UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, *et al.*	)	
	)	
Plaintiffs,	)	
	)	**Civil Action**
v.	)	**No. 02CV2307**
	)	**(Gleeson, J.)**
	)	
JOHN ASHCROFT, Attorney General of the United States, *et al.*,	)	
	)	
	)	
Defendants.	)	
	/	

REPLY BY ATTORNEY GENERAL JOHN ASHCROFT
TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM

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Ashcroft in his individual capacity

Defendant Attorney General John Ashcroft in his individual capacity, by and through undersigned counsel and incorporating all Government briefs, replies as follows.

I. DISCUSSION

Subject Matter Jurisdiction. Plaintiffs argue that a *Bivens* remedy is unaffected by IIRIRA in light of the decision in *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991). This argument fails because IIRIRA's "cavalcade of jurisdictional bars," *Mapp v. Reno*, 241 F.3d 221, 229 (2d Cir. 2001), bars § 1331 jurisdiction, and, hence, a *Bivens* remedy, for claims brought by aliens challenging aspects of their removal process.[1] *See Reno v. American-Arab*, 525 U.S. 471, 476 (1999) (§ 1252(g) bars § 1331 jurisdiction); *Jean-Baptiste v. Reno*, 144 F.3d 212, 218 (2d Cir. 1998) (§ 1252(g) bars § 1331 jurisdiction). Prior to IIRIRA, "only actions attacking the deportation order itself" were subject to exclusive court-of-appeals review while other claims were subject to § 1331 jurisdiction in the district courts. *Calcano-Martinez v. INS*, 232 F.3d 328, 340 (2d Cir. 2000), *aff'd*, 533 U.S. 348 (2001). IIRIRA changed that by channeling to the court of appeals all claims "'arising from any action taken or proceeding brought to remove an alien." *Id.*, quoting § 1252(b)(9); *see also* 8 U.S.C. 1252(f)(1)(barring class-wide injunctive relief over statutes governing apprehension, examination and removal). *See also* Gov't Repl. 2.

Further evidence of the removal process' expansive nature after IIRIRA is the Supreme Court's observation in *American-Arab*. "There are * * * many other decisions or actions [besides removal-proceeding commencement and the adjudication and execution of removal

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[1] Plaintiffs did not address § 1231(h) even though "[t]he burden of proving jurisdiction is on the party asserting it." *Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir. 1996). Section 1231(h) states that nothing in § 1231 "shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." In this instance, the affected claims include § 1231(a) detention claims and the SHU claim, the latter because the Attorney General's discretionary authority to detain aliens where he chooses is based on § 1231(g). *See Van Dinh v. Reno*, 197 F.3d 427 (10th Cir. 1999).

orders] that may be part of the deportation process – such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order." *American-Arab*, 525 U.S. at 482. The Court's expansive view finds support in the text of § 1252(b)(9). That Section refers to "this subchapter." 8 U.S.C. 1252(b)(9). The "subchapter" at issue is subchapter II of Chapter 12 of Title 8, in other words, §§ 1151 to 1379 of Title 8. With good reason, therefore, did this Court recognize that § 1252(b)(9) is "'the unmistakable zipper clause, one that 'covers the universe of deportation claims,'"[2] *Pena-Rosario v. Reno*, 83 F. Supp.2d 349, 359 (E.D.N.Y. 2000) (Gleeson, J.), quoting *American-Arab*, 525 U.S. at 483).[3] And with good reason this Court should grant the Attorney General's motion to dismiss plaintiffs' *Bivens* claims for lack of subject matter jurisdiction.

Special Factors. Plaintiffs dispute that "special factors" argue against a *Bivens* remedy by downplaying the comprehensive legislative scheme because the scheme does not offer an alternative monetary remedy. Pltfs' Supp. 10. *United States v. Stanley*, 483 U.S. 669 (1987), reversed the Eleventh Circuit on precisely this point. Whether Stanley was afforded a federal

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[2] Not every incident in the course of an alien's removal is subject to a jurisdictional bar. A prison guard's assault of an inmate, unrelated to the physical contact needed to maintain effective control over a prisoner (see *Thielman v. Leean*, 282 F.3d 478, 484 (7th Cir. 2002) (use of waist belt and leg arms "is the stuff of nickels and dimes" and justified in prison environment)) would be unrelated to the immigration law purposes served by the detention and beyond the jurisdiction bar.

