UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN; ASIF-UR-REHMAN SAFFI; SAED AMJAD ALI JAFFRI, YASSER EBRAHIM; HANY IBRAHIM; SHAKIR BALOCH; and AKIL SACHVEDA 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, Commissioner, Immigration and Naturalization Service; DENNIS HASTY, former Warden, Metropolitan Detention Center; MICHAEL ZENK, Warden of the Metropolitan Detention Center; JOHN DOES 1-20, Metropolitan Detention Center Corrections Officers, and JOHN ROES 1-20, Federal Bureau of Investigation and /or Immigration and Naturalization Service Agents, Defendants.	)	Civil Action No. 02 CV 2307 (Gleeson, J.)

REPLY MEMORANDUM OF LAW IN SUPPORT OF THE UNITED STATES' AND THE NAMED DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

On September 11, 2001, terrorists perpetrated heinous and cowardly attacks on our Nation, killing nearly 3000 people. The United States has engaged in a massive investigation intended to bring the perpetrators of these attacks to justice and, even more importantly, to prevent future attacks on the American people. Where this investigation has led to individuals who are unlawfully present in the United States, they have been arrested and placed in removal proceedings. Plaintiffs allege that they were arrested in connection with this investigation and that defendants prolonged their detention in order to investigate possible links to terrorism.

There is no question that each plaintiff had violated the immigration laws and was subject to arrest and detention on that basis. In particular, there is no question that there was statutory authority to detain plaintiffs once their removal orders became final. See 8 U.S.C. § 1231(a)(2) (2001); 8 C.F.R. § 241.3 (2001). And there is no question that each plaintiff was removed within a six-month "presumptively reasonable" period following the issuance of his final order of removal. See Zadvydas v. Davis, 533 U.S. 678, 701 (2001).

The gravamen of plaintiffs' complaint is that their detention violated the Constitution because defendants allegedly prolonged the detention in order to investigate whether plaintiffs had information about or connections to terrorism. Plaintiffs contend that this motivation renders their detention unlawful. Given that plaintiffs were arrested upon objective probable cause, detained pursuant to statute, and removed within the six-month Zadvydas period, however, defendants' alleged subjective motivation cannot defeat the legality of plaintiffs' detention. See Zadvydas, 533 U.S. at 700-01 (recognizing six months as "presumptively reasonable period of detention" in order "to limit the occasions" when courts may second-guess Executive Branch decisions concerning detention pending removal); Whren v. United States, 517 U.S. 806, 813

(1996) (rejecting contention that "an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment"). Furthermore, to the extent that defendants' motives are relevant, the motive that plaintiffs allege confirms rather than undermines the legality of plaintiffs' detention, because investigating whether a removable alien has terrorism connections serves several obvious and compelling immigration law and foreign policy purposes. See infra at 4-6. Indeed, Zadvydas suggests that even *indefinite* detention of unlawfully present aliens may be permissible when motivated by concerns about terrorism or national security. See 533 U.S. at 691, 696.

In short, plaintiffs were arrested and detained for objectively valid reasons, and the subjective terrorism-investigation motive that plaintiffs allege is entirely legitimate. Because plaintiffs were validly subjected to immigration detention pending removal and were removed during the six-month Zadvydas period, their attempts to characterize their detention as "post-immigration incarceration," Opp. Memo. at 37, "pretext[ual]" detention, id. at 1, or anything other than lawful immigration detention are nothing more than empty rhetoric.

Nor do plaintiffs provide any basis to avoid dismissal of their other claims. As argued in defendants' initial memorandum, plaintiffs' constitutional tort claims should be dismissed as a matter of law and under the qualified immunity doctrine; plaintiffs' international law claims should be dismissed under the Federal Employees Liability Reform and Tort Compensation Act ("Liability Reform Act"), 28 U.S.C. § 2679, and plaintiffs' demand for equitable relief should be dismissed for lack of standing.

II. PLAINTIFFS FAIL TO STATE ANY CONSTITUTIONAL CLAIMS, LET ALONE

ANY CLEARLY ESTABLISHED CONSTITUTIONAL CLAIMS.

A. Counts One and Two Challenging the Length of Plaintiffs' Detention Should be Dismissed Because the Detention was Objectively Reasonable.

1. Plaintiffs' Fourth Amendment claims fail because the Fourth Amendment does not apply to detention after arrest.

Plaintiffs argue that they have stated both Fourth and Fifth Amendment claims based upon the identical allegation that they were held in detention "longer than necessary to secure their departure from the United States." Am. Comp. at ¶¶ 152, 157. Plaintiffs do not dispute that they were all in clear violation of immigration law at the time they were arrested, and plaintiffs thus cannot challenge their arrests. Opp. Memo. at 12; Whren, 517 U.S. at 813.[1] Nonetheless, plaintiffs claim that their detentions violated the Fourth Amendment because defendants "unnecessarily prolonged" their immigration detentions as a pretext to conduct criminal investigations. See Opp. Memo. at 15.

