances, acknowledges that there may be instances in which "the alien cannot be removed due to the refusal of all countries" to accept him. It is significant, however, that the statute nowhere provides an express exception to the command to remove aliens within 90 days for such cases of impossibility. Instead, that exception must be implied based on the explicit textual references acknowledging that aliens may, in fact, be in the country past the 90-day period, the nature of the process Congress established for choosing the country of removal (a process that, on its face, may take longer than 90 days), and the assumption that Congress would not extend its command about timing to require the Attorney General to do the impossible.

The question here is whether a similar exception may also be implied under the statute that would permit the Attorney General under certain conditions to *choose* to delay removal of an alien even where it would be possible to remove him by the deadline. It could be argued that impossibility of removal — a circumstance beyond the Attorney General's control — is the *only* circumstance that makes it permissible for the Attorney General to fail to accomplish removal by the 90-day mark. Such a limited exception to the 90-day rule, however, would not be consistent with the nature of the decisions that are entrusted to the Attorney General under the immigration laws. Rather, a similar exception to the 90-day deadline should be understood as implicit in the statute where the time deadline would conflict with the Attorney General's ability properly to enforce the immigration laws, taking into account the full range of considerations he is charged with weighing in accomplishing removal of an alien. The Attorney General is charged by different provisions of section 241, for example, with determining whether it would be "prejudicial to the United States" to remove an alien to the country of his choosing, *see* INA § 241(b)(2)(C)(iv), and with determining whether it would be "inadvisable" to remove aliens to other countries designated by the statutory decision tree, *see* INA § 241(b)(1)(C)(iv); INA § 241(b)(2)(E)(vii); INA § 241(b)(2)(F). *Cf.* INA § 241(a)(7)(B) (noting circumstances in which Attorney General may make a finding that "removal of the alien is otherwise impracticable or contrary to the public interest"). As explained above, in making these and other similar determinations an essential part of the operation of the immigration laws, Congress has

embedded considerations of foreign policy and national security in the decisions that the Attorney General must make in accomplishing the removal of aliens. *See Zadvydas*, 533 U.S. at 700-01. And even where a specific statutory determination is not required, in any situation involving removal of an alien with terrorist connections, weighty considerations of foreign policy and national security bear upon efforts to provide the fullest information possible to the receiving country to promote both its security and the security of the United States. At other times, the health and well-being of an alien, including human rights that are protected by the United States' treaty obligations, must be considered. *See, e.g.,* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Apr. 18, 1988, S. Treaty Doc. No. 100-20 (1988); INA § 241(b)(3)(A).

In entrusting the Attorney General with the responsibility to make determinations that could have such serious implications, Congress surely did not intend to require him to make determinations in undue haste and without taking the necessary time to conduct thorough investigations, seriously deliberate, confer with other executive agencies, and make an informed decision. If the 90-day deadline were considered an inexorable command, however, it might require precisely such uninformed decisionmaking. For example, under the decision tree provided by section 241(b), a country willing to accept a particular alien might not be found until late in the removal period, and the Attorney General might then be faced with deciding whether it would be "inadvisable" to remove the alien to that particular country in a matter of days. Where the Attorney General has such a role to perform — and particularly where his decision may rest upon grave concerns for national security — there is no reason to understand the 90-day deadline as an overriding imperative in the statute that may force a premature decision based on incomplete information or lack of deliberation. Similarly, where the removal of an alien with terrorist connections is at stake and the United States is in the process of investigating information that, if passed along to a receiving country, could have a profound impact on the measures that country could take to ensure both its security and the national security of the United States, there is no reason for thinking that the 90-day deadline was meant to trump due deliberation on such proper considerations under the immigration laws.

In short, in our view, Congress did not intend a rigid time deadline to take precedence in situations where the proper administration of the immigration laws requires additional time. The statute gives no indication that Congress attributed any less importance to discretionary immigration-related determinations entrusted to the Attorney General and his designees than it did to non-discretionary functions such as securing travel documents and finding a country willing to accept an alien. Thus, in our view, the Attorney General is not rigidly bound by the 90-day requirement even in situations where it theoretically would be possible to remove an alien and a foreign country has already signaled its willingness to accept him.

Our conclusion that such an implicit exception to the 90-day deadline should be understood under the statute is also buttressed by the INS's longstanding conclusion that it has implied authority under the statute to refrain from removing aliens within the removal period

essentially as a matter of prosecutorial discretion. *See* Memorandum to Regional Directors, etc., from Doris Meissner, Commissioner, Immigration and Naturalization Service, *Re: Exercising Prosecutorial Discretion* ("*INS Prosecutorial Discretion Memorandum*") at 1 (Nov. 12, 2000). The INS exercises this discretion even with respect to "executing a removal order," *id.* at 2, despite the fact that doing so will often result in non-compliance with the directive of section 241(a)(1)(A) requiring the Attorney General to remove all aliens within 90 days of the time that a removal order becomes final.

