

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: February 14, 2008 Decided: December 18, 2009)

Docket Nos. 06-3745-cv(L); 06-3785-cv(Con);
06-3789-cv(Con); 06-3800-cv(Con);
06-4187-cv(XAP)

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IBRAHIM TURKMEN, ASIF-UR-REHMAN SAFFI,
SYED AMJAD ALI JAFFRI, AKIL SACHDEVA,
SHAKIR BALOCH, HANY IBRAHIM, YASSER
EBRAHIM, ASHRAF IBRAHIM,

Plaintiffs-Appellees-Cross-
Appellants,

- v.-

JOHN ASHCROFT, Former United States
Attorney General, DENNIS HASTY, Former
Warden of MDC, JAMES W. ZIGLAR,
Commissioner, Immigration and
Naturalization Service, JAMES SHERMAN,
ROBERT MUELLER,

Defendants-Appellants-
Cross-Appellees,

JOHN DOES 1-20, MDC Corrections Officers,
MICHAEL ZENK, Warden of MDC, CHRISTOPHER
WITSCHER, CLEMETT SHACKS, BRIAN
RODRIGUEZ, JON OSTEN, RAYMOND COTTON,
WILLIAM BECK, SALVATORE LOPRESTI, STEVEN
BARRERE, LINDSEY BLEDSOE, JOSEPH CUCITI,
HOWARD GUSSAK, MARCIAL MUNDO, DANIEL
ORTIZ, STUART PRAY, ELIZABETH TORRES,
PHILLIP BARNES, SYDNEY CHASE, MICHAEL

1 DEFRANCISCO, RICHARD DIAZ, KEVIN LOPEZ,
2 MARIO MACHADO, MICHAEL MCCABE, RAYMOND
3 MICKENS, SCOTT ROSEBERY, UNITED STATES,
4

5 Defendants.
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7 - - - - -x
8

9 Before: JACOBS, Chief Judge, and RAGGI, Circuit
10 Judge.^{*}
11
12

13 Cross appeals from an order entered in the United
14 States District Court for the Eastern District of New York
15 (Gleeson, J.) granting in part and denying in part motions
16 to dismiss made by certain defendants. Plaintiffs plead a
17 host of claims alleging abuse, mistreatment, and detention
18 of Arab and Muslim aliens who were held on immigration
19 violations in the wake of the terrorist attacks of September
20 11, 2001. For the reasons that follow, we affirm the
21 district court order insofar as it dismissed certain claims,
22 and we vacate that order insofar as it denied the
23 defendants' motions to dismiss certain remaining claims.
24

* The Honorable Sonia Sotomayor, originally a member of the panel, was elevated to the Supreme Court on August 8, 2009. The two remaining members of the panel, who are in agreement, have determined the matter. See 28 U.S.C. § 46(d); Local Rule 0.14(2); United States v. Desimone, 140 F.3d 457 (2d Cir. 1998).

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28 Plaintiffs-Appellees-Cross-
29 Appellants.
30

31 PER CURIAM:

32 This putative class action was brought by seven named
33 plaintiffs, all non-citizens who were detained on
34 immigration violations following the terrorist attacks of
35 September 11, 2001.¹ The plaintiffs allege, inter alia,

¹ An eighth named plaintiff, Syed Amjad Ali Jaffri, has withdrawn his claims.

1 that on account of their Arab or Muslim background (or
2 perceived background), they were subjected to excessively
3 prolonged detention, abused physically and verbally,
4 subjected to arbitrary and abusive strip searches, and
5 otherwise mistreated while in custody. Crucially,
6 plaintiffs acknowledge that at the time they were detained
7 they were present in the United States illegally, and were
8 subject to removal. Their constitutional claims rest on (i)
9 the conditions of their confinement, and (ii) the allegation
10 that their detentions were illegally prolonged so that the
11 Government could investigate any potential ties to
12 terrorism.

13 Plaintiffs brought thirty-one separate claims against
14 thirty-one identified defendants, including the United
15 States, former Attorney General John Ashcroft, FBI Director
16 Robert Mueller, and former Immigration and Naturalization
17 Service ("INS") Commissioner James W. Ziglar, as well as
18 Metropolitan Detention Center ("MDC") officials and
19 correctional officers.