Plaintiffs' claims fail because they have not demonstrated that the Fourth Amendment applies at all to post-arrest detention. Numerous courts have held that the Fourth Amendment no longer applies once an arrest is complete. Instead, the Due Process Clause governs in the post-arrest stage. See, e.g., Riley v. Dorton, 115 F.3d 1159, 1162-64 (4th Cir. 1997) (en banc) (rejecting "continuing seizure" theory under Fourth Amendment); Valencia v. Wiggins, 981 F.2d 1440, 1444 (5th Cir. 1993) ("As the Fourth Amendment protects against unreasonable 'seizures,'

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[1] Once arrest on civil immigration charges is accomplished, aliens have no right to be taken before a magistrate for a probable cause hearing as suggested by plaintiffs. Opp. Memo. at 12. 8 U.S.C. § 1357(a)(2) instead requires that aliens be taken "without unnecessary delay for examination before an officer of the . . . [INS] having authority to examine aliens as to their right to enter or remain in the United States . . . ."

it seems primarily directed to the *initial* act of restraining an individual's liberty . . . .") (emphasis in original). Under this majority rule, plaintiffs can state no claim under the Fourth Amendment. Moreover, even plaintiffs concede that the Supreme Court has "left open" the question whether the Fourth Amendment applies to post-arrest detention, Opp. Memo. at 15-16, and plaintiffs cite no Second Circuit precedent resolving this issue in their favor. Given this state of the law, plaintiffs cannot seriously maintain that their Fourth Amendment claims are clearly established.

2. Plaintiffs cannot state clearly established Fifth Amendment claims based upon their detention of less than six months after their removal orders became final.

Plaintiffs' second claim, alleging that they were detained for less than six months after the issuance of final removal orders pending "clearances – one from the FBI and the other from INS – absolving them of any linkage to terrorists or terrorist activities" (Am. Comp. at ¶ 41), fails to state a Fifth Amendment claim. Nothing in the Due Process Clause requires the Attorney General to remove an unlawfully present alien at the earliest possible moment. To the contrary, the Supreme Court made clear in Zadvydas v. Davis, 533 U.S. at 678, that no serious Fifth Amendment concerns exist when an alien is detained for less than six months following entry of a final order of removal. Moreover, on plaintiffs' own account of the facts, plaintiffs' detentions were prolonged for purposes that are valid and important. Contrary to plaintiffs' contention that investigating possible connections to terrorism before removal is improper, the Zadvydas Court noted that concerns about terrorism present exceptional circumstances that may justify detention *beyond* the presumptively permissible six-month period (which, as noted, was observed in this case). Terrorism investigations of the type alleged by plaintiffs serve fundamental and legitimate

immigration law and foreign policy purposes by protecting the Nation's security and furthering the Nation's relations with the countries of removal.

Plaintiffs' argument is premised on the assumption that once removal is physically possible, the Executive Branch can have no valid reason to continue to detain an alien. See Opp. Memo. at 8 (asserting that "effectuat[ing] their removal" is "the only legitimate basis for immigration detention" of aliens); id. at 17 ("Once Plaintiffs' removal could have been effectuated, there was no legitimate purpose to their continued detention."). Plaintiffs' premise is false, because accomplishing the alien's physical removal is only one aspect of the Executive's interest in and authority over removal. If plaintiffs are correct that defendants prolonged their detention in order to investigate their links to terrorism, those investigations served at least four compelling immigration law purposes.

First, in the wake of the terrorist attacks of September 11, it was entirely reasonable to undertake investigations to ensure that the INS did not unknowingly deport aliens with terrorist ties who might pose a danger to the United States. See Mapother v. Department of Justice, 3 F.3d 1533, 1535-36 (D.C. Cir. 1998) (discussing the National Immigration Lookout System and Automated Visa Lookout System used as "watchlists" for law enforcement purposes to deny entry and visas to listed persons on grounds including national security).[2] Second, such

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[2] The use of additional time to address national security concerns serves the plainly valid immigration law purpose of protecting the United States from aliens who would harm it. See Carlson v. Landon, 342 U.S. 524, 540-541 (1952) (upholding detention of deportable members of the Communist Party pending deportation on the ground that they posed a threat to national security); Doherty v. Thornburgh, 943 F.2d 204, 211 (2d Cir. 1991) (noting that Doherty's affiliation with Irish Republican Army may constitute a threat to national security and was thus a proper basis for detention), cert. dismissed, 503 U.S. 901 (1992); United States ex rel. Barbour v. District Director, 491 F.2d 573, 578 (5th Cir. 1974) (that an alien is a danger to national security

investigations also furthered the legitimate immigration law and foreign policy purpose of permitting the United States to inform plaintiffs' home countries of any terrorism or other security concerns that might have been uncovered. The United States obviously has a strong interest in ensuring that it does not inadvertently export threats to the security of other nations, particularly its allies. Third, immigration law specifically authorizes the Attorney General to reject an alien's designation of a country of removal and select another country whenever he determines that the alien's designation "is prejudicial to the United States." 8 U.S.C. § 1231(b)(2)(C)(4). That statutory authority would be of little use if it did not include the right to undertake the types of investigations alleged by plaintiffs so that the Attorney General may appropriately assess the security interests of the Nation and determine whether and how to exercise his redesignation authority. Fourth, because most aliens are removed via ordinary commercial flights, investigations of the type alleged by plaintiffs serve to protect the safety of the public on such flights and of the INS agents who escort aliens onto such flights. Where an investigation suggests that removal via commercial carrier might entail risks, the INS may take special precautions or opt for removal via private charter flight.

Contrary to plaintiffs' contention, Wong Wing v. United States, 163 U.S. 228 (1896), does not establish that detention of an alien past the moment when he can be removed serves "no legitimate immigration purpose." Opp. Memo. at 17. Wong Wing held that an illegal alien could not be *punished* by being sentenced to imprisonment at hard labor without due process of

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is reason enough to detain him pending deportation); see also 8 U.S.C. § 1227(a)(4)(A)(ii), (B) (2001) (providing that an alien who engages in terrorist activities or criminal activity that endangers national security is removable).

law. Id. at 235-37. Plaintiffs here, in contrast, do not even allege that they were detained for punitive purposes.

