United States Department of State

United States Permanent Mission to the Organization of American States

Washington, D.C. 20520

April 3, 2019

Dr. Paulo Abrão
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

Re: Mostafa Seyed Mirmehdi, Mohsen Seyed Mirmehdi, Mojtaba Seyed Mirmehdi, and Mohammad-Reza Mirmehdi, Petition No. P-1939-13 Response to Petition

Dear Dr. Abrão:

The United States Government has the honor of submitting to the Inter-American Commission on Human Rights this response to the Petition your office transmitted to us on December 10, 2018 via a letter dated November 30, 2018. The Petition, with exhibits, was submitted by Mr. Mostafa Seyed Mirmehdi, Mr. Mohsen Seyed Mirmehdi, Mr. Mojtaba Seyed Mirmehdi, and Mr. Mohammad-Reza Mirmehdi to the Inter-American Commission on Human Rights and forwarded to the United States as Petition No. P-1939-13 ("Petition"). The Petition was apparently submitted the Commission in November 2013. Please find enclosed the United States' response to the Petition. We trust this information is useful to the Commission and thank the Commission for its attention to this matter.

Please accept renewed assurances of my highest consideration.

Sincerely,

Carlos Trujillo
Ambassador

Enclosures: as stated

Enclosures: Selected Domestic Proceedings Relating to Petitioners Mostafa Seyed Mirmehdi, Mohsen Seyed Mirmehdi, Mojtaba Seyed Mirmehdi, and Mohammad-Reza Mirmehdi

1) *Mirmehdi et al. v. U.S. Immigration and Naturalization Service*, Order Den. Mot. to Dismiss, United States District Court for the Central District of California, Case No. 2:02-cv-08916-R-PJW (Mar. 18, 2003)

2) *Mirmehdi et al. v. Immigration and Naturalization Service*, 113 F. App'x 739 (9th Cir. 2004)

3) *Mirmehdi et al. v. Ashcroft et al.*, Original Br. for Pet'rs-Appellants, United States Court of Appeals for the Ninth Circuit, 2003 WL 22907763 (Nov. 10, 2003)

4) *Mirmehdi et al. v. Ashcroft et al.*, Resp'ts/Appellees' Brief, United States Court of Appeals for the Ninth Circuit, 2004 WL 297808 (Jan. 7, 2004)

5) *Mirmehdi et al. v. United States et al.*, Br. of Appellant, United States Court of Appeals for the Ninth Circuit, 2010 WL 5810102 (Dec. 29, 2010)

6) *Mirmehdi et al. v. Mukasey*, 2009 WL 247903 (9th Cir. 2009)

7) *Mirmehdi et al. v. U.S. Immigration and Naturalization Service*, Report and Recommendation of United States Magistrate Judge, United States District Court for the Central District of California, Case No. 2:02-cv-08916-R-PJW (May 1, 2003)

8) *Mirmehdi et al. v. U.S. Immigration and Naturalization Servic*e, Order Accepting Report and Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge, United States District Court for the Central District of California, Case No. 2:02-cv-08916-R-PJW (May 19, 2003)

9) *Mirmehdi et al. v. United States et al.*, Br. for the Respondents in Opp'n, United States Supreme Court, 2013 WL 1450988 (Apr. 8, 2013)

10) *Mirmehdi et al. v. United States et al.*, 689 F.3d 975 (9th Cir. 2012)

11) *Mirmehdi v. United States*, Denial of Pet. for Writ of Cert., 569 U.S. 972 (May 13, 2013)

12) *Mirmehdi et al. v. United States et al.*, Br. for Defs.-Appellees, United States Court of Appeals for the Ninth Circuit, 2011 WL 1554874 (Mar. 14, 2011)

PETITION NO. P-1939-13, MOSTAFA SEYED MIRMEHDI, MOHSEN SEYED MIRMEHDI, MOJTABA SEYED MIRMEHDI, AND MOHAMMAD-REZA MIRMEHDI RESPONSE OF THE UNITED STATES

The United States appreciates the opportunity to submit these observations on the documents submitted by Mr. Mostafa Seyed Mirmehdi, Mr. Mohsen Seyed Mirmehdi, Mr. Mojtaba Seyed Mirmehdi, and Mr. Mohammad-Reza Mirmehdi ("the Petitioners") to the Inter-American Commission on Human Rights ("Commission") and forwarded to the United States as Petition No. P-1939-13 ("Petition"). The Petition was received by the Commission in November 2013 and forwarded to the United States in November 2018.

The Petition is inadmissible because the Petitioners have not exhausted the domestic remedies available to them in the United States. It is further inadmissible because the Petition does not in any way indicate even a potential failure on the part of the United States to live up to any commitment under the American Declaration of the Rights and Duties of Man ("American Declaration"). Moreover, insofar as it relies on legal arguments submitted to and rejected by courts in the United States, it impermissibly seeks to place the Commission in the position of acting as a fourth instance review mechanism. Accordingly, the United States respectfully requests that the Commission find the Petition inadmissible. Should the Commission nevertheless declare the Petition admissible and examine its merits, the United States urges it to deny the Petitioner's request for relief, as the Petition is entirely without merit.

A. FACTS AND PROCEDURAL HISTORY

The Petitioners are citizens of Iran who either entered the United States unlawfully or entered lawfully but then over-stayed their visas.[1] The Petitioners applied for political asylum in 1998 and were denied asylum, but were granted withholding of removal to Iran.[2] The Petitioners' claims appear to turn on the fact that they were involved in two parallel sets of proceedings in the United States: removal proceedings after denial of their asylum claims and bond proceedings resulting in revocation of their bond and subsequent detention.[3] These two sets of proceedings were then followed by the Petitioners filing civil tort claims.[4] The United States provides the following overview of the facts relevant to the Petitioners' claims.

1. Denial of Asylum Claims and Removal Proceedings

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[1] Mirmehdi et al. v. U.S. Immigration and Naturalization Service, Order Den. Mot. to Dismiss, United States District Court for the Central District of California, Case No. 2:02-cv-08916-R-PJW (Mar. 18, 2003) (hereinafter "Order Den. Mot. to Dismiss") at 2 (Annex 1).

[2] Mirmehdi et al. v. Immigration and Naturalization Service, 113 F. App'x 739, 741 (9th Cir. 2004) (Annex 2).

[3] *Id.*

[4] Petition, ¶ 28.

The Petitioners applied for asylum to the United States with the help of Bahram Tabatabai, but falsified information was included in their applications.[5] The Petitioners were arrested in March 1999 and charged with immigration violations, and they were subsequently turned over to the Immigration and Naturalization Service ("INS").[6]

Because of their falsified applications, immigration judges ("IJ") denied the Petitioners applications for asylum in 2002.[7] The immigration judge who denied Mohammad-Reza's asylum application "cit[ed] his use of false documentation to enter the United States and his 'blatant deceit' against the asylum system," concluding that Mohammad-Reza was responsible for the denial of his own asylum application because of his fraud.[8] In fact, Mohammad-Reza admitted that the information in his 1998 asylum application was false.[9] The IJ who denied Mohsen, Mostafa, and Mojtaba's requests for asylum found that Mohsen was not credible, Mostafa had "lied to an INS asylum officer and [] he misrepresented himself in immigration court, only confessing his error after the government uncovered his fraudulent conduct," and Mojtaba had "misrepresented himself to an INS asylum officer, lied to an immigration judge on material questions relating to the heart of his asylum claim, knowingly presented false documents in court during a hearing, and knowingly filed a false asylum application in order to obtain a benefit under the [Immigration and Nationality Act]."[10]

Nevertheless, the IJs also found that the Petitioners were entitled to withholding of removal to Iran because they would be subject to torture if they were returned.[11] Both the Petitioners and the government appealed from the IJs' decisions, so the Petitioners did not have final removal orders.[12] Initially, the IJs granted the Petitioners bond and they were released from INS custody pending their removal proceedings.[13]

Both parties appealed to the Board of Immigration Appeals ("BIA"), which upheld the denial of asylum and withholding decisions in 2004.[14] Moshen and Mohammad-Reza Mirmehdi petitioned the United States Court of Appeals for the Ninth Circuit to review the BIA's decision. The Court concluded that the BIA's decision was supported by substantial evidence, the BIA did not abuse its discretion, and the Court upheld the asylum denial in 2009.[15]

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[5] Mirmehdi et al. v. Ashcroft et al., Original Br. for Pet'rs-Appellants, United States Court of Appeals for the Ninth Circuit, 2003 WL 22907763 (Nov. 10, 2003) (hereinafter "Original Br. for Pet'rs-Appellants") at 6 n.4 (Annex 3).

[6] *See* Order Den. Mot. to Dismiss, *supra* note 1, at 2; Petition, ¶ 13.

[7] Mirmehdi et al. v. Ashcroft et al., Resp'ts/Appellees' Brief, United States Court of Appeals for the Ninth Circuit, 2004 WL 297808 (Jan. 7, 2004) (hereinafter "Resp'ts/Appellees' Brief") at 5–6 (Annex 4).

[8] *Id.*

[9] Original Br. for Pet'rs-Appellants, *supra* note 5, at 18.

[10] Resp'ts/Appellees' Brief, *supra* note 7, at 6–7.

[11] Order Den. Mot. to Dismiss, *supra* note 1, at 3.

[12] Resp'ts/Appellees' Brief, *supra* note 7, at 7.

[13] *Id.*

[14] *See* Mirmehdi et al. v. United States et al., Br. of Appellant, United States Court of Appeals for the Ninth Circuit, 2010 WL 5810102 (Dec. 29, 2010) (hereinafter "Br. of Appellant") at 13–15 (Annex 5).

[15] Mirmehdi et al. v. Mukasey, 2009 WL 247903 *1 (9th Cir. 2009) (Annex 6).

2. Revocation of Bond and Subsequent Detention

In October 2001, the Petitioners were re-arrested by the INS.[16] The government had seized a document attributed to a group called the Mojahedin-E-Khalaq ("MEK") that had the Petitioners' names on it ("the L.A. Cell list").[17] The federal government had designated the MEK as a Foreign Terrorist Organization. After this second arrest, the Petitioners were given another bond hearing, but the IJ denied bond in January 2002.[18] The IJ found that the INS's new evidence constituted a "material changed circumstance"[19] and the Petitioners' association with the MEK justified not releasing them on bond.[20] The IJ also found that the Petitioners were a significant flight risk, as they had a lack of family ties within the United States and they had admitted to filing fraudulent asylum applications and obtaining fraudulent identification, indicating that they had hoped to avoid the legal process concerning immigration.[21]

The Petitioners then appealed the IJ's bond decisions to the BIA, but the BIA affirmed the IJ's decisions in 2002, concluding that there was sufficient evidence on the record to determine that the Petitioners were "associated with a terrorist organization and posed a danger to persons or property."[22]

Next, the Petitioners appealed to the United States District Court for the Central District of California in November 2002 for a writ of habeas corpus, seeking to overturn the IJ's decision denying them bond.[23] The Magistrate Judge assigned to the case found that the Respondents did not abuse their discretion in denying the Petitioners' bond.[24] The Magistrate Judge concluded, in relevant part, that "[p]etitioners are in the United States illegally. The FBI recovered an MEK document which lists Petitioners' names on it. The MEK is a Foreign Terrorist Organization. The government presented evidence that Petitioners are associates of the MEK through the testimony of an FBI agent. The agent had been investigating the MEK for five years at the time he testified at their bond hearing . . . He had extensive experience with the organization."[25] In May 2003, the District Court accepted the Magistrate Judge's Report and Recommendations and adopted its findings and conclusions.[26]

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[16] Order Den. Mot. to Dismiss, *supra* note 1, at 3.
[17] *Id.*
[18] *Id.*
[19] Original Br. for Pet'rs-Appellants, *supra* note 5, at 14.
[20] Mirmehdi et al. v. U.S. Immigration and Naturalization Service, Report and Recommendation of United States Magistrate Judge, United States District Court for the Central District of California, Case No. 2:02-cv-08916-R-PJW (May 1, 2003) (hereinafter "R&R") at 8 (Annex 7).
[21] Resp'ts/Appellees' Brief, *supra* note 7, at 16.
[22] R&R, *supra* note 20, at 3, 9.
[23] Order Den. Mot. to Dismiss, *supra* note 1, at 3–4.
[24] R&R, *supra* note 20, at 5.
[25] *Id.* at 14.
[26] Mirmehdi et al. v. U.S. Immigration and Naturalization Service, Order Accepting Report and Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge, United States District Court for the Central District of California, Case No. 2:02-cv-08916-R-PJW (May 19, 2003) (Annex 8).

The Petitioners then appealed to the United States Court of Appeals for the Ninth Circuit, which concluded that Mohammad-Reza and Mohsen's appeals were not moot, but both Mostafa and Mojtaba's appeals were. Because both Mostafa and Mojtaba did not appeal the denial of their asylum claims and they were ordered removed, they had no subsequent right of appeal from that order.[27] Once Mostafa and Mojtaba were ordered removed, the Attorney General was required under U.S. law to detain them and their appeals for revocation of bond were moot.[28] Mohammad-Reza and Mohsen, meanwhile, did appeal the denial of their asylum claims to the BIA, which affirmed the denial.[29] Because Mohammad-Reza and Mohsen then petitioned the Ninth Circuit to review their asylum denials, their appeals for revocation were not moot.[30] The Ninth Circuit also held that because the BIA's findings appeared to be contradictory, the agency had an "obligation to explain [itself]" on why it came to a different conclusion after taking a second look at the facts.[31] Accordingly, the Ninth Circuit remanded Mohammad-Reza and Mohsen's cases to the district court to review the sufficiency of the evidence in the brothers' bond determinations.[32]

3. Civil Tort Claims

Following several unsuccessful attempts to establish agreed terms of conditional release, and before the case was decided on remand, the Petitioners were released from custody in March 2005.[33] The Petitioners then brought lawsuits against the United States, the Attorney General, FBI Director, INS Commissioners— Special Agents Castillo, Special Agent MacDowell, the City of Santa Ana, the City of Las Vegas, MVM, Inc., several prison guards, and others. The Petitioners raised a number of claims, including unlawful detention, inhumane detention conditions, witness intimidation, and the intentional infliction of emotional distress. The District Court dismissed almost all of the Petitioners' claims for either lack of personal jurisdiction or failure to state a cause of action.[34] The parties then settled all the remaining claims, except the claims against Castillo and MacDowell for unlawful detention and conspiracy to violate civil rights, against Castillo for witness intimidation, and against the United States for false imprisonment.[35]

The Ninth Circuit upheld the District Court's decision from June 18, 2008.[36] The Petitioners appealed the Ninth Circuit ruling to the U.S. Supreme Court, which declined to hear the case.[37]

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[27] Mirmehdi et al. v. Immigration and Naturalization Service, 113 F. App'x at 741.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Mirmehdi et al. v. United States et al., Br. for the Respondents in Opp'n, United States Supreme Court, 2013 WL 1450988 (Apr. 8, 2013) at 5 (Annex 9).
[34] Mirmehdi et al. v. United States et al., 689 F.3d 975, 980 (9th Cir. 2012) (Annex 10).
[35] *Id.*
[36] *Id.*
[37] Mirmehdi v. United States, Denial of Pet. for Writ of Cert., 569 U.S. 972 (May 13, 2013) (Annex 11).

B. THE PETITION IS INADMISSIBLE AND SHOULD BE DISMISSED

The matter addressed by the Petition is not admissible and must be dismissed because it fails to meet the Commission's established criteria in Articles 31 and 34 of the Rules of Procedure ("Rules"). The Petitioners have not exhausted the domestic remedies available in the United States, as required by Article 31 of the Rules. The Petition is also plainly inadmissible under Article 34 of the Rules. In particular, the Petition fails under Article 34(a) to state facts that tend to establish violations[38] of rights set forth in the American Declaration; it is manifestly groundless under Article 34(b); and its consideration would be inappropriate in light of the Commission's fourth instance formula.

1. The Petitioners Have Not Pursued or Exhausted Domestic Remedies

The Commission should declare the Petition inadmissible because the Petitioners have not satisfied their duty to demonstrate that they have "invoked and exhausted" domestic remedies under Article 20(c) of the Commission's Statute and Article 31 of the Rules.

The Commission has repeatedly emphasized that a petitioner has the duty to pursue all available domestic remedies. Article 31(1) of the Rules states that "[i]n order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law." As the Commission is aware, the requirement of exhaustion of domestic remedies stems from customary international law, as a means of respecting State sovereignty. It ensures that the State on whose territory a human rights violation allegedly has occurred has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system.[39] A State conducting judicial proceedings for its national system has the sovereign right to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before resorting to an international body.[40] The Inter-American Court of Human Rights has remarked that the exhaustion requirement is of particular importance "in the international jurisdiction of human rights, because the latter reinforces or complements the domestic

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[38] As the American Declaration of the Rights and Duties of Man is a non-binding instrument and does not create legal rights or impose legal duties on member states of the Organization of American States, the United States understands that a "violation" in this context means an allegation that a country has not lived up to its political commitment to upload the American Declaration. The United States respects its political commitment to uphold the American Declaration. For an elaboration of the United States' longstanding position on the non-binding nature of the American Declaration, see Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988.

[39] *See, e.g.* Interhandel Case (Switzerland v. United States) [1959] I.C.J. 6, 26–27; Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania), 1939 P.C.I.J., Ser. A/B, No. 76.

[40] THOMAS HAESLER, THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS (1968) at 18–19.

jurisdiction."[41] The Commission has repeatedly made clear that petitioners have the duty to pursue *all* available domestic remedies.[42]

The Petitioners in this case failed to pursue or exhaust all available domestic remedies in several ways. First, the Petitioners chose not to appeal the Ninth Circuit's affirmation of the denial of their asylum claims to the U.S. Supreme Court. Second, the Petitioners' habeas corpus petitions challenging the IJs' decisions failed to exhaust administrative remedies.[43] After the BIA had concluded that the INS met its burden of demonstrating a material change in the Petitioners' circumstances that warranted a change in their custody status, the burden then shifted to the Petitioners to demonstrate that their release would not pose a danger to property or persons and that they were not a flight risk.[44] However, the Petitioners did not carry this burden and the BIA therefore declined to reconsider the Attorney General's custody decision. The Petitioners chose not to challenge the BIA's decision, which illustrates yet another way that they did not pursue or exhaust all domestic remedies.[45] Third, although the Petitioners have made numerous allegations about the conditions of their detention, claiming that the conditions were "cruel, inhuman, and punitive," the Petitioners voluntarily settled these claims rather than pursue remedies in court.[46] The Petitioners thus chose to settle claims that they now bring up before this Commission.

For these reasons, the Petitioners have failed to exhaust their local remedies and the Petition is inadmissible under Article 31.

2. The Petition Fails to Establish Facts that Could Support a Claim of Violation of the American Declaration

The Petition is also inadmissible under Article 34 of the Rules because it does not state facts that establish a violation of the American Declaration and it is manifestly groundless. The Petitioners allege that the United States has violated Article I (Right to Liberty), Article II (Right to Equality Before the Law), Article IV (Right to Freedom of Expression), Article XVII (Right to Recognition of Juridical Personality), Article XVIII (Right to Civil Rights), Article XXI (Right of Assembly), Article XXII (Right of Association), Article XXV (Right of Protection from Arbitrary Arrest or Detention), and Article XXVI (Right to Due Process) of the American Declaration.

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[41] Velásquez Rodríguez Case, Judgment of July 29, 1988, ¶ 61, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988).

[42] *See, e.g.* Páez Garcia v. Venezuela, Petition No. 670-01, Report No. 13/13, Mar. 20, 2013, Analysis § B(1) & Conclusions ¶ 35 (finding petition inadmissible for failure to exhaust because petitioner did not avail himself of remedies available to him in the domestic system).

[43] Resp'ts/Appellees' Brief, *supra* note 7, at 24–25.

[44] *Id.* at 25–26

[45] *Id.* at 26.

[46] Br. of Appellant, *supra* note 14, at 4.

a. The Petition Fails to Establish Facts that Support Claims that the United States Violated Article I, Article XVII, Article XVIII, Article XXV, and Article XXVI of the American Declaration

The Petitioners allege that the United States violated their right of protection from arbitrary arrest under Article XXV of the American Declaration, arguing that "[t]he process by which [they] were detained . . . was anything but fair."[47] The Petitioners also allege that the United States violated their right to liberty under Article I, claiming that their detention was arbitrary and "State agents presented [false] evidence . . . to secure the Petitioners' detention."[48] Finally, the Petitioners charge that the United States violated their rights under Articles XVII, XVIII, and XXVI by detaining them, despite their insistence that they had no connection to terrorist activities.[49]

It should be noted at the outset the lawfulness of Petitioners' detention is uncontested: Petitioners were detained for violating the immigration laws of the United States. What the Petitioners take issue with is the subsequent denial of bond while they awaited removal proceedings from the United States following their violation of U.S. immigration laws and denial of their asylum applications. However, individuals are not entitled to bond pending removal proceedings under the American Declaration, and so the denial of bond following the Petitioners' second arrest cannot be construed as a violation of the American Declaration.

Yet, even if such denial of bond could be construed in terms of arbitrary arrest or detention, the Petitioners challenged their detention through five levels of administrative and judicial review: IJs, the BIA, a magistrate judge, the District Court, and the Ninth Circuit.[50] U.S. immigration laws and regulations provide a "comprehensive scheme for [Petitioners] to challenge their bond revocation and detention," as they were represented by counsel at the bond revocation hearing, who cross-examined Special Agent Castillo and presented rebuttal evidence.[51] The "L.A. Cell" list—which Petitioners claim to have been fabricated and therefore wrongfully relied upon by detaining officials—was also not the only piece of evidence considered when the IJ determined that the Petitioners constituted a risk to persons or property and should have their bond revoked: the IJ considered the "totality of the information" in reaching this conclusion.[52] The Petitioners were thus provided with a process that was not arbitrary: they were afforded a hearing before an impartial judge, "given an opportunity to present evidence and to know and meet the claims of the opposing party," and the proceedings complied with the rules of procedural fairness.[53]

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[47] Petition, ¶ 42.
[48] *Id.* ¶ 45–46.
[49] *Id.* ¶ 56.
[50] Mirmehdi et al. v. United States et al., Br. for Defs.-Appellees, United States Court of Appeals for the Ninth Circuit, 2011 WL 1554874 (Mar. 14, 2011) (hereinafter "Br. for Defs.-Appellees") at 16–17 (Annex 12).
[51] *Id.* at *16, 29.
[52] R&R, *supra* note 20, at 8.
[53] Ferrer-Mazorra v. United States, Case 9903, Inter-Am. Comm'n H.R., Report No. 51/01 ¶ 213 (2001).

Moreover, the Petitioners either entered or remained in the United States unlawfully and now seek to transform their own wrongdoing into the source of a "right" not to be held accountable for their fraudulent actions. Nothing in the American Declaration recognizes a human right to unlawfully enter or remain in a State without facing the immigration consequences for these actions. On the contrary, the American Declaration affirms that "[i]t is the duty of every person to obey the law and other legitimate commands of the authorities of his country and those of the country in which he may be."[54] It is also a general principle of law recognized by international courts and tribunals that an unlawful act cannot serve as the basis for a claim under international law.[55] The Petitioners nevertheless seek to use their own wrongful entry or over-staying of their visas in violation of U.S. law as the basis for asserting that they have an alleged right that was violated by their detention pending the outcome of their immigration proceedings. The Commission should not allow itself to be used for such a purpose.

The Petitioners also repeatedly insist that the evidence against them was fabricated, but do not provide any evidence to support this claim. Despite their allegations that Special Agent Castillo was responsible for fabricating evidence against them, the Petitioners offered no objections to Castillo's testimony nor did they cross examine him when given the opportunity.[56] The Petitioners cite to *Teleguz v. United States*[57] to say that the Commission has found a violation of Article I when a prosecutor uses witness statements known to be false.[58] In this case, however, the Petitioners have provided no evidence to show that Special Agent Castillo's statements were false, nor have they shown that the government used Castillo's testimony knowing it was false. Similarly, the Petitioners "made no attempt to call Tabatabai as a witness, notify the court of his unavailability or intimidation, subpoena him to testify, or recess until he could be located,"[59] so it is unclear how the Petitioners can now claim that Special Agents Castillo and MacDowell "prevented the Petitioners from asserting a full and legitimate defense" by keeping Tabatabai out of the hearing.[60] These bare allegations of supposed witness intimidation are entirely without factual support in the Petition.

For these reasons, the Petitioners have failed to establish facts to support their claims that the United States violated their rights under Article I (Right to Liberty), Article XVII (Right to Recognition of Juridical Personality), Article XVIII (Right to Civil Rights), Article XXV (Right of Protection from Arbitrary Arrest or Detention), and Article XXVI (Right to Due Process) of the American Declaration.

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[54] American Declaration, Art. XXXIII.

[55] *See, e.g.* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (2006) at 149–57 (discussing principle that *nullus commodum capere de sua injuria propria*).

[56] Resp'ts/Appellees' Brief, *supra* note 7, at 44–45.

[57] Teleguz v. United States, Case 12.864, Inter-Am. Comm'n H.R., Report No. 53/13 ¶ 130 (2013).

[58] Petition, ¶ 46.

[59] Br. for Defs.-Appellees, *supra* note 50, at 59.

[60] Petition, ¶ 60.

b. The Petition Fails to Establish Facts that Support Claims that the United States Violated Article II, Article IV, Article XXI, and Article XXII of the American Declaration

The Petitioners allege that the United States violated their right of equality before the law under Article II of the American Declaration, claiming that they were "subjected to differentiated and coercive treatment due to their Iranian nationality and presumed political views"[61] and "deprived of liberty due to their perceived political opinions . . . ."[62] The Petitioners also allege violations of their right to freedom of expression under Article IV, stating that the United States "used evidence of the Petitioners' participation in a lawful and peaceful demonstration to justify their arrest and prolonged detention."[63] Finally, the Petitioners charge that the United States violated their right of assembly and right of association under Articles XXI and XXII by detaining them based on their attendance at a demonstration.[64]

What the Petitioners fail to acknowledge, however, is that their bond revocation was not based on their Iranian nationality or participation in a rally. The Petitioners were included in the L.A. Cell list, which listed names of people with ties to a Foreign Terrorist Organization, the MEK. In *Biscet*, which the Petitioners cite to support their allegations, the Cuban government punished people who had published political articles and participated in political groups that the government determined to be "counterrevolutionary."[65] In this case, however, the United States government did not take any action against the Petitioners because of their political activism: the Petitioners were detained after they had entered or remained in the country illegally and in violation of U.S. immigration law, and their bond was subsequently revoked because they were determined to be associates of a Foreign Terrorist Organization. In addition to this "material changed circumstance,"[66] the IJ also found that the Petitioners were a significant flight risk, as they had a lack of family ties within the United States and they had admitted to filing fraudulent asylum applications and obtaining fraudulent identification, indicating that they had hoped to avoid the legal process concerning immigration.[67] This evidence—rather than Petitioners' Iranian nationality or participation in a rally—justified the denial of their bond following their second arrest.[68]

The Petitioners also make broad-sweeping allegations that the United States denied them equality before the law because of their Iranian nationality and cite to various non-governmental actors that claim that the United States profiled Iranian nationals after the terrorist attacks of September 11, 2001.[69] Crucially, however, the Petitioners fail to identify any particularized

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[61] *Id.* ¶ 47.
[62] *Id.* ¶ 50.
[63] *Id.* ¶ 52.
[64] *Id.* ¶ 61.
[65] *Id.* ¶ 54.
[66] Original Br. for Pet'rs-Appellants, *supra* note 5, at 14.
[67] Resp'ts/Appellees' Brief, *supra* note 7, at 16.
[68] R&R, *supra* note 20, at 8.
[69] Petition, ¶ 49.

evidence that they were profiled in such a way in this case. Again, Petitioners attempt to distract from the non-discriminatory rationale for their detention: the Petitioners violated U.S. immigration law, were denied asylum, and had their bond revoked after a second arrest related to their association with a known Foreign Terrorist Organization, the MEK. The Petitioners have not provided any concrete evidence to show that they had been profiled and detained because of their nationality and political views.

For these reasons, the Petitioners have failed to establish facts to support their claims that the United States violated their rights under Article II (Right to Equality Before the Law), Article IV (Right to Freedom of Expression), Article XXI (Right of Assembly), and Article XXII (Right of Association) of the American Declaration.

3. The Petition Must Be Dismissed Under Article 34(b) of the Rules Because the Petitioners have Already Been Compensated and Received Effective Remedy for the Claims They Assert, and Their Claims Are Thus Manifestly Groundless

The Petitioners have voluntarily settled some of their claims. The only claims that they did not settle were those "against Castillo and MacDowell for unlawful detention and conspiracy to violate their civil rights, against Castillo for intimidation of a witness, and against the United States for false imprisonment."[70] The Petitioners cannot now assert that the United States has violated the American Declaration with respect to those settled matters because they have already received a remedy.[71] Such claims are accordingly moot. To the extent that the Petitioners continue to pursue unsettled claims related to allegations of arbitrary arrest or detention, the Petitioners have already received an effective remedy in the domestic system: they were released from custody. Although the Petitioners appear to equate "remedy" with "monetary compensation" throughout their Petition, such equivalence is not supported by the American Declaration.

As a result, the Commission should reject Petitioners' claims as manifestly groundless under Article 34(a) and (b) of the Rules.

4. The Commission Cannot Review the Merits of the Petition Without Running Afoul of the Fourth Instance Formula

Furthermore, the Petition plainly constitutes an effort by the Petitioners to use the Commission as a "fourth instance" body to review claims already heard and rejected by U.S. courts. The Commission has repeatedly stated that it may not "serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic

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[70] Mirmehdi et al. v. United States et al., 689 F.3d at 980.

[71] Undocumented Migrant, Legal Resident, and U.S. Citizen Victims of Anti-Immigrant Vigilantes v. United States, Petition No. 478-05, Report No. 78/08, Admissibility, Aug. 5, 2009, ¶ 60 & Decision ¶ 4 (declaring case inadmissible with respect to petitioners who obtained access to an effective remedy in the domestic system).

courts acting within their jurisdiction," a doctrine the Commission calls the "fourth instance formula."[72]

The fourth instance formula recognizes the proper role of the Commission as subsidiary to States' domestic judiciaries,[73] and indeed, nothing in the American Declaration, the Organization of American States Charter, the Commission's Statute, or the Rules gives the Commission the authority to act as an appellate body. As the Commission has explained, "The Commission . . . lacks jurisdiction to substitute its judgment for that of the national courts on matters that involve the interpretation and explanation of domestic law or the evaluation of the facts."[74]

The United States' domestic legal process, including the availability of appellate and collateral review of immigration proceedings, affords those in the Petitioners' positions the highest level of internationally recognized protection. The Petitioners have availed themselves of this legal framework to challenge their revocation of bond and subsequent detention in multiple proceedings over a number of years, through five levels of administrative and judicial review: IJs, the BIA, a magistrate judge, the District Court, and the Ninth Circuit.[75] In each of these proceedings, the courts carefully reviewed the evidence and rejected the Petitioners' arguments.

If the Commission were to accept a petition based on the same arguments that the Petitioners have litigated and lost in U.S. courts, it would be acting precisely as the type of fourth instance review mechanism it has consistently refused to embody. For this reason as well, it should dismiss the Petition.

* * *

For all of the foregoing reasons, the Petition is inadmissible and should be dismissed.

C. THE PETITION IS MERITLESS

Even if the Commission could overcome these many barriers and proceeded to examine the Petitioners' allegations—which it plainly lacks the competence to do—it should find the allegations without merit and deny the Petitioners' request for relief.

The Petitioners provide no evidence for the premise on which their Petition is based. The Petitioners repeatedly allege that Special Agents Castillo and MacDowell knowingly and intentionally fabricated evidence that was used to revoke their bond, but they have provided no evidence to support this claim. In fact, contrary to the Petitioners' claims, the L.A. Cell list was

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[72] *See* Marzioni v. Argentina, Case No. 11.673, Report No. 39/96, Inadmissibility, Oct. 15, 1996, ¶ 51.
[73] *See* Castro Tortrino v. Argentina, Case No. 11.597, Report No. 7/98, Admissibility, Mar. 2, 1998, ¶ 17.
[74] Macdeo García de Uribe v. Mexico, Petition No. 859-03, Report No. 24/12, Inadmissibility, Mar. 20, 2012, ¶ 40.
[75] Br. for Defs.-Appellees, *supra* note 50, at 16–17.

not the only piece of evidence that was used by the IJ in concluding that the Petitioners have ties to a Foreign Terrorist Organization. This case has proceeded through five levels of administrative and judicial review in the United States and not once did a judge or reviewing entity determine that the United States had falsified evidence or that there was insufficient evidence to detain the Petitioners.

Moreover, the Petitioners allege that they were profiled and detained by the United States because of their Iranian nationality and political activity. However, as explained above, the Petitioners were not detained because of their nationality or political activity; rather, they were detained because they violated U.S. immigration law by either entering or remaining in the country unlawfully, they falsified their asylum applications that were eventually denied, and they were determined to have ties to a Foreign Terrorist Organization that led to revocation of their bond.

As such, the Petitioners' allegations have no merit and the Commission should deny their request for relief.

D. CONCLUSION

For the foregoing reasons, the Petition fails to pass the threshold for consideration under Articles 31 and 34 of the Rules, as well as under the Commission's fourth instance doctrine. Should the Commission nevertheless find the Petition admissible and proceed to examine its merits, it should find the Petition meritless in light of what is explained above. While the United States reserves the right to provide further views on the merits in such an eventuality, it reiterates that none of the conduct alleged in the Petition implicates—much less violates—any of the rights set forth in the American Declaration. The immigration and criminal justice systems in the United States embody the protections set forth in the American Declaration, and the Petitioners manifestly have benefited from these robust protections throughout their immigration and bond proceedings in the United States.

Finally, as one of the strongest supporters of the Commission and by far its largest financial contributor, the United States continues to have concerns about the efficient management of the Commission's resources. It is unclear why this Petition was forwarded to the United States despite its obvious inadmissibility and the significant passage of time between its receipt by the Commission more than five years ago and eventual referral to the United States. In any event, further consideration of the present matter would not be a prudent use of the Commission's limited resources.

ENCLOSURES

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MOHAMMAD-REZA MIRMEHDI, Petitioner, v. U.S. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. CV 02-8916-R (PJW) ORDER DENYING MOTION TO DISMISS
MOSTAFA MIRMEHDI, Petitioner, v. U.S. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. CV 02-8918-R (PJW) ORDER DENYING MOTION TO DISMISS
MOHSEN MIRMEHDI, Petitioner, v. U.S. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. CV 02-8919-R (PJW) ORDER DENYING MOTION TO DISMISS

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MOJTABA MIRMEHDI, Petitioner, v. U.S. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. CV 02-8920-R (PJW) ORDER DENYING MOTION TO DISMISS

I.

INTRODUCTION

Petitioners, four brothers, brought habeas corpus Petitions challenging Respondent's denial of their request for bond pending final decisions in their removal proceedings. Respondent filed a motion to dismiss the Petitions on the ground that the Court lacked subject matter jurisdiction to review the bond determinations. For the reasons set forth below, Respondent's motion is DENIED.

II.

FACTS

Petitioners are Iranian nationals who are in the United States illegally, having entered illegally or having entered legally but then over-staying their visas. Petitioners were arrested by the Federal Bureau of Investigation ("FBI") on March 16, 1999. After deciding not to charge them with a crime, the FBI turned them over to Respondent. (Petitioners' Points and Authorities in Support of Petition for Habeas Corpus (hereinafter "Petitioners' Brief") at 4.) Petitioners were granted bond by an Immigration Judge ("IJ") and released from INS custody pending disposition of removal proceedings.[1]

[1] Moshen, Mojtaba, and Mostafa were granted bond at the outset of their removal proceedings. Mohammad-Reza was initially denied bond and appealed to the Board of Immigration Appeals ("BIA"). The BIA

On October 2, 2001, Petitioners were re-arrested by the INS. Their arrest was prompted by the government's seizure of a document attributed to a group called the Mojahedin-E Khalaq ("MEK") with Petitioners' names on it. The MEK has been designated by the federal government as a Foreign Terrorist Organization. Petitioners were given another bond hearing after this second arrest, but this time the IJ denied bond. (Administrative Record ("AR") at 332-461, 474-490.)[2] Petitioners appealed the IJ's bond decisions to the BIA. (AR 2-6.) The BIA affirmed the IJ's decision. (*Id.*)

Subsequently, in a separate hearing, the IJ found that Petitioners were here illegally and were subject to removal. (Petitioners' Brief, Exhibit 4 at 20-21.) The IJ also found, however, that Petitioners were entitled to withholding of removal to Iran because, as supporters of MEK, they would be subject to torture there. (*Id.* at 21.) As a result, Petitioners were ordered removed from the United States to any country other than Iran.[3] Petitioners appealed the IJ's removal decision to the BIA. Their appeals are still pending before the BIA.

On November 20, 2002, Petitioners filed habeas corpus Petitions in this Court seeking to have the Court overturn Respondent's decision

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remanded the case to the IJ for reconsideration. On reconsideration, the IJ granted him bond. (Petitioners' Brief at 4.)

[2] The Court cites to the Certified Administrative Record in Mostafa Mirmehdi's case. The records for all four brothers are essentially identical, except for the inclusion of documents specifically related to one and not the others.

[3] The order reads Petitioners are to be "removed from the United States to any country appropriate under section 241(b) of the [Immigration and Nationality] Act, with the exception of Iran." (*Id.*)

denying them bond. On January 28, 2003, Respondent moved to dismiss the Petitions on the ground that the district court lacked subject matter jurisdiction. Petitioners opposed the motion.

III.

ANALYSIS

The District Courts Have Jurisdiction To Review Bond Decisions In Habeas Corpus Proceedings

Section 2241 of title 28 of the United States Code provides, *inter alia*, that a district court may grant a writ of habeas corpus to a prisoner in the custody of the United States in violation of the Constitution, laws, or treaties of the United States. *See* 28 U.S.C. § 2241(a), (c)(1)and(3). Section 2241 applies to aliens. *See Zadvydas v. Davis*, 533 U.S. 678, 687 (2001). Two laws enacted in 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), effected many changes in immigration law. However, they did not eliminate all habeas jurisdiction of the district courts in immigration cases. *See, e.g., INS v. St. Cyr*, 533 U.S. 289 (2001); *Calcano-Martinez v. INS*, 533 U.S. 348 (2001); *Zavaleta-Gallegos v. INS*, 261 F.3d 951 (9th Cir. 2001); *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999). One thing these laws did do was require aliens wanting to challenge adverse INS rulings to appeal directly to the circuit courts of appeal and only after the INS decision was final. *See* 8 U.S.C. §1252. The threshold issue in this case, then, is whether, in the wake of AEDPA and IIRIRA, this court still has habeas jurisdiction to consider challenges to INS decisions denying bond.

There is no Ninth Circuit case on point. A review of the cases throughout the country make it clear that this issue is in dispute. The Eleventh Circuit, in *Richardson v. Reno*, 180 F.3d 1311, 1318 (11th Cir. 1999), held that under IIRIRA the district court did not have jurisdiction in habeas to review bond denials by the INS. A district court in Pennsylvania agreed. *Burca v. Holmes*, 73 F.Supp. 2d 484 (M.D. Penn. 1999). While a district court in Texas found otherwise. *Sebuma v. INS*, 2001 WL 984884 (N.D. Tex. 2001).

In *Flores-Miramontes v. INS*, 212 F.3d 1133, 1142 (9th Cir. 2000), the Ninth Circuit rejected the reasoning of the Eleventh Circuit in *Richardson* and held that IIRIRA only limited the district court's review on habeas to the extent that the statute provided for direct review to the circuit court. The test set forth by the court in *Flores-Miramontes* was that, if IIRIRA barred review in the circuit court, then habeas review was available in the district court. *Id.*

Applying the reasoning of *Flores-Miramontes* to the case at bar, the Court finds that direct review by the circuit court of Respondent's decisions denying bond to Petitioners is precluded under IIRIRA. First, the Act provides that "[n]o court may set aside any action or decision by the Attorney General under this section *regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.*" 8 U.S.C. § 1226(e)(emphasis added). Second, from a practical standpoint, since an alien can only seek circuit court review of a *final* decision of the INS, *see* 8 U.S.C. §1252(b)(2), interim bond decisions by the INS pending a determination of removal would never be justiciable before the circuit court. Either the alien would prevail before the BIA and have the removal proceedings terminated, or he would not prevail and be ordered

removed. An order of detention following a final order of removal would be pursuant to a different section and be based on different criteria, as would review in the circuit court. Thus, absent habeas review of a bond decision by a district court prior to a final removal order by the INS, INS orders denying bail pending removal decisions would escape all judicial review. There is nothing in the statutes or the regulations which provide that habeas review has been eliminated. *See INS v. St. Cyr*, 533 U.S. 289, 314 (2001)(holding that IIRIRA did not repeal the district court's habeas jurisdiction as to final decisions of removal by the INS). For that reason, the Court finds that it has subject matter jurisdiction under section 2241 to entertain a challenge to the INS's denial of bond pending its decision on removal. *See Flores-Miramontes*, 212 F.3d at 1140(explaining that IIRIRA's preclusion of "judicial review" did not preclude habeas review, which historically has been distinguished from "judicial review").

The Court next turns to Respondent's arguments in support of dismissal. Respondent first contends that jurisdiction is lacking here because Petitioners have not supported their Fifth Amendment claims with sufficient facts. (Respondent's Motion to Dismiss at 6.) But Petitioners cite a litany of facts which they contend establish that they were denied due process in their bail hearings. They allege that the IJ relied on their association with MEK; he failed to give proper notice; their detention without bond for more than a year is excessive; their detention is based on their refusal (or failure) to cooperate with the government in a pending investigation; they should not be held in custody because the IJ ruled they will not be removed to Iran; their continued detention is a result of the September 11,

2001, terrorist attack, not something they have done; and the IJ's rulings were based on hearsay. (Petitioners' Brief at 2-3.) These are Petitioners' version of the facts, which, if true, could support a reversal of the IJ's bond decision. For purposes of this motion to dismiss, the Court, accepting Petitioners' version of the facts as true, finds that it does not plainly appear from the face of the pleadings and the record that Petitioners are not entitled to relief For that reason, dismissal is not appropriate.

Respondent also argues that Petitioners cannot challenge the federal government's designation of MEK as a terrorist organization in these habeas Petitions. The Court agrees. Congress has selected the D.C. Circuit Court as the forum for challenges under this Act. 8 U.S.C. § 1189(b). Further, Petitioners are precluded from raising their challenges to MEK's designation in removal proceedings. 8 U.S.C. § 1189(a)(8).

The Court also agrees with the government that Petitioners' third argument, *i.e.*, that they are being detained indefinitely in violation of 8 U.S.C. § 1231(a), is without a legal basis. *See Zadvydas v. Davis*, 533 U.S. 678 (2001). *Zadvydas* precludes indefinite detention of aliens who have been determined to be removable. It does not apply to cases like Petitioners' where their removal orders are not yet final and may never be. *See Id.* at 697 (stating indefinite detention rationale does not apply to cases in which removal has not yet been determined because detention resulting from pre-removal-hearing case has obvious termination point (i.e. order of removal), post-removal-hearing indefinite detention case does not).

IV.

CONCLUSION

For these reasons, Respondent's motion to dismiss is DENIED. The Court will review the IJ's (and the BIA's) bond decision for abuse of discretion. *See Hernandez-Avila v. Boyd*, 294 F.2d 373, 376 (9th Cir. 1961)(holding INS bail determinations reviewed under abuse of discretion standard). The parties need not submit any additional briefing but may do so if they choose.[4] Any additional briefing should be submitted no later than April 7, 2003. Thereafter, the Court will issue a decision on the merits as soon as practicable.

DATED: March 17, 2003.

Patrick J. Walsh

PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

S:\Cases-Federal Habeas\MIRMEHDI, MOHAMMAD\Ord deny MTD.wpd

[4] The parties are, however, requested to inform the Court if the BIA issues a decision on Petitioners' appeal of the removal orders.

113 Fed.Appx. 739
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Ninth
Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals,
Ninth Circuit.

Mohammad-Reza MIRMEHDI,
Petitioner-Appellant,
v.
IMMIGRATION AND NATURALIZATION
SERVICE, Respondent-Appellee.
Mostafa Mirmehdi, Petitioner-Appellant,
v.
Immigration And Naturalization
Service, Respondent-Appellee.
Mohsen Mirmehdi, Petitioner-Appellant,
v.
Immigration and Naturalization
Service, Respondent-Appellee.
Mojtaba Mirmehdi, Petitioner-Appellant,
v.
Immigration and Naturalization
Service, Respondent-Appellee.

Nos. 03-56261, 03-56272 to 03-56274.
|
Argued and Submitted May 10, 2004.
|
Filed Oct. 4, 2004.
|
Amended Nov. 15, 2004.
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Decided Nov. 15, 2004.

Synopsis

Background: Aliens appealed from denial by the United States District Court for the Central District of California, Manuel L. Real, J., of their habeas petitions alleging improper revocation of bond and subsequent detention without bond during ongoing removal proceedings.

Holdings: The Court of Appeals held that:

[1] appeals as to revocation of bond by aliens who were ordered removed were moot, but

[2] Board of Immigration Appeals (BIA) failed to offer satisfactory explanation for its contradictory findings regarding aliens' involvement in terrorist activity.

Petition granted in part, and dismissed in part.

West Headnotes (2)

[1] **Aliens, Immigration, and Citizenship**
Bond or bail

Once aliens, whose bond was revoked and who were detained without bond during ongoing removal hearings, were ordered removed, their appeals as to revocation of bond were moot, since Attorney General had independent, superseding reason for detaining them. Immigration and Nationality Act, § 241(a)(2), as amended, 8 U.S.C.A. § 1231(a)(2).

Cases that cite this headnote

[2] **Aliens, Immigration, and Citizenship**
Bond or bail

Aliens' bond revocation, subsequent to which aliens were detained without bond during removal proceedings, was improperly predicated in large part on findings by Board of Immigration Appeals (BIA) regarding aliens' involvement in terrorist activity; BIA failed, under its duty of consistent dealing, to offer satisfactory explanation for its inconsistent treatment in initially finding aliens to be involved in terrorist activity, and then after taking a second look at facts, coming to conclusion that there was no evidence connecting them to terrorist activities.

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Cases that cite this headnote

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Robyn-Marie Lyon Monteleone, Esq., USLA-Office of the U.S. Attorney, Los Angeles, CA, Alison Marie Igoe, DOJ-U.S. Department of Justice, Office of Immigration Lit., Washington, DC, for Respondent-Appellee.

Appeal from the United States District Court for the Central District of California, Manuel L. Real, District Judge, Presiding. D.C. Nos. CV-02-08916-MLR, CV-02-08918-MLR to CV-02-08920-MLR.

Before: PREGERSON, MCKEOWN, and BYBEE, Circuit Judges.

AMENDED MEMORANDUM *

****1** This appeal is brought by Mohammad-Reza Mirmehdi, Mohsen Mirmehdi, Mostafa ***741** Mirmehdi, and Mojtaba Mirmehdi, four brothers from Iran. The issue before us is whether the district court properly denied the Mirmehdis' 28 U.S.C. § 2254 habeas petitions alleging improper revocation of bond and subsequent detention without bond during the brothers' ongoing removal proceedings.

Separate from the bond proceeding, the Mirmehdis' removal proceedings moved forward on a parallel track. All four brothers were denied asylum but granted withholding of removal by immigration judges ("IJ"). Mohammad-Reza Mirmehdi and Mohsen Mirmehdi appealed the denial of asylum to the Board of Immigration Appeals ("BIA"). Mostafa Mirmehdi and Mojtaba Mirmehdi did not appeal their asylum decisions. The government appealed the withholding of removal decisions. On August 20, 2004, the BIA affirmed the IJ's denial of the asylum claims and granting of withholding of removal.

Mostafa Mirmehdi and Mojtaba Mirmehdi

[1] Mostafa Mirmehdi and Mojtaba Mirmehdi did not appeal the denial of their asylum claims. They were ordered removed, although their removal was stayed. They have no right of appeal from that order. Once they were ordered removed, 8 U.S.C. § 1231(a)(2) commands the Attorney General to detain them. Because the Attorney General has an independent, superceding reason for detaining them, their appeals as to revocation of bond are moot.

Mohammad-Reza Mirmehdi and Mohsen Mirmehdi

[2] Mohammad-Reza Mirmehdi and Mohsen Mirmehdi appealed the denial of their asylum claims to the BIA, which in turn affirmed the denial. Because they have now appealed the denial of their asylum claims to this Court, their appeals of the denial of bond revocation are not moot.

The bond revocation was predicated in large part on findings regarding their involvement in terrorist activity. In light of the BIA's findings to the contrary in its April 30, 2002 decision, we are faced with contradictory findings by the BIA. Agencies have a general duty of consistent dealing. When they change direction, whether on matters of law, policy, or fact, they have an obligation to explain themselves. Ordinarily, consistency in factual findings is enforced through our collateral estoppel rules. *See United States v. Stauffer Chemical Co.,* 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984) (approving mutual defensive collateral estoppel against the government); *Shaw's Supermarkets, Inc. v. NLRB,* 884 F.2d 34, 41 (1st Cir.1989) (Breyer, J.) ("[T]he Board remains free to modify or change its rule; to depart from, or to keep within, prior precedent, as long as it focuses upon the issue and explains why change is reasonable").

Here, the BIA did not invoke either the doctrine of res judicata or collateral estoppel. Rather, the BIA has taken a second look at the facts and come to a different conclusion. The BIA has not offered a satisfactory explanation for its inconsistent treatment of the Mirmehdis. As to Mohammad-Reza Mirmehdi and Mohsen Mirmehdi, we grant the petition and remand these two cases to the district court for review of the sufficiency of the evidence in light of the BIA's decision finding no evidence connecting the Mirmhedis to terrorist activities.

****2** PETITIONS GRANTED as to Mohammad-Reza Mirmehdi and Mohsen Mirmehdi. The mandate shall issue forthwith.

***742** PETITIONS DISMISSED as moot as to Mojtaba Mirmehdi and Mostafa Mirmehdi.

All Citations

113 Fed.Appx. 739, 2004 WL 2580897

Footnotes

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

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2003 WL 22907763 (C.A.9) (Appellate Brief)
United States Court of Appeals,
Ninth Circuit.

Mohammad-Reza MIRMEHDI Mostafa Mirmehdi Mohsen
Mirmehdi Mojtaba Mirmehdi, Petitioner-Appellants,
v.
John ASHCROFT, Attorney General of the United States, et. al., Respondent-Appellees.

Nos. 03-56261, 03-56272, 03-56273, 03-56724.
November 10, 2003.

On Appeal From Decisions of the U.S. District Court for the Central District of California Nos. CV 02-8916-R (PJW), CV 02-8918-R (PJW), CV 02-8919-R (PJW), CV 02-8920-R (PJW)

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***1** I. *INTRODUCTION*

Petitioners Mohammad-Reza MIRMEHDI, Mostafa MIRMEHDI, Mohsen MIRMEHDI, and Mojtaba MIRMEHDI (hereafter "Petitioners"), are four brothers who had been charged with being removable in 1999 because they did not have legal status. They were released on bond on August 19, 1999. [1]

On October 2, 2001, less than one month after the events of September 11th, Petitioners were re-arrested and held without bail by the then Immigration and Naturalization Service ("INS") based on asserted "changed circumstances." At Petitioners' bond redetermination hearing before U.S. Immigration Judge D.D. Sitgraves, the INS presented the testimony of an FBI agent to assert that Petitioners were "associated" with the "Mujahedin-e Khalq" or People's Mojahdin Organization of Iran ("MEK"), an organization that was designated as a terrorist organization in 1997. *See* "Designation of Foreign Terrorist Organizations," 62 Fed. Reg. 2612 (Oct. 8, 1997). The government presented a document it confiscated from an alleged MEK "safe house" which it asserted was an MEK membership list, based on the alleged statement of an anonymous informant, who Petitioners never had the opportunity to cross-examine. E.R. at 17. Petitioners maintained that the list was a travel log for a June 20, 1997 political rally in which ***2** over 1,000 people, including a United States Congressman, protested the actions of the Iranian government. Based solely on the testimony of the of the FBI agent, which, in turn was based primarily on the out of court statements of alleged confidential informants, the Immigration Judge ("IJ") found Petitioners to be a danger to the community and thus denied them release from detention.