20 The United States, Ashcroft, Mueller, and Ziglar, as

1 well as four high-ranking MDC officials² (collectively, the
2 "moving defendants") moved to dismiss certain claims on
3 grounds that include qualified immunity and failure to state
4 a claim. At the risk of oversimplifying a complex ruling:
5 the United States District Court for the Eastern District of
6 New York (Gleeson, J.) denied the motions to dismiss claims
7 concerning the conditions of confinement, but dismissed
8 claims concerning the length of detention. See Turkmen v.
9 Ashcroft, No. 02 Civ. 2307(JG), 2006 WL 1662663, at *1
10 (E.D.N.Y. June 14, 2006). Both sides appealed.

11
12 **I**

13 On November 2, 2009, plaintiffs moved for dismissal
14 without prejudice of the pending appeals and cross-appeals
15 in their entirety. Plaintiffs argue principally that the
16 appeals and cross-appeals are moot in light of a settlement
17 recently reached with five named plaintiffs and plaintiffs'

² By consolidated motion, former MDC wardens Dennis Hasty and Michael Zenk joined the United States, Ashcroft, Mueller, and Ziglar in moving to dismiss. The United States sought partial dismissal, and the five individual defendants sought dismissal of all claims brought against them. MDC associate warden James Sherman separately moved to dismiss all claims brought against him, as did MDC unit manager Clemmet Shacks.

1 counsel's intent to seek leave in the district court to file
2 a proposed Fourth Amended Complaint on behalf of the two
3 remaining plaintiffs, other plaintiffs to be named, and the
4 putative class. Ashcroft and Mueller oppose such a
5 dismissal.

6 Plaintiffs argue that we should dismiss as moot the
7 appeals related to the denial of the conditions of
8 confinement claims, because the two remaining named
9 plaintiffs (Ibrahim Turkmen and Akil Sachdeva) did not
10 appeal the dismissal of claim 3 and never asserted claims
11 20-23. However, plaintiffs' counsel intends to preserve
12 claims 3 and 20-23 as part of the putative class complaint
13 by proposing to file a Fourth Amended Complaint adding five
14 new named plaintiffs. Further, Ashcroft and Mueller argue
15 that they appealed the district court's decision to deny the
16 dismissal of claims 5 (in part), 7, and 8 (in addition to
17 claims 3 and 20-23)--three claims that Turkmen and Sachdeva
18 asserted along with the five settling plaintiffs.

19 Plaintiffs indicate that the proposed Fourth Amended
20 Complaint will not allege claim 8; however, claims 5 and 7
21 remain live (as does claim 8 pending its withdrawal).
22 Moreover, defendants retain a strong interest in a decision

1 on their invocation of qualified immunity concerning claims
2 that have been long pending and (as plaintiffs' counsel
3 confirms) will be asserted in a new pleading. Finally, this
4 is not the kind of case in which the class representative's
5 interest abated during briefing or before oral argument; the
6 settlement did not arise until long after the February 14,
7 2008 argument and the settling plaintiffs thus maintained a
8 personal stake in pressing this appeal throughout.

9 Based on these circumstances and the district court's
10 stay of the class certification motion, this Court is
11 persuaded that the appeals related to the conditions of
12 confinement claims are not moot. See Comer v. Cisneros, 37
13 F.3d 775, 799 (2d Cir. 1994) ("Where the claims of the named
14 plaintiffs become moot prior to class certification, there
15 are several ways in which mootness is not had."); see also
16 Swan v. Stoneman, 635 F.2d 97, 102 n.6 (2d Cir. 1980) ("To
17 the extent that appellants' argument is that Swan's death
18 does not moot the class claim if one of the proposed
19 intervenors can be substituted as named plaintiff, we
20 agree."); In re Nat'l Australia Bank Sec. Litig., No. 03
21 Civ. 6537(BSJ), 2006 WL 3844463, at *2 (S.D.N.Y. Nov. 8,
22 2006) (recognizing general rule that lack of class

1 representative renders class action moot, and exceptions to
2 that rule where motion for class certification is pending or
3 plaintiff did not have reasonable opportunity to move for
4 class certification); id. at *3 (explaining that live
5 controversy exists where new named plaintiff may be
6 substituted or may intervene upon pre-certification mooting
7 of class representative's claims). Accordingly, we deny
8 plaintiffs' motion to dismiss this appeal without prejudice
9 on the ground of mootness.³

10 The appeals and cross-appeals are hereby dismissed only
11 to the limited extent necessary to recognize the settlement
12 of five named plaintiffs. Despite this settlement and the
13 proposed Fourth Amended Complaint, virtually all of the
14 appeals and cross-appeals remain pending for our review