As just discussed, the terrorism investigations alleged by plaintiffs would have furthered valid immigration law purposes and justified continuing plaintiffs' detention beyond the date when their physical removal became possible. Because plaintiffs were detained for less than the six-month Zadvydas period, moreover, their detention presumptively can raise no issue under the Due Process Clause. Instead, in a case such as this the Court should defer to the Executive Branch's core authority over immigration law and should decline plaintiffs' demand to second-guess the validity of the terrorism-related motivations they allege.

Plaintiffs admit they were all deported within the six-month Zadvydas period. Am. Comp. at ¶ 40. The Zadvydas Court recognized this six-month period precisely to afford the "necessary Executive leeway" in this area of "primary Executive Branch responsibility," and concomitantly, "to limit the occasions when courts" may intrude into the Executive's core functions of administering the immigration laws and conducting the Nation's foreign policy. 533 U.S. at 700-01. To avoid the "difficult judgments" that arise when courts inquire into this area of Executive primacy, id. at 700, Zadvydas suggests that when an alien is detained for less than the six-month period, a court should defer to the Executive's judgment concerning that detention and should not second-guess whether the Executive's motives served legitimate immigration law purposes. See id. at 700-01.

Plaintiffs ignore this required deference when they contend that Zadvydas shows that the doctrine of plenary Executive power over immigration does not apply to immigration detention. Opp. Memo. at 20-23. To be sure, Zadvydas made clear that the plenary power doctrine does not

immunize immigration detention from judicial review when the detention is "indefinite and potentially permanent," when the detention is in aid of removal that cannot be accomplished, and when the detention is not supported by concerns of "terrorism or other special circumstances." 533 U.S. at 696. But as shown above, Zadvydas made equally clear that the plenary power doctrine requires judicial forbearance where detention is limited to the presumptively reasonable six-month period. Because plaintiffs were detained for less than the six-month Zadvydas period, this Court should not second-guess the propriety of defendants' alleged motives for detaining plaintiffs.[3]

Plaintiffs also ignore that Zadvydas suggests that the plenary power doctrine would apply even to *indefinite* detention motivated by concerns about terrorism or other national security issues – precisely what plaintiffs allege motivated their own detention. See id. at 696 ("Neither do we consider terrorism or other special circumstances where special arguments might be made

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[3] An important point of the plenary power doctrine is to restrict judicial inquiry into motive. See, e.g., Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999) ("The Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat . . . and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy."); Fiallo v. Bell, 430 U.S. 787, 799 (1977) ("it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision"); Kleindienst v. Mandel, 408 U.S. 753, 770 (1972); see also Mathews v. Diaz, 426 U.S. 67, 82 (1976) ("Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution"); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (how much inquiry is needed and how long it should take are vested exclusively in the Executive's discretion to manage foreign affairs).

At most, Zadvydas holds out the possibility that an alien detained within the six-month period might be able to overcome the presumption of reasonableness by specifically alleging and proving an unconstitutional purpose for the detention. Here, however, the alleged purpose – investigation related to terrorism – is not only a valid immigration law purpose, it is the quintessential concern that the Zadvydas Court recognized as *justifying* detention – perhaps even indefinite detention.

for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."); id. at 691 (emphasizing that the Court was not considering detention applied "narrowly to 'a small segment of particularly dangerous individuals,' say suspected terrorists") (internal citation omitted). The essence of plaintiffs' claims is that defendants were motivated by concerns about terrorism and national security, and it goes without saying that September 11 implicated such concerns to an unprecedented degree. Far from supporting plaintiffs' contention that these alleged motives would be improper, Zadvydas suggests that concerns about terrorism and national security would make plaintiffs' detention within the presumptively reasonable six-month period all the more unassailable.[4]

For these reasons, plaintiffs have failed to state a Fifth Amendment claim relating to their allegedly prolonged detention. In any event, however, defendants are entitled to qualified immunity. To overcome qualified immunity, plaintiffs must demonstrate that it was clearly established that their continued detention violated the Due Process Clause. As discussed above, Zadvydas supports plaintiffs' detention as reasonable, and plaintiffs have identified no authority supporting a due process claim where detention is limited to the six-month Zadvydas period. Moreover, Zadvydas makes clear that terrorism concerns are a legitimate motivation for detention (and, indeed, suggests that such concerns could be a ground for indefinite detention),

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[4] Even in criminal cases involving United States citizens, the Supreme Court has "repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." United States v. Salerno, 481 U.S. 739, 748 (1987) ("For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous."); see also Ludecke v. Watkins, 335 U.S. 160 (1948) (approving unreviewable executive power to detain enemy aliens in time of war).

and plaintiffs have identified no authority holding that investigating an alien's terrorism connections before removing the alien fails to serve a legitimate immigration law purpose. Under these circumstances, defendants are at least entitled to immunity.[5]

B. Count Five Challenging Plaintiffs' Detention on Equal Protection Grounds Should be Dismissed Because Plaintiffs have Alleged No Unlawful Discrimination.

As discussed above, plaintiffs' continued detention was warranted by valid immigration law and foreign policy concerns independent of their national origin or religion. However, even accepting plaintiffs' allegations of discrimination, their equal protection claims still fail because "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." Mathews, 426 U.S. at 79-80; see also Angel-Ramos v. Reno, 227 F.3d 942, 949 (7th Cir. 2000) (upholding nationality classification; stating that authority to distinguish among classes of aliens "is 'a fundamental sovereign attribute exercised by the Government's political departments [and is] largely immune from judicial control'") (quoting Fiallo, 430 U.S. at 792); Narenji v. Civiletti, 617 F.2d 745, 746 (D.C. Cir. 1980).

