violate what in this case would have to be clearly-established constitutional norms.

CHIEF JUSTICE ROBERTS: I understand that. But the point made by your friend on the other side, though, of overdeterrence, when you have the attorney general, the director of the FBI, the director of INS sitting down and making -- what are we going to do to respond to this crisis, and -- and people in the -- were of -- old enough, 9/11, sort of have a better sense of what that crisis was like.

And if you imply a Bivens actions, one of the things they're going to enter into, what is best, what is appropriate, and presumably also, what's constitutional. They're going to say, well, gosh, if, you know, I'm wrong, I'm going to -- I'm going to be sued, not because I'm the attorney general, but as an -- as an individual. And -- and part of the policy that we've announced is that we don't want people forming policy to have to worry about they're going to have to -- to pay if the -- if the policy is found infirm.

MS. MEEROPOL: I have two responses to that, Mr. Chief Justice.

First of all, qualified immunity creates a powerful protection for Federal officials who are undertaking a good-faith effort to protect our national

security, which everyone agrees is of paramount concern, but who do so believing their actions to be lawful, even if they are mistaken. There is already that incredibly substantial protection.

Second, I don't believe that it would be a threat to the republic to provide the attorney general with incentives to not create policy that violates clearly-established law. I see the threat coming from the other side.

I -- I would like to make sure to take the time to correct --

JUSTICE BREYER: I'll ask you one other thing, which is, has this been fully argued out below? I mean, I think it is an enormously important and very open question. And we can say on the one hand, just what was said. I think everything the Chief Justice said is true. There is a problem, in this time, of real national emergency, to overdeter people from doing what they reasonably think is necessary. And they have the authority for security, not the judges.

At the same time, the law of this Court correctly, I think is, but there's no blank check even for the President. And if there's no blank check, that means sometimes they can go too far. And if they have gone too far, it is our job to say that.

Now, there are considerable advantages, as I pointed out, saying, at the time they're going to say yes, because there's a big frightening thing happening. But maybe they went too far too fast, and then this offers a remedy later and maybe the deterrence is good. Okay? You see both sides.

MS. MEEROPOL: Uh-huh.

JUSTICE BREYER: Has that been fully argued in this case? If I go and look in the record, can I find a question that I have wondered about for quite a long time fully answered?

MS. MEEROPOL: I -- I don't believe so. I -- I think the question you're posing is whether damages would actually be a less intrusive remedy in this situation than allowing for an injunctive relief claim at the outset, if I understand your -- your question correctly.

JUSTICE BREYER: In a set of cases.

MS. MEEROPOL: And -- and yes. No. I don't believe that that has been fully addressed below. The circuit, of course, found that no extension of Bivens was required. So the circuit didn't engage in the analysis of whether, if an extension is required, one in this situation would be called for.

My -- my friend argued, both on reply and

from the podium, that -- that even -- that -- that this case cannot be distinguished from Iqbal. But what distinguishes this case from Iqbal is that we -- Respondents have a factual allegation that the DOJ Petitioners' policy was to target Muslims and Arabs for harsh treatment, and that they imposed this treatment knowing there was no reason to suspect Respondents of ties to terrorism.

Now, my friend argued that even if Petitioners, DOJ Petitioners, had known that there was -- that -- had known that many were arrested without an articulable tie to terrorism, that the Petitioners had reason to believe that some among that group might have potential ties to terrorism, and that explains the harsh treatment without raising an inference of discriminatory intent, but I don't believe that is a fair reading of the complaint or the OIG report.

Respondents allege in paragraph 47 that Petitioners received detailed daily reports of the arrests and the detentions, and that they learned that the FBI had no basis to suspect Respondents and the class of ties to terrorism. There was no reason to think that any of these individuals were -- had an articulate -- that there was an articulated basis to suspect them of ties to terrorism.