³ Plaintiffs do not argue that their cross-appeals related to the length of detention claims are moot. Any such argument would be untenable because the two remaining plaintiffs joined the settling plaintiffs in appealing the dismissal of claims 1, 2, and 5 (in part). The district court also dismissed two additional claims, 24 and 25, which are related to the length of detention. We do not reach claim 24 because it was asserted only by the settling plaintiffs (and not by the two remaining plaintiffs); the proposed Fourth Amended Complaint does not seek to preserve claim 24 through the proposed intervenor plaintiffs; and Ashcroft and Mueller concede that claim 24 is moot. We do not reach claim 25 because no plaintiffs appealed the dismissal of this claim.

1 because (i) the two remaining plaintiffs asserted several of
2 the claims underlying the moving defendants' appeals, and
3 (ii) plaintiffs propose to file a Fourth Amended Complaint
4 preserving for the putative class the claims asserted only
5 by the settling plaintiffs through the addition of the
6 proposed intervenor plaintiffs.

7 8 **II**

9 We review de novo the grant or denial of a motion to
10 dismiss a complaint. See Woods v. Rondout Valley Cent. Sch.
11 Dist. Bd. of Educ., 466 F.3d 232, 235 (2d Cir. 2006). "To
12 survive a motion to dismiss, a complaint must contain
13 sufficient factual matter, accepted as true, to 'state a
14 claim to relief that is plausible on its face.'" Ashcroft
15 v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl.
16 Corp. v. Twombly, 550 U.S. 554, 570 (2007)). "A claim has
17 facial plausibility when the plaintiff pleads factual
18 content that allows the court to draw the reasonable
19 inference that the defendant is liable for the misconduct
20 alleged." Id.

21 22 **III**

1 We first consider defendants' challenge to the district
2 court's order denying dismissal of claims related to the
3 conditions of confinement--claims 3, 5 (in part), 7, 8, and
4 20-23.

5 The district court ruled on the defendants' motions to
6 dismiss prior to the Supreme Court's decisions in Twombly
7 and Iqbal. It applied a standard of review under which it
8 would not dismiss a claim "unless it appears beyond doubt .
9 . . . that the plaintiff can prove no set of facts which would
10 entitle him to relief." Turkmen, 2006 WL 1662663, at *24
11 (citing Jaghory v. N.Y. State Dep't of Educ., 131 F.3d 326,
12 329 (2d Cir. 1997)). Now, following the district court's
13 decision, Twombly and Iqbal require "a heightened pleading
14 standard in those contexts where factual amplification is
15 needed to render a claim plausible." Ross v. Bank of
16 America, N.A. (USA), 524 F.3d 217, 225 (2d Cir. 2008)
17 (internal quotation marks, citations, brackets, and emphasis
18 omitted). We could undertake to decide whether the
19 challenged claims satisfy the pleading standard of Twombly
20 and Iqbal; however, in the circumstances of this case--where
21 plaintiffs have already announced their intent to file a
22 Fourth Amended Complaint to preserve for the putative class

1 the claims asserted only by the settling plaintiffs--we
2 think it better to vacate that portion of the district
3 court's order denying dismissal of the conditions of
4 confinement claims on the ground that an outdated pleading
5 standard was applied, and to remand the case for further
6 proceedings consistent with the standard articulated in
7 Twombly and Iqbal.

8 It may be that the district court will grant plaintiffs
9 leave to file the proposed Fourth Amended Complaint to
10 satisfy the heightened pleading standard. See Fed. R. Civ.
11 P. 15(a)(2) (providing that a court should "freely give
12 leave when justice so requires"). We decline to consider
13 whether plaintiffs should be allowed to replead yet again
14 because, "[i]n the ordinary course, we are accustomed to
15 reviewing a district court's decision whether to grant or
16 deny leave to amend, rather than making that decision for
17 ourselves in the first instance." Iqbal v. Ashcroft, 574
18 F.3d 820, 822 (2d Cir. 2009).

19 If the district court denies leave to file the proposed
20 Fourth Amended Complaint, it should evaluate the sufficiency
21 of the Third Amended Complaint in light of the settlement
22 and the heightened pleading standard. The district court

1 can then address whether, under Twombly and Iqbal, the Third
2 Amended Complaint fails to state a claim, or inadequately
3 alleges the personal involvement of the moving defendants,
4 or entitles the moving defendants to qualified immunity with
5 respect to the conditions of confinement claims.