Notably, plaintiffs fail to address the authority demonstrating that the plenary power doctrine applies to the Executive Branch's judgments that some aliens should be detained or removed more aggressively than others. For example, in Reno v. American-Arab Anti-

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[5] Plaintiffs contend, without citing any supporting authority, that due process required individualized determinations as to whether they would pose a flight risk or a danger to society if released pending removal. Even if, as plaintiffs allege, no individualized determinations were conducted, nothing in Zadvydas premises the permissibility of detention limited to the six-month period on the condition that aliens be provided with individual custody reviews.

Executive should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat . . . and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy." Id. at 490-91.

AADC is dispositive of the equal protection issue here. There is no dispute that plaintiffs are aliens who were in the United States unlawfully. Accordingly, they were properly subject to detention and removal, and the Executive's reasons for selecting them for detention and removal are not subject to judicial challenge under AADC. See id. Moreover, in the wake of September 11, the United States had sound reasons for treating some illegal aliens differently than others with respect to the length of their detentions, based in part on the country from which they entered, their affiliations, or other criteria rationally related to the danger of terrorism. Id.[6]

This Court should also reject plaintiffs' equal protection claim on the independent ground that they have failed adequately to plead such a claim because they have not identified other similarly-situated aliens who allegedly received preferential treatment. Indeed, plaintiffs do not claim to have identified such persons, contending instead that no such allegation is required. Plaintiffs' argument ignores United States v. Armstrong, 517 U.S. 456, 466 (1996), which held that a plaintiff alleging selective prosecution cannot prevail – or even obtain discovery – without showing that "similarly situated individuals of a different race were not prosecuted." Just as the

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[6] On this point plaintiffs simply cite Yick Wo v. Hopkins, 118 U.S. 356 (1886). Opp. Memo. at 24-25. That case, however, had nothing to do with immigration law. Far from questioning the Attorney General's prosecutorial discretion to distinguish among classes of aliens in enforcing the immigration laws in a time of national crisis, Yick Wo involved a municipal ordinance governing licensing of laundries. Cf. Mathews, 426 U.S. at 86-87 ("[I]t is not 'political hypocrisy' to recognize that the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization.").

Court emphasized that "[a] selective-prosecution claim asks a court to exercise judicial power over a 'special province' of the Executive" by questioning the Executive's prosecutorial discretion, id. at 464, plaintiffs' claims here ask this Court to invade the Executive's core function of administering the immigration laws by questioning defendants' motivations for detaining and removing plaintiffs. Under Armstrong, plaintiffs cannot proceed on such a claim without at the very least identifying similarly-situated individuals of different national origin or religion who allegedly were not selected for detention and removal. See also United States v. Lindh, 212 F. Supp.2d 541, 565-66 (E.D. Va. 2002).

Plaintiffs do not mention Armstrong and rely instead on two Second Circuit decisions. Opp. Memo. at 25-26 (relying on Pyke v. Cuomo, 258 F.3d 107 (2d Cir. 2001), and Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 2000), cert. denied, 122 S.Ct. 44 (2001)). Neither Pyke nor Brown, however, involved a claim that sought to second-guess the Executive Branch's discretionary exercise of a core function such as enforcement of the immigration or criminal laws, and both decisions expressly reaffirm that Armstrong governs claims of selective prosecution. In Pyke, the Second Circuit thus explained that under Armstrong, "a plaintiff alleging a claim of selective prosecution in violation of the Equal Protection Clause *must plead and establish* the existence of similarly situated individuals who were not prosecuted; that is because courts grant special deference to the executive branch in the performance of the 'core' executive function of deciding whether to prosecute." 258 F.3d at 109 (emphasis added); see also Brown, 221 F.3d at 337 (reaffirming Armstrong). Because plaintiffs have not identified similarly-situated aliens of different national origin or religion who were treated differently, they have not stated a valid equal protection claim, let alone one that is clearly established.

C. Counts Three and Eight Should be Dismissed for Failure to Allege Defendants' Personal Involvement in any Unlawful Act.

Plaintiffs argue that they have alleged sufficient personal involvement of defendants in the allegedly unconstitutional conditions of their confinement based solely on plaintiffs' conclusory assertion that defendants "'authorized, condoned and/or ratified' the conditions in which they were detained." Opp. Memo. at 43 (quoting Am. Compl. ¶¶ 3, 19-23). The only factual allegation that plaintiffs mention in support of this conclusory assertion is a statement attributed to the Attorney General. Id. at 44. On its face, this statement bears no relationship to any allegedly unconstitutional condition of plaintiffs' confinement, and plaintiffs have alleged no fact from which such a relationship could be inferred. Likewise, plaintiffs allege no facts to support their contention that defendants Ashcroft, Mueller, and Ziglar decided that plaintiffs' detention "would be 'hard time.'" Opp. Memo. at 45. Nor have plaintiffs mentioned anything allegedly said or done by any of the other defendants. As to defendants Hasty and Zenk, plaintiffs simply argue that "by virtue of the particular responsibilities they hold," they "should have known of the violations taking place in their institution . . . ." Id. at 45.[7] Plaintiffs' contention that such sweeping boilerplate saves their claims from dismissal is erroneous.