Petitioners were subsequently granted withholding of removal by two different immigration judges, Ipema and Peters. At those hearings, Petitioners presented evidence that the information Agent Castillo relied on was provided by two informants who agreed to name Petitioners as MEK members as part of their plea bargains, in order to avoid more serious sentences. The reliability of these informants was, to say the least, highly questionable. Both judges Peters and Ipema found that Petitioners did not commit any terrorist activity, that the "LA Cell Form" submitted by the government was a travel log for the Denver June 20, 1997 rally, and that Petitioners had no association with the MEK other that attending rallies and parties.

Petitioners admitted attending political rallies and parties sponsored by the National Council of Resistance" ("NCR" or "NCRI") [2], as well as attending other ***3** political protests against the Iranian government. However, in neither the bond redetermination hearing nor the withholding of removal hearings, was any evidence submitted that linked Petitioners to any terrorist activity or activity that would endanger national security. In fact, immigration judges Ipema and Peters found that Petitioners had engaged solely in political activity that was protected by the U.S. Constitution.

Following the decision of the BIA affirming the decision of IJ Sitgraves, Petitioners filed a petition for writ of habeas corpus, asserting that they were being unlawfully detained. The District Court affirmed the denial of their release, holding that there was sufficient evidence that Petitioners's association with the MEK rendered them a danger to national security. Petitioners now challenge that decision, asserting that there was insufficient evidence to find they had engaged in any terrorist activity or activity that constituted a danger to national security. They also assert that: their due process rights were violated because they were denied the opportunity to cross-examine the anonymous informant who spoke to the FBI agent; that the conclusions of the FBI agent were based on the statements of totally unreliable informants; that the District Court improperly failed to consider the evidence of record presented in Petitioners' withholding of removal hearings; that the Immigration and Nationality Act's ("INA") preclusion of a challenge to ***4** the MEK as a terrorist

organization violates due process; and that the deprivation of procedural safeguards in their case was a result of the court and agency's reaction to the events of September 11, 2001.

II. *STATEMENT OF JURISDICTION*

Petitioners timely appealed the decisions of the U.S. District Court for the Central District of California, denying their Petitions for Writ of Habeas Corpus. This Court has jurisdiction pursuant to 28 U.S.C. § 2253(a), which states that "in a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held."

III. *ISSUES PRESENTED*

1. Whether the district court's finding that petitioners were sufficiently associated with the MEK to require detention without bond was clearly erroneous.

2. Whether the District Court erred in failing to consider Petitioners' evidence from their withholding of removal cases, evidencing that they were not threats to national security.

3. Whether the denial of release based on statements by an anonymous ***5** informant, without affording the opportunity for cross-examination, violated petitioners' due process rights.

4. Whether 8 U.S.C. § 1189(a)(8), INA § 219(a)(8) violates due process because it prevents Petitioners from challenging the designation of the MEK as a terrorist organization.

5. Whether Petitioners' denial of an individualized bond hearing violated due process.

6. Whether Petitioners deprivation of the full procedural safeguards required by due process was the result of concerns over the events of September 11th.

IV. *STANDARD OF REVIEW*

Petitioners raise both errors of law and fact in their appeal of the District Court's finding that Petitioners should be denied release on bail. This Court engages in *de novo* review of issues of law. *See United States v. Mateo-Mendez,* 215 F.3d 1039, 1042 (9th Cir. 2000). A district court's findings of fact are reviewed under the clearly erroneous standard. Fed. R. Civ. P. 52(a); *Easley v. Cromartie,* 532 U.S. 234, 242 (2001); *Lawyer v. Department of Justice,* 521 U.S. 567, 580 (1997).

***6** V. *STATEMENT OF THE FACTS AND CASE*

Petitioners are four brothers who originally entered the United States in 1993 and who applied for asylum before the former Immigration and Naturalization Service ("INS"). [3] Their applications were filed by Bahram ("Ben") Tabatabai who Petitioners retained to apply for a "green card". E.R. at 370, 392, 409, 430. [4]

On March 16 1999, Petitioners were arrested by the INS when they appeared for a scheduled asylum interview before the INS.

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Petitioner Mohammad-Reza's Bond Hearing

Petitioner Mohammad Mirmehdi was denied bond by the immigration judge on August 18, 1999. E.R. at 10.[5] The immigration judge stated that the denial of ***7** release was based on a finding that Petitioner Mohammad was a flight risk. *Id.* Petitioner Mohammad-Reza filed a request for reconsideration on August 26, 1999 which was denied by the immigration judge because Petitioner failed to specify any errors of facts or law in the original decision. *Id.* Mohammad-Reza appealed the bond denial to the BIA. On August 15, 2000, the BIA remanded his case because the immigration judge did not issue a bond memorandum in support of her decision. On September 20, 2000, Mohammad-Reza was released from custody with a bond of $75,000 after spending over one year in custody. At the time of his release, U.S. Immigration Judge D.D. Sitgraves found that the government did not have sufficient evidence to link him to the MEK. E.R. at 344.

Petitioners Mostafa, Mojtaba, and Mohsen Mirmehdi's Bond Hearing

On August 19, 1999, Petitioners Mostafa, Mudjtaba and Mohsen Mirmehdi were granted bond before the immigration judge pursuant to a joint stipulation in the amount of $50,000 each. E.R. at 11-13.[6]

Petitioners' Re-Arrest

On October 2, 2001, Petitioners were again taken into custody because the INS revoked their prior bond based on "new evidence" that Petitioners were ***8** allegedly linked to the "Mujahedin-e Khalq" or People's Mojahdin Organization of Iran ("MEK"). Petitioners' requests for release on bond were consolidated before U.S. Immigration Judge D.D. Sitgraves. E.R. at 155.

On October 23, 2001, the INS filed several bond exhibits in support of Petitioners' denial of bond. Among these exhibits was a document entitled "L.A. Cell Form" with an attached translation. E.R. at 17.

Petitioners appeared before the immigration judge on October 30, 2001. At that time the INS asserted that Petitioners were subject to mandatory detention based on 8 U.S.C. § 1226A, INA § 236A, as implemented by section 412 of the USA PATRIOT ACT, Pub. L. 107-56, 115 Stat. 272 (Oct. 26, 2001). The immigration judge gave the INS an opportunity to obtain the certification by the Attorney General, or Deputy Attorney General, as required by INA § 236A. The government filed an untimely brief on November 29, 2001, asserting that "the Patriot Act's requirement for certification pursuant to section 236A was not mandatory and, therefore, it was within the Court's authority to deny bond without the Attorney General's certification." E.R. at 158. On December 10, 2001, Petitioners appeared before the immigration judge. Because the INS had delayed in submitting its brief, and that delay had prejudiced Petitioners who did not have time to respond, the judge ordered that it would not consider the INS' brief that no ***9** certification under INA § 236A was required.

Agent Castillo's December 10. 2001 Testimony

The INS presented a witness, Federal Bureau of Investigation ("FBI") Special Agent Christopher Castillo, who testified telephonically. E.R. at 38.[7] Mr. Castillo testified that he was assigned to the "Joint Terrorism Task Force" in Los Angeles, and that he was assigned to investigating the "Mujahedin cult." E.R. at 34-5. He stated that he became familiar with Petitioners based on a document called the "L.A. Cell Form" which was seized at the MEK "base" in Los Angeles. E.R at 36.[8] He stated that pursuant to a search warrant, the FBI seized:

a log of all the members of [the MEK], and on the log was the name of each of the four Mirmehdi brothers; Mohammad Mirmehdi, ***10** Mohsen Mirmehdi, Mostaba Mirmehdi, and Mostafa Mirmehdi. And it indicated that they were part of, associates or members of the cell.

E.R. at 36.[9] Castillo stated that this list shows "members, supporters, and associates of the Los Angeles MEK cell." *Id.* at 151. He also stated that he identified the individuals on the list as associated with the MEK because "we showed the document to a Government witness who was also a MEK member and this Government witness indicated to me that the list ... contain [sic] the names of MEK members, MEK supporters, and MEK associates." *Id.* at 50. He further stated that he believed the document was produced by the MEK because it was found with an official MEK newspaper, MEK books, and because an anonymous witness stated that it contained a list of MEK "members, supporters, and associates."[10] *Id.* at 51. The "L.A. Cell Form" was admitted into evidence, and Castillo identified Petitioners' names on the document. E.R. at 52-3.[11]

Castillo further testified to the structure of the MEK. He stated that an ***11** MEK "member" is a "leader of the organization" or an officer. E.R. at 57-8. He further testified that the government believed that all four Petitioners fall under the MEK term for "supporters," (or an "S1") and a supporter is an individual who "will provide financial support, carry out physical missions, to include demonstrations; some of which may be violent, to conduct surveillance or counter surveillance, and to attend meetings, as directed by their leadership." E.R. at 58. The final category in the MEK organization is a "sympathizer" (or an "S") and is one who attends "meetings and demonstrations and may, or may not, give financial support. E.R. at 59.

Agent Castillo identified the date of "Khordad 30th, 76" on the "LA Cell form" and stated that that date was symbolic because "[i]t is the day that many Mujahedin entered the streets of Tehran and protested the Iranian regime, and many casualties were suffered when they clashed with Iranian government forces." E.R. at 60. Castillo testified that the date on the LA Cell form was symbolic "to show that these people who participate in some function, that it's happening in honor of that particular date." E.R. at 61.[12] On cross-examination, Petitioners submitted into evidence a "date converter," showing that the equivalent western ***12** date was June 20, 1997. E.R. at 152, E.R. at 89. Castillo further testified on cross-examination that June 20, 1997 was the date of a demonstration in Denver which two of Petitioners attended. E.R. at 92.[13]

Castillo testified that he believed that the MEK cell posed a security threat because it is has been designated as a foreign terrorist organization by the State Department. E.R. at 63.[14] He further stated that he believed all four Petitioners were "supporters" of the MEK, and that by definition Petitioners provided financial support, attended meetings, established other "cells" for the MEK. E.R. at 64. Additionally, Castillo testified that at the time of the October 2001 arrest, the FBI found "an envelope with the name of YusefHamidi" in Petitioners' garbage can, "which indicated that they were communicating with other known Mujahedin members, even presently." E.R. at 65.[15]

***13** Castillo testified that he believed that Petitioners were a threat to national security, if released from custody, because "their mere association" with the MEK made them a threat to national security, and because the Iranian government may, in an effort to "capture" Petitioners, threaten the safety of the general public. E.R. at 67.[16]

Castillo further testified that Bahram ("Ben") Tabatabai, the individual who applied for asylum on Petitioners' behalf and who provided false documents to Petitioners, plead guilty to material support of a terrorist organization- the MEK, pursuant to 8 U.S.C. § 2339b. E.R. at 104. Petitioners were named by Tabatabai as "MEK members and supporters" as part of his plea agreement. E.R. at 106.[17]

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Finally, Castillo testified that "NCR" (the "National Council of Resistance") ***14** is listed by the State Department as an alias of the MEK, and that in his opinion the MEK and the NCR are the same thing. E.R. at 122.

The Immigration Judge's Decision

On January 9, 2002, the immigration judge denied Petitioners' request for release on bond, finding that the INS' new evidence (the "LA Cell Form") constituted a material changed circumstance that "mitigates against release on bond." E.R. at 170. The immigration judge further found that Petitioners were affiliated with the MEK, and that because that organization was designated as a terrorist organization, Petitioners "pose a danger to persons and property as a result of their MEK participation." *Id.* [18] Petitioners appealed their case to the BIA. On appeal, they also submitted a declaration of a political scientist named Mehran Kamrava who was fluent in Farsi. E.R. at 172. Kamrava reviewed the "LA Cell" Form submitted by FBI agent Castillo at the bond hearing. E.R. at 173-4. Kamrava, in this declaration, stated that the form appeared to be a "travel log" and not a membership list. *Id.* [19]

***15** *The BIA Decision*

On June 13, 2002, the BIA issued four decisions denying Petitioners' appeal of their denial of bond, of which the reasoning and conclusion was identical. E.R. at 179-194. The BIA held that there was sufficient evidence in the "record that [Petitioners are] associated with a terrorist organization, and therefore [they pose] a danger to persons or property." E.R. at 182. The BIA noted the testimony of Agent Castillo and Petitioners' arguments on appeal. Yet, when in its "discussion section," the BIA failed to address why the testimony of Castillo should be given more weight, or why Petitioners' arguments and evidence did not discredit Castillo's assertions, the BIA stated only that "[i]n light of the Service's new evidence and the FBI Agent's testimony, we find that the Service has met its ***16** burden of demonstrating a material change in the [petitioner's] circumstances." *Id.* The BIA also found that Petitioners were subject to mandatory detention pursuant to 8 U.S.C. § 1226(c)(1)(D), INA § 236(c)(1)(D). [20]

***18** *Petitioners Are Granted Withholding of Removal*

While Petitioners bond cases were pending before the BIA, Petitioners proceeded on the merits of their immigration cases. Petitioners Mostafa, Mohsen, and Mojtaba Mirmehdi proceeded before immigration judge Peters, and Petitioner Mohammad-Reza Mirmehdi proceeded before U.S. Immigration Judge Ipema.

Petitioner Mohammad-Reza Mirmehdi's Grant of Withholding of Removal

Petitioner Mohammad-Reza submitted an application for asylum, withholding of removal and relief pursuant to Article 3 of the United Nations Convention Against Torture on May 2, 2000. The basis for this claim was Petitioner Mohammad-Reza's political activity against the Iranian government. E.R. at 388.

Immigration Judge Ipema ("IJ Ipema") concluded that Petitioner Mohammad-Reza had entered the United States on documents that had not been issued to him. E.R. at 369. Petitioner further admitted that the information contained in his 1998 asylum application was false, but maintained that the affidavit submitted with the application detailing his fear of persecution was truthful. E.R. at 369-70.

Petitioners' 1998 asylum application had been filed by Bahram ("Ben") Tabatabai. Tabatabai was arrested on March 16, 1999, the same day as ***19** Petitioners, "on suspicion of running an immigration fraud ring." E.R. at 370. Prosecutors alleged that the ring assisted MEK members, and the government alleged that Petitioners were clients of Tabatabai who had ties to the MEK.

IJ Ipema explicitly asked the INS if it "was arguing that Petitioner was ineligible for withholding of removal because 'there are reasonable grounds to believe that the alien is a danger to the security of the United States,'" and the INS "answered in the affirmative." E.R. at 372; *see also* 8 U.S.C. § 1231(b)(3)(B)(iv). IJ Ipema found that Petitioner Mohammad-Reza had the burden of proving that he was not statutorily precluded from applying for asylum. E.R. at 376.

On April 30, 2002, Immigration Judge Ipema issued an order granting Petitioner Mohammad-Reza withholding of deportation. [21] The government appealed that decision, and the appeal is still pending before the BIA. IJ Ipema thus inquired as to whether there was a "reasonable ground to believe" that Petitioner Mohammad-Reza was a "danger to the security of the United States." E.R. at 377. First, IJ Ipema found that Petitioner Mohammad-Reza's participation in NC demonstrations was protected by the First Amendment. *Id.*

IJ Ipema also considered the testimony and depositions of Ben Tabatabai ***20** and Hojatt Azimi. He found both Tabatbai and Azimi to be "weak and unworthy witnesses" and that "there is no reason to believe that Bahram Tabatabai and Hojatt Azimi have anything of substance to show that the [petitioner] is a danger to the security of the United States." E.R. at 386. [22]

IJ Ipema also considered the "LA Cell Form" introduced in Petitioners' bond hearing, as well as Agent Castillo's testimony. E.R. at 381-2. IJ Ipema reviewed the transcript of the December 10, 2001 testimony of Castillo. IJ Ipema noted that Castillo's testimony conflicted because for the bulk of his testimony he he had stated that the names on the charts represented "a broad range of connection including 'associates, the sympathizers, and supporters and members." ***21** E.R. at 384. IJ Ipema stated that the statement about "members" at the end of his testimony conflicted with the statement about the individuals on the list. IJ Ipema further stated that Castillo stated that Petitioners were "supporters" of the MEK, and thereby participated in fundraising and that the INS never provided any evidence that any money was contributed to the MEK. *Id.* [23] Ipema further found that the "LA Cell Form" did not provide evidence that Petitioner was involved in terrorist activities, and that "membership" in a group does not constitute terrorist activity under the INA. E.R. at 385.

IJ Ipema held that it was much more reasonable to conclude that the "LA Cell Form" was created to monitor contacts attending the June 20, 1997 rally in Denver. E.R. at 385. [24] Ipema also noted that the INS did not offer evidence to rebut Kamrava's explanation that "cell" was mistranslated and the correct term was "network." E.R. at 386. He concluded that "[t]here is not more evidence for than against' to establish probable or reasonable cause that the [petitioner] is a danger to the security of the United States." E.R. at 386. Finally, IJ Ipema ***22** granted Petitioner Mohammad-Reza withholding of removal, finding that his attendance at demonstrations, as well as the public accusations that he is a member of the MEK and his voice in opposition to the Iranian regime supported a finding that he "would face a clear probability of threat to his life or freedom on account of political opinion and imputed political opinion as well as a clear probability of torture." E.R. at 388. *See* 8 U.S.C. § 1231(b), INA § 241(b).

Petitioners Mostafa, Mojtaba, and Mohsen Mirmehdis' Grants of Withholding of Removal

The remaining three Petitioners proceeded on the merits of their cases before Immigration Judge Rose Peters ("IJ Peters"). Petitioners filed an application for asylum withholding of removal, and relief pursuant to the Convention Against Torture on May 7, 2001. E.R. at 391,406, 427.

Petitioners had three separate hearings before the immigration judge. At Petitioner Mostafa's hearing, Professor Asgari testified that the Iranian Government closely monitors the activities of Iranians in the U.S. and that "the publicity that [Petitioner's] case has received coupled with his name being published in Iranian newspapers was sufficient to subject him to arrest and deportation." E.R. at 393. Azimi also testified at the hearing, where he stated that the "FBI wanted him to

be employed in Mr. Tabatabai's office because he was ***23** filing fabricated asylum claims." E.R. at 394. [25] In addition, INS Agent James MacDowell testified that the FBI, State Department, and INS worked with Azimi as a confidential informant and that he was aware of Azimi's criminal history and past the fact that he had filed fake asylum applications in the past. E.R. at 396. MacDowell further testified that he found Tabatabai to be "truthful and forthcoming because he had nothing to gain by not being truthful." *Id.* Finally, FBI agent Castillo testified at the hearing regarding the "LA Cell Form." E.R. at 398. He testified that the "FBI determined that Mostafa and Mohamad were MEK supporters, and that the other two brothers were *only* sympathizers." *Id.*

Petitioners Mujtaba and Mohsen's hearings went similarly. [26] IJ Peters ***24** found that the assertions of Castillo and Azimi were unreliable and did not lead to a conclusion that Petitioners did anything more than attend political rallies and a New Years celebration, and that this conduct did not lead to "reasonable grounds to believe" that Petitioners were dangers to the security of the United Sates. E.R. at 423, 441.

On August 20, 2002, IJ Peters granted Petitioners Mostafa, Mohsen, and Mojtaba withholding of removal. E.R. at 404, 425, 442. [27] Like IJ Ipema, IJ Peters found that there were not reasonable grounds to believe that Petitioners were dangers to the national security of the United States, and therefore they were not statutorily precluded from applying for withholding of removal. IJ Peters noted that while Petitioners' names appear on the "LA Cell Form," "no one knows when the document was created or who created it or why it was created." E.R. at 400. [28] ***25** She also noted that Castillo's sole knowledge of the list came from an unnamed cooperating witness, and that "[n]o evidence was presented regarding what specific information the cooperating witness was relying on to reach the conclusion that [Petitioner] is a 'supporter' of the MEK." E.R. at 401. She further noted that there was no evidence that Petitioners "collect money or donate money, to travel to other cities to organize events and demonstrations, to courier individuals, money or other items from place to place, to arrange for false identifications, and to use businesses for money laundering purposes." *Id.* This is all activity, according to Castillo, that "supporters" by definition engage in. She further found that Azimi's testimony that Petitioners were members of the MEK was unreliable, because he testified that he wore a "wire to record conversations 200-300 times" but no transcript was ever introduced evidencing that Petitioners admitted to being members of the MEK, even though Azimi asserted this to be the case. IJ Peters concluded that:

there is no evidence that [the petitioner] engaged in terrorist activities as defined in the statute, no evidence that he was a member of the MEK, and no evidence that he provided support to the MEK. The evidence showed that [petitioner] sympathized with at least some of the views of the MEK, that he attended lawful demonstrations and a new year's celebration. For all of these reasons, the court finds no ***26** reasonable grounds to believe that [petitioner] is a danger to the security of the United States.

E.R. at 403. She further found that Petitioners merited a grant of withholding of removal (and CAT) because of their political activity in opposition to the Iranian government. [29]

The three decisions of IJ Peters and the decision of IJ Ipema was appealed to the BIA and have been pending for over one year, despite the fact that all four Petitioners are detained, and such cases are to be expedited.

The District Court's Habeas Decision

Petitioners filed a petition for writ of habeas corpus with the U.S. District Court for the Central District of California on November 20, 2002, challenging the IJ and BIA denial of bond. Petitioners attached the four grants of withholding of removal and CAT, from IJ Peters and IJ Ipema, to their petitions. They asserted that Petitioners were neither flight risks nor dangers to the community, but exiles from Iran who now had responsible jobs and who, although they were politically active, were not members of the MEK, and had not engaged in any terrorist activity. The petition repeatedly cited the decisions of IJs Ipema and Peters, and their findings that there was no reason to believe that Petitioners were

dangers to ***27** national security, or involved in any activity proscribed under the Immigration and Nationality Act. The petition also cited numerous inconsistencies in Castillo's testimony at Petitioners' joint bond hearing.

The case was assigned to Magistrate Judge Patrick J. Walsh. On January 24, 2003, Respondent filed a motion to dismiss for lack of jurisdiction, asserting that the District Court did not have jurisdiction to review a discretionary bond decision. The parties briefed this issue, and on March 18, 2003, the Magistrate Judge issued an order denying the motion to dismiss.

On May 1, 2003, the Magistrate Judge issued his report and recommendation. The Magistrate, in his report and recommendation, considered both the BIA decision and the immigration judge decision and, like the BIA and IJ, found that Petitioners were not subject to mandatory detention pursuant to 8 U.S.C. § 1226A, INA § 236A (as implemented by the USA PATRIOT ACT).

The court found that the BIA and immigration judge had not committed an abuse of discretion in denying Petitioners' request for release. The Court found that 1) Petitioners were precluded from asserting that the MEK was not a terrorist organization and that due process does not require the availability of such review; 2) Petitioners' ongoing detention without the availability of bond is not unlawful; 3) that the immigration judge's grant of withholding of removal does not require a ***28** finding that they should be released on bond because they are not a danger to the community based on alleged activities with the MEK; 4) that the immigration judge did not abuse her discretion in relying on certain evidence to find that Petitioners were ineligible for bond based on their association with the MEK; 5) the use of hearsay in the bond proceeding did not violate Petitioners' rights; 6) that Petitioners were not entitled to a notice and hearing before their bond was revoked; and 7) that the denial of bond did not violate Petitioners' due process rights. E.R. at 453-460.

The Magistrate Judge did, however, find that the immigration judge had erred in grouping all of Petitioners together and using some evidence against the others. E.R. at 459-60. The court found that there was no evidence at all that all four Petitioners had gone to the MEK headquarters in Los' Angeles, and that only one of the brothers was seen by the agent, and he did not specify which brother he witnessed. However, the court found that this erroneous factual finding did not warrant overturning the immigration judge's decision. *Id.*

The Magistrate Judge ordered that all objections should be made by May 21.2003. On May 15, 2003 Petitioners filed objections, and Respondent filed objections on May 16, 2003. The District Court adopted the report and recommendation of U.S. Magistrate Judge Patrick Walsh on May 19, 2003. E.R. ***29** at 461-464. [30]

On July 15, 2003, Petitioners filed a notice of appeal of the District Court decision. This Court ordered that Petitioners brief be due on September 8, 2003. On August 4, 2003, the Court issued an order consolidating Petitioners' cases. Petitioners subsequently filed a motion for extension of time and on September 10, 2003 the Court ordered that Petitioners opening brief be filed by November 7, 2003.

On September 23, 2003, Petitioners filed a motion for immediate release pursuant to Circuit Rule 27-3. Respondent filed an opposition to that motion on October 6, 2003.

Petitioners now file their opening brief.

VI. *SUMMARY OF ARGUMENT*

Petitioners challenge their continued detention that began on October 2, 2001, less than one month after the events of September 11th. Immigration Judge Sitgraves denied bond for all four Petitioners, finding that Petitioners were ***30** associated with the MEK and, therefore, "a danger to persons or property." E.R. at 170. The basis for this decision was the testimony of an FBI agent, which relied on the allegations of an informant not present in court, that Petitioners

were “supporters” of the MEK, and the submission of the “LA Cell Form,” which the informant stated was an MEK membership list. The IJ's decision was affirmed by the BIA. At the District Court, Petitioners submitted the decisions of two other immigration judges (Peters and Ipema) that found that there was not sufficient evidence in the record to find that Petitioners were associated with the MEK, or that they had engaged in any terrorist activity. The District Court, however, found that Petitioners should not be released from custody because of their alleged affiliation with the MEK.

Petitioners appeal that decision. As discussed below, there was not sufficient evidence in the record to establish that Petitioners were associated with the MEK. Petitioners assert that the “LA Cell Form” was actually a travel log of individuals traveling to a June 20, 1997 protest, and that the form was not accurately translated. They further assert that Agent Castillo's testimony was not reliable because it was based on unreliable witnesses who had a motive to name Petitioners as MEK members, and that Castillo's testimony itself was not credible. Petitioners also assert that the District Court failed to consider evidence presented ***31** questioning the credibility of Castillo, that the court's reliance on the statements of an anonymous informant violated their due process rights, that the Immigration and Nationality Act's prohibition on challenging the MEK as a terrorist organization violates due process, and that Petitioners were deprived of constitutional protections based on the events of September 11th.

VII. *ARGUMENT*

A. THE DISTRICT COURT'S FINDING THAT PETITIONERS WERE SUFFICIENTLY ASSOCIATED WITH THE MEK TO REQUIRE DETENTION WITHOUT BOND WAS CLEARLY ERRONEOUS

The District Court affirmed both the BIA and IJ's denial of bond because of Petitioners alleged associations with the MEK. However there was insufficient evidence in the record to establish that any unlawful “association” existed. The immigration judge concluded, based on the evidence submitted by the Government alleging that Petitioners had ties to the MEK, and the designation of the MEK as a terrorist organization by the State Department:

> I would find that [Petitioners] are a danger to the general public of the United States and potentially, could be potentially a danger to the national security of the United States and its Citizens.

E.R. at 144. As discussed below, the District Court erred in affirming the decision ***32** of IJ Sitgraves, because the record did not support a finding that Petitioners had engaged in terrorist activity or were security threats.

Immigration Judge Sitgraves denied Petitioners' release request based on the sole testimony of Agent Castillo, who presented a piece of paper with Petitioners' names on it, that two immigration judges later concluded to be a “travel log.” He testified that Petitioners were a threat to national security because of “their mere association” with the MEK. E.R. at 67. Finally, he stated that Petitioners were named as members of the MEK by Ben Tabatabai in accordance with Tabatabai's plea agreement. Based on this testimony, IJ Sitgraves concluded that Petitioners were threats to persons and property and therefore denied bond. As discussed below, this conclusion was erroneous when all of the evidence in Petitioners' bond hearing and their withholding hearings is considered in conjunction with Castillo's statements.

. The Testimony of Agent Castillo Did Not Establish That Petitioners Were Associated With the MEK

The immigration judge in the bond case relied exclusively on the testimony of Agent Castillo. However, the evidence from the withholding cases, submitted before the District Court, establishes that the basis for Castillo's assertions was ***33** unreliable and highly questionable. For this reason, the District Court's finding that Petitioners should be denied bond was clearly erroneous ans should be reversed.

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First, the District Court erroneously concluded that "LA Cell Form" was a membership list for the MEK, affirming IJ Sitgraves' decision to the same effect. E.R. at 17. However, Petitioners presented clear evidence that the form was actually a travel log pertaining to a June 20, 1997 Denver rally, which over 1,000 people protested in conjunction with the Denver "Summit of the Eight," the annual economic summit for industrial nations. Petitioners explained in the bond hearing before Judge Sitgraves, before immigration judges Ipema and Peters, and before the District Court that "Khordad 30th, 76", when translated into the western calendar, was "June 20, 1997," the date of the Denver protest. They submitted the Persian calendar converter, the declaration of Dr. Kamrava, and IJ Peters' and Ipema's decisions relying on Dr. Kamrava, to the District Court.

Petitioners also submitted evidence regarding the correct translation of the term "shabakeh". Agent Castillo had stated that the term meant "cell" but Petitioners provided evidence that the correct translation was "network," further calling into question Castillo's conclusion about the document. E.R. at 338. In addition, the third column on the form identifies "Departure [Flight] Time," and ***34** says "Friday 20" and "Thursday 19" under that column. In 1997, the year when Petitioners say the Denver protest took place, June 19, 1997 fell on a Thursday, and June 20, 1997 fell on a Friday. All of these factors supported a finding that the log was a "travel log" for those attending the June 20, 1997 Denver protest, and not an MEK membership list. *See* E.R. at 385, IJ Peters Decision ("Ultimately, it is much more reasonable to conclude that [the "LA Cell Form"] was created to monitor contacts attending an event on June 20, 1997, and then subsequently used to keep track of these contacts, than it is to conclude it is a membership list.").

Additionally, Castillo testified that he identified the list as an MEK membership list by "showing the document to a Government witness who was also a member of the MEK and this Government witness indicated to me that the list ... contain [sic] the names of MEK members, MEK supporters, and MEK associates" and that this witness personally knew Petitioners. E.R. at 86. As discussed below in greater detail, reliance on this alleged anonymous informant violated the requirements of due process because Petitioners had no right to cross-examine the alleged informant. In addition, Castillo testified that the alleged informant was an officer of the MEK, and therefore was able to identify the meaning of the "LA Cell Form." However, Castillo did know why the form was ***35** created or who created the form. E.R. at 400. If this anonymous informant was really that familiar with the workings of the Los Angeles MEK, as an "officer" would be, he would have been able to identify the origin of this form. As IJ Peters noted, "no one knows when the document was created or who created it or why it w as created." E.R. at 400.

Castillo also testified at the bond hearing that Petitioners were all "supporters" of the MEK, and that by definition Petitioners provided financial support, attended meetings, or established other "cells" for the MEK. E.R. at 64. Yet when Castillo testified at Petitioners' hearings on their applications for withholding of removal and CAT, he testified differently, stating that the "FBI determined that Mostafa and Mohamad were MEK supporters, and that the other two brothers were *only* sympathizers." E.R. at 398. Castillo also stated in regard to Petitioner Mohsen Mirmehdi that the "MEK does *not* consider [Petitioner] a member and that according to his [Castillo's] unnamed cooperating witness, [Petitioner] is more accurately described as a sympathizer of the group." E.R. at 420. IJ Sitgraves relied entirely on Castillo's testimony that Petitioners were "supporters," of the MEK and thus provided financial support and "may be violent," carry out missions, and conduct counter-surveillance. E.R. at 58. But Castillo later proved to be an inconsistent and unreliable witness, who ***36** presented no evidence in support of his assertion that Petitioners were *either* supporters or sympathizers. [31]

2. *It was Legal Error for the District Court to Rely on the Testimony of FBI Agent Castillo to Conclude that Petitioners Were a Danger to National Security When Castillo's Testimony Was Based on Unreliable Informants*

Separate and apart from the more fundamental problem that the District Court relied, in part, on out of court hearsay statements not subject to cross-examination by Petitioners to conclude that Petitioners were associated with the MEK,

the District Court erred in relying on these statements for the separate reason that Castillo's testimony was based on unreliable informants.

***37** Castillo's testimony, the basis for IJ Sitgrave's decision, stated that he relied on Ben Tabatabai and the statements of an anonymous informant, who allegedly personally knew Petitioners, to conclude that Petitioners were "associated" with the MEK. E.R. at 253-4. [32]

According to Castillo's testimony at the bond hearing, Tabatabai named Petitioners as members of the MEK as part of his plea agreement. E.R. at 67. Tabatabai was charged with operating a fraudulent asylum application ring and pled guilty to providing material support to the MEK, pursuant to 18 U.S.C. § 2339b. E.R. at 104. Tabatabai clearly had a motive for fabricating Petitioners' association with the MEK. [33] In fact, IJ Ipema further found that Tabatabai's testimony was entirely unreliable. He stated that Tabatabai was a "confessed opium addict" who:

is the leader of the fraud conspiracy and was convicted, in essence of chronically lying and deceiving the INS. He is a convicted felon who, according to his deposition, agreed to testify as part of his plea... As such he is a proven liar, and his participation in these proceedings ***38** is self-motivated. The INS offered Tabatabai as their witness. *But when he was deposed, and when he testified in this Court, his testimony was that he had no knowledge that the [petitioner] was a member of the MEK. The INS spent the rest of its time trying to show that Tabatabai was not credible.*

E.R. at 377.

The INS and FBI also relied on the assistance of their "confidential informant" Azimi to conclude that Petitioners were associated with the MEK. Castillo testified that the INS paid Azimi around $50,000 in the two years he worked undercover with Tabatabai for his "expenses." E.R. at 272. Azimi testified that while working undercover with Tabatabai, he reported to the FBI that Tabatabai told him that Petitioner Mostafa Mirmehdi established a chapter of the MEK in Oklahoma, and that he had had a conversation with Petitioner Mostafa confirming this. E.R. at 308. However, when confronted on cross-examination with a transcript of his statement to the FBI about his conversation with Petitioner Mostafa, Azima admitted that he had only stated to the government that Petitioner was "in Oklahoma and was supporting organization." E.R. at 336. [34]

***39** IJ Ipema found Azimi entirely unreliable as a witness. He noted that in 1984 Azimi was "arrested and charged with kidnaping, battery, and robbing" and was convicted of coercion, and that he was convicted for cheating on gambling in 1995. E.R. at 379. Azimi was given immunity from prosecution from the fraud ring prosecution as a result in his assistance to the FBI. *Id.* IJ Peters also found him totally unreliable. E.R. at 379. She stated that Azimi's testimony that Petitioners were members of the MEK was unreliable, because he testified that he wore a "wire to record conversations 200-300 times" but no transcript was ever introduced evidencing that Petitioners admitted to being members of the MEK, even though Azimi asserted this to be the case. *Id.*

Clearly the underlying basis for Castillo's testimony was more than questionable. Both Tabatabai and Azimi had motives to identify Petitioners as members of the MEK, and upon further questioning it was clear that they could point to no evidence to support a conclusion that Petitioners were in any way associated with the MEK. Thus, the District Court's finding that the IJ's ***40** conclusions that Petitioners were associated with the MEK was not supported by the record and hence was clearly erroneous.

3. *The Only Reliable Evidence of Petitioners' Support of MEK Causes Was Their First Amendment Protected Activity*

As discussed above, the government provided no evidence that Petitioners engaged in any activity that threatened national security or constituted terrorist activity.

The government provided *no evidence* that Petitioners did anything more than attend political rallies. [35] Even if these rallies were sponsored by the NCR, and this Court finds that Petitioners cannot challenge the NCR's designation as an alias of the MEK, Petitioners *still* have not engaged in terrorist activity. There has been no evidence of any material support to the MEK or the NCR--only attendance at rallies. [36]

Petitioners admitted that they attended political rallies sponsored by the ***41** NCR. Attendance at political rallies and political events is *unquestionably* protected by the First Amendment. U.S. CONST. amend I ("Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble..."); *Brandenburg v. Ohio,* 395 U.S. 444, 449 (1969); *CP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460-461 (1958). The ability to organize and voice political dissent is one of the core principles of this country. As IJ Ipema stated in Petitioner Mohammad-Reza' grant of withholding of removal and CAT:

> The INS has offered no evidence that the demonstrations were violent, threatening, or violated the law. There is no evidence that the [Petitioner] violated the law or participated in fund-raising on behalf of the MEK... The fact that the [Petitioner], like thousands of other persons in cities across the United States, participated in demonstrations against the Iranian government is not a reasonable ground to believe hat he is a danger to the security of the United States.

E.R. at 377. [37]

***42** Notwithstanding the clear holding of the Supreme Court, the decisions of the District Court, the BIA, and IJ Sitgraves found that mere "association" or "affiliation" with a group constitutes sufficient grounds to deny release from custody. E.R. at 187 ("[w]e find sufficient evidence in the record that [petitioner] is associated with a terrorist organization, and therefore he poses a danger to persons or property"); E.R. at 188 ("we agree with the Immigration Judge that the [petitioner] is now subject to detention without bond as an individual associated with a terrorist organization."); E.R. at 170 ("although [Petitioners] deny any affiliation with the MEK, the circumstantial evidence submitted by the Service demonstrates the [Petitioners'] ties to the MEK."); E.R. at 460 ("The decision denying bond was premised entirely on the fact that Petitioners were associates of the MEK"). Besides being unconstitutional as a basis for detention, the Petitioners' alleged "association" or "affiliation" is a legally insufficient basis to detain them. This is even more so when such a relationship does not even meet the requirements listed in the inadmissibility grounds enumerated by 8 U.S.C. § 1182(a)(3)(B), INA § 212(a)(3)(B). *See also* E.R. at 381, Decision of IJ Peters ("'Associated' is not a word used in section 212(a)(3)(B) even as amended by the USA Patriot Act.").

43 4. *The District Court Erred in Finding that the IJ's Decision was Not Arbitrary and Capricious

Petitioners, who were never convicted of any criminal offense, must be released from custody, unless the government can demonstrate that they pose a danger to the safety of other persons or property and are unlikely to appear for any scheduled proceeding. *See Matter of Patel,* 15 I. & N. Dec. 666 (BIA 1976) (finding that "[a]n alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security"); *Matter of Vea,* 18 I. & N. Dec. 171 (BIA 1981); *Matter of Adeniji,* Interim Dec. 3417 (BIA 1999). *See also* 8 U.S.C. §1226(a), INA § 236(a). The alien has the burden of proof only when he or she is a criminal alien. *See Matter of Adeniji,* Interim Dec. 3417 (BIA 1999); *Matter of Valdez,* Interim Dec. 3302 (BIA 1997); *Matter of Noble,* Interim Dec. 3301 (BIA 1997); *Matter of Drysdale,* 18 I. & N. Dec. 815 (BIA 1994). The government did not meet this burden, and thus the IJ decision was arbitrary and capricious, and the District Court erred in not reversing the IJ's decision.

Separate and apart from any consideration of the evidence submitted from Petitioners' withholding hearings, the District Court erred in finding that IJ Sitgraves' decision was not arbitrary and capricious. IJ Sitgraves denied ***44** Petitioners' release on two grounds. The first ground was that Petitioners "MEK participation would endanger their own lives and the lives of others in the United States if released on bond." E.R. at 169. The IJ relied on Agent Castillo's testimony that Iranian government agents could "harm the [petitioners'] and in turn harm the general public." *Id.* Based in significant part on this concern over risking American lives, the IJ denied bond.

However, such a consideration was clearly unlawful as it is wholly irrelevant to the assessment of whether *Petitioners* are dangers to the safety of others. IJ Sitgraves found Petitioners' alleged association or affiliation with the MEK rendered Petitioners dangers to the community because the Iranian government could attempt to retaliate against Petitioners and, thereby, endanger the lives of Americans. IJ Sitgraves stated that, "[a]ccording to Agent Castillo, the Iranian government is known to have agents within the United States that could harm the [petitioners] and in turn harm the general public." E.R. at 169. This conclusion is wholly speculative but, more importantly, is a wholly irrational and impermissible consideration. If Petitioners can be detained as dangers to the community because a bystander could be injured due to possible Iranian government attack on Petitioners, then every asylum application with a strong claim could be locked up as a threat to national security because the regime from ***45** which they fled could come after them, and therefore endanger American lives. Clearly this is not what the standard "danger to the safety of others" envisions. Rather, such a determination requires an assessment of whether *the individual* poses a risk to others, not what actions a foreign country may or may not take in retaliation.

The IJ also denied Petitioners' release finding that Petitioners were connected to a Los Angeles MEK cell and that rendered them a danger to others. E.R. at 169. However, on the record before the IJ, this decision was also arbitrary and capricious. There was insufficient evidence presented to show that Petitioners did anything more than attend political activities. Petitioners provided evidence that the "LA Cell Form" presented by the government was no more than a travel log for the June 20, 1997 Denver protest, and they provided thorough evidence that they were responsible members of the community. The government failed to produce its alleged anonymous informant to testify that Petitioners were MEK members or to authenticate the "LA Cell Form." Agent Castillo stated that he observed one brother leaving the MEK safe house, but he failed to identify which of the four it was. There was simply inadequate evidence in the record to render a finding that Petitioners were a danger and warranted a denial of bond, and for that reason the District Court erred in failing to reverse IJ Sitgraves' decision as ***46** arbitrary and capricious.

B. THE DISTRICT COURT ERRED IN FAILING TO CONSIDER PETITIONERS' EVIDENCE FROM THEIR WITHHOLDING OF REMOVAL CASES, EVIDENCING THAT THEY WERE NOT THREATS TO NATIONAL SECURITY

Petitioners submitted IJ Ipema and IJ Peters' decisions to the District Court, as well as much of the evidence that three courts relied on to conclude that Petitioners were *not* dangers to the security of the United States, the precise issue that IJ Sitgraves had ruled on to the contrary. The government also submitted evidence from the removal hearing, including Agent Castillo's testimony (E.R. at 248), Azimi's testimony (E.R. at 296), the deposition ofTabatabai (E.R. at 199), and Petitioner Mostafa Mirmehdi's testimony before IJ Peters. Nonetheless, in its analysis and decision, the District Court addressed only that an immigration judge had found Petitioners were entitled to withholding of removal and that this conflicted with IJ Sitgraves finding that they were security risks. E.R. at 454. However, the court failed to address any of the evidence that was the basis for the withholding decisions despite the fact that it had the evidence before it. Thus, the court erred because its decision was not based on all of the evidence of record. Had the District Court considered all of the evidence, it clearly would have had to find that Castillo's testimony was inconsistent, unpersuasive, and entirely ***47** unreliable.

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C. THE DENIAL OF RELEASE BASED ON STATEMENTS BY AN ANONYMOUS INFORMANT, WITHOUT AFFORDING THE OPPORTUNITY FOR CROSS-EXAMINATION, VIOLATED PETITIONERS' DUE PROCESS RIGHTS

In immigration proceedings, the test for admissibility is whether the hearsay statement is "probative" and whether its admission is "fundamentally fair". *Cunanan v. INS,* 856 F.2d 1373, 1375 (9th Cir. 1988). This test arises out of the requirements of the due process clause. *Id.* In Petitioners' cases, the District Court, BIA, and IJ Sitgraves' decisions all rely on the testimony of Agent Castillo at the December 2001 bond hearing. Castillo stated at this hearing that he relied on an anonymous informant who identified the "LA Cell Form" as being an MEK membership list, and who personally knew Petitioners. E.R. at 51, 86. Petitioners never had the opportunity to cross examine the alleged informant, however, were never informed of the identity of the informant, and the IJ never inquired as to the unavailability of the witness. The consideration of the hearsay assertion without the opportunity to cross-examine was "fundamentally unfair" because the alleged out of court statements formed the basis for IJ Sitgraves' conclusion that Petitioners were MEK members. *See Bridges v. Wixon,* 326 U.S. 135 (1945); *Cunanan v. INS,* 856 F.2d 1373 (9th Cir. 1988); ***48** *Matter of Grijalva,* 19 I. & N. Dec. 713 (BIA 1988). [38]

In *Bridges, supra,* the Supreme Court considered the unsworn statements to an official by a government informant, alleging that petitioner Bridges was a member of the Communist Party. At that time, regulations required that any statements admitted for substantive purposes must be made in person, unless the witness is unavailable (or if used for impeachment purposes). *Id.* at 150. [39] The Supreme Court noted that these regulations were "designed to protect the interests of the alien and to afford him due process of law." *Id.* at 152. The Supreme Court further stated that:

Here the liberty of an individual is at stake. Highly incriminating statements are used against him -- statements which were unsworn and which under the governing regulations are inadmissible. We are dealing here with procedural requirements prescribed for the protection of the alien.... Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

Id. at 154. [40] The Court went on to find that the informant's hearsay statements ***49** could not be used to prove that Bridges was deportable for Communist activity. "On the record before us it is clear that the use of [the informant's] *ex parte* statements was highly prejudicial. Those unsworn statements of [the informant] and the testimony of the officer] were accepted by the Attorney General as showing that Bridges was a member of the Communist Party." *Id.* at 154. The court further stated that:

The issue of membership was too close and too crucial to the case to admit of mere speculation. Since it was error to admit [the informant's] unsworn statements against Bridges, since they were so crucial to the findings of membership, and since that issue was so close, we are unable to say that the order of deportation may be sustained without them.

Id. at 156. *See also American-Arab Anti-Discrimination Committee v. Reno,* 70 F.3d 1045 (9th Cir. 1995) ("governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."); *Rafeedie v. INS,* 880 F.2d 506 (D.C. Cir. 1989) (summary proceeding cannot be used to exclude a LPR where the government relied on confidential information to conclude that he was a terrorist with the Popular Front for the Liberation of Palestine, thereby denying him the ability to cross-examine witness, consider the government's evidence, or otherwise effectively defend himself); ***50** *Kiareldeen v. Ashcroft,* 71 F. Supp. 2d 402 (D. N.J. 1999) *rev'd on other grounds* 273 F.3d 542 (3rd Cir. 2001)) (due process required the ability to cross-examine confidential informants, even in cases involving national security).

In *Cunanan v. INS,* 856 F.2d 1373 (9th Cir. 1988), this Court considered the admissibility of an affidavit by the petitioner's wife which stated that their marriage was a sham. The INS made no reasonable efforts to present the declarant for cross-examination at the hearing. The Court thus found that use of the affidavit as evidence against the petitioner was fundamentally unfair. The Court held that "the government must make a reasonable effort in INS proceedings to afford the alien a reasonable opportunity to confront the witnesses against him or her." 856 F.2d at 1375. *See also Saidane v. INS,* 129 F.3d 1063 (9th Cir. 1997) (holding that a hearsay statement contained in an affidavit was inadmissible where the government failed to make a reasonable effort to present the witness for cross-examination); *Matter of Grijalva,* 19 I. & N. Dec. 713 (BIA 1988) (hearsay evidence is inadmissible in deportation proceedings if the non-citizen can show that its use is fundamentally unfair); *Matter of M-,* 5 I. & N. Dec. 484 (BIA 1953) (requiring testimony and cross-examination to establish an alien's deportability under the Act of 1918 as a "member of the Communist Party of the United States after entry").

***51** Petitioners' due process rights were clearly violated by IJ Sitgraves', the BIA's, and the District Court's reliance on Agent Castillo's testimony regarding the "LA Cell Form" and Petitioners' alleged association with the MEK. Castillo testified that an anonymous informant identified the form as an MEK membership list and Petitioners as associates in some way with the MEK. E.R. at 86. It was on the basis of these allegations that IJ Sitgraves denied bond and the District Court upheld her ruling. The use of the informant's statements was fundamentally unfair and a violation of Petitioners' right under due process of law to confront the evidence against them.

D. INA § 219(a)(8) VIOLATES DUE PROCESS B BECAUSE IT PREVENTS PETITIONERS FROM CHALLENGING THE DESIGNATION OF THE MEK AS A TERRORIST ORGANIZATION

The District Court also erred in finding that due process did not require that Petitioners be afforded the opportunity to challenge the designation of the MEK as a terrorist organization in their removal proceedings. *See U.S. v. Rahmani,* 209 F. Supp. 2d 1045 (C.D. Cal. 2002).[41] The immigration judge found that Petitioners ***52** were "affiliated" with the MEK, and that the MEK had been designated as a terrorist organization since 1997, pursuant to 8 U.S.C. § 1189, INA § 219. E.R. at 170. The immigration judge stated that "[g]iven the U.S. Department of State's designation, the Court finds that the respondents pose a danger to persons and property as a result of their MEK participation." *Id.* The BIA also relied on the designation of the MEK as a terrorist organization, finding that Petitioners' association with the MEK ("a terrorist organization") supported a finding that they were dangers to persons or property. E.R. at 197. The District Court found that Petitioners were precluded from raising a challenge to the designation of MEK as a terrorist organization because the only forum available for such a challenge is the U.S Court of Appeals for the District of Columbia Circuit, and because "Petitioners are precluded from raising their challenges to the MEK's designation in removal proceedings." E.R. at 453.[42]

***53** However, in *U.S. v. Rahmani,* 209 F. Supp. 2d 1045 (C.D. Cal. 2002), the Central District of California, where Petitioners' action arises, held that 8 U.S.C. § 1189(a)(6)(B)(8), INA § 219(a)(6)(B)(8) violates due process because the statute "only provides a right to judicial review to designated foreign terrorist organizations." 209 F. Supp. 2d at 1055. The court held that the statute never gives an individual being charged under that section the right to challenge the underlying designation, and therefore 8 U.S.C. § 1189, INA § 219, is facially unconstitutional. To the extent that Petitioners were unable to challenge the designation of the MEK as a terrorist group, and the designation of the NCRI as an "alias" of the MEK, their right to due process was violated. The District Court erred in holding to the contrary.[43]

*54 E. PETITIONERS' DENIAL OF AN INDIVIDUALIZED BOND HEARING VIOLATED DUE PROCESS

An alien in immigration proceedings is entitled to due process of law under the Fifth Amendment. *Campos-Sanchez v. INS,* 164 F.3d 448 (9th Cir. 1999). Due process requires that an alien is entitled to a full and fair hearing. *Colmenar v. INS,* 210 F.3d 967 (9th Cir. 2000). Due process also requires an individualized determination of an alien's circumstances.

U.S. v. Mendoza-Lopez, 481 U.S. 828 (1987);. *U.S. v. Muro-Inclan,* 249 F.3d 1180, 1184 (9th Cir. 2001); *U.S. v. Proa-Tovar,* 975 F.2d 592, 595 (en *banc*) (9th Cir. 1992); *Paramasamy v. Ashcroft.* 295 F.3d 1047, 1050-51 (9th Cir. 2002).

Petitioners were subjected to a joint bond hearing before IJ Sitgraves, where every bit of evidence submitted was used against all four Petitioners. For instance, agent Castillo testified that only one brother was seen leaving the MEK house (E.R. at 37, 119). Yet the testimony was that one (unidentified) brother was witnessed near the MEK house, was and only two brothers (Mohammad and Michael Mojtaba) attended the Denver June 20, 1997 rally. E.R. at 137. The immigration judge, however, considered the cumulative effect of all of these allegations on each Petitioner, even though the allegations were not specific to each of them. Based on the improper analysis of the evidence, she denied ***55** Petitioners's release from custody, finding that they were *all* associated with MEK. For this reason, Petitioners' due process rights were violated because they did not receive individualized determinations at their bond hearing.

F. PETITIONERS' IMPROPER DEPRIVATION OF THE FULL PROCEDURAL SAFEGUARDS REQUIRED BY DUE PROCESS WAS THE RESULT OF CONCERNS OVER THE EVENTS OF SEPTEMBER 11TH

Petitioners have been in custody for over two years, since their October 2, 2001 arrest, which took place only less than one month after the horrific events of September 11,2001.