JUSTICE KENNEDY: We're talking about adequate remedies. Can you tell me, as Justice Ginsburg pointed out, we didn't -- these detainees didn't have access to the outside. Were there any legal proceedings filed, injunctive proceedings, after say month 2, month 3, and were -- were those remedies completely added to district courts to look at this and say that we're not going to give relief?

MS. MEEROPOL: There were some habeas petitions filed. In general, the government's response to those petitions being filed was to move the detainee up to the front of the list, to clear him so that he could be removed from the country and from the restrictive conditions of confinement before a court could have the opportunity to rule on the legality of the detention. And importantly, those habeas petitions were about the -- the right to detain these people in itself, not about conditions of confinement.

It is still not clear today that one can use a habeas petition to challenge conditions of confinement, and it wasn't clear in the Second Circuit at the time either. So while habeas petitions were filed eventually, when some detainees finally had access to counsel, although restricted access, those -- those petitions were not actually ruled on by a court. The

court -- no court had the opportunity to determine whether what was happening to the detainees was lawful or not, and that was part of DOJ Petitioners' entire policy of harsh treatment. It was not just to impose maximum pressure. It was also, as we allege in paragraph 61, to keep the detainees from accessing the outside world.

Now, my friend argued that the DOJ Petitioners cannot be on the hook for the substantive due process claim in this case, a claim which was not presented in Iqbal. There was no conditions claim in Iqbal, just the equal protection claim, because the -- because the DOJ Petitioners did not set all the details of the restrictive conditions of confinement.

But their order itself, paragraph 61, requires keeping individuals in solitary confinement, in isolation. That is the way within the prison system people are kept from accessing the outside world. It cannot be done in a general population unit. So an order that requires solitary confinement for individuals who are arrested in connection with the terrorism investigation, but whom the attorney general and the other DOJ Petitioners know there is no nondiscriminatory reason to suspect of any ties to terrorism, that states the substantive due process claim. That is so excessive

as to be arbitrary and punitive.

This is what the panel found so compelling, I believe, about the merger of the New York list and the national list, that it was not a situation where some of the men on that list perhaps hadn't been vetted. Rather, the entire list, 300 men, were people for whom the FBI had not stated any interest or lack of interest. And it was this list of men who we allege Attorney General Ashcroft ordered should be treated as of interest to the 9/11 investigation.

JUSTICE KENNEDY: If -- if we -- if we hold that our previous cases instruct that we should not go further with Bivens, you still have Section 1985(3). Can officials conspire with each other?

MS. MEEROPOL: Yes, absolutely.

JUSTICE KENNEDY: Is there -- is there -- I was thinking of the -- is -- is there precedent on that in your point?

MS. MEEROPOL: It -- in this case --

JUSTICE KENNEDY: In your favor?

MS. MEEROPOL: Yes. What the circuit held as to that is that the question of whether officials can conspire with each other is so fact-intensive and had been so inconclusively briefed in the district court, yet it was required to remand back to the district to

determine sort of how they might have conspired with each other, whether -- what their positions were vis-à-vis each other such that a 1985 claim would be appropriate.

JUSTICE KENNEDY: Is there precedent in your favor on this point that there can be this conspiracy if -- if it's established by the facts?

MS. MEEROPOL: Yes. And I believe the case is cited by the Second Circuit, by the panel, our precedent in our favor for that.

CHIEF JUSTICE ROBERTS: What -- what is so fact-intensive about the argument that government officials -- the government is the entity and officials within that same entity don't conspire among themselves, they're just doing their -- doing their jobs?

MS. MEEROPOL: Well, I think it depends on the role of the high-level officials vis-à-vis the low-level officials at the Metropolitan Detention Center. Certainly, we argue that officials at such disparate levels of the federal government, which is vast, could -- could be held to have conspired with each other. But I don't think it is an argument that was fully developed before the district court, and that was what the circuit held, and that's why it should be remanded to the circuit and that -- remanded to the

district.