Although notice pleading rules apply, factual allegations of personal participation in unconstitutional conduct are required to state claims against supervisory personnel. Plaintiffs

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[7] Rather than allege any actual conduct by defendants, plaintiffs resort to the irrational assertion that verbal harassment they allegedly received from guards during their confinement indicates a "flexible, top-down directive to mistreat plaintiffs." Opp. Memo. at 44. In truth, there is nothing about the isolated and disparate mistreatment alleged by plaintiffs to suggest any supervisory involvement, much less a "top-down directive" from the highest levels of the government.

may not evade that requirement merely by alleging legal conclusions devoid of factual content.[8] In cases involving conditions-of-confinement claims against prison administrators, courts have taken special care to adhere to the requirement that personal involvement be properly pleaded with factual allegations rather than mere conclusions. Even where inmates have claimed to have informed administrators in writing of unlawful conditions, that has been held insufficient to establish the required level of personal involvement. As one court explained in recently rejecting such a claim in the correctional setting:

> It is a reasonable presumption that hundreds of court complaints, motions for preliminary injunctions and appeals are filed each year by prisoners within the Commissioner's jurisdiction alleging mistreatment by his subordinates. It would not be just to hold that Commissioner Goord received constructive notice of all of such allegations . . . for purposes of establishing supervisory liability. Nor am I aware of any case which has deemed constructive notice on such a basis.

Carter v. Artuz, No. 95-2361, 1999 WL 46685, at *6 (S.D.N.Y. Feb. 1, 1999).[9] "Were it otherwise, virtually every prison inmate who sues for constitutional torts by [prison officials] could name the [supervisor] as a defendant . . . ." Thompson v. N.Y., No. 99-9875, 2001 WL

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[8] See, e.g., Boddie v. Schnieder, 105 F.3d 857, 862 (2d Cir. 1997) ("complaint containing only vague, conclusory, or general allegations of conspiracy cannot withstand a motion to dismiss"); Ying Jing Gan v. City of N.Y., 996 F.2d 522, 536 (2d Cir. 1993) (allegation that actions were taken pursuant to "practice, custom, policy and particular direction" of supervisor is inadequate to allege personal participation).

[9] See also Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994) (inmate's letter to Governor complaining about conditions of confinement did not put Corrections Commissioner "on actual or constructive notice of the violation"); Rivera v. Goord, 119 F. Supp.2d 327, 344 (S.D.N.Y. 2000) (holding insufficient inmate's assertions that he wrote to supervisory defendants to complain of alleged mistreatment); Woods v. Goord, No. 97-5143, 1998 WL 740782, at *6 (S.D.N.Y. Oct. 23, 1998); Cox v. Colgane, No. 94-6361, 1998 WL 148424, at *9 (S.D.N.Y. Mar. 27, 1998) ("It is well-established that an allegation that an official ignored a prisoner's letter of protest . . . is insufficient to hold that official liable for the alleged violations").

636432, at *7 (S.D.N.Y. Mar. 15, 2001).[10]

Plaintiffs do not claim that they even tried to notify any of the defendants of the allegedly unlawful conditions of their confinement, much less that any of the defendants actually witnessed any of the alleged conditions. Instead, as is apparent from their opposition memorandum, plaintiffs' claims against the highest level law enforcement officials in the federal government are based exclusively on boilerplate pleadings that are wholly lacking in factual content. To allow such insubstantial claims to proceed would effectively eviscerate top officials' qualified immunity protection by opening the floodgates to discovery in nearly every constitutional tort action.[11]

D. Count Four Should be Dismissed Because Plaintiffs did Not Allege the Use of Incriminating Statements Against Them in Criminal Proceedings.

Although plaintiffs concede that they made no incriminating statements and that they do not allege that any statement was offered against them in criminal proceedings,[12] they insist that

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[10] Although plaintiffs claim that liability can be based on a "constructive notice" theory, Opp. Memo. at 45-46, the scant case law they cite is limited to circumstances where "there exists a *known history of widespread abuse* sufficient to alert a supervisor to ongoing violations." Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 582 (1st Cir. 1994) (emphasis added); accord Williams v. Smith, 781 F.2d 319, 324 (2d Cir. 1986) (claim against warden for unfair disciplinary hearing survived dismissal where numerous published cases found that inmates in that prison had been denied fair hearings). The amended complaint in this case does not allege a "known history of widespread abuse."

[11] In addition to the absence of factual allegations of defendants' personal involvement, as explained in defendants' opening memorandum, most of plaintiffs' complaints about the alleged conditions of their confinement do not rise to the level of a clearly established constitutional violation. See Def. Opening Memo. at 30-34.

[12] Plaintiffs inexplicably suggest that they have been unable to determine whether their statements were used against them in criminal proceedings because they have been denied discovery. Opp. Memo. at 29 n.15. Plaintiffs are not entitled to take discovery in hopes of uncovering claims they have not alleged. On a motion to dismiss under Rule 12(b)(6), courts

no such allegations are necessary to state a clearly established claim for the violation of the Self-Incrimination Clause. Opp. Memo. at 29-32. Plaintiffs admit that the controlling Second Circuit rule is to the contrary: "Even if it can be shown that a statement was obtained by coercion, there can be no Fifth Amendment violation until that statement is introduced against the defendant in a criminal proceeding." DeShawn E. v. Safir, 156 F.3d 340, 346 (2d Cir. 1998); Opp. Memo. at 31.

