# INTERNAL INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO ABDULLAH ALMALKI, AHMAD ABOU EL MAATI AND MUAYYED NUREDDIN ESTABLISHED BY ORDER IN COUNCIL P.C. 2006-1526

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## MOTION FOR STANDING BY BENAMAR BENATTA DATED MARCH 14, 2007

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## NOTICE OF MOTION

TAKE NOTICE THAT the Moving Party herein, BENAMAR BENATTA, makes a motion pursuant to the *Inquiries Act*, R.S., c. I-13, s. 1, Order-in-Council P.C. 2006-1526 and paragraphs (f) and (g) of the Terms of Reference of this Commission of Inquiry.

THE MOVING PARTY ADVISES that he wishes, though his counsel, to make oral submissions in support of this motion at a participation hearing to be held beginning at 10:00 a.m. on Wednesday March 21, 2007 at the Bytown Lounge, 111 Sussex Drive, Ottawa, Ontario, or at the discretion of the Commissioner at any other date and time.

THIS MOTION is for:

1. An order pursuant to Order-in-Council P.C. 2006-1526 granting Mr. Benatta standing to participate before this Commission of Inquiry;
2. In the alternative, an order pursuant to Order-in-Council P.C. 2006-1526 granting Mr. Benatta intervenor status in this Commission of Inquiry;
3. A recommendation pursuant to Order-in-Council P.C. 2006-1526 by the Commissioner to the Clerk of the Privy Council that funding be provided to Mr. Benatta to ensure that he is represented by counsel and is thereby able to appropriately participate or intervene in the Inquiry.

THE GROUNDS FOR THIS MOTION are as follows:

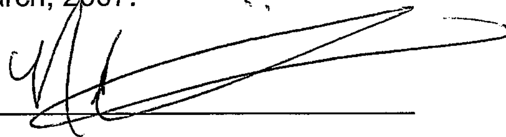
1. Mr. Benatta has a substantial and direct interest in the subject matter of the Inquiry of this Commission sufficient to warrant standing to participate.
2. In the alternative, Mr. Benatta has a genuine concern about the subject matter of the Inquiry of this Commission and has a particular perspective that will assist the Commissioner sufficient to warrant intervenor status.

3. Mr. Benatta does not have the financial means to retain counsel to represent him before this Commission, if standing or intervenor status is granted to him.

THE DOCUMENTS IN SUPPORT OF THIS MOTION are as follows:

1. The Affidavit of Benamar Benatta and exhibits sworn March 14, 2007.
2. The Moving Party's written submissions dated March 14, 2007.

DATED at Toronto, this 14th day of March, 2007.



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## MOVING PARTY'S SUBMISSIONS IN SUPPORT OF HIS MOTION FOR STANDING OR INTERVENOR STATUS AND FUNDING

### I. OVERVIEW

1. Benamar Benatta is a citizen of Algeria who is currently making a claim for asylum in Canada. On September 5, 2001, Mr. Benatta entered Canada from the United States of America using a false document for the purpose of claiming asylum. He was detained by Canadian officials pending inquiries into his identity. Directly following the events of September 11, 2001, Mr. Benatta was driven back over the Canadian / American border in the back of a car by Canadian officials and handed over to American officials without a hearing, access to counsel or access to an interpreter. Mr. Benatta was held in prison in America for nearly 5 years where he was tortured and abused. Mr. Benatta believes that Canadian officials triggered this chain of events and thus bear a measure of responsibility for his experiences. In fact, Mr. Benatta was incarcerated in America solely because of information provided to American officials by Canadian officials.

2. Mr. Benatta has a substantial and direct interest in the subject matter of this Commission of Inquiry sufficient to warrant standing. In the alternative, Mr. Benatta has a genuine concern about the subject matter of the Inquiry of this Commission and has a particular perspective that will assist the Commissioner sufficient to warrant intervenor status. His experiences are similar to those of Abdullah Almalki, Ahmad Abou El Maati and Muayyed Nureddin, as detailed below.

3. Abdullah Almalki, Ahmad Abou El Maati and Muayyed Nureddin were all detained and tortured on foreign soil allegedly because of information provided to foreign governments (Syria and Egypt) by Canadian officials linking these men to terrorist activities. Mr. Benatta was also detained and tortured on foreign soil because of information provided to a foreign government (America) by Canadian officials linking Mr. Benatta to terrorist activities, in particular, the events of September 11, 2001.

4. In the cases of Abdullah Almalki, Ahmad Abou El Maati and Muayyed Nureddin, Canadian officials allegedly provided information to foreign governments resulting in the detention of these men. In the case of Mr. Benatta, Canadian officials not only provided information to a foreign government but also actually drove Mr. Benatta over the border into the United States of America and handed him over to American officials. This transfer or 'rendition' was effected extra-judicially, that is, without due process.

5. Abdullah Almalki, Ahmad Abou El Maati and Muayyed Nureddin allege that they were tortured on foreign soil. Mr. Benatta was also tortured on foreign soil (America) as documented in a United Nations, Commission on Human Rights, Working Group on Arbitrary Detention (hereinafter "UN Working Group") Opinion dated May 7, 2004 (Opinion No. 18/2004). Mr. Benatta's abuse while he was held in an American prison in Brooklyn, New York is also documented by the United States government in two reports issued by the Office of the Inspector General of the US Department of Justice: *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003) and *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Centre in Brooklyn, New York* (December 2003).

6. Abdullah Almalki, Ahmad Abou El Maati and Muayyed Nureddin believe that they were targeted by Canadian officials because they are Muslim. Mr. Benatta also believes that he was targeted by Canadian officials because he is Muslim.

7. Abdullah Almalki, Ahmad Abou El Maati and Muayyed Nureddin are concerned about unchallenged inferences that they are connected with terrorist activities. Mr. Benatta is also concerned about unchallenged inferences that he is connected with terrorist activities. He was identified by Canadian officials in 2001 as having involvement in the terrorist attacks of September 11, 2001. Mr. Benatta does not believe that this allegation was warranted and is concerned about adverse inferences being drawn by members of the public in Canada. Mr. Benatta denies

having any connection to terrorism and requests the opportunity to clear his name in Canada.

8. Furthermore, as a victim, Mr. Benatta has a direct interest in any policy review undertaken by this Commission of Inquiry. He has a direct interest in seeing that existing legal safeguards are enforced and that there are appropriate mechanisms in place to ensure that human rights are balanced against national security interests, such that human rights are protected in respect of such investigations. He has a direct interest in the proper operation and development of mechanisms that will ensure accountability and monitoring of Canadian security and / or immigration officials in their investigations. He has a direct interest in the elimination of racial profiling and systemic racism as part of the Canadian security intelligence regime.

9. Mr. Benatta does not have the funds to retain counsel to represent him at this Commission. He is seeking funding for his counsel to act on his behalf before the Commission.