6 At this stage of proceedings, we do no more than vacate
7 the order denying the motions to dismiss with respect to the
8 conditions of confinement claims, and remand to the district
9 court for further proceedings.

11 IV

12 The district court entered final judgment dismissing
13 plaintiffs' length of detention claims as against all
14 defendants for failure to state a claim. Plaintiffs
15 challenge these dismissals.

16 The claims concerning length of detention allege
17 generally that defendants detained plaintiffs longer than
18 necessary to effect their removal (or voluntary departure)
19 from the United States. Although plaintiffs acknowledge
20 that they violated the immigration laws (for instance by
21 overstaying their visas), they allege that the Government
22 used these immigration violations "as a cover, as an excuse"

1 to investigate whether plaintiffs were tied to terrorism.
2 Turkmen, 2006 WL 1662663, at *1. Plaintiffs maintain that
3 their excessive detentions violated their Fourth and Fifth
4 Amendment rights.⁴

5 **A. The Statutory Scheme**

6 By statute, aliens ordered removed shall be removed by
7 the Attorney General within the 90-day "removal period."
8 See 8 U.S.C. § 1231(a)(1)(A). The government is required to
9 detain an alien ordered removed until removal is effected,
10 at least for the removal period. Id. § 1231(a)(2).

11 By regulation, prior to the expiration of the removal
12 period, the District Director or the Director of the
13 Detention and Removal Field Office conducts a "custody
14 review"--a review of an alien's record to determine whether
15 detention is warranted after the removal period (if removal
16 cannot be accomplished during the removal period). See 8
17 C.F.R. § 241.4(c)(1), (h), (k)(1)(i). Factors considered in
18 this determination include a detainee's criminal conduct,

⁴ Claim 1 alleged that a prolonged detention was an unreasonable seizure under the Fourth Amendment; Claim 2 that it was a violation of the Due Process Clause of the Fifth Amendment; and Claim 5 that it (along with other conduct) violated the equal protection guarantee of the Fifth Amendment.

1 mental health, ties to the United States, prior immigration
2 violations and history, and the likelihood that the alien is
3 a significant flight risk or a potential danger to the
4 community. See 8 C.F.R. § 241.4(f). If an alien is further
5 detained, the regulations require additional periodic
6 custody reviews. See 8 C.F.R. § 241.4(k)(1)(ii), (k)(2).
7 Notice of the records review component of the custody review
8 must be provided to an alien so that he may submit
9 information in support of his release. See 8 C.F.R. §
10 241.4(h)(2).

11 **B. Zadvydas**

12 In Zadvydas v. Davis, 533 U.S. 678 (2001), two aliens
13 who had been ordered removed claimed that the length of
14 their detention following the 90-day removal period violated
15 their due process rights. The Government had been unable to
16 remove the aliens because no country was willing to accept
17 them. The Government argued that 8 U.S.C. § 1231(a)(6)
18 authorizes indefinite post-removal-period detention. The
19 Supreme Court concluded, however, that such a reading would
20 render the statute unconstitutional in certain contexts
21 under the Fifth Amendment's Due Process Clause, and held
22 that "once removal is no longer reasonably foreseeable,

1 continued detention is no longer authorized by statute.”
2 Zadvydas, 533 U.S. at 699.

3 In order to give appropriate leeway to the Executive
4 Branch (based on its “immigration-related expertise” and
5 “the serious administrative needs and concerns” associated
6 with immigration enforcement), and “[i]n order to limit the
7 occasions when courts will need to make” the difficult
8 judgments required by recognizing such Executive leeway,
9 Zadvydas accorded a presumption of reasonableness to six
10 months’ detention for an alien subject to an order of
11 removal.⁵ Id. at 700-01. Zadvydas indicated that,

⁵ The seven named plaintiffs were detained for the following durations: Turkmen was detained for three months and 25 days from the date he accepted a voluntary departure order; Sachdeva was detained for three months and 17 days after he was ordered removed; Asif-Ur-Rehman Saffi was detained for four months and 18 days after he was ordered removed; Ashraf Ibrahim was detained for four months and 22 days after he was ordered removed; Hany Ibrahim was detained for six months and nine days after he was ordered removed; Yasser Ebrahim was detained for six months and 16 days after he was ordered removed; and Shakir Baloch was detained for six months and 27 days after he was ordered removed. Accordingly, Turkmen, Sachdeva, and two of the settling plaintiffs were detained for less than six months; and three of the settling plaintiffs were detained in excess of six months.