I want to make sure to address the arguments by the MDC Petitioners, because, really, their argument about extending Bivens -- about not extending Bivens for the claims against those officials is very different from the argument by the DOJ Petitioners. Every judge who has considered the issue has agreed that the claims that Hasty and Sherman were deliberately indifferent to months of physical and verbal abuse arise in a familiar Bivens context and should be allowed to go forward.

JUSTICE KENNEDY: That's Carlson v. Green?

MS. MEEROPOL: Yes, exactly.

JUSTICE GINSBURG: I thought the -- the Second Circuit majority said yes as to Hasty, Hasty, deliberate indifference, but not as to Sherman.

MS. MEEROPOL: That's correct. I must have misspoke. I apologize.

Yes. The deliberate indifference claim goes forward against Hasty, and then there were the claims against Hasty and Sherman for the official conditions of confinement at the Metropolitan Detention Center. These are claims that the men were held in solitary confinement for months, deprived of sleep, deprived of exercise. This is not just the MDC Petitioners in -- following the orders from their superiors in the Bureau

of Prisons. They created the actual conditions of confinement.

There is nothing in the record to suggest that the BOP ordered that all of the conditions that Respondents were subjected to, lights on in their cells 24 hours a day while they were in solitary confinement, that the solitary confinement continue without any individualized review. There's nothing in the record.

JUSTICE ALITO: Well, would that -- were they -- were those conditions constitutional as to individuals about whom the FBI had reasonable suspicion of a connection with terrorism?

MS. MEEROPOL: That would depend. Placement in solitary confinement, if it is incredibly prolonged and incredibly restrictive, may be unconstitutional for anybody. We don't concede that the conditions --

JUSTICE ALITO: Is your argument dependent on that?

MS. MEEROPOL: No --

JUSTICE ALITO: The proposition that it would be unconstitutional even as to those who have -- with respect to whom the FBI had reasonable suspicion?

MS. MEEROPOL: No. And that brings up an incredibly important point that I want to make sure to get out, which is that we disagree with the MDC

Petitioners' statement that there was a terrorism designation here, that there was reason to believe that any of the 9/11 detainees had ties to terrorism.

There was no designation. What there was is the fact that some men were arrested in connection to the terrorism investigation.

JUSTICE ALITO: The whole position as I understand it, the way it was presented today, was that the FBI had a list and the -- there was no way they could determine what degree of information the FBI had as to any particular person.

MS. MEEROPOL: But they were told what information the FBI was relying on. That's in paragraph 70, it's 71 through 74 of our complaint, that actually a liaison to the headquarters investigation was providing the MDC with information about all the men.

JUSTICE ALITO: With all the information? Do you -- you think that the FBI in a -- in a sensitive -- investigation of something sensitive like this about terrorism would necessarily have told people at MDC every bit of information they had connecting people with -- with terrorism?

MS. MEEROPOL: Well, our factual allegation was that they were told all the information that was relevant to the threat that the men posed to the

institution.

And also important here is what the OIG has explained about the meaning of the -- of the of-interest designation. Being determined by the FBI to be of interest to the 9/11 investigation meant only that they were not, not of interest. This is not just something that was happening in New York. The OIG quotes the head of the national security unit of the INS, who explains that if the FBI could not state whether or not it had an interest in an individual, that individual was held as of interest to the 9/11 investigation.

So even if there is word being sent out that, you know, these men are of interest to the investigation, we have to be careful with them, what the MDC Petitioners received was that of-interest designation, which meant very little based on the policy being applied here. And then they received the detailed information; for example, that Ahmed Khalifa was arrested -- was encountered by the FBI in the context of the 9/11 investigation, had violated the immigration law, and that the FBI might be interested in him. This is the actual information that was provided that we have made available in the complaint.

JUSTICE BREYER: The FBI goes into a rooming house after having information there's a nuclear weapon

on the floor. They find it. And there might be another. Would they be justified in taking into custody every single person in that rooming house and looking into it? I mean, for how long? Would you say to them, no, you can't do it because we don't know, there are people on the floor, they knew nothing about them, actually. They admit it. We knew nothing about them. All we know is they're in the rooming house.