IJ Sitgraves considered the events of September 11, 2001 as a dominant factor in denying release. She stated in her decision that the association with the MEK "is further exacerbated by the recent events of the September 11th attacks," but fails at all to explain why. E.R. at 170. This was true even though Petitioners were alleged to have been associated with the MEK, an organization that had absolutely nothing to do with the events of September 11th. She completely deferred to Agent's Castillo's conclusions about Petitioners' MEK activity, without even considering Petitioners' evidence that contradicted his assertions. Neither she, the BIA, nor the District Court even addressed Petitioners' arguments ***56** that due process required the right to cross-examine the alleged anonymous witness on whose alleged allegations Castillo based his conclusions. Petitioners' hearings were conducted under the shadow of "terrorism" and as a result they were deprived of the right to a full and fair hearing.

Petitioners were clearly victims of the fear of terrorism our country experienced after September 11, 2001. As the U.S. Court of Appeals noted in *Detroit Free Press v. Ashcroft,* 303 F.3d 681 (6th Cir. 2002), a case finding that the blanket-closure of "special interest" immigration hearings to the public violated the First Amendment and Due Process:

> No one will ever forget the egregious, deplorable, and despicable terrorist attacks of September 11, 2001. These were cowardly acts. In response, our government launched an extensive investigation into the attacks, future threats, conspiracies, and attempts to come. As part of this effort, immigration laws are prosecuted with increased vigor.

Id. at 682.

The Court went on to note, however, that even though the Government has a compelling interest in preventing terrorism, it is still restrained by the limits of the Constitution:

> Without question, the events of September 11, 2001, left an indelible mark on our nation, but we as a people are united in the wake of the destruction to demonstrate to the world that we are a country deeply committed to preserving the rights and freedoms guaranteed by our democracy.

***57** *Id.* at 711. Petitioners remain in custody because they have not been afforded the procedural protections that are required by the Constitution. Both the BIA and the District Court deferred to IJ Sitgraves' decision without even questioning the basis for Castillo's statements that Petitioners were affiliated with the MEK. This was especially true in the District Court, where Petitioners offered direct evidence that contradicted two of the three witnesses Castillo relied on (Azimi and Tabatabai). Additionally, the District Court did not even consider Petitioners' argument that the Court's reliance on Castillo's testimony, which included the alleged statements of an anonymous informant, violated their right to due process. But the events of September 11th, as horrific as they were, are not a justification to ignore the procedural safeguards required by the Constitution.

IX. *CONCLUSION*

For the foregoing reasons Petitioners respectfully request that this Court sustain their appeal, reverse the decision of the District Court, and order that Petitioners be released from custody on a reasonable bond.

**59 STATEMENT OF RELATED CASES*

Pursuant to Ninth Circuit Rule 28-2.6, Petitioner is aware of the following related case before this Court:

USA v. Rahmani, No. 02-50355

Appendix not available.

Footnotes

1 Petitioner Mohammad-Reza was released in September 2000. E.R. at 156.

2 The NCRI is designated as an "alter ego or alias of the" MEK. *See People's Mojahdin Organization of Iran v. U.S. Dept. of State,* 337 U.S. App. D.C. 106 (D.C. Cir. 1999).

3 The INS has been abolished and replaced by the Department of Homeland Security, pursuant to the "Homeland Security Act of 2002" 107 Pub. L. 296, 116 Stat. 2135 (Nov. 25, 2002). The enforcement arm of the former INS is now the "Bureau of Immigration and Customs Enforcement" and the adjudications arm is now the "Bureau of Citizen and Immigration Services."

4 The government later provided evidence that Tabatabai submitted false asylum applications on Petitioners' behalf, and Petitioners admitted that incorrect information was included in their applications, and many others'. E.R. at 371, 398,413,433. U.S. Immigration Judges Peters and Ipema also later concluded that the entry documents Petitioners used were false.

5 Petitioner Mohammad-Reza testified in support of his request for release at this hearing. He was the only one of the four Petitioners to testify in a bond hearing.

6 When Petitioners were initially arrested, their attorney had only requested release on behalf of Petitioner Mohammad Reza and not on behalf of his three brothers. Thus, Petitioner Mohammad-Reza's bond proceedings, and eventually his removal proceedings, were separate from those of the other three Petitioners.

7 At the December 10, 2001 hearing, Petitioners did not testify, but stated that they would "proffer their testimony." E.R. at 133-4. Petitioners proffered that they had not participated in any MEK, or any other political activity, since their release on bond. E.R. at 134. They further proffered that they were not members or associates of the MEK, nor affiliated with the

MEK. E.R. at 137. They only participated in some demonstrations which, unknown to them, were sponsored by the National Council of Resistance (NCR), and that the MEK was not affiliated with these demonstrations at all. *Id.* Petitioners further proffered that they were not flight risks because they voluntarily presented themselves to INS, made good money as licensed real estate agents, and had committed no crimes. E.R. at 139.

8 Castillo identified this house as the "main base, or headquarters, in the Los Angeles area." E.R. at 37. The form was seized by the FBI on February 27, 2001. Castillo testified that he never saw any of Petitioners near this safe house at on "Marco Place" in Los Angeles, but that at least "one was present" at the former safe house on Ocean View on Santos, California. E.R. at 37, 119.

9 Castillo testified at the bond hearing that there were approximately 60 pages to the "LA Cell Form" list, of which only one was excerpted. E.R. at 102.

10 Castillo testified that this witness personally knew Petitioners. E.R. at 86.

11 astillo stated that the document had been translated by Behrood Sasarshar, and FBI language specialist. E.R. at 54-5. Petitioners proffered that the term "cell" was translated erroneously, and that the correct translation was "network," and that the document was actually a log of people who were invited to participate in a demonstration. E.R. at 136.

12 Petitioners were listed as conditioned in "Prison" on the "LA Cell" document. Castillo testified that he believed the document was created after March 1999, when Petitioners were originally arrested and detained. E.R. at 62.

13 At that demonstration, there were more than 1,000 Iranians demonstrating against the Iranian government. E.R. at 93. In addition, Petitioners presented evidence that U.S. Representative Gary Ackerman spoke at the demonstration. E.R. at 97. Only Petitioners Mohammad and Michael Mojtaba Mirmehdi attended the demonstration. E.R. at 137.

14 The MEK was designated as a terrorist organization in 1997. *See* "Designation of Foreign Terrorist Organizations," 62 Fed. Reg. 2612 (Oct. 8, 1997).

15 Petitioners proffered that Petitioner Mohammad Mirmehdi met Yusef Hamidi while he was incarcerated and that they developed a friendship after living together for a year in detention. They exchanged letters of friendship and the letter had no connection to terrorism whatsoever. E.R. at 135. The envelope was found at Petitioners Mohammad and Mohsen's home. E.R. at 139.

16 Castillo also testified that he believed Petitioners to be a flight risk because they used "false identity documents" and fraudulent asylum applications. E.R. at 70. However, Petitioners submitted that they were responsible business people with significant ties to the community. E.R. at 135-6.

17 Tabatabai encouraged Petitioners to apply for asylum because they had a legitimate claim based on Petitioner Mostafa Mirmehdi's past persecution and imprisonment by the Iranian government. E.R. at 140. Tabatabai, however, failed to file anything until after April 1, 1998, when the one year filing deadline for asylum went into effect. *See* 8 U.S.C. § 1158(a)(2)(B), INA § 208(a)(2)(B). Tabatabai then filed an application without their knowledge and without their consent. E.R. at 140. They never realized that Tabatabai used any fraudulent documents. *Id.*

18 The immigration judge stated that Petitioners were not subject to mandatory detention pursuant to 8 U.S.C. § 1226A, INA § 236A because the government did not receive the proper certification.

19 He based this assertion on the listing of "30 Khordad 1376" which he stated indicated that the list was not a "membership list" because such a list would not "be specific to a particular date." E.R. at 173-4. He stated that the corresponding date for "30 Khordad 1376" was "Friday June 20, 1997." *Id.* Kamrava noted that on that date there was a gathering in Denver of more than 1,000 political exiles from Iran which corresponded to a Denver meeting of the "Summit of the Eight," the annual economic summit for industrial nations. *Id.* A copy of an article from the Denver Post, dated June 21, 1997, described the protest. The NCR sponsored the event to send a message to leaders of the summit not to "do business with Iran." The article quoted U.S. Representative Gary Ackerman stating at the rally:

Tehran's record of terrorism is no secret. Let Denver's Summit of the Eight be united against Iran's tyranny of the wicked ... A free and fair election can only take place when all candidates can out their name on the ballot and not fear for their lives. E.R. at 177.

20 The BIA affirmed the decision of the immigration judge that Petitioners should be detained without bail because of their alleged association with the MEK. The government argued below that the District Court considered the wrong decision in considering the immigration judge's decision, rather than the decisions of the BIA on appeal. The government argued that the BIA held that Petitioners were subject to mandatory detention. However, it is not at all clear that that is what the Board held. At one point the BIA stated that "[i]t appears from this record that [the petitioners] fits within the category of individuals that are subject to mandatory detention under USA PATRIOT ACT amendments." E.R. at 183, 188, 193, 198,. However, in its conclusion, the Board states "we agree with the immigration *judge* that [the petitioner] is now subject to detention without bond as an individual *associated* with a terrorist organization." *Id.* (emphasis added). Due to the fact that the BIA's conclusion stated that it agreed with the immigration judge's conclusion, the District Court properly focused its analysis of the agency's

decision below on the decision of the immigration judge. To the extent the government argues that the Board found Petitioners were subject to mandatory detention, it was mistaken. Although the BIA does say that it "appears" that Petitioners might fall under the mandatory detention provisions of the PATRIOT ACT, this is clearly wrong as the BIA itself states. The only amendments to the PATRIOT ACT regarding the detention provisions of the Immigration and Nationality Act was the addition of 8 U.S.C. § 1226a, INA § 236A. *See* USA PATRIOT § 412. Both the immigration judge and the BIA acknowledge that the bond proceedings were adjourned for the government to attempt to obtain the certification that is *required* under INA § 236A for that section to apply pursuant to 8 U.S.C. § 1226a(a)(3), INA § 236A(a)(3), but "the Service testified that the Attorney General would not at that time certify the [petitioners] under the new law." E.R. at 7. Nor could Petitioners be subject to mandatory detention under 8 U.S.C. § 1226(c)(1)(D), INA § 236(c)(1)(D) because the Board's conclusion that it agreed with the immigration judge that each Petitioner should be detained without bond "as an individual *associated* with a terrorist organization" (E.R. at 183, 187, 192, 197) does not subject an individual to any of the grounds specified under 8 U.S.C. § 1182(a)(3)(B), INA § 212(a)(3)(B). *See* INA § 236(c)(1)(D). The District Court thus rejected the government's arguments in this regard and the government did not raise this issue on appeal to this Court.

In any event, INA § 236(c)(1)(D) could not be applied in this case because in order for mandatory detention to apply, Petitioners would have had to have ben charged with being inadmissible or deportable for terrorist activities. *See e.g. Alvarez-Santos v. INS,* 332 F.3d 1245, 1250-53 (9th Cir. 2003); *Chowdhury v. INS,* 249 F.3d 970, 975 (9th Cir. 2001); *Briseno v. INS,* 192 F.3d 1320, 1322-23 (9th Cir. 1999); *Matter of Joseph I,* 22 I. & N. Dec. 660 (BIA 1999).

In addition, INA § 236(c)(1)(D) only applies to "criminal aliens," and only when "the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." INA § 236(c)(1)(D). If their has been no criminal conviction, then the alien can never be subject to "release."

Finally, if the BIA believed that mandatory detention applied, it was required to remand the case to the immigration judge where Petitioners would have the opportunity to address such a charge, and where the immigration judge would have to determine whether there was a "reason to believe" *Matter of Joseph,* 22 I. & N. Dec. 660 (BIA 1999) that Petitioners were removable or inadmissible under the terrorist grounds. *See also Noriega-Lopez v. Ashcroft,* 335 F.3d 874 (9th Cir. 2003) (BIA does not have the authority to rule on a decision that was not addressed by the immigration judge below); *Campos-Sanchez v. INS,* 164 F.3d 448, 450 (9th Cir. 1999) (BIA may not *sua sponte* address an issue not raised before the IJ without offering the petitioner a chance to address the issues).

21 He denied asylum because Petitioner had filed outside of the one-year filing deadline. *See* 8 U.S.C. § 1158(a)(2)(B), INA § 208(a)(2)(B).

22 IJ Ipema also discredited the statements of Azimi, who "worked for Tabatabai primarily in procuring false documentation to present to the INS." E.R. at 378. IJ Ipema noted that in 1984 Azimi was "arrested and charged with kidnaping, battery, and robbing" and was convicted of coercion, and that he was convicted for cheating on gambling in 1995. *Id.* Azimi was given immunity from prosecution from the fraud ring prosecution as a result in his assistance to the FBI. *Id.* When questioned about Petitioner Mohammad-Reza's MEK membership, Azimi responded that he had no information that he was a member of the MEK, but that Mohammad-Reza was likely a "strong supporter" because he attended a "Persian New Year's Party." E.R. at 379. IJ Ipema found that this retort

lacks logic and substance when it is considered that there are over 600,000 Iranians in Southern California, Persian New Year is the most celebrated of the secular Persian holidays, the party was open to the public, and it was reportedly attended by two members of the United States Congress, and of course, by Azimi himself.

Id.

23 IJ Ipema further stated that the reliance on "an unnamed, unidentified cooperating witness, who has not been shown to be unavailable... is insufficient evidence to indicate that the [petitioner] is a terrorist." E.R. at 384.

24 IJ Ipema stated "[o]bviously, one would not have to be a member of the MEK to attend the rally and voice opposition to the Islamic regime." E.R. at 385.

25 Azimi testified that he believed Petitioner Mostafa founded the MEK in Oklahoma. E.R. at 396. However IJ Peters noted that there was no evidence to substantiate the claim that Petitioner Mostafa was involved in the "start up of an MEK cell chapter in Oklahoma." E.R. at 398.

26 Petitioner Mojtaba also testified about his arrest in Iran in 1981 because he "got caught up in a demonstration in which the participants were opposing the regime and supporting democracy." E.R. at 428. He was taken to prison for three years and was hit, shot at, and threatened with this life. *Id.* After his release, he learned that he had been convicted of "participating in a demonstration." Additionally, he testified that four of his cousins were executed by the Iranian government for being

members of the MEK. He further testified that "he began to stutter while incarcerated and that prior to his incarceration he never stuttered." *Id.*

Petitioner Mohsen testified about his brother Mujtaba's arrest and about his four cousins who were executed because they were members of the MEK. E.R. at 408. He also testified that he attended a demonstration in 1996 in Washington D.C. that was sponsored by NCR, an Iranian New Years Celebration in March 1998 sponsored by NCR, a demonstration in Los Angeles in November 1998 to protest the secret service in Iran, and a demonstration on August 2000 "sponsored by the monarchists to commemorate the anniversary killing and imprisonment of university students." E.R. at 409. He also testified that he denied being a member of the MEK and that he had no contact with the MEK cell in Los Angeles. E.R. at 411.

27 She found them ineligible for asylum because they had not filed within one year of arriving to the U.S. *See* 8 U.S.C. § 1158(a)(2)(B), INA § 208(a)(2)(B).

28 At Petitioner Mohsen Mirmehdi's hearing, a handwriting expert testified that she examined the original "LA cell list" and noted that the original was written in pencil. E.R. at 413. She testified that in her opinion the list was written "by at least four people" *Id.* In part based on this evidence, IJ Peters concluded that the chart was created for the June 20, 1997 event, and that the word "prison" was added after March 16, 1999, when Petitioners were an update. E.R. at 386.

29 This finding was in part based on the publicity that Petitioners had received as MEK supporters since their 2001 arrest. E.R. at 441.

30 Petitioners filed supplemental objections to the report and recommendation on May 21, 2003, the day when the U.S. Magistrate Judge ordered that all objections be filed. However, these objections were not considered by the District Court because the court issued a decision on May 19, 2003, before the deadline stated by the Magistrate Judge.

31 Castillo testified at the bond hearing that there were approximately 60 pages to the "LA Cell Form" list, of which only one was excerpted. E.R. at 102. However, when the original document was reviewed by Dr. Kamrava, he stated that there were approximately 100 pages just like the excerpted "LA Cell Form" that had potentially approximately 900 different names listed. E.R. at 383, Decision of IJ Peters.

More fundamentally, throughout both the testimony of Castillo and the decisions of the Us, the BIA and the District Court, it was asserted variably that Petitioners were "supporters" (E.R. at 78), "sympathizers" (E.R. at 420), "members" (E.R. at 106), "affiliates" (E.R. at 159, 168), participants (E.R. at 169, 170) and "associated with" (E.R. at 79, 80, 183, 188, 459, 460) of the MEK. Yet the conclusion that they were "supporters" was crucial to the IJ's decision. But that conclusion was contradicted many times, as exhibited by the citations above, and thus the District Court's conclusion that Petitioners were a danger to security was clearly erroneous.

32 Castillo testified in Petitioner Mosatafa Mirmehdi's case that this informant was not Azimi, and that the anonymous informant was an officer in the MEK.

33 According to Tabatabai's deposition, his plea agreement required cooperation with the government. E.R. at 210. Tabatabai also was questioned about his relationship with Azimi. He stated that he had been addicted to opium, and that Azimi was a "pothead" and "very low IQ." E.R. at 223-4. He also stated that Azimi robbed a bank, and that Azimi worked with the U.S. Government because the "government of Iran wanted him." E.R. at 225.

34 Castillo also testified that he based his conclusion on Azimi's alleged observations of Petitioners at a New Years party. Azimi also testified about this event at Petitioner Mohammad-Reza's hearing, stating that while he had no information about Mohammad's MEK membership, he believed that Petitioner Mohammad-Reza was likely a "strong supporter" because he attended a "Persian New Year's Party." E.R. at 379. IJ Ipema found that this statement:

lacks logic and substance when it is considered that there are over 600,000 Iranians in Southern California, Persian New Year is the most celebrated of the secular Persian holidays, the party was open to the public, and it was reportedly attended by two members of the United States Congress, and of course, by Azimi himself.

Id.

35 In fact, Petitioners also participated in non-NCR rallies, including nationalist and monarchist rallies. They testified that they were not aligned to any one opinion, but only in support of the Iranian exile community.

36 In fact, the government never even alleged that Petitioners provided material support to a terrorist organization. *See* 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd); INA § 212(a)(3)(B)(iv)(VI)(dd). The "LA Cell Form" list provides no evidence of material support and the INS could not even identify when the list was created.

37 In *Detroit Free Press v. Ashcroft,* 303 F.3d 681, 691 (2002) the U.S. Court of Appeals noted that "[a]lthough the question has never been addressed specifically, there is ample foundation to conclude that the Supreme Court would also recognize that non-citizens enjoy unrestrained First Amendment rights in deportation proceedings." *citing Bridges v. Wixon,* 326 U.S. 135 (1945) (J. Murphy, concurring) (noting that deportees had unqualified First Amendment rights in deportation hearings); *see*

also Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999) (Ginsburg, J., concurring) (recognizing First Amendment restrictions on the political branches' authority over deportation).

38 The District Court failed to address Petitioners' due process arguments, finding only that hearsay is admissible at bond hearings and in immigration proceedings. E.R. at 457.

39 The Supreme Court stated that these regulations were based on procedural due process requirements. Thus, even if the regulations are no longer in effect, the due process requirements still remain.

40 Clearly Petitioners also have a liberty interest in being released from INS custody.

41 The People's Mojahdin Organization of Iran ("MEK") was designated as terrorist organization by the Secretary of State on October, 1997, pursuant to 8 U.S.C. § 1189, INA § 219. *See People's Mojahdin Organization of Iran v. U.S. Dept. of State,* 337 U.S. App. D.C. 106 (D.C. Cir. 1999). On October 8, 1998, the Secretary of State redesignated MEK as a terrorist organization and included the National Council of resistance of Iran ("NCRI") as an "alter ego or alias of the" MEK. Both the NCRI and the MEK challenged this designation in the District of Columbia Court of Appeals, as required by statute. *See* 8 U.S.C. § 1189(b)(1), INA § 219(b)(1). The NCRI challenged the designation of the organization as an alias of the MEK, asserting that it was in fact an independent and non-terrorist organization, and the court remanded the case to the Secretary of State to "afford to the entities under consideration notice that the designation is impending" as required by procedural due process. *Id.* at 209-9. On May 9, 2003, the D.C. Circuit affirmed the redesignation of the MEK, with the NCRI included as an alias. *See People's Mojahdin Organization of Iran v. Dept. of State,* 327 F.3d 1238 (D.C. Cir. 2003).

42 The INA states that once a designation has become effective:

a defendant in a criminal action or an alien in removal proceedings shall not be permitted to raise any question concerning the validity of the issuance of such designation or redesignation as a defense or an objection at any trial or hearing.

8 U.S.C. § 1189(a)(6)(B)(8), INA § 219(a)(6)(B)(8).

43 The ability to challenge the designation of NCRI as an alias of the MEK was vital to Petitioners because the rallies they admitted to attending were solely sponsored by the NCRI, and the MEK had no involvement in them.

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2004 WL 297808 (C.A.9) (Appellate Brief)
United States Court of Appeals,
Ninth Circuit.

Mohammad-Reza MIRMEHDI, et al., Petitioners/Appellants,
v.
John ASHCROFT, Attorney General of the United States, et al., Respondents/Appellees.

Nos. 03-56261, 03-56272, 03-56273 and 03-56274.
January 7, 2004.

APPEALS FROM A DECISION OF A DISTRICT COURT DENYING PETITIONS FOR HABEAS CORPUS

Respondents'/Appellees' Brief

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*1 *STATEMENT OF JURISDICTION*

Mohammad-Reza Mirmehdi, Mostafa Mirmehdi, Mohsen Mirmehdi, and Mojtaba Mirmehdi (Mirmehdis) appealed from a decision of the United States District Court for the Central District of California denying their petitions for habeas corpus, in which they challenged the Attorney General's decision to detain them pending a final decision regarding their removal flora the United States. Excerpts of Record (ER) 465-468. The district court had jurisdiction pursuant to ***2** 28 U.S.C. § 2241. This Court generally has jurisdiction to review the district court's denial of a habeas petition. *See* 28 U.S.C. § 1292. However, because the Mirmehdis are challenging a discretionary decision by the Attorney General to revoke their bond, this Court is foreclosed by section 236(e) from reviewing that decision. *See* 8 U.S.C. § 1226(e)(2002).

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In addition, the district court referred the Mirmehdis' petitions to a magistrate judge for a report and recommendation. The magistrate judge recommended that the district court deny the petitions and gave the Mirmehdis time to file objections. ER 443. The Mirmehdis' filed objections to only some of the magistrate judge's recommendations, leaving others unchallenged. [1] After the time for filing objections expired, the district court approved and adopted the magistrate judge's report and recommendation and denied the Mirmehdis' petitions. ER 461. Where a magistrate judge issues a non-dispositive report and recommendation, where the petitioner was been given an opportunity to file objections to that report and recommendation, and where the district court adopts the magistrate judge's report and recommendation as the court's opinion, the reviewing court of appeals has jurisdiction to review the district court's decision only to the extent that the ***3** petitioner has filed objections. *See* Fed. R. Civ. P. 72(a) ("a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made"); *see also Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1996) ("We... conclude that a party who fails to file timely, objections to a magistrate judge's nondispositive order with the district judge to whom the case is assigned forfeits its fight to appellate review of that order."). As a result, the Mirmehdis forfeited appellate review of those issues the magistrate judge resolved and to which they did not object, limiting this Court's review to the issues to which they did object.

ISSUES

I. Where the Mirmehdis are challenging the Attorney General's discretionary to revoke their bond, is this Court precluded by INA § 236(e) from reviewing that decision?

II. Assuming for the sake of argument that the Court may review the claim, is the Attorney General's discretionary decision to revoke the Mirmehdis' bond neither arbitrary nor capricious where the record contains substantial evidence of a material change in circumstances sufficient to warrant a change in custody status, and where the Mirmehdis did not demonstrate that their release would neither endanger the community nor result in a significant risk of flight?

***4** **III.** Was the admission of hearsay evidence probative where it corroborated the Mirmehdis' link to a foreign terrorist organization, and was its admission fundamentally fair where the Mirmehdis neither objected at the time of the testimony, nor challenged the evidence on cross examination?

IV. Was the immigration judge bound by subsequent non-final decisions of immigration judges whose rulings were based on a different standard?

V. Where the Mirmehdis failed to object to the magistrate judge's recommendation regarding the Mojahedin-E Khalq's (MEK) designation as a foreign terrorist organization, is this Court precluded from addressing that issue and, even if they preserved their right to appeal, is their challenge precluded by law where the statute limits such challenges to the Court of Appeals for the District of Columbia Circuit? VI. Are the Mirmehdis foreclosed from challenging the consolidation of their bond proceedings where they did not raise the issue in their habeas petitions?

VII. Where the record shows that the immigration judge's sole reference to September 11,2001,was made as an example of the tragic collateral consequences to innocent lives caused by international terrorism on domestic soil, does the record dispute the Mirmehdis' contention that September 11,2001, was the ***5** dominant factor in the immigration judge's decision denying their request for custody redetermination?

STATEMENT OF THE CASE

I. *Procedural Facts*

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The Mirmehdis are brothers and citizens of Iran who remained in or entered the United States unlawfully. ER 1-8. They are currently in removal proceedings.[2] The Mirmehdis filed applications for asylum and requested withholding of removal to Iran under section 241(b)(3) of the Immigration and Nationality Act (INA or Act) and the Convention Against Torture.[3]

On April 20, 2002, an immigration judge denied Mohammad-Reza's request for asylum, citing his use of false documentation to enter the United States and his "blatant deceit" against the asylum system. ER 371. The immigration judge ordered Mohammad-Reza removed from the United States "to any country appropriate under section 214(b) of the Act, with the exception of Iran." ER 338. ***6** The immigration judge pointed out that Mohammad-Reza was responsible for the denial of his asylum application "due to his fraud." ER 338.

On August 20, 2002, an immigration judge denied Mohsen's request for asylum, finding he was not credible and rejecting his request for a waiver of the one-year deadline for filing an asylum application. ER 419. The judge ordered Mohsen removed from the United States, but granted his request for withholding of removal to Iran. ER 424-25.

On August 20, 2002, an immigration judge denied Mostafa' claim for asylum, finding that he lied to an INS asylum officer and that he misrepresented himself in immigration court, only confessing his error after the government uncovered his fraudulent conduct. ER 398-400. As a result, the judge denied Mostafa' request for a waiver of the one-year deadline for filing an asylum application and ordered Mostafa removed. ER 404. The immigration judge granted Mostafa's request for withholding of removal to Iran, but ordered him removed to any other country. ER 404.

On August 20, 2002, an immigration judge denied Mojtaba's application for asylum, finding that he misrepresented himself to an INS asylum officer, lied to an immigration judge on material questions relating to the heart of his asylum claim, knowingly presented false documents in court during a hearing, and knowingly filed ***7** a false asylum application in order to obtain a benefit under the INA. ER 437-38. The immigration judge ruled that Mojtaba's testimony was not credible on other material aspects of his claim and denied his request for asylum. ER 438. The immigration judge granted Mojtaba's request for withholding of removal to Iran, but ordered him removed to any other country. ER 442.

The Mirmehdis and the government appealed from the immigration judges' separate decisions. Both the Mirmehdis' and the government's appeals are pending before the Board. As a result, the Mirmehdis do not have final removal orders.

The Mirmehdis were initially released on bond under INA § 236(a) pending the completion of their removal proceedings. *See* 8 U.S.C. § 1226(a) (2002). While those proceeding were pending before the immigration court, the Attorney General received new and material evidence showing that the Mirmehdis were associated with a foreign terrorist organization pursuant, causing the Attorney General to revoke the Mirmehdis' bonds and to return them to custody pending a final decision in their removal proceedings. *See id.* § 1226(b) (2002) ("The Attorney General *at any time may revoke a bond* or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.") (emphasis supplied). When the Mirmehdis sought a custody redetermination, an ***8** immigration judge held a hearing, heard testimony, considered documentary submissions, and, at the conclusion of the hearing, denied their request and ordered them held without bond. ER 155.

II. *Bond Hearing Evidence*

Special agent (SA) Christopher Castillo testified that he was employed by the Federal Bureau of Investigation (FBI), working in Los Angeles in counter-terrorism as a member of the Joint Terrorism Task Force (JTTF). ER 33-35. The JTTF is a joint effort by federal, state, and local agencies organized to combat terrorism and, as part of that effort, SA Castillo he had been investigating the MEK since 1996. ER 33. SA Castillo testified that the MEK maintained terrorist camps in Iraq and enjoyed the military and financial support of Saddam Hussein. ER 83.

SA Castillo became familiar with the Mirmehdis as a result of an ongoing criminal investigation into the MEK's activities and the activities of its members, associates, and supporters. ER 35. It was during the course of this investigation that SA Castillo obtained a document that he identified as representing the structure and makeup of the Los Angeles cell of the MEK. ER 35-36. That document was obtained as part of a search of the MEK headquarters conducted on February 27, 2001. ER 36..

***9** After conducting extensive surveillance of, and sending a witness wearing a body wire to, the targeted address, the JTTF concluded that the address was the headquarters of the MEK, and that the group ran its business and daily activities from that location. ER 36-37. Simultaneous with the execution of the search warrant, the JTTF arrested two or three MEK members, two MEK supporters, and two or three MEK associates. ER 36-37, 56-57. Those arrests culminated in criminal indictments and a criminal case that was known as Operation Eastern Money and Operation Eastern Approach. ER 37.

SA Castillo testified that they seized numerous documents written in Farsi and had to be translated, slowing the JTTF's analysis of the fruits of the search. ER 287-88. In addition, after the search the government's witness received death threats and consequently entered a witness protection program. ER 287. Both of these circumstances impeded the government's discovery of the Mirmehdis' connection to the MEK. ER 287. On September 10, 2001, however, when going through the numerous seized documents, SA Castillo discovered and identified for the immigration judge, a log of MEK members, associates, and supporters, and testified that it contained the Mirmehdis' names. ER 50. A government witness and acknowledged MEK member, confirmed that the list contained the names of MEK members, associates, and supporters, and identified the Mirmehdis as MEK ***10** supporters. ER 50-51. The government witness pled guilty in October 1999 to providing material support to the MEK, a terrorist organization. ER 106.

SA Castillo described the document as showing the actual structure of the Los Angeles cell, including sub unit leaders and the units within the cell. ER 86. Although SA Castillo testified he could not identify the individual who produced the list, he stated that the list was seized at the Los Angeles headquarters of the MEK, where it had been stored with training videos, manuals, books, and other MEK material and paraphanalia produced by the MEK, and that the purpose of the list was corroborated by a government witness, whose testimony was, in turn, corroborated by the other material seized. ER 50-51, SA Castillo also pointed out that the INS had evidence that the Mirmehdis were in communication with another Iranian national, who is currently detained after acknowledging his MEK membership. ER 65.

SA Castillo identified Masshek Salami, one of the other names appearing on the same document, as a known supporter or member of the MEK Los Angeles cell. ER 59. SA Castillo testified that the MEK is a very closed organization whose membership is highly suspicious of its own supporters and associates. ER 66. The fact that the Mirmehdis appeared as part of Salami's cell indicated that they had some level of access to the organization, meaning that they enjoyed greater ***11** trust than other supporters or associates. ER 66. SA Castillo testified that the FBI had arrested and detained as MEK members other people whose names appeared on the list. ER 102. In fact, he stated that "[o]f the top 71 Mujahedin I've arrested, I would say about 60 were on that list." ER 102. The names of six or seven people under indictment for material support of the MEK at the time of the Mirmehdis' hearing were on the list on which the Mirmehdis' names appeared. ER 107-08.

SA Castillo testified that the Farsi date "Khordad 30," which appeared on the document, coincided with a day that many mujahedin took to the streets of Tehran to protest the Iranian regime. ER 60. SA Castillo denied knowing, however, what date 30 Khordad 1976 translated to in the American calendar but believed the document was "a list of individuals that are expected to attend some kind of event or meeting." ER 60, 87. SA Castillo testified that the fact that Khordad 30 was a significant date, whether or not it coincided with a demonstration in Denver that two of the Mirmehdi brothers attended on June 20, 1997. ER 92, 101.

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The demonstration was attended by a thousand mujahedin supporters flying the flag of the National Liberation Army, the violent wing of the MEK. ER 95. SA Castillo, who attended the June 20, 1997, event, testified that the overwhelming majority of MEK supporters physically attacked the small group of attendees who ***12** did not support the MEK. ER 97. SA Castillo also testified that, although the JTTF surveillance did not place the Mirmehdis at the Los Angeles headquarters from which their names were obtained, they were in fact seen at a known MEK "safe house." ER 120.

SA Castillo testified that Behrood Sasarshar, an FBI language specialist, translated from Farsi and explained to him the contents of the Los Angeles cell list. ER 54, 55. Based on Sasarshar's translation and the results of his own investigation, SA Castillo concluded that the Mirmehdis "are part of the Los Angeles MEK cell structure." ER 55. SA Castillo testified that, based on his experience, investigation, and the information available, the JTTF had concluded that while the Mirmehdis were not MEK members, they were MEK supporters. ER 121. SA Castillo described "supporters" as those individuals who provide financial support, carry out physical missions, conduct surveillance, or attend meetings at the direction of the MEK leadership. ER 58.

SA Castillo testified that the Mirmehdis' *current* involvement in the Los Angeles cell was "zero" because they were detained. ER 65. SA Castillo confirmed, however, that between 1992 and March 1999, when they were initially detained on the initiation of their removal proceedings, each of the four brothers provided financial or other functional support to the MEK. ER 63-64. SA Casfillo ***13** described these other functions as being involved in "establishing other cells in the MEK, as was discussed on consensually recorded conversations between individuals involved in their immigration fraud." ER 64.

SA Castillo testified that based on his training, his experience, information from cooperating witnesses, physical surveillance of MEK members, supporters, and associates, interviews with law enforcement officers, witnesses in this and other cases, coupled with discovery of the documents in the MEK headquarters in Los Angeles, and particularly the cell form or list of names including those of the Mirmehdis, he concluded that the list contained the names of MEK members, associates, and supporters, and that it was maintained to facilitate future MEK contact. ER 101. He explained that

> [t]he information from this document was found at the main MEK base in Los Angeles. The information on the form contains the names of MEK members, MEK supporters, and MEK associates. There are many other names or other sheets of paper that were attached to this piece of paper. But these four are the defendants. Therefore, there's new information which was discovered during a review of the evidence seized on February 27, 2001, led us to believe that the four Mirmehdi brothers were either MEK members, MEK supporters, or MEK associates. When we combined this information with our past investigation, which included physical surveillance, electronic surveillance, and witness interviews, I came to the professional conclusion, based on my experience in counter-terrorism investigations, that the four Mirmehdi brothers were either MEK members, MEK supporters, or MEK associates.

***14** ER 56-57. SA Castillo also concluded that "based on the information we have, the Mirmehdi brothers are supporters of the MEK, and [as] supporters of the MEK, as associating with a designated foreign terrorist group organization [,] are a threat to national security and thus a danger to the community." ER 78.

III. *The Immigration Judge's Decision*

The immigration judge concluded that the Mirmehdis were not subject to mandatory detention under INA § 236A. ER 167-68. However, after examining all of the evidence the immigration judge concluded that the government had

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adequately demonstrated material and changed circumstances since the original bond heating to warrant revocation of the Mirmehdis' bond. ER 168. The immigration judge noted specifically the document identified by SA Castillo as the Los Angeles MEK cell form, which the immigration judge concluded showed the Mirmehdis' affiliation with the MEK. ER 168. The immigration judge recognized that the document by itself would not have sufficed, but ruled that the totality, of the circumstances demonstrated that the Mirmehdis would pose a danger to persons or property if released. ER 168. The immigration judge emphasized SA Castillo's testimony regarding the identification of the Mirmehdis as MEK supporters by a government witness; the fact that the document containing the Mirmehdis' names along with other MEK members, associates, and supporters was found in the Los ***15** Angeles headquarters of the MEK; that the documents seized contained the names of sixty individuals who had been arrested and charged with being MEK supporters. ER 168. The immigration judge also acknowledged that she had previously rejected as insufficient the government's testimony that the Mirmehdis had attended a lawful demonstration against the Iranian government, but concluded that their participation had taken on a different significance in light of the discovery of their name on a document listing MEK members, associates, and supporters from its headquarters, and SA Castillo's testimony that very few of the rally participants were not at least MEK supporters. ER 168-69. The immigration judge concluded that such evidence undermined the Mirmedhis' claim that they were simply innocent participants. ER 169. The immigration judge also credited SA Castillo's testimony regarding the corroboration of the Mirmehdis' MEK support by a government witness. ER 169. The immigration judge found that the Miremhdis' communication with Yousef Hamidi, an acknowledged MEK member, was likewise significant, pointing out that the Board had concluded that Hamidi was a threat to national security as a.result of his MEK participation. ER 169.

The immigration judge pointed out that the Iranian government, which maintains agents within the United States, likely knows of the Mirmehdis' MEK support, and, citing the events of September 11, 2001, remarked on the possibility ***16** of collateral injury to the innocent public in the event of a confrontation. ER 169 70. The immigration judge concluded that the Mirmehdis posed a danger to persons and property as a result of their MEK participation. ER 169-70.

The immigration judge also found that the Mirmehdis were a significant flight risk, pointing out their lack of family ties within the United States. ER 170. In this regard, the immigration judge also noted that the Mirmehdis had admitted filing fraudulent asylum applications and obtaining fraudulent identification, indicating a desire to obviate the legal process governing immigration. ER 170. The immigration judge ruled that, when examined together, the facts demonstrated a significant flight risk. ER 170.

The immigration judge ruled that the government's evidence showed material and changed circumstances mitigating against a release on bond. ER 170 (citing *Matter of Patel*, 19 I. & N. Dec. 774 (BIA 1988) (a sequence of events may be used as probative evidence); *Matter of Luis-Rodriguez*, Int. Dec. 3395 (BIA 1999) (noting that the court could rely on circumstantial evidence). The immigration judge denied the Mirmehdis' request for bond redetermination.

The Mirmehdis appealed to the Board of Immigration Appeals. While that appeal was pending, the Mirmehdis submitted post-hearing evidence in the form of ***17** an affidavit, excerpts of a Farsi/English dictionary, and a newspaper article. ER 172-177.

IV. *Post-Hearing Evidence*

After the immigration judge issued her decision denying their motions for reconsideration of their custody, the Mirmehdis introduced an affidavit of Mehran Kamrava, PhD. ER 172. Dr. Kamrava claimed an expertise in Middle Eastern Studies and Iran. ER 172. Dr. Kamrava is fluent in Farsi, authored a single article in Farsi, and claimed to translate documents from Farsi to English on a routine basis. ER 172. Dr. Kamrava stated that the document submitted by the INS as the Los Angeles cell form "appear[ed]... to be a travel log of some sort," but Dr. Kamrava conceded that he could "not speak with certainty as to whether or not this is indeed a list of supporters or members of the Mujahedeen-e Khalq Oganization

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of Iran (MEK)." ER 173. Dr. Kamrava also stated that he "believe[d]" that translation of the Farsi word "shabakeh" as "cell" was inaccurate. ER 173.

V. *Board of Appeals' Decision Dismissing Mirmehdis' Appeal*

The Board concluded that the INS had met its burden of demonstrating a material change in the Mirmehdis' circumstances to warrant a change in their custody status. ER 183 (citing *Matter of Sugay*, 17 I. & N. Dec. 637 (BIA 1981), which found that following a bond redetermination, a change in circumstances may ***18** justify a modification of an immigration judge's bond order). Having found that INS met its burden, the Board pointed out that the Mirmehdis had the burden to demonstrate that their release would not pose a danger to property or persons and that their are likely to appear for future hearings. ER 183 (citing 8 C.F.R. 236.1(c)(8); *Matter of Adenfi*, 22 I. & N. Dec. 1102 (BIA 1999)). The Board found sufficient evidence to conclude that the Mirmehdis were associated with a terrorist organization and that they, therefore, posed a danger to persons or property. ER 183.

The Board also concluded that enactment of the USA PATRIOT Act expanded the category of aliens who are subject to mandatory detention under INA § 236(c)(1)(D), as inadmissible under section 212(a)(3)(B) or removable under section 237(A)(4)(B). ER 183. The Board concluded that the Mirmehdis fell within the category of aliens subject to mandatory detention under INA § 236(c)(1)(D) because it was not necessary that an alien be charged with or found removable on the basis of the ground making him subject to mandatory detention, but only that the alien was described in those provisions, and that the Mirmehdis fit that description. ER 183 (citing *Matter of Melo-Pena*, 21 I. & N. Dec. 883 (BIA 1997), that found the phrase "is deportable" did not require an alien to be charged with deportability as an aggravated felon before the presumption in the bond ***19** provision applied). The Board concluded by holding that, in light of the new evidence the INS presented and the statutory changes enacted by Congress since the Mirmehdis' previous release on bond, the Mirmehdis were subject to mandatory detention without bond as individuals associated with a terrorist organization. ER 183. The Board affirmed the immigration judge's decision and dismissed Mirmehdis' appeal. ER 183.

VI. *Mirmehdis' Petition for Habeas Corpus* [4]

The Mirmehdis petitioned the United States District Court for the Central District of California for a writ of habeas corpus, challenging their detention. In six separate causes of action, the Mirmehdis alleged that (1) the revocation of their bond without notice or an opportunity to be heard violated due process, *see* Petition for Habeas Corpus at 54; (2) that the admission of hearsay evidence violated due process, *see id.* at 54-55; (3) that the failure to set a reasonable bond violated INA §§ 1101, et seq., and its implementing regulations, and violated due process and equal protection guarantees, *see id.* at 55; (4) conditioning their release on cooperation with the government violated INA §§ 1101, et seq., due process, and equal protection guarantees, *see id.* at 56; (5) their detention was based on the ***20** events of September 11, 2001, *see id.* at 56; (6) that the agency applied policies, procedures, and standards that were not applied to similarly situated persons, and that this violated Equal Protection, *see id.* at 57.

VII. *The Magistrate Judge's Recommendation that the District Court Dismiss the Petitions*

After a lengthy discussion of the facts underlying his recommendation, the magistrate judge ruled that the Attorney General did not abuse his discretion when he denied Mirmehdis' application for bond redetermination. *See* ER 446. The magistrate judge concluded that (1) the court did not have jurisdiction to reconsider the designation of the MEK as a foreign terrorist organization because "Congress has selected the United States Court of Appeals for the District of Columbia Circuit as the only forum for challenges to the Foreign Terrorist Organizations," *see* ER 452-53 (citing 8 U.S.C. §§ 1189 (a)(8), (b)); (2) the Mirmehdis' detention did not violate 8 U.S.C. §§ 1231(a)(2) and (a)(6) or the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), because those sections (and *Zadvydas*) only govern the detention of aliens who, unlike the Mirmehdis, have final removal orders and whose removal is unlikely in the foreseeable future,

ER 454; (3) the immigration judge was not bound by the decisions of two other immigration judges in the substantive proceedings, ER 454; (4) the key INS document was translated ***21** by a language expert who concluded that the Farsi word "shabakeh" was interpreted as "cell," and SA Castillo's testimony regarding the Farsi date, "Khordad 30th, 76" had little, if any, effect on the immigration judge's decision, ER 455-56; (5) hearsay is admissible in immigration proceedings and the immigration judge did not abuse her discretion when she considered the INS's evidence, ER 456-57 (citing *Saidane v. INS*, 129 F.3d 1063, 1065 (9th Cir. 1997)); (6) the immigration judge's conclusion that the Mirmehdis were MEK supporters was neither an abuse of discretion nor a denial of due process, ER 457; (7) the revocation of the Mirmehdis' bond without notice or a pre-revocation hearing did not violate due process, ER 457-58; (8) the immigration judge did not rely on the government's offer to release the Mirmehdis in exchange for their cooperation, and even is she had, the immigration judge found no authority precluding the government from conditioning release on cooperation, ER 458-59; (9) nothing in the immigration judge's reference to September 11, 2001, indicated that those events played any part in her decision, ER 459; and (10) bond decisions are individual, fact specific decisions, precluding the Mirmehdis' claim that their continued detention violated equal protection, ER 459. The magistrate judge rejected as clearly erroneous the immigration judge's conclusion that all of the ***22** petitioners visited one of the MEK "safe houses" in Los Angeles, but concluded that it did not affect the immigration judge's ultimate decision. ER 459-60.

VIII. *Mirmehdis' Objections to the Magistrate Judge's Report and Recommendation*

The Mirmehdis filed objections to the magistrate judge's report and recommendation in which they singled out specific issues, ignoring other issues - and thus waiving their objections to and forfeiting the appeal of those issues to which they did not raise objections. The Mirmehdis took issue with the immigration judge's determination that they were "associates" of the MEK; they complained that the immigration judge's ruling was based on hearsay, and that their continued detention was a result of the events of September 11,2001. *See* Petitioner's Objection to Magistrate Judge's Report at 2-3. In supplementary objections, the Mirmehdis argued that the magistrate judge's report and recommendation failed to consider arguments that the bond hearing violated the Mirmehdis' rights by relying on 8 C.F.R. § 236(a) rather than INA § 236. *See* Petitioner's Supplemental Objections to Report and Recommendation of United States Magistrate Judge at 2. The Mirmehdis also argued that the magistrate judge failed to consider their challenge to the retroactive application of the USA ***23** PATRIOT Act of 2001, and that he did not address the fact that the Mirmehdis did not visit Oklahoma. *Id.* at 3.

STANDARD OF REVIEW

This Court reviews de novo a district court's denial of a petition for habeas corpus to the extent a petitioner filed timely objections to the report and recommendation of a magistrate judge. *See Singh v. Reno*, 113 F.3d 1512, 1513 (9th Cir. 1997) (citing *Chen v. INS*, 95 F.3d 801, 804 (9th Cir. 1996)). The reviewing court conducts the same inquiry as did the district court, which includes reviewing the underlying factual findings. *Id.* (citing *Chavez-Ramirez v. INS*, 792 F.2d 932, 934-35 (9th Cir. 1986)). While conclusions of law are reviewed de novo, an administrative agency's findings of fact are conclusive "unless any reasonable adjudicator would be compelled to conclude to the contrary." *See* 8 U.S.C. § 1252(b)(4)(B); *see also INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *Aruta v. INS*, 80 F.3d 1389, 1392 (9th Cir. 1996). To determine whether a reasonable person would have been compelled to reach a contrary conclusion, a Court reviews the record to determine whether the facts found are supported by substantial evidence. *Elias-Zacarias*, 502 U.S. at 481. Review for substantial evidence is extremely deferential to the administrative decision. *Prasad v. INS*, 47 F.3d 336, 338-39 (9th Cir. 1995) (post-*Elias-Zacarias* clarification of substantial evidence ***24** review). Before this Court can reverse, it has to find that the evidence the petitioner presented was so compelling that no reasonable fact-finder could have rejected it. *See Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997). A court cannot reverse simply because it would have decided the case differently. *Yadegar-Sargis v. INS*, 297 F.3d 596, 601 (7th Cir. 2002).

SUMMARY OF THE ARGUMENT

The Attorney General's discretionary decision to revoke bond and to detain an alien pending a final removal order is not subject to judicial review. The Mirmehdis cloak their challenge in constitutional terms, but even a cursory review of their arguments demonstrate that they are challenging the Attorney General's ultimate exercise of discretion in denying a bond redetermination, and thus are attacking the discretionary basis of his decision. Accordingly, the Court must affirm the denial of their habeas corpus petition.

Even assuming for the sake of argument that the Attorney General's decision were subject to judicial review, however, because the Mirmehdis appealed the immigration judge's decision to the Board, which dismissed their appeal in an independently-reasoned decision, the Court should review the Board's, and not the immigration judge's, decision. The Mirmehdis habeas corpus petitions challenging the immigration judge's decision were, at best, premature, and are fatally flawed for ***25** failure to exhaust administrative remedies. The Mirmehdis compounded that error by ignoring the Board's decision in their brief to this Court. Although the magistrate judge in the first instance, and the district court in adopting the report and recommendation, reviewed at length the immigration judge's decision and not the Board's, this Court may affirm the district court's denial of habeas corpus relief on any ground fairly presented by the record that, as a matter of law, sustains the judgment. Because the Mirmehdis' attack on the immigration judge's decision was premature and must therefore be rejected, the district court's action should be affirmed.

Although the Board did its own review of the record, it also adopted the immigration judge's decision, and hence the reasons for denying habeas corpus relief articulated by the magistrate judge's report and recommendation and adopted by the district court can be sufficient to show that those issues preserved by the Mirmehdis were decided without error by the lower court. Issues not timely preserved in a challenge to the report and recommendation, however, are waived. The Board concluded that the INS had met its burden of demonstrating a material change in the Mirmehdis' circumstances that warranted a change in their custody status. Because the government met its burden, the Mirmehdis had the burden to demonstrate that their release would not pose a danger to property or persons and ***26** that they were likely to appear for future hearings. The record evidence supports the Board's determination that they failed to carry that burden. The Board, therefore, properly declined to reconsider the Attorney General's custody decision. The Mirmehdis did not challenge that decision. The district court, therefore properly denied the habeas corpus petition. In any event, even if the Mirmehdis had challenged that decision, it is both supported by substantial record evidence and consistent with the law, and thus it was neither arbitrary nor capricious. The Court should therefore affirm the district court's decision denying the Mirmehdis' habeas petitions.

The Mirmehdis' objection to the agency's reliance on hearsay evidence should be rejected. Administrative proceedings are not bound by the strict rules of evidence, and, therefore, hearsay evidence is not necessarily excluded. The proper test asks whether the evidence was probative and whether its admission was fundamentally fair. SA Castillo's hearsay reference to corroboration provided by a government witness was probative. Despite the opportunity to object to SA Castillo's testimony and to challenge it on cross examination, the Mirmehdis did neither. Due process requires only an opportunity to be heard. Because the Mirmehdis had but declined the opportunity to challenge SA Casfillo's testimony and the hearsay evidence it contained, the district court's decision that the ***27** immigration judge did not violate due process in allowing SA Castillo's testimony, must be affirmed.

The Mirmehdis also argue that the immigration judge was bound by a subsequent non-final decision on the merits of the Mirmehdis' asylum claims decided by another immigration judge who heard different evidence and who adjudicated claims involving different standards of proof. Their argument is incorrect. No such restrictions are found in any statute, regulation, or rule of law.

Because the Mirmehdis did not object to the magistrate judge's recommendation that the court lacked jurisdiction to review the MEK's designation as a foreign terrorist organization they have forfeited appellate review of that issue. Even

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if they had preserved their tight to appeal on that issue, Congress vested sole jurisdiction to review such designations in the Court of Appeal for the District of Columbia Circuit. Therefore, the magistrate judge's conclusion that the district court lacked subject-matter jurisdiction to address the Mirmehdis' challenge was correct as a matter of law.

The Mirmehdis did not contest the consolidation of their bond heating in their habeas corpus petitions. Nor did they raise the issue in their objections to the magistrate judge's report and recommendation. For the first time they now argue in their brief to this Court that the consolidation of their bond heatings into one ***28** proceeding violated due process. Because the Mirmehdis did not present this issue to the district court, they cannot raise it for the first time on appeal, and this Court must dismiss the claim.