Turkmen’s and Sachdeva’s detentions were under six months, and thus were presumptively reasonable. However, our analysis proceeds to consider detentions in excess of six months because the proposed intervenor plaintiffs intend to assert claims 1, 2, and 5. See Comer v. Cisneros, 37

1 thereafter, the alien's continued detention would be deemed
2 unlawful "if (1) an alien demonstrates that there is no
3 significant likelihood of removal in the reasonably
4 foreseeable future and (2) the government is unable to rebut
5 this showing." Wang v. Ashcroft, 320 F.3d 130, 146 (2d Cir.
6 2003). Zadvydas thus "articulates the outer bounds of the
7 Government's ability to detain aliens (other than those
8 serving criminal sentences) without jeopardizing their due
9 process rights." Id.

10 **C. The District Court's Decision**

11 The district court, relying on Zadvydas and Wang,
12 concluded that plaintiffs failed to state a claim because
13 "the complaint does not allege that during the period of
14 their detention there was no significant likelihood of
15 removal in the reasonably foreseeable future." Turkmen,

F.3d 775, 799 (2d Cir. 1994) ("Where the claims of the named plaintiffs become moot prior to class certification, there are several ways in which mootness is not had."); see also Swan v. Stoneman, 635 F.2d 97, 102 n.6 (2d Cir. 1980) ("To the extent that appellants' argument is that Swan's death does not moot the class claim if one of the proposed intervenors can be substituted as named plaintiff, we agree."); In re Nat'l Australia Bank Sec. Litig., No. 03 Civ. 6537(BSJ), 2006 WL 3844463, at *3 (S.D.N.Y. Nov. 8, 2006) (explaining that live controversy exists where new named plaintiff may be substituted or may intervene upon pre-certification mootness of class representative's claims).

1 2006 WL 1662663, at *39. The complaint alleged simply that
2 the detentions were “longer than necessary” to effectuate
3 removal. Id. As the district court reasoned, recognizing
4 such a claim as a violation of due process would “flood the
5 courts with habeas petitions brought by aliens seeking to be
6 removed as soon as they deemed it practicable.” Id.
7 (emphasis added). The district court explained that:

8 [Plaintiffs] assume that all that is required for
9 the Attorney General to secure removal is a
10 deportation order and an airplane. This
11 assumption ignores legitimate foreign policy
12 considerations and significant administrative
13 burdens involved in enforcing immigration law in
14 general, and, specifically, those concerns
15 immediately following a terrorist attack
16 perpetrated on the United States by non-citizens,
17 some of whom had violated the terms of their visas
18 at the time of the attack.

19
20 Id.

21 On appeal, plaintiffs argue that they were detained for
22 a criminal investigation, and their detentions thus
23 constituted separate seizures requiring their own
24 justification and probable cause. As plaintiffs see it,
25 “the [district] court asked the wrong question. The
26 question is not *how long* could Plaintiffs be detained, but
27 *for what reason.*” Plaintiffs-Appellees-Cross-Appellants’
28 Br. at 20. Plaintiffs further argue that their prolonged

1 detentions violated their rights to substantive due process,
2 procedural due process, and equal protection.⁶

3 **D. Qualified Immunity**

4 Plaintiffs assert that the Zadvydas standard identifies
5 constitutional violations only “when removal is *impossible*”;
6 they submit that it is inadequate to identify constitutional
7 violations where, as alleged here, defendants employ
8 “detention as an alternative to removal.” Plaintiffs-
9 Appellees-Cross-Appellants’ Br. at 27. We disagree. In
10 Whren v. United States, 517 U.S. 806, 813 (1996), the
11 Supreme Court held that a law enforcement official’s actual
12 motivation for the Fourth Amendment seizure of a person is
13 constitutionally irrelevant if the seizure is supported by
14 probable cause. To the extent plaintiffs challenge their

⁶ Plaintiffs also argue that Ebrahim and Turkmen were removed under 8 U.S.C. § 1227(a)(1)(B), thereby rendering inapplicable the 8 U.S.C. § 1231(a)(6) framework described in the text. Assuming arguendo that Ebrahim and Turkmen did not waive this argument by failing to raise it before the district court and failing to plead the relevant details, plaintiffs’ argument overlooks (i) that an immigration judge found Ebrahim was a disappearance risk, and he thus fell under 8 U.S.C. § 1231(a)(6) (permitting further detention of an alien ordered removed “who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal”), and (ii) that Turkmen declined to request bond after he accepted a voluntary departure order.