[3] Plaintiffs argue that statutorily barring a *Bivens* remedy would raise constitutional concerns. Pltfs Supp. 2, n.2. However, while that concern may be valid in the habeas context, habeas review is constitutionally based but a *Bivens* remedy is only *Bivens*-based. Plaintiffs were free to seek habeas review. *Demore v. Kim*, 123 S. Ct. 1708 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001); *INS v. St. Cyr*, 533 U.S. 289 (2001); *Pena-Rosario v. Reno*, 83 F. Supp.2d 349, 361 (citing *Henderson*, 157 F.3d 106, 122 n.15 (2d Cir. 1998)); *see also* Gov't Supp. Rep. n.2.

remedy for injuries from secretly being given LSD was "irrelevant to a 'special factors' analysis.'" *Id.* at 683.[4] In the removal process, Congress has taken care to limit judicial review, even going so far as to provide expressly that "[n]othing" in the laws and rules arising from 8 U.S.C. 1231 "shall be construed to create any substantive or procedural right or benefit" that could be enforceable against individual officers of the United States. 8 U.S.C. 1231(h).

Claim 17. As explained in the Government's Reply Brief, plaintiffs wrongly claim a substantive and procedural due process violation regarding the service of their Notices to Appear. Gov't Supp. Rep. Br. II.A. Plaintiffs fail at an attempt to equate the due process rights of aliens detained during immigration proceedings with rights that apply only in the "criminal justice setting."[5] Because none exists, Plaintiffs cite no binding Supreme Court or circuit law establishing that detained aliens have a clearly established constitutional right to receive notice of an immigration violation within a specified period after arrest. Even if the Government had not complied with the regulations, immunity would attach as to these allegations.[6]

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[4] Congressional action and the unique nature of military service were the "special factors" that counseled hesitation in *Stanley*. The additional special factor here is the national emergency, recognized by both political branches, that led to plaintiffs' detention and deportation.

[5] Plaintiffs wrongly reject the critical distinction between deportable aliens and inadmissible aliens. *See, e.g., Zadvydas,* 533 U.S. at 682, 693.

[6] Here, though, officials complied with the regulation. 8 C.F.R. 287.3(d) allowed service of the NTA beyond 48 hours "in the event of an emergency or other extraordinary circumstances." September 11 was an "extraordinary circumstance." Plaintiffs contest the Attorney General's references to the events of September 11 and their aftermath as beyond the scope of the allegations. But "September 11" appears twice in the OIG Report's title alone, and the report (which plaintiffs seek to incorporate into their pleadings) details the attacks and burden on Department resources. OIG 10, 12, 22, 31, 33. Given the national emergency, plaintiffs fail to establish that their NTAs were not served within "an additional reasonable period of time." 8 C.F.R. 287.3(d).

Claim 18. Plaintiffs' allegations of a "no bond" policy (which only meant opposing bond applications before immigration judges) similarly fails to withstand qualified immunity analysis. No constitutional violation arises from a decision to take a strong litigative stand in opposing bond applications. *DeMore v. Kim*, 123 S. Ct. 1708 (2003); *Carlson v. Landin*, 345 U.S. 524 (1952). This is especially true given the national security and foreign policy concerns here, which require deference from the courts.[7] Supreme Court precedent holds that even when, as here, it identifies an ambiguous issue, or lower courts later decide it, an official's decisions are entitled to qualified immunity because the law was open at the time the official acted. *Mitchell v. Forsyth*, 472 U.S. 511, 534-35 (1985). Even assuming plaintiffs were held preventatively in this wartime context, *Zadvydas* explicitly anticipated an exception for "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 (emphasis added).

Claim 19. Qualified immunity also bars plaintiffs' equal protection claim. They contend that Government officials detained them because of "private biases," even though "their nations have taken no hostile action toward us." Pltf's Supp. 25. The Inspector General's report makes clear that plaintiffs were detained not because of bias but because they had violated immigration law and were suspected of involvement in terrorism. *See, e.g.*, OIG 1, 4 n.8, 5. 12-13; *cf. Ihab Ali*, No. M11-188, 1999 WL 595665 (S.D.N.Y. 1999) ("Contrary to counsel's suggestion that

[7] The OIG Report itself notes that these aliens were held until it was determined that deportation to a proper country was appropriate, taking national security and foreign policy into consideration. *See, e.g.*, OIG 37, 74.

Mr. Ali is being treated differently because he is a Muslim or Arab Muslim, there are many Arab Muslims who come before the Court who are not in the Special Housing Unit but are housed in the general population of the MCC."). In any case, plaintiffs ignore the legitimate role of nationality distinctions in immigration law enforcement. *See, e.g., American-Arab*, 525 U.S. 471 (holding equal protection clause generally inapplicable in removal process). While it is true that the United States was not attacked by a foreign state, it was attacked by a foreign power existing within the shadows of nations throughout the world, including our very own.

Claim 20. Plaintiffs complain they were not afforded hearings under 28 C.F.R. 541.22(c). Settled principles of *Bivens* liability require allegations of personal misconduct and preclude holding an agency head liable for every act of an agency's subordinate officers and employees.[8] *Provost v. City of Newburgh*, 262 F.3d 146, 154-55 (2d Cir. 2001). The Attorney General obviously lacks the time to learn of every notice, every waiver, every review, and every administrative hearing. *Black v. United States*, 388 F. Supp. 805, 808 (E.D.N.Y. 1975), *aff'd.* 534 F.2d 524 (2d Cir. 1976). The portions of the OIG Report on which plaintiffs rely reflect only general knowledge within senior levels of the Department about the handling of the September 11 detainees. They do not reflect any knowledge (let alone authorization) by senior leadership of any failure to comply with BOP procedures.[9] This is far short of that which would be required

[8] Plaintiffs inaccurately claim that the Attorney General does not dispute personal involvement except as to the SHU claim. Pltfs' Supp. 43-44, n.45. The Government's motion to dismiss and reply asserted those defenses extensively as to all claims, and the Attorney General only supplemented those defenses as to the SHU claim by way of example.

[9] *See, e.g.*, OIG 13 (Office of Attorney General (OAG) demands lawful action); OIG 19-20 (ADMAX placement); OIG 35 (no conclusion of NTA violation); OIG 37, 70 ("hold until cleared"); OIG 74 (national security aspect of deportation); OIG 108 (bond policy change); OIG 112-13 (communications within limits of BOP regulations).

to show personal liability of the Attorney General, who is not even referenced in the cited material. *See Gonzalez v. Reno*, 325 F.3d 1228, 1234-35 (11th Cir. 2003). Plaintiffs' allegations as to the Attorney General's personal liability fail, especially given the national security context here, and the presumption of legitimacy generally. *Dep't of State v. Ray*, 502 U.S. 164, 179 (1991).

Qualified immunity requires consideration of the circumstances in which an official acted. *Anderson v. Creighton*, 483 U.S. 635, 640-41, 643 (1987). Factfinding is not required to confirm what Congress already has determined, that September 11 presented "an unusual and extraordinary threat to the national security and foreign policy of the United States." Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). Plaintiffs were held pending FBI investigation – a criterion under BOP regulations that may subject an inmate to administrative detention. 28 C.F.R. 541.22(a)(3). The second criterion under § 541.22(c) also was met. Unlawful aliens whom the FBI had determined were "of high interest" to the terrorist investigation posed unprecedented security concerns. *See Center for Nat'l Security Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 928-33 (D.C. Cir. 2003)(*CNSS*); *Ihab Ali*, 1999 WL 595665 (material witness in SHU for safety reasons).[10]

BOP regulations did not contemplate the situation that confronted prison officials here, however. The critical FBI determination that "high interest" detainees required administrative

[10] Concerns such as those cited in *CNSS* clearly warranted the FBI's decision to designate "high interest" detainees for administrative detention. *See generally Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976)(no liberty interest in classifications). These concerns would not have evaporated by placing these detainees in the general prison population where "information quickly travels through the prison 'grapevine.'" *Dawson v. Smith*, 719 F.2d 896, 899 (7th Cir. 1983).

segregation under § 541.22(a) was driven by national security and foreign threat analyses. Such determinations are devoid of the "'particularized standards'" and "substantive limitations on official discretion" the Supreme Court requires before finding a protected liberty interest. *Olim v. Wakinerona*, 461 U.S. 238, 249 (1983) (citation omitted).[11] These circumstances are far different from the situation contemplated by the regulations, where prison officials' judgment, formed by their own experiences and information inmates themselves chose to submit, have significance – the type of routine situation addressed by the Court of Appeals in *Tellier v. Fields*, 230 F.2d 502 (2d Cir. 2000).

Regulations written in peacetime cannot circumscribe an official's statutory discretion at a time of national emergency from foreign threats. Courts have recognized that even statutes should not be read to preclude action for legitimate national security reasons that Congress never

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[11] Even accepting plaintiffs' allegations, BOP's procedures reasonably could be adapted to the immediacy of an investigation into foreign terrorist threats to the nation. The Government's discretionary authority (*see* 8 U.S.C. 1231(g)(1), (h)) coupled with the need to protect detainee information from a hostile foreign enemy meant that, in this singular situation, the detainees did not have a liberty interest in seeing that every feature of an institution's process was followed to the letter. *Hewitt v. Helms*, 459 U.S. 472, 471-72 (1983); *see also Olim*, 461 U.S. at 250 ("'[A] liberty interest *** is a substantive interest of an individual; it cannot be the right to demand needless formality.' Process is not an end in itself.")(citation omitted).