Plaintiffs do not dispute that they cannot state self-incrimination claims under this Circuit's precedent, but they ask the Court to withhold ruling on defendants' qualified immunity until the Supreme Court decides a pending case likely to resolve whether the use of statements in a criminal proceeding is always required for a self-incrimination claim. Id. at 32-33. This request betrays a fundamental misunderstanding of qualified immunity. At the time of the conduct at issue in this case, binding precedent in the Second Circuit (and most other circuits) held that there could be no self-incrimination claim unless an incriminating statement was elicited and then used in a criminal proceeding. As a result, it cannot possibly have been clearly established at the time of defendants' alleged conduct that defendants would violate plaintiffs' Fifth Amendment rights if defendants compelled plaintiffs to respond but did not use any of plaintiffs' statements in criminal proceedings. Qualified immunity exists precisely to protect officials against liability for failure to be clairvoyant, so nothing the Supreme Court might say in the future would deprive defendants of qualified immunity from this claim. See, e.g., McCann v. Coughlin, 698 F.2d 112, 124 (2d Cir. 1983) ("[O]fficials are not required to predict future

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may look only to the allegations in the complaint to determine whether the plaintiff has stated a viable cause of action. See, e.g., Newman & Schwartz v. Asplundh Tree Expert Co., 102 F.3d 660, 663 (2d Cir. 1996).

developments in constitutional adjudication.").

E. Count Six for the Violation of Plaintiffs' Speedy Trial Rights Should be Dismissed Because No Such Right Existed Under the Facts Alleged.

Plaintiffs' Speedy Trial Clause claims fail because plaintiffs' arrests on civil immigration charges did not trigger that Clause. Even if plaintiffs are correct that formal criminal charges are not always necessary to trigger that Clause, Opp. Memo. at 35, there can be no Speedy Trial Clause claim where, as here, plaintiffs were not held to answer any criminal charges, no criminal proceeding of any kind was instituted against plaintiffs, and plaintiffs in fact were removed on their civil immigration charges.

The Supreme Court specifically held in United States v. Marion, 404 U.S. 307 (1971), that speedy trial rights are triggered under the Sixth Amendment when there is "either a formal indictment or information or else the actual restraints imposed by arrest *and holding to answer a criminal charge*." Id. at 320 (emphasis added); see also United States v. Bloom, 865 F.2d 485, 491 (2d Cir. 1989) (holding that for an arrest to trigger speedy trial rights, "[t]here must be a federal deprivation of liberty in connection with ... [a criminal] complaint"). When a suspect is already incarcerated on a separate charge, the mere fact of incarceration (or some other penalty such as placement in administrative segregation) does not trigger speedy trial rights with respect to any additional charges that the government may be contemplating. See United States v. Daniels, 698 F.2d 221, 223 (4th Cir. 1983); United States v. Blevins, 593 F.2d 646, 647 (5th Cir. 1979) (per curiam). Because plaintiffs were incarcerated on civil immigration charges at the time they allegedly were investigated for terrorist activity, their detention did not implicate the Speedy Trial Clause.

Apparently recognizing that their speedy trial rights were not triggered under traditional Sixth Amendment analysis, plaintiffs rely on a so-called "ruse" exception that has been recognized by some courts in challenges under the Speedy Trial Act, 18 U.S.C. § 3161, to criminal prosecutions. Opp. Memo. at 38. Those courts have held that the Speedy Trial Act – not the Speedy Trial Clause – may be triggered by an arrest on a civil charge that is a "mere ruse[] to detain a defendant for later criminal prosecution." United States v. Noel, 231 F.3d 833, 836 (11th Cir. 2000) (per curiam), cert. denied, 531 U.S. 1200 (2001). To show that an arrest on a civil charge was a "mere ruse," the defendant must demonstrate that "the primary or exclusive purpose of the civil detention was to hold him for future criminal prosecution." Id.; see also United States v. De La Pena-Juarez, 214 F.3d 594, 598 (5th Cir.), cert. denied, 531 U.S. 983 (2000). The ruse exception to the Speedy Trial Act does not support plaintiffs' constitutional claims under the Speedy Trial Clause for at least three important reasons.

First, the handful of cases relied upon by plaintiffs construing the Speedy Trial Act are inherently inadequate to clearly establish the law as to the Speedy Trial Clause because the Act and the Clause are not coextensive. See, e.g., United States v. Sorrentino, 72 F.3d 294, 297-98 (2d Cir. 1995); United States v. Carini, 562 F.2d 144, 148 (2d Cir. 1977). Second, because neither the Supreme Court nor the Second Circuit has recognized the ruse exception even in regard to the Act, that novel doctrine is not clearly established law in this Circuit. See Townes v. City of New York, 176 F.3d 138, 144 (2d Cir. 1999). Finally, even if the ruse exception were recognized in this Circuit, its elements are not satisfied in this case. The ruse cases relied upon by plaintiffs involve individuals who were detained on sham civil charges and later prosecuted on identical criminal charges developed while they were incarcerated. See United States v.

Restrepo, 59 F. Supp.2d 133, 136 (D. Mass. 1999); United States v. Vasquez-Escobar, 30 F. Supp.2d 1364, 1366 (M.D. Fla. 1998). In this case, in contrast, no criminal charges – let alone identical criminal charges – have been filed against plaintiffs. Moreover, the civil immigration charges brought against plaintiffs cannot be dismissed as a sham, because they were successfully pursued and plaintiffs were removed on the basis of those charges. See Noel, 231 F.3d at 836 (placing great weight on the fact that "INS actively pursued deportation action against Noel during his custody"); United States v. Ortiz-Lopez, 24 F.3d 53, 54 (9th Cir. 1994) ("[T]his civil arrest was more than a mere formality. The INS has a valid reason to detain Ortiz-Lopez -- the order to show cause and the deportation proceeding").