1 prolonged detention after final orders of removal (or
2 voluntary departure) were entered against them, it is clear
3 from the complaint that such detention was supported by the
4 IJs' findings of removability, which constitute a good deal
5 more than probable cause. Because plaintiffs were thus
6 lawfully detained as aliens subject to orders of removal (or
7 voluntary departure), they could not state a claim for
8 unconstitutionally prolonged detention without pleading
9 facts plausibly showing "no significant likelihood of
10 removal in the reasonably foreseeable future." Wang, 320
11 F.3d at 146; see also Zadvydas, 533 U.S. at 699. In the
12 absence of such a pleading, plaintiffs' challenge to their
13 detention was properly dismissed under Federal Rule of Civil
14 Procedure 12(b)(6). Moreover, we need not decide whether or
15 under what circumstances aliens subject to removal (or
16 voluntary departure) orders could state claims for
17 unconstitutional detentions without satisfying Zadvydas. To
18 the extent plaintiffs' claims are not based on Zadvydas, the
19 moving defendants are entitled to qualified immunity. See
20 Pearson v. Callahan, 129 S. Ct. 808, 818 (2009) (concluding
21 that two-step qualified immunity analysis set forth in
22 Saucier v. Katz, 533 U.S. 194 (2001), is no longer

1 mandatory).

2 In light of the analysis above, plaintiffs can point to
3 no authority clearly establishing a due process right to
4 immediate or prompt removal (following an order of removal
5 or voluntary departure). Cf. Turkmen, 2006 WL 1662663, at
6 *40. The moving defendants therefore are entitled to
7 qualified immunity with respect to claim 2.

8 Assuming arguendo that the Fourth Amendment applies to
9 post-arrest detention, probable cause would be required only
10 if the detentions at issue were not otherwise authorized.
11 For reasons stated above, the moving defendants had an
12 objectively reasonable belief that the detentions were
13 authorized, and therefore are entitled to qualified immunity
14 with respect to claim 1.

15 Similarly, plaintiffs point to no authority clearly
16 establishing an equal protection right to be free of
17 selective enforcement of the immigration laws based on
18 national origin, race, or religion at the time of
19 plaintiffs' detentions. See Reno v. American-Arab Anti-
20 Discrimination Comm., 525 U.S. 471, 490-91 (1999) ("What
21 will be involved in deportation cases is not merely the
22 disclosure of normal domestic law enforcement priorities and

1 techniques, but often the disclosure of foreign-policy
2 objectives and (as in this case) foreign-intelligence
3 products and techniques. The Executive should not have to
4 disclose its 'real' reasons for deeming nationals of a
5 particular country a special threat--or indeed for simply
6 wishing to antagonize a particular foreign country by
7 focusing on that country's nationals--and even if it did
8 disclose them a court would be ill equipped to determine
9 their authenticity and utterly unable to assess their
10 adequacy."); see also Zadvydas, 533 U.S. at 696 ("terrorism"
11 might warrant "special arguments" for "heightened deference
12 to the judgments of the political branches with respect to
13 matters of national security"); Matthews v. Diaz, 426 U.S.
14 67, 81-82 (1976) ("The reasons that preclude judicial review
15 of political questions also dictate a narrow standard of
16 review of decisions made by the Congress or the President in
17 the area of immigration and naturalization."); but see Iqbal
18 v. Hasty, 490 F.3d 143, 175 (2d Cir. 2007) (determining that
19 Reno "does not stand for the proposition that the Government
20 may subject members of a particular race, ethnicity, or
21 religion to more restrictive conditions of confinement than
22 members of other races, ethnic backgrounds, or religions"),

1 rev'd on other grounds and remanded, Iqbal, 129 S. Ct. at
2 1954. The moving defendants therefore are entitled to
3 qualified immunity with respect to claim 5 (to the extent
4 that claim 5 is based on the length of plaintiffs'
5 detentions).

6

7

CONCLUSION

8 For the foregoing reasons, we affirm in part, vacate in
9 part, and remand for further proceedings consistent with
10 this opinion.

11