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United States District Court,
E.D. New York.

Ehab ELMAGHRABY and Javaid Iqbal, Plaintiffs,
v.
John ASHCROFT, Attorney General of the United States, Robert Mueller, Director of the Federal Bureau of Investigation, Michael Rolince, former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counterterrorism Division; Kenneth Maxwell, former Assistant Special Agent in Charge, New York Field Office, Federal Bureau of Investigations; Kathleen Hawk Sawyer, former Director of the Federal Bureau of Prisons; David Rardin, former Director of the Northeast Region of the Bureau of Prisons; Michael Cooksey, former Assistant Director for Correctional Programs of the Bureau of Prisons; Dennis Hasty, former Warden of the Metropolitan Detention Center, Michael Zenk, Warden of the Metropolitan Detention Center; Linda Thomas, former Associate Warden of Programs of the Metropolitan Detention Center; Associate Warden Sherman, Associate Warden of Custody for the Metropolitan Detention Center; Captain Salvatore Lopresti; Lieutenant Steven Barrere; Lieutenant William Beck; Lieutenant Lindsey Bledsoe; Lieutenant Joseph Cuciti; Lieutenant Thomas Cush; Lieutenant Howard Gussak; Lieutenant Marcial Mundo; Lieutenant Daniel Ortiz; Lieutenant Elizabeth Torres; Corrections Officer Reynaldo Alamo; Corrections Officer Sidney Chase Corrections Officer James Clardy; Corrections Officer Raymond Cotton; Corrections Officer Michael Defrancisco; Corrections Officer Richard Diaz; Corrections Officer Jai Jaikisson; Corrections Officer Dexter Moore; Corrections Officer Jon Osteen; Corrections Officer Angel Perez; Corrections Officer Scott Roseberry; Unit Manager Clemmett Shacks; Nora Lorenzo, Physician's Assistant; "John Doe" Corrections Officers Nos. 1-19, "John Doe" being fictional first and last names, and the United States of America, Defendants.

No. 04 CV 01809 JG SMG. | Sept. 27, 2005.

Attorneys and Law Firms

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Opinion

MEMORANDUM AND ORDER

GLEESON, J.

***1** Plaintiffs Ehab Elmaghraby and Javaid Iqbal are Muslim men from Egypt and Pakistan, respectively, who were arrested on criminal charges in the months following September 11, 2001, and detained at the Metropolitan Detention Center ("MDC") in Brooklyn, New York.[1] Plaintiffs allege that they and other Muslim men were arbitrarily classified as persons "of high interest" to the government's terrorism investigation following the September 11 attacks, and accordingly were housed in the Administrative Maximum Special Housing Unit (the "ADMAX SHU") of the MDC instead of in a general population unit of the facility. Neither plaintiff was

afforded the opportunity to contest his classification or continued confinement in the ADMAX SHU. Elmaghraby remained confined there for the entire time he was detained in the MDC-from October 1, 2001 until August 28, 2002. Iqbal remained in the ADMAX SHU from January 8, 2002, when he was transferred there from the general population, until the end of July 2002, when he was returned to the general population.

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

Plaintiffs allege that during their confinement in the ADMAX SHU, they were subjected to, among other things, severe physical and verbal abuse; unnecessary and abusive strip and body-cavity searches; extended detention in solitary confinement; deliberate interference with the exercise of their religious beliefs; and deliberate interference with their attempts to communicate with counsel. In addition, plaintiffs allege that they were denied adequate exercise, nutrition, and medical treatment. As a result of their treatment while in detention, plaintiffs allege that they suffered severe physical injuries, emotional distress and humiliation.

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

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

In addition to bringing claims against the MDC officers with whom they had direct contact, plaintiffs name as defendants former Attorney General John Ashcroft; Robert Mueller, the Director of the Federal Bureau of Investigation ("FBI"); Michael Rolince, the former Chief of the Counterterrorism Division of the FBI's International Terrorism Operations Section; Kenneth Maxwell, the former Assistant Special Agent in Charge of the FBI's New York Field Office; Kathleen Hawk Sawyer, the former Director of the Bureau of Prisons ("BOP"); Michael Cooksey, the former Assistant Director for Correctional Programs of the BOP; and David Rardin, the former Director of the Northeast Region of the BOP. These defendants have moved to dismiss all the claims against them, as have Dennis Hasty and Michael Zenk (the former and current Wardens of the MDC, respectively), and Nora Lorenzo (a physician's assistant at the MDC) .[2] The United States has also moved pursuant to the Liability Reform Act, 28 U.S.C. § 2679, to be substituted as the sole defendant on the claims brought under the Alien Tort Statute and for dismissal of those claims.

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

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

BACKGROUND

A. *Overview*

For the purposes of this motion, I assume, as I must, that plaintiffs' allegations are true.[3] On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States, including the World Trade Center. *See Hamdi v. Rumsfeld,* 124 S.Ct. 2633, 2635 (2004). Approximately 3,000 people were killed in those attacks. *Id.* In the months following September 11, the FBI arrested and detained thousands of Arab Muslim men (designated herein as "post-September 11 detainees") as part of its investigation into the attacks.[4]

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

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

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

Plaintiffs and other "of high interest" detainees were confined in the ADMAX SHU, a special housing unit at the MDC created specifically to house post-September 11 detainees in highly restrictive conditions ("Administrative Maximum" refers to the most restrictive type of detention permitted under BOP procedures).[5] Plaintiffs allege that former Warden Hasty, Associate Warden Sherman, and Captain Salvatore Loprestri selected the officers to work in the ADMAX SHU. Further, plaintiffs allege that the procedures for handling detainees within this restrictive unit were developed by Sherman, Lopestri, and Lieutenant Joseph Cuciti at the request of Hasty.

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

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

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

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

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

Plaintiffs allege that this "hold until cleared" policy was approved by former Attorney General Ashcroft and FBI Director Mueller "in discussions in the weeks after September 11, 2001." (Compl.¶ 69.) Further, plaintiffs allege that (1) on October 1, 2001, Cooksey directed that all "of high interest" detainees be confined in the most restrictive conditions possible until cleared by the FBI; (2) former BOP Director Hawk Sawyer was aware and approved of this policy of restrictive detention for "of high interest" detainees; (3) Rolince and Maxwell were responsible for determining whether a post-September 11th detainee had been "cleared" of any connection to terrorist activities; (4) FBI officials in Washington, D.C. were aware that the BOP relied on the FBI's "high interest" classification to determine whether to detain prisoners in the ADMAX SHU of the MDC; (5) notwithstanding that awareness, Ashcroft, Mueller, and Rolince failed to impose deadlines for the clearance process; (6) as a result, numerous detainees, including plaintiffs, were held in the ADMAX SHU for extended periods of time although there was no evidence linking

them to terrorist activity; and (7) Rolince and Maxwell failed to approve post-September 11th detainees' release to the general population because of the detainees' race, religion, and national origin, and not on any evidence that continued detention in the ADMAX SHU was important or relevant to the FBI's investigation of the events of September 11, 2001.