MS. MEEROPOL: Well --

JUSTICE BREYER: And we also know there was a nuclear weapon. And that isn't totally fanciful; it could happen. And -- and so what are they supposed to do and how long?

MS. MEEROPOL: Well, we don't challenge the fact that these men were detained at all. And we don't challenge that they were investigated while they were detained. So even if they had been detained -- you know, some of them were up to eight months, which is a long period of time, and there's no challenge to that detention in this case. The challenge is to the way they were treated while they were detained. That if you need to investigate after a national security emergency, there are a lot of tools at the government's disposal to do so.

What you cannot do is single out a group of

people whom you know there is no basis to suspect them of any ties to terrorism beyond sharing racial and religious characteristics with the 9/11 hijackers, and to decide that that group of people poses such a threat that they must be placed in the most restrictive conditions of confinement that exist in the Federal system while we take the time, eight months, up to eight months, to determine whether there actually is any basis to suspect them of anything other than an immigration violation. And at the end of the day, oh, actually, there wasn't. Everybody was cleared and deported, as one would expect from a policy that is not based on investigating based on actual suspicion, but is rather a blunderbuss attempt to gather all of the Muslim and Arab noncitizens whom one has authority over by virtue of their immigration detentions, and -- and hold them in restrictive conditions of confinement while they are treated as suspected terrorists.

If I could get back for a moment to one of the Bivens questions, and that's about whether Bivens is appropriate for altering policy. I don't know if I was able to get this point out as well as I'd like to before. To -- to explain, I don't think that there is really any precedent for the idea that you can't use Bivens to deter creation of a clearly unconstitutional

policy. And if -- if the Court did rule in that way, what would there be to deter the creation of unconstitutional policies in the future? Now, of course, policies can be stopped as they are ongoing, but that does not protect the individual against whom, you know, potential serious law enforcement action has been taken.

CHIEF JUSTICE ROBERTS: Well, I suppose one answer would be the normal injunctive action would challenge the constitutionality of the policy, which would seem, at least at first blush, to be a more appropriate way of doing it than to -- than individual damages actions against officials responsible.

MS. MEEROPOL: But an injunctive -- an injunctive claim, while it could stop, currently, current unconstitutional conduct cannot deter future unconstitutional conduct from occurring. It doesn't deter the future attorney general from creating an unconstitutional policy. And if national security policy is somehow insulated from judicial review without even a determination that this is the type of national security policy where we could expect there could -- there should be sensitive judgments made, if -- if in that situation there is no Bivens remedy, then there are times when the Court will play no -- will be able to

play no role in reviewing what has occurred, because the -- the individuals simply can't get into court fast enough. Maybe in a situation like this, they're denied from getting into court for a period of time. And then when they finally do, the claim that the way that they've been treated is stopped. You know, they're released; someone else is picked up instead. There's never a chance to actually undertake judicial analysis of what has been occurring.

If qualified immunity justifies what was done here, or if Petitioners have not plausibly alleged a claim, those are bases to affirm the circuit. But if there is no cause of action at all, if individuals who are the subject of clearly unconstitutional national security policy don't even have the opportunity to get into the court, then there is nothing to deter even more excessive exercises of government power in the future.

If there are no further questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

General Gershengorn, four minutes.

REBUTTAL ARGUMENT OF IAN H. GERSHENGORN

ON BEHALF OF THE PETITIONERS

IN NOS. 15-1358 AND 15-1359

GENERAL GERSHENGORN: Thank you, Mr. Chief Justice.

A few quick points.

First, a few short corrections of the record, although I apologize for the confusion about the date. It's not in the complaint, the date of the list-merger decision. The OIG report suggests it was on November 2nd.