Finally, the Mirmehdis quote the immigration judge out of context to argue that she considered the events of September 11, 2001, as the dominant factor in denying their release. Viewed in context, the immigration judge's sole reference to September 11, 2001, contradicts the Mirmehdis' assertion, demonstrating that the immigration judge simply pointed to September 11, 2001, as an example of the tragic collateral consequences to innocent lives caused by international terrorism on domestic soil. Nothing in the record supports the Mirmehdis' contention that the immigration judge relied either solely or tangentially on September 11,2001, in concluding that the INS had met its burden of demonstrating a material change in the Mirmehdis' circumstances to warrant a change in their custody status.

ARGUMENT

THE COURT LACKS JURISDICTION TO REVIEW THE ATTORNEY GENERAL'S DISCRETIONARY DECISION TO DETAIN AN ALLEN UNDER 8 U.S.C. § 1226

The Miremhdis were detained under INA § 236(a), which gives the Attorney General the authority to detain an arrested alien, or to release an alien on bond or parole. *See* 8 U.S.C. § 1226(a) (2002). In circumstances where an alien is released ***29** on bond or parole, the statute gives the Attorney General authority to revoke that bond or parole "at any time," and to "re [-]arrest the alien under the original warrant, and detain the alien." *Id.* § 1226(b). Finally, the statute not only specifically precludes judicial review of the Attorney General's discretionary detention decision under section 236, it precludes any court from setting aside any such decision by the Attorney General made pursuant to that section:

> (e) JUDICIAL REVIEW. - The Attorney General's discretionary judgment regarding the application of this section shall not be subject to judicial review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

Id. § 1226(e). This Court is precluded by INA § 236(e) from reviewing the Attorney General's discretionary decision to deny bond redetermination to the Mirmehdis and from setting aside that decision.

The Supreme Court recently concluded that, notwithstanding the review preclusion of section 236(e), a court could nonetheless grant habeas relief to an alien detained under the provisions of section 236 where the alien challenged the constitutionality of his detention. *See Demote v. Kim*, 538 U.S. 510, ___, 123 S. Ct. 1708, 1714 (2003) ("But respondent does not challenge a 'discretionary judgment' by the Attorney General or a 'decision' that the Attorney General has ***30** made regarding his detention or release. Rather respondent challenges the statutory framework that permits his detention without bail."). While the Mirmehdis frame their challenge in constitutional terms in an attempt to avoid the preclusive effect of section 236(e), their arguments demonstrate that they are attacking the Attorney General's discretionary decision

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to revoke their bond based on a change in material circumstances. Therefore, INA § 236(e) precludes any court from setting aside that decision.

Even assuming that section 236(e) does not bar review of the Mirmehdis' claims in habeas, *see Kim*, 123 S. Ct. at 1714 (suggesting but not holding that habeas claims may survive the review preclusion of section 236(e)), it is clear from precedent in this Court and the Supreme Court that judicial review of the Attorney General's discretionary decisions is outside the scope of immigration-related habeas corpus review authority. *See Singh v. Ashcroft*, 351 F.3d 435,439 (9th Cir. 2003) ("The scope of habeas jurisdiction under 28 U.S.C. § 2241 is limited to claims that allege constitutional or statutory error in the removal process.") (citing *Gutierrez-Chavez v. INS*, 298 F.3d 824, 829-30 (9th Cir. 2002)); *Gutierrez-Chavez*, 298 F.3d at 828 ("But habeas is not available to claim that the INS simply came to an unwise, yet lawful, conclusion when it did exercise its discretion."); *see generally INS v. St. Cyr*, 533 U.S. 289, 306 (2001).

***31** It is not enough that the Mirmehdis simply allege due process violations by the Attorney General in the exercise of his Congressionally-granted discretion. *See Sanchez-Cruz v. INS*, 255 F.3d 775, 779 (9th Cir. 2001) ("abuse of discretion claims recast as due process violations do not constitute colorable due process claims over which we may exercise jurisdiction"). Although the Mirmehdis have made numerous claims of constitutional deprivation, as explained herein, many were not raised as objections to the magistrate judge's report and recommendation and are thus barred from this Court's review and others do not rise to constitutional levels but merely take issue with the weight given certain evidence by the Attorney General or with the materiality of evidence submitted and relied on. The Mirmehdis had ample opportunity to challenge the evidence of changed conditions that was presented by the INS in support of its burden to justify denial of bond. *See id.* ("The Due Process Clause requires that aliens ... are provided the right to 'a full and fair hearing.' ") (quoting *Getachew v. INS*, 25 F.3d 841, 845 (9th Cir. 1994)). Hence, the claims here are challenges to the Attorney General's exercise of the discretion granted by Congress in section 236(a), are therefore outside the scope of habeas corpus review, and should be dismissed.

**32 IF THE ATTORNEY GENERAL'S DECISION IS SUBJECT TO REVIEW THE COURT MUST REVIEW THE BOARD'S, NOT THE IMMIGRATION JUDGE'S, DECISION*

The Mirmehdis appealed the immigration judge's decision to the Board of Immigration Appeals, which dismissed their appeal in an independently-reasoned decision. Therefore, if the Court concludes that it has subject-matter jurisdiction to review the Attorney General's discretionary decision to revoke the Mirmehdis' bond, it must review the Board's, and not the immigration judge's, decision. *See, e.g., Lopez-Urenda v. Ashcroft*, 345 F.3d 788, 791 (9th Cir. 2003) ("Our review is limited to the BIA's decision because the BIA reviewed the IJ's decision de novo.") (citing *See Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002)).

In their habeas petitions, the Mirmehdis ignored the Board's dismissal of their appeals and instead attacked the immigration judge's decision. The Mirmehdis compound that error by completely ignoring the Board's decision in their opening brief to this Court. Even if this Court had jurisdiction to review the Board's decision, the Court should dismiss the Mirmehdis' appeal because it challenges a decision that was not the final agency decision.

**33 THE ADMINISTRATIVE DECISION TO DENY THE MIRMEHDIS' REQUEST FOR BOND REDETERMINATION WAS BASED ON A PERMISSIBLE INTERPRETATION OF THE EVIDENCE, WAS NOT AN ABUSE OF DISCRETION, AND DID NOT VIOLATE DUE PROCESS*

Ignoring the Board's intervening decision, the Mirmehdis challenge the immigration judge's decision as arbitrary and capricious. The consequence of the Mirrnehdis refusal to acknowledge the Board's decision results in their failing to challenge the basis for that decision. Moreover, it is not only the procedural premise of their argument that suffers. The Mirmehdis ignore material evidence and rely on other evidence that was not available to the immigration judge to

challenge her decision as arbitrary and capricious in an argument whose main refrain consists of their complaint that the immigration judge interpreted the evidence in a different manner than the Mirmehdis themselves. *See, e.g., Shirazi-Parsa v. INS*, 14 F.3d 1424, 1427 (9th Cir. 1994) (court cannot reverse simply because it disagrees with the administrative fact finder's evaluation of the facts). Even crediting such arguments, however, serious gaps in their logic requires the Court to affirm the district court's decision dismissing their habeas petitions.

*34 I. *The Board Concluded That The Attorney General Demonstrated a Change in Circumstances to Warrant a Change in Custody and the Mirmehdis Did Not Demonstrate Release Would Not Endanger Persons and Property*

After a detailed discussion of the facts on which it based its decision, including SA Castillo's testimony regarding his extensive investigation and knowledge of the MEK, corroboration provided by a government witness, the Mirmehdis' acknowledged communication with an admitted MEK member, combined with a document bearing the Mirmehdis' names that was found in the Los Angeles headquarters of a group that has been repeatedly designated by the Secretary of State as a foreign terrorist organization, the Board concluded that the evidence was sufficient to demonstrate a material change in the Mirmehdis' circumstances warranting a change in their custody status. *See* ER 180-83 (citing *Matter of Sugay*, 17 I. & N. Dec. 637 (BIA 1981) (finding that following a bond redetermination, a change in circumstances may justify a modification of an immigration judge's bond order)). The Board also ruled that once the INS had met its burden that the burden shifted to the Mirmehdis' to show that their release would not pose a danger to property or persons. ER 183. Based on evidence of their support of the MEK, the Board determined that the Mirmehdis had not met that burden.

***35** The Mirmehdis do not challenge this aspect of the Board's decision, but instead take issue with the Board's alternative conclusion that the Mirmehdis were also subject to mandatory detention undér INA § 236(c)(1)(D), requiring the detention of an alien who is inadmissible under INA § 212(a)(3)(B) or removable under section 237(a)(4)(B). [5] *See* ER 183. Thus, even if this Court were to conclude that the evidence does not sustain the Mirmehdis' mandatory detention, because the Mirmehdis have never challenged the discretionary aspect of the Board's decision, this Court must affirm that conclusion and dismiss the Mirmehdis' petition.

II. *The Denial of the Mirmehdis' Request for a Custody Redetermination Was Not Arbitrary and Capricious Simply Because the Facts Might Have Been Interpreted Differently*

The Mirmehdis argue that the district court should have rejected the agency's factual finding that the “LA Cell Form” was a membership list for the MEK because (1) “they presented clear evidence that the ‘cell form’ form was actually a travel log pertaining to a Denver rally”; (2) they explained that “Khordad 30th, 76” coincided with June 20, 1997, the date of the Denver rally; and (3) they submitted evidence that the Farsi word “shabakeh” meant network, and not cell. *See* ***36** Petitioners' Brief at 33. The Mirmehdis claim that the only evidence linking them to the MEK was the attendance by two of the brothers at a Denver rally on June 20, 1997, and that therefore the decision to detain them was arbitrary and capricious. The Mirmehdis' arguments are flawed.

First, in challenging only the immigration judge's decision, the Mirmehdis rely on evidence they did not submit until after the close of the hearing, and which the immigration judge was not privy. Second, although the Mirmehdis argue that that evidence - Dr. Kamrava's affidavit - was “clear” evidence that the disputed form was “essentially a travel log,” Dr. Kamrava was not so “clear” in his opinion, where he stated only that the document “appear[ed] ... to be a travel log of some sort,” and conceded that he could “not speak with certainty as to whether or not this is indeed a list of supporters or members of the Mujahedeen-e Khalq Organization of Iran (MEK).” AR 49. Dr. Kamrava was no more certain in his statement regarding the proper translation of the Farsi work “shabakeh,” stating only that he “believe[d]” translating it as “cell” was inaccurate. AR 49.

Third, and most importantly, even if the court accepted the Mirmehdis' untimely evidence as tree, they cannot explain how either describing the document as a travel log or translating "shabakeh" as network would have changed the outcome of their case. Indeed, logic suggests it would not. For example, even if ***37** the document on which SA Castillo relied to demonstrate the Mirmehdis' support of the MEK was "essentially a travel Iog," it was nevertheless maintained in, and seized from, the Los Angeles headquarters of a foreign terrorist organization. The Mirmehdis do not explain why or how the MEK would have accumulated and maintained a travel log of individuals who were not affiliated with their organization. If indeed the document were a travel log, it is more likely that the MEK used a previously compiled list of its members, associates, and supporters to encourage and to determine which of its members, associates, and supporters would be attending the June 20, 1997, event.

The fact that the document might have been a travel log was not mutually exclusive of the fact that it was also a compilation of the MEK Los Angeles members, associates, and supporters. Indeed, that is the logical conclusion. The list was found in the headquarters of the Los Angeles office of the MEK among its business papers, a fact the Mirmehdis do not address. SA Casfillo testified that the document bore notations demonstrating the level of the different individuals' affiliations - thus the Mirmehdis were listed as "S 1," which SA Castillo testified identified them as supporters. SA Castillo also testified that his lengthy investigation of and experience with the MEK had demonstrated to him that the organization was very suspicious, even of its own affiliates. Such a trait is ***38** inconsistent with the MEK having maintained a travel log of individuals who were not otherwise members, associates, or supporters. The Mirmehdis do not explain why the MEK would have solicited and kept a list of outsiders to attend a public event. Thus, even if the contested document was created to monitor contacts attending the June 20, 1997, rally, as the Mirmehdis argue, *see* Petitioners' Brief at 21, that fact does not preclude a finding that the individuals whose attendance at the rally the MEK was monitoring were its members, associates, and supporters, including the Mirmehdi brothers. Hence, the factual determinations challenged by the Mirmehdis were not arbitrary or capricious, but are in fact supported by substantial record evidence.

The Mirmehdis also complain that the government misinterpreted the Farsi word "shabakeh" as cell, when, the argue, it actually should have been translated as network. Again, the Mirmehdis argue a distinction without a meaningful difference. Words often become a term of art in a specific context in one language such that a direct translation is difficult if not impossible. For example, while English speakers may have become accustomed to using the word "cell" to describe the various units of a terrorist or criminal organization, Farsi speakers may not use the Farsi equivalent in the same circumstances, making a direct translation difficult. While Dr. Kamrava testified that he regularly translated Farsi documents into English, ***39** unlike the government translator, he had no background in criminal or terrorism investigation and no particular knowledge of the terms of art Farsi speakers would use in similar circumstances.

Therefore, like the identification of the document seized from the MEK headquarters as a "travel log," even if the term "shabakeh" is directly translated as "network," rather than interpreted as "cell," the Mirmehdis do not explain how the outcome of their case would have been different. The sole difference would be that the document the government seized from the Los Angeles headquarters of the MEK identified the "network" of its members, associates, and supporters, including the Mirmehdi brothers, rather than a "cell" of its members, associates, and supporters. While "cell" may indeed carry a connotation of sinister secrecy which the Mirmehdis would like to avoid, the same may be said with respect to a "network" where that network is directly involved with a designated foreign terrorist organization. Arguing that the Board and the district court would have changed their decisions if only they had acknowledged the word in question meant "network" and not "cell" does not create error where none existed.

The Mirmehdis argue that the only evidence supporting their detention was the attendance of two of the brothers at the June 20, 1997, Denver rally. That assertion ignores the fact that FBISA Casfillo was a veteran of the JTTF task force ***40** whose investigation had targeted the MEK. It was through his investigation and knowledge of the MEK's activities, its members, associates, and supporters that the Mirmehdis came to his attention. As a result of that same

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investigation, the JTTF arrested and prosecuted numerous MEK members, associates, and supporters - many of whom, like the Mirmehdis, were on the "LA Cell Form."

The document linking the Mirmehdis to the MEK was seized from that entity's Los Angeles headquarters, from which the group ran its business and daily activities, and where the document had been stored with training videos, manuals, books, and other MEK material and paraphernalia produced by the MEK. The contents of the list was corroborated by a government witness, and SA Castillo testified that the totality of the information provided by that witness was corroborated by the other material seized.

From that same document, SA Castillo identified the name of a known MEK supporter or member, and SA Castillo testified that the JTTF had arrested and detained numerous other MEK members and supporters whose names appeared on the same list. SA Castillo estimated that the names of at least sixty of the more than seventy MEK members or supporters he had arrested appeared on the same list, including the names of six of seven people then under indictment for material support of the MEK at the time of the Mirmehdis' hearing. SA Castillo also ***41** testified that although the JTTF had not seen the Mirmehdis at the Los Angeles MEK headquarters, they had placed all of them at another MEK location. SA Castillo testified that his conclusion regarding the Mirmehdis' support of the MEK was based on his training, his experience, information from cooperating witnesses, physical surveillance of MEK members, supporters, and associates, interviews with law enforcement officers, witnesses in this and other cases, coupled with the discovery of the document in the MEK Los Angeles headquarters.

The record contains substantial evidence supporting the Board's conclusion that the Attorney General demonstrated a change in material circumstances to warrant a change in the Mirmehdis' custody status, shifting the burden to the Mirmehdis to show that their release would not pose a danger to persons and property or a significant risk of flight. The record also contains substantial evidence supporting the Board's conclusion that the Mirmehdis did not meet their burden. The Board's decision was neither arbitrary nor capricious, and the Court should therefore affirm the district court's decision denying the Mirmehdis' habeas petitions.

**42 SA CASTILLO'S REFERENCE TO CORROBORATION PROVIDED BY A GOVERNMENT WITNESS WAS PROBATIVE AND ITS ADMISSION WAS FUNDAMENTALLY FAIR WHERE THE MIRMEHDIS NEITHER OBJECTED TO NOR CHALLENGED THE EVIDENCE ON CROSS EXAMINATION*

Administrative proceedings are not bound by the strict rules of evidence. *See, e.g., Baliza v. INS*, 709 F.2d 1231 (9th Cir. 1983) (citing *de Hernandez v. INS*, 498 F.2d 919 (9th Cir. 1974)). The only limitation this Circuit has placed on immigration proceedings is that a hearing, even if summary, must be fair. *See, e.g., Navarrette-Navarrette v. Landon*, 223 F.2d 234, 237 (9th Cir. 1955) (quoting *United States v. Brough*, 15 F.2d 377, 379 (2d Cir. 1926)). The test for the admission of hearsay evidence in such proceedings asks only whether the evidence was probative and whether its admission was fundamentally fair. *See Baliza*, 709 F2d at 1231 (citing *Trias-Hernandez v. INS*, 528 F.2d 366, 369 (9th Cir. 1975), and *Martin-Mendoza v. INS*, 499 F.2d 918, 921 (9th Cir. 1974)).

The Mirmehdis challenge SA Castillo's testimony regarding the information provided by a government witness identifying the seized document as a list of. MEK members, associates, and supporters, and identifying the Mirmehdis as MEK supporters. The Mirmehdis argue that they should have had the opportunity to cross examine the witness. But, this Court has upheld the admission of hearsay evidence in a number of cases in which the government was unable to produce the ***43** witness for cross-examination. *See Trias- Hernandez*, 528 F.2d at 369 (upholding the admission of government memos prepared by individuals who were not subject to cross examination); *Martin-Mendoza*, 499 F.2d at 921- 22 (rejecting unsupported assertions that the government made insufficient efforts to locate witness that alien claimed would corroborate his story); *de Hernandez*, 498 F.2d at 921 (admission of sworn statements did not render the deportation proceeding unfair on ground that petitioner was denied her right to cross-examine where affiants' whereabouts were

unknown); *Navarrette-Navarrette*, 223 F.2d at 236 (ruling that the mere fact that incompetent evidence is received and considered does not in itself establish a want of due process such as would require a reversal on that ground).

SA Castillo testified that a government witness who admitted to being a member of the MEK and who pled guilty to providing material support to the MEK, identified the document seized from the MEK's Los Angeles headquarters as containing the names of members, associates, and supporters of that organization. SA Castillo's testimony was probative. Moreover, its admission was fundamentally fair.

While 28 U.S.C. § 2241 does not specifically require a petitioner to exhaust administrative remedies before filing a petition for habeas corpus, this Court ***44** requires, as a prudential matter, that a habeas petitioner exhaust available judicial and administrative remedies before seeking relief under section 2241. *Marquez v. INS*, 346 F.3d 892, 896 (9th Cir. 2003). The requirement of exhausting administrative remedies gives the trier of fact an opportunity, to resolve the issue. Failure to give the trier of fact the opportunity to resolve the issue not only wastes judicial resources, it encourages a piecemeal adjudication of a petitioner's claim.

This issue typifies the prudential concerns highlighted by this Court's exhaustion requirement. Despite having the opportunity to do so, the Mirmehdis offered no objection to SA Castillo's testimony. *See, e.g., Trias-Hernandez*, 528 F.2d at 369 (petitioner had the opportunity at the deportation hearing to dispute his understanding of the questions put to him and the accuracy of his answers at the earlier interrogation; if there were errors in the statement he could have corrected them) (citing *Strantzalis v. INS*, 405 F.2d 1016, 1017 (3d Cir. 1972)). The transcript reads:
Q. Do you know if [the disputed document] was produced by the MEK?

A. Yes.

Q. How do you know?

A. It was, there's two reasons. The first is the Government witness that indicated, in a debriefing on [] September 11th, 2001, that it contained names of MEK members, supporters, and associates. The second reason was that this document was found with press releases from the ***45** MEK under the name the People's Mujahedin of Iran, PMOI. This document was also found with the official MEK newspaper known as Mojohead (phonetic sp.). It was also found with MEK books, videos, training manuals, and other paraphernalia which corroborated the statements of the Government witness.

ER 50-51. The Mirmehdis offered no objection to the testimony nor did they cross examine SA Castillo about his statement when given the opportunity, despite the fact that the Mirmehdis had deposed Ben Tabatabai, the government's witness, more than a year before their bond redetermination hearing.

In *Baliza*, on which the Mirmehdis rely, the Court found that admission of an unauthenticated affidavit was fundamentally unfair where the government knew for over a year that the witness's testimony would play a key role in its case, yet it made no attempt to maintain contact, relying instead on an unauthenticated year old affidavit. 790 F.2d at 1234. The case works against the Mirmehdis, not for them. The Mirmehdis were aware of the identity of the government's witnesses but voluntarily chose not to object to the testimony at the time it was offered. They had deposed the witness in question. With this knowledge and this opportunity, they chose not to object to the SA Castillo's testimony at the time it occurred, and they chose to not cross-examine SA Castillo on that issue. By remaining silent when the evidence was presented, they prevented not only the trier of fact but also ***46** its administrative appeals body from reviewing any possible error or unfaimess in its admission and from resolving the issue before it reached the federal court. Due process requires only an opportunity to be heard. The Mirmehdis had the opportunity to be heard and declined. The immigration judge's failure to sua sponte exclude SA Castillo's testimony was therefore not a violation of due process.

THE IMMIGRATION JUDGE WAS NOT BOUND BY THE SUBSEQUENT, NON-FINAL DECISION OF AN IMMIGRATION JUDGE WHOSE RULING WAS BOUND BY A DIFFERENT STANDARD

The Mirmehdis argue that the immigration judge who heard evidence and adjudicated their requests for bond redetermination should have been bound by the decisions of two different immigration judges who heard different evidence and who were adjudicating claims involving different standards of proof. The Mirmehdis' argument fails for numerous reasons.

First, the Mirmehdis failed to exhaust administrative remedies when they failed to raise the issue in their appeal to the Board. *Marquez*, 346 F.3d at 896 (requiring, as a prudential matter, that a habeas petitioner exhaust available judicial and administrative remedies before seeking relief under section 2241). Second, the immigration judge ruling on the Mirmehdis' bond was not bound by a subsequent decision by a different immigration judge adjudicating the merits of the Mirmehdis' ***47** asylum claims. *Cf Hart v. Massanari*, 266 F.3d 1155, 1174 (9th Cir. 2001) ("That the binding authority principle applies only to appellate decisions, and not to trial court decisions, is yet another policy choice. There is nothing inevitable about this; the rule could just as easily operate so that the first district judge to decide an issue within a district, or even within a circuit, would bind all similarly situated district judges, but it does not."); *Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co., Ltd.*, 240 F.3d 956, 965 (11th Cir. 2001) ("While the decisions of their fellow [district] judges are persuasive, they are not binding authority."); *Kennedy v. Commonwealth Edison Co.*, 252 F. Supp. 2d 737, 740 (C.D. Ill. 2003) ("a basic jurisprudential tenet is that a federal district court's decision can provide persuasive - though not binding - authority on another federal district court"); *see also Burr v. Niagara Machine and Tool Works*, 301 F. Supp. 899, 901 (W.D. Pa. 1969) (same).

Finally, the immigration judge who adjudicated the Mirmehdis' request for a custody redetermination was bound by a different standard than the immigration judges who resolved their substantive asylum claims. The issue before the immigration judge in this case addressed the grant and revocation of bond under INA § 236(a). Under that statute, the Attorney General may revoke a bond at any time. The issue facing the immigration judge adjudicating the Mirmehdis' custody ***48** redetermination request was whether the INS demonstrated a change in material circumstances to warrant a discretionary change in custody status, and, if so, whether the Mirmehdis demonstrated their release would not endanger the community or result in a significant risk of flight. *See, e.g.*, ER 183. In contrast, the immigration judges adjudicating the Mirmehdis' asylum applications were required to adjudicate the application of the mandatory bar to withholding of removal, which required a finding of "reasonable grounds to believe that the alien is a danger to the security of the United States." *See* 8 U.S.C. § 1231(b)(3)(B)(iv). The fact that one imrrdgration judge concluded that the evidence was insufficient to demonstrate reasonable grounds to find the Mirmehdis were a "danger to the security of the United States" did not preclude another immigration judge from finding that different evidence demonstrated a change in material circumstances to justify a change in their custody status.

**49 BECAUSE THE MIRMEHDIS DID NOT OBJECT TO THE RECOMMENDATION THAT THE COURT LACKED JURISDICTION TO REVIEW THE MEK'S DESIGNATION AS A FOREIGN TERRORIST ORGANIZATION THEY FORFEITED APPELLATE REVIEW OF THAT ISSUE*

I. *The Mirmehdi's Failure to Object to the Magistrate Judge's Recommendation Regarding the MEK's Designation as a Foreign Terrorist Organization Precludes This Court From Reviewing the District Court's Decision*

The magistrate judge recommended to the district court that it did not have subject-matter jurisdiction to review the MEK's designation as a foreign terrorist organization. *See* Petitioners' Brief at 51. When they filed their objections to the magistrate judge's report and recommendation, the Mirmehdis left unchallenged this aspect of the magistrate judge's recommendation, which the district court subsequently adopted. Despite their omission, the Mirmehdis now attempt to raise this issue here. They cannot do so.

"A party who fails to file timely objections to a magistrate judge's nondispositive order with the district judge to whom the case is assigned forfeits its right to appellate review of that order." *Simpson v. Lear Astronics Corp.*, 77 F.3d at 1174; *see also* Fed. R. Civ. P. 72(a) ("a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made"). Having failed to file a timely objection to the magistrate judge's recommendation ***50** regarding this issue, the Mirmehdis forfeited any right to appellate review of the district court's adoption of that recommendation.

II. *Even if the Mirmehdis Preserved Their Appeal, Such a Challenge is Limited by Statute to a Lawsuit By the Designated Entity Filed in the Court of Appeals for the District of Columbia*

Section 302 of the Antiterrorism and Effective Death Penalty Act of 1996 authorized the Secretary of State, on a determination that an entity meets certain criteria, to designate that entity as a "foreign terrorist organization." *See* 8 U.S.C. § 1189(a)(1) (2002). [6] A designation lasts for two years and is subject to renewal. *See id.* § 1189(a)(4). A designated entity may challenge its designation by filing in the United States Court of Appeals for the District of Columbia Circuit a petition for judicial review. *See id.* § 1189(b). [7] The statute specifically precludes an alien in ***51** removal proceedings from challenging either designation or re-designation of an entity as a defense or an objection at any trial or hearing. *See id.* at § 1189(a)(8).

The MEK was designated, and was recently re-designated, as a foreign terrorist organization. The statute expressly precluded the Mirmehdis, aliens in removal proceedings, from challenging, and precluded the United States District Court for the Central District of California from reviewing, that designation. *See* 8 U.S.C. §§ 1189(a)(8), (b). *But see United States v. Rahmani*, 209 F. Supp. 2d 1045 (C.D. Cal. 2002) (holding that, notwithstanding section 1189's explicit language, a criminal defendant could challenge an FTO designation), *appealed* Case No. CR 01-209 RMT (9th Cir. July 12, 2002). Therefore, even if the Mirmehdis had objected to the magistrate judge's recommendation that the district court deny their petition on this specific basis, both the magistrate judge's recommendation and the district court's subsequent adoption of that recommendation were legally correct.

THE MIRMEHDIS' CANNOT CHALLENGE CONSOLIDATION OF THEIR BOND HEARINGS FOR THE FIRST TIME IN THIS COURT

The Mirmehdis did not contest the consolidation of their bond hearing in their habeas corpus petitions. Nor did they raise the issue in their objections to the ***52** magistrate judge's report and recommendation. [8] Instead, the Mirmehdis argue here for the first time that the consolidation of their bond hearings into one proceeding violated due process. The established rule for appellate review, however, provides that where a party failed to present an issue to the district court, it cannot raise it for the first time on appeal, *see United States v. Pimental-Flores*, 339 F.3d 959, 967 (9th Cir. 2003) (citing *United States v. Robertson*, 52 F.3d 789, 791 (9th Cir. 1994)), and where "[a] party who fails to file timely objections to a magistrate judge's nondispositive order with the district judge to whom the case is assigned forfeits its right to appellate review of that order," *Simpson*, 77 F.3d at 1174; *see also* Fed. R. Civ. P. 72(a) ("a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made"). The question of whether it was error to consolidate the Mirmehdis' proceedings is therefore not before this Court and the claim with respect thereto must be denied.

***53** *THE IMMIGRATION JUDGE DID NOT RELY ON THE EVENTS OF SEPTEMBER 11, 2001, TO DENY THE MIRMEHDIS' REQUEST FOR CUSTODY REDETERMINATION*

Quoting the immigration judge's decision out of context, the Mirmehdis argue that the immigration judge considered the events of September 11,2001, as the dominant factor in denying their release. *See* Petitioners' Brief at 55. When the

immigration judge's remark is viewed in context, however, it contradicts their assertion. The immigration judge made the contested remark when considering testimony by SA Castillo, in which he opined that the publicity surrounding the Mirmehdis' case most likely assured that the Iranian government was aware of their activities. AR 169. SA Castillo proposed the possibility that a violent confrontation between the Mirmehdis and agents of the Iranian government maintained within the United States could endanger the general public. AR 169. It was in this context that the immigration judge observed that "this threat is further exacerbated by the recent events of the September 11th attacks." ER 169-70.

From this context, it becomes clear that the immigration judge referred to September 11, 2001, as an example of the tragic collateral consequences to innocent lives caused by international terrorism on domestic soil, consequences the United States had, to that point, never experienced and had largely believed improbable.

***54** This was the immigration judge's sole reference to September 11,2001, as reported in the magistrate judge's report and recommendation. Nothing in the record supports the Mirmehdis' contention that the immigration judge relied either solely or tangentially on the events of September 11, 2001, in concluding that the INS had met its burden of demonstrating a material change in the Mirmehdis' circumstances to warrant a change in their custody status. Hence, this claim is meritless and must be rejected.

CONCLUSION

For the reasons stated above, the district court's denial of the Mirmehdis' habeas corpus petitions should be affirmed and the Mirmehdis' appeal therefrom denied.

RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, and after a survey of attorneys within the United States Department of Justice, Civil Division, Office of Immigration Litigation, undersigned counsel is unaware of any cases raising the same or similar issue.

Footnotes

1 Notably, the Mirrnehdis omit their objections from their Excerpts of Record.

2 The underlying facts of the petitioners' cases, which have been consolidated by this Court, are virtually identical; the petitioners made identical arguments in their habeas corpus petitions.

3 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, G.A. Res. 39/46, 39th Sess., U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

4 The Mirmehdis' habeas corpus petitions were virtually identical. They do not, however, include copies in their Excerpts of Record.

5 The Board's alternative decision that the Mirmehdis' detention is mandated by section 236(c), does not violate due process. *See Kim*, 123 S. Ct. at 1721-22 ("Detention during removal proceedings is ... constitutionally permissible....").

6 The criteria were amended by the USA PATRIOT Act of 2001. Designation of a group as a foreign terrorist organization (FTO) has three legal consequences. First, United States financial institutions possessing or controlling any funds in which a designated FTO or its agent has an interest are required to block all financial transactions involving those funds. *See* 18 U.S.C. § 2339B(a)(2). Second, representatives and members of designated organizations are inadmissible to this country under the Immigration and Nationality Act, and are ineligible for visas. *See* 8 U.S.C. § 1182. Third, and most relevance here, persons within the United States or subject to its jurisdiction cannot "knowingly" provide "material support or resources" to any designated FTO. *See* 18 U.S.C. § 2339B(a)(1).

7 The designation takes effect on publication in the Federal Register. *See id.* § 1189(a)(2)(B).

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8 It does not appear from the record that the Mirmehdis objected to the immigration judge at the time the hearings were consolidated and scheduled simultaneously, although they subsequently raised the issue in their appeals to the Board of Immigration Appeals.

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2010 WL 5810102 (C.A.9) (Appellate Brief)
United States Court of Appeals, Ninth Circuit.

Mohammad MIRMEHDI, et al, Plaintiffs-Appellants,
v.
UNITED STATES OF AMERICA, et al, Defendants-Appellees.

No. 09-55846.
December 29, 2010.

Appeal from a Decision of the United States District Court for the Central District of California, No. CV-06-05055-R-PJW-Honorable Manuel Real

Brief of Appellant

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*1 PRELIMINARY STATEMENT

Plaintiffs in this case are four hard-working and law-abiding Iranian brothers who were wrongfully imprisoned for nearly three and a half years after September 11, 2001. Plaintiffs were arrested and detained after federal officials falsely accused them of ties to a group involved in armed struggle against the current Iranian regime in the furor following September 11, 2001. Plaintiffs appeal the dismissal of their unlawful detention claims by the District Court. [1]

The District Court in this case dismissed Plaintiffs' unlawful detention claims, finding that Plaintiffs had no constitutional right to be free from their 41 month detention based on false evidence submitted by Defendants Castillo and MacDowell. In fact, Plaintiffs' Complaint sets forth violations of clearly established constitutional rights against these two defendants, as well as false imprisonment claims under the Federal Tort Claims Act ("FTCA") against the United States.

***2** Prior to their arrest and prolonged arbitrary detention, the Mirmehdi brothers were living and working in Los Angeles while going through immigration proceedings that were initiated because of the malfeasance of their immigration attorney (who was later convicted of immigration fraud). The immigration judge had found there was no reason for them to be detained during these proceedings and Plaintiffs had been living in Los Angeles without incident for more than a year before the tragic events of September 11th.

After September 11, 2001, the Mirmehdis were detained for more than three years without justification based on false evidence. Defendants Castillo and MacDowell falsely claimed that the Mirmehdis were members of the Mujahedin-e Khalq ("MEK"), a group previously supported by the United States but subsequently labeled a "terrorist" group, in order to detain them and pressure them to provide information the Mirmehdis did not have. The Mirmehdis' only link to the MEK was their attendance, along with thousands of others, including government officials, at a public rally in Denver, Colorado in 1997. For this the Mirmehdis spent three and a half years in detention treated no better than common criminals.

Defendants Castillo and MacDowell knew that the Mirmehdis' opposition to the Iranian regime had been expressed solely in peaceful, constitutionally- ***3** protected ways and that there was no evidence linking them to membership in the MEK or to any unlawful activities. Defendants Castillo and MacDowell manipulated the evidence in order to keep Plaintiffs in detention for 41 months knowing that there was no basis to detain them at all.

The dismissal of these claims should be reversed and the Mirmehdis should finally have their day in court.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. §§1331 and 1346. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. Plaintiffs timely filed a Notice of Appeal on June 4, 2009. ER 1.

ISSUES PRESENTED ON APPEAL

1. Whether the District Court erred in dismissing Plaintiffs' first, seventh and fourteenth claims for relief against Defendants Castillo and MacDowell for failure to state constitutional or statutory violations.

2. Whether the District Court erred in dismissing Plaintiffs' tenth cause of action against the United States under the FTCA for failure to state a claim.

STANDARD OF REVIEW

The District Court's dismissal of Plaintiffs' claims for failure to state a ***4** claim upon which relief may be granted is reviewed *de novo. Kahle v. Gonzalez*, 487 F.3d 697, 699 (9th Cir. 2007); *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). This Court must assume that Plaintiffs' allegations are true and all reasonable inferences should be resolved in Plaintiffs' favor. *Id.*

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STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The original Complaint in this case was filed on August 14, 2006. Plaintiffs filed their First Amended Complaint ("FAC") on January 30, 2007. ER 109. At the initial hearing on Defendants' motion to dismiss, Judge Real *sua sponte* transferred the case to the District Court for the District of Columbia. This Court granted Plaintiffs' writ petition and ordered that the case be returned to the Central District of California.

Defendants renewed their motions to dismiss after the case was returned to the District Court. Before any discovery and after a perfunctory hearing (ER 23-32), Judge Real granted Defendants' motion with respect to Plaintiffs' claims concerning their unlawful detention and false imprisonment, as well as other claims which are not the subject of this appeal. ER 14, 22. Plaintiffs' claims concerning their treatment while in custody were litigated and ultimately settled.

Judge Real dismissed Plaintiffs' first cause of action for unlawful detention ***5** against Defendants Castillo and MacDowell "because Plaintiffs did not possess the right to be free from arrest and detention under the circumstances alleged in the amended complaint." ER 16. The court did not address Defendants' other arguments for dismissal and did not explain what "circumstances" the court was referring to.

Judge Real dismissed Plaintiffs' seventh cause of action against Defendants Castillo and MacDowell for witness intimidation and due process violations based on his view that Plaintiffs were not prejudiced by the alleged witness intimidation. ER 18.

Judge Real dismissed Plaintiffs' tenth cause of action against the United States for false imprisonment under the Federal Tort Claims Act ("FTCA") because of his view that "Plaintiffs bond revocation and re-arrest were proper." ER 19.

Finally, Judge Real dismissed Plaintiffs' fourteenth cause of action against Defendants Castillo and MacDowell for conspiracy to violate civil rights under 42 U.S.C. § 1985 based on his ruling on Plaintiffs' seventh cause of action that Plaintiffs were not prejudiced by any witness intimidation. ER 19.

The parties ultimately settled Plaintiffs' claims concerning the conditions of their confinement. ER 6. After the last settlement a final judgment was entered. ***6** ER 4. This appeal followed. ER 1.

B. STATEMENT OF FACTS

1. *Re-arrest and Bond Hearing*

In March 1999, the four Mirmehdi brothers were arrested and charged with immigration violations which, unknown to them, had been committed by their immigration attorney without their knowledge. ER 114-18; FAC ¶¶ 18, 23, 28, 33. Michael, Mojtaba, and Mohsen were released on bond in late 1999 and Mohammad was released on bond in September 2000. The immigration judge determined that the Mirmehdis were neither a flight risk nor a threat to the community or to national security. ER 126; FAC ¶ 70.

Three weeks after the September 11, 2001, attacks, all four brothers were re-arrested on October 2, 2001, and detained based on the false information supplied by Defendants Castillo and MacDowell. ER 127; FAC ¶ 72. Defendants Castillo and MacDowell based Plaintiffs' re-arrest and detention on "evidence" which they knew to be false and which they knew did not justify the Mirmehdis' detention. Castillo and MacDowell intentionally used this false evidence to attempt to pressure the Mirmehdis into providing information about the MEK that the brothers did not possess.

On December 10, 2001 -- after a post-arrest delay of nearly 70 days -- the ***7** Mirmehdis received their first full hearing on their motions to be released on bond. ER 127-28; FAC ¶ 74. Based upon the false claims by Defendant Castillo that the Mirmehdis were involved in MEK, the immigration judge denied bond on the grounds that Plaintiffs now posed a danger to the community. ER 128; FAC ¶ 76.

Defendants also claimed that the Mirmehdis' lawyer, Bahram Tabatabai had made statements linking them to the MEK. ER 128-29; FAC ¶ 77. [2] However, on multiple occasions, including at a deposition and during live testimony, Tabatabai asserted that the Mirmehdis were not associated with the MEK. ER 129; FAC ¶¶ 78-80. Defendants knew that Tabatabai had no evidence linking Plaintiffs to the MEK, yet they made this false allegation to keep Plaintiffs in detention. ER 130, ¶¶ 84, 86.

Nonetheless, Defendant Castillo falsely claimed at the Mirmehdis' December 10, 2001, bond hearing, that Tabatabai had "named the four Mirmehdi brothers as M.E.K. members and supporters as part of the plea agreement." ER 129; FAC ¶81. Castillo also testified that Tabatabai had informed him that "the four Mirmehdi brothers...had founded the Oklahoma cell." Castillo knew this to be false, *inter alia*, because Mohsen, Mojtaba, and Mohammad Mirmehdi had not ***8** even arrived in the United States until ten years after Michael left Oklahoma, where he had been studying, to come to California. The judge relied on Defendant Castillo's false information in revoking the Mirmehdis' bonds. ER 130; FAC ¶ 85.

Defendant Castillo subsequently admitted that Tabatabai's earlier statements did not provide reliable evidence that the Mirmehdis were affiliated with the MEK, testifying, "I think Tabatabai was just speculating. That's my opinion that Tabatabai's statements... have no factual basis." ER 130; FAC ¶ 84. However, to keep Tabatabai from rebutting his hearsay misrepresentations, Defendant Castillo threatened to re-arrest Tabatabai and renew his prosecution if he continued to appear as a witness for the Mirmehdis. ER 129; FAC ¶ 82.

Similarly, in an asylum hearing for Mohsen on May 23, 2002, Defendant MacDowell testified that "only" one person, Yousef Hamidi, was named as a MEK member when Tabatabai was indicted for providing material support to a "terrorist." Yet Defendant MacDowell testified at the same hearing that he believed that Plaintiffs were associated with MEK, even though they were not named in Tabatabai's indictment and despite the absence of evidence linking them to MEK. ER 130; FAC ¶ 86.

The other "evidence" Defendants Castillo and MacDowell concocted ***9** against the Mirmehdis was a document referred to as the "L.A. Cell Form" dating from 1997. This was one page which Defendant Castillo admited he took from a larger list containing at least 60 pages of names, along with other notations such as travel dates and airfares. The translated document purposefully excluded the information that demonstrated that the document was not a "Cell Form" as Defendants claimed. ER131; FAC ¶ 88. As Defendants knew, the list was actually created by the organizers of a legal and constitutionally-protected political rally, and used to record the plans (including air travel schedules) of potential participants in the rally. The list was apparently retained, and later modified, for the further purpose of inviting participants to future rallies. ER 131; FAC ¶ 89. It was essentially, a travel log, and later a marketing list. There is no evidence that this document indicated membership in MEK in 1997 or at any subsequent time. Defendants Castillo and MacDowell knew what this list was and what it was not, yet they falsely claimed that the list was evidence that the Mirmehdis were MEK members to keep Plaintiffs in detention. ER 133; FAC ¶ 98. The list was deliberately mistranslated and its contents misrepresented in the immigration proceedings to create an alleged link between the Mirmehdis and MEK that did not exist. ER 131; FAC ¶ 88.

The rally in question took place in Denver, Colorado, on June 20, 1997, and ***10** was attended by several members of Congress, at least one of whom appeared as a speaker, and was organized under the auspices of the National Council of Resistance in Iran ("NCRI"). ER 131; FAC ¶ 90. NCRI is an international umbrella group which claims to be the

Iranian democratic "government in exile," and is supported by a broad range of prominent Iranian exiles and exile groups of diverse political beliefs. NCRI members are united by their shared opposition to the Iranian Islamic regime and commitment to democratic decision-making. ER 131-32; FAC ¶ 91.

Historically, the MEK was one among the many elements comprising the NCRI. The MEK was first designated as a Foreign Terrorist Organization ("FTO") by the Secretary of State on October 8, 1997, after the Colorado rally. On October 8, 1999, the Secretary re-designated the MEK as an FTO, and designated NCRI an "alias" of the MEK. These designations were renewed in October 2001. At the time of the June 20, 1997 rally in Colorado, however, neither MEK nor NCRI had received even their initial designations as FTO's by the Secretary of State. ER 132; FAC ¶ 93. [3]

***11** At the Mirmehdis' December 10, 2001 bond hearing, Defendant Castillo testified that the presence of the Mirmehdis' names on the travel log was evidence of their "support" of the MEK. Yet as the immigration judge in three of the brothers' asylum cases wrote, in determining that they were not risks to national security, "[n]owhere on the cell list does it describe respondent as either a sympathizer, supporter or member of the MEK." ER 133; FAC ¶ 97.

Thus, there was no basis to detain the Mirmehdi brothers on these "facts," which amounted to nothing more than what the brothers freely admitted--that they had attended constitutionally-protected demonstrations against the government of Iran. Although these demonstrations were sponsored by an entity which would later be designated as an FTO, the demonstrations were held before that designation was made. Not only were these demonstrations free and open to the public, they were attended by thousands of people. Such attendance at public demonstrations was not sufficient evidence to demonstrate "membership" or "material support" of a terrorist organization -- the only possible justification for the Mirmehdis' continued detention.

While the record contains no evidence which could have justified detaining the Mirmehdis as threats to national security, it does clearly show that Defendants Castillo and MacDowell wanted the Mirmehdis held without bond to pressure ***12** them to cooperate with the FBI's ongoing investigations of MEK activity in cities other than Los Angeles. During the bond hearing, Agent Castillo explained this forthrightly to the judge, saying that "it's easier to negotiate if they're held without bond." ER 134-35; FAC ¶ 102. Thus, the Mirmehdis were kept in detention despite Defendants' knowledge that there was no basis for this detention in order to put pressure on them to provide information they did not possess. The false claim that the Mirmehdis were linked to MEK initiated and perpetuated by Defendants Castillo and MacDowell were directly responsible for the 41 months they spent in detention.

2. *The Brothers' Appeals and Eventual Release*

During the Mirmehdis' detention, between October 2, 2001, and March 16, 2005, their immigration legal cases proceeded along various tracks: reviews and appeals in immigration court of their applications for asylum; appeals in immigration court of the initial January 2002 decision denying them bond; and, when those appeals were exhausted, the filing in November 2002 and appeal through October 2004, of a habeas corpus petition in the federal courts. ER 149; FAC ¶ 157. Throughout these proceedings, their continued detention was based on the false claims made by Defendants Castillo and MacDowell about Plaintiffs' MEK membership.

***13** During 2002, immigration judges overseeing the Mirmehdis' asylum cases granted them withholding of deportation to Iran based on the fact that they would face torture in Iran. In each case, the judges denied the brothers' applications for asylum, but granted withholding of deportation, after finding no credible evidence that any of the brothers was involved with terrorism or was in any way dangerous to national security. ER 150; FAC ¶ 158.

In Mohammad's April 30, 2002, asylum decision, Immigration Judge Henry Ipema denounced, in scathing terms, the Government's witnesses and evidence and its vague and unsupported allegations of terrorism. ER 150; FAC ¶ 159. The

government appealed Judge Ipema's decision in Mohammad's asylum case, which granted Mohammad withholding of removal. The government's appeal was rejected by the Board of Immigration Appeals on August 20, 2004. *Id.* Mohammad subsequently appealed Judge Ipema's denial of asylum to the Ninth Circuit, which upheld the denial of asylum on February 2, 2009.

Michael, Mojtaba, and Mohsen received their asylum decisions on August 20, 2002, from Immigration Judge Rose Peters, who denied asylum but granted withholding of deportation, finding the government's allegations of terrorism too vague to be credible. From Judge Peters' August 20, 2002 order, the INS appealed the withholding of removal, and Mohsen subsequently appealed his denials of ***14** asylum. Mohsen's appeal for asylum was rejected, but the BIA upheld the withholding decisions for Michael, Mojtaba, and Mohsen on August 20, 2004. ER 150; FAC ¶ 161. Mohsen subsequently appealed his denial of asylum in federal court. ER 150; FAC ¶ 162. This Court upheld the denial of asylum on February 2, 2009.

The Mirmehdis' bond proceedings were conducted jointly for all four brothers, both in the initial hearings and in the BIA appeal. After Judge Sitgraves' January 2002 decision denying bond, the brothers appealed to the BIA, which upheld Judge Sitgraves on June 13, 2002. ER 150; FAC ¶ 163.

Next, the brothers filed habeas corpus petitions in the U.S. District Court for the Central District of California, before Judge Real, who dismissed the petitions with prejudice on May 23, 2003. Plaintiffs appealed this dismissal to this Court. ER 150-51; FAC ¶ 164. In its ruling on November 15, 2004, on the habeas petitions, this Court found that the BIA owed the brothers a duty of consistent dealing, which it had violated by the conflicting rulings in its asylum and bond decisions. *Mirmehdi v. INS*, 113 F. App'x 739, 740 (9th Cir. 2004). Accordingly, this Court remanded, asking the District Court for "review of the sufficiency of the evidence" in the brothers' bond determinations "in light of the BIA's decision finding no evidence connecting the Mirmehdis to terrorist activities." ER 151; ***15** FAC ¶ 165.

Although Plaintiffs actively litigated their cases in immigration court and federal court, the gist of their claims in this damages action is that Defendants Castillo and MacDowell caused their continued detention by using false evidence to ensure Plaintiffs were detained.

On February 2, 2005, the day before the brothers were to be interviewed on Nightline about their plight, the government offered to release the brothers but then, after they had changed into civilian clothes, gave them a list of 13 restrictive conditions of release, such as not traveling more than 30 miles from home, not attending political rallies, and not flying on airplanes. The brothers refused to sign the conditional release form, were deemed "uncooperative" and remained in detention for another month despite the fact that there was never any justification for their detention. ER 136, 151; FAC ¶ 108, 168.

On March 5, 2005, Mohammad was severely beaten by Officer M. Lopez at San Pedro Detention Center. After the assault, Mohammad was visited in jail, and his injuries noted, by several reporters and attorneys. Mohammad was also informed that the Attorney General would look into the matter, presumably to investigate whether to charge Officer Lopez criminally. A person from the AG's office was scheduled to interview Mohammad on March 17, 2005. ER 151; FAC ***16** ¶ 169. On March 16, 2005, the day before this interview was scheduled, the brothers were again served with a list of conditions for their release. They again refused to sign, but this time they were released nevertheless. ER 151-52; FAC ¶ 170.

SUMMARY OF ARGUMENT

The District Court dismissed all of Plaintiffs' claims relating to their re-arrest and 41 month detention finding that "Plaintiffs did not possess the right to be free from arrest and detention under the circumstances alleged in the amended complaint." ER 16. The District Court also found that Plaintiffs were not prejudiced by the intimidation of a key witness

by Defendants Castillo and MacDowell. ER 18. The District Court did not specifically address the arguments made by the parties in rejecting these claims, nor did it cite to any legal authority in support of its dismissal order.

Plaintiffs' complaint sets forth several constitutional violations arising from Plaintiffs' re-arrest and 41 month detention based on Defendants Castillo and MacDowell's false evidence that Plaintiffs were linked to MEK. All of these claims are based on established law. None of these claims are barred in this ***17** procedural posture prior to discovery on a motion to dismiss. [4]

Plaintiffs had a right not to be re-arrested or detained absent new facts showing that they posed some cognizable threat to the community and certainly not based on the submission of knowingly false evidence by Defendants to use detention as a coercive measure against them. The District Court's casual acceptance of such outrageous government conduct is inexplicable and should be rejected by this Court in the strongest terms.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS BECAUSE THE COMPLAINT SUFFICIENTLY ALLEGES CLEARLY ESTABLISHED CONSTITUTIONAL CLAIMS AGAINST DEFENDANTS CASTILLO AND MACDOWELL.

*18 A. Plaintiffs Alleged Clearly Established Fourth Amendment Claims.

Plaintiffs stated a clearly established Fourth Amendment claim based upon their October 2001 re-arrest without probable cause and the revocation of their bond on the basis of false evidence presented by Defendants Castillo and MacDowell that Plaintiffs were linked with MEK. Plaintiffs alleged that given the finding that they were eligible for release on bond where their immigration proceedings while pending, [5] the Defendants violated their Fourth Amendment rights against unreasonable seizure by causing them to be re-arrested without probable cause and based on false evidence.

The District Court dismissed Plaintiffs' claims without seriously addressing them based on its apparent view that "Plaintiffs did not possess the right to be free from arrest and detention under the circumstances alleged in the amended complaint." ER 16. Thus, the District Court apparently condoned the intentional use of false evidence to detain Plaintiffs for 41 months.

It is well-established that the Fourth Amendment is violated where law ***19** enforcement officers have misled judicial officers based on deliberate falsehoods or the reckless disregard for the truth. *See Franks v. Delaware*, 438 U.S. 154, 171 (1978); *Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th Cir. 1991), *overruled on other grounds, Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). "[I]f an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements, ...he cannot be said to have acted in a reasonable manner, and the shield of qualified immunity is lost." *Branch*, 937 F.2d at 1387 (quotation marks and internal citations omitted). This standard has been applied on numerous occasions by this Court. [6]

***20** Arrests without probable cause violate the Fourth Amendment. *See Borunda v. Richmond*, 885 F.2d 1384, 1391 (9th Cir. 1988). This Court's opinion in *Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992), makes clear that the applicable test under the Fourth Amendment is whether the Defendants acted in an objectively reasonable manner in arresting Plaintiffs. The allegations in the FAC clearly show that Defendants did not act reasonably where they lacked probable cause to arrest and detain Plaintiffs because they had obtained no evidence showing that Plaintiffs were a security threat. Therefore, the FAC sets forth a claim for violation of Plaintiffs' Fourth Amendment rights. The Fourth

Amendment protects citizens and non-citizens alike. *See, e.g., Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) (holding that border patrol agents violated non-citizen's Fourth Amendment rights in searching his automobile without probable cause).