10. The details of Mr. Benatta's experiences and submissions are set out below.

## II. THE FACTS

11. Mr. Benatta was born in Muaskar City (also known as Mascara) in Algeria on May 16, 1974. Mr. Benatta joined the Algerian armed forces in 1992. Following one year of training in the military, he went to the University of Blida near Algiers and trained as an aeronautical engineer, with an emphasis of avionics (also known as aviation electronics). Following graduation in 1998, Mr. Benatta returned to military service where he eventually attained the rank of lieutenant.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 3, 5.

12. In December 2000, Mr. Benatta travelled to the United States of America with a large group of individuals from the Algerian Armed Forces to participate in a training program offered by a private aerospace firm, Northrup Grumman. Unbeknownst to his peers and superiors, Mr. Benatta intended to desert the Algerian military and seek sanctuary in North America. At the end of the program in April 2001, Mr. Benatta deserted the Algerian Armed Forces by not returning to Algeria.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 8, 9.

13. Mr. Benatta deserted the Algerian Armed Forces because he feared for his life in Algeria which had been threatened by the GIA, the armed wing of the Islamic Salvation Front (FIS) due to his military associations. Further, Mr. Benatta's life and liberty was also threatened by the military itself. While engaged in active combat in Algeria in 1999, Mr. Benatta witnessed, objected to and was forced to participate in what he perceived to be unlawful and unconscionable acts of the Algerian military that troubled his conscience. For his refusal to participate in these acts, Mr. Benatta spent five months in prison for insubordination and further disciplinary measures. He was fearful that he would be forced to participate in such unconscionable acts again and that he would be imprisoned, tortured or even killed if he refused once more.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 6, 7.

14. It is very dangerous to attempt to desert the Algerian military. Deserters who are caught face punishments including torture and summary execution. Mr. Benatta reasonably believed that he could not desert the military until he was outside of Algeria's borders.

15. In April 2001, instead of returning to Algeria, Mr. Benatta travelled to New York City with the intention of claiming asylum. Mr. Benatta learned that his chances of obtaining asylum in the United States of America as a military deserter from Algeria were slim. He also needed to work in order to support himself but he was afraid that he would be caught working illegally and sent back to Algeria. Further, Mr.

Benatta could not speak English and so he worried that he would have difficulty in making a claim for asylum.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 10.

16. In or around early September 2001, Mr. Benatta learned through his contacts that it might be possible for him to cross the Canada / United States border at Fort Erie and make a claim in Canada. Mr. Benatta was told by his contacts and he believed that his chances of being granted asylum in Canada were reasonable compared to the slim chance that he would be granted asylum in the United States.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 10.

17. Further, Mr. Benatta did not speak English at the time but he was fluent in French. For that reason, he believed that he would have a better opportunity to explain his story to Canadian officials in his claim for asylum.

18. Mr. Benatta decided to attempt to enter Canada using his false identity and, once he had entered Canada, he would make his claim for asylum.

19. On September 5, 2001, Mr. Benatta presented Canadian immigration officials at the border at Fort Erie with his false Green Card and false Social Security Card. Mr. Benatta's genuine and legitimate Algerian passport was in his luggage.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 11.

20. A Canadian immigration official pulled Mr. Benatta aside for questioning after suspecting that his documents were fraudulent. When pulled aside for questioning, Mr. Benatta immediately came forward with the truth and admitted to his true identity and that he was claiming asylum in Canada. He explained about his experiences with the Algerian Armed Forces and that he feared for his life and his safety if he were returned to Algeria.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 11.

21. Mr. Benatta was scheduled for a detention review to take place on September 12, 2001. In the meantime, Mr. Benatta was detained by Canadian officials at the Canadian border in the Niagara Detention Centre.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 13.

22. Unbeknownst to Mr. Benatta, on September 11, 2001, terrorists attacked the World Trade Centre and other targets in New York City.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 15.

23. On September 12, 2001, Mr. Benatta appeared before an Immigration Adjudicator.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 14.

24. Mr. Benatta did not have representation at this proceeding. In fact, Mr. Benatta was not provided with contact information for counsel or legal aid.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 14.

25. Furthermore, the proceedings were conducted in English even though Mr. Benatta could not understand English very well and was fluent in French. At various times during the proceeding, Mr. Benatta requests that the Adjudicator and advocates speak more slowly so that he could understand what was happening.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 16 and Exhibit "A" at pp. 2 and 4.

26. The Immigration Adjudicator ordered Mr. Benatta's continued detention, in order to allow the immigration officials to make further inquiries in order to confirm

his identity. A further review was to be scheduled within one week. In fact, a further review was scheduled to take place on September 19, 2001.

> Affidavit of Mr. Benatta sworn March 14, 2007, para. 17 and Exhibit "A" at p. 5.

27. A further detention review never took place in Canada.

> Affidavit of Mr. Benatta sworn March 14, 2007, para. 18.

28. Instead, still on September 12, 2001, Mr. Benatta was interviewed by Canadian officials. These two people asked Mr. Benatta questions about the events of September 11, 2001. They did not ask Mr. Benatta any questions about his asylum claim.

> Affidavit of Mr. Benatta sworn March 14, 2007, para. 19.

29. On September 12, 2001, without legal counsel or the opportunity to argue his case, Canadian officials handed Mr. Benatta over to American officials. In fact, Mr. Benatta was unceremoniously driven across the border over the Rainbow Bridge in the back of a car by two Canadian officials.

> Affidavit of Mr. Benatta sworn March 14, 2007, para. 20, 21.

30. Canadian authorities had alerted the United States authorities of Mr. Benatta's presence and profile and provided misinformation which led the United States authorities to perceive Mr. Benatta as a terror threat and / or led the United States to believe that he was responsible for the attacks of September 11, 2001.

> Affidavit of Mr. Benatta sworn March 14, 2007, para. 34 and Exhibit "E" at p.1.

31. Mr. Benatta believes that the only reason that he was identified as a suspect in the September 11, 2001 terrorist attacks by Canadian officials was because he was a Muslim man who knew how to fly planes.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 46.

32. Mr. Benatta was held at the Batavia Detention Centre (hereinafter, "BDC") in Buffalo, New York where he was repeatedly interrogated about his involvement in the recent terrorist attacks in New York City. While detained, Mr. Benatta was held in isolation.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 21, 22.

33. On September 16, 2001, Mr. Benatta was transported to the Metropolitan Detention Centre (hereinafter, "MDC") in Brooklyn, New York. He was assigned "high security status".

Affidavit of Mr. Benatta sworn March 14, 2007, para. 23.

34. Mr. Benatta was kept in solitary confinement and deprived of sleep. Mr. Benatta's cell was illuminated 24 hours a day and the prison guards woke him up every half hour of every day by knocking loudly on the door of his cell.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 24.