And then just, Justice Ginsburg, you had asked about the warden visits. J.A. page 224, it says on September 20, 2001, various wardens, including MDC Warden Zenk, reestablished legal visits, legal telephone calls, and legal mail for the September 11 detainees.

JUSTICE GINSBURG: What was --

GENERAL GERSHENGORN: I'd like to make --

JUSTICE GINSBURG: What was the date of that?

GENERAL GERSHENGORN: That was September 20, 2001. And it's on page 224 of the Joint Appendix.

Three points on the law.

First, this would be a massive extension of Bivens. Malesko said, Justice Kennedy, you had asked, that unlike a Bivens remedy, which we have never considered a proper vehicle for altering an entity's policy, injunctive relief has long been recognized as the proper means for doing so. That makes good sense. It cannot be that the secretary of the treasury, who

promulgates a policy that's later found unconstitutional, could be liable personally to all the banks for the unconstitutional policy.

Bivens is not -- Justice Breyer, absence of Bivens is not lawlessness. It is not a blank check, and it is incorrect as -- to say that there's no way to get into court. The way to get into court to challenge a policy is through an APA; it's through injunctive relief.

And although my friend on the other side suggests that a damages remedy is not a threat to the republic or a less-intrusive remedy, that's exactly the -- the judgment that this Court is ill-equipped to -- to make, and that Congress should make.

With respect to 1985(3), Justice Kennedy, I want to make just one quick point, which is that the -- the -- the DOJ defendants would be -- and all the defendants would be subject to qualified immunity for 1985(3) because it was not clear that officials within a corporate unit could -- could conspire with each other. There's case law suggesting they couldn't. And it was unclear, specifically in the Second Circuit, whether 1985(3) applied at all to Federal officials. So qualified immunity would eliminate the 1985(3) claim.

And then if I could close with the -- the --

the Iqbal pleading and what we're talking about here. The -- the other side has made clear they're not talking about the initial treatment and they're not even talking about the length of time. They're talking about the conditions of confinement and the fact that conditions that could lawfully be imposed with people in individualized suspicion were imposed on a much broader group. But I submit that that ignores the perspective that the attorney general, even assuming that he was the person who made the policy decision, which, as Judge Raggi suggested, we should not assume --

JUSTICE KENNEDY: Just one point on -- on 1985. The fact that it wasn't clear that there was a remedy under 1985, it doesn't follow -- it wasn't clear that there wasn't a right that was being violated.

GENERAL GERSHENGORN: That -- so --

JUSTICE KENNEDY: That's different.

GENERAL GERSHENGORN: With respect to the interagency conspiracy, I think that suggests even the right wasn't involved. And if the statute doesn't -- it's not clear the statute applies at all to them, we do think that's a situation in which qualified immunity would attach.

But just to close what -- with what the attorney general knew. The attorney general knew that

he had aliens who were legally detained as out of status and had been arrested in connection with Pent-Bomb, that restrictive conditions of confinement -- not the unlawful -- the unofficial conditions which have no connection to my clients, but the restrictive conditions of confinement were okay for some with individualized suspicion, but he had no way to know which ones were and which ones were not subject to that condition.

In that situation, he made the decision to subject the whole group to a hold-until-cleared policy until they could figure it out.

The idea that because in 20/20 hindsight we can identify the particular individuals who were not -- had not -- were not connected at all to terrorism and thus wrongly detained does not change the reasonableness of his judge -- of his judgment. The fact that you can't infer putative intent and discriminatory content and the -- intent -- and the fact that it was not clearly established at the list-merger decision, which is what -- a core of what the Second Circuit decided, that the list-merger decision was unconstitutional when made.

If there are no further questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

General Gershengorn, before you leave the

podium, I'd like to note that the Court thanks you for your service to the Court as acting Solicitor General over the past many months.

GENERAL GERSHENGORN: Thank you.

CHIEF JUSTICE ROBERTS: The case is submitted.

(Whereupon, at 12:02 p.m., the case in the above-entitled matter was submitted.)

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