Just as the Fourth Amendment prohibits law enforcement authorities from *arresting* individuals on mere suspicion that they have engaged in criminal activity, so too it prohibits authorities from *continuing to detain* individuals (already in lawful custody) merely on suspicion of criminal activity for investigatory purposes. *See* ***21** *Adams v. United States*, 399 F.2d 574, 577 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1067 (1969). [7]

Plaintiffs' allegations regarding the lack of probable cause for re-arrest and the misleading and false evidence and testimony are plainly sufficient under established law. The fact that there may be some discretion to revoke bonds in immigration proceedings does not defeat Plaintiffs' claims. "Federal officials do not possess discretion to violate constitutional rights[.]" *Galvin v. Hay*, 374 F.3d 739, 758 (9th Cir. 2004). A discretion exercised based upon false statements by federal law enforcement agents would still violate the Constitution. *See, e.g., Nurse v. United States*, 226 F.3d 996, 1002 n.2 (9th Cir. 2000).

B. Plaintiffs Alleged Clearly Established Due Process Claims.

Plaintiffs alleged that Castillo and MacDowell caused the Plaintiffs' arrest, FAC ¶ 96, and that they proceeded to give false testimony and intimidate a witness with the intent of ensuring that Plaintiffs remained in detention. ER 129-30; FAC ¶¶ 82, 85-86.

The principle that state officials may not knowingly use false evidence to convict or detain a person is also well established in due process jurisprudence. ***22** As this Court held in *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001), there is a clearly established right "not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." [8] *See also Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (per curiam); *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

It is also well established that plaintiffs can recover damages against officials for this type of conduct. *Blankenhorn v. City of Orange*, 485 F.3d 463, 482 (9th Cir. 2007) (In § 1983 action, plaintiff sought "damages for the three months he spent incarcerated after the district attorney filed charges against him. A police officer who maliciously or recklessly makes false reports to the prosecutor may be held liable for damages incurred as a proximate result of those reports."); [9] *See also* ***23** *Costanich v. Department of Social and Health Services*, 2010 WL 4910222, 12 (9th Cir. 2010) ("government officials are on notice that deliberately falsifying information during civil investigations which result in the deprivation of protected liberty or property interests may subject them to § 1983 liability.")

Plaintiffs had a constitutional right not to be deprived of their liberty without due process of law in the determination of whether they should be detained under the rules and regulations in place at the time. Plaintiffs had already been granted bail during the pendency of their removal proceedings because they were found to be neither threats to national security nor flight risks. They had a right not to be deprived of the liberty they were entitled to under existing law and regulations based on false evidence and witness intimidation.

Moreover, at the time of Plaintiffs' arrest in October 2001, it had been clearly established that detaining illegal aliens for more than six months is presumptively unreasonable and violates their due process rights to their liberty. *See Zadvydas v. Davis*, 533 U.S. 678, 701-02 (2001); *see also Clark v. Martinez*, 543 U.S. 371 (2005).

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***24** In the District Court, Defendants argued that they complied with *Zadvyas* because Plaintiffs' removal orders were not final until August 2004 and Plaintiffs were released approximately six months later. However, Plaintiffs were granted withholding of removal in August 2002. ER 150; FAC ¶¶ 158-59, 161.

The fact that the government appealed these decisions does not mean that the Constitution authorized the government to hold Plaintiffs in detention for two more years, especially given the immigration judges' findings that Plaintiffs were not terrorists or security threats. In any event, it was Defendants' use of knowingly false information which caused this continuing constitutional violation.

Defendants' responsibility for these due process violations were not cut off by Judge Sitgraves' decision to detain the Plaintiffs, or subsequent decisions based on the same false and misleading evidence presented by Defendants Castillo and MacDowell. Defendants' submission of false evidence to justify the arrest and detention of the Plaintiffs prevented these judicial actions from constituting an intervening cause for Plaintiffs' continued detention. This Court has held repeatedly that law enforcement officials who knowingly or recklessly give false testimony may be liable if their false testimony prevents a judicial officer from ***25** exercising independent judgment. [10] That is what Plaintiffs have alleged in this case. ER 128-30; FAC ¶¶ 76, 78, 81-86. Judge Sitgraves relied on Castillo's false evidence in upholding the revocation of Plaintiffs' bail causing Plaintiffs to be detained for 41 months. Because Defendants prevented the court from exercising independent judgment, the decision to keep Plaintiffs in detention cannot be considered an intervening cause and these Defendants remain liable for Plaintiffs' wrongful detention.

C. Plaintiffs Alleged Clearly Established First Amendment Claims.

Plaintiffs alleged that their arrest and detention was based on their participation in lawful public demonstrations against the Iranian government and that detaining them for this reason violated their First Amendment rights. ER 131-33, 153; FAC ¶¶ 88-90, 98-99,175.

Castillo stated that the travel log which noted Plaintiffs' attendance at a lawful demonstration against the Iranian government was the basis for the revocation of the bond. ER 132-33; FAC ¶ 96. The travel log was the only ***26** documentary evidence introduced against the Plaintiffs at the December 10, 2001, joint bond hearing. *See* ER 127; FAC ¶¶ 73. Thus, Defendants used this false evidence to re-open the issue of whether Plaintiffs should remain free in the community and to justify the revocation of the bonds Plaintiffs had been granted because they posed no risk to the community. ER 101; *Joint Bond Decision*, at 16 ("[t]he Court finds that the Service's new evidence which was obtained on February 27, 2001 are material changed circumstances that mitigates [sic] against a release on bond."). The revocation of Plaintiffs' bail based on a list of attendees at a lawful demonstration clearly violated their First Amendment rights. ER 153; FAC ¶ 175. The District Court did not specifically address this claim.

Defendants relied below on dictum in *Reno v. American-Arab AntiDiscrimination Committee*, 525 U.S. 471 (1999)(hereinafter referred to as "AADC"), that "the Government does not offend the Constitution by deporting [an illegal alien] for the additional reason that it believes him to be a member of an organization that supports terrorist activity." 525 U.S. at 491-92. Defendants mischaracterized Plaintiffs' claim. Plaintiffs' claim is that they were detained for 41 months based on their participation in a lawful, public demonstration.

It is well established that denying or revoking bail because of the exercise of First Amendment rights is a constitutional violation. Justice Jackson, acting as a ***27** circuit justice for the Second Circuit, wrote that "courts should not utilize their discretionary powers [of granting or denying bail] to coerce men to forego conduct as to which the Bill of Rights leaves them free. Indirect punishment of free press or free speech is as evil as direct punishment of it." *Williamson v. United States*, 184 F.2d 280, 283 (2d Cir. 1950). Revoking Plaintiffs' bail for their participation in a lawful demonstration was an indirect punishment of their exercise of freedom of association. *See also Leary v. United States*, 431 F.2d 85, 89-90 (5th Cir. 1970) (denying bail to Timothy Leary because he would continue advocating illegal drug use was a violation of

the First Amendment); *United States ex rel. Means v. Solem*, 440 F. Supp. 544, 553 (D.C.S.D. 1977) (restrictions imposed on a defendant's speech and association as a condition of bail held unconstitutional). The revocation of Plaintiffs' bail based on their participation in public demonstrations violated their First Amendment rights. [11] Plaintiffs suffered 41 months in detention because they attended a public, lawful rally to express the widely shared belief in their country that the current Iranian regime violates the human rights of its citizens and is a threat to its neighbors and world peace. The District Court did not address this claim.

***28 D. Plaintiffs' Equal Protection Claim Is Not Foreclosed by *Reno v. American-Arab Anti-Discrimination Committee*.**

Plaintiffs also alleged that the reason that they were detained not because they posed any threat to national security, but because of their national origin, race and religion. ER 153, 157-58; FAC ¶¶ 175, 198. *See, e.g., Kwai Fun Wong v. United States*, 373 F. 3d 952 (9th Cir. 2004) The District Court did not address this claim.

Defendants argued that *AADC* undermines this claim by holding that an alien unlawfully in this country cannot assert selective enforcement "as a defense against his deportation." 525 U.S. 471, 488 (1999). As noted above, Plaintiffs do not claim that they were targeted for *deportation* based on their race, religion, ethnicity, and/or national origin. Rather, Plaintiff's claim that their re-arrest and 41 -month detention were based on their national origin. *AADC* is inapplicable to Plaintiffs' central contention that they are not involved with the MEK at all, and that the Defendants at all relevant times knew or had reason to know this. ER 131; FAC ¶¶ 88-89.

The reasoning of *AADC* focuses on the principle that prosecutorial discretion is a "special province of the Executive," and that successful selective prosecution claims are rare in any field. 525 U.S. at 489. But, again, Plaintiffs' ***29** claims are not analogous to a selective prosecution claim in criminal law. Subjecting Plaintiffs to unlawful detention because of their national origin does not implicate the concerns in *AADC* or the government's ability to deport aliens who violate the immigration laws.

E. Plaintiffs Alleged Sufficient Facts to Survive a Motion to Dismiss for Their Claim for Conspiracy to Intimidate Witnesses to Deny Equal Protection of the Laws.

Plaintiffs alleged a conspiracy under 42 U.S.C. §1985. Section 1985 covers conspiracies to intimidate witnesses in federal courts, as well as conspiracies to deny people the equal protection of the laws. Under 1985(3), four elements must be proven: "(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 Bhd. of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 828-29 (1983). Additionally, the conspiracy must be motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus[.]" *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). However, a conspiracy to intimidate witnesses does not have to be motivated by any discriminatory animus to be ***30** actionable under § 1985(2). *Kush v. Rutledge*, 460 U.S. 719, 724-27 (1983).

Plaintiffs pleaded facts from which a "meeting of the minds" between Castillo and MacDowell can reasonably be inferred. [12] Castillo and MacDowell worked together to investigate the Mirmehdis, ER 128; FAC ¶ 77, and both therefore had reason to seek to keep them imprisoned in order to pressure them to cooperate with the FBI, as Castillo openly stated. ER 128; FAC ¶ 75. Both Castillo and MacDowell knowingly falsely testified at various hearings that the Mirmehdis were MEK members or associates. ER 127-29; FAC ¶¶ 74-77, 80-82. Both Castillo and MacDowell had interviewed Tabatabai, and they both gave false hearsay testimony at various hearings as to what Tabatabai had said about the Mirmehdis. ER 128-30; FAC ¶¶ 77-78, 81, 86.

These facts fully justified the inference that Castillo and MacDowell shared the objective of keeping the Mirmehdis in detention for improper, coercive purposes. Plaintiffs also alleged at least two overt acts that were done pursuant to the conspiracy: (1) Castillo's false testimony at the December 10, 2001 bond ***31** hearing, ER 129; FAC ¶ 81, and (2) Castillo's intimidation of Tabatabai. ER 129, FAC ¶ 82.

The prejudice Plaintiffs suffered from Castillo's intimidation of Tabatabai is readily apparent given the procedural posture at the time the intimidation took place and the eventual results of those proceedings. Tabatabai was prepared to testify that Plaintiffs had not been involved in any immigration fraud and that they were not connected to MEK. ER 129; FAC ¶ 79-80. Contrary to the District Court's ruling, Plaintiffs sufficiently alleged facts demonstrating that they were prejudiced because of the intimidation. On January 4, 2002, Castillo threatened to renew Tabatabai's prosecution in order to dissuade Tabatabai from discrediting the false evidence Castillo had given about Plaintiffs' links to MEK less than a month earlier. ER 129; FAC ¶ 82. This threat not only caused Tabatabai not to testify in all four Plaintiffs' asylum proceedings, [13] but also kept Tabatabai from appearing as a witness to discredit Castillo *in any future legal proceeding* in which Plaintiffs sought to regain their liberty. Thus, Plaintiffs were deprived of important evidence showing that Defendants' claims about their links to MEK ***32** were false. Plaintiffs were accordingly prejudiced by Castillo's intimidation of Tabatabai, which made Tabatabai unavailable as a witness either to help Plaintiffs overturn the revocation of bail or to help them prevail on their asylum claims.

II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' FALSE IMPRISONMENT CLAIMS UNDER THE FTCA.

A. Plaintiffs Stated a Claim For False Imprisonment.

Plaintiffs alleged that their re-arrest in October 2001 and continuing detention thereafter, based on knowingly false evidence presented by Defendants, constituted false imprisonment under the FTCA. "The FTCA specifies that the liability of the United States is to be determined 'in accordance with the law of the place where the [allegedly tortious] act or omission occurred.' " *Rhoden v. United States*, 55 F.3d 428, 430 (9th Cir. 1995) (per curiam) (quoting 28 U.S.C. § 1346(b). [14]

California tort law states that false imprisonment is "(1) the nonconsensual, intentional confinement of a person, (2) without lawful privilege, (3) for an appreciable length of time, however brief." *Blaxland v. Commonwealth Director of Public Prosecutions*, 323 F.3d 1198, 1205 (9th Cir. 2003) (*quoting Easton v.* ***33** *Sutter Coast Hosp.*, 80 Cal. App. 4th 485, 496 (2000)). Cal. Civil Code § 43.55 provides that "[t]here shall be no liability on the part of... any [] officer who makes an arrest pursuant to a warrant of arrest regular upon its face" in the absence of malice. [15]

Plaintiffs allege that it had already determined that they were neither flight risks nor national security threats, and that they were re-arrested and detained based on the false evidence and statements made by Defendants Castillo and MacDowell. ER 127, 129, 132-33; FAC, ¶¶ 71-72, 81, 96. The re-arrest was based on "unsupported claims... built upon 'evidence' which Defendants knew to be false and which Defendants knew did not justify the Mirmehdis' continued detention." ER 127; FAC ¶ 72. Defendant Castillo, referring to the travel log which Defendants masqueraded as a terrorist cell list, stated that "in October, the bond for the Mirmehdi brothers was revoked [by INS] based on this information..." ER 132-33; FAC ¶ 96. Plaintiffs alleged sufficient facts to demonstrate that false statements were provided and relied upon by the court in revoking Plaintiffs' bond. Making false statements to procure an unlawful arrest constitutes false imprisonment under California law.

***34** Although *arresting officers* are not liable for false imprisonment when they make an arrest pursuant to a warrant that is "regular upon its face," Cal. Civil Code §43.55, the FAC alleged that Defendants Castillo and MacDowell, *not*

the arresting officers, deliberately made false statements in order to cause the Mirmehdis to be re-arrested. ER 127 and 132-33; FAC ¶¶ 72-73, 96. [16] Likewise, although Cal. Penal Code § 847(b) protects investigators who "had reasonable cause to believe [an] arrest was lawful," Plaintiffs alleged that Defendants *knew* that they had *no lawful basis* to cause the Mirmehdis to be re-arrested or detained and supplied false evidence in order to coerce them. ER 127, 130 and 132-33; FAC ¶¶ 72, 73, 84, 85, 96.

Under California law, liability for false imprisonment can arise from "false statements... made with the *intent* to induce an arrest." *Harden v. San Francisco Bay Area Rapid Transit Dist.*, 215 Cal. App. 3d 7, 16 n.5 (1989) ***35** (emphasis in original). [17] This is precisely what Plaintiffs alleged. The United States is liable under the FTCA for false imprisonment because Agents Castillo and MacDowell made false statements to procure an unlawful arrest and Plaintiffs' continuing detention.

The re-arrest of the Mirmehdis was based on knowingly false statements and without probable cause, [18] in violation of the Fourth and Fifth Amendments. Contending that Plaintiffs' constitutional rights were not violated, Defendants heavily espoused the federal regulation granting officials discretion to revoke an alien's bond "at any time." 8 C.F.R. § 236.1. This argument would make sense if ***36** it were possible for regulations and statutes to authorize officials to violate the Constitution. "It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally." *Galvin v. Hay*, 374 F.3d 739, 758 n.13 (9th Cir. 2004) (quoting *Myers & Myers, Inc. v. United States Postal Serv.*, 527 F.2d 1252, 1261 (2d Cir. 1975)). Since the re-arrest based on knowingly fase statements violated Plaintiffs' constitutional rights, it was without lawful privilege and amounted to false imprisonment. *See Molko v. Holy Spirit Assn.*, 46 Cal. 3d 1092, 1123 (1988). There is no privilege in California or United States law to cause the arrest and detention of any person based on false evidence.

Plaintiffs' allegations stated a claim for relief for false imprisonment under California law and the FTCA. The District Court, without analysis, dismissed this claim for the same unexplained reasons it dismissed Plaintiffs' other false arrest and detention claims. This decision should be reversed.

III. PLAINTIFFS SHOULD BE GRANTED LEAVE TO AMEND.

At a minimum, Plaintiffs should be granted leave to amend their claims if this Court finds there are any deficiencies in their allegations. Under this Court's cases, leave to amend is granted liberally. *Lira v. Herrera*, 427 F.3d 1164, 1176 (9th Cir. 2005) ("We note, however, that "[l]eave to amend should be granted unless the pleading 'could not possibly be cured by the allegation of other ***37** facts,' "); *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir.2003), *cert. denied*, 541 U.S. 1063 (2004).

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave of court to file an amended pleading "shall be freely given when justice so requires." *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (noting strong policy in favor of granting leave to amend). Furthermore, where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one more chance to amend the complaint before the District Court dismisses the action with prejudice. *See Silva v. Bieluch*, 351 F3d 1045, 1048 (11th Cir. 2003).

Notwithstanding these well-established principles, the District Court dismissed Plaintiffs' claims without granting leave to amend. Plaintiffs should be given an opportunity to amend their complaint unless there is no possibility that they could cure any defects in their pleading found by this Court.

IV. THIS CASE SHOULD BE REASSIGNED TO THE DISTRICT COURT JUDGE TO WHOM IT WAS ORIGINALLY ASSIGNED.

28 U.S.C. Section 2106 authorizes the Court of Appeals to reassign a case to another district judge upon remand to the district court. This principle was recently reaffirmed in *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151 (9th Cir. 2007), another case involving Judge Real, where the Court stated:
***38** Under § *2106*, remand to a different district is appropriate if there is a demonstration of personal bias or unusual circumstances. In determining whether unusual circumstances exist the court considers:

(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected,

(2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

The first two factors are considered to be of equal importance; moreover, a finding of either one would support remand to a different judge

Id. at 1165. [19]

***39** Here, the above factors clearly favor reassignment to a different judge. Judge Real's actions in this case suggest that he would have difficulty putting aside his beliefs about this case. Judge Real's rejection of Plaintiffs' claims without analysis and without addressing arguments made by the parties suggests that Judge Real has prejudged these issues and that Plaintiffs cannot get a fair hearing before him.

This case was originally randomly assigned to Judge Collins. Judge Real, who had denied the Mirmehdis' habeas petitions several years before this action was filed, decided that this action for damages was a related case and thus had the case transferred from Judge Collins' docket to his docket. Then, after the parties extensively briefed four complex motions, Judge Real, *sua sponte* and without explanation, transferred the entire action to the District of Columbia without ruling on any of the motions. After this Court ordered the case returned to him, Judge Real granted the Defendants' motions without addressing Plaintiffs' arguments in a serious manner.

Given Judge Real's handling of this case, reassignment to Judge Collins (the judge to whom the case was originally and randomly assigned) is clearly ***40** advisable to preserve the appearance and reality of fairness in this case. As there has been no discovery on these claims there would be no duplication of effort if this case was returned to the judge originally assigned to the case.

*41 CONCLUSION

For all these reasons the District Court's dismissal of Plaintiffs' claims against Castillo and MacDowell and Plaintiffs' false imprisonment claims under the FTCA against the United States should be reversed. At a minimum, Plaintiffs should be allowed the opportunity to amend their complaint. Finally, this Court should reassign this case to the District Judge originally randomly assigned to this case.

Footnotes

1 Plaintiffs' claims relating to the manner in which they were treated during their imprisonment have been resolved by settlement and are not a part of this appeal. ER 6-13. Plaintiffs have not appealed from the dismissal of senior federal officials in this

appeal. This appeal concerns the dismissal of Plaintiffs' first, seventh and fourteenth causes of action against Defendants Castillo and MacDowell and their tenth cause of action for false imprisonment against the United States.

2 Mr. Tabatabai was convicted in 2010 for participating in a fraudulent "bust-out" scheme and violating 18 U.S.C. §§ 371, 1341, 1343, 1956, and 2314.370 F. App'x. 845 (9th Cir. 2010) (affirming conviction).

3 In July 2010, the D.C. Circuit Court of Appeals ordered the State Department to re-evaluate whether the MEK should be labeled a terrorist group. *People's Mojahedin Organization of Iran v. U.S. Dept. of State*, 613 F. 3d 220 (D.C. Cir. 2010).

4 Defendants made a variety of additional arguments for dismissal, also unaddressed by the District Court, which are not addressed herein. Plaintiffs will address these arguments if they are renewed by Defendants in this appeal.

5 "The Board of Immigration Appeals has stated that 'an alien generally... should not be detained or required to post bond except on a finding that he is a threat to the national security... or that he is a poor bail risk.' " *Reno v. Flores*, 507 U.S. 292, 295 (1993) (quoting *Matter of Patel*, 15 I. & N. Dec. 666 (1976)). Thus, the government cannot simply detain aliens, even those involved in immigration proceedings, without a substantial reason for doing so.

6 *See, e.g., Liston v. County of Riverside*, 120 F.3d 965, 972 (9th Cir. 1997); *Lombardi v. City of El Cajon*, 117 F.3d 1117, 1123 (9th Cir. 1997); *Hervey v. Estes*, 65 F.3d 784, 788 (9th Cir. 1995); *Forster v. County of Santa Barbara*, 896 F.2d 1146, 1148 n.3 (9th Cir. 1990). *See also Spencer v. Staton*, 489 F. 3d 658,662 n.5 (5th Cir. 2007) ("[T]he Fourth Amendment is violated when an official intentionally, or with reckless disregard for the truth, includes false testimony in a warrant affidavit"); *see also Rivera v. United States*, 928 F.2d 592, 604 (2d Cir. 1991); *Snell v. Tunnell*, 920 F.2d 673, 698 (10th Cir. 1990); *Myers v. Morris*, 810 F.2d 1437, 1457-58 (8th Cir. 1987), *cert. denied*, 484 U.S. 828 (1987); *Perlman v. City of Chicago*, 801 F.2d 262, 264-65 (7th Cir. 1986), *cert. denied*, 480 U.S. 906 (1987); *Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir. 1985); *Krohn v. United States*, 742 F.2d 24, 31-32 (1st Cir. 1984).

7 Similarly, while Plaintiffs have admittedly committed minor (but deportable) immigration violations, that too does not give rise to probable cause to believe that they are terrorists. *Cf. Knowles v. Iowa*, 525 U.S. 113, 114-19 (1998) (finding that the mere fact that police had probable cause to cite motorist for traffic infractions did not provide probable cause to search motor vehicle for contraband).

8 The Ninth Circuit has repeatedly reaffirmed this principle. *See, e.g., Hovey v. Ayers*, 458 F.3d 892, 916 (9th Cir. 2006); *Hayes v. Brown*, 399 F.3d 972, 981 (9th Cir. 2005); *Lee v. City of Los Angeles*, 250 F.3d 668, 683 (9th Cir. 2001).

9 *See also Robinson v. Maruffi*, 895 F.2d 649, 657-58 (10th Cir. 1990) (upholding § 1983 damages award against police officers for conspiracy to frame plaintiff for murder); *White v. Frank*, 855 F.2d 956, 957-59 (2d Cir. 1988) (§ 1983 claim against officers for perjuring themselves before a grand jury survived motion to dismiss; disputed fact issue whether officers could be considered "complaining witnesses"); *Jones v. City of Chicago*, 856 F.2d 985, 995 (7th Cir. 1988) (upholding § 1983 damages award against officers who gave false information to prosecutors for false imprisonment); *Anthony v. Baker*, 767 F.2d 657, 661-62 (10th Cir. 1985) ("officers are liable under § 1983 and § 1985(2) when they conspire to procure groundless state indictments and charges based upon fabricated evidence or false, distorted, perjurious testimony"); *Hand v. Gary*, 838 F.2d 1420, 1426 (5th Cir. 1988) (claim for bad faith prosecution cognizable under § 1983).

10 *Galen v. County of Los Angeles*, 477 F.3d 652, 663-64 (9th Cir. 2007). *See also Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067 (9th Cir. 2004) (state or local officials may be liable under § 1983 if they "improperly exerted pressure on the prosecutor, knowingly provided misinformation to him, concealed exculpatory evidence, or otherwise engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings").

11 *See Bridges v. Wixon*, 326 U.S. 135, 148 (1945) ("Freedom of speech and of press is accorded aliens residing in this country.") (*citing Bridges v. California*, 314 U.S. 252 (1941)).

12 *See In re Sunset Bay Associates*, 944 F.2d 1503, 1517 (9th Cir. 1991) ("the existence of a conspiracy may sometimes be inferred from the nature of the acts done, the relations of the parties, the interests of the alleged conspirators, and other circumstances") (internal quotation omitted); *Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999) (civil rights conspiracy can involve tacit rather than explicit agreement).

13 Tabatabai did testify at Mohammad's asylum proceeding on June 19, 2001, but he was intimidated by Defendant Castillo when he arrived on January 4, 2002, at *a continuation* of the asylum proceeding, and he left the courthouse *that day* without testifying. FAC ¶¶ 82-83.

14 See *Galvin v. Hay*, 374 F.3d 739, 758 (9th Cir. 2004) (applying California law to determine the liability of federal officers for false arrest); *Cervantes v. United States*, 330 F.3d 1186, 1188 (9th Cir. 2003) (same).

15 Cal. Penal Code § 847(b) immunizes officers from civil liability for false imprisonment if "the arrest was lawful, or the [] officer, at the time of arrest, had reasonable cause to believe the arrest was lawful."

16 Moreover, § 43.55 does not immunize malicious action. *See Ting v. United States*, 927 F.2d 1504, 1514 (9th Cir. 1991) (defining malicious action negating immunity under Section 43.55, which is not limited to false imprisonment by excessive force, to

include an officer knowingly using false information to obtain a warrant); *see also Singleton v. Singleton*, 68 Cal. App. 2d 681, 696 (1945) ("the trier of facts was... justified in drawing an inference of malice from want of probable cause").

17 *See also Ramsden v. Western Union*, 71 Cal. App. 3d 873, 880 (1977) ("The fact that the arrest was made by... police officers and not directly by defendants does not render them immune, because a party who... procures an unlawful arrest... is liable.... Plaintiffs' allegations that the arrests were at the request and insistence of defendants were sufficient.") (internal quotations omitted); *Hughes v. Oreb*, 36 Cal. 2d 854, 858 (1951) ("a person who participates in an unlawful arrest, or who causes or procures or instigates it, is liable for false imprisonment."). Although both *Ramsden* and *Hughes* involved situations where the plaintiff was arrested without any process at all, neither case limits false imprisonment claims to such situations. *Accord Arnsberg v. United States*, 757 F.2d 971, 977 (9th Cir. 1984) ("any arrest pursuant to an invalid warrant constitutes a wrongful and therefore false imprisonment regardless of the arresting officers' lack of fault.").

18 When the existence of probable cause turns on the resolution of "a dispute as to the state of the defendant's knowledge... the jury must resolve the threshold question of the defendant's factual knowledge or belief." *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 881 (1989) (internal citation omitted).

19 *See also U.S. v. Sears, Roebuck & Co., Inc.*, 785 F.2d 777, 780 (9th Cir. 1986) ("Ordinarily, further proceedings in a case remanded to the district judge are conducted by the judge who originally tried the case. But, on rare occasions, both for the judge's sake and the appearance of justice, an assignment to a different judge is desirable. The remand does not imply any personal grievance against the judge.").

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decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals,
Ninth Circuit.

Mohsen Seyed MIRMEHDI, aka
Musen Meermedi, Petitioner,
v.
Michael B. MUKASEY,
Attorney General, Respondent.
Mohammed–Reza Mirmehdi, aka
Muhamed Meer Medi, Petitioner,
v.
Michael B. Mukasey, Attorney General, Respondent.

Nos. 04–74743, 04–74744.
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Argued and Submitted Oct. 22, 2008.
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On Petition for Review of an Order of the Board of Immigration Appeals. Agency Nos. AXXX–XX7–462, AXXX–XX2–144.

Before: PREGERSON and HALL, Circuit Judges, and EZRA,[*] District Judge.

MEMORANDUM[**]

***1** Mohsen Mirmehdi (Mohsen) and Mohammad–Reza Mirmehdi (Mohammad), brothers and natives of Iran, claim the Board of Immigration Appeals (BIA) abused its discretion by denying their asylum claims on discretionary grounds. The BIA, in detailed opinions, affirmed the Immigration Judge's grant of withholding and CAT relief and found that the brothers' prior fraudulent immigration claims were not outweighed by the probability of future persecution, given the grant of withholding and CAT protections. We find the BIA did not abuse its discretion and therefore deny their petition. Because the parties are familiar with the facts of the case, we do not recite them here.

I.

Factual determinations underlying the exercise of discretion are reviewed for substantial evidence. *Gulla v. Gonzales,* 498 F.3d 911, 915 (9th Cir.2007). Substantial evidence supports the BIA's factual determinations in Mohsen's case, and all but one in Mohammad's. The Government concedes one factual error in Mohammad's decision, but that error did not serve as the basis for the Board's decision that Mohammad was engaged in immigration fraud, and was therefore harmless. *See United States v. Erickson,* 75 F.3d 470, 479 (9th Cir.1996).

II.

Mohsen claims the BIA improperly considered the misconduct of his brothers in its exercise of discretion. *See Virk v. INS,* 295 F.3d 1055, 1060 (9th Cir.2002). Rather than substantively considering his brothers' conduct, however, the BIA relied upon Mohsen's knowledge of their misconduct only as evidence that he knew his own claim was fraudulent.

Mohammad claims the BIA improperly considered his fraud committed when entering the United States, because the BIA made no specific finding that the fraud was "deliberate and voluntary," as required by INA § 212(a)(6)(c)(i). *See Espinoza–Espinoza v. INS,* 554 F.2d 921, 925 (9th Cir.1977). But, "a factor that falls short of the

grounds of mandatory denial is not for that reason alone excluded from consideration as an adverse factor for the discretionary, entitlement prong." *Kalubi v. Ashcroft,* 364 F.3d 1134, 1139 (9th Cir.2004).

III.

The Mirmehdis argue that BIA failed to explain its reasons for finding their mitigating explanations regarding the extent of their fraud implausible. The BIA did not make an "adverse credibility determination" in the traditional sense, however, but rather carefully explained the reasons why it found the Mirmehdis' explanations implausible, and thus not mitigating. The Mirmehdis were not escaping persecution when they entered the United States, and hence had no excuse to circumvent any of the normal asylum laws. Denial of discretionary relief is appropriate when the denial is based on fraud perpetuated throughout immigration proceedings. *See Hosseini v. Gonzales,* 464 F.3d 1018, 1021 (9th Cir.2006); *see also Matter of Pula,* 19 I. & N. Dec. 467, 474 (1987).

IV.

The Mirmehdis argue that the BIA improperly weighed positive factors in its exercise of discretion, including significant personal ties to the United States, whether the Mirmehdis had family legally present in the United States and the likelihood of future persecution upon return to Iran. However, no Mirmehdi brother was *legally* present in United States at the time of the BIA's decision. "An applicant for asylum has the burden of establishing that the favorable exercise of discretion is warranted," and neither Mirmehdi argued that significant personal ties predated their decision to come to the United States and "motivated him to seek asylum here rather than elsewhere." *Matter of Pula,* 19 I. & N. at 474; *see also Gullet,* 498 F.3d at 917–918. Finally, while "[t]here is no question that in determining whether to grant asylum as a discretionary matter, the likelihood of future persecution is a particularly important fact to consider ... withholding of removal eliminates that chance of future persecution as [the Mirmehdis] cannot be returned to [Iran]." *Kalubi,* 364 F .3d at 1141. The BIA did not abuse its discretion. PETITION DENIED.

All Citations

Slip Copy, 2009 WL 247903

Footnotes

* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MOHAMMAD-REZA MIRMEHDI, Petitioner, v. U.S. IMMIGRATION AND NATURALIZATION SERVICE, et al., Respondents.	No. CV 02-8916-R (PJW) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE
MOSTAFA MIRMEHDI, Petitioner, v. U.S. IMMIGRATION AND NATURALIZATION SERVICE, et al., Respondents.	No. CV 02-8918-R (PJW) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE
MOHSEN MIRMEHDI, Petitioner, v. U.S. IMMIGRATION AND NATURALIZATION SERVICE, et al., Respondents.	No. CV 02-8919-R (PJW) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

MOJTABA MIRMEHDI,

Petitioner,

v.

U.S. IMMIGRATION AND NATURALIZATION SERVICE, et al.,

Respondents.

No. CV 02-8920-R (PJW)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Hon. Manuel L. Real, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 01-13 of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that the Petition be denied and this action be dismissed with prejudice.

I.

SUMMARY OF PROCEEDINGS

Petitioners are Iranian nationals who are in the United States illegally, having entered illegally or having entered legally but then over-stayed their visas. They were arrested by the Federal Bureau of Investigation ("FBI") on March 16, 1999. After deciding not to charge them with a crime, the FBI turned them over to Respondent, the Immigration and Naturalization Service ("INS").[1] (Petitioners' Points and Authorities in Support of Petition for Habeas Corpus (hereinafter "Petitioners' Brief") at 4.) Petitioners were granted bond by an

[1] Petitioners named as Respondents John Ashcroft, the Attorney General of the United States; James S. Ziglar, the Commissioner of the INS; and Thomas Schiltgen, the Los Angeles District Director of the INS. For ease of reference and clarity, the Court refers to all three collectively as Respondent.

Immigration Judge ("IJ") and released from INS custody pending disposition of removal proceedings.[2]

On October 2, 2001, Petitioners were re-arrested by the INS. Their arrest was prompted by the government's seizure of a document attributed to a group called the Mojahedin-E Khalaq ("MEK") with Petitioners' names on it. The MEK has been designated by the federal government as a "Foreign Terrorist Organization." Petitioners were given another bond hearing after this second arrest, but this time the IJ denied bond. (Reporter's Transcript of Bond Hearing ("RT") included in Administrative Record ("AR") at 332-461, 474-490.)[3] Petitioners appealed the IJ's bond decisions to the BIA. (AR 2-6.) The BIA affirmed the IJ's decision. (*Id.*)

Subsequently, in a separate hearing, the IJ found that Petitioners were here illegally and were subject to removal. (Petitioners' Brief, Exhibit ("Exh.") 4 at 2.) The IJ also found, however, that Petitioners were entitled to withholding of removal to Iran because, as supporters of the MEK, they would be subject to torture there. (*Id.* at 21.) As a result, Petitioners were ordered removed from the United States to any country other than Iran.[4] (*Id.*)

---

[2] Moshen, Mojtaba, and Mostafa were granted bond at the outset of their removal proceedings. Mohammad-Reza was initially denied bond and appealed to the Board of Immigration Appeals ("BIA"). The BIA remanded the case to the IJ for reconsideration. On reconsideration, the IJ granted him bond. (Petitioners' Brief at 4.)

[3] The Court cites to the Certified Administrative Record in Mostafa Mirmehdi's case. The records for all four brothers are essentially identical, except for the inclusion of documents specifically related to one and not the others.

[4] The order reads Petitioners are to be "removed from the United States to any country appropriate under section 241(b) of the [Immigration and Nationality] Act, with the exception of Iran."

Petitioners appealed the IJ's removal decision to the BIA. Their appeals are still pending before the BIA.

On November 20, 2002, Petitioners filed habeas corpus Petitions in this Court, seeking to have the Court overturn Respondent's decision denying them bond. In late January 2003, Respondent moved to dismiss the Petitions on the ground that the district court lacked subject matter jurisdiction. Petitioners opposed the motion. On March 18, 2003, the Court denied Respondent's motion to dismiss.

II.

ANALYSIS

Respondent's Decision To Deny Petitioners Bond Was Not an Abuse of Discretion and Did Not Violate the Constitution

Petitioners allege in their habeas corpus Petitions that they were denied due process in their bail hearings before the IJ. They contend: 1) the designation of the MEK as a Foreign Terrorist Organization is improper; 2) the IJ improperly relied on their alleged association with the MEK in denying bond; 3) they were not given proper notice before their bond was revoked; 4) their detention without bond for more than a year is excessive; 5) their detention is improperly based on their refusal (or failure) to cooperate with the government in a pending investigation; 6) they should not be held in custody because the IJ ruled they cannot be removed to Iran (their native country); 7) their continued detention is a result of the September 11, 2001, terrorist attack, not something they have done; and 8) the IJ's rulings were based on hearsay. (Petitioners' Brief at 2-3.)

(Petitioners' Brief, Exh. 4 at 21.)

Under *Hernandez-Avila v. Boyd*, 294 F.2d 373, 376 (9th Cir. 1961), this Court reviews INS decisions denying bond under an abuse of discretion standard. An abuse of discretion has been defined by the Ninth Circuit as "a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *See Wing v. Asarco Inc.*, 114 F.3d 986, 988 (9th Cir. 1997). Under the abuse of discretion standard, a reviewing court cannot reverse a decision unless it has a definite and firm conviction that the court below "committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors." *SEC v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001). For the reasons set forth below, the Court finds that Respondent did not abuse its discretion in denying Petitioners bond.[5]

After a lengthy bond hearing in which Petitioners were represented by counsel, the IJ rendered the following decision:

> I've listened to the evidence of record, Agent's Castillo's testimony, and I've looked at the prior hearing held on Mohammad and I would give you basically a rundown of how I view this case.
>
> When I initially heard Mohammad's case, and I've listened to the testimony, one thing that was very clear is

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[5] Respondent argued in its motion to dismiss that the Court did not have jurisdiction to review INS bond decisions. As a fallback position, Respondent argues that the Court should only review the bond decisions to determine that they do not violate the federal Constitution. Relying on *Hernandez-Avila*, which appears to remain good law in this circuit, the Court has reviewed the IJ's decision for an abuse of discretion and, at the same time, considered whether the decision or the process afforded Petitioners infringed upon the Constitution.

that the Government had no proof, at that point in time, or no nexus at that point in time to connect any of these brothers to the MEK, or for the matter the NCR. I had no evidence to show that they had any kind of affiliation with the alleged State Department designation of a terrorist organization. But, it's clear to me is that even today there is no evidence to show that they are terrorists. The Attorney General clearly has not designated them as terrorists. So I find that they are now, even the agent has stated that they were not members of this terrorist organization. They were, at best, according to his testimony, associates as a S1 to this organization. The list, standing alone, I do not find to be significant.

However, in listening to Agent Castillo's testimony and finding that it was, they found this list because their was a search warrant executed at a safe house of the MEK cell in Los Angeles, that they arrested multiple people at that location, at least seven. And that, since he's been working on terrorist groups in the Los Angeles area, 60 out of 71 people he arrested were on that list. The respondents four names were on that list. He had an inside informant that had been wired, that went undercover, as part of their operation into that cell, or safe house as part of their surveillance and undercover operation. And that individual also identified these four respondents as being associates of the MEK. That, in conjunction with this list, in conjunction with Agent's Castillo's testimony that they were in fact associates and didn't participate.

And, the activities alone, standing alone, the demonstrations are not the key. The key is whether or not, under the Immigration and Nationality Act, they fall under the definition of participating, raising money for, or within the definition of what has now been designated as individuals who can be targeted and held without bond because of their participation, fund raising, or affiliation with, known terrorist organizations.

The last time [Petitioners] were in Court, we had no evidence placing them in a nexus situation. When counsel for [Petitioners] asked, why didn't you present this evidence before, well, it clearly was not available until February of 2001. This is newly discovered evidence. I find it material to [Petitioners'] cases and detention.

And, based upon this evidence, I would find that they are a danger to the general public of the United States and potentially, could be potentially a danger to the national security of the United States and its citizens. I would have to agree with Agent Castillo. I've been sitting here long enough. I've seen too many of these cases. If they are not just a danger because of their activities, but I have heard enough about knowing that the Iranian undercover agents walking, or working within the United States, and they could potentially also put United States citizens in harms way. It's particularly significant since September 11th of 2001.

I find that because of their activities with, in light of this new evidence that's come before the Court, based

upon Agent Castillo's testimony today, I would find that the Government has established changed circumstances in the case in light of this new evidence and the ongoing investigations that they had. And this new evidence has been revealed because of those two investigations and I will not release your clients on bond. I believe that your clients need to [be] held without bond because of this new significant evidence.

It was very clear to me the last time the four respondents appeared before me, they all, it was purported to me on the three that were stipulated that they were not MEK members. And Mohammad stated he was not a MEK member. I clearly have evidence before me today, that I have the log in addition to Agent Castillo's testimony, based upon operative or undercover individual that identified them as being part of the MEK, or working with the MEK. And that they were known to have gone into a prior cell--strike that, prior safe house in the Los Angeles area. They may not have gone into the recent one but they did go into the prior one.

I find all of the, when you look at the totality of the information, in addition to there being now a nexus based upon the information that the FBI has received that they actually setup the safe house in Oklahoma. I find that there to be significant ties of your client with the MEK and them being associates. And therefore, I will not release them on bond.

(Petitioners' Brief, Exh. 5 (RT) at 243-46.)

Petitioners appealed the IJ's decision to the Board of Immigration Appeals (BIA). The BIA ruled:

> In light of the Service's new evidence and the FBI Agent's testimony, we find that the Service has met its burden of demonstrating a material change in [Petitioner's] circumstances. *See generally Matter of Sugay*, 17 I&N Dec. 637 (BIA 1981)(finding that following a bond redetermination, a change in circumstances may justify a modification of an Immigration Judge's bond order). Therefore, [Petitioner] has the burden to demonstrate that his release would not pose a danger to property or persons, and that he is likely to appear for any future proceedings. 8 C.F.R. § 236.1(c)(8); *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999). We find sufficient evidence in the record that [Petitioner] is associated with a terrorist organization, and therefore he poses a danger to persons or property.
>
> We also note that subsequent to [Petitioner's] August 19, 1999, release on $50,000 bond, Congress enacted the USA PATRIOT ACT. This statute significantly expanded the category of individuals who are subject to mandatory detention pursuant to section 236(c)(1)(D), as inadmissible under section 212(a)(3)(B) of the Act or deportable under section 237(a)(4)(B) of the Act on security and related grounds. It appears from this record that [Petitioner] fits within the category of individuals who are subject to mandatory detention under the USA PATRIOT ACT amendments. In this regard, we note that it is not necessary that an alien be charged and found removable on a mandatory

> detention ground in order to be subject to the mandatory detention under section 236(c)(1)(D) of the Act. *See generally Matter of Melo-Pena*, 21 I&N Dec. 883 (BIA 1997)(finding the language "is deportable" in the Transition Period Custody Rules does not require an alien to be charged with deportability as an aggravated felon before the presumptions contained in that bond provision apply.)
>
> . . .
>
> In light of the Service's new evidence and the statutory changes enacted by Congress since [Petitioner's] prior release on bond, we agree with the Immigration Judge that [Petitioner] is now subject to detention without bond as an individual associated with a terrorist organization.

(Petition, Exh. 115 at 5 (Mohammad-Reza's Decision of the Board of Immigration Appeals, June 12, 2002).)

Petitioners have filed 58-page Petitions and 24-page points and authorities in support of their Petitions. In addition, they have filed thousands of pages of documents along with the certified administrative records in each of their cases. Sprinkled throughout these pleadings are a myriad of claims that the bond decisions were wrong and that the procedure used by the IJ was improper. The Court has endeavored to sift through the record and the briefs to locate every issue raised by Petitioners and to address each issue separately.

Petitioners seek to challenge the federal government's designation of the MEK as a terrorist organization. Congress has selected the United States Court of Appeals for the District of Columbia Circuit as the only forum for challenges to Foreign Terrorist

Organizations. 8 U.S.C. § 1189(b). Further, Petitioners are precluded from raising their challenges to the MEK's designation in removal proceedings. 8 U.S.C. § 1189(a)(8).

Petitioners argue that under *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), they have a right to challenge the designation of the MEK as a terrorist organization in these proceedings. Petitioners are wrong. *Mendoza-Lopez* involved a criminal prosecution of an illegal alien who had reentered the United States after being deported. The Supreme Court held that the defendant could challenge his prior deportation in his criminal case because there had been no judicial review of his administrative deportation order at the time he was initially deported. *Id.* at 837-39. It does not support Petitioners' contention that they should be able to challenge the government's terrorist designation of the MEK in their removal proceedings or in this habeas action. Nor does *National Counsel of Resistance of Iran (NCRI) v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001), also cited by Petitioners, support their position. In that case, two groups that had been designated by the Secretary of State as Foreign Terrorist Organizations challenged the designations in the D.C. Circuit Court. The court held that the Secretary was required to give the organizations notice and an opportunity to be heard before designating them terrorist organizations. *Id.* at 209. Again, that case does not support Petitioners' claims here. Because this Court does not have jurisdiction to consider Petitioners' claim that the designation of the MEK as a Foreign Terrorist Organization was improper, their argument in this regard is rejected without prejudice for Petitioners to renew it in the D.C. Circuit Court.

Petitioners next contend that their "indefinite" detention violates 8 U.S.C. sections 1231(a)(2) and (a)(6). These sections prohibit indefinite detention of an alien where a final order of removal has been entered but removal is not imminent due to the unavailability of a country willing to accept the alien. They cite *Zadvydas v. Davis*, 533 U.S. 678 (2001), in support of this argument. *Zadvydas* precludes indefinite detention of aliens who have been finally determined to be removable. It does not apply to cases like Petitioners' where removal orders are not yet final and may never be. *See id.* at 697 (stating indefinite detention rationale does not apply to cases in which removal has not yet been finally determined because detention resulting from pre-removal-hearing case has an obvious termination point (*i.e.*, the order of removal), while detention resulting from post-removal-hearing indefinite detention case does not). Thus, this ground is also without merit.

Petitioners argue that the revocation of their bonds violated the Due Process Clause of the Fifth Amendment. They point out that they are being held without bond because one IJ found they were a danger to the national security, yet a different IJ later found they were entitled to a withholding of removal because they were not terrorists or threats to national security. They cite no authority for the proposition that both IJs were required to arrive at the same conclusion or that their failure to do so was improper. The Court has not found any authority for this proposition either. In fact, this case establishes that such a rule would not inure to Petitioners' benefit. Had the second IJ in this case been bound by the decision of the first that Petitioners posed a danger to national security, Petitioners would not have been eligible for withholding of removal.

Petitioners argue that the IJ incorrectly relied on the government's translation of the MEK document that purportedly identified them as Los Angeles ("LA") cell members. They contend that the correct interpretation of the Farsi word "Shabakeh" found on the form was "network," not "cell" member. They point out that other IJs who considered this document and the translation have sided with them. Again, this Court finds that the IJ did not abuse her discretion nor did she deny Petitioners due process when she arrived at a different conclusion than the one urged by Petitioners and accepted by other IJs. The government presented evidence at the bail hearings that the form was seized from the MEK offices and that it was translated from Farsi to English by a language specialist who determined that it said "cell" above Petitioners' names. (Petitioners' Brief, Exh. 5 (RT) at 137, 155-56.) The Special Agent who testified about his investigation into the MEK told the IJ that he had shown the document to a government witness who is a member of the MEK who had confirmed that the list contained the names of the MEK members. (*Id.* at 151.) Petitioners' counsel argued to the IJ at the hearing that "Shabakeh" did not mean "cell" member but, rather, it referred to a networking group. (*Id.* at 237.) The IJ did not agree. But Petitioners had an opportunity to present their interpretation of the document and what the document meant.

The FBI agent also testified that the phrase "Khordad 30th, 76," found on the MEK document listing Petitioners as cell members, signified an important date for the MEK because it was the day the organization began to fight the Iranian government. Petitioners argue that that interpretation was wrong. They contend it corresponds to the date of a rally in Denver opposing investment in Iran. They argue

that the incorrect interpretation was one of the factors leading to their detention. Petitioners made this same argument at their bail hearing. (*Id.* at 194.) The IJ rejected it. But a fair reading of the IJ's decision shows that the date on the document had little if any effect on her decision to deny Petitioners' bail. In fact, she did not even mention the date in her decision. Thus, even if the Court were to accept that the government's interpretation of the date was in error, Petitioners would still not be entitled to bond.

Petitioners make general arguments that the IJ's conclusion that they were a danger was based on unreliable, inconsistent, and unsubstantiated evidence. Again, this Court disagrees. The core facts relating to the bond issue are not really in dispute in this case. Petitioners are in the United States illegally. The FBI recovered an MEK document which lists Petitioners' names on it. The MEK is a Foreign Terrorist Organization. The government presented evidence that Petitioners are associates of the MEK through the testimony of an FBI agent. The agent had been investigating the MEK for five years at the time he testified at their bond hearing. (*Id.* at 135-36.) He had extensive experience with the organization. He had surveilled the group, conducted extensive investigation of it, and spoken with some of its members.

Petitioners claim they are not associates, that they merely participated in public, peaceful demonstrations with other like-minded persons and that is how their names ended up on the list. The IJ sided with the government. This was not an abuse of discretion. Nor did it violate Petitioners' rights to due process.

Petitioners complain that they did not have a fair chance to cross-examine a government witness whose statements were introduced

through hearsay testimony of the agent. Hearsay is admissible in immigration hearings. *Saidane v. Immigration and Naturalization Service*, 129 F.3d 1063, 1065 (9th Cir. 1997). Further, even outside the realm of immigration cases, hearsay is admissible at bond hearings. *United States v. Winsor* 785 F.2d 755, 756 (9th Cir. 1986)(per curiam). In fact, the rules governing detention hearings specifically provide that the Federal Rules of Evidence (including the hearsay rules) do not apply to bond hearings. *See* 18 U.S.C. § 3142 (f)(2) and Fed. R. Evid. 1101(d)(3)("The [R]ules [of Evidence] . . . do not apply [to] . . . proceedings with respect to release on bail . . . ."). Further, Petitioners capitalized on the admissibility of hearsay evidence at the hearing: they submitted all of their evidence through hearsay. Their testimony was introduced by proffer. Additionally, they submitted hundreds of pages of letters amounting to testimonials of their good character, as well as work and school records supporting their request for release on bond. Even in this Court Petitioners continue to submit hearsay declarations and records supporting their attempt to be released on bond.

Hearsay is admissible at bond hearings. Petitioners' constitutional rights were not abridged when the IJ accepted hearsay, nor did she abuse her discretion in doing so. For these reasons, this claim, too, is rejected.

Petitioners were on bond when they were arrested by the federal government after the government found the MEK document. Petitioners contend that they were entitled to notice and a hearing before they were arrested, which, they argue, effectively amounted to a bond revocation. The Court disagrees. The government's seizure of a list tying Petitioners to a Foreign Terrorist Organization supported its

arrest of Petitioners. They were afforded a hearing thereafter. Petitioners have cited no authority in support of the proposition that they were entitled to notice and a hearing before their arrests nor has the Court found any. Common sense dictates that where, as here, the federal government learns that individuals who are in the United States illegally and out on bond pending removal are associates of a Foreign Terrorist Organization the government detain the individuals first and then afford them notice and a hearing relating to bond. Petitioners' alternative (*i.e.*, that the INS mail them a notice that it has information they are associated with a terrorist organization and they should appear at a hearing in a month to determine whether they should be incarcerated pending removal hearings) is unworkable.

Petitioners contend that the IJ's decision to deny them bond was arbitrary, capricious, and an abuse of discretion. As set forth in this decision, Petitioners are wrong. The IJ based her decision on the evidence and her decision was not an abuse of discretion nor did it violate the Constitution.