The INS typically exercises its prosecutorial discretion with respect to the execution of final orders of removal through two means. First, 8 CFR § 241.6 provides that an alien "under a final order of deportation or removal" may apply for a stay of removal by filing form I-246. The regulation further provides that "in his or her discretion and in consideration of factors listed in 8 CFR 212.5 and section 241(c) of the Act," certain INS officials "may grant a stay of removal or deportation for such time and under such conditions as he or she may deem appropriate." Although the statutory factors referenced by the regulation appear in provisions that apply only to aliens "applying for admission" and "arriving at a port of entry of the United States" respectively, *see* INA §§ 212(d)(5)(A), 241(c)(2), the INS appears to construe its authority to grant stays to extend more broadly to *all* aliens under a final order of deportation or removal. The instructions accompanying form I-246 state, without limitation, that "[y]ou may file this application if you have been ordered deported or removed from the United States and you wish to obtain a stay of deportation or removal under the provisions of 8 CFR 241.6." Moreover, it is clear that the regulation's cross-references to statutory provisions are intended only to borrow lists of relevant factors to be considered, not to limit the scope of the regulation to the scope of the statutory provisions. Thus, broad stay authority exercised by the INS pursuant to 8 CFR § 241.6 cannot be derived from any statutory source, but rather is derived from the INS's extra-statutory prosecutorial discretion authority. *See INS Prosecutorial Discretion Memorandum* at 6 (referring to "whether to stay an order of deportation" as one potential exercise of prosecutorial discretion).

Second, the INS may at times exercise its prosecutorial discretion authority by granting a longer-term "deferred action" with respect to the order of removal. The power to grant such deferred action has been "developed [by the INS] without express statutory authorization." 6 Charles Gordon, Stanley Mailman, & Stephen Yale-Loehr, Immigration Law and Procedure § 72.03[2][h] (rev. ed. 2002). Nevertheless, it has been acknowledged by, and appears to have received the blessing of, the courts. *See Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-84 (1999) (noting that "[a]t each stage the Executive has discretion to abandon the endeavor" of immigration proceedings, at any time up to and including the execution of removal orders); *Johns v. Department of Justice*, 653 F.2d 884, 890 (5th Cir. 1981) ("The Attorney General is given discretion by express statutory provisions, in some situations, to ameliorate the rigidity of the deportation laws. In other instances, as the result of implied authority, he exercises discretion nowhere granted expressly. By express delegation, and by practice, the Attorney General has authorized the INS to exercise his discretion. . . . The Attorney General also determines whether (1) to refrain from (or, in administrative parlance, to

defer in) executing an outstanding order of deportation, or (2) to stay the order of deportation. Although such a stay is usually designed to give a deportee a reasonable amount of time to make any necessary business or personal arrangements, both the length of and reason for the stay lie entirely within the discretion of the Attorney General or his delegate.").

The INS thus has long treated the apparent statutory mandate that aliens be removed within the removal period as having implied exceptions and has long exercised its prosecutorial discretion in such a manner as to refrain from removing aliens within the removal period. If that approach is correct (which we need not decide here), and if deferral and stay considerations such as the conservation of limited INS resources, humanitarian concerns, and law-enforcement needs constitute sufficient grounds to refrain from removing an alien within the removal period as directed by section 241(a)(1)(A), then it would seem to follow *a fortiori* that the considerations described above (which are directly relevant to the proper execution of the immigration laws) certainly provide a sufficient basis for a similar implicit exception from the 90-day removal deadline.

Thus, we conclude that the statute permits the Attorney General to delay the removal of an alien beyond the removal period when the failure to effect removal is directly related to the administration of the immigration laws and policies of the United States. This does not give the Attorney General *carte blanche* to delay an alien's removal excessively. The delay must be based upon reasons related to the proper implementation of the immigration laws. And as the Court established in *Zadvydas*, where the alien is detained, the Attorney General must complete the removal process within "a period reasonably *necessary* to secure removal," 533 U.S. at 699-700 (emphasis added), a period that the Court concluded presumptively runs for 180 days.[12] This reading of the statute accords the Attorney General the time that he reasonably requires to carry out his immigration-related duties thoroughly and effectively. We could not purport here to define in the abstract a comprehensive list of all the activities that are related to the enforcement of the immigration laws and the completion of which could justify delaying an alien's removal beyond the 90-day time period. At a minimum, delays in removal that are attributable to actions taken by the Attorney General for the purposes discussed at pages 12-14 above relating to delays *within* the 90-day period — namely, investigating whether and to what extent an alien has terrorist connections — satisfy this standard.

Whether an alien can be *detained* after the expiration of the 90-day removal period is determined by section 241(a)(6). As explained above, under the reading of section 241(a)(6) that

[12] We address here solely a decision to refrain from removing an alien by the 90-day deadline with a view to effecting removal at a later date. A decision in the exercise of prosecutorial discretion not to execute an order of removal *at all* need not be subject to the same limitations and might be subject to almost absolute discretion of the Attorney General. *See generally INS Prosecutorial Discretion Memorandum*; *see also Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483 (1999) ("[a]t each stage the Executive has discretion to abandon the endeavor" of pursuing removal). We express no view on that issue here.

we have assumed for purposes of this portion of our analysis, that provision authorizes the Attorney General to detain aliens who fall into the listed classes and who, despite an order of removal, are still in the country beyond the removal period. Among the classes of aliens who may be detained are aliens who pose a threat to national security or the foreign policy of the United States as set forth in section 237(a)(4) and aliens who are otherwise determined by the Attorney General to be a risk to the community or unlikely to comply with an order of removal. Again, as noted above, *Zadvydas* makes clear that if an alien is detained pending removal beyond the removal period, the Attorney General must act within a period "reasonably *necessary* to secure removal." *Zadvydas*, 533 U.S. at 699-700 (emphasis added). Presumptively, a reasonable period lasts for six months, but the Court made clear that in cases involving suspected terrorism, the same limitations would likely not apply. We cannot attempt here to provide bright-line guidance in the abstract concerning the permissible duration of detention. That may well depend on facts in a particular case.

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CERTIFICATE OF SERVICE

I CERTIFY that on January 25, 2005, I caused to sent to counsel for Plaintiffs an electronic version of the foregoing document, and a copy by U.S. mail, addressed to:

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