For all these reasons, plaintiffs have not stated a claim for violation of the Speedy Trial Clause, much less a clearly established claim.[13]

F. Count Nine Should be Dismissed Because Plaintiffs Have an Adequate Postdeprivation Remedy Under the FTCA.

Plaintiffs' argument that they have stated clearly established due process claims against defendants for the alleged loss of their property is based primarily on Dwyer v. Regan, 777 F.2d 825 (2d Cir.), modified, 793 F.2d 457 (2d Cir. 1986). Opp. Memo. at 59-60. In Dwyer, a tenured state employee sued a high-ranking official for abolishing the employee's job for illegal and sham purposes without affording the employee a hearing. Id. at 827. That case is not remotely analogous to plaintiffs' claims, where plaintiffs have disregarded a clear remedy for

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[13] Even if (contrary to fact) plaintiffs' rights under the Speedy Trial Clause were triggered when their deportation orders became final, see Opp. Memo. at 34-35, plaintiffs were not held long enough to state clearly established claims under that Clause. Plaintiffs concede that courts have considered a delay "presumptively prejudicial" for purposes of that Clause only as the delay "approaches one year." Id. at 40; see also United States v. Jones, 91 F.3d 5, 9 (2d Cir. 1996).

their property losses under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-80, in order to seek personal recovery against high-ranking federal officials based solely on the conclusory assertion that the officials formulated unspecified policies and practices that caused their losses in unspecified ways.[14] See Am. Comp. at ¶ 5. As previously discussed, plaintiffs' naked allegations of defendants' culpability for an alleged policy or practice are insufficient, and to countenance such insubstantial claims would defeat the qualified immunity doctrine by subjecting our Nation's leaders to a potential flood of litigation that would distract from their public duties. See supra at 13-15.

III. THE LIABILITY REFORM ACT BARS PLAINTIFFS' INTERNATIONAL LAW CLAIMS.

Plaintiffs argue that their international law claims fall within the exception to immunity under the Liability Reform Act because their claims are brought under a federal statute, the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. Plaintiffs are incorrect, because the Liability Reform Act exempts only those claims that are "brought *for a violation of a statute of the United States*," 28 U.S.C. § 2679(b)(2)(B) (emphasis added), and plaintiffs' claims under the ATS do not charge "a violation of a statute of the United States." The ATS, like 42 U.S.C. § 1983, is a procedural statute that does not set out duties or obligations capable of "violation."

In United States v. Smith, 499 U.S. 160, 174 (1991), the Supreme Court held that claims brought under federal procedural statutes that merely provide jurisdiction for tort claims defined

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[14] Contrary to plaintiffs' suggestion, they have not alleged the uniform confiscation of property that might be indicative of a controlling policy or practice. Opp. Memo. at 61. Presumably, all of the plaintiffs had some form of identification when arrested, yet only three allege that their documents were not returned. Am. Comp. at ¶¶ 88, 101, 138. Also, plaintiff Sachveda specifically admits that some of his property was returned, including his "Canadian identification card." Id. at ¶ 149.

by other law are covered by the Liability Reform Act and do not fall within the Act's exemption for claims "brought for a violation" of a federal statute. As the Court explained, a claim cannot qualify as "brought for a violation of a statute" if that statute "does not impose any duties . . . that could be violated." Id. at 175. Accordingly, even if the claim at issue in Smith were "authorized" by a federal statute known as the Gonzales Act, the claim could not be deemed "brought for a violation of" the Gonzales Act because that Act merely provided a remedy and did not impose any duties capable of violation. Id.

The plain wording of the ATS shows that it is a procedural statute that confers jurisdiction but that does not impose any duties capable of "violation." The ATS provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Plaintiffs' claim that the ATS "incorporates preexisting international law" rewrites the ATS. Opp. Memo. at 64. By its plain terms, the ATS simply provides federal jurisdiction for certain tort claims by aliens; the ATS does not impose any duties. The Second Circuit and other courts have held that where a claim is brought under the ATS, the court must look outside the ATS to evolving international law standards to assess the validity of the claim. See Abebe-Jiba v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law"); Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).[15]

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[15] Plaintiffs assert that Jama v. INS, 22 F. Supp.2d 353 (D.N.J. 1998), held that claims against federal employees under the ATS are exempt from the Liability Reform Act. Opp. Memo. at 64. In fact, Jama is utterly silent on this issue. The Ninth Circuit in Alvarez-Machain v. United States, 266 F.3d 1045, 1053-54 (9th Cir.), vacated and reh'g en banc granted, 284 F.3d 1039 (9th Cir. 2002), remains the only court to address this issue specifically in regard to the

The ATS is directly analogous in this regard to 42 U.S.C. § 1983. Section 1983 authorizes suit for violations of federal law, but § 1983 itself is not capable of violation. In discussing § 1983 actions in Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979), the Supreme Court explained this distinction between a procedural statute and a statute capable of violation:

> No matter how broad the ... [§ 1983] cause of action may be, the breadth of the coverage does not alter its procedural character. Even if claimants are correct in asserting that § 1983 provides a cause of action for all federal statutory claims, it remains true that *one cannot go into court and claim "a violation of § 1983"* – for § 1983 by itself does not protect anyone against anything.

Id. at 617-18 (emphasis added). The same reasoning applies to plaintiffs' ATS claims. The ATS does not define international law standards and it is impossible to "violate" the ATS. Accordingly, the Liability Reform Act applies and defendants are immune from these claims.[16]

IV. PLAINTIFFS LACK STANDING TO SEEK ANY FORM OF EQUITABLE RELIEF BASED UPON THEIR DETENTION OR REMOVAL PROCEEDINGS.

Plaintiffs do not contend that any of the alleged illegalities they claim to have suffered is likely ever to be repeated against them. Plaintiffs' immigration proceedings have long since concluded, they have all left this country, and they do not claim any intention (or right) ever to

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ATS, and it held that ATS claims are covered by the Liability Reform Act. Although Alvarez-Machain was vacated pending rehearing on other issues, the ATS holding is not under reconsideration.