During the agent's testimony, he informed the IJ that the government was attempting to convince Petitioners to cooperate with the government and act as informants. The agent intimated that, if Petitioners agreed to cooperate, the government's position regarding bond might be different. Petitioners argue that this proposal violates their rights because it conditions release on cooperation, which they claim they will not or cannot provide. The IJ did not rely at all on Respondent's proposed deal that if Petitioners cooperate they may be able to be released on bail. That discussion was not even mentioned by the IJ in her decision. Further, there is no authority for the proposition that offering bail to a cooperator is improper or

a violation of Petitioners' rights. The government can seek release of individuals who agree to cooperate with it in its investigation and, at the same time, urge against the release of those who choose not to cooperate. As Petitioners point out, this cuts against the government's argument that an individual is a danger if the government is willing to agree to bond under the right circumstances, but it does not mean that it is improper or unconstitutional.

Petitioners argue that they are really being held in custody because of the terrorist attacks on the World Trade Center in September 2001. Though the IJ referenced September 11 in her decision, the transcript from the hearing demonstrates that Petitioners are being held because the IJ accepted the government's argument that Petitioners are associates of a terrorist organization and pose a danger to national security.

Petitioners claim an equal protection violation because they claim similarly situated aliens were released on bond. There is no evidence of this in this case and, as can be seen from the extensive record here, each case is different. Bond determinations are individual, fact-specific decisions. The IJ in this case considered each individual separately and found that detention was appropriate.

Petitioners take exception to the IJ's finding that Petitioners went to one of the MEK's headquarters in Los Angeles. They argue that the IJ grouped all of them together and used evidence as to some against the others. Petitioners are right. The IJ found that Petitioners had visited the MEK safehouse in Los Angeles based on testimony from the FBI agent. That finding was clearly erroneous. In the first place, the agent testified he only saw one of the brothers at the safehouse and did not specify which one. (Petitioners' Brief,

Exh. 5 at 221.) But, clearly, there was no evidence that all four had gone to the safehouse. Nor was there any evidence as to which one had gone. Having concluded that the IJ's factual finding was in error, however, does not mean that her decision should be overturned. The decision denying bond was premised almost entirely on the fact that Petitioners were associates of the MEK. It did not turn on the fact that they purportedly were seen at a safehouse, though the IJ mentioned that fact in her decision. Again, Petitioners' arguments here are rejected.

Because Petitioners were afforded the safeguards required under the Constitution, including notice and a hearing and representation by counsel, and because the IJ did not abuse her discretion, the Petitions are dismissed.

IV.

CONCLUSION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation and (2) directing that Judgment be entered denying the instant Petition and dismissing this case with prejudice.

DATED: April 30, 2003.

Patrick J. Walsh

PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MOHAMMAD-REZA MIRMEHDI, Petitioner, v. UNITED STATES IMMIGRATION &, NATURALIZATION SERVICE, et al. Respondents.	CASE NO. CV 02-8916-R (PJW) ORDER ACCEPTING REPORT AND ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the records on file, and the Report and Recommendation of United States Magistrate Judge, and has considered *de novo* the portions of the Report as to which objections have been filed. The Court accepts the Magistrate Judge's Report and adopts it as its own findings and conclusions.

DATED: May 19, 2003.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

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2013 WL 1450988 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Mohammed MIRMEHDI, et al., petitioners,
v.
UNITED STATES OF AMERICA, et al.

No. 12-522.
April 8, 2013.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for the Respondents in Opposition

Donald B. Verrilli, Jr., Solicitor General, Counsel of Record.

Stuart F. Delery, Acting Assistant Attorney General.

Barbara L. Herwig, Edward Himmelfarb, Attorneys, Department of Justice, Washington, D.C. 20530-0001, SupremeCtBriefs@usdoj.gov, (202) 514-2217.

*I QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the United States is not liable under the Federal Tort Claims Act in this case in light of the discretionary-function exception in 28 U.S.C. 2680(a) and, in the alternative, in light of a litigation privilege under California law.

2. Whether, despite existing statutory remedies under both the Immigration and Nationality Act and habeas corpus, petitioners are nevertheless entitled to judicial recognition of a new damages remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), for detention pending their removal, when that detention was allegedly unlawful because it was based on fabricated evidence.

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*1 OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-20b) is reported at 689 F.3d 975. The superseded opinion of the court of appeals (Pet. App. 21a-39a) is reported at 662 F.3d 1073. The judgment of the district court (Pet. App. 40a-42a) and the order dismissing petitioners' complaint in relevant part (Pet. App. 43a-54a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2012, and a petition for rehearing was also denied on that date (Pet. App. 2a-3a). On August 28, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 22, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

*2 STATEMENT

1. This dispute arises out of immigration proceedings against petitioners, four Iranian brothers who entered the United States between 1978 and the early 1990s. In 1998, petitioners applied for political asylum. The next year, their former immigration attorney was charged with immigration fraud and began to cooperate with a federal investigation. He told federal authorities that petitioners were supporters of the Mujahedin-e Khalq (MEK), a group that the Secretary of State had designated as a foreign terrorist organization in 1997. Pet. App. 3a-5a. [1]

a. In March 1999, the Immigration and Naturalization Service (INS) initiated removal proceedings against petitioners on charges that they were in the United States illegally. C.A. E.R. 59, 75, 104. Petitioners were arrested and detained in light of a Joint Terrorism Task Force's determination that they had committed immigration fraud in connection with their asylum applications. *Id.* at 37-38, 77. An immigration judge (IJ), however, granted their release on bond. *Id.* at 86-87; Pet. App. 4a.

In February 2001, a federal search of an MEK safehouse located a cache of documents, including one that was known as the "L.A. Cell Form." Pet. App. 5a; C.A. E.R. 90. That document included petitioners' names on a list of what the government contends were members, affiliates, and supporters of MEK. Pet. App. 5a. In October 2001, the INS revoked petitioners' bond and detained them pursuant to the original 1999 warrant. *Ibid.*; see 8 U.S.C. 1226(b).

***3** Petitioners then sought redetermination of their bond pursuant to 8 C.F.R. 1003.19(a)-(b). C.A. E.R. 87. During a December 2001 hearing before an IJ, FBI Special Agent Christopher Castillo testified about the L.A. Cell Form, stating that he had shown the document to a confidential informant who claimed to know petitioners and who stated that they were affiliated with MEK. *Id.* at 91. Petitioners proffered rebuttal testimony, in which they denied being affiliated with MEK and contended that the L.A. Cell Form was merely a list of individuals who had been invited to participate in a 1997 demonstration protesting the Iranian government that was (unbeknownst to them) organized by MEK. *Id.* at 95-97. The IJ found that petitioners' bond should be revoked based on "the totality of the circumstances," specifically noting that the L.A. Cell Form alone would have been insufficient to establish changed circumstances warranting bond revocation. *Id.* at 99. The IJ discussed, *inter alia*, other testimony from Castillo about petitioners' ties to MEK; evidence about the extensive overlap between MEK supporters and attendees at the 1997 demonstration; letters between one of petitioners and a known MEK supporter; an allegation by petitioners' former attorney that petitioners "had been

involved in forming an MEK Cell in Oklahoma"; and the fact that petitioners admitted they had filed "[f]raudulent asylum applications and obtain[ed] fraudulent identifications, which indicate[d] a desire to obviate the legal process governing immigration" and made them a significant flight risk. Mat 99-101.

Petitioners appealed the bond revocation to the Board of Immigration Appeals (Board) pursuant to 8 C.F.R. 1003.1(b)(7), which affirmed on the ground that petitioners posed a danger to persons or property as a ***4** result of their association with MEK. C.A. E.R. 107-108; C.A. Defendants-Appellees' Addendum (C.A. Addendum) 34, 38, 43.

b. Meanwhile, Us conducted removal proceedings against petitioners, who conceded that they were removable as charged but requested asylum. C.A. E.R. 37, 59-60; C.A. E.R. Supp. 54, 74. The IJs denied asylum and ordered that petitioners be removed but also held that they were entitled to withholding of removal to Iran, because their MEK connections would make them likely to be subject to torture. C.A. Addendum 47.

Both sides appealed to the Board, which affirmed in all respects. *E.g.*, C.A. E.R. 75-84. Two of petitioners sought review in the court of appeals pursuant to 8 U.S.C. 1252. In denying their petitions, the Ninth Circuit held that the Board did not err in denying asylum, because substantial evidence supported the Board's conclusion that one petitioner "was engaged in immigration fraud" and because the Board properly relied on evidence that the other petitioner "knew his own [asylum] claim was fraudulent." *Mirmehdi v. Mukasey,* Nos. 04-74743, 04-74744, 2009 WL 247903, at *1 (9th Cir. Feb. 2, 2009).

c. After the Board affirmed the revocation of petitioners' bond, and while removal proceedings against petitioners were ongoing, petitioners filed a petition for habeas corpus seeking release from detention. The district court denied their petition. C.A. Addendum 45-63. The court of appeals affirmed with respect to two of petitioners, but remanded with respect to the other two, to allow the government to reconcile a potential inconsistency about their connections with terrorist activities between the Board's decisions in the bond-revocation proceeding and the removal proceedings. ***5** *Mirmehdi v. INS,* 113 Fed. Appx. 739, 741 (9th Cir. 2004). On remand, the government never had an opportunity to reconcile that potential inconsistency because petitioners were released from detention in March 2005. Pet. App. 6a.

2. In August 2006, petitioners filed this action seeking damages, in relevant part, under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). They alleged, among other things, that Agent Castillo and Immigration and Customs Enforcement Agent James MacDowell fabricated evidence against them, resulting in their unlawful detention. Pet. App. 55a-158a. The district court dismissed most of petitioners' claims, and the others were settled. *Id.* at 6a.

As relevant here, the district court dismissed the *Bivens* claims against Castillo and MacDowell for unlawful detention on the ground that "[petitioners] did not possess the right to be free from arrest and detention under the circumstances alleged in the amended complaint." Pet. App. 46a. The court also dismissed the FTCA claim against the United States for false imprisonment on the ground that "[petitioners'] initial bond determination and subsequent bond revocation and rearrest were proper exercises of the Attorney General's discretion." *Id.* at 50a.

3. The court of appeals affirmed. Pet. App. 21a-39a (initial opinion), 1a-20b (amended opinion). [2]

***6** a. With respect to petitioners' *Bivens* claim, the court of appeals did not reach the question of whether petitioners had a "constitutional right not to be detained pending deportation proceedings." Pet. App. 7a n.1. Instead, the court concluded that it would not "extend *Bivens*" to allow a damages remedy "for illegal immigrants to recover for unlawful detention during deportation proceedings." *Id.* at 9a; see *id.* at 10a-13a.

Applying this Court's two-part analysis in *Wilkie v. Robbins,* 551 U.S. 537 (2007), the court of appeals concluded that no *Bivens* remedy should lie because petitioners were able to pursue alternative remedies and special factors counseled hesitation in recognizing an implied damages remedy in this context. Pet. App. 11a. The court explained that petitioners

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"could - and did - challenge their detention through not one but two different remedial systems": the "substantial, comprehensive, and intricate remedial scheme in the context of immigration" and the remedial framework provided by habeas corpus. *Id.* at 11a-12a (citation omitted). The court acknowledged that neither of those systems provides for "monetary compensation for unlawful detention," but it concluded that it was required to defer to Congress's judgment and that Congress's failure to provide for that particular remedy "can hardly be said to be inadvertent," given the frequency with which it has amended the INA. *Id.* at 12a. The court further concluded that hesitation in recognizing a damages remedy was justified by "[t]he complexity and comprehensiveness of the existing remedial system" and by the fact ***7** that "immigration issues have the natural tendency to affect diplomacy, foreign policy, and the security of the nation." *Id.* at 13a (citation and internal quotation marks omitted). [3]

b. With respect to petitioners' FTCA claim, the court of appeals rejected that claim on the basis of two different statutory exceptions from liability. Pet. App. 15a-19a.

First, the court of appeals relied on the discretionary-function exception, under which the United States cannot be sued "based upon the exercise or performance or the failure to exercise or perform a discretionary function *** , whether or not the discretion involved be abused." 28 U.S.C. 2680(a). The court explained that it needed to determine whether the challenged conduct involves an element of judgment or choice and implements social, economic, or political policy considerations, and also whether the complaint alleges that the policymaking defendants promulgated unconstitutional policies that they had no discretion to create. Pet. App. 16a. The court held that petitioners' detention fell within the scope of the discretionary-function exception "[b]ecause the decision to detain an alien pending resolution of immigration proceedings is explicitly committed to the discretion of the Attorney General and implicates issues of foreign policy, and because [petitioners] do not allege that this decision itself violated the Constitution." *Id.* at 16a-17a.

***8** Second, focusing on petitioners' allegation that Castillo's "knowingly false testimony" about the L.A. Cell Form "constituted false imprisonment under California law" (Pet. App. 17a), the court of appeals determined (*id.* at 17a-19a) that the United States would not be liable because it could "assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim," 28 U.S.C. 2674 (third paragraph). Even assuming that petitioners' allegations would state a claim of false imprisonment under California law - a question the court did not resolve, Pet. App. 17a n.9 - the court held that "California law would not permit recovery against an individual defendant for testimony given to an IJ in a bond revocation proceeding" in light of California's "very broad litigation privilege" for statements made in official proceedings authorized by law. *Id.* at 18a (internal quotation marks omitted). The court noted that the litigation privilege does not apply in a suit for malicious prosecution, but petitioners "have not brought a claim for malicious prosecution." *Id.* at 18a, 19a. Having found immunity under California law, the court of appeals declined to address whether Castillo's testimony "would also be immune under federal law." *Id.* at 19a n.10. [4]

4. Petitioners sought rehearing, but the court of appeals denied their petition. Pet. App. 3a.

***9 ARGUMENT**

Petitioners contend (Pet. 13-21) that the court of appeals erred in two ways when applying the discretionary-function exception to liability under the FTCA. The court of appeals, however, did not even address the first aspect of petitioners' argument and it did not disagree with petitioners' legal rule with respect to the second aspect. Moreover, the court's rejection of petitioners' FTCA claim rested on an independent state-law ground that does not warrant this Court's review and is bolstered by additional federal- and state-law grounds that defeat petitioners' underlying tort claim. Petitioners also contend (Pet. 25-35) that the court of appeals erred in declining to extend a damages remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), to a claim by aliens that they were unlawfully

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detained pending removal from the United States. That decision was correct and does not conflict with any decisions of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 13-21) that the court of appeals' reliance on the FTCA's discretionary-function exception implicates two different circuit conflicts: one pertaining to the relationship between the discretionary-function exception in 28 U.S.C. 2680(a) and the so-called "law-enforcement proviso" to the intentional-tort exception in 28 U.S.C. 2680(h), and one pertaining to whether the discretionary-function exception applies to allegedly unconstitutional conduct. [5] Even if petitioners are correct ***10** about the merits of either of those two arguments (neither of which was addressed by the government in the court of appeals), this would be an especially poor vehicle for resolving them.

a. While there is indeed some disagreement in the courts of appeals about both of the issues that petitioners discuss (Pet. 14-21), petitioners tellingly fail to describe what the court of appeals actually held in this case. With respect to the first issue, the court did not even mention or cite the law-enforcement proviso. There is accordingly not even an implicit holding in the decision below about what petitioners describe (Pet. 18) as "the relationship between" that proviso and the FTCA's discretionary-function exception.

With respect to the second issue - whether the discretionary-function exception can prevent the United States from being liable for unconstitutional acts - the court of appeals' decision did not express disagreement with petitioners' proposed rule of law. Indeed, the court found the discretionary-function exception applicable here "because [petitioners] do not allege that th [e] decision [to detain them pending resolution of their removal proceeding] violated the Constitution." Pet. App. 17a. Petitioners presumably believe that the court of appeals should not have focused on the decision to detain them made by the IJ and the Board (*i.e.*, the Attorney General's agents), as opposed to the allegedly false testimony provided to the IJ. This Court, however, generally does not grant review "when the asserted error consists ***11** of *** the misapplication of a properly stated rule of law." Sup. Ct. R. 10. [6]

b. Moreover, the court of appeals' rejection of petitioners' FTCA claim rested on an independent ground: that California's litigation privilege would immunize Castillo from liability for his testimony before the IJ, and thus prevent the United States from being held liable under 28 U.S.C. 2674 (third paragraph). Pet. App. 17a-19a. Petitioners contest the correctness of the court of appeals' application of state law (Pet. 21-24), but they do not suggest that the state-law question itself warrants this Court's review. It does not. See Sup. Ct. R. 10(a)-(c) (referring to "important" questions of "federal" law). [7]

c. In any event, even if petitioners are correct about the scope of California's litigation privilege, they do not explain why Castillo's live testimony to the IJ would not ***12** be entitled to immunity under federal law. See Pet. App. 19a n.10 (not resolving the question but noting that "[t]he Supreme Court has stated that both lay and law enforcement witnesses are absolutely immune for live testimony given either at a trial or before a grand jury") (citing *Rehberg v. Paulk,* 132 S. Ct. 1497, 1507 & n.1 (2012), and *Malley v. Briggs,* 475 U.S. 335 (1986)); see also *Briscoe v. LaHue,* 460 U.S. 325 (1983) (refusing, in light of absolute immunity for witnesses at common law, to permit a damages suit under 42 U.S.C. 1983 against law-enforcement officers for allegedly perjured trial testimony).

d. Nor do petitioners address another argument that the government made in its response to their rehearing petition (at 16-17), which would provide yet another independent ground for rejecting their FTCA claim. False imprisonment under California law requires that an arrest be "without lawful privilege." *Molko v. Holy Spirit Ass'n,* 46 Cal. 3d 1092, 1123 (1988), cert. denied, 490 U.S. 1084 (1989). Under California law, lawful privilege exists when an arrest is made pursuant to a warrant "which is regular in form and which reasonably appears to have been issued by a court with jurisdiction." *Arnsberg v. United States,* 757 F.2d 971, 979 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986); see Cal. Civ. Code § 43.55 (West 2007) (arrest under warrant regular on its face is not actionable). Here, the warrants applicable to petitioners were issued in 1999. See p. 2, *supra.* Those warrants, which petitioners have not challenged, could not have been tainted by the

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allegedly false testimony subsequently presented in 2001. They did, however, provide authority for petitioners' detention upon revocation of their bond. See 8 U.S.C. 1226(b) (authorizing the Attorney General to "revoke a bond ***13** *** , rearrest the alien under *the original warrant,* and detain the alien") (emphasis added).

Accordingly, further review of the dismissal of petitioners' FTCA claim is unwarranted.

2. Petitioners also contend (Pet. 25-35) that the court of appeals erred in declining to extend a *Bivens* damages remedy to aliens' claims of unlawful detention pending removal. That contention lacks merit, and the decision below does not conflict with decisions of this Court or of other courts of appeals.

a. In its 1971 decision in *Bivens*, this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Ashcroft v. Iqbal,* 556 U.S. 662, 675 (2009) (citation omitted). The Court held that federal officials acting under color of federal law could be sued for money damages for violating the plaintiff's Fourth Amendment rights by conducting a warrantless search of his home. In creating that commonlaw action, the Court noted that there were "no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens,* 403 U.S. at 396-397.

Bivens "rel[ied] largely on earlier decisions implying private damages actions into federal statutes" - decisions from which the Court has since "retreated" and that reflect an approach to recognizing private rights of action that the Court has since "abandoned." *Correctional Servs. Corp. v. Malesko,* 534 U.S. 61, 67 & n.3 (2001). This Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker v. Chilicky,* 487 U.S. 412, 421 (1988). "The Court has therefore on multiple occasions declined to extend *Bivens* because Congress is in a better position to decide whether or not ***14** the public interest would be served by the creation of new substantive legal liability." *Holly v. Scott,* 434 F.3d 287, 290 (4th Cir.) (internal quotation marks and citation omitted), cert. denied, 547 U.S. 1168 (2006); see *Iqbal,* 556 U.S. at 675 (*Bivens* liability has not been extended to new contexts "[b]ecause implied causes of action are disfavored").

Indeed, in the 40 years since *Bivens* itself, the Court "has extended it twice only: in the context of an employment discrimination claim in violation of the Due Process Clause; and in the context of an Eighth Amendment violation by prison officials." *Arar v. Ashcroft,* 585 F.3d 559, 571 (2d Cir. 2009) (en banc) (citations omitted), cert. denied, 130 S. Ct. 3409 (2010). Since 1980, the Court "ha[s] consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko,* 534 U.S. at 68; see also *Minneci v. Pollard,* 132 S. Ct. 617, 622-623 (2012) (listing cases).

In describing how to decide whether to extend *Bivens* to a new context, the Court has described a two-step process. First, a court should ask whether there is "any alternative, existing process for protecting" the plaintiff's interests; if so, such an established process implies that Congress "expected the Judiciary to stay its *Bivens* hand" and "refrain from providing a new and freestanding remedy in damages." *Wilkie v. Robbins,* 551 U.S. 537, 550, 554 (2007). Second, "even in the absence of [such] an alternative" process, inferring a remedy under *Bivens* is still disfavored, and a court must make an assessment "appropriate for a common-law tribunal" of whether judicially created relief is warranted, "paying particular heed *** to any special factors counselling hesitation before authorizing a new kind of federal litigation." ***15** *Id.* at 550 (quoting *Bush v. Lucas,* 462 U.S. 367, 378 (1983)).

b. The court of appeals correctly applied that framework in declining to extend *Bivens* to the context of petitioners' claims of unlawful detention pending removal. As the court explained with respect to the framework's first step, petitioners "could - and did - challenge their detention through not one but two different remedial systems." Pet. App. 11a-12a.

The first system was provided by the INA, which, like other statutes that have been found to preclude creation of a *Bivens* remedy, is a "comprehensive statutory scheme[]" that has received "frequent and intense" attention from Congress. *Chilicky,* 487 U.S. at 425, 428. As the court of appeals explained, although Congress has made "multiple changes to

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the structure of appellate review in the [INA]," it has "never created [a damages] remedy." Pet. App. 12a; see generally *INS v. St. Cyr,* 533 U.S. 289, 292 (2001) (noting that Congress made "comprehensive amendments" to the INA in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546).

Instead of damages, the INA offers quasi-judicial hearings and appeals, as well as judicial review, of many significant government decisions. For example, an alien who is detained pending a removal decision - as petitioners were - under 8 U.S.C. 1226(a) is entitled to submit an application for release to an IJ, 8 C.F.R. 1236.1(d), and may appeal the IJ's decision to the Board, 8 C.F.R. 1003.38. If a bond is revoked under 8 U.S.C. 1226(b) - as it was here - the alien may seek review from an IJ and may appeal the IJ's decision to the Board. ***16** 8 C.F.R. 1003.19(f). If action is taken to remove an alien and he requests asylum, he is entitled to an IJ decision on that question as well. 8 C.F.R. 1208.2(b). During proceedings before an IJ, the alien is entitled to crossexamine government witnesses, to attempt to discredit evidence relied on by the government, to present his own evidence and witnesses, and to be represented by an attorney or other representative. 8 C.F.R. 1003, Subpart C. Judicial review of removal orders is available under 8 U.S.C. 1252.

In addition, an alien who is detained is entitled to use a second remedial system by filing a petition for habeas corpus - a remedy that has long been available in the immigration context. See *St. Cyr,* 533 U.S. at 305-310. Petitioners "took full advantage" of that system, too. Pet. App. 12a.

In short, both the INA and habeas corpus provided petitioners with "the means to be heard" in challenging their allegedly unlawful detention. *Wilkie,* 551 U.S. at 552.

c. Petitioners contend (Pet. 28) that the INA's remedies were not an adequate alternative, because the INA provides "no damages, jury trial, or right to recover against individuals." But this Court has already recognized that an alternative remedial scheme may bar *Bivens* claims even when it fails to "provide complete relief for the plaintiff." *Bush,* 462 U.S. at 388; see *Malesko*, 534 U.S. at 68 (noting that the *Bivens* claim in *Bush* was foreclosed even though "the plaintiff had no opportunity to fully remedy the constitutional violation"). As the Court has explained, "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the ***17** course of its administration," it is inappropriate for a court to create "additional *Bivens* remedies." *Chilicky,* 487 U.S. at 423; see also *Western Radio Servs. Co. v. U.S. Forest Serv.,* 578 F.3d 1116, 1120 (9th Cir. 2009) ("[s]o long as Congress' failure to provide money damages, or other significant relief, has not been inadvertent, courts should defer to its judgment") (citation omitted), cert. denied, 130 S. Ct. 2402 (2010); *Spagnola v. Mathis,* 859 F.2d 223, 227 (D.C. Cir. 1988) (en banc) ("[I]t is the comprehensiveness of the statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention."). [8]

d. Even assuming that the INA and habeas corpus were not adequate alternative remedial schemes, the court of appeals also correctly noted that, under the second step in *Wilkie*'s framework, there are "special factors counselling hesitation before authorizing a new kind of federal litigation." 551 U.S. at 550 (quoting *Bush,* 462 U.S. at 378). Petitioners contend (Pet. 32) that "the context of immigration does not in and of itself constitute a special factor counseling hesitation." But the court of appeals spoke more specifically of the "context" ***18** of "[d]eportation proceedings," which, unlike domestic law-enforcement practices, " 'have the natural tendency to affect diplomacy, foreign policy, and the security of the nation.' " Pet. App. 10a, 13a (quoting *Arar,* 585 F.3d at 574). That tendency is clearly manifested in petitioners' own case, which involved a federal investigation into a designated foreign terrorist organization and questions about whether petitioners would be removed to Iran. Although it Is true, as petitioners contend, that the courts are competent to determine "whether *** detention is proper," Pet. 35, that does not justify judicial creation of a private cause of action for damages outside the comprehensive framework of the INA by aliens who have been detained under that framework - especially when petitioners were able to pursue a decision about the lawfulness of their detention through the INA and habeas corpus.

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e. Petitioners contend (Pet. 25-27) that there is a conflict in the courts of appeals about whether a *Bivens* remedy exists in an immigration case. But there is no conflict, in part because the cases petitioners invoke did not actually address the question, and in part because the court of appeals' decision here did not purport to address all claims that might arise in the immigration context, and instead addressed only claims of "wrongful detention pending deportation." Pet. App. 13a; see *id.* at 20a (Silverman, J., concurring) ("[T]his case does not present the issue of whether illegal immigrants could ever bring a *Bivens* action.").

Petitioners assert (Pet. 26) that the decision below conflicts with *Martinez-Aguero v. Gonzalez,* 459 F.3d 618 (5th Cir.), cert. denied, 549 U.S. 1096 (2006), and *Franco-de Jerez v. Burgos,* 876 F.2d 1038 (1st Cir. 1989). But both of those courts applied *Bivens,* without addressing ***19** the two-step framework later set forth in *Wilkie* or suggesting that they were consciously extending *Bivens* to a new context. See *Martinez-Aguero,* 459 F.3d at 621-622 & n.l; *Franco-de Jerez,* 876 F.2d at 1039.

While petitioners also allege a conflict with prior decisions from the Ninth Circuit (Pet. 27) and with the decisions of several district courts (Pet. 29-31), this Court does not typically resolve intra-circuit conflicts or conflicts with district court opinions. See *Wisniewski v. United States,* 353 U.S. 901, 902 (1957) (per curiam); Sup. Ct. R. 10(a). [9]

Petitioners do not claim that there is any conflict with respect to the court of appeals' reliance on habeas corpus as an alternative remedy. Instead, they merely contend (Pet. 31) that "[n]o other circuit court has found that habeas proceedings bar a *Bivens* remedy in any remotely similar context." As petitioners' phrasing ***20** indicates, other courts of appeals have indeed found that the availability of habeas relief barred *Bivens* relief. [10]

In the absence of any conflict, this Court should not review the court of appeals' decision declining to extend *Bivens* to petitioners' claim of unlawful detention pending removal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Footnotes

1 The designation of MEK as a foreign terrorist organization was revoked in September 2012. 77 Fed. Reg. 60,741 (Oct. 4, 2012).

2 At the same time that it denied petitioners' rehearing petition, the court of appeals issued an amended opinion. Pet. App. 3a. The amended opinion contained two principal additions to the court's discussion of petitioners' FTCA claim: a sentence about having to consider whether the policy-making defendants had promulgated unconstitutional policies outside their discretion (*id.* at 16a) and two paragraphs about whether an individual tortfeasor would be immune from suit under state law (*id.* at 17a-19a & nn.9-10). The following discussion tracks the amended opinion.

3 In a concurring opinion, Judge Silverman agreed that petitioners "lack an implied right of action under *Bivens,*" but wrote "separately to emphasize that this case does not present the issue of whether illegal immigrants could ever bring a *Bivens* action." Pet. App. 20a-20b.

4 The court of appeals also affirmed the district court's dismissal of petitioners' witness-intimidation and conspiracy claims against Castillo and MacDowell, Pet. App. 14a-15a, and affirmed the denial of their motion to amend their complaint, *id.* at 19a-20a. Those holdings are outside the scope of the questions presented to this Court.

5 This Court recently concluded that the waiver of sovereign immunity "effected by the law enforcement proviso extends to acts or omissions of law enforcement officers that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest." *Millbrook v. United States,* No. 11-10362 (Mar. 27, 2013), slip op. 7. The decision in *Millbrook* has no salient bearing on the scope of the discretionary-function exception or its relationship with the law-enforcement proviso.

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6 As the court of appeals noted (Pet. App. 16a n.7), the parties did not address the discretionary-function exception in their court of appeals briefs. Petitioners first discussed it in their rehearing petition (at 10-14). The government's response to the rehearing petition disputed (at 16) petitioners' "premise that there was a constitutional violation here," but that response did not otherwise address the discretionary-function exception because it explained (at 17) that, "whatever [the] merit" of the panel's rationale, petitioners' FTCA claim would fail under California law.

7 To the extent that petitioners' criticism of the court of appeals' analysis rests on a contention that California law affords immunity for "private parties" but not for "law enforcement officers" (Pet. 23), that asserted basis for this suit under the FTCA is foreclosed by 28 U.S.C. 1346(b)(1), which waives sovereign immunity only "under circumstances where *** a private person[] would be liable." Cf. *United States v. Olson,* 546 U.S. 43, 45-47 (2005) (requiring a comparison with the liability of private persons even when state law would hold a state or municipal entity liable for performing governmental functions).

8 In *Minneci* - which was cited by the court of appeals (Pet. App. 9a) but is not discussed in the petition - this Court declined to recognize a *Bivens* remedy for alleged Eighth Amendment violations by the employees of a privately operated federal prison. 132 S. Ct. at 625. The Court noted that the claim at issue focused upon the kind of conduct that typically falls within the scope of state tort law and it found that state tort law provided an adequate alternative remedy in part because it would permit compensation that was "roughly similar" to what would be available under *Bivens. Ibid.* The Court did not, however, cast doubt on *Bush* or *Chilicky.* To the contrary, it discussed both cases and specifically noted the Court's conclusion in *Bush* that the administrative remedies there did "not provide complete relief." *Id.* at 622, 625.

9 In any event, there is no intra-circuit conflict. *Papa v. United States,* 281 F.3d 1004 (9th Cir. 2002), involved a different constitutional question (treatment in detention), and it did not actually decide whether a *Bivens* remedy is available in the face of the comprehensive alternative remedial scheme of the INA. *Id.* at 1009-1011; see Pet. App. 7a n.2 (noting "*Papa* did not squarely present the issue"). Petitioners also cite (Pet. 27) *Harris v. Roderick,* 126 F.3d 1189 (9th Cir. 1997), cert. denied, 522 U.S. 1115 (1998), which held in the nonimmigration context that agents who provided false testimony did not have absolute immunity. *Id.* at 1198-1199. That, too, is inapposite, for the relevant question is not whether immunity is appropriate, but whether it is proper for the courts to create a *Bivens* action for damages in this specific immigration context when Congress has provided other remedies (but not damages).

10 See, *e.g., Lebron v. Rumsfeld,* 670 F.3d 540, 556 (4th Cir.) ("Padilla had extensive opportunities to challenge the legal basis for his detention *** in habeas corpus proceedings before five different courts."), cert. denied, 132 S. Ct. 2751 (2012); *Wilson v. Rackmill,* 878 F.2d 772, 775 (3d Cir. 1989) ("There may be special factors counselling hesitation in finding a *Bivens* claim here if appellant has an effective remedy available through habeas corpus."); *Rauschenberg v. Williamson,* 785 F.2d 985, 987 (11th Cir. 1986); see also *Engel v. Buchan,* No. 11-1734, 2013 WL 819375, at *8 (7th Cir. Mar. 5, 2013) (finding habeas to be an inadequate alternative to *Bivens* for an alleged violation, outside the immigration context, of *Brady v. Maryland,* 373 U.S. 83 (1963), but distinguishing this case and others as ones where "habeas is one element of a broader, integrated remedial scheme").

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689 F.3d 975
United States Court of Appeals,
Ninth Circuit.

Mohammad MIRMEHDI; Mostafa Mirmehdi; Mohsen Mirmehdi; Mojtaba Mirmehdi, Plaintiffs–Appellants,
v.
UNITED STATES of America; Mario Lopez; John Ashcroft; Robert S. Mueller, III; James W. Ziglar; Michael Garcia, Esquire; Christopher Castillo; James MacDowell, Defendants–Appellees.

No. 09–55846.
|
Argued and Submitted Aug. 30, 2011.
|
Filed Nov. 3, 2011.
|
Amended June 7, 2012.

Synopsis
Background: Aliens not lawfully in United States filed action against United States seeking monetary damages on claim of constitutionally invalid detention, inhumane detention conditions, witness intimidation, and the intentional infliction of emotional distress. The United States District Court for the Central District of California, Manuel L. Real, J., dismissed some claims and parties settled remaining claims. Plaintiffs appealed.

Holdings: The Court of Appeals, O'Scannlain, Circuit Judge, held that:

[1] *Bivens* did not provide remedy for aliens not lawfully in United States to sue federal agents for monetary damages for wrongful detention pending deportation;

[2] aliens had not been prejudiced by witness intimidation; and

[3] decision to detain alien pending resolution of immigration proceedings fell within discretionary function exception to waiver of sovereign immunity under Federal Tort Claims Act (FTCA).

Affirmed.

Silverman, Circuit Judge, filed concurring opinion.

Opinion, 662 F.3d 1073,amended and superseded on denial of rehearing en banc.

West Headnotes (23)

[1] **United States**
Aliens, immigration, and customs

Bivens did not provide remedy for aliens not lawfully in United States to sue federal agents for monetary damages for wrongful detention pending deportation; although neither immigration system nor habeas provided monetary compensation for unlawful detention, doing so under *Bivens* would have been plainly inconsistent with Congress' authority in that field, given extensive remedial procedures available to and invoked by them and unique foreign policy considerations implicated in immigration context.

21 Cases that cite this headnote

[2] **United States**
Aliens, immigration, and customs

Immigrants' remedies for vindicating the rights which they possess under the Constitution are not coextensive with those offered to citizens; therefore, deportation proceedings constitute the relevant environment of fact and law in which to decide whether to recognize a *Bivens* remedy.

8 Cases that cite this headnote

[3] **United States**
Aliens, immigration, and customs

A court must consider whether an immigrant may bring a *Bivens* claim to vindicate certain constitutional rights separately from whether a citizen may bring such a *Bivens* claim because Congress has the ability to make rules as to aliens that would be unacceptable if applied to citizens.

2 Cases that cite this headnote

[4] **United States**
Constitutional Violations;Bivens Claims
United States
Existence and Exclusivity of Other Remedies

The examination of the availability of a *Bivens* remedy requires a court to determine whether there is any alternative, existing process for protecting the plaintiffs' interests, and if there is such an alternative remedy, the inquiry stops; if there is not, a court asks whether there nevertheless are factors counseling hesitation before devising such an implied right of action.

9 Cases that cite this headnote

[5] **United States**
Constitutional Violations;Bivens Claims

So long as Congress' failure to provide money damages has not been inadvertent, courts should defer to its judgment, rather than providing a remedy under *Bivens*.

1 Cases that cite this headnote

[6] **United States**
Constitutional Violations;Bivens Claims
United States
Existence and Exclusivity of Other Remedies

The complexity and comprehensiveness of an existing remedial system is a factor among a broad range of concerns counseling hesitation before allowing a *Bivens* remedy.

3 Cases that cite this headnote

[7] **United States**
Aliens, immigration, and customs

Immigration issues that have the natural tendency to affect diplomacy, foreign policy, and the security of the nation counsel hesitation in extending *Bivens*.

10 Cases that cite this headnote

[8] **Conspiracy**
Rights or privileges involved

Aliens not lawfully in United States had not been prejudiced by witness intimidation, and thus did not have viable civil rights conspiracy claim, where witness testimony would have helped aliens to establish that they were eligible for withholding of removal because they were not involved with any terrorist activities, but aliens were awarded withholding of removal even without that testimony. Immigration and Nationality Act, §§ 212(a)(3)(B)(i), 241(b)(3)(B), 8 U.S.C.A. §§ 1182(a)(3)(B)(i), 1231(b)(3)(B); 42 U.S.C.A. § 1985(2).

Cases that cite this headnote

[9] **Aliens, Immigration, and Citizenship**
Undocumented aliens

Alien unlawfully in United States did not have constitutional right to assert claim of selective enforcement of immigration laws.

1 Cases that cite this headnote

[10] **Conspiracy**
Conspiracy to Interfere with Civil Rights

Allegations of witness intimidation will not suffice for a cause of action for civil rights conspiracy unless it can be shown the litigant was hampered in being able to present an effective case; this rule applies to both witness intimidation and conspiracy to intimidate a witness. 42 U.S.C.A. § 1985(2).

Cases that cite this headnote

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[11] **Evidence**
Records and decisions in other actions or proceedings

Court of Appeals could take judicial notice of related habeas and immigration cases, as matters of public record, that had been referenced on face of complaint of aliens not lawfully in United States against United States seeking monetary damages on claim of witness intimidation. 42 U.S.C.A. § 1985(2); Fed.Rules Evid.Rule 201, 28 U.S.C.A.

5 Cases that cite this headnote

[12] **United States**
Particular Functions or Settings

Decision to detain alien pending resolution of immigration proceedings fell within discretionary function exception to waiver of sovereign immunity under Federal Tort Claims Act (FTCA), since it was explicitly committed to discretion of Attorney General and implicated issues of foreign policy. 28 U.S.C.A. §§ 1346, 2680(a).

7 Cases that cite this headnote

[13] **United States**
Necessity of waiver or consent

United States, as a sovereign, may not be sued except insofar as it consents to be sued. 28 U.S.C.A. § 1346.

Cases that cite this headnote

[14] **United States**
Waiver of immunity;limitations and exceptions in general

Federal Tort Claims Act (FTCA) is subject to both procedural and substantive exceptions to sovereign immunity that must be strictly interpreted. 28 U.S.C.A. § 1346.

2 Cases that cite this headnote

[15] **United States**
Jurisdiction and venue

Court of Appeals had to sua sponte consider applicability of discretionary function exception to waiver of sovereign immunity under Federal Tort Claims Act (FTCA), on claim for false imprisonment under California law, since claim affected its jurisdiction. 28 U.S.C.A. §§ 1346, 2680(a).

4 Cases that cite this headnote

[16] **United States**
Discretionary Acts or Functions

To determine whether conduct falls within the discretionary function exception to the waiver of sovereign immunity under the Federal Tort Claims Act (FTCA), a court must first determine if the challenged conduct involves an element of judgment or choice and then if the conduct implements social, economic, or political policy considerations, and must also determine whether the complaint alleges that the policy-making defendants promulgated discriminatory, unconstitutional policies which they had no discretion to create. 28 U.S.C.A. §§ 1346, 2680(a).

7 Cases that cite this headnote

[17] **United States**
Law enforcement

On claim for false imprisonment under California law, discretionary function exception to waiver of sovereign immunity under Federal Tort Claims Act (FTCA) did not immunize conduct of federal officers from judicial review who made arrest at operational level. 28 U.S.C.A. §§ 1346, 2680(a).

2 Cases that cite this headnote

[18] **False Imprisonment**
Persons Liable

United States
Law enforcement

California's litigation privilege entitled federal immigration officer to immunity with regard to his allegedly false testimony before immigration judge (IJ) during alien's bond

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revocation hearing, and thus Federal Tort Claims Act (FTCA) barred alien's claim against the United States alleging that officer's testimony constituted false imprisonment under California law. 28 U.S.C.A. § 2674; West's Ann.Cal.Civ.Code § 47(2).

Cases that cite this headnote

[19] False Imprisonment
Liability of officer or other person making arrest and persons assisting officer

California law allows false imprisonment claims for arrests by officers in two situations: when an arrest is made without a warrant, and when an officer maliciously arrests and imprisons another by personally serving an arrest warrant issued solely on information deliberately falsified by the arresting officer himself.

1 Cases that cite this headnote

[20] Torts
Litigation privilege;witness immunity

Designed to promote open communication in official proceedings, California's litigation privilege covers even those statements not made in a court or even in existing litigation; they can be specifically intended to cause investigators to institute charges. West's Ann.Cal.Civ.Code § 47(2).

Cases that cite this headnote

[21] Torts
Litigation privilege;witness immunity

All that is required for California's litigation privilege to apply is that the communication be (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) have some connection or logical relation to the action. West's Ann.Cal.Civ.Code § 47(2).

2 Cases that cite this headnote

[22] Torts
Litigation privilege;witness immunity

A federal administrative hearing counts as a "quasi-judicial proceeding" for purposes of California's litigation privilege if: the administrative body is vested with discretion based upon investigation and consideration of evidentiary facts, that body may hold hearings and decide the issue by the application of rules of law; and that body has the power to affect the personal or property rights of private persons. West's Ann.Cal.Civ.Code § 47(2).

Cases that cite this headnote

[23] Federal Civil Procedure
Liberality in allowing amendment

Federal Civil Procedure
Form and sufficiency of amendment; futility

Federal Civil Procedure
Pleading over

Requests for leave to amend should be granted with extreme liberality, particularly when a complaint was filed before *Twombly* and fails for lack of sufficient factual content; however, a party is not entitled to an opportunity to amend his complaint if any potential amendment would be futile. Fed.Rules Civ.Proc.Rule 15, 28 U.S.C.A.

31 Cases that cite this headnote

Attorneys and Law Firms

***978** Paul L. Hoffman, Schonbrun DeSimone Seplow Harris Hoffman & Harrison LLP, Venice, CA, argued the cause and filed the briefs for the plaintiffs-appellants. With him on the briefs were Michael Seplow, Adrienne Quarry, and Victoria Don, Schonbrun DeSimone Seplow Harris Hoffman & Harrison LLP, Venice, CA.

Andrew D. Silverman, United States Department of Justice, Torts Branch, Civil Division, Washington, D.C., argued the cause and filed the briefs for the defendants-

appellees. With him on the brief were Jeremy S. Brumbelow, Tony West, Timothy P. Garren, and Andrea W. McCarthy, Department of Justice Civil Division, Washington, D.C.

Appeal from the United States District Court for the Central District of California, Manuel L. Real, District Judge, Presiding. D.C. No. 2:06–cv–05055–R–PJW.

Before: ARTHUR L. ALARCÓN, DIARMUID F. O'SCANNLAIN, and BARRY G. SILVERMAN, Circuit Judges.

Opinion by Judge O'SCANNLAIN; Concurrence by Judge SILVERMAN.

ORDER

The opinion filed in this case on November 3, 2011, and reported at 662 F.3d 1073, is hereby amended. An amended opinion is filed concurrently with this order. With this amendment, the panel has unanimously voted to deny the petition for rehearing. Judges O'Scannlain and Silverman have voted to deny the suggestion for rehearing en banc, and Judge Alarcón has so recommended. The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing and the suggestion for rehearing en banc are DENIED. No subsequent petitions for rehearing or suggestions for rehearing en banc may be filed.

OPINION

O'SCANNLAIN, Circuit Judge:

We are asked to decide, among other things, whether an alien not lawfully in the United States may sue for monetary damages claiming constitutionally invalid detention.

I

Mohammad, Mostafa ("Michael"), Mohsen, and Mojtaba Mirmehdi (collectively the "Mirmehdis") are four citizens of Iran who came to the United States at various times, purportedly due to their long-standing opposition to that nation's theocratic regime. In 1978, Michael arrived on a student visa. Having abandoned the degree ***979** that earned him entry into the United States, he became a real estate agent in 1985. Mohsen, Mojtaba, and Mohammad joined Michael in California in the early 1990s. Mohsen and Mohammad also became real estate agents. Unable to pass the real estate licensing exam, Mojtaba worked in construction.

In 1998, the Mirmehdis applied for political asylum with the assistance of an attorney named Bahram Tabatabai. Tabatabai falsified certain details in the Mirmehdis' applications. After Tabatabai was arrested for immigration fraud in March 1999, he agreed to cooperate with federal authorities. As part of his plea bargain, Tabatabai spoke to Special Agents Christopher Castillo of the Federal Bureau of Investigation and J.A. MacDowell of the Immigration and Naturalization Service regarding their ongoing investigation of a terrorist group known as the Mujahedin-e Khalq ("MEK"). Though he later recanted, Tabatabai told Castillo and MacDowell that the Mirmehdis were supporters of the group, which was founded on an antipathy for the Iranian government.

Based on this information, agents arrested the Mirmehdis for immigration violations in March 1999. Michael, Mojtaba, and Mohsen were released on bond later that year; Mohammad was released in September 2000.

On October 2, 2001, immigration authorities revoked the Mirmehdis' bond, largely based on a document known as the "L.A. Cell Form," a handwritten piece of paper that has become the subject of considerable litigation and is at the center of this case. The government has always maintained that the Form lists members, affiliates, and supporters of the MEK. During the Mirmehdis' bond revocation proceedings, Castillo testified to the immigration judge ("IJ") that the FBI seized the document from an MEK facility and that a confidential informant told him of its significance.

The Mirmehdis have always denied their involvement in the MEK and allege that Castillo and MacDowell knew from the start that the document was really just a list of attendees at a rally hosted by the National Council

of Resistance of Iran ("NCRI"). It is undisputed that the MEK was listed as a terrorist group in 1997 and is affiliated with the NCRI. But the Mirmehdis assert that they attended the rally *before* that classification occurred.

The Mirmehdis also assert that Castillo knowingly lied to convince the IJ to revoke their bond. They claim that the cooperating witness never existed and that Castillo's testimony before the IJ unreasonably continued to rely upon Tabatabai, even after he recanted. Castillo's motive, the Mirmehdis contend, was to pressure them into giving up information about the MEK that they did not possess.

The Mirmehdis' assertions are not new. They raised them on direct appeal of their detention, during the merits proceeding related to their asylum applications, and in a federal petition for a writ of habeas corpus. Almost all such forms of relief were denied. The Mirmehdis were, however, granted withholding of removal because they had demonstrated a likelihood of mistreatment if removed to Iran, and because the government failed to establish that they were engaged in terrorist activity as defined by statute.

Their immigration proceedings at last final, the Mirmehdis were released from detention in March 2005. The Mirmehdis subsequently brought this suit naming as defendants: Attorney General John Ashcroft, FBI Director Robert Mueller, INS Commissioners James Ziglar and Michael Garcia, the City of Santa Ana, the City of Las Vegas, MVM, Inc., Castillo, MacDowell, several named prison guards, John Does 1–10, and the United States. They ***980** raised a number of claims including unlawful detention, inhumane detention conditions, witness intimidation, and the intentional infliction of emotional distress.

The district court dismissed almost all of the Mirmehdis' claims for either lack of personal jurisdiction or failure to state a cause of action. The parties later settled all claims except those against Castillo and MacDowell for unlawful detention and conspiracy to violate their civil rights, against Castillo for intimidation of a witness, and against the United States for false imprisonment. The district court entered a final judgment, and the Mirmehdis timely appealed the claims to which they did not stipulate.

II

[1] The Mirmehdis first appeal the dismissal of their claim against Castillo and MacDowell for wrongful detention under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). [1] Whether such a claim presents a cognizable legal theory has been an open question in this circuit. *See Wong v. United States INS,* 373 F.3d 952, 961 (9th Cir.2004); *see also Sissoko v. Rocha,* 412 F.3d 1021, 1028 (9th Cir.2005), *withdrawn and replaced,* 509 F.3d 947 (9th Cir.2007). [2]

A

In the past, we have suggested that "federal courts have inherent authority to award damages to plaintiffs whose federal constitutional rights were violated by federal officials." *Papa v. INS,* 281 F.3d 1004, 1009 (9th Cir.2002). But as the Supreme Court has since reminded us, "any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee." *Wilkie v. Robbins,* 551 U.S. 537, 550, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007). Such a cause of action "is *not* an automatic entitlement *no matter what other means there may be* to vindicate a protected interest." *Id.* (emphasis added).

Indeed, "[i]n the ... years since *Bivens,*" the Supreme Court has repeatedly rejected *Bivens* claims outside the context discussed in that specific case and has "extended it twice only: in the context of an employment discrimination claim in violation of the Due Process Clause, *Davis v. Passman,* 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979); and in the context of an Eighth Amendment violation by [publicly employed] prison officials, [*Carlson v. Green,* 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980)]." *Arar v. Ashcroft,* 585 F.3d 559, 571 (2d Cir.2009) (en banc). The Supreme Court has refused to extend *Bivens* to: violations of federal employees' First Amendment rights by their employers, *Bush v. Lucas,* 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983); harms suffered incident to military service, *United* ***981** *States v. Stanley,* 483 U.S. 669, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987); denials of Social Security benefits, *Schweiker v. Chilicky,* 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988);

decisions by federal agencies, *FDIC v. Meyer,* 510 U.S. 471, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994); actions by private corporations operating under federal contracts, *Corr. Servs. Corp. v. Malesko,* 534 U.S. 61, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001); retaliation by federal officials against private landowners, *Wilkie,* 551 U.S. at 562, 127 S.Ct. 2588; or Eighth Amendment claims against private contractors hired to administer public prisons, *Minneci v. Pollard,* —— U.S. ——, 132 S.Ct. 617, 181 L.Ed.2d 606 (2012).

The Court has also "recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa v. Alvarez–Machain,* 542 U.S. 692, 727, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (citing inter alia *Malesko,* 534 U.S. at 68, 122 S.Ct. 515). Such a decision implicates grave separation of powers concerns because the "creation of a private right of action raises [policy choices] beyond the mere consideration whether primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." *Id.* For such reasons, the Court has instructed the federal courts to "respond[ ] cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker,* 487 U.S. at 421, 108 S.Ct. 2460.

It quickly becomes apparent, however, that this query has a logical predicate—whether we would *need* to extend *Bivens* in order for illegal immigrants to recover for unlawful detention during deportation proceedings. Only after answering in the affirmative, would we need to turn to the issue of whether we *ought* to extend *Bivens* to such a context. *Arar,* 585 F.3d at 572.

B

To answer this question requires us to enter by a narrow gate. Examining the availability of a *Bivens* remedy at a "high level of generality" would "invite claims in every sphere of legitimate governmental action" touching, however tangentially, on a constitutionally protected interest. *Wilkie,* 551 U.S. at 561, 127 S.Ct. 2588. Examining the question at too low a level of generality would invite never ending litigation because "every case has points of distinction." *Arar,* 585 F.3d at 572. As such, we join our sister circuit and "construe the word 'context' as it is commonly used in law: to reflect a potentially recurring scenario that has similar legal and factual components." *Id.*

[2] **[3]** Deportation proceedings are such a context, unique from other situations where an unlawful detention may arise. It is well established that immigrants' remedies for vindicating the rights which they possess under the Constitution are not coextensive with those offered to citizens. *See, e.g., Reno v. Am.-Arab Anti–Discrim. Comm.,* 525 U.S. 471, 488, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) ("*AADC* ") ("As a general matter ... an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation."). Therefore, deportation proceedings constitute the relevant "environment of fact and law" in which to "decide whether to recognize a *Bivens* remedy." *Arar,* 585 F.3d at 572. [3]

***982 C**

[4] Having identified the appropriate context, we now must apply the Supreme Court's test from *Wilkie,* in which it "distilled its 35–year history of *Bivens* jurisprudence into a two-step analysis." *W. Radio Servs. Co. v. U.S. Forest Serv.,* 578 F.3d 1116, 1120 (9th Cir.2009). First we must "determine[ ] whether there is 'any alternative, existing process for protecting' the plaintiffs' interests." *Id.* If there is such an alternative remedy, our inquiry stops. If there is not, we proceed to the next step and "ask[ ] whether there nevertheless are 'factors counseling hesitation' before devising such an implied right of action." *Id.* The Mirmehdis' claim for unlawful detention founders at both obstacles.