35. Mr. Benatta was held incommunicado and was denied access to counsel or any communication with the outside world. He was only taken out of his cell to be interrogated regarding the terrorist attacks of September 11, 2001.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 25.

36. Mr. Benatta was beaten regularly by MDC prison guards. He repeatedly had has head slammed against the wall and the guards routinely stepped on his leg shackles causing injuries.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 26.

37. Mr. Benatta was left by prison guards outside in the freezing cold without a coat on more than one occasion. If he attempted to speak to other prisoners, he was punished. The punishments consisted of withholding food and other entitlements. The acronym WTC (referring to the "World Trade Centre") was written in graffiti outside Mr. Benatta's cell, further labelling him for personal attacks within the prison.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 27.

38. Mr. Benatta and other detainees used hunger strikes and excessive noise in an attempt to improve their conditions and treatment while being held at MDC.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 28.

39. The treatment of Mr. Benatta and other detainees at MDC is documented by the United States government in two reports issued by the Office of the Inspector General of the US Department of Justice: *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003) and *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Centre in Brooklyn, New York* (December 2003).

Affidavit of Mr. Benatta sworn March 14, 2007, para. 29 and Exhibits "B" and "C", respectively.

40. Mr. Benatta's treatment at MDC in particular is also documented in a United Nations, Commission on Human Rights, Working Group on Arbitrary Detention (hereinafter "UN Working Group") Opinion dated May 7, 2004 (Opinion No. 18/2004). In that report, the UN Working Group opined that Mr. Benatta was held in conditions that could be described as torture.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 30 and Exhibit "D" at para. 9(c).

41. On November 11, 2001, Mr. Benatta made an Application for Asylum and Withholding of Removal in America. He was terrified that he would be returned to Algeria.

42. On November 15, 2001, the Federal Bureau of Investigation (hereinafter, the "FBI") officially cleared Mr. Benatta of any connection to terrorism. Mr. Benatta was never told that he was cleared. He continued to be held at MDC in solitary confinement and without access to legal counsel.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 31 and Exhibit "D' at para. 9(c).

43. On December 12, 2001, Mr. Benatta's asylum claim was rejected.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 32.

44. On the same day, December 12, 2001, Mr. Benatta was criminally indicted for possession of a false Social Security Card and possession of a false and procured US Alien Registration Receipt Card. At that time, Mr. Benatta was not informed of these charges or offered counsel in order to provide him with legal advice.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 32.

45. On January 4, 2002, Mr. Benatta represented himself and appealed the denial of his Application for Asylum. The denial was upheld.

46. On April 30, 2002, five months after he had been cleared of any connection to wrongdoing and over seven months of being held incommunicado, without access to counsel, in harmful, harsh and degrading conditions, Mr. Benatta was transferred back to the BDC in Buffalo, New York.

47. It was at this time that Mr. Benatta was first provided with access to a lawyer.

48. At BDC, Mr. Benatta was held in a maximum security part of the detention centre, with high-risk criminal convicts.

49. On September 25, 2003, Magistrate Schroeder recommended that the criminal charges against Mr. Benatta be dismissed on various grounds including: the delay in prosecution violated Mr. Benatta's Sixth Amendment right to a speedy trial and the undue and oppressive conditions that he endured in prison compromised his ability to make a proper defence.

> Affidavit of Mr. Benatta sworn March 14, 2007, para. 33 and Exhibit "E".

50. Magistrate Schroeder noted that Mr. Benatta's case "presented a concentration of events that bordered on the bizarre". Magistrate Schroeder found that the bizarre events seem to lend credence to the claim that the criminal charges were a "ruse" by the Immigration and Naturalization Service (hereinafter, the "INS") in conjunction with the FBI to justify Mr. Benatta's detention and that the absence of documentation before Mr. Benatta's removal justifies him in concluding that the government intentionally did not want to leave a "paper trail" regarding its actions and that "the claim that [Mr. Benatta] was being held for immigration removal proceedings and not for other purposes was a subterfuge".

> Affidavit of Mr. Benatta sworn March 14, 2007, para. 33 and Exhibit "E" at p. 5, 6.

51. Magistrate Schroeder found that the attempt by INS to "back-fill" its documentation constitutes "the height of legal folly" and was, in fact, "a sham". He concluded as follows:

> "There is no doubt in this Court's mind that the defendant, because of the fact that he was an Algerian citizen and a member of the Algerian Air Force, was spirited off to the MDC Brooklyn on September 16, 2001 and held in SH [special housing] as "high security" for purposes of providing an expeditious means of having the defendant

interrogated by special agents of the FBI's ITOS as a result of the horrific events of September 11, 2001" (at p. 6).

Affidavit of Mr. Benatta sworn March 14, 2007, para. 33 and Exhibit "E" at p. 6.

52. Magistrate Schroeder further noted that Mr. Benatta "undeniably was deprived of his 'liberty' and held in custody under harsh conditions which can be said to be 'oppressive'".

Affidavit of Mr. Benatta sworn March 14, 2007, para. 33 and Exhibit "E" at p. 10.

53. Magistrate Schroeder also noted that Canadian officials were the ones who identified Mr. Benatta as a terror suspect, finding as follows: "As a result of the horrific events of September 11, 2001, the Canadian authorities alerted United States authorities of [sic] defendant's presence and profile . . ." (at p. 1).

Affidavit of Mr. Benatta sworn March 14, 2007, para. 34 and Exhibit "E" at p. 1.

54. The charges against Mr. Benatta were formally dismissed in October 2003 on Magistrate Schroeder's harsh recommendation. However, Mr. Benatta remained in custody in the United States until July 20, 2006. He remained in immigration detention on grounds that he was a flight risk.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 35.

55. Following dismissal of the charges, Mr. Benatta was informed by American officials that he could be released if he could post a $25,000 bond, a sum that he simply could not afford.

Affidavit of Mr. Benatta sworn March 14, 2007, Exhibit "D" at para. 9(b).

56. On May 7, 2004, the UN Working Group released its opinion that the United States government arbitrarily deprived Mr. Benatta of his liberty and acted in

contravention of Articles 9 and 14 of the *International Covenant on Civil and Political Rights*, the Universal Declaration of Human Rights and the United Nations Standard Minimum Rules for the Treatment of Prisoners.

Affidavit of Mr. Benatta sworn March 14, 2007, Exhibit "D".

57. The UN Working Group noted that the high-security prison regime to which he was subject involved "impositions that could be described as torture". The UN Working Group's opinion was formally adopted on September 16, 2004.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 30 and Exhibit "D" at para. 9(c).

58. Despite international pressure for his release, Mr. Benatta remained in US custody until July 20, 2006. On that date, following a period of negotiation between the US and Canada involving the Canadian Council for Refugees, Mr. Benatta was transferred to Canada in order that he might make an asylum claim.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 35, 36.

59. Mr. Benatta arrived in Canada in chains and made an asylum claim immediately upon his arrival at the border on July 20, 2006. He was interviewed by members of CSIS for an entire day where he was asked questions about his time in Algeria and the United States.

60. Mr. Benatta's asylum claim in Canada is currently pending.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 37.

61. Mr. Benatta sought records of his earlier refugee claim from Canadian officials but he was told that his earlier claim has been misplaced. Canadian officials also erroneously allege that Mr. Benatta withdrew his claim for asylum prior to being removed to the United States of America on September 12, 2001.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 38.

62. Mr. Benatta strongly denies withdrawing his refugee claim in 2001. To date, Canadian officials have not provided Mr. Benatta with a record of this alleged withdrawal.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 38, 39.

63. In fact, a Canadian official admitted in a letter that "there is no documentation to support the suggestion that Mr. Benatta withdrew his claim such as a copy of an "Allowed to Leave" form, as would normally be the case".

Affidavit of Mr. Benatta sworn March 14, 2007, para. 39 and Exhibit "F".

## III. THE ISSUES

64. Mr. Benatta respectfully submits that there are three issues arising in this motion:

A. Should the Commissioner, in the exercise of his discretion, grant Mr. Benatta standing to participate in the Commission of Inquiry;
B. In the alternative, should the Commissioner, in the exercise of his discretion, grant Mr. Benatta the opportunity to participate as an intervenor in the Commission of Inquiry; and
C. If standing is so granted either to participate or intervene, should the Commissioner, in the exercise of his discretion, recommend to the Clerk of the Privy Council that funding be provided to Mr. Benatta to ensure that he is represented by counsel and is thereby able to appropriately participate in the Inquiry?

## IV. ARGUMENT AND THE LAW

### A. Mr. Benatta should be granted standing to participate in the Inquiry.

65. Mr. Benatta has a substantial and direct interest in the subject matter of the Inquiry and thus should be granted standing to participate.

66. The test for determining whether or not to grant standing to a person before this Commission of Inquiry is whether the person has a substantial and direct interest in the subject matter of the Inquiry.

> Order-in-Council P.C. 2006-1526.
> Commission of Inquiry Terms of Reference, paragraph (f).

67. The phrase "substantial and direct interest" has been interpreted to include not just the persons whose experiences are at issue in an Inquiry (such as Messrs. Almalki, El Maati and Nureddin), but rather any person or organization who has been affected or who may be affected by the outcome of the Inquiry. The Ontario Divisional Court *per* Linden J. canvassed the kinds of interests which could give rise to a conclusion that an individual has a substantial and direct interest:

> There is very little guidance in the authorities as to the factors to be examined by the Court (or a Commissioner) in determining this question. It does seem as though the subject matter of the inquiry is of significance. Obviously, the more general, theoretical and abstract the subject of an inquiry is, the more difficult it would be to find that a person has a substantial and direct interest in it. The more specific, practical and concrete the subject of an inquiry is, the more likely it would be that the property or individual rights of a person are affected, and hence, he would have a substantial and direct interest. The potential importance of the findings and the recommendations to the individual involved would have to be considered; if a particular person would be greatly affected by a recommendation or a finding in relation to him or his interests, then that would be taken into account in deciding whether he had a substantial and direct interest. Obviously, individual property interests have to be taken into account. (See *Re Royal Commission on Conduct of Waste Management* (1977), 80 D.L.R. (3d) 76.) If a person has vital information to give or has made the charges that the Commission is inquiring into, then that person may be considered to have a substantial and direct interest, whereas others might not. (See *Re Public Inquiries Act and*

> *Shulman* [1967] 2 O.R. 375.) It seems to us that the value of the potential interest that is being affected would have to be considered in arriving at its conclusion. Similarly, if one person is potentially affected, that might be viewed differently than if 100 or 1,000 or more persons may be affected. None of these specific items would be controlling; it is necessary to look at all of these factors as well as any others in the context of each inquiry. The decision must be made after examining all of the circumstances. Essentially, what is required is evidence that the subject-matter of the inquiry may seriously affect a [sic] individual. If that is the case, then that individual is entitled to full participation rights pursuant to s. 5(1).
>
> *Re Ontario Royal Commission on the Northern Environment*, [1983] O.J. No. 994 (Ont. Div. Ct.) at para. 8.

68. The present Commission of Inquiry will look into whether the experiences of Messrs. Almalki, El Maati and Nureddin resulted directly or indirectly from the actions of Canadian officials, particularly in relation to the sharing of information with foreign countries as set out in the Terms of Reference. The subject matter of the present Inquiry will seriously affect Mr. Benatta and the findings and recommendations are of great importance to him. Mr. Benatta was also subjected to detention, torture and abuse because of Canadian officials sharing information with foreign security agencies. This was a direct result of legal protections to which he was entitled being overridden in a comparable manner and in comparable circumstances to the alleged violations experienced by Messrs. Almalki, El Maati and Nureddin. Mr. Benatta wishes to ensure that this experience does not happen to him again. This specific, practical and concrete subject matter of the Inquiry directly and greatly affects Mr. Benatta and, hence, he has a substantial and direct interest in its outcome.

> Commission of Inquiry, Terms of Reference, paragraph (a).

69. In fact, Mr. Benatta has a substantial and direct interest in the subject matter of this Inquiry because he was likely the first person in Canada following the events of September 11, 2001 to be labeled a terror suspect by Canadian officials solely on the basis of racial stereotypes and prejudice. Further, he is likely the first person in Canada following the events of September 11, 2001 to be handed over to the Americans without due process. Mr. Benatta is a necessary party to this Inquiry in order to establish whether his experiences were the beginning of a practice or policy

or procedure adopted by Canadian officials to deal with terror suspects post September 11, 2001.

70. Further, Mr. Benatta has a substantial and direct interest in the subject matter of the Inquiry as he will be seriously affected by its findings and recommendations. For example, a finding by the Inquiry that what happened to Messrs. Almalki, El Maati and Nureddin was not the responsibility of Canadian officials would serve to invalidate Mr. Benatta's own experiences and would place him at future risk of the same thing happening again.

71. Aside from making the charges against Canadian officials that are being examined in this Commission for Inquiry, Mr. Benatta also has vital information to provide to the Commission of Inquiry. Mr. Benatta's case will shed light on the relationship between Canadian officials and foreign governments in respect of national security issues. As stated above, Mr. Benatta was likely the first person in Canada following September 11, 2001 to be treated this way by Canadian officials. Mr. Benatta's case might have set a precedent and established procedures that were followed by Canadian officials in subsequent cases. Mr. Benatta is a necessary party to the Inquiry which is charged with examining the actions of Canadian officials in their sharing of information with foreign countries. Given that this information arises in a context where Mr. Benatta was also detained, tortured and mistreated by a foreign state on the basis of information provided by Canadian officials, Mr. Benatta has a substantial and direct interest in this Inquiry sufficient to meet the test for standing.

72. The terms of reference of this Inquiry direct the Commissioner to conduct the Inquiry as he considers appropriate with respect to accepting as conclusive, or giving weight to, the findings of other examinations that may have been conducted into the actions of Canadian officials in relation to Messrs. Almalki, El Maati and Nureddin. Mr. Benatta respectfully submits that this term is broad enough to encompass the investigation of other cases, similar to those of Messrs. Almalki, El Maati and Nureddin, because the Commission must determine whether these cases arose in isolated circumstances or as part of a practice on the part of Canadian officials.

Commission of Inquiry, Terms of Reference, paragraph (b).

73. Mr. Benatta has a substantial and direct interest in the subject matter of the Inquiry because Mr. Benatta's experiences are similar to those of Messrs. Almalki, El Maati and Nureddin. In particular:

i. Abdullah Almalki, Ahmad Abou El Maati and Muayyed Nureddin were all detained and tortured on foreign soil allegedly because of information provided to foreign governments (Syria and Egypt) by Canadian officials linking these men to terrorist activities. Mr. Benatta was also detained and tortured on foreign soil because of information provided to a foreign government (America) by Canadian officials linking Mr. Benatta to terrorist activities, in particular, the events of September 11, 2001.

ii. In the cases of Abdullah Almalki, Ahmad Abou El Maati and Muayyed Nureddin, Canadian officials allegedly provided information to foreign governments resulting in the detention of these men. In the case of Mr. Benatta, Canadian officials not only provided information to a foreign government but also actually drove Mr. Benatta over the border into the United States of America and handed him over to American officials. This transfer or 'rendition' was effected extra-judicially, that is, without due process.

iii. Abdullah Almalki, Ahmad Abou El Maati and Muayyed Nureddin allege that they were tortured on foreign soil. Mr. Benatta was also tortured on foreign soil (America) as documented in a UN Working Group Opinion dated May 7, 2004 (Opinion No. 18/2004). Mr. Benatta's abuse while he was held in an American prison in Brooklyn, New York is also documented by the United States government in two reports issued by the Office of the Inspector General of the US

Department of Justice: *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003) and *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Centre in Brooklyn, New York* (December 2003).

iv. Abdullah Almalki, Ahmad Abou El Maati and Muayyed Nureddin believe that they were targeted by Canadian officials because they are Muslim. Mr. Benatta also believes that he was targeted by Canadian officials because he is Muslim. In fact, the only apparent reason that he was designated by Canadian officials as a security concern in the September 11, 2001 attacks was the fact that he was a Muslim man who knew how to fly planes.

v. Abdullah Almalki, Ahmad Abou El Maati and Muayyed Nureddin are concerned about unchallenged inferences that they are connected with terrorist activities. Mr. Benatta is also concerned about unchallenged inferences that he is connected with terrorist activities. He was identified by Canadian officials in 2001 as having involvement in the terrorist attacks of September 11, 2001. Mr. Benatta does not believe that this allegation was warranted and is concerned about adverse inferences being drawn by members of the public in Canada. Mr. Benatta denies having any connection to terrorism and requests the opportunity to clear his name in Canada.

74. The Ontario Divisional Court in *Range Representative on Administrative Segregation Kingston Penitentiary v. Ontario Regional Coroner* found that the unique identity of legal interests in an investigation into a death of an inmate in prison was so acute as to be substantial and direct. The unique identity of legal interests between Mr. Benatta and Messrs. Almalki, El Maati and Nureddin are so acute as to be substantial and direct, as listed above.

*Range Representative on Administrative Segregation Kingston Penitentiary v. Ontario Regional Coroner*, [1989] O.J. No. 1068 (Ont. Div. Ct.).

75. Mr. Benatta has a substantial and direct interest in any policy review undertaken by this Commission of Inquiry. He has a direct interest in seeing that there are appropriate mechanisms in place to ensure that human rights are balanced against national security interests, such that human rights are protected in respect of such investigations. He has a direct interest in the development of mechanisms that will ensure accountability and monitoring of Canadian security and / or immigration officials in their investigations. He has a direct interest in the elimination of racial profiling and stereotyping and systemic racism as part of the Canadian security intelligence regime.

76. Mr. Benatta's individual rights, including his right to his reputation, are already affected and will continue to be so affected in the future. Mr. Benatta spent 5 years of his life in prison and has been identified in Canada and in America as a person who was in some way responsible for the September 11, 2001 terror attacks. It is imperative that Mr. Benatta clear his name, a name that was impugned by Canadian officials in 2001.

77. Mr. Benatta is one of only a few individuals who are potentially affected by the outcome of this Commission of Inquiry. There are not hundreds or thousands more directly and substantially affected in the same way.

**B. In the alternative, Mr. Benatta should be granted intervenor status.**

78. In the alternative, Mr. Benatta has a genuine concern about the subject matter of the Inquiry and has a particular perspective that will assist the Commissioner and so should be granted intervenor status.

79. Mr. Benatta repeats and relies on the arguments set out above in respect of his argument that he should be granted standing to participate in the Inquiry.

80. Mr. Benatta has a genuine concern about the subject matter of the Inquiry. To summarize, the present Inquiry will look into whether the experiences of Messrs. Almalki, El Maati and Nureddin resulted directly or indirectly from the actions of Canadian officials, particularly in relation to the sharing of information with foreign countries. Mr. Benatta was a genuine concern about this subject matter as he was also subjected to detention, torture and abuse because of Canadian officials sharing information with foreign security agencies. Mr. Benatta wishes to ensure that this experience does not happen to him again or to anyone else in his position.

Commission of Inquiry, Terms of Reference, paragraph (a).

81. Mr. Benatta also a particular perspective that will assist the Commissioner in the context of this Inquiry. Mr. Benatta's case will shed light on the relationship between Canadian officials and foreign governments in respect of national security issues. As stated above, Mr. Benatta was likely the first person in Canada following September 11, 2001 to be treated this way by Canadian officials. Mr. Benatta's case might have set a precedent and established procedures that were followed by Canadian officials in subsequent cases. Given that this information arises in a context where Mr. Benatta was also detained, tortured and mistreated by a foreign state on the basis of information provided by Canadian officials, Mr. Benatta has a genuine concern and a particular perspective sufficient to meet the test for intervenor status.

**C. Mr. Benatta respectfully requests funding to participate or intervene.**

82. According to Order-in-Council 2006-1526, the Commission may recommend to the Clerk of the Privy Council that funding be provided, in accordance with approved guidelines respecting rates of remuneration and reimbursement and the assessment of accounts, to ensure the appropriate participation of any person granted an opportunity to participate, to the extent of the person's interest, where in the Commissioner's view the participant would not otherwise be able to participate in the Inquiry.

Order-in-Council P.C. 2006-1526.
Commission of Inquiry Terms of Reference, paragraph (g).

83. Mr. Benatta respectfully requests that, should the Commissioner grant standing or intervenor status to Mr. Benatta, the Commissioner so recommend that Mr. Benatta receive funding so as to enable him to put his case forward at the Inquiry.

84. Mr. Benatta cannot afford to retain counsel to assist him if he is granted standing or intervenor status in this Inquiry. Mr. Benatta has been largely unemployed since his return to Canada on July 20, 2006. He spent 5 years of his life in prison and his prison record has made securing future employment difficult. He is also unable to continue to work in his chosen field due to the amount of time and money that it would take for him to re-train to work in aeronautical engineering.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 53, 54.

85. Mr. Benatta is currently unemployed and is receiving a small amount of social assistance on which to live.

Affidavit of Mr. Benatta sworn March 14, 2007, para. 55.

86. Granting Mr. Benatta standing to participate or intervene without granting funding will not assist him. In practical terms, he is not in a position to be able to adequately represent his own interests before the Commission.

*Groenewegen v. N.W.T. Legislative Assembly*, [1998] N.W.T.J. No. 129 (S.C.) at para. 57.

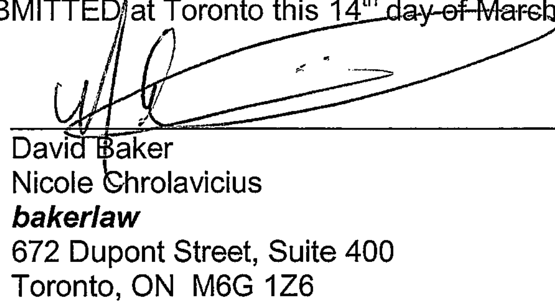
## V. ORDER SOUGHT

87. Mr. Benatta respectfully seeks an order an order pursuant to Order-in-Council P.C. 2006-1526 granting him standing to participate in this internal Commission of Inquiry.

88. In the alternative, Mr. Benatta respectfully seeks an order pursuant to Order-in-Council P.C. 2006-1526 granting Mr. Benatta intervenor status in this internal Commission of Inquiry.

89. Mr. Benatta further seeks a recommendation pursuant to Order-in-Council P.C. 2006-1526 by the Commissioner to the Clerk of the Privy Council that funding be provided to Mr. Benatta to ensure that he is represented by counsel and is thereby able to appropriately participate in the Inquiry, whether by standing or by intervenor status.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Toronto this 14th ~~day of March~~, 2007.

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Solicitors for the Moving Party, Mr. Benamar Benatta

TAB A

Indexed as:

# Ontario (Royal Commission on the Northern Environment) (Re)

IN THE MATTER OF the Public Inquiries Act, S.O. 1971, c. 49
AND IN THE MATTER OF the Royal Commission on the Northern Environment appointed pursuant to Orders-In-Council 1900/77, 2316/78 and 3679/81

[1983] O.J. No. 994

**Ontario Supreme Court - High Court of Justice**
**Divisional Court**
**Callon, J. Holland and Linden JJ.**

Heard: January 25 and 26, 1983.
Oral judgment: January 26, 1983.
Released: February 14, 1983.
(10 pp.)

**Counsel:**

G. Watkins and R. Cotton, for the Commission.
S.T. Goudge and C. Beamish, for Grand Council Treaty 9.
S.W. Mercer, for the Attorney General of Ontario.

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The judgment of the Court was delivered by

¶ 1 **LINDEN J.** (orally):— The issue raised by this application is the right of individuals to participate fully, that is, to present evidence, call witnesses and to cross-examine witnesses, before a Commission of Inquiry under the Public Inquiries Act, S.O. 1971, c. 49 and, in particular, before the Royal Commission on the Northern Environment which was appointed pursuant to Orders-In-Council 1900/77, 2316/78 and 3679/81.

¶ 2 There were two questions put to us by the Commissioner, Mr. J.E.J. Fahlgren, who replaced the Honourable Mr. Justice Hartt in 1978. Those questions are as follows:

1. Did I exceed my authority by denying the application of the Grand Council which, in effect, requested the opportunity to cross-examine persons making submissions to me during my inquiry on evidence relevant to its interests?
2. Did I exceed my authority by, in effect, denying the application of the

Red Lake Chamber of Commerce for a opportunity to cross-examine a person scheduled to make a submission to me during my inquiry on evidence relevant to its interest?

¶ 3 It is agreed by counsel that implicit in the wording of these questions is whether section 5(1) of the Public Inquiries Act allows the two applicants to participate fully in the proceedings of the inquiry. Neither counsel wish to raise technicalities as to the exact wording of the questions but wish us to confront the issue squarely, which we have.

¶ 4 The section of the Public Inquiries Act which must be interpreted by this Court reads as follows:

5.(1) A commission shall accord to any person who satisfies it that he has a substantial and direct interest in the subject-matter of its inquiry an opportunity during the inquiry to give evidence and to call and examine or to cross-examine witnesses personally or by his counsel on evidence relevant to his interest.

¶ 5 It is also common ground that the Divisional Court serves a "supervisory" function in cases like these but that, if there is an error made by the Commissioner in the interpretation of s. 5(1), then that error amounts to a Jurisdictional error. See Re Bortolotti and Ministry of Housing (1977) 76 D.L.R. (3d) 408; and Re Royal Commission into Metropolitan Toronto Police Practices and Ashton, (1975) 10 O.R. (2d) 111.

¶ 6 Our courts have rightly sought, in supervising public inquiries in this province over the years, to foster full and open discussion (See Re The Children's Aid Society of the County of York [1934] O.W.N. 418). In recent years this policy has led to a marked liberalization of the rules of standing in the courts of this country. (See for example Thorson v. Attorney General of Canada (1975), 1 S.C.R. 138; Nova Scotia Board of Censors v. McNeil (1976), 2 S.C.R. 265; Borowski v. Minister of Justice (1982), 39 N.R. 330; Re Rauca, Court of Appeal, January 18, 1983.) The decision dealing with the Coroners Act investigation is consistent with this notion (Brown and Patterson 21 CCC (2d) 373.)

¶ 7 The first question before us then is simply -- Does the Grand Council of the Treaty 9 Bands have a "substantial and direct interest" in the subject-matter of this inquiry? It is clear that this legislation does not grant full participation rights to every single individual in the province who happens to be interested in an inquiry. The persons entitled to full participation are only those who have a 'substantial and direct interest', not just anyone who has a mere academic interest which is neither substantial nor direct. It is not enough merely to be as interested as any other member of the public in this inquiry. (See Re Inmates Committee of the Prison for Women, et al. and Meyer 55 C.C.C. (2d) 308.).

¶ 8 There is very little guidance in the authorities as to the factors to be examined by the Court (or a Commissioner) in determining this question. It does seem as though the

subject matter of the inquiry is of significance. Obviously, the more general, theoretical and abstract the subject of an inquiry is, the more difficult it would be to find that a person has a substantial and direct interest in it. The more specific, practical and concrete the subject of an inquiry is, the more likely it would be that the property or individual rights of a person are affected, and hence, he would have a substantial and direct interest. The potential importance of the findings and the recommendations to the individual involved would have to be considered; if a particular person would be greatly affected by a recommendation or a finding in relation to him or his interests, then that would be taken into account in deciding whether he had a substantial and direct interest. Obviously, individual property interests have to be taken into account. (See Re Royal Commission on Conduct of Waste Management (1977), 80 D.L.R. (3d) 76. If a person has vital information to give or has made the charges that the Commission is inquiring into, then that person may be considered to have a substantial and direct interest, whereas others might not. (See Re Public Inquiries Act and Shulman [1967] 2 O.R. 375. It seems to us that the value of the potential interest that is being affected would have to be considered in arriving at its conclusion. Similarly, if one person is potentially affected, that might be viewed differently than if 100 or 1,000 or more persons may be affected. None of these specific items would be controlling; it is necessary to look at all of these factors as well as any others in the context of each inquiry. The decision must be made after examining all of the circumstances. Essentially, what is required is evidence that the subject-matter of the inquiry may seriously affect a individual. If that is the case, then that individual is entitled to full participation rights pursuant to s. 5(1).

¶ 9 Looking at the facts in this particular situation, the matters that are still being inquired into are items (ii) and (iii) which read as follows:

(ii) to inquire into methods that should be used in the future to assess, evaluate and make decisions concerning the effects on the environment of such major enterprises;
(iii) to investigate the feasibility and desirability of alternative undertakings north or generally north of the 50th parallel of north latitude, for the benefit of the environment as defined in Schedule A.

¶ 10 It appears, on the evidence, that the Commissioner wishes to conduct a informal and relaxed inquiry. It seems that may of the recommendations will be theoretical and long-term. However, it must be noted, in particular, that one of the important matters that is being looked into is the method or procedure whereby decisions concerning the environment will be made. The use of the land north of the 50th parallel and its effect on the environment and the resources will also be dealt with.

¶ 11 The Grand Council, Treaty No. 9, is a corporation representing the democratically elected representative of 40 different bands of Ojibway and Cree people of Northern Ontario, comprising some 20,000 individuals. This corporation, therefore, represents approximately two-thirds of the population in the area in question. These people call themselves the Nishnawbe-Aski, which means the people and the

land. Theirs is a unique way of life, one which they have lived for centuries. They fear their culture and lifestyle is being threatened by developmental activities in the north. They feel they have not shared fully in the decision-making in the past and wish to do so in the future. This group also claims, although this has not been established legally, the right to ownership of vast areas of the land mass that is being considered by this Commission. Hence, the Grand Council is not the spokesman for a few citizens who are vaguely interested in the outcome of the Commission's inquiry, but rather it represents the majority of the population in the region, a different culture and lifestyle, and a totally different attitude towards the use of land and resources. It is significant to note that the Commissioner, in opening his hearings, stated: "... a central theme of my inquiry is the necessity to address the position of Native People north of the 50th parallel". This exercise by necessity must profoundly affect the people represented by the Grand Council. We are, therefore, convinced that the Grand Council, as official spokesman of the Nishnawbe-Aski, has a substantial and direct interest in the work of the Commission.

¶ 12 The Commissioner, in his reasons, was unduly influenced by his concern that, if he gave the Grand Council participation rights, he would be unable to prevent all of the other people of the north who might conceivably feel they have an interest from participating. This was not a proper factor to consider in determining whether a applicant has standing pursuant to section 5(1). If participation rights are given to individuals by the statute, then they are entitled to exercise those rights, even though it may slow down the work of the Commission. This is not to say that every person who wishes to participate fully may do so. Each person must establish to the satisfaction of the Commissioner (reviewable by this court) that he has more than just a general interest, but that he has a direct and substantial interest.

¶ 13 Further, holding that the Council has standing, in general, does not mean that every single time the Council wishes to produce a witness or ask a question in cross-examination that they have the right to do so indiscriminately. The Commissioner remains in charge of the inquiry. He is in control of its process, thus he is obligated to rule on the relevance of any questions to the interest of the Council (or such other individuals as are given standing).

¶ 14 Counsel for the Grand Council indicated that the Premier of the Province had promised them full participation in the inquiry. He also indicated that there were statements of the Commissioner on the record to the effect that he thought the applicants had a "substantial and direct interest" in the inquiry. We feel that those facts are totally irrelevant to the decision of this court and to the rulings of the Commissioner on s. 5 applications.

¶ 15 There are three caveats: (1) First, nothing in these reasons should prevent the Commissioner from deciding, in the first instance at least, whether individuals have standing under section 5(1). In other words, he need not state a case to the Divisional Court every time someone appears and wishes to have full participation rights. It is within his jurisdiction to make a initial determination, subject of course to review by this court.

¶ 16 (2) Second, there is nothing in these reasons that is meant to limit the exercise of the discretion of the Commissioner in relation to the day-to-day operation of the inquiry, such as the questions to be asked, the witnesses to be called, the issues to be investigated, nor the research undertaken. All that is decided here is that the Council (and any others who are granted standing pursuant to s. 5(1) may, in appropriate circumstances, call witnesses and cross-examine in accordance with the rules that are generally followed in these matters. Hence, questions that may be asked are those that would assist the Commissioner in his work. Questions that are irrelevant or are merely part of a fishing expedition or are found to be politically motivated might not be permitted. In other words, each of these matters must be dealt with by the Commissioner on a situational basis as they arise in the course of his continuing inquiry.

¶ 17 (3) The third caveat is that there is nothing in this decision which is meat to influence the Commissioners or others in relation to the question of funding of the participants with regard to this cross-examination feature. Merely because funding is provided for the presentation of briefs does not necessarily mean that funding would be provided for full participation. That is a distinct question that will be determined by those responsible for those matters.

¶ 18 In conclusion, our answer to question 1 is yes. As for question 2, although we would have preferred more facts than are set out, counsel for the Commission has invited us to treat both groups in the same way. Since we heard no objection from Mr. Goudge, we answer question 2 in the same way.

¶ 19 No order as to costs.

LINDEN J.
CALLON J.
J. HOLLAND J.

QL Update: 971113
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TAB B

Indexed as:

# Range Representative on Administrative Segregation Kingston Penitentiary v. Ontario (Regional Coroner)

Between
Larry Stanford, Range Representative on Administrative Segregation Kingston Penitentiary, Applicant, and
Walter Harris, Regional Coroner Eastern Ontario, Respondent

[1989] O.J. No. 1068
Action No. 521/88
38 Admin. L.R. 141

**Supreme Court of Ontario - High Court of Justice**
**Divisional Court - Toronto, Ontario**
**Craig, O'Brien and Campbell JJ.**

Heard: February 20, 1989
Judgment: June 28, 1989

*Parties — Standing — Intervenors — Coroner's inquests — Inquest being held into suicide of inmate held in super-protective custody unit — Other inmates held in same unit seeking standing — Application dismissed — Application for judicial review allowed — Given uniqueness of situation and identity of circumstances inmates having direct and substantial interest within s. 41 of Coroners Act — Coroners Act, R.S.O. 1980, c. 90, s. 41.*

This was an application for judicial review of a decision refusing to grant standing to participate in a coroner's inquest. An inquest was being conducted by the coroner into the suicide of a mentally ill inmate confined in a unique super-protective custody unit within a federal penitentiary. The applicant, the officially elected representative of 20 other prisoners confined in the same unit, applied for standing at the inquest. The coroner dismissed the application ruling that the inmates were not "substantially and directly interested in the inquest" within the meaning of s. 41 of the Coroners Act and that he had no residual discretion to grant standing to persons falling beyond the legislated criteria. The applicant applied for judicial review.

**HELD:** (one diss.) The application was allowed. The applicant and the other 19 inmates were granted standing to intervene. While the coroner had a wide discretion which was not to be lightly interfered with by the courts, the coroner erred in law in the interpretation of his jurisdiction to grant standing to a degree that resulted in jurisdictional error. In finding that the inmates did not have a substantial and direct interest in the inquest, the coroner erred by applying a test which was based on a private law approach and did not reflect the public interest functions of the inquest. Mere concern about the issues to be canvassed at the inquest was not enough to constitute direct and substantial interest. The interest of an applicant for standing had to be so acute that the interest was not only substantial but also direct. Here, the applicant had a unique identity of legal interest with the deceased and had an extraordinary interest in any recommendations made which would directly affect the inmates' lives. The coroner also had a residual discretion to grant standing quite apart from the provisions of s. 41 of the Act. There was no evidence that the legislature intended to exclude any powers beyond the Act considering in particular the public interest protected by the Act.

[Ed. note: Corrigenda, released July 25, 1989, appended and corrections made to the judgment.]

Diane L. Martin, for the Applicant.
Michael W. Bader, for the Respondent.

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Reasons for judgment delivered by Craig J., allowing the application; concurring reasons delivered by Campbell J. O'Brien J. delivered separate and dissenting reasons for Judgment.

**CRAIG J.**:— I have had the advantage of reading the Reasons for Judgment of my brothers O'Brien and Campbell JJ. Contrary to the views expressed by Campbell J., O'Brien J. holds the view that a coroner does not retain any residual jurisdiction to grant standing.

In the interest of ensuring a fair inquest and for the reasons stated by Campbell J. I agree that the applicant should be granted standing; and that the application be allowed on the basis of jurisdictional error. However, having come to that conclusion, it is my view that it is unnecessary to decide in this case whether or not the coroner retains a residual jurisdiction to grant standing.

CRAIG J.

O'BRIEN J.:-- I have had the advantage of reading the careful analysis and decision of Campbell J. Unfortunately, I do not agree with it.

THE issue on this application for judicial review is whether the Court should reverse a coroner's decision that the Coroners' Act gave him no jurisdiction to grant standing to the Applicant.

THE coroner was conducting an inquest into the suicide of Michael Zubresky, a mentally ill inmate confined to a super-protective custody unit in Kingston Penitentiary. Super-protective custody is a form of administrative segregation. Prisoners are put into that custody because they are, by reason of their offences, or their perceived status as informers, at great risk of injury or death from other inmates.

ALTHOUGH no order for standing has apparently yet been made on behalf of Mr. Zubresky's family or the Penitentiary authorities, the usual course in these matters would be to grant standing to them, if requested.

THE Applicant, Larry Stanford, is the officially elected range representative of the 20 prisoners confined to the super-protective unit.

HE applied for standing at the inquest on behalf of himself and the other inmates on the basis that the unique conditions in that unit, including allegedly inadequate supervision and treatment, may have caused or contributed to Zubresky's death and the Applicants had a direct interest in the jury's recommendations.

IN my view, the coroner correctly considered and interpreted his statutory duty under section 41 of the Coroners' Act, R.S.O. 1980, c. 93. He fully and fairly considered the submissions of counsel and concluded the Applicants had not satisfied him their interest was substantial and direct.

THE relevant sections of the Coroners' Act, R.S.O. 1980, c. 93, are as follows:

20. When making a determination whether an inquest is necessary or unnecessary, the

Coroner shall have regard to whether the holding of an inquest would serve the public interest and, without restricting the generality of the foregoing, shall consider,

(b) the desirability of the public being fully informed of the circumstances of the death through an inquest; and
(c) the likelihood that the jury on an inquest might make useful recommendations directed to the avoidance of death in similar circumstances.

31(1) Where an inquest is held, it shall inquire into the circumstances of the death and determine,

(a) who the deceased was;

(b) how the deceased came to his death;
(c) when the deceased came to his death;
(d) where the deceased came to his death; and
(e) by what means the deceased came to his death.

(2) The jury shall not make any finding of legal responsibility or express any conclusion of law on any matter referred to in subsection (1).
(3) Subject to subsection (2), the jury may make recommendations directed to the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest.
(4) A finding that contravenes subsection (2) is improper and shall not be received.
(5) Where a jury fails to deliver a proper finding it shall be discharged.

32. An inquest shall be open to the public except where the coroner is of the opinion that national security might be endangered or where a person is charged with an indictable offence under the Criminal Code (Canada) in which cases the coroner may hold the hearing concerning any such matters in camera.

41(1) On the application of any person before or during an inquest, the coroner shall designate him as a person with standing at the inquest if he finds that the person is substantially and directly interested in the inquest.

(2) A person designated as a person with standing at an inquest may,

(a) be represented by counsel or an agent;
(b) call and examine witnesses and present his arguments and submissions;
(c) conduct cross-examinations of witnesses at the inquest relevant to the interest of the person with standing and admissible.

50(1) A coroner may make such orders or give such directions at an inquest as he considers proper to prevent abuse of its processes.

(2) A coroner may reasonably limit further cross-examination of a witness where he is satisfied that the cross-examination of the witness has been sufficient to disclose fully and fairly the facts in relation to which he has given evidence.
(3) A coroner may exclude from a heraring anyone, other than a barrister and solicitor qualified to practise in Ontario, appearing as an agent advising a witness if he finds that such person is not competent properly to advise the witness or does not understand and comply at the inquest with the duties and responsibilities of an adviser.

IT is to be noted that the current statutory regime relating to coroners' inquests was enacted in Ontario