[16] Plaintiffs try to analogize the ATS to the RICO Act, which has been held to fall within the exemption to the Liability Reform Act. Opp. Memo. at 64 n.65. However, RICO contains unambiguous prohibitions that are clearly subject to violation. See 18 U.S.C. § 1962 (beginning with the prohibitory phrase "[i]t shall be unlawful"); 18 U.S.C. § 1964(c) (providing a private action for persons injured by reason of "a *violation* of section 1962") (emphasis added). There is no similar language in the ATS or § 1983.

return. Am. Comp. at ¶¶ 69, 88, 101, 124, 138, 147. Nonetheless, plaintiffs contend that they have standing to seek equitable relief based on their challenge to the legality of their immigration proceedings for two reasons. First, plaintiffs suggest that because they are only seeking declaratory relief rather than a "coercive" injunction, they are not required to show an imminent likelihood of future injury to establish standing. Opp. Memo. at 72-73. Second, plaintiffs contend that they have standing to seek equitable relief because they were stigmatized by their removal proceedings and that stigma has led to continuing mistreatment by governments and employers in their home countries. Id. at 69-70. Neither argument has merit.[17]

Plaintiffs' attempted distinction between declaratory and coercive relief fails, because Article III's standing requirements apply no less to declaratory relief than to injunctive relief. Regardless of the form of relief requested, "the federal courts . . . do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, no[t] abstractions,' are requisite. This is as true of declaratory judgments as any other field." Golden v. Zwickler, 394 U.S. 103, 108 (1969). Consistent with this principle, the Court in Lyons did not distinguish between Lyons' demand for injunctive relief and his demand for declaratory relief. To the contrary, the Court held that Lyons lacked standing to seek any form of

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[17] Plaintiffs argue that City of Los Angeles v. Lyons, 461 U.S. 95 (1983), does not apply here because they have alleged "an officially sanctioned policy" of unlawful conduct and there are no "prudential" concerns of comity or federalism warranting federal court restraint. Opp. Memo. at 70-71. Plaintiffs misread Lyons. Lyons specifically held that the mere allegation of an official policy or practice is inadequate to establish standing under Article III, and that the plaintiff must also show a real and immediate threat of personal injury from the policy or practice. Id. at 106-07 n.7. As a requirement of Article III, that rule applies fully here. See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (denying declaratory relief against Interior Secretary); Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1040-41 (9th Cir. 1999) (en banc) (denying declaratory relief against Border Patrol); Feit v. Ward, 886 F.2d 848, 857 (7th Cir. 1989) (denying declaratory relief against Forest Service).

prospective relief because he could not show an imminent likelihood that his prior injuries would be repeated. 461 U.S. at 97-98, 105; see also Ashcroft v. Mattis, 431 U.S. 171 (1977) (no standing to seek declaratory relief where there was no threat that a prior injury would soon be repeated); see also Deshawn E. by Charlotte E. v. Safir, 156 F.3d at 344 ("[a] plaintiff seeking injunctive *or* declaratory relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future") (emphasis added). These decisions leave no doubt that the standing requirements for declaratory relief are identical to those for other forms of equitable relief; the standards are not reduced or more easily satisfied.

Plaintiffs' attempt to establish standing based on alleged mistreatment in their home countries is equally unavailing. If, as alleged, plaintiffs were detained in part because of concerns that they might have connections or information relating to terrorism, it is unlikely that the relief sought from this Court would affect any inferences a third country might draw from the circumstances of plaintiffs' detention or from any information regarding plaintiffs that may have been provided by the Executive Branch.[18] The Court in Lujan v. Defenders of Wildlife, 504 U.S. at 562, emphasized that a party cannot establish standing for equitable relief based upon threatened injuries from "independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict . . . ." See also

[18] It bears mention that plaintiffs may misconstrue the meaning of the "clearances" that they allege they received. Plaintiffs appear to assert that the "clearance" of an alien means that the alien is no longer suspected of any connection to crime or terrorism. In some cases, plaintiffs' understanding of the term may be correct. Among other things, however, a "clearance" also may mean simply that the alien was cleared *for removal*, or in other words, that the Executive Branch concluded that the Nation's security would be adequately protected by removing the alien from this country. A "clearance," accordingly, does not constitute a determination that an alien is free from suspicion.

Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 43 (1976) (holding that standing could not be based upon injuries caused by the independent actions of third parties not before the court); Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (same).

Plaintiffs attempt to distinguish Lujan on the theory that they are challenging government action aimed at them while the plaintiff in Lujan challenged government action aimed at others. Opp. Memo. at 75. The flaw in this purported distinction is that the declaratory relief plaintiffs seek is not aimed at defendants, who pose no threat to them, but rather is aimed at altering the conduct of the foreign governments and employers who are allegedly mistreating them. Plaintiffs lack standing to seek such relief because this Court has no control over these foreign actors, and there is nothing but speculation to suggest that they would alter their alleged behavior toward plaintiffs based upon any decision this Court might render. See also, e.g., Talenti v. Clinton, 102 F.3d 573, 578 (D.C. Cir. 1996); Dellums v. U.S. Nuclear Regulatory Com'n, 863 F.2d 968, 976 (D.C. Cir. 1988) (no standing "when the effectiveness of the relief requested depends on the unforeseeable actions of a foreign nation").

V. CONCLUSION.

For the above reasons and those set forth in defendants' initial memorandum, the United States and the named defendants request dismissal under Fed. R. Civ. P. 12(b)(1) and (6) of all plaintiffs' claims asserted against them in their individual and official capacities.

Dated:

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