The Mirmehdis could—and did—challenge their detention through not one but two different remedial systems. As the Second Circuit stated: "Congress has established a substantial, comprehensive, and intricate remedial scheme in the context of immigration." *Arar,* 585 F.3d at 572. The availability of habeas is another remedy. *See Rauschenberg v. Williamson,* 785 F.2d 985, 987–88 (11th Cir.1986). The Mirmehdis took full advantage of both.

[5] We are unpersuaded by the Mirmehdis' assertions they are nonetheless entitled to a *Bivens* remedy because neither the immigration system nor habeas provides monetary compensation for unlawful detention. "Even

where Congress has given plaintiffs no damages remedy for a constitutional violation, the Court has declined to create a right of action under *Bivens* when doing so 'would be plainly inconsistent with Congress' authority in th[e] field.' " *W. Radio Servs. Co.,* 578 F.3d at 1120 (quoting *Chappell v. Wallace,* 462 U.S. 296, 304, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983)). Indeed, "[s]o long as Congress' failure to provide money damages ... has not been inadvertent, courts should defer to its judgment." *Berry v. Hollander,* 925 F.2d 311, 314 (9th Cir.1991) (internal quotation marks omitted).

Congress's failure to include monetary relief can hardly be said to be inadvertent, given that despite multiple changes to the structure of appellate review in the Immigration and Nationality Act, Congress never created such a remedy. *See Schweiker,* 487 U.S. at 423, 425, 108 S.Ct. 2460 (1988) (considering "frequent and intense" congressional attention to "the design of a Government program [to] suggest[ ] that Congress has provided what it considers adequate remedial mechanisms for constitutional violations").

[6] The complexity and comprehensiveness of the existing remedial system is another factor among a broad range of concerns counseling hesitation before allowing a *Bivens* remedy. *Id.* at 423, 91 S.Ct. 1999; *see also Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 280, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997); *see also Saul v. United States,* 928 F.2d 829, 840 (9th Cir.1991) (considering the Civil Service Reform Act).

[7] Furthermore, immigration issues "have the natural tendency to affect diplomacy, foreign policy, and the security of the nation," which further "counsels hesitation" in extending *Bivens. Arar,* 585 F.3d at 574. As the Supreme Court has ***983** noted, concerns that always mitigate against "subjecting the prosecutor's motives and decisionmaking to outside inquiry" have particular force in the immigration context. *AADC,* 525 U.S. at 490, 119 S.Ct. 936 (internal quotation marks omitted). Rather than mere "disclosure of normal domestic law-enforcement priorities and techniques" such cases often involve "the disclosure of foreign-policy objectives and (as in this case) foreign-intelligence products." *Id.* at 490–91, 119 S.Ct. 936.

Accordingly, we decline to extend *Bivens* to allow the Mirmehdis to sue federal agents for wrongful detention pending deportation given the extensive remedial procedures available to and invoked by them and the unique foreign policy considerations implicated in the immigration context.

III

[8] **[9]** The Mirmehdis next appeal the dismissal of their claims against Castillo for witness intimidation and against both Castillo and MacDowell for conspiracy to intimidate a witness pursuant to 42 U.S.C. § 1985(2),[4] arguing that the district court erred by failing to find prejudice. Specifically, they argue that but for Castillo's supposed threats, Tabatabai was ready, willing, and able to testify that they were not supporters of the MEK.

[10] But "[a]llegations of witness intimidation ... will not suffice for a cause of action [under section 1985] unless it can be shown the litigant was hampered in being able to present an effective case." *David v. United States,* 820 F.2d 1038, 1040 (9th Cir.1987) (emphasis omitted). This rule applies to both witness intimidation and conspiracy to intimidate a witness. *Id.* at 1040; *see also Rutledge v. Ariz. Bd. of Regents,* 859 F.2d 732, 735–36 (9th Cir.1988).

[11] Even assuming that the Mirmehdis could have been prejudiced by the absence of a witness that the relevant fact finder had dismissed as not credible, the outcome of the Mirmehdis' immigration proceedings demonstrate that they were not so harmed.[5] According to the Mirmehdis, Tabatabai would have rebutted Castillo's testimony that they were involved with the MEK. As such, his testimony would have helped them to establish that they were eligible for withholding of removal because they were not involved with any terrorist activities as defined by 8 U.S.C. § 1182(a)(3)(B)(i). *See also* 8 U.S.C. § 1231(b)(3)(B). But the Mirmehdis were awarded withholding of removal even without Tabatabai's testimony. Therefore, they could not have been prejudiced by any alleged wrongdoing.[6]

*984 IV

[12] **[13]** **[14]** The Mirmehdis also appeal the dismissal of their claim against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, arguing

that they have stated a claim for false imprisonment under California law. "The United States, as a sovereign, may not be sued except insofar as it consents to be sued." *Rooney v. United States,* 634 F.2d 1238, 1241 (9th Cir.1980). The FTCA does waive that immunity for certain torts, but it is subject to both procedural and substantive exceptions that "must be strictly interpreted." *Id.* (citing *United States v. Sherwood,* 312 U.S. 584, 590, 61 S.Ct. 767, 85 L.Ed. 1058 (1941)).

[15] **[16]** **[17]** One such exception is that the United States may not be sued "based upon the exercise or performance or the failure to exercise or perform a discretionary function ..., whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). [7] To determine whether conduct falls within this exception, we must first determine whether the "challenged conduct involves an element of judgment or choice" and then whether "the conduct implements social, economic or political policy considerations." *Nurse v. United States,* 226 F.3d 996, 1001 (9th Cir.2000) (citing *Berkovitz v. United States,* 486 U.S. 531, 536, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988)). We must also determine whether the "complaint alleges that the policy-making defendants promulgated discriminatory, unconstitutional policies which they had no discretion to create." *Id.* at 1002. Because the decision to detain an alien pending resolution of immigration proceedings is explicitly committed to the discretion of the Attorney General and implicates issues of foreign policy, and because the Mirmehdis do not allege that this decision itself violated the Constitution, it falls within this exception. *Cf. Medina v. United States,* 259 F.3d 220, 229 (4th Cir.2001) ("Even though the INS ultimately decided not to pursue the deportation of Medina, we are fully satisfied that the initial decision to initiate proceedings and arrest him was the type of agency conduct Congress intended to immunize in the discretionary function exception."); *Wright v. United States,* 719 F.2d 1032, 1035 (9th Cir.1983) ("The decision whether or not to prosecute a given individual is a discretionary function for which the United States is immune from liability."). [8]

[18] **[19]** The Mirmehdis assert that the United States is nonetheless liable because Officer Castillo's knowingly false testimony to the IJ itself constituted false imprisonment under California law. [9] This argument is unavailing under a second limitation imposed by the FTCA: the United States may not be held liable if the individual tortfeasor would be immune from suit. ***985** 28 U.S.C. § 2674; *see also Galvin v. Hay,* 374 F.3d 739, 758 (9th Cir.2004) (affirming the dismissal of an FTCA claim when California law would have immunized the officers for claims of false arrest). California law would not permit recovery against an individual defendant for testimony given to an IJ in a bond revocation proceeding.

[20] **[21]** **[22]** California has a very broad "litigation privilege," which provides absolute immunity for almost any statement made "in any .... official proceeding authorized by law," as against any tort except for malicious prosecution. Cal. Civ.Code § 47(2). Designed to promote open communication in official proceedings, the privilege covers even those statements not made in a court or even in existing litigation; they can be specifically intended to cause investigators to institute charges. *Tiedemann v. Superior Court,* 83 Cal.App.3d 918, 148 Cal.Rptr. 242 (1978) (allowing immunity for statements by a confidential informant to the IRS). All that is required is that the communication be "(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) ... have some connection or logical relation to the action." *Silberg v. Anderson,* 50 Cal.3d 205, 266 Cal.Rptr. 638, 786 P.2d 365, 368–69 (1990). A federal administrative hearing counts as a "quasi-judicial proceeding" if: "the administrative body is vested with discretion based upon investigation and consideration of evidentiary facts", that body may "hold hearings and decide the issue by the application of rules of law"; and that body has the power to affect "the personal or property rights of private persons." *Tiedemann,* 148 Cal.Rptr. at 247 (internal quotation marks omitted). Malice is irrelevant to this definition. *Silberg,* 266 Cal.Rptr. 638, 786 P.2d at 368–69. Castillo's testimony falls within these parameters. As the Mirmehdis have not brought a claim for malicious prosecution, they have not stated a claim for relief under the FTCA. [10]

V

[23] Finally, the Mirmehdis appeal the denial of their motion to amend their complaint, arguing that they should be allowed an opportunity to comply with the heightened pleading requirements of *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), and *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955,

167 L.Ed.2d 929 (2007). "[R]equests for leave [to amend] should be granted with 'extreme liberality,' " particularly when a complaint was filed before *Twombly* and fails for lack of sufficient factual content. *Moss v. U.S. Secret Serv.,* 572 F.3d 962, 972 (9th Cir.2009). However, a party is not entitled to an opportunity to amend his complaint if any potential amendment would be futile. *See, e.g., May Dep't Store v. Graphic Process Co.,* 637 F.2d 1211, 1216 (9th Cir.1980). As the Mirmehdis' woes are not caused by insufficient allegations of factual content, no potential amendments would change the outcome.

***986 VI**

For the forgoing reasons, the decision of the district court is

AFFIRMED.

SILVERMAN, Circuit Judge, concurring:

Although I concur in the opinion of the court, I write separately to emphasize that this case does not present the issue of whether illegal immigrants could *ever* bring a *Bivens* action. In fact, we have previously allowed an illegal immigrant to bring a *Bivens* action. *See Papa v. United States,* 281 F.3d 1004, 1010–11 (9th Cir.2002) (holding that immigrant could bring *Bivens* action for alleged due process violations during immigration detention). However, in *this* case, I agree with my colleagues that the plaintiffs lack an implied right of action under *Bivens.*

All Citations

689 F.3d 975, 12 Cal. Daily Op. Serv. 6221, 2012 Daily Journal D.A.R. 7540

Footnotes

1 The district court dismissed these claims based on its conclusion that the Mirmehdis had no constitutional right not to be detained pending deportation proceedings. We do not reach this issue because, even assuming such a violation, we must still decide whether *Bivens* provides for a theory for recovery. *See Wilkie v. Robbins,* 551 U.S. 537, 550, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007); *see also Shaw v. Cal. Dep't of Alcoholic Beverage Control,* 788 F.2d 600, 603 (9th Cir.1986) ("We may affirm the judgment on any basis supported by the record even if the district court did not rely on that basis.").

2 The Mirmehdis argue that we have, in fact, recognized an immigrant's right to pursue a *Bivens* action citing *Papa,* 281 F.3d 1004. But because cases like *Papa* did not squarely present the issue, it remains open. *See Berry v. Hollander,* 925 F.2d 311, 314 & n. 3, 316 (9th Cir.1991) (concluding that no *Bivens* action exists for government employees despite previously allowing such claims).

3 By identifying this as the appropriate frame of reference, we do not hold that an illegal alien may never bring a *Bivens* claim. Instead, we merely recognize that because Congress has the ability to "make rules as to aliens that would be unacceptable if applied to citizens," *Demore v. Kim,* 538 U.S. 510, 521–22, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003) (citing inter alia *Reno v. Flores,* 507 U.S. 292, 305–06, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993) ("Thus, 'in the exercise of its broad power over immigration and naturalization,' Congress regularly makes rules that would be unacceptable if applied to citizens.")), we must consider whether an immigrant may bring a *Bivens* claim to vindicate certain constitutional rights separately from whether a citizen may bring such a *Bivens* claim.

4 To the extent that the Mirmehdis bring a separate claim for conspiracy selectively to enforce immigration laws, such a claim does not exist. The Supreme Court has stated that for reasons implicating the constitutional separation of powers, "an alien unlawfully in this country has no constitutional right to assert [a claim of] selective enforcement" of immigration laws. *AADC,* 525 U.S. at 488, 119 S.Ct. 936.

5 "When ruling on a Rule 12(b)(6) motion to dismiss, if a district court considers evidence outside the pleadings, it must normally convert the 12(b)(6) motion into a Rule 56 motion for summary judgment, and it must give the nonmoving party an opportunity to respond." *United States v. Ritchie,* 342 F.3d 903, 907 (9th Cir.2003). But because the Mirmehdis referred to their related habeas and immigration cases on the face of their complaint, we may take judicial notice of any matters of public record. *See Emrich v. Touche Ross & Co.,* 846 F.2d 1190, 1198 (9th Cir.1988).

6 We are not persuaded by the Mirmehdis' fallback argument that Tabatabai's testimony would have allowed them to reopen the bond determination because we see no evidence that they tried to do so, even after the IJ's initial decision in 2002.

7 Though neither party raised this exception, because the applicability of an FTCA exception affects our jurisdiction, we must consider it sua sponte. *See Morris v. United States,* 521 F.2d 872, 875 & n. 1 (9th Cir.1975).

8 This does not immunize from judicial review the conduct of the officers who made the arrest at an operational level. *Wright,* 719 F.2d at 1035. But, for the reasons discussed above, the Mirmehdis have not stated a claim on those grounds.

9 It is unclear that this states a claim for false imprisonment under California law. As we have previously noted, California law allows false imprisonment claims "for arrests by officers ... in two situations: when an arrest is made without a warrant, ... and when an officer 'maliciously arrests and imprisons another by personally serving an arrest warrant issued solely on *information deliberately falsified by the arresting officer himself.*' " *Blaxland v. Commonwealth Dir. of Pub. Prosecutions,* 323 F.3d 1198, 1205 n. 4 (9th Cir.2003) (emphasis added). There was a warrant here, and the Mirmehdis have never alleged that either Castillo or MacDowell participated in their actual arrests.

10 The United States asserts that this testimony would also be immune under federal law. The Supreme Court has stated that both lay and law enforcement witnesses are absolutely immune for live testimony given either at a trial or before a grand jury. *Malley v. Briggs,* 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (trial testimony); *Rehberg v. Paulk,* —— U.S. ——, 132 S.Ct. 1497, 1507 & n. 1, 182 L.Ed.2d 593 (2012) (grand jury testimony) (distinguishing cases where law enforcement officers falsify affidavits for the purpose of obtaining an arrest). We see little distinction between this case and those, but we need not reach the issue because California law already provides immunity here.

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133 S.Ct. 2336
Supreme Court of the United States

Mohammad MIRMEHDI, et al., petitioners,
v.
UNITED STATES, et al.

No. 12–522.
|
May 13, 2013.

Synopsis
Case below, 689 F.3d 975.

Opinion
Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

All Citations

569 U.S. 972, 133 S.Ct. 2336 (Mem), 185 L.Ed.2d 1063, 81 USLW 3335, 81 USLW 3634, 81 USLW 3637

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2011 WL 1554874 (C.A.9) (Appellate Brief)
United States Court of Appeals, Ninth Circuit.

Mohammad MIRMEHDI, et al., Plaintiffs-Appellants,
v.
UNITED STATES OF AMERICA, et al., Defendants-Appellees.

No. 09-55846.
March 14, 2011.

Appeal from the United States District Court for the Central District of California, No. 2:06-cv-05055-R (PJWx)

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Cal. Penal Code § 847(b) 63

*1 JURISDICTIONAL STATEMENT

Invoking *Bivens v. Six Unknown Named Agents of Fed. Bur. of Nar-cotics*, 403 U.S. 388 (1971), and the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 ("FTCA"), Plaintiffs-Appellants Mohammad Mirmehdi, Mohsen Mirmehdi, Mojtaba Mirmehdi, and Mostafa Mirmehdi sued 13 federal employees and the United States in the United States District Court for the Central District of California.

On June 18, 2008, the district court dismissed with prejudice most claims against the Federal Defendants (including the claims before this Court). After discovery, Plaintiffs and the United States settled the remaining claims, and final judgment was entered on May 26, 2009. Plaintiffs filed a notice of appeal on June 4, 2009. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. No statute provides a damages remedy against federal employees for violating the Constitution. Instead, a court must infer a private right of action but only if no special factors counsel against implication of a freestanding damages remedy. Here, did special factors counsel against implication of a *Bivens* remedy when Plaintiffs challenged their re-arrest and detention through five levels of judicial and administrative review, Plaintiffs' detention ***2** for connection to a terrorist

organization touches on sensitive areas of national security, and the political branches have wide latitude to act in the area of immigration because such actions implicate foreign policy, diplomacy, and separation of powers?

2. To recover damages for their arrest and detention, Plaintiffs must show that government officials caused their confinement without sufficient cause and deprived them of liberty without due process. Did the district court cor-rectly dismiss the claims against Castillo and MacDowell where the revocation of Plaintiffs' bonds was vested in the discretion of the Attorney General and his designees (not Castillo and MacDowell), Defendants' challenged testi-mony was provided in an adversarial hearing where Plaintiffs could cross-examine and proffer rebuttal evidence, and the evidence established Plaintiffs' connection to a foreign terrorist organization in the United States?

3. False imprisonment requires the non-consensual, intentional confinement of a person without lawful privilege. Plaintiffs allege they were arrested based on false information provided in their bond proceeding. Did the district court correctly dismiss Plaintiffs' false-imprisonment claim where the At-torney General's designee exercised discretion to revoke bond and arrest Plaintiffs under the original arrest warrant, ample cause justified Plaintiffs' ***3** re-arrest and detention, and Plaintiffs' claim is premised on federal-employee conduct that is privileged and thus not actionable under the FTCA?

ADDENDUM

Defendants separately file an addendum containing pertinent constitu-tional provisions, statutes, and regulations. Since the Board of Immigration Appeals ("BIA") bond decisions for each Plaintiff were largely identical, only Mostafa's was attached to the dismissal motions. The addendum contains the remaining BIA bond decisions. For the Court's convenience, Defendants also include the magistrate and district court decisions in Plaintiffs' *habeas* case. These were cited extensively below but not attached because they were avail-able to the same district judge who presided over the *habeas* case.

STATEMENT OF THE CASE

I. Nature of the Case

Plaintiffs, four brothers from Iran who illegally resided in the United States for many years, were arrested and detained during their immigration proceedings. They filed an FTCA suit against the United States for false im-prisonment. Plaintiffs also sue two investigative officers, alleging witness intimidation and unlawful detention under the First, Fourth, and Fifth Amendments.

*4 II. Relevant Course of Proceedings and Disposition Below

Plaintiffs filed this action on August 14, 2006, and the First Amended Complaint ("FAC") on January 30, 2007, naming the United States and 13 federal employees as well as the City of Santa Ana; MVM, Inc.; and several of their employees. The FAC alleged that Plaintiffs' detention was unlawful and sought damages and declaratory relief based on their detention and alleged mistreatment while detained.

Plaintiffs ultimately settled their claims against the Santa Ana and MVM Defendants. Those claims are not before this Court.

The Federal Defendants filed dismissal motions on behalf of **(1)** the United States, **(2)** Senior Defendants (former Attorney General Ashcroft; Federal Bureau of Investigation ("FBI") Director Mueller; former Immigration and Naturalization Service ("INS") Commissioner Ziglar; and former Immigration and Customs Enforcement ("ICE")

Assistant Secretary Garcia); **(3)** Investiga-tive Defendants (ICE Special Agent James MacDowell and FBI Special Agent Christopher Castillo), and **(4)** ICE Defendants (Arturo Subia, Paul Santos, Ste-wart Cortes, George Isaacs, Jerry Petrey, Mario Lopez, and Neal Collins). The district court granted the motions, in part, and dismissed with prejudice nearly all claims, including all the claims appealed.

***5** In relevant part, the district court held that Plaintiffs did not allege sufficient facts in support of their detention claims. The first claim (unlawful detention) failed because "Plaintiffs did not possess the right to be free from arrest and detention under the circumstances alleged in the amended complaint," E.R. 16 (D.Ct. Dec.) -- namely, Plaintiffs' re-arrest and detention during their immigration proceedings after evidence linked them to a terrorist organization.

The court dismissed the seventh cause of action -- averring that Castillo intimidated a witness -- because Plaintiffs intended to call the witness in their removal proceeding but prevailed on the issue (withholding of removal) that the witness would have addressed. *Id.* at 18.

The court dismissed the tenth claim (false imprisonment) against the United States. It held that "Plaintiffs' bond revocation and re-arrest were proper" "exercises of the Attorney General's discretion," *id.* at 19, because he may, "at any time . . . revoke a bond . . ., rearrest the alien under the original warrant, and detain [him]." 8 U.S.C. § 1226(b) (*cited by* E.R. 19); *accord* E.R. 19 (citing 8 C.F.R. § 236.1(c)(9) (2002)).

The court dismissed the fourteenth claim (conspiracy to violate civil rights) against Castillo and MacDowell because Plaintiffs failed to establish ***6** the underlying claim upon which the alleged conspiracy was based. E.R. 18-19 (D.Ct. Dec.).

Discovery followed. Some claims were voluntarily dismissed, doc. 120, and all remaining ones were later settled and dismissed. Docs. 153, 159. After dismissal of all claims against all parties, final judgment was entered. Doc. 160.

FACTUAL STATEMENT [1]

Plaintiffs were arrested in March 1999, after a Joint Terrorism Task Force investigation revealed they committed immigration fraud in connection with their asylum applications and were removable. E.R. 126-29 (FAC ¶¶ 70, 77). Plaintiffs were initially released on bond in 1999. *Id.* at 126-27 (¶ 70).

In February 2001, the Task Force executed a search warrant at a Mujahe-din-e Khalq ("MEK") safe-house that yielded evidence linking Plaintiffs to MEK activities in the United States. *Id.* at 131-33 (¶¶ 88, 94-97). This was significant ***7** because MEK is a foreign terrorist organization, and its presence in this country threatens national security. *Id.* at 127, 132 (¶¶ 71-73, 93); *accord* E.R. 106 (Mostafa BIA Bond Dec.). Bond was subsequently revoked, and Plaintiffs were re-arrested and detained pursuant to the 1999 warrant. E.R. 127 (FAC ¶¶ 71-72); *see also* 8 U.S.C. § 1226(b) (upon revocation of bond, an alien is "rearrest[ed] . . . under the original warrant, and detain [ed]"). While detained, Plaintiffs challenged their arrest, detention, and removal on three separate tracks. E.R. 149 (FAC ¶ 157).

1. After their re-arrest, Plaintiffs sought bond redetermination. 8 C.F.R. § 1003.19(a)-(b). At a December 10, 2001 hearing before an immigration judge ("IJ"), Plaintiffs were represented by counsel and presented evidence, as did the government. E.R. 87-89 (IJ Bond Dec.).

The government's only witness was Defendant Castillo. E.R. 106 (Mo-stafa BIA Bond Dec.); E.R. 128 (FAC ¶ 75). He testified that **(1)** an MEK document (the "cell list") was seized during the search of an MEK safe-house in Los Angeles, E.R. 90 (IJ Bond Dec. at 5); **(2)** numerous names, including Plain-tiffs', were on the cell list, indicating Plaintiffs were "associates of the MEK," *id.*; **(3)** the cell list bore the names of "approximately 60" of the 71 MEK affiliates who were

arrested, *id.*; **(4)** Castillo saw one of the Plaintiffs at an ***8** MEK safe-house during surveillance, *id.* at 90-91; and **(5)** after seeing Plain-tiffs' names on the cell list, Castillo showed the document to an undercover witness, who stated that he or she knew Plaintiffs and that Plaintiffs were "affiliated with the MEK." *Id.* at 91.

During his bond-hearing testimony, Castillo distinguished members, supporters, and associates of MEK. He explained that a "member" is similar to an office holder or "leader of an organization." *Id.* "Supporters" provide "financial support and may participate in demonstrations, some of which are violent, and attend meetings or conduct surveillance." *Id.* An "associate" or "sympathizer" "attends meetings and demonstrations for MEK but may or may not provide financial assistance." *Id.* at 91-92. Castillo testified that, "[i]n his professional opinion, [Plaintiffs] are not 'members' or leaders of the MEK, but they are MEK 'supporters,' " E.R. 106 (Mostafa BIA Bond Dec.) (cit-ing Castillo testimony transcript); E.R. 92 (IJ Bond Dec.) ("Castillo testified that it is his opinion and belief that [Plaintiffs] are affiliated with the MEK"); *id.* at 92-93; *accord id.* at 94 (Castillo testified he "believes [Plaintiffs] either provided financial support and/or participated in MEK functions, such as at-tendance at meetings which discussed or planned violence"). Castillo testi-fied that Plaintiffs' asylum lawyer, Bahram Tabatabai, informed him that ***9** Plaintiffs "were affiliated with the MEK L.A. Cell and had also founded an Oklahoma MEK cell." *Id.* at 95.

On cross-examination, Plaintiffs' attorney inquired whether the cell list was a travel log indicating Plaintiffs' presence at a 1997 MEK demonstration. Castillo testified that he did not believe it was because the cell list indicated that Plaintiffs were in prison, and Plaintiffs were not detained until their first arrest in 1999. *Id.* at 93-94; *accord* E.R. 106 (Mostafa BIA Bond Dec.). Two Plaintiffs attended the June 1997 MEK demonstration in Denver, and Castillo testified that, based on his investigation, "out of the 1,000 demonstrators [there,] only five or six individuals did not support the MEK." E.R. 94 (IJ Bond Dec.).

Finally, Castillo testified "that it is his opinion that the existence of the MEK's L.A. Cell is a security threat[,] . . . that the Department of State had designated the MEK as a foreign terrorist organization[, and that t]he MEK carries out . . . violent acts to support terrorist organizations." *Id.* Castillo tes-tified that Plaintiffs "would pose a threat to the national security of the United States if released from custody because of their affiliation with the MEK," at least, in part, because Plaintiffs' names had been publicized, and Iran is likely to send agents to harm or kill Plaintiffs for their reported "affiliat[ion] with ***10** MEK," *id.* at 95. Castillo also testified that Plaintiffs "submitted false documents relating to their asylum applications and . . . obtained false identifica-tions[,] which demonstrate [] that they could be a significant flight risk." *Id.*

Plaintiffs choose not to testify but instead proffered rebuttal evidence. *Id.* at 95-96. Plaintiffs denied any participation or affiliation with MEK and proffered, *inter alia*, that they had no contact with the MEK safe-house, they did not provide financial support to MEK, the "cell list" indicated their participation in a demonstration only, and they have an excellent reputation among co-workers. *Id.* at 96-97. Plaintiffs denied the significance of letters between Mohammad and Youself Hamidi found by the FBI, even though the BIA de-termined Hamidi is "a danger to the security of the United States," *id.* at 96, and a known MEK member, E.R. 106 (Mostafa BIA Bond Dec.).

The IJ found the government made an adequate showing that Plaintiffs' bonds should be revoked. Although the IJ observed that the cell list "alone would not meet the [government's] burden," the IJ found that "considering all the evidence presented" and "based on the totality of the circumstances," Plaintiffs "pose[d] a danger to persons or property, if released." E.R. 99 (IJ Bond Dec.); *accord id.* at 99-01. Finally, the IJ observed that Plaintiffs "admit-ted to filing [f]raudulent asylum applications and obtaining fraudulent identifications, ***11** which . . . demonstrate a . . . flight risk." *Id.* at 101.

Plaintiffs appealed to the BIA, which affirmed. *See, e.g.*, E.R. 104-08 (Mostafa BIA Bond Dec.); *accord* Add. 30-44 (BIA Bond Decs.). The BIA found the evidence sufficiently established that Plaintiffs were "associated with a designated foreign terrorist organization [MEK], and therefore [they] pose[d] a danger to persons or property." E.R. 107 (Mostafa

BIA Bond Dec.). The BIA separately determined that Plaintiffs were subject to mandatory detention under 8 U.S.C. § 1226(c)(1)(D) (2002), as inadmissible aliens due to ter-rorism connections, *id.* § 1182(a)(3)(B) (Apr. 2002), and removable on national-security and related grounds, *id.* § 1227(a)(4)(B) (2002). E.R. 104-05 (Mostafa BIA Bond Dec.).

2. In concurrent removal proceedings, Plaintiffs conceded removability and requested asylum. E.R. 37 (Mohammad IJ Removal Dec.); E.R. 59-60 (Mo-stafa IJ Removal Dec.); Supp. E.R. 54 (Mohsen IJ Removal Dec.); Supp. E.R. 74-75 (Mojtaba IJ Removal Dec.).

Each was denied asylum because he knowingly engaged in immigration fraud. Mohammad, Mojtaba, and Mostafa admitted to intentionally engaging in immigration fraud and lying to IJs and officers. E.R. 37-39 (Mohammad IJ Removal Dec.); E.R. 61, 67-68 (Mostafa IJ Removal Dec.); Supp. E.R. 78, 84-85 ***12** (Mojtaba IJ Removal Dec.). Mohsen denied knowingly engaging in immigration fraud, but the IJ found otherwise. Supp. E.R. 65-67 (Mohsen IJ Removal Dec.).

Plaintiffs were thus ordered removed but granted Convention Against Torture protection and withholding of removal to Iran because they demon-strated they would likely be persecuted or tortured if removed to Iran. E.R. 150 (FAC ¶ 158). In 2002, an alien seeking withholding of removal was re-quired to prove that he was not, *inter alia*,"a danger to the . . . United States," 8 U.S.C. § 1231(b)(3)(B)(iv) (Apr. 2002) -- meaning he must not have engaged in "any terrorist activity" as defined in 8 U.S.C. § 1182(a)(3)(B)(iv) (Apr. 2002). *See* E.R. 40-44 (Mohammad IJ Removal Dec.) (reciting April 2002 statutes).

In assessing whether Plaintiffs had engaged in terrorist activity and thus were barred from withholding of removal, the IJ heard substantial testimony. Hoijat Azimi, Tabatabai's office assistant and an undercover informant for the FBI and State Department, testified that Tabatabai told him that Mostafa was an MEK member and had founded the Oklahoma chapter. *See, e.g.*, E.R. 63-64 (Mostafa IJ Removal Dec.); E.R. 48 (Mohammad IJ Removal Dec.). Defendant MacDowell testified that Tabatabai informed him that Tabatabai believed Plaintiffs were MEK members or supporters, but MacDowell stated that Taba ***13** tabai did not "necessarily know this to be true." *E.g.*, E.R. 65 (Mostafa IJ Re-moval Dec.). Castillo testified about the cell list and his investigation of MEK and Plaintiffs. He testified that the FBI believed that Mostafa and Mohammad were MEK supporters -- meaning they were less than MEK members and had not yet committed acts of terrorism against the United States -- and that Moh-sen and Mojtaba were associates or sympathizers. *Id.* at 66-67. Although the government argued that Plaintiffs were MEK "members," as defined in the dictionary, Castillo testified "that the MEK does *not* consider [Plaintiffs] mem-ber[s] and that according to his unnamed cooperating witness," Plaintiffs "are more accurately described as [] supporter[s] or associate[s] of MEK." *Id.* at 69; E.R. 52 (Mohammad IJ Removal Dec.); Supp. E.R. 68 (Mohsen IJ Removal Dec.); Supp. E.R. 87 (Mojtaba IJ Removal Dec.).

The IJs concluded that Plaintiffs were not subject to the mandatory bar to withholding of removal because, *inter alia*,"[t]here is no evidence that [they] engaged in terrorist activities, as defined in the statute," *e.g.*, E.R. at 72 (Mostafa IJ Removal Dec.). The government appealed, and Mohammad and Mohsen cross-appealed the denial of asylum.

On August 20, 2004, the BIA issued decisions affirming the IJs' decisions in all respects and, thereby, finalized Plaintiffs' orders of removal, ***14** 8 C.F.R. §§ 1003.39, 1240.14. *See, e.g.*, E.R. 81 (Mohammad BIA Removal Dec.). The BIA upheld the withholding of removal, despite evidence linking Plaintiffs to MEK, because the weight of the evidence did not demonstrate they engaged in terrorist activities. *Id.* at 82-83 & n.8.

Mohsen and Mohammad then petitioned for review in this Court. In denying the petition, this Court held that the BIA did not err in denying asy-lum because "Mohammad was engaged in immigration fraud," and "Mohsen . . . knew his own [asylum] claim was fraudulent." *Mirmehdi v. Mukasey*, 2009 WL 247903, *1 (9th Cir. Feb. 2, 2009).

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3. After Plaintiffs were denied bond but while their removal proceedings were pending, they filed petitions for *habeas corpus,* E.R. 150-51 (FAC ¶ 164), which the district court denied in May 2003. Add. 45-63 (*Mirmehdi v. I.N.S.*, No. CV-02-8916 (C.D. Cal.) (Report & Rec. & Order)).

In November 2004, this Court affirmed the denial of Mostafa's and Moj-taba's *habeas* petitions since they did not appeal their removal order, thus providing "the Attorney General . . . an independent, superceding reason for detaining them." *Mirmehdi v. I.N.S.*, 113 Fed. Appx. 739, 741 (9th Cir. 2004). But this Court remanded Mohammad's and Mohsen's *habeas* petitions so that the BIA could explain a potential inconsistency between its withholding-of-re ***15** moval and bond decisions. *Id.* This Court did not find that Plaintiffs should have been granted bond but rather remanded for the purpose of reconciling this arguable inconsistency. *Id.*

While on remand (and less than six months after the BIA's August 20, 2004 removal decisions), ICE tried to release Plaintiffs from detention pur-suant to *Zadvydas v. Davis*, 533 U.S. 678 (2001). On February 2, 2005, Plaintiffs rejected the release terms and, instead, were Plaintiffs were released in March 2005. E.R. 136, 151-52 (FAC ¶¶ 107, 170). [2]

STANDARD OF REVIEW

The District Court dismissed Plaintiffs' claims for failure to state a claim. Accordingly, this Court's review is *de novo*. *Walter v. Drayson*, 538 F.3d 1244, 1247 (9th Cir. 2008).

***16** Although ample grounds support the district court's dismissal decision, this Court may affirm "on any basis supported by the record[,] even if the district court did not rely on that basis." *Shaw v. Cal. Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 603 (9th Cir. 1986).

SUMMARY OF ARGUMENT

Bond was revoked -- and Plaintiffs were re-arrested and detained during their removal proceedings -- when it was determined they were connected to a terrorist organization operating in the United States. Although Plaintiffs contend their detention was unlawful, the district court dismissed those claims because it concluded that Plaintiffs' detention was appropriate under the circumstances. This Court should affirm that dismissal on those and other grounds.

First, Plaintiffs' *Bivens* claims against Castillo and MacDowell are pre-mised on Plaintiffs' bond proceeding, in which MacDowell was not involved. MacDowell, therefore, is not liable for Plaintiffs' detention.

Second, no *Bivens* cause of action exists here because the immigration laws and regulations create a comprehensive scheme for Plaintiffs to challenge their bond revocation and detention. Plaintiffs used those procedures to challenge their detention before the IJ and BIA and then before a magistrate ***17** judge, the district court, and this Court in their *habeas* case. Despite five levels of administrative and judicial review, Plaintiffs now ask this Court to afford them an implied damages remedy under *Bivens*. Given the ample review and the policy ramifications of inferring a new cause of action in this area traditionally reserved for the political branches, this Court should reject Plaintiffs' invitation to create a new damages remedy.

Third, Plaintiffs' detention claims are premised on Castillo's bond-hear-ing testimony, for which he has absolute immunity. Castillo testified in an ad-versarial proceeding, where Plaintiffs cross-examined him and proffered rebuttal evidence. Moreover, the "complaining witness" exception to abso-lute immunity does not apply since it is limited to *ex parte* testimony pre-sented without the protections of an adversarial proceeding.

Fourth, Castillo and MacDowell are entitled to, at least, qualified im-munity on Plaintiffs' detention claims. Underlying those claims are Plaintiffs' incorrect assumption that the bond and removal decisions are inconsistent and the importance Plaintiffs place on that faulty assumption. The decisions are not inconsistent, but, even if they were, that is of no moment. A disagree-ment amongst judges -- far from sustaining a claim -- necessarily entitles a government official to qualified immunity. ***18** *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Here, at least six judges (bond IJ, three BIA bond judges, Magistrate Judge Walsh, and Judge Real in this and the *habeas* case) examined the record and found the bond revocation and detention to be proper. Even were this Court now to disagree with those other judges, it would undermine well-settled, qualified-immunity doctrine to subject Castillo and MacDowell to suit.

Additionally, the First, Fourth, and Fifth Amendment claims all suffer from fatal flaws and, in any event, are based on snippets from the bond and removal record that Plaintiffs have improperly twisted, misstated, and decon-textualized. Once this Court reviews the actual record, free from Plaintiffs' negative gloss, it should find (like the district court did) that Plaintiffs' re-ar-rest and detention were supported by ample cause and were not based on false testimony, protected speech, or improper ethnic classification. Further-more, Plaintiffs were detained for a constitutionally permissible time period, *i.e.*, the pendency of their removal proceedings.

Fifth, for similar reasons, the false-imprisonment claim against the United States fails. False imprisonment requires intentional confinement of a person without lawful process. Here, Plaintiffs' detention was authorized by lawful process: a valid arrest warrant and sufficient cause to detain under ***19** immigration law. This claim is also based on actions for which the United States, like its employees, is immune from suit.

Finally, Castillo and MacDowell have qualified immunity for the witness-intimidation claim because Plaintiffs cannot show they were prejudiced from the alleged "intimidation." The supposed intimidation occurred in the removal proceeding, but Plaintiffs *prevailed* on the issue for which the witness would have testified. The immigration record also belies any intimidation. Plaintiffs failed to alert the IJ to the witness's absence, and their admission to immigration fraud eliminated any probative value that the witness might have otherwise had. The related conspiracy claim fails for the additional reason that it is not supported by sufficient factual allegations.

ARGUMENT

I. This Court Should Affirm the District Court's Dismissal of Plaintiffs' *Bivens* Claims.

A. MacDowell Was Not Involved in Plaintiffs' Bond Proceeding.

Plaintiffs' *Bivens* claims are for unlawful detention, *see* E.R. 109, 152 (FAC), based on the allegedly wrongful revocation of bond, *id.* at 128 (¶ 76). Although Plaintiffs bring this claim against Castillo and MacDowell, Castillo was the only witness in Plaintiffs' bond proceeding. *Id.* (¶ 75); E.R. 106 (Mostafa BIA Bond Dec.). A government official can only be liable for his ***20** "own individual actions," *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), and MacDowell was not involved in Plaintiffs' bond proceeding. Thus, all the claims against MacDowell (except the witness-intimidation-conspiracy claim) must fail for his lack of involvement. *Bibeau v. Pacific N.W. Research Found.*, 188 F.3d 1105, 1114 (9th Cir. 1999) (dismissing defendants because they were only "peripherally connected" to challenged actions and lacked sufficient "involvement" in the matter), *amended on other grounds*, 208 F.3d 831 (9th Cir. 2000); *Grayson v. Ross*, 454 F.3d 802, 809-10 (8th Cir. 2006) (dismissing defendant where he "was not involved" in the challenged action and thus "could not have violated" plaintiff's rights). [3]

B. No Right of Action Exists under *Bivens* for Plaintiffs' Detention-Related Claims

Plaintiffs seek damages under *Bivens* for the revocation of their bond and ensuing immigration detention. E.R. 152-53 (FAC ¶¶ 171-77). But Plain-tiffs may not challenge this conduct through a *Bivens* action. As we explained in district

court, a *Bivens* action is inappropriate since Plaintiffs could have challenged -- and did challenge -- their bond revocation and detention in ***21** other administrative and judicial proceedings. Given the "special factors" present in this context, this case is not one of "the limited settings" in which *Bivens* should "apply," *Iqbal*, 129 S. Ct. at 1948.

1. In *Bivens*, the Supreme Court " 'recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights.' " *Id.* at 1947-48 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001)). *Bivens* held that, notwithstanding the absence of a statutory cause of action, federal officers could be sued for damages under the Fourth Amendment for a warrantless arrest and search. In creating that common-law action, the Court noted there were "no special factors coun-selling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. In the nearly 40 years "since *Bivens*, the Supreme Court has extended it twice only" -- for "employment discrimination" under "the Due Process Clause" and for "an Eighth Amendment violation by prison officials," *Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (*en banc*) (citing *Davis v. Pass-man*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980)). Each time, the Court did so only after determining there were no special factors counseling against judicial creation of a cause of action. *Carlson*, 446 U.S. at 18-19; *Davis*, 442 U.S. at 245.

***22** *Bivens* "rel[ied] largely on earlier decisions implying private damages actions into federal statutes" -- decisions from which the Court has since "re-treated," *Malesko*, 534 U.S. at 67 & n.3. "Because implied causes of action are disfavored," *Iqbal*, 129 S. Ct. at 1948, the Court has "consistently refused," post-*Carlson*, "to extend *Bivens* liability to any new context or new category of defendants," *Malesko*, 534 U.S. at 68; *see Wilkie v. Robbins*, 551 U.S. 537, 541, 549-62 (2007) (no *Bivens* remedy for retaliation against exercise of property rights); *Malesko*, 534 U.S. at 63, 66-74 (same as to mistreatment of in-mate in corporate halfway house); *F.D.I.C. v. Meyer*, 510 U.S. 471, 473, 483-86 (1994) (same as to suit against federal agency); *Schweiker v. Chilicky*, 487 U.S. 412, 414, 420-29 (1988) (same as to denial of disability benefits); *United States v. Stanley*, 483 U.S. 669, 678-86 (1987) and *Chappell v. Wallace*, 462 U.S. 296, 297-305 (1983) (same as to harms suffered by military personnel through ac-tivity incident to service); *Bush v. Lucas*, 462 U.S. 367, 368, 373-90 (1983) (same as to First Amendment violations arising in federal-employment context). A *Bivens* remedy, therefore, "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest," and, "in most instances," the Court has "found a *Bivens* remedy unjustified." *Wilkie*, 551 U.S. at 550; *accord Neb. Beef v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005) (there ***23** "is a 'presumption against judicial recognition of' " *Bivens* actions) (citation omitted).

2. As this Court recently observed, the Supreme Court in *Wilkie* "distilled [the] history of *Bivens* jurisprudence into a two-step analysis for determining congressional intent as to the appropriateness of a *Bivens* remedy." *W. Radio Servs. v. U.S. Forest Serv.*, 578 F.3d 1116, 1120 (9th Cir. 2009). "First, the Court determines whether there is 'any alternative, existing process for protecting' the plaintiff's interests. Such an alternative remedy would raise the inference that Congress 'expected the Judiciary to stay its *Bivens* hand' and 'refrain from providing a new and freestanding remedy in damages.' . . . Second, if the Court cannot infer that Congress intended a statutory remedial scheme to take the place of a judge-made remedy, the Court next asks whether there nevertheless are 'factors counseling hesitation' before devising such an im-plied right of action." *Id.* (citations omitted).

3. Plaintiffs' detention claims founder at each step. Plaintiffs had available to them several "alternative, existing process[es] for protecting" their "in-terest" in avoiding or ending detention -- indeed, Plaintiffs have vigorously pursued such alternative remedies -- and this "amounts to a convincing reason" for this Court to reject an additional *Bivens* remedy. ***24** *Wilkie*, 551 U.S. at 550. As explained above, Plaintiffs challenged the bond revocation before the IJ and BIA as permitted by regulations promulgated under immigration statutes. 8 C.F.R. §§ 1003.19(a)-(f), 1003.1(b)(7), 1236.1(d). Plaintiffs later sought release via a *habeas* petition, filed in district court and reviewed by this Court on appeal, which challenged their detention on the same grounds advanced in the complaint. *Compare* E.R. 126-35, 152-53 (FAC ¶¶ 70-102, 171-77) *with* Add. 56-61 (Report & Rec.). In *this* action, Plaintiffs brought a false-imprisonment claim against the United States.

These administrative and judicial remedies are significant and compel rejection of an implied remedy under *Bivens*. Through the bond and *habeas* proceedings, Plaintiffs had an opportunity to secure their release, and, here, they pursue damages from the United States on a state-law tort theory. Plaintiffs ought not be allowed to litigate their re-arrest and detention, as well, through a judicially created *Bivens* action. *See Rauschenberg v. Williamson*, 785 F.2d 985, 987-88 (11th Cir. 1986) (*habeas* availability was among "special factors" precluding *Bivens* remedy for parolee);[4] *see also* ***25** *Wilkie*, 551 U.S. at 551 (plaintiff "had a civil remedy in damages for trespass"); *Malesko*, 534 U.S. at 72-73 (considering availability of state tort remedies in refusing to recog-nize *Bivens* remedy).

Plaintiffs argued below that, since no "monetary recovery" was avail-able through the alternative remedies they pursued, there was no "special fac-tors" bar to their *Bivens* claim.[5] If Plaintiffs renew this argument on appeal, it should be rejected. Plaintiffs already seek FTCA damages from the United States for their re-arrest and detention. Moreover, a *Bivens* claim may be pre-cluded when *no* alternative remedy exists, *Wilkie*, 551 U.S. at 550; *Stanley*, 483 U.S. at 683; *W. Radio*, 578 F.3d at 1120 ("Even where Congress has given plaintiffs no damages remedy for a constitutional violation, the Court has de-clined to create a right of action under *Bivens* when doing so 'would be plainly inconsistent with Congress' authority in this field.' ") (citation omitted); *accord Saul v. United States*, 928 F.2d 829, 840 (9th Cir. 1991), and certainly when, as here, a statutory or regulatory regime affords an alternative remedy that Plaintiffs view as incomplete. *Schweiker*, 487 U.S. at 421-26; ***26** *Bush*, 462 U.S. at 372-73, 388-90; *Moore v. Glickman*, 113 F.3d 988, 994 (9th Cir. 1997) (Administrative Procedure Act remedies "preclude a *Bivens* action even when that relief is incomplete"); *Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995); *Berry v. Hollander*, 925 F.2d 311, 315-16 (9th Cir. 1991); *Kotarski v. Cooper*, 866 F.2d 311, 312 (9th Cir. 1989); *see Dotson v. Griesa* 398 F.3d 156, 166-67 (2d Cir. 2005) ("[I]t is the overall comprehensiveness of the statutory scheme at issue, not the adequacy of the particular remedies afforded, that counsels judicial caution in implying *Bivens* actions.").[6]

4. In any event, "special factors," including separation-of-powers concerns and the plenary authority of the Executive and Legislature over immigration matters, counsel against inferring a *Bivens* remedy here.[7] As Plaintiffs "had an avenue for *some* redress, bedrock principles of separation of powers fore-close[] judicial imposition of a new substantive liability." ***27** *Malesko*, 534 U.S. at 69 (emphasis added); *see Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.") (footnote omitted); *accord United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1982); *see Jama v. ICE*, 543 U.S. 335, 348 (2005) ("Removal decisions . . . 'may impli-cate our relations with foreign powers' and require consideration of 'changing political and economic circumstances.' ") (citation omitted); *Demore v. Kim*, 538 U.S. 510, 523 (2003) ("[D]etention . . . [is] a constitutionally valid aspect of the deportation process."); *accord Carlson v. Landon*, 342 U.S. 524, 538 (1952); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896).

In this unique and sensitive area, a *Bivens* action would be an especially "blunt and powerful instrument," *Benzman v. Whitman*, 523 F.3d 119, 125 (2d Cir. 2008) (citation omitted), and the Court should "proceed cautiously" be-fore "extending such implied relief," *Dotson*, 398 F.3d at 166. Immigration is "an area that [has] received careful attention from Congress," *Schweiker*, 487 U.S. at 423--indeed, it has been comprehensively and repeatedly regulated ***28** by the political branches, *Arar*, 585 F.3d at 573[8]--and Congress has provided specific remedies for constitutional violations that may occur in the administration of immigration laws while elsewhere limiting or foreclosing judicial review of immigration-related claims.[9] Given this, it cannot have been through "inadvertence" that Congress omitted to provide a damages remedy to a wrongly detained alien. *Schweiker*, 487 U.S. at 423.

Just as the Supreme Court "[h]as not created additional *Bivens* remedies" where "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitu-tional violations that may occur in the course of its administration," *id.*, so too should this Court decline to engraft a *Bivens* remedy onto the

extant statutory and regulatory scheme. Here, as "in the great majority of cases," any "decision to create" a "private right of action" in favor of a wrongly detained alien "is one better left to legislative judgment," ***29** *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004); *accord Holly v. Scott*, 434 F.3d 287, 290 (4th Cir. 2006). Be-cause it "would be plainly inconsistent with Congress' authority in this field," *Chappell*, 462 U.S. at 304, Plaintiffs' proposed *Bivens* remedy should be re-jected.

C. Castillo Is Entitled to Absolute Immunity for Plaintiffs' Detention Claims.

Plaintiffs' claims against Castillo are predicated on his testimony during their bond hearing, which was adversarial in nature and in which Plaintiffs were represented by counsel who cross-examined Castillo and presented re-buttal evidence. Accordingly, even if Castillo presented "false and misleading testimony" that caused the IJ to deny Plaintiffs bond, E.R. 128 (FAC ¶ 76), Castillo enjoys absolute witness immunity.

In its leading case in this area, *Briscoe v. Lahue*, 460 U.S. 325 (1983), the Supreme Court held that two police officers, alleged to have provided per-jured testimony in plaintiffs' criminal trial, were entitled to absolute immun-ity. In holding that witnesses in adversarial judicial proceedings are abso-lutely immune from suit based on their testimony, the Court recognized the critical, practical implications of allowing witnesses to be sued for their testi-mony. *Id.* at 333-36. The Court declined to limit absolute witness immunity to private witnesses and, instead, confirmed that such immunity applies ***30** equally to government witnesses (*i.e.*, investigative officers). *Id.* at 342-43; *accord id.* 335-36 & n.15.

This Court also recognizes immunity for officers testifying in adversar-ial proceedings, including bond and bail hearings. In *Burns v. Cnty. of King*, 883 F.2d 819, 822 (9th Cir. 1989), this Court found that a social worker was absolutely immune for allegedly submitting false information to a prosecutor for use at defendant's bail hearing, resulting in bond revocation. This Court reasoned that the social worker's information was submitted in an adversarial proceeding and under penalty of perjury. *Id.* at 823; *accord Krug v. Imbor-dino*, 896 F.2d 395, 397 (9th Cir. 1990) (deputy sheriffs' testimony in bail determination was protected by absolute witness immunity); *see generally Franklin v. Terr*, 201 F.3d 1098, 1099, 1101-02 (9th Cir. 2000); *Holt v. Castaneda*, 832 F.2d 123, 125, 127 (9th Cir. 1987).

In this case, Castillo has absolute immunity because he is sued for testi-mony he provided at Plaintiffs' bond-redetermination hearing. *See* E.R. 128-30, 133-34 (FAC ¶¶ 75-76, 81, 84-85, 97, 99-100); Pls. Br. at 7-8, 10, 21, 24-25, 30. Plaintiffs claim the IJ revoked their bond "based upon [allegedly] false and misleading testimony of Defendant Castillo," E.R. at 128 (FAC ¶ 76), which Plaintiffs allege consisted of Castillo (1) repeating information provided by ***31** Tabatabai about their MEK association and role in founding an MEK Okla-homa cell, *id.* at 129-30 (FAC ¶¶ 81, 84-85); and (2) testifying about the mean-ing of the cell list and the significance of Plaintiffs' presence on it, *id.* at 133-34 (FAC ¶¶ 97, 99-100).

Plaintiffs argued below that Castillo was not entitled to absolute im-munity as a "complaining witness[]." Pls. Opp. to Castillo & MacDowell MTD (doc. 41) at 9-10. However Plaintiffs may understand that term, in this Circuit, a "complaining witness" is, at least, one who testifies in a *non-adver-sarial* proceeding (*e.g.*, a request for a warrant) and is *not* a person who testi-fies in an *adversarial* proceeding. *See Cruz v. Kauai Cnty.*, 279 F.3d 1064, 1068 (9th Cir. 2002) ("a witness in an *adversarial* proceeding to revoke a defendant's bail" is "accorded absolute immunity," but a defendant, who testified at "an *ex parte* proceeding," where plaintiff "did not enjoy the protections of the adversary process," is more "analogous to . . . a 'complain-ing witness' "); *Burns*, 883 F.2d at 822-23 ("[defendant's] position here is not analogous to that of a complaining witness" because his "statements were used by the court in adversarial post-trial [bail] proceedings"); *Holt*, 832 F.2d at 127 (noting distinction in *Briscoe* between adversarial and non-adversarial proceedings because of an "absence of cross-examination"). Thus, when a ***32** defendant "testifies in court, under oath, under the supervision of the pre-siding judge" and "is subject to criminal prosecution for perjury" and "available for cross-examination," he is entitled to absolute immunity. *Holt*, 832 F.2d at 125; *accord Burns*, 883 F.2d at 821-22.

Like the defendants in *Holt* and *Burns*, Castillo is entitled to absolute immunity because he testified under oath in a proceeding supervised by a presiding judge and was cross-examined and subject to criminal prosecution for perjury under 18 U.S.C. § 1621. *See* E.R. 89, 93-95 (IJ Bond Dec.) (Castillo was sworn in and cross-examined by Plaintiffs' lawyer and Plaintiffs pre-sented rebuttal evidence). Indeed, as opposed to the "complaining witness" cases, where the proceedings are *ex parte* and a putative plaintiff is not present to protect his interests through cross-examination or presentation of re-buttal evidence, here Plaintiffs had every opportunity to (and, in fact, did) challenge the government's evidence and Castillo's testimony. Accordingly, Castillo is not a complaining witness. [10]

***33** Lastly, Plaintiffs argued below that their claims are based on non-testimonial conduct, such as "deliberately mistranslat[ing]" the cell list, Pls. Opp. to Castillo & MacDowell MTD (doc. 41) at 11, and are, therefore, not barred by *Briscoe*. Plaintiffs allege no facts supporting this argument. They do not allege that Castillo translated the document personally, and, indeed, the document was translated by an FBI language specialist. E.R. 92 (IJ Bond Dec.). [11] Nor do Plaintiffs allege facts showing that Castillo spoke to the trans-lator prior to or during the translation, encouraged or caused the translator to mistranslate the document, or was otherwise involved in the translation. Plaintiffs neither dispute the authenticity of the document nor allege it was manipulated. Instead, Plaintiffs dispute the meaning and significance of the document, which Castillo testified demonstrates Plaintiffs' association with a terrorist organization and warranted their bond revocation. This is precisely the type of testimonial act immunized by *Briscoe* and its progeny.

***34 D. Qualified Immunity Bars Plaintiffs' Detention Claims.**

When a plaintiff sues a government official for alleged violation of con-stitutional or statutory rights, the official is entitled to qualified immunity if the alleged "conduct does not violate clearly established statutory or constitu-tional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 818 (1982). Thus, qualified immunity provides " 'ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law,' " *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (*per curiam*) (quoting *Malley v. Briggs*, 475 U.S. 335, 343 (1986)), and "applies regardless of whether the government official's error is a mistake of law, . . . fact, or . . . mixed question[] of law and fact." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (internal quotation marks and citation omitted).

In assessing a qualified-immunity defense, this Court first determines whether, as a matter of law, the defendant's alleged action violated the plain-tiff's rights. *Cousins v. Lockyer*, 568 F.3d 1063, 1069 (9th Cir. 2009). If so, this Court considers "whether the right at issue was 'clearly established' at the ***35** time of the alleged misconduct." *Id.* [12] After a defendant asserts qualified im-munity, the plaintiff bears the burden of showing immunity is not appropriate by demonstrating that the right was "clearly established at the time of the al-leged violation." *Robinson v. York*, 566 F.3d 817, 826 (9th Cir. 2009). To do so, a plaintiff must show that the right allegedly violated was clearly estab-lished in a "particularized" and "relevant[] sense" such that "[t]he contours of the right [were] sufficiently clear that a reasonable official would under-stand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Plaintiffs cannot satisfy this heavy burden by cherry-picking only the decisional authorities supporting their claims. Indeed, "[i]f judges . . . disagree . . ., it is unfair to subject [officials] to money damages for picking the losing side of the controversy," *Wilson*, 526 U.S. at 618.

Since qualified immunity is "an *immunity from suit* rather than a mere defense to liability," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), the Supreme Court has "repeatedly stressed" that courts should apply qualified immunity "at the earliest possible stage of litigation." *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (quoting *Hunter*, 502 U.S. at 227). Accordingly, if a complaint fails to ***36** state a claim sufficient to overcome qualified immunity, it should be dismis-sed at the outset without discovery. *Mitchell*, 472 U.S. at 526; *Harlow*, 457 U.S. at 818; *accord Behrens v. Pelletier*, 516 U.S. 299, 308 (1996).

Because Plaintiffs cannot satisfy either step of the qualified-immunity analysis, the district court correctly dismissed their individual-capacity claims.

1. The Fourth Amendment Claim

Plaintiffs premise their Fourth Amendment claim on the mistaken belief that there was insufficient cause to support their detention. To wit, Plaintiffs assert that probable cause was lacking and that Castillo provided false bond testimony. Each assertion is demonstrably false.

1. In claiming that "probable cause" did not support their re-arrest and detention, Pls. Br. at 18, Plaintiffs misidentify the quantum of proof required. For aliens out on bond, like Plaintiffs, E.R. 126-27 (FAC ¶¶ 70-71), "such re-lease may be revoked *at any time* in the *discretion* of [specified officials], in which event the alien may be taken into physical custody and detained." 8 C.F.R. § 236.1(c)(9) (2002) (emphasis added) (implementing 8 U.S.C. § 1226(b)). Accordingly, all that is needed for an alien's bond revocation "is *any basis in fact* for the agency's decision." *U.S. ex rel. Barbour v. Dist. Dir. of* ***37** *I.N.S.*, 491 F.2d 573, 577-78 (5th Cir. 1974) (emphasis added); *accord Ocon v. Landon*, 218 F.2d 320, 323 (9th Cir. 1954) ("the test . . . is whether under the prevailing circumstances the Attorney General exercised sound discretion"). Indeed, bond decisions are "presumptively correct and unassailable except for abuse," *Carlson*, 342 U.S. at 540, and an alien challenging a bond decision has a "heavy burden" in establishing abuse of discretion, *Barbour*, 491 F.2d at 578; *accord Reno v. Flores*, 507 U.S. 292, 294-95 (1976) (*cited by* Pls. Br. at 18 n.5) ("Congress has given the Attorney General broad discretion to" detain an alien during removal proceedings).

Plaintiffs' citations are not contrary. The cases establishing that probable cause must support arrests, Pls. Br. at 20, do not address an alien's bond revocation. The Fourth Amendment, of course, is context-specific, *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985), and the Supreme Court has long recognized that Congress's "plenary power" in the immigration context permits it to enact laws vesting bond revocation in the Executive's discretion. *Carlson*, 342 U.S. at 534; *cf. Demore*, 538 U.S. at 521-22 (the Supreme Court "has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens"). Thus, Plaintiffs' argument that an official's discretion may be limited by the Constitution, Pls. ***38** Br. at 21, is unavailing. In this area of unique plenary authority, the Executive's discretion to revoke an alien's bond -- although not limitless -- is pre-sumed correct, reviewed only for abuse, and justified if supported by any basis in fact.

2. Regardless of which standard is used, the record demonstrates ample cause for Plaintiffs' bond revocation.

Plaintiffs concede numerous pieces of evidence supported their MEK association. E.R. 133-34 (FAC ¶ 100); *id.* at 128 (¶ 76) (bond denied based on "totality of the circumstances"). Here, bond was revoked after the FBI recov-ered an MEK document, at an MEK safe-house, listing Plaintiffs' names. Of the 71 MEK affiliates arrested, 60 appeared on that MEK document, just like Plaintiffs. In addition, at least one Plaintiff was observed at an MEK safe-house. An informant, who reviewed the document, stated that he or she knew Plaintiffs and that they are affiliated with MEK. Plaintiffs reportedly founded the Oklahoma MEK cell. Mohammad was in correspondence with a known MEK member, who was determined to be a danger to national secur-ity. Mostafa and Mohammad admittedly participated in an MEK rally, where only 5-6 attendees were *not* MEK supporters. Plus, even if Plaintiffs were not associated with MEK, the press coverage to the contrary risked reprisals ***39** against them by the Iranian government, threatening their safety and that of the community. Plaintiffs were also a flight risk. E.R. 90-92, 95, 99-01 (IJ Bond Dec.); E.R. 105-08 (Mostafa BIA Bond Dec.); Add. 49-54 (Report & Rec.); *accord* E.R. 130-34 (FAC ¶¶ 86, 88, 94, 100).

Plaintiffs essentially seek to hold Defendants liable for their detention because the bond and removal judges came to different conclusions about the import of the above evidence. This argument lacks merit for two reasons. First, the bond and removal inquiries were entirely different -- both in terms of the applicable legal standard and the evidence presented, *supra* note 2. So the conclusion in one context has no bearing on the other. Second, and more fundamentally, Defendants

have raised qualified immunity, which protects them where, as here, judges have weighed the evidence and reached different conclusions. *Wilson*, 526 U.S. at 618. Indeed, Supreme Court precedent squarely forecloses Plaintiffs' effort to subject Defendants to suit simply be-cause the removal judges rejected evidence accepted by the bond and *habeas* judges.

Plaintiffs also complain that some of the evidence was hearsay, E.R. 127 (FAC ¶ 73), but hearsay is permissible in the bond-hearing context. Add. 59 (Report & Rec.) (collecting authorities); *accord* ***40** *Hart v. Parks*, 450 F.3d 1059, 1066-67 (9th Cir. 2006). And, Plaintiffs misstate the record when they claim that Castillo "admitted his desire that [Plaintiffs] be held without bond . . . to induce" their cooperation. E.R. 128, 134-35 (FAC ¶¶ 75, 102). *See* Supp. E.R. 101 (Bond Hearing Tr. at 180); Add. 60-61 (Report & Rec.) (rejecting this char-acterization of Castillo's testimony).

3. The record also belies Plaintiffs' assertion that Defendants violated the Fourth Amendment by deliberately providing false testimony. Pls. Br. at 18-19 & n.6. As explained below, Plaintiffs' arguments have been rejected by at least one of the numerous courts to consider them. When the record of Plain-tiffs' bond and *habeas* proceedings is examined in its proper context, without the distortions and negative gloss offered by Plaintiffs, it is clear that they have no Fourth Amendment claim based on knowingly false testimony.

A. Plaintiffs claim that MacDowell's testimony in their *asylum* proceedings -- that Plaintiffs are "associated with MEK" -- was "false" because he also testified that Yousef Hamidi was the only "MEK member" identified by Tabatabai. Pls. Br. at 8 (citing E.R. 130 (FAC ¶ 86)). This is irrelevant because it involves Plaintiffs' *asylum proceedings*, not their bond proceedings, and the *Bivens* claims are based on the revocation of bond and subsequent detention, not their order of removal. *Supra* § I.A.

***41** Nor is there a contradiction in this testimony. Even if Plaintiffs were not MEK *members*, that does not mean that they were not *associated with* MEK, as MacDowell testified. This distinction is significant. *Membership* in a for-eign terrorist organization makes an alien inadmissible, 8 U.S.C. § 1182(a)(3)(B)(i)(V) (2011), but an alien is inadmissible for *association* with a terrorist organization only if he also intends to engage in terrorist activity, *id.* § 1182(a)(3)(F) (2011). Moreover, the distinction matters within MEK, which recognizes a difference in its internal structure between association and mem-bership. E.R. 91-92 (IJ Bond Dec.).

B. Plaintiffs also challenge Castillo's bond-hearing testimony regarding certain of Tabatabai's statements, claiming that testimony was "false" because it was contradicted by some of Tabatabai's *later* statements. Pls. Br. at 7-8 (cit-ing E.R. 129-30 (FAC ¶¶ 81, 85)). This argument is unavailing for several rea-sons. First, it ignores that the FBI recorded Tabatabai identifying Plaintiffs as MEK members. E.R. 48 (Mohammad IJ Removal Dec.). Although an IJ later found this insufficient to deny Mohammad withholding of removal, the FBI recording shows, at the very least, that Castillo was truthful when he testified about Tabatabai linking Plaintiffs to MEK.

Second, Plaintiffs conflate membership, support, and association. *Compare* ***42** E.R. 123-24 (FAC ¶ 51) *with id.* at 133-34 (¶ 100) ("When asked at the Mirmehdis' bond hearing which . . . categor[y] [Plaintiffs] fit into, . . . Castillo opined that they were 'supporters.' ") *and* E.R. 106 (Mostafa BIA Bond Dec. at 3) (Castillo testified that, "[i]n his professional opinion, [Plaintiffs] are not 'members' or leaders of the MEK, but they are MEK 'supporters' ") (citing Cas-tillo's bond testimony). [13] In any event, Plaintiffs concede, and the BIA made clear, that Castillo's testimony was based on his *belief* that Plaintiffs were associated with MEK. E.R. 133-34 (FAC ¶ 100); E.R. 77 (Mostafa BIA Bond Dec.). Castillo cannot be liable for testimony he admitted was based on his personal belief, especially when numerous decisions substantiate that belief.

Third, Plaintiffs' allegations on this issue are internally inconsistent. Al-though Plaintiffs maintain that Tabatabai did *not* say they were connected to MEK, Plaintiffs also allege that Tabatabai testified "that he had 'made up the details' concerning the Mirmehdis," E.R. 129 (FAC ¶ 80), and that he assisted the government in its investigation as part of his

plea arrangement, *id.* at 128 ***43** (¶ 77). Plaintiffs thus concede that Tabatabai incriminated them, and, thereby, they undercut their assertion that Castillo testified falsely about Tabatabai's statements.

Fourth, Tabatabai's later statements on which Plaintiffs rely, *id.* at 129 (¶¶ 79-80), do not demonstrate any falsity in Castillo's testimony. Castillo tes-tified that, during an interview, Tabatabai told him that Plaintiffs were affiliated with MEK. E.R. 95 (IJ Bond Dec.). Even if Tabatabai later changed his story, this does not mean that Castillo testified falsely when recounting what Tabatabai told him at a particular interview.

Lastly, Castillo's testimony about his Tabatabai interviews was irrelevant to the BIA's decision. This Court can "set to one side" the allegedly false testimony and determine whether "there remains sufficient content . . . to support" the bond revocation. *See Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). Other evidence amply supported the bond decision. *Supra* p. 38-40. And, since the challenged testimony was not even mentioned by the BIA, it clearly was not relied upon and, thus, is irrelevant to Plaintiffs' detention claims.

C. Plaintiffs next claim that the cell list was mistranslated and is a travel log. Pls. Br. at 9 (citing E.R. 131 (FAC ¶ 88)). But, as explained *supra* 33 & ***44** n.11, Defendants did not translate this document -- an FBI language specialist did -- and Castillo did not introduce it to the immigration court. Rather, he merely testified about its meaning and significance based on his investigation.

Moreover, Plaintiffs' argument that the cell list is a travel log was re-jected by the bond IJ, the BIA, and the *habeas* court. Add. 57 (Report & Rec.) (Plaintiffs "had an opportunity to present their interpretation of the [cell list] and what [it] meant" but "[t]he IJ did not agree" with them); E.R. 96-97 (IJ Bond Dec.), E.R. 106-07 (Mostafa BIA Bond Dec.). Plus, the immigration courts were well aware of the cell-list information that Plaintiffs argue was pertinent. [14] Also, despite Plaintiffs' focus on the cell list, the IJ stated that the document "alone would not meet the [government's] burden of demonstrat-ing materially changed circumstances" sufficient for bond revocation. E.R. 99 (IJ Bond Dec.); *see Franks*, 438 U.S. at 171-72. For these reasons, Plaintiffs cannot state a Fourth Amendment claim based on the cell list.

D. Plaintiffs further assert that Castillo testified about a "cooperating witness," ***45** who, "on information and belief, [Plaintiffs] contend . . . never existed." E.R. 133 (FAC ¶ 99). Plaintiffs allege no facts supporting this contention but rather rely only on rank speculation and argument in the FAC. This is not en-titled to an assumption of truth on motion to dismiss. *Iqbal*, 129 S. Ct. at 1949; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 & n.3, 570 (2007). As Castillo testified in the bond hearing, the cooperating witness *does* exist, but "he or she 'was placed in a witness protection program due to death threats,' " E.R. 91 (IJ Bond Dec.). The witness's unavailability was also taken into account in evaluating his/her credibility and veracity. *See, e.g.*, E.R. 70 (Mostafa IJ Removal Dec. at 12). In any event, Plaintiffs overstate the significance of the cooperating witness. Plaintiffs may believe that, without this witness, the government could not establish the cell list's significance and, thus, lacked sufficient evidence of Plaintiffs' association with MEK. But the IJ held otherwise. E.R. 99-100 (IJ Bond Dec.) (identifying ample additional evidence establishing Plaintiffs' association with MEK as summarized *supra* p. 38-40).

E. Lastly, Plaintiffs cannot show that Castillo gave knowingly false testi-mony in the bond hearing when he recounted that Tabatabai told him that Mostafa founded the Oklahoma MEK cell. Pls. Br. at 7. The government pro-vided a transcript of a recorded conversation where Tabatabai said precisely ***46** this, E.R. 48 (Mohammad IJ Removal Dec.), and Plaintiffs concede that Taba-tabai made several statements against them, E.R. 129 (FAC ¶¶ 79-80). Whether or not Tabatabai spoke accurately in the recorded statement, Plain-tiffs allege no facts showing that Castillo knew (or should have known) that the statement was false. Although Plaintiffs allege that Mohsen, Mojtaba, and Mohammad did not arrive in the United States until after Mostafa left Okla-homa, *id.* at 130 (¶ 85), this does not preclude their potential involvement in creating the cell. Moreover, far from suggesting a knowingly false statement, Castillo's later testimony that no evidence was uncovered to corroborate Ta-batabai's statement and that Tabatabai may have been speculating, E.R. 70 (Mostafa IJ Removal Dec.), reveals Castillo's candor to the tribunal. In any event, this testimony was not relied

upon by the BIA in revoking Plaintiffs' bond. E.R. 104, 106-07 (Mostafa BIA Bond Dec. at 1, 3-4). Consequently, Plaintiffs cannot establish injury or state a claim for relief based on this allegation. *See Franks*, 438 U.S. at 171-72.

Since Plaintiffs cannot allege Defendants provided knowingly false testi-mony and because ample cause supported their detention, no Fourth Amend-ment claim lies here.

***47 2. The Fifth Amendment Claims**

A. Alleged False Statements

Plaintiffs claim that Defendants violated due process by "giv[ing] false testimony and intimidat[ing] a witness with the intent of ensuring that Plain-tiffs remained in detention." Pls. Br. at 21. This claim fails for the same rea-sons explained elsewhere. First, this claim relates to detention, and MacDow-ell was not involved in Plaintiffs' bond proceeding. *Supra* § I.A. Second, Plaintiffs have no *Bivens* cause of action in this context. *Supra* § I.B. [15] Third, Defendants are entitled to absolute immunity for their testimony. *Supra* § I.C. Fourth, ample cause supported Plaintiffs' detention, and Defendants did not provide knowingly false testimony. *Supra* § I.D.1. Fifth, there was no witness intimidation. *Infra* § II.

B. Equal Protection Claim

The equal-protection claim also fails. Plaintiffs' detention was based on their connection to a terrorist organization, danger to the community, and flight risk -- not because of their race or national origin. But even were Plain ***48** tiffs detained on their asserted grounds, the Supreme Court has foreclosed any such damages claim.

1. Any suggestion that Plaintiffs were detained based on their race is be-lied by the record. Indeed, the argument was rejected in the *habeas* case. Add. 61 (Report & Rec.). And, as Plaintiffs concede, they were detained be-cause they were connected to a terrorist organization and found to be na-tional-security threats, E.R. 128 (FAC ¶ 76), and flight risks, E.R. 101 (IJ Bond Dec.). In light of the obvious non-discriminatory reasons for their detention, Plaintiffs have no equal-protection claim.

2. Even if Plaintiffs sufficiently alleged an equal-protection violation, they could only pursue relief through a selective-enforcement claim, which an alien cannot bring. The inquiry in an unlawful-detention case is whether there is sufficient cause for the arrest or detention, and the officer's state of mind "is irrelevant." *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (citing *Whren v. United States*, 517 U.S. 806, 813-15 (1996)). As "[s]ubjective intentions play no role in" the seizure/detention analysis, the existence of suffi-cient cause to arrest or detain means Plaintiffs' only recourse is a selective-enforcement claim. *Whren*, 517 U.S. at 813. But in *Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 488 (1999) ("*AADC*"), the Supreme Court con ***49** firmed that "an alien unlawfully in this country has no constitutional right to assert [a] selective enforcement" claim. *Cf. id.* at 488 & n.10 (stating that the Court "must address" this question in its holding). *AADC* observed that selective-enforcement actions "invade a special province" of "prosecutorial discretion" and risk exacting "systemic costs," such as undermining "general deterrence," "enforcement priorities," and the government's "overall enforce-ment plan," *id.* at 489-91 (internal citation and quotation marks omitted). Such considerations are "greatly magnified" in the immigration context -- an area of maximum Executive Branch discretion -- because such actions inher-ently have broad foreign-policy implications. *Id.* at 490-91.

Plaintiffs try to distinguish *AADC* by arguing it applies only to deportation and not detention. Pls. Br. at 28. Plaintiffs cite no authority for such a limitation, which runs counter to long-established Supreme Court precedent that "[d]etention is necessarily a part of . . . deportation," *Carlson*, 342 U.S. at 538 (to hold otherwise would allow "aliens arrested for deportation [to] have opportunities to hurt the United States during the pendency of deportation proceedings"); *accord Demore*, 538 U.S. at 523; *Wong Wing*, 163 U.S. at 235.

Plaintiffs also attempt to distinguish *AADC* by arguing that it focuses on prosecutorial discretion but that their bond-based theory is distinct. The ***50** decision to revoke bond, however, is "a traditional prosecutorial function." *Cruz*, 279 F.3d at 1067 n.3 (quoting *Pinaud v. Cnty. of Suffolk*, 52 F.3d 1139, 1149 (2d Cir. 1995)). Moreover, the Attorney General is vested with substan-tial prosecutorial discretion in bond revocations. 8 U.S.C. § 1226(b). Thus, the holding in *AADC* -- that there is no right to challenge selective enforcement in removal -- applies equally, if not more so, to a decision to detain illegal aliens pending removal.

3. The equal-protection claim also fails because Plaintiffs do not allege facts demonstrating that they were treated differently than "similarly situated individuals of a different race." *United States v. Armstrong*, 517 U.S. 456, 464-70 (1996); *Dillingham v. I.N.S.*, 267 F.3d 996, 1007 (9th Cir. 2001). This Court has observed that "scrutiny" of race and national-origin classifications in "immigration matters" is more " 'relaxed' " than in other areas because federal authority in this context is "plenary," *Dillingham*, 267 F.3d at 1005 (quoting *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977)). Plaintiffs thus have an even greater burden to demonstrate disparate treatment here, and their allegations fall below this hefty standard. All Plaintiffs offer are mere recitations of the legal standard, Pls. Br. at 28 (citing E.R. 153, 157-58 (FAC ¶¶ 175, 198)), but this is insufficient, *Iqbal*, 129 S. Ct. at 1949, especially in the immigration con ***51** text, where more -- not less -- is required.

C. Length of Detention

Plaintiffs base their length-of-detention claim on the fact that they were detained from October 2001 to March 2005. They fail to acknowledge, how-ever, that they were detained predominantly during the pendency of their removal proceedings and that their detention was lawful since those pro-ceedings were not final until August 2004. Thus, the district court correctly concluded that "Plaintiffs did not possess the right to be free from . . . detention under the circumstances," E.R. 16 (D.Ct. Dec.).

The government is permitted to detain an alien during his removal pro-ceedings and for an additional six months after the alien receives a final re-moval order. In *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001), the Supreme Court addressed the detention of "an alien [who] has been found to be unlaw-fully present in the United States and [for whom] a final order of removal has been entered . . . ." The Court determined that the Constitution "limits an alien's post-removal-period detention to a period reasonably necessary to bring about the alien's removal," *id.* at 689. That presumptively reasonable time is six months. *Id.* at 701. Thus, under *Zadvydas*, it is presumptively rea-sonable and constitutional for the government to detain an alien for six ***52** months after a removal order is administratively final.

Plaintiffs argue that *Zadvydas* says that any detention of an illegal alien for over six months "is presumptively unreasonable and violates . . . due pro-cess," Pls. Br. at 23. This is plainly incorrect. *Zadvydas* is not, as Plaintiffs suggest, a decision about detention of aliens generally. Instead, *Zadvydas* ad-dresses the specific circumstance of an alien who already has a final removal order. 533 U.S. at 682. [16]

Since due process allows a detention of approximately six months after entry of a final removal order, Plaintiffs have no length-of-detention claim. During all but six months of their detention, the removal proceedings were ongoing. Although IJs issued decisions in Plaintiffs' removal proceedings in April and August of 2002, appeals were taken. Thus, Plaintiffs' removal or-ders were not final, 8 C.F.R. §§ 1003.39; 1240.14, and did not become final until August 20, 2004, when the BIA issued its decisions. *See* E.R. 150 (FAC ¶¶ ***53** 160-61); *see, e.g.*, E.R. 75 (Mohammad BIA Removal Dec.). Less than six months later -- on February 2, 2005 -- ICE tried to release Plaintiffs. Plaintiffs rejected the release terms and instead were released in March 2005. E.R. 136, 151-52 (FAC ¶¶ 107, 170).

Plaintiffs suggest their detention during this appellate stage was unrea-sonable since the appeals were only taken by the government. Pls. Br. at 24. This is incorrect for several reasons.

First, with respect to Mohammad and Mohsen, both they and the United States appealed the removal decisions. *See Mirmehdi*, 113 Fed. Appx. at 741; *accord* Pls. Br. at 13. Mohammad and Mohsen do not dispute (nor could they) that their removal orders were not final until the BIA dismissed the appeals on August 20, 2004. These two Plaintiffs, then, have no length-of-detention claim under *Zadvydas*.

Second, as to Mostafa and Mojtaba, that only the government appealed the removal decisions does not give them a length-of-detention claim. Until the BIA reached its decision, the IJs' decisions were not administratively final. 8 C.F.R. §§ 1003.39, 1240.14; *accord Lolong v. Gonzales*, 484 F.3d 1173, 1178 (9th Cir. 2007) (*en banc*) (BIA's decision on government's appeal, challenging grant of removal cancellation, established "final order of removal"); ***54** *Castrejon-Garcia v. INS*, 60 F.3d 1359, 1361-62 (9th Cir. 1995) (the BIA's decision on government's appeal established final order of removal); *Del Pilar v. U.S. Atty Gen.*, 326 F.3d 1154, 1156 (11th Cir. 2003) (relying on *Castrejon-Garcia*, 60 F.3d at 1361-62).

Third, that Mostafa and Mojtaba did not appeal their removal decisions was precisely the ground upon which this Court dismissed their *habeas* petitions. *Mirmehdi*, 113 Fed. Appx. at 741-42 (failure to appeal to BIA was "an independent, superceding reason for detaining them"). Significantly, at the time of this its *habeas* decision, this Court did not seem troubled that Plain-tiffs had been detained for 37 months -- far longer than what Plaintiffs say *Zadvydas* permits. Even were this Court now to hold that Mostafa and Mojtaba have stated a length-of-detention claim, Castillo and MacDowell would, at least, be entitled to qualified immunity given this Court's previous *habeas* ruling. *See Wilson*, 526 U.S. at 618.

Lastly, Plaintiffs cannot prevail on this claim against Castillo and Mac-Dowell, anyway. "[E]ach Government official . . . is only liable for his or her own misconduct." *Iqbal*, 129 S. Ct. at 1949. Plaintiffs do not -- and cannot -- claim that Castillo and MacDowell were personally involved in the decision to keep Plaintiffs detained after the IJs ruled in the removal and bond pro ***55** ceedings. Indeed, neither Defendant was authorized to release Plaintiffs. *See* 8 C.F.R. § 236.1(c)(8) (2002) (officials authorized to issue arrest warrants may, in their discretion, release non-criminal aliens on bond); *id.* § 287.5(e)(2) (such officials do not include ICE or FBI special agents). Accordingly, insofar as Plaintiffs assert any *Zadvydas*-based, length-of-detention claim against Castillo and MacDowell, the claim is barred by qualified immunity. *Bibeau*, 188 F.3d at 1114; *Grayson*, 454 F.3d at 809-10.

3. The First Amendment Claim

Plaintiffs were re-arrested and detained because of their connection to a terrorist organization and the danger such a connection presented to them-selves and the community. Nevertheless, Plaintiffs assert they were detained because of participation in public demonstrations. Not only is that allegation contradicted by the record, but it also fails as a matter of law.

Plaintiffs' First Amendment claim is premised on their mistaken assertion that their bond was revoked merely because of participation in public demonstrations and the listing of their names on the so-called "travel log." E.R. 131 (FAC ¶ 89). However, bond was not revoked because of Plaintiffs' presence at a rally. E.R. 99 (IJ Bond Dec.) (Plaintiffs' "participation in the 1997 demonstration . . . alone not would . . . render [them] a danger to persons or ***56** property"). Indeed, the *habeas* court rejected Plaintiffs' contention that the cell list records only their participation in a rally. Add. 57-58 (Report & Rec.). In any event, the government did not seek detention on that basis. Rather, it argued that Plaintiffs were associated with a terrorist organization and their rally attendance was one of several facts supporting that conclusion. E.R. 90-95, 99-100 (IJ Bond Dec.). Plaintiffs were detained because the totality of the circumstances established their MEK connection, which posed a danger to the community. *Id.* at 99-100; E.R. 107 (Mostafa BIA Bond Dec.).

Plaintiffs' First Amendment claim also fails as a matter of law for two reasons. First, the protections afforded by the Fourth Amendment adequately protect First Amendment rights in the context of searches, seizures, and investigations.

See Zurcher v. Stanford Daily, 436 U.S. 547, 565-67 (1978); *Rubio v. United States*, 727 F.2d 786, 791 (9th Cir. 1984) (*as amended*). As explained *supra* § I.D.1, Plaintiffs' re-arrest and detention comported with the Fourth Amendment, and so their First Amendment claim fails.

Second, Plaintiffs cannot state an independent First Amendment claim. "When an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by de-porting him for the additional reason that it believes him to be a member of ***57** an organization that supports terrorist activity." *AADC*, 525 U.S. at 491-92. The same holds true for detention, which is a part of removal. *See, e.g.*, *Carl-son*, 342 U.S. at 538.

Plaintiffs' arguments to the contrary rely on authorities outside the immigration context, Pls. Br. at 27, and do not involve *aliens*, whom the law al-lows to be detained and removed even on the basis of arguably protected ac-tivity. *AADC*, 525 U.S. at 491-92. Here, detention was based on Plaintiffs' connection to a terrorist organization and the inherent dangers that posed to the community, E.R. 100 (IJ Bond Dec.), but Plaintiffs only cite inapposite cases involving lawful organizations that posed no similar threat. Pls. Br. at 27 & n.11 (citing *Williamson v. United States*, 184 F.2d 280, 283-84 (2d Cir. 1950) (appellant's writings contain no "advocacy of violence" and "[t]he Com-munist Party has not been outlawed"); *Bridges v. Wixon*, 326 U.S. 135, 146-48 (1945) (same); *United States ex rel. Means v. Solem*, 440 F. Supp. 544, 551 (D.S.D. 1977) (same)). Another of Plaintiffs' authorities specifically permits detention, even if predicated on protected activity, if there is "a 'danger' to the community," *Leary v. United States*, 431 F.2d 85, 91 (5th Cir. 1970) (re-manding for an evidentiary hearing). Under their authorities, then, Plaintiffs' detention did not violate the First Amendment.

***58 II. The District Court Correctly Dismissed Plaintiffs' Witness-Intimidation and Related Conspiracy Claims.**

The district court correctly dismissed Plaintiffs' witness-intimidation and conspiracy claims, E.R. 18-20 (D.Ct. Dec.), because there was no prejudice from any alleged intimidation. Thus, Defendants are entitled to qualified immunity. *See Harlow*, 457 U.S. at 818 (qualified immunity also applies to statutory claims). As Plaintiffs concede, they must show that the alleged intimidation caused them prejudice. Pls. Br. at 31-32; *see Rutledge v. Ariz. Bd. of Regents*, 859 F.2d 732, 735-36 (9th Cir. 1998); *David v. United States*, 820 F.2d 1038, 1040 (9th Cir. 1987); *United States v. Little*, 743 F.2d 1420, 1438 n.8 (9th Cir. 1984); *cf. Ruttledge*, 859 F.2d at 735 (Plaintiffs' witness-intimidation claim arises under 42 U.S.C. § 1985(2), not § 1985(3)).

As the district court explained, Plaintiffs prevailed in their removal pro-ceedings on the issue about which Tabatabai would have testified. E.R. 18. Plaintiffs allege that the supposed intimidation prevented Tabatabai from "re-but[ting] Defendant Castillo's hearsay misrepresentations of Tabatabai's ear-lier testimony," E.R. 129-30 (FAC ¶ 83) -- *i.e.*, Castillo's testimony that Taba-tabai linked Plaintiffs to MEK, *id.* at 128-30 (FAC ¶¶ 77-87). But Plaintiffs were granted withholding of removal despite the government's contention that Plaintiffs' MEK connection made them ineligible for withholding. E.R. ***59** 69-72 (Mostafa IJ Dec.); E.R. 78-82 (Mohammad BIA Dec.); Supp. E.R. 68-71 (Mohsen IJ Dec.); Supp. E.R. 86-89 (Mojtaba IJ Dec.). Thus, Plaintiffs were not prejudiced.

Moreover, Plaintiffs cannot demonstrate prejudice because they made no attempt to call Tabatabai as a witness, notify the court of his unavailability or intimidation, subpoena him to testify, or recess until he could be located. *See* Supp. E.R. 1-52 (Tr. of Mohammad's Removal Proceeding); *cf.* E.R. 161 (FAC ¶ 217) (alleging Tabatabai would have testified at that hearing). This defeats their claim. *See United States v. Mickens*, 837 F. Supp. 745, 748-49 (S.D.W.Va. 1993), *aff'd*, 53 F.3d 329 (4th Cir. 1995); *Green v. Estelle*, 488 F.2d 918, 919-20 (5th Cir. 1973); *accord United States v. Viera*, 839 F.2d 1113, 1115 (5th Cir. 1988); *United States v. Hoffman*, 832 F.2d 1299, 1304-05 (1st Cir. 1987).

Plaintiffs now assert that Tabatabai was also "prepared to testify that Plaintiffs had not been involved in any immigration fraud," Pls. Br. at 31 (citing E.R. 129 (FAC ¶¶ 79-80)), but these FAC paragraphs contain *no* support for Plaintiffs' new assertion. Instead, these are "new" or "additional" facts in a brief and are therefore "irrelevant for Rule 12(b)(6)

purposes" and " 'may not [be] take[n] into account.' " ***60** *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (citations omitted); *accord Com. of Pa. v. PepsiCo.*, 836 F.2d 173, 181 (3d Cir. 1988). Any suggestion that Tabatabai would have testified on such issues is also belied by the transcript of the Janu-ary 4, 2002 hearing -- where Plaintiffs claim Tabatabai would have testified, E.R. 161 (FAC ¶ 217) -- because that hearing was limited to testimony authen-ticating the cell list and establishing when it was first available. Supp. E.R. 7-8 (Tr. of Mohammad's Removal Proceeding).

In any event, each Plaintiff (except Mohsen) *admitted* to engaging in asylum fraud, E.R. 37 (Mohammad IJ Dec.); E.R. 61 (Mostafa IJ Dec.); Supp. E.R. 84 (Mojtaba IJ Dec.), [17] and all Plaintiffs were denied asylum because they failed to timely apply for it. E.R. 37-38 (Mohammad IJ Dec.); E.R. 73 (Mostafa IJ Dec.); E.R. 60 (Mostafa IJ Dec.); Supp. E.R. 73 (Mohsen IJ Dec.); Supp. E.R. 90 (Mojtaba IJ Dec.). The decisions in Plaintiffs' asylum proceedings, there-fore, could not have been affected by the lack of Tabatabai's purported testi-mony.

Recognizing this, Plaintiffs now assert that Tabatabai was kept from tes-tifying "in any future legal proceeding," Pls. Br. at 31. As this assertion appears ***61** nowhere in the complaint, it is irrelevant. *Schneider*, 151 F.3d at 1197 n.1. And again, it is undisputed that **(1)** Plaintiffs prevailed on the issue about which Tabatabai allegedly would have testified (eligibility for withholding of removal) and **(2)** Plaintiffs were denied asylum due to their own admissions of immigration fraud and failure to timely file asylum applications. Given this, Plaintiffs cannot show "prejudice" based on a bare assertion that Tabata-bai was unable to testify in some unspecified future proceeding.

Additionally, any suggestion that "any future proceeding" would be a bond proceeding is belied by the record. The bond IJ announced his decision at the December 10, 2001 hearing (and issued a written decision on January 9, 2002). E.R. 128 (FAC ¶ 76) (IJ denied Plaintiffs' bond "[a]t the end of the December 10" hearing). Tabatabai's alleged intimidation occurred four weeks *later* and thus was obviously irrelevant to the bond decision. Plus, any "future" testimony by Tabatabai could not have been considered by the BIA regarding Plaintiffs' bond, since the BIA's review is limited to the record be-fore the IJ. 8 C.F.R. § 1003.1(d)(3)(iv); *Matter of Haim*, 19 I&N Dec. 641, 643 (BIA 1988).

Finally, since Plaintiffs do not -- and cannot -- allege witness intimidation, the district court correctly dismissed their conspiracy claim, too. E.R. 19- ***62** 20 (citing *Olsen v. Idaho State Bd of Med.*, 363 F.3d 916, 930 (9th Cir. 2004) (citing *Caldeira v. Cnty. of Kauai*, 866 F.2d 1175, 1182 (9th Cir. 1989)). [18]

III. The District Court Correctly Dismissed the False-Imprisonment Claim Against the United States.

Absent a waiver, sovereign immunity shields the federal government from suit. *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). Be-cause sovereign immunity is jurisdictional in nature, the "terms of [the United States'] consent to be sued . . . define that court's jurisdiction," *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

The FTCA is a limited waiver of sovereign immunity, making the United States liable to the same extent as a private party for certain torts com-mitted by federal employees acting in the scope of employment. 28 U.S.C. §§ 1346(b)(1), 2674. "Liability is determined by the tort law of the state where the claim arose." *Gasho v. United States*, 39 F.3d 1420, 1427 (9th Cir. 1994). California tort law provides that false imprisonment is "[1] the nonconsensual, ***63** intentional confinement of a person, [2] without lawful privilege, [3] for an appreciable length of time, however short." *Molko v. Holy Spirit Assn.*, 46 Cal. 3d. 1092, 1123 (1988), *superseded on other grounds by* Cal. C. Civ. P. § 437c(o)(2). "Lawful privilege" may exist under state or federal law. *Rhoden v. United States*, 55 F.3d 428, 430 (9th Cir. 1995); *accord Galvin v. Hay*, 374 F.3d 739, 742, 758 (9th Cir. 2004); *Arnsberg v. United States*, 757 F.2d 971, 979 (9th Cir. 1985).

1. Plaintiffs argue they were re-arrested and detained without probable cause, Pls. Br. at 35, but probable cause is not the correct standard. Instead, the question is whether any facts supported the Attorney General's exercise of discretion

to revoke Plaintiffs' bond. In any event, ample cause supported Plaintiffs' re-arrest and detention. *Supra* § I.D.1. Thus, since Plaintiffs' re-arrest was "lawful" -- or, at least, an officer "had reasonable cause to believe the arrest was lawful" -- Plaintiffs cannot sustain a false-imprisonment claim. Cal. Penal Code § 847(b); *accord Galvin*, 374 F.3d at 758; *Cervantes v. United States*, 330 F.3d 1186, 1188 (9th Cir. 2003). [19]

***64 2.** Plaintiffs press for a false-imprisonment claim based on knowingly false testimony. Pls. Br. at 33-34, 36. The record, however, belies the existence of, or reliance on, any knowingly false testimony. *Supra* § I.D.1. Accordingly, Plaintiffs cannot allege false imprisonment.

3. Even if Plaintiffs were re-arrested and detained based on false testi-mony, they still have no false-imprisonment claim. Under the FTCA, "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674. *Briscoe*, however, makes clear that a private individual (as well as a law-enforcement officer) cannot be held liable in tort for giving false testimony in an adversar-ial proceeding. 460 U.S. at 329-36. This immunity is codified in California law. Cal. Civ. Code § 47(b); *Silberg v. Anderson*, 50 Cal. 3d 205, 211-20 (1990); *Titus v. Cnty. of Los Angeles*, 308 Fed. Appx. 210, 212 (9th Cir. 2009) (no complaining-witness exception to California statute).

4. Finally, false imprisonment requires arrest "without lawful privilege," *Molko*, 46 Cal. 3d. at 1123, *e.g.*, without a warrant. *Arnsberg*, 757 F.2d at 979; *accord* Cal. Civ. Code § 43.55. Yet, here, lawful privilege existed and immunized ***65** Plaintiffs' arrest. Under 8 U.S.C. § 1226(b), when an alien's bond is re-voked, the alien is arrested pursuant to the original warrant. Plaintiffs argue that Cal. Civ. Code § 43.55 does not apply because their re-arrest was based on allegedly false statements given to procure their re-arrest. But this ignores that Plaintiffs were re-arrested pursuant to *the original arrest warrant*, which Plaintiffs do not challenge. *See* Pls. Opp. to U.S. MJP (doc. 37) at 16-19 (chal-lenging only 2001 arrest, not 1999 arrest or original arrest warrant); *see, e.g., also* Supp. E.R. 74 (Mojtaba IJ Removal Dec.) (conceding charges in notice to appear); *cf.* 8 C.F.R. § 318.1 (notice to appear regarded as an arrest warrant). Even if knowingly false statements induced Plaintiffs' re-arrest, the original arrest warrant (involving Plaintiffs' inadmissibility and removability) is un-tainted by any such statements. Therefore, lawful privilege authorized Plain-tiffs' re-arrest. *See Arnsberg*, 757 F.2d at 979 ("an arrest is privileged if it is made pursuant to a warrant which is regular in form and which reasonably appears to have been issued by a court with jurisdiction").

IV. Plaintiffs Should Not Be Permitted to Amend Their Complaint Again.

Plaintiffs concede that leave to amend should be granted only if an amended complaint could cure the defects that warrant dismissal in the first place. Pls. Br. at 36-37. The legal bases for dismissal raised by Defendants ***66** (*i.e.*, no *Bivens* cause of action, absolute witness immunity, qualified immun-ity, and that Plaintiffs' claims are belied by the record of their bond and *ha-beas* proceedings) cannot be cured by amendment. Accordingly, the district court correctly dismissed Plaintiffs' claims without granting leave to amend. [20]

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of Plaintiffs' claims against Defendants Castillo, MacDowell, and the United States.

*68 STATEMENT OF RELATED CASES

Counsel for the Appellees is not aware of any related cases, as defined in Ninth Circuit Rule 28-2.6, pending in this Court.

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Footnotes

1 The facts are drawn from the FAC and decisions in the administrative record of Plaintiffs' bond, removal, and *habeas* proceedings. Plaintiffs exten-sively refer to these matters, E.R. 127-35 (FAC ¶¶ 72-102, 157-66), and ac-knowledged their *habeas* proceeding is related to this case. *See* Notice of Re-lated Case (doc. 4). A court may take notice of "proceedings and determinations" in related litigation without converting the dismissal motion to one for summary judgment, *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1198 (9th Cir. 1988), and may consider documents incorporated by reference in the com-plaint, *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

2 Although Plaintiffs' release from custody mooted the matter before the BIA could explain its findings, the apparent contradiction can be reconciled. First, bond and removal proceedings are separate. 8 C.F.R. § 1003.19(d). Second, the bond and removal judges were presented different evidence, including two experts called by Plaintiffs only in removal proceedings. E.R. 61-62 (Mostafa IJ Removal Dec.); E.R. 131 (FAC ¶ 88). Third, the standards in each proceeding were different. The withholding-of-removal bar applied if Plaintiffs had engaged in terrorist activities, whereas bond revocation re-quired only that Plaintiffs pose a danger to persons or property or a flight risk, and mandatory detention was permitted, *inter alia*, if an alien merely was a representative of a terrorist organization. E.R. 78 n.5 (Mohammad BIA Removal Dec.) (explaining differences in requirements).

3 If Plaintiffs are able to somehow show that MacDowell was involved in Plaintiffs' detention, the *Bivens* claims against him would fail for the reasons below.

4 *Accord Wormley v. United States*, 601 F. Supp. 2d 27, 36-37 (D.D.C. 2009); *see also Wilson v. Rackmill*, 878 F.2d 772, 775 (3d Cir. 1989) ("There may be special factors counselling hesitation in finding a *Bivens* claim here if appellant has an effective remedy available through habeas corpus."), *dismissing on those grounds on remand*, 1990 WL 63504, *4 (E.D. Pa. May 11, 1990).

5 Pls. Opp. to Ashcroft MTD at 10; Pls. Opp. to Castillo & MacDowell MTD at 6.

6 *Accord Spagnola v. Mathis*, 859 F.2d 223, 227 (D.C. Cir. 1988) (*en banc*) (*per curiam*); *see also Feit v. Ward*, 886 F.2d 848, 854 (7th Cir. 1989) ("the 'special factors' doctrine does not require a foray into the meaningfulness of a [plaintiff's alternative] remedies").

7 *See Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261, 280 (1997) (Op. of Kennedy, J.) ("[T]he . . . *Bivens* line[] of cases reflect [s] a sensitivity to varying contexts, and courts should consider whether there are 'special factors counselling hesitation,' before allowing a suit to proceed under [that] theory. The range of concerns to be considered in answering this inquiry is broad.") (citations omitted).

8 *See Schweiker*, 487 U.S. at 423, 425-26 (where "Congressional attention" to disability benefits was "frequent and intense," Congress's omission of damages remedy in statutory scheme was "not . . . inadvertent").

9 *See* 8 U.S.C. § 1226(e) ("No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole."); *see also* 8 U.S.C. §§ 1252(a)(2)(B)(ii), 1252(g); *cf. Sissoko v. Rocha*, 509 F.3d 947 (9th Cir. 2007); *Van Dinh v. Reno*, 197 F.3d 427 (10th Cir. 1999) (each applying jurisdiction-removing provisions in *Bivens* actions).

10 Plaintiffs also argued below that this case is controlled by *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), but *Harris* stands for the unremark-able and irrelevant proposition that witness immunity does not protect defen-dant-officers from liability for their *out-of-court statements* just because those statements are later repeated in otherwise immunized testimony. *Id.* at 1199. By contrast, Plaintiffs' claims here are not based on out-of-court statements that resulted in their alleged injuries; rather, their claims are based on detention they attribute to Castillo's *in-court testimony*.

11 It would have been impossible for Castillo to translate the cell list because he does not read or speak Farsi. Supp. E.R. 36 (Tr. Mohammad's Removal Proceeding).

12 Judges can decide which step of the qualified-immunity analysis should be addressed first given the circumstances of a particular case. *Pear-son*, 129 S. Ct. at 816; *Cousins*, 568 F.3d at 1070 n.2.

13 The only time Castillo arguably differed from that testimony was when he was asked if Plaintiffs would qualify as "members" under the dic-tionary definition. E.R. 52 (Mohammad IJ Removal Dec.). However, that portion of his testimony was rejected by the reviewing courts as inconsistent with the rest of his testimony and the definition of "member" employed by MEK. *Id.*; *accord* E.R. 69 (Mostafa IJ Removal Dec.); Supp. E.R. 68 (Mohsen IJ Removal Dec.); Supp. E.R. 87 (Mojtaba IJ Removal Dec.).

14 *Compare* Pls. Br. at 9 (information supposedly not included) *with* E.R. 90-91 (IJ Bond Dec.); E.R. 61-62 (Mostafa BIA Bond Dec.); Add. 57-58 (Report & Rec.); E.R. 49-50 (Mohammad IJ Removal Dec.) (which together indicate that the courts were

aware that the cell list was one page of 60 and were informed of the different possible translations of the word "Shabakeh" in the document, the significance of the date listed on the cell list, and the columns of information Plaintiffs now claim were not included).

15 Plaintiffs' authorities are not to the contrary, Pls. Br. at 22-23 & n.9, as they arise under 42 U.S.C. § 1983, which provides a statutory cause of action. Here, Plaintiffs challenge their detention only through a *Bivens* action, which is judicially created and exists only in the absence of special factors counseling hesitation. *Supra* § I.B.

16 *Accord Clark v. Martinez*, 543 U.S. 371, 387 (2005) (*habeas* petitions should have been granted because aliens "were detained well beyond six months after their removal orders became final"); *Demore*, 538 U.S. at 527; *Rodriguez v. Hayes*, 591 F.3d 1105, 1115 (9th Cir. 2010) (*Zadvydas* "deter-mined that for six months following the beginning of the removal period[,] an alien's detention was presumptively authorized"); *see also Prieto-Romero v. Clark*, 543 F.3d 1053, 1062 (9th Cir. 2008); *Xi v. I.N.S.*, 298 F.3d 832, 833 (9th Cir. 2002); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1098 (9th Cir. 2001).

17 As for Mohsen, the IJ and this Court found that he was aware of the immigration fraud. Supp. E.R. 65-67 (Mohsen IJ Dec.); *Mukasey*, 2009 WL 247903 at *1.

18 In any event, Plaintiffs do not allege sufficient facts to demonstrate a conspiracy to intimidate a witness. *Twombly*, 550 U.S. at 556 ("an allegation of parallel conduct and a bare assertion of conspiracy will not suffice"); *Burns*, 883 F.2d at 821; *Ivey v. Bd of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982); *accord Green v. Benden*, 281 F.3d 661, 666 (7th Cir. 2002) (*quoted by Glair v. City of Los Angeles*, 2010 WL 1407357 *5 (C.D. Cal. Feb. 17, 2010), *adopted by*, 2010 WL 1403947 (C.D. Cal. Apr. 5, 2010)).

19 Plaintiffs argue probable cause is a question of fact, Pls. Br. at 35 n.18, but there is no dispute of fact here. Instead, the bond and *habeas* records es-tablish sufficient cause for Plaintiffs' re-arrest and detention. Plus, this issue has been repeatedly litigated, and bond judges (IJ and BIA) and the *habeas* court all found there was sufficient cause to re-arrest and detain. This defeats a false-imprisonment claim.

20 Plaintiffs also provide no serious basis to reassign this case in the event of remand. Pls.' Br. at 37-40. Their argument is based on a demonstra-bly false premise -- that Judge Real transferred the case to himself. Actually, Plaintiffs filed a notice of related case with their *habeas* case, doc. 4, and the clerk transferred the case to Judge Real with his consent, doc. 5. In any event, Plaintiffs have not shown personal bias or unusual circumstances.

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