The Second Circuit has recognized the *Hewitt* test for determining whether pretrial detainees have a liberty interest in release from administrative detention. *Benjamin v. Fraser*, 264 F.3d 175, 188-90 (2d Cir. 2001) (rejecting application of *Sandin v. Connecticut*, 515 U.S. 472 (1995), and applying *Hewitt* to nonpunitive segregation). But even *Benjamin* did not address unlawful alien detainees who have been ordered deported. Although BOP generally treats immigration and pretrial detainees the same (28 C.F.R. 551.101(a)(1)), qualified immunity should protect judgments where the very test for determining an immigration detainee's liberty interest has not yet been addressed, much less clearly foreshadowed or resolved, and where the classes of inmates (pretrial detainees, post-conviction inmates, and alien detainees) all are defined by different constitutional interests. And even if the *Sandin* test was applied, qualified immunity bars plaintiffs' claims because their administrative detention was not atypical of the unique group of "high interest" detainees.

anticipated in enacting a law.[12] The Government's interest in maintaining the "high interest" plaintiffs in administrative detention until cleared could not have been more substantial. The necessarily uncertain application of those regulations in a national emergency following a foreign attack raised legitimate questions given the inherent mandate of the Government to act to protect the Nation from future attacks.[13] Given the foreign terrorist investigative concerns at stake, plaintiffs' administrative segregation was nonpunitive and did not infringe established liberty interests created by process adopted when the special circumstances that arose from September 11 could not be envisioned. The justification for qualified immunity is especially appropriate here.[14] In the critically important and sensitive field of national security, the balance of competing considerations weighs in favor of protecting the Attorney General and those who act

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[12] *See United States v. Butenko*, 494 F.2d 593, 601 (3d Cir. 1974)(en banc)(wiretap statute did not limit President's foreign security electronic surveillance powers "[i]n the absence of any indication that the legislators considered the possible effect of § 605 [the statute] in the foreign affairs field").

[13] Section 541.22 recognizes deviations from the regulations would be justified in unusual circumstances, even in the routine prison environment. 8 C.F.R. 541.22(a), (c)(1), (d). Even these provisions did not anticipate what confronted MDC after September 11, a large influx of unlawful alien detainees of "high interest" to a foreign terrorist investigation. For example, procedures such as § 541.23, providing notice and an evidentiary hearing when an inmate is placed in segregation for his own safety (an objectively reasonable concern here given potential hostility of some in the general prison population to possible suspects in the attacks) would not have readily adapted, given the foreign security nature of the terrorist investigation. Moreover, it is noteworthy that although plaintiffs aver they were denied hearing and review, none allege they attempted to provide information to prison officials in order to secure their placement in the general prison population.

[14] A circuit conflict on whether § 541.22 creates a liberty interest is a compelling ground for judicial recognition that the law was not clearly established. *Compare Crowder v. True*, 74 F.3d 812, 815 (7th Cir. 1996)(per curiam) (*Sandin* analysis) *with Tellier v. Fields*, 280 F.2d at 81. The nationwide responsibility of the Attorney General (who typically may make decisions in the District of Columbia that affect more than one circuit's jurisdiction) calls for flexibility in the qualified immunity equation.

at his direction. The day is long past when protecting the Nation from acts of foreign terrorist attacks can be easily dismissed; and the potential consequences of inaction are too great to permit personal financial considerations and the consequences of protracted litigation to interfere with the vigorous and unhesitating performance of the Attorney General's duties.

F. Claims 21 and 22. Plaintiffs fail to state a claim that they, as illegal aliens, have a clearly established constitutional right of access to counsel or to the court more quickly than they received it. Factually, they articulate only a delay in access that cannot underpin a constitutional claim. Legally, they wrongly assert that *Benjamin*, 264 F.3d 175, means they do not have to establish "actual injury" under the law because their claim involves a direct, and not a derivative, denial of right of access to the courts. However, *Benjamin* is a *forward-looking* claim as described in *Lewis v. Casey*. *Lewis*, 518 U.S. at 351-52; *cf. Christopher v. Harbury*, 536 U.S. 403, 413 (2002). Here, however, each plaintiff is no longer detained, which is a classic *backward-looking* or "missed opportunity" claim requiring a showing of actual injury. *Davis v. Goord*, 320 F.3d 346, 351-52 (2d Cir. 2003); *Kelly v. Farquharson*, --- F. Supp. 2d ---, 2003 WL 1803052 (D. Mass. Apr. 3, 2003). For that reason, they do not assert actual injury, and their claim fails. Moreover, plaintiffs' failure to address the logistical difficulty September 11 caused, and the national security questions it spawned, results in a failed claim because it ignores the deference due to the national security reasons why the alleged temporary communications disruption might properly have occurred. *Fiallo v. Bell*, 430 U.S. 787, 794 n.5 (1977).

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CONCLUSION

The Court should dismiss the *Bivens* claims against the Attorney General.

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July 23, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July 2003, one copy of the foregoing **Reply by Attorney General John Ashcroft to Plaintiffs' Supplemental Memorandum** was served on plaintiffs and on counsel for the defendants by facsimile transmission and overnight mail addressed to:

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