B. ***Conditions of Confinement in the ADMAX SHU***

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

Plaintiffs allege that while detained in the ADMAX SHU they were (1) kept in solitary confinement; (2) prohibited from leaving their cells for more than one hour each day with few exceptions; (3) verbally and physically abused; (4) routinely subjected to humiliating and unnecessary strip and body-cavity searches, (5) denied access to basic medical care; (6) denied access to legal counsel; (7) denied adequate exercise and nutrition; (8) housed in small cells where the lights were left on almost 24 hours a day;[7] (9) deliberately subjected to air conditioning during the winter months and heat during the summer months; (10) deprived of adequate bedding or personal hygiene items;[8] and (11) they were deprived of adequate food, as a result of which Iqbal lost over 40 pounds (and suffers from persistent digestive problems) and Elmaghraby lost 20 pounds.

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

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

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

Whenever plaintiffs were removed from their cells, they were handcuffed and shackled around their legs and waist. On the rare occasions when they were permitted to exercise, the officers subjected them to the harsh effects of the weather for purely punitive reasons. For example, during the winter months, MDC officers left Elmaghraby outside in the open-air recreation area for hours without a proper jacket or shoes. As the weather became milder, he was permitted to remain outside for only 15 minutes. In the summer months, when it was extremely hot and humid, Elmaghraby was again left outside for hours. Iqbal was also not provided with proper clothing when permitted to exercise in the winter. In addition, on certain days when it rained, Iqbal was left out in the open-air recreation area for hours. When he was brought back to his cell, drenched, officers turned on the air conditioner deliberately, causing him severe physical discomfort.

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

C. ***Excessive Force***

1. ***Elmaghraby***

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

Later that day, upon his return to the MDC, Elmaghraby was brought to the ADMAX SHU by elevator (the unit is on the ninth floor of the MDC). In the elevator, MDC officers verbally and physically assaulted him, causing him to bleed from the nose. Although the officers carried a video camera with them, they turned it off while assaulting Elmaghraby.

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

2. ***Iqbal***

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

***5** On March 20, 2002, several MDC officers subjected Iqbal to three strip and body-cavity searches, all while he was in the same room. Although the officers had a hand-held video camera, they turned it off while conducting the searches. When the officers ordered Iqbal to submit to a fourth search, he protested. In response, one officer punched him in the face while another punched and kicked him in the back and legs. As a result, Iqbal bled from the mouth. While escorting Iqbal back to the ADMAX SHU, the officers continued to physically and verbally harass Iqbal, kicking him and making racist and threatening comments about Muslims. When they arrived at the SHU, the officers pulled Iqbal's arm through the slot in his cell door, causing him excruciating pain. An officer then urinated in the toilet in Iqbal's cell and turned the water off so the toilet could not be flushed until the next morning.

D. ***Strip and Body-Cavity Searches***

1. ***Elmaghraby***

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

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

While the strip and body-cavity searches were being conducted, Elmaghraby was threatened, verbally abused, and regularly pushed and shoved. On many occasions, the searches were conducted in an outrageous manner. Lieutenant Barrere once displayed Elmaghraby, naked, to a female MDC employee. On October 1, 2001, Barrere inserted a flashlight into Elmaghraby's anal cavity. Elmaghraby saw blood on the flashlight when it was removed. On two occasions (involving two different officers), an MDC defendant pushed a pencil into Elmaghraby's anal cavity during a search. Other officers were present during all of these searches.

2. ***Iqbal***

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

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

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

E. ***Interference with Religious Practice***

During the entire time plaintiffs were confined in the ADMAX SHU, MDC officers constantly interfered with their religious practices and beliefs. Such interference included banging on plaintiffs' cells while they were praying, routinely confiscating their copies of the Koran, and refusing to permit plaintiffs to participate in Friday prayer services with fellow Muslims. When plaintiffs requested to join fellow Muslims for Friday prayers, officers made comments such as, "No prayer for terrorists," and "Why do you need to pray when you are in jail?" Elmaghraby complained about this interference to Hasty and Zenk, among others, and they refused to take

any action to remedy the situation.

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

When Iqbal spoke to his attorney by telephone, Cotton would disconnect the phone if he complained about the conditions of his confinement. On several occasions, Iqbal's attorney was turned away from the MDC after being falsely informed that Iqbal had been transferred to another facility. In addition, Defendant Shacks routinely delayed Iqbal's receipt of legal mail, sometimes by up to two months.

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

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

H. ***Personal Involvement***
Plaintiffs allege that all defendants were personally involved in creating or implementing the policy under which they were confined without recourse to procedures for challenging their confinement. Plaintiffs allege that defendants were not only aware of the conditions of their confinement, but agreed to subject plaintiffs to those conditions because of their race, religion, and national origin.

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

I. ***Summary of Plaintiffs' Claims***
Plaintiffs bring the following claims:

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

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

2. The policy of assigning plaintiffs to the ADMAX SHU without affording them the opportunity to challenge their continued administrative detention violated their due process rights under the Fifth Amendment. Plaintiffs assert this claim against Ashcroft, the FBI Defendants, the BOP Defendants, the Wardens, and other MDC defendants.

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

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

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

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

***8** 9. The policy of subjecting plaintiffs to unreasonable strip and body-cavity searches, and the failure to remedy such a policy, violated the Fourth Amendment's prohibition against unreasonable searches. Plaintiffs assert this claim against Hawk Sawyer, the Wardens, and other MDC defendants.

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

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

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

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

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

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

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

18-20. The beatings of Iqbal and the failure to prevent those beatings; the negligent medical care Iqbal received; and the brutal conduct that caused him to suffer extreme and lasting emotional distress constitute torts for which Iqbal seeks compensatory damages from the United States pursuant to the FTCA, 28 U.S.C. § 2671 *et seq.*

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

DISCUSSION

A. *The Motion to Dismiss Standard*

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

will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.; see also Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 514 (2002) ("A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.") (internal quotation omitted).

B. ***Personal Jurisdiction***

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

Personal jurisdiction must be established under the law of the state where the federal court sits. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 171 F.3d 779, 784 (2d Cir.1999); Fed.R.Civ.P. 4(k)(1)(A). Under New York's long-arm statute, a court may exercise jurisdiction over any non-domiciliary if "in person or through an agent," he "transacts any business within the state," or "commits a tortious act within the state" and the cause of action arises from those acts. *See* N.Y. C.P.L.R. § 302(a)(1), (2). The statute's purpose is to "extend the jurisdiction of New York courts over nonresidents who have 'engaged in some purposeful activity [here] in connection with the matter in suit." ' *Padilla v. Rumsfeld,* 352 F.3d 695, 709 (2d Cir.2003), *rev'd on other grounds,* 542 U.S. 426 (2004) (quoting *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.,* 15 N.Y.2d 443, 457 (1965)). One transaction is sufficient to support jurisdiction under § 302 "so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Kreutter v. McFadden Oil Corp.,* 71 N.Y.2d 460, 467 (1988); *cf. Kronisch v. United States,* 150 F.3d 112, 130 (2d Cir.1998) (there must be an "articulable nexus" between the defendant's actions and the asserted claim). Personal jurisdiction cannot be based solely on a defendant's supervisory position. *See Ontel Prods., Inc. v. Project Strategies Corp.,* 899 F.Supp. 1144, 1148 (S.D.N.Y.1995). Instead, a plaintiff must show that defendant "personally took part in the activities giving rise to the action at issue." *Id.*

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

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

Accordingly, motions to dismiss for lack of personal jurisdiction are properly granted where plaintiffs have failed to sufficiently allege defendants' involvement in any of the alleged violations of plaintiffs' rights. Where such involvement is adequately alleged and discovery is required to determine the extent of personal involvement, such discovery will likewise resolve the jurisdictional question as well. *See Newbro v. Freed,* 2004 WL 691392, at *3 (S.D.N.Y. March 31, 2004) (discovery to resolve question of personal jurisdiction proper where plaintiff has "established that his jurisdictional position is not frivolous.").

C. ***Qualified Immunity Generally***

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

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

Whether a right was clearly established at the relevant time is a question of law. *Kerman v. City of New York,* 374 F.3d 93, 108 (2d Cir.2004). The inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen,* 125 S.Ct. 596, 599 (2004) (internal quotation omitted). Accordingly, a court must determine the level of

generality of the relevant legal rule. *Cf. Wilson v. Layne,* 526 U.S. 603, 615 (1999) (it "could plausibly be asserted that any violation of the Fourth Amendment is 'clearly established' since it is clearly established that the protections of the Fourth Amendment apply to the actions of police."). The precise act challenged need not have previously been held unlawful in order to defeat qualified immunity, but, its unlawfulness must be "apparent" in light of pre-existing law. *Id.* at 615; *cf. Back v. Hastings on Hudson Union Free School Dist.,* 365 F.3d 107, 129 (2d Cir.2004) (the right in question "must not be restricted to the factual circumstances under which it has been established.").

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

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

> Not only must the facts supporting the defense appear on the face of the complaint, but as with all 12(b)(6) motions, the motion may be granted only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Thus, the plaintiff is entitled to all reasonable inferences from the facts alleged, not only those that support his claim, but also those that defeat the immunity defense.

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

1. ***Allegations of Personal Involvement***

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

To survive a motion to dismiss, a plaintiff need only provide a statement that gives the defendant " 'fair notice of what the plaintiff's claim is and the grounds upon which it rests." ' *See Swierkiewicz,* 534 U.S. at 512 (quoting *Conley v. Gibson,* 355 U .S. 41, 47 (1957)). Rule 8(a)'s simplified pleading standard applies to "all civil actions, with limited exceptions," such as Rule 9(b)'s requirement that allegations of fraud and mistake be pleaded with particularity. *See id.* at 513. Thus, whether the allegations in a complaint are too conclusory to survive a motion to dismiss depends upon whether they meet the permissive standard set forth in Rule 8(a). The expectation that a defendant will assert qualified immunity as a defense does not elevate a plaintiff's pleading requirements. *See McKenna,* 386 F.3d at 434 (defendant asserting qualified immunity at 12(b)(6) stage faces "formidable hurdle").[13]

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

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

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

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

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

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

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

D. Bivens *Actions Generally*

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

rights violations by state officials. *See Wilson,* 526 U.S. at 609 (qualified immunity analysis identical for *Bivens* and § 1983 actions); *Butz v. Economou,* 438 U.S. 478, 498-99 (1978) (treating a *Bivens* claim as directly analogous to a § 1983 claim).

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

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

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

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

Mitchell v. Forsyth, 472 U.S. 511, 524 (1985). The problems posed by issues of national security are not akin to those posed by military service, where the need for a separate system of military justice precludes the provision of a *Bivens* remedy. *See Chappell v. Wallace,* 462 U.S. 296, 304 (1983); *Stanley,* 483 U.S. at 683-84.

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

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

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

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

E. *Plaintiffs'* Bivens *Claims*

1. *Conditions of Confinement Claims*

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

Plaintiffs allege that the conditions of their confinement

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

The Due Process Clause protects pretrial detainees-persons who have been charged with a crime but have yet to be found guilty of the charge-from certain conditions and restrictions of pretrial detainment. *Bell v. Wolfish,* 441 U.S. 520, 535 (1979). Specifically, a pretrial detainee has the right to be free from punishment prior to an adjudication of guilt in accordance with due process of law.[14] *Id.* This does not mean, however, that a detainee may not be subject to significant restrictions. The maintenance of an institution's security and discipline are "essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Id.* at 546. Prison administrators are "accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security ." *Id.* at 547. Thus, "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate government objective, it does not, without more, amount to 'punishment." ' *Id.* at 539. Conversely, where a condition is not reasonably related to a legitimate goal, "a court permissibly may infer that the purpose of the governmental action is punishment." *Id.*

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

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

***16** Plaintiffs do not contend, however, that legitimate security interests could never justify some of the conditions which they were subjected to, such as strip and body-cavity searches. Instead, they allege that they were subjected to harsh conditions of confinement for purely punitive reasons. These conditions included: verbal and physical abuse; purposeless and abusive strip and body-cavity searches; the denial of access to basic medical care and hygiene; the denial of proper exercise; and confinement in solitary confinement with the lights on almost 24 hours per day.

In short, while defendants posit legitimate reasons that might justify the conditions in the ADMAX SHU, plaintiffs assert illegitimate reasons for those conditions. A restriction or condition that under some circumstances has a legitimate justification cannot be inflicted upon detainees where no such justification exists. *See Bell* 441 U.S. at 539 (where a restriction or condition is arbitrary or purposeless, a court may infer that the purpose of the governmental action is punishment). Here, the determination whether the conditions imposed upon plaintiffs were legitimate or punitive is not amenable to resolution on a motion to dismiss. In this procedural setting, I assume the truth of plaintiffs' allegations and draw all inferences in their favor. While a court will normally defer to a prison administrator's expert judgment on security matters, *see Bell,* 441 U.S. at 540 n .23, such deference is inappropriate "where there is substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations." *Id.; cf. United States v. Gotti,* 755 F.Supp. 1159, 1164 (E.D.N.Y.1991) ("due deference does not mean blind deference"). Without such a record, a court may not be able to determine the reasonableness or legitimacy of an allegedly punitive condition of confinement. *See Bell* at 541-63 (evaluating reasonableness of restrictions, including strip searches conducted after contact visits, on a full evidentiary record). The cases cited by Zenk to support the legitimacy of the conditions of the ADMAX SHU are not to the contrary. *Morreale v. Cripple Creek,* 113 F.3d 1246 (table), 1997 WL 290976 (10th Cir. May 27, 1997) (unpub.op.) (decision on summary judgment); *Keenan v. Hall,* 83 F.3d 1083 (9th Cir.1996) (same); *Davenport v. DeRobertis,* 844 F.2d 1310 (10th Cir.1988) (decision after

full trial); *Hay v. Waldron,* 834 F.2d 481 (5th Cir.1987) (review of denial of preliminary injunction); *Goff v. Nix,* 803 F.2d 358 (8th Cir.1987) (review of grant of permanent injunction).

(i) ***Personal Involvement***

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

***17** The Wardens elide the difference between vicarious liability under the doctrine of *respondeat superior* (which is not available under *Bivens*) and the liability of a supervisor based on his own actions or inactions). Hasty's argument that he "had no meaningful contact with Plaintiffs" ' during their confinement, *see* Reply Br. at 1, misapprehends the type of personal involvement that must be alleged to state a claim of supervisory liability. An allegation, for example, that a supervisor was aware of a constitutional violation but took no action to remedy it may be sufficient to state a claim. *See Johnson,* 239 F.3d at 255 (denying motion to dismiss asserting qualified immunity where plaintiff alleged that supervisors failed to act on "information that unconstitutional acts were occurring" at the hands of subordinates); *McKenna,* 386 F.3d at 437 (allegation that prison superintendents allowed the continuation of unlawful policies sufficient to defeat assertion of qualified immunity at motion to dismiss stage); *cf. Richardson,* 347 F.3d at 435 (supervisors may be liable for, among other things, creation of a policy that sanctioned unconstitutional conduct, grossly negligent supervision, or failure to act on information indicating that unconstitutional conduct was occurring).

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

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

b. ***Procedural Due Process (Claim 2)***

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

(i) ***Whether a Protectable Liberty Interest Existed***

In determining whether a prisoner has stated a claim for a procedural due process violation, a court evaluates: "(1) whether the plaintiff had a protected liberty interest in not being confined and, if so, (2) whether the deprivation of that liberty interest occurred without due process of law." *Tellier v. Fields,* 280 F.3d 69, 79-80 (2d Cir.2000) (internal quotation and ellipsis omitted). Plaintiffs allege that they received no process at all with regard to their continued detention in the ADMAX SHU. Thus, the issue here is whether they assert a protectable interest. In *Tellier,* the plaintiff was held in a Special Housing Unit at the Metropolitan Correction Center ("MCC")[16] because he was considered a flight risk. *Id.* at 74. He remained in the SHU for 514 days without an opportunity to be heard regarding his continued confinement in segregated housing. *Id.* The defendants, including the MCC's former and current wardens, moved to dismiss for failure to state a claim and for summary judgment based on qualified immunity. *Id.* at 73, 79. The Second Circuit held that Tellier had a protectable liberty interest because (a) the alleged SHU conditions were "atypical and significant";[17] and (b) the interest in not being subjected to those conditions was created by BOP regulations setting forth mandatory procedures to be followed whenever a prisoner

was subjected to segregated housing.[18] *Id.* at 80-81.

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

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

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

***18** As in *Tellier,* plaintiffs here have satisfied both requirements for establishing a protectable liberty interest. First, the highly restrictive ADMAX SHU conditions are "atypical and significant" in comparison to the conditions faced by prisoners in the general population. *See id.* at 80 (where plaintiff has alleged confinement "under conditions that differ markedly from those in the general population, ... we cannot conclude as a matter of law that this confinement was not 'atypical and significant.' "). Second, the government "has created a liberty interest by statute or regulation." *Id.* at 81. BOP regulations, codified at 28 CFR § 514.22, require individualized determinations concerning the appropriateness of continued segregation.[19] *See id.* at 83 (§ 541.22 contains mandatory language that gives rise to a state-created right that requires a factual determination of the nature of confinement). The regulations also set forth the bases for administrative detention:

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

> Administrative detention is to be used only for short periods of time except where an inmate needs long-term protection (see § 541.23), or where there are exceptional circumstances, ordinarily tied to security or complex investigative concerns. An inmate may be kept in administrative detention for longer term protection only if the need for such protection is documented by the SRO. Provided institutional security is not compromised, the inmate shall receive at each formal review a written copy of the SRO's decision and the basis for this finding. The SRO shall release an inmate from administrative detention when reasons for placement cease to exist.
> 28 CFR § 514.22(c).

I reject Hawk Sawyer's argument that the statute does not create a protectable interest because § 541.22 is "designed to allow continued segregation, with fewer procedural protections, for a continuing complex investigation and/or security concerns." Hawk Sawyer Br. at. 12. While administrative detention may be used in the context of a complex investigation, the regulations do not suggest that under such circumstances an inmate may be denied all process while confined under highly restrictive conditions for over ten months.

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

Defendants further argue that the context of plaintiffs' detention provided legitimate rationales for not following BOP procedures. Ashcroft argues that the post-September 11 context extinguishes any rights otherwise conferred by § 541.22: "Regulations written in peacetime cannot circumscribe the government's discretion at a time of national emergency from foreign threats." Ashcroft Mem. at 15. This proposition, which suggests that, as a matter of law, constitutional and statutory rights must be suspended during times of crisis, is supported neither by statute nor the Constitution. *Cf. Hamdi,* 124 S.Ct. at 2648 ("It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.") (citing *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 164-65 (1963) ("The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with guarantees which, it is feared, will inhibit government action.")).

***19** In addition, Ashcroft asserts that: (1) "high interest"

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

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

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

There is little dispute that the right to due process for a detainee held in administrative detention was clearly established as of September 10, 2001. In November 2000, the Second Circuit held in *Tellier* that under BOP regulations, an inmate's right to process when held in atypically restrictive detention was clearly established, and that "it [was] simply unreasonable for any official to believe" that § 541.22 permitted a detainee to be kept in the SHU for 514 days without a hearing. *Id.* at 85; *see also Wright v. Smith,* 21 F.3d 496, 500 (2d Cir.1994) ("prison officials [could not] doubt that they have acted unconstitutionally where confinement ... continued, without a hearing, for 67 days.").

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

Plaintiffs are not complaining of a brief deprivation of process in the immediate aftermath of September 11, but one that continued for more than 8 months in Iqbal's case and nearly 11 months in Elmaghraby's. Indeed, Judge Glasser stated in February 2002 (approximately four months after Elmaghraby entered the ADMAX SHU) that "it appears that [Elmaghraby's] constitutional rights have been violated as to being housed in a special unit at MDC." *See USA v. Elmaghraby,* Docket No. 01-cr-1175, Docket Entry No. 42 (February 12, 2002 status conference entry).

(iii) ***Objective Reasonableness of Defendants' Acts***

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

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

(iv) ***Personal Involvement***

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

Generally, the assertion that high-level executive branch members created an unconstitutional policy, without more, would be insufficient to state a claim. *See Nuclear Transp. & Storage, Inc. v. United States,* 890 F.2d 1348, 1355 (6th Cir.1989) ("If a mere assertion that a former cabinet officer and two other officials acted to implement, approve, carry out, and otherwise facilitate alleged

unlawful policies were sufficient to state a claim, any suit against a federal agency could be turned into a *Bivens* action by adding a claim for damages against the agency head and could needlessly subject him to the burdens of discovery and trial.") (internal quotation omitted) (footnote omitted). Here, however, the post-September 11 context provides support for plaintiffs' assertions that defendants were involved in creating and/or implementing the detention policy under which plaintiffs were confined without due process. *See generally* the April 2003 OIG Report.[20] In addition, plaintiffs have alleged that defendants were aware of the atypically restrictive conditions of their lengthy confinement. *See Richardson,* 347 F.3d at 435 (supervisory liability under *Bivens* may be shown by "creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue," or by the "failure to act on information indicating that unconstitutional acts were occurring.").

[20] The April 2003 OIG report, which discusses the detention of aliens held on immigration violations after September 11, 2001, suggests the involvement of Ashcroft, the FBI Defendants, and the BOP Defendants in creating or implementing a policy under which plaintiffs were confined in restrictive conditions until cleared by the FBI from involvement in terrorist activities. *See, e.g.,* 37-38 (Stuart Levey, an Associate Deputy Attorney General, stated that "the idea of detaining September 11 detainees until cleared by the FBI was 'not up for debate.' He said he was not sure where the policy originated, but thought the policy came from 'at least' the Attorney General."); 39 (Daniel Levin, Counselor to the Attorney General, "described a 'continuous meeting' for the first few months after the terrorist attacks involving the Attorney General, Deputy Attorney General, FBI Director, and [then Assistant Attorney General Michael] Chertoff, and said he was sure that the issue of holding aliens until they were cleared was discussed."); 112 ("MDC officials placed all incoming September 11 detainees in the ADMAX SHU without conducting the routine individualized assessment. BOP Director Kathy Hawk Sawyer told the OIG that this designation resulted from the FBI's assessment and was not the BOP's 'call.' "); 113 ("Rardin ... directed wardens in his region not to release inmates classified by the BOP as 'terrorist related' from restrictive detention in SHUs until further notice."); 116 ("Cooksey's October 1, 2001 memorandum ... directed all BOP staff, including staff at the MDC, to continue holding September 11 detainees in the most restrictive conditions of confinement possible" until cleared by the FBI); 42, 49, 60 (mentioning Rolince and Maxwell's roles in the clearance process) and 69-71 (criticizing the pace of the FBI clearance process, the "indiscriminate and haphazard manner in which the labels of 'high interest,' 'of interest,' or 'of undetermined interest' were applied to many aliens who had no connection to terrorism," and explaining that the delays in clearing detainees had "enormous ramifications" for those detainees).

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

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

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

(v) *Discovery*

The issue of qualified immunity should be addressed at the earliest appropriate stage. Where, as here, there are factual disputes that bear on the availability of the defense, discovery may be structured accordingly. *See Crawford-El,* 523 U.S. at 599-600. Rule 26 of the Federal Rules of Civil Procedure "vests the trial judge with broad discretion to tailor discover narrowly and dictate the sequence of discovery." *Id.* The personal involvement, if any, of the non-MDC defendants should be the subject of the initial stage of discovery. Accordingly, discovery concerning Ashcroft, the FBI Defendants (Mueller, Maxwell, and Rolince), and the BOP Defendants (Sawyer, Cooksey, and Rardin) will be generally limited to

inquiries into their involvement in the alleged denials of due process. Appropriate topics will include whether the individual defendant participated in the creation and implementation of the policy or policies under which plaintiffs were detained, whether he or she had knowledge of the conditions under which plaintiffs were detained, and the defendant's involvement in or knowledge of the clearance process and the alleged bypassing of BOP procedures for challenging administrative segregation of pretrial detainees. Any dispute about the precise form(s) and scope of discovery shall be resolved by Judge Gold. Once he determines that discovery related to the issue is completed, defendants may file a properly supported motion for summary judgment.

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

***22** Plaintiffs allege that they were physically abused by MDC officers, and that Warden Hasty, among others, failed to take reasonable measures to prevent or remedy this abuse in violation of the Fifth and Eighth Amendments. For the reasons discussed above in connection with plaintiffs' due process claims, I reject Hasty's argument that plaintiffs do not adequately allege his personal involvement in the alleged deprivations of plaintiffs' rights.

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

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

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

Plaintiffs allege that while detained in the ADMAX SHU, MDC defendants substantially interfered with plaintiffs' ability to communicate with counsel by, among other things, preventing Elmaghraby from speaking over the telephone with his attorney for almost two months; subsequently disconnecting the phone when plaintiffs complained about the conditions of their confinement; videotaping Elmaghraby's meetings with his attorney; ransacking Elmaghraby's cell while he met with his attorney; subjecting Elmaghraby to strip searches after non-contact visits with his attorney; preventing Iqbal from meeting with his attorney by falsely telling the attorney that Iqbal had been transferred out of the MDC; and routinely delaying Iqbal's receipt of legal mail. Plaintiffs allege that this interference with counsel was pursuant to a discriminatory policy, and that Hasty and other defendants knew of this interference and did nothing to remedy it.

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

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

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

Plaintiffs allege that they were denied adequate medical treatment in violation of the Fifth and Eighth Amendments. Defendant Nina Lorenzo, a physician's assistant at the MDC while plaintiffs were confined there, contends that (1) plaintiffs fail to state a claim; and (2) she is entitled to qualified immunity.

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

[22] The standard for alleging a due process violation

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

a. ***Objective Test***

There is "no settled, precise metric" for determining whether a prisoner's condition is "sufficiently serious" such that liability under the Eighth Amendment may attach. *See Brock v. Wright,* 315 F.3d 158, 162 (2d Cir.2003). Factors courts consider include whether a reasonable doctor would perceive the medical need in question as worthy of treatment; whether the condition significantly affects daily activities; and whether the condition results in chronic and substantial pain. *Id.*

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

b. ***Subjective Test***

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

As demonstrated by virtually all of the cases cited by Lorenzo, determining whether her conduct is actionable will require some discovery. *See, e.g., Richardson,* 347 F.3d 431 (deciding issue on summary judgment); *Hernandez v. Keane,* 341 F.3d 137 (2d Cir.2003) (affirming grant of judgment as a matter of law after jury trial); *see also Phelps v. Kapnolas,* 308 F.3d 180, 186 (2d Cir.2002) (allegation that prison officials knew that diet was inadequate and likely to inflict pain and suffering sufficiently pleads the subjective element of the deliberate indifference test); *cf.* Fed.R.Civ.P. 9(b) ("Malice, intent, knowledge, and other conditions of mind of a person may be averred generally."). Plaintiffs' allegations that Lorenzo was deliberately indifferent when she misdiagnosed Elmaghraby and failed to treat Iqbal (albeit after being instructed not to provide treatment at the ADMAX SHU) are sufficient to state a claim.

The deliberate indifference standard for a prisoner's Eighth Amendment claims was clearly established during the period of plaintiffs' confinement at the MDC in 2001 and 2002. *See Estelle,* 429 U.S. at 106. Lorenzo asserts that plaintiffs have not shown "that she should reasonably have known that her conduct fell short of meeting her legal duties" under that standard, and thus she is entitled to qualified immunity. Reply Br. at 6. Although Lorenzo may ultimately prevail on that ground and others as well, it is too early to make the determination. What Lorenzo

knew; whether she in fact made a misdiagnosis; if so, whether it was mere negligence; whether she was bound to follow Shacks's direction; and whether she acted reasonably under the circumstances are among the questions that cannot be resolved at this early stage. Lorenzo's motion to dismiss Claims Six and Seven is therefore denied.

5. ***Unreasonable Searches (Claim 9)***

***25** Plaintiffs allege that they were subjected to unreasonable strip and body-cavity searches in violation of the Fourth Amendment. Specifically, they allege that there was a policy under which (1) they were subjected to daily strip and body-cavity searches for no legitimate penological reason and without reasonable suspicion; and (2) they were searched multiple times whenever transported to court or the medical department, despite remaining in continuous custody from one search to the next. They further allege that Hawk Sawyer, Hasty, and Zenk were either instrumental in establishing the search policy or, knowing that the searches were being conducted in an unconstitutional manner, failed to prevent or remedy the practice.

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

a. ***The Legal Standard***

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

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

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

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

[23] Those cases are *Weber v. Dell,* 804 F.2d 796 (2d Cir.1986) (holding that the Fourth Amendment

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

Plaintiffs argue that the MDC is the federal equivalent of a jail, and thus the clearly established applicable law is *Shain/Weber* (*Shain* was decided on October 19, 2001). I conclude, however, that plaintiffs are much more closely situated to the pretrial detainee held in prison in *Covino* than the misdemeanants and minor offenders of *Shain/Weber*. The MDC holds both pre-trial detainees and convicted criminals of all security levels. Moreover, plaintiffs were pretrial detainees who had been flagged, legitimately or not, as being "of high interest" to the postSeptember 11 investigation and were being held in a maximum security unit.

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

b. ***Reasonable Relation***

Under the *Covino/Turner* reasonable relation standard, plaintiffs state a constitutional violation. Plaintiffs assert that they were subjected to a policy of serial and daily suspicionless strip and body-cavity searches, and that such a policy was unmoored from any legitimate penological interest. Plaintiffs do not dispute that there are legitimate justifications for strip or body-cavity searches-*see Bell,* 441 U.S. at 558-560 (upholding body-cavity searches after contact visits); *Covino,* 967 F.2d at 77-80 (upholding random searches)-but they allege that such justifications were not present here. *Cf. Covino,* 967 F.2d at 80 (random visual searches are constitutional, but plaintiff's claim not dismissed because it was unclear whether purportedly random search procedure was being used to harass or punish the inmate); *Hodges v. Stanley,* 712 F.2d 34, 35 (2d Cir.1983) (second search of administrative detainee appears to be unreasonable when detainee had been under continuous escort after initial search) (citing *Bono v. Saxbe,* 620 F.2d 609, 617 (7th Cir.1980) (*Bell* rationale does not justify strip searches after noncontact, supervised visits absent a showing that there is some risk that contraband will be smuggled into the prison)). In sum, the success or failure of these claims as well will turn on the particular facts of the case.

c. ***Personal Involvement***

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

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

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

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

25 *See* Office of the Inspector General, *Supplemental*

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

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

Plaintiffs allege that, as a matter of policy, MDC officers interfered with their religious practices in violation of the Free Exercise Clause of the First Amendment. Specifically, plaintiffs allege that MDC officers banged on their cells while they were praying, routinely confiscated their copies of the Koran, and refused to permit plaintiffs to participate in Friday prayer services with other Muslims. Plaintiffs allege that the Wardens, among others, were instrumental in the implementation of such a policy, or that they knew (or should have known) that their subordinates were unlawfully interfering with plaintiffs' religious practices but did nothing to curtail such actions. The Wardens assert, among other things, that plaintiffs should have complained through administrative channels, and that plaintiffs have failed to sufficiently allege their personal involvement. In addition, Hasty asserts that he reasonably deferred to the MDC chaplain on issues concerning the religious accommodation of inmates at the ADMAX SHU.

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

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

***28** Here, plaintiffs have stated a claim under the First Amendment. Whether the policy or policies that allegedly impinged on their rights existed, and if so whether they were reasonably related to legitimate objectives are not questions that can be resolved on a motion to dismiss. *Cf. O'Lone,* 482 U.S. at 350-353 (the Supreme Court's determination that regulations were reasonably related to legitimate objectives was grounded in testimony by, among others, prison officials at a two-day hearing before the district court). Similarly, whether Hasty deferred to the MDC chaplain, and whether such deference was reasonable, are questions for summary judgment or trial.

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

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

Plaintiffs allege that harsher conditions of confinement were imposed upon them because of their religious beliefs and race, in violation of the First Amendment and the Equal Protection Clause of the Fifth Amendment, respectively. They claim that defendants created or implemented such a discriminatory policy, or failed to remedy the policy once it was imposed. Defendants assert that plaintiffs fail to state a constitutional violation and have not sufficiently alleged their personal involvement

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

racial classifications" imposed by government, including those in the prison context, must be analyzed under strict scrutiny).

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

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

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

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

a. ***Personal Involvement***

Defendants argue that plaintiffs have failed to sufficiently allege their personal involvement. I agree with respect to the BOP Defendants but not with respect to Ashcroft, the FBI Defendants, or the Wardens. Plaintiffs assert that Ashcroft was the principal architect of the challenged policies (Compl.¶ 10), and that Rolince and/or Maxwell classified them as "of high interest" because of their race, religion, or national origin. (Compl.¶ 51.) In support of this assertion, plaintiffs allege that "all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks-however unrelated the arrestee was to the investigation-were immediately classified as "of interest" to the post-September 11th investigation. (Compl.¶ 52.) Taking those allegations as true, it cannot be said that there are no set of facts on which the plaintiffs would be entitled to relief as against Ashcroft and the FBI Defendants. Though Plaintiffs assert that the BOP defendants were instrumental in the imposition of the challenged policies, they do not allege that those defendants were involved in the challenged classification. Accordingly, these claims are dismissed against the BOP Defendants. Although plaintiffs also have not alleged that the Wardens were involved in their initial classification, they have alleged that the Wardens were personally involved in imposing harsher conditions of confinement because of plaintiffs' race and religion. Such a challenge, combined with the allegations of their treatment at the MDC, is sufficient to state a claim against the Wardens and defeat the assertion of qualified immunity on a motion to dismiss.

F. ***Plaintiffs' Statutory Claims***

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

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

RFRA prohibits government[27] from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless

the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. In *City of Boerne v. Flores,* 521 U.S. 507 (1997), the Supreme Court "invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial powers under the Fourteenth Amendment." *Cutter v. Wilkinson,* 125 S.Ct. 2113, 2118 (2005).

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

Plaintiffs argue that RFRA's application to federal officials was clearly established during the relevant period because (1) *Browne v. United States,* 176 F.3d 25 (2d Cir.1999), implicitly holds that RFRA applies to federal officials; (2) other circuit courts that have considered the question post-*Boerne* have uniformly held that RFRA applies to federal officials; and (3) Congress amended RFRA post-*Boerne* (and prior to the alleged violations here) to eliminate references to state governments, and thus defendants could not have reasonably believed that RFRA did not apply to their actions. I find, however, that support for the proposition that it was clearly established in the Second Circuit that RFRA applied to federal officials during the 2001-2002 period is too tenuous to provide a basis for denying qualified immunity. *Cf. Back,* 365 F.3d at 129-130 (clearly established analysis based on whether the decisional law of the Supreme Court and the applicable circuit court supports the existence of the right in question).

Neither the Supreme Court nor the Second Circuit has directly addressed the applicability of RFRA to federal officials post-*Boerne. See Cutter,* 125 S.Ct. at 2118 n. 2 ("RFRA, Courts of Appeals have held, remains operative as to the Federal Government and federal territories and possessions. This Court, however, has not had occasion to rule on the matter.") (citations omitted); *Browne,* 176 F.3d at 26. In *Browne,* the Second Circuit affirmed the dismissal of a claim asserting that an IRS judgment violated RFRA. *Id.* The district court had questioned RFRA's continuing constitutionality post-*Boerne,* but assumed it was constitutional for the purposes of its decision. *See Browne v. United States,* 22 F.Supp.2d 309, 312 (D.Vt.1998). On appeal, the Second Circuit did not discuss RFRA's constitutionality.[28] In comparison to the thorough discussion of the question by appellate courts that have directly addressed the issue (discussed below), the *Browne* court's silence does not provide strong support for the proposition that RFRA's applicability to the federal government was clearly established. Moreover, in *Ford v. McGinnis,* 352 F.3d 582 (2d Cir.2003), the Second Circuit stated that the Supreme Court had "invalidated" RFRA:

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

> ***31** While it was still good law, we dutifully applied RFRA's substantial burden test to prisoners' free exercise claims, despite the Supreme Court's suggestion in [*Employment Div., Dep't of Human Res. v. Smith,* 494 U.S. 872 (1990)] that so doing puts courts in "the unacceptable business of evaluating the relative merits of differing religious claims." Now with RFRA invalidated, however, the Circuits apparently are split over whether prisoners must show a substantial burden on their religious exercise in order to maintain free exercise claims.
>
> 352 F.3d at 592 (quoting *Smith,* 494 U.S. at 887, other citations omitted). While the holding in *Ford* concerned RFRA's applicability to the states, the Second Circuit did not temper its language to make this distinction clear.

Plaintiffs argue that all other circuit courts that have squarely addressed the issue have held that RFRA continues to apply to the federal government[29] and that even where there is no Second Circuit or Supreme Court authority directly on point, decisions of other circuits may warrant the conclusion that a right was clearly established. In fact, the Second Circuit's decisions have sent "conflicting signals" on the latter issue, *see African Trade & Information Center, Inc. v. Abromaitis,* 294 F.3d 355, 361 (2d Cir.2002), but I need not resolve it here, as the cases plaintiffs rely on suggest that during the 2001-2002 period in question here, RFRA's applicability to the federal government was unclear. For example, in 2003, prior to its holding in *O'Bryan,* the Seventh Circuit stated only that *Boerne* had "left open the possibility" that RFRA still applied to the federal government. *See United States v. Israel,* 317 F.3d 768, 770-71 (7th Cir.2003) (assuming RFRA's constitutionality as applied to the federal government where neither party contested it). Similarly, the Ninth Circuit explained in *Guam v. Guerrero* that it previously had "not definitively held

RFRA constitutional as applied in the federal realm." 290 F.3d at 1220. And *Kikumura* reversed a district court's holding that *Boerne* had rendered RFRA claims against federal prison officials unconstitutional as well. 242 F.3d at 958-60. Thus, the legal landscape in which the actions challenged in this case occurred differs markedly from that of *Varrone v. Bilotti,* 123 F.3d 75, 79 (2d Cir.1997) (finding reasonable suspicion standard for strip searching prison visitors was clearly established where three other circuits had so held prior to the search at issue and second circuit decisions had "foreshadowed" that standard); and *Weber,* 804 F.2d at 803-04 (relying on eleven decisions from other circuit courts, three of which antedated questioned search, in finding law clearly established).

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

I find that it was not clearly established in October 2001 that RFRA applied to the federal government. Accordingly, defendants are entitled to qualified immunity and the motions to dismiss these claims are granted.

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

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

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

> If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

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

a. *Clearly Established Law*

Defendants argue that the Second Circuit has never recognized that 1985(3) is available for suits against federal officials sued in their individual capacities. In *Gregoire v. Biddle,* 177 F.2d 579 (2d Cir.1949), the Second Circuit held that the United States Attorney General had absolute immunity from civil actions for malicious prosecution. 177 F.2d at 581. In reaching its decision, the court implied that § 1985(3) required state action. *Id.* In *Griffin v. Breckenridge,* 403 U.S. 88 (1971), the Supreme Court held that § 1985(3) did not contain a state action limitation. 403 U .S. at 101. The Court stated that instead, a plaintiff was required to establish "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102.

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

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

1997 WL 40979, at *3 (citations omitted); *see also Moriani v. Hunter,* 462 F.Supp. 353, 356 (S.D.N.Y.1978) ("Unless there is a rationale, unknown to the past cases, for holding that federal officers are not 'persons' under § 1985(3), there is no longer any reason to exclude from coverage federal officers acting under color of federal law."); *Hobson v. Wilson,* 737 F.2d 1, 44 (D.C.Cir.1984) (*Gregoire* effectively overruled by *Griffin;* applying § 1985(3) to FBI agents); *Jafree v. Barber,* 689 F.2d 640, 643 (7th Cir.1982) (§ 1985(3) action available against federal officials). I conclude that, after *Griffin,* it was clearly established that § 1985(3) applied to federal officers.

b. ***Personal Involvement***

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

Plaintiffs assert that they have met these standards by alleging that various defendants agreed to deprive plaintiffs of their rights, and by alleging that defendants adopted and implemented policies which deprived plaintiffs of these rights. As discussed in connection with plaintiffs' Fourth Amendment claim, plaintiffs have not sufficiently alleged the personal involvement of the BOP Defendants in subjecting them to "unnecessary and extreme strip and body-cavity searches," and the BOP Defendants' motions are granted as to that alleged agreement. In all other respects, defendants motions to dismiss the § 1985 claims are denied. As discussed above, I am mindful of the fact that cabinet-level and other high-ranking government officials may not properly be burdened by litigation based on conclusory allegations that they are responsible (through policy-making or failing to supervise) the alleged torts of federal employees. Nevertheless, I am not convinced, given the particularized allegations in paragraphs 249-51 and the virtually unique context in which the alleged actions occurred, that there is no set of facts consistent with those allegations on which plaintiffs will be entitled to relief against the defendants.

3. ***Alien Tort Statute (Claim 21)***

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

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

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

a. ***Liability Reform Act***

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

the Constitution of the United States, or ... for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(A), (B).

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

The ATS reads in its entirety as follows: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The statute, although "in terms only jurisdictional," enables "federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa,* 124 S.Ct. at 2754. In *Sosa,* the Court concluded that although the ATS did not create new causes of action, "[t]he jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Id.* at 2761.

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

Because the ATS is not a statute that itself can be violated, it does not fall within the § 2679(b)(2)(B) exception. Accordingly, the government's motion for substitution is granted. Because the United States has not waived its sovereign immunity from suits seeking money damages under international law, its motion to dismiss the ATS claim is granted. *See Federal Deposit Ins. Corp. v. Meyer,* 510 U .S. 471, 474 (1994) (absent an express waiver of sovereign immunity, a plaintiff may not sue the United States in federal court).[30]

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

CONCLUSION

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

Claim 1:	The Wardens' motions to dismiss are denied.
Claim 2:	Defendants' motions to dismiss are denied.
Claim 3-4:	Hasty's motion to dismiss is denied.

Claim 5:	Hasty's motion to dismiss is denied.
Claims 6-7:	Lorenzo's motion to dismiss is denied.
Claim 8:	The Wardens' motions to dismiss are denied.
Claim 9:	The Wardens' motions to dismiss are denied. Hawk Sawyer's motion to dismiss is granted.
Claim 10:	The Wardens' motions to dismiss are denied.
Claims 11-12:	The Wardens' motions to dismiss are denied. Ashcroft and the FBI Defendants' motions to dismiss are denied. The BOP Defendants' motions to dismiss are granted.
Claims 13-15:	Defendants' motions to dismiss are granted.

Claims 16-17:	The BOP Defendants' motions to dismiss are granted with respect to the alleged agreement to subject plaintiffs to unnecessary and extreme strip and body-cavity searches. In all other respects, Defendants' motions to dismiss are denied.
Claim 21:	The United States' motions for substitution and dismissal are granted. The claim is dismissed as to all defendants.

***36** So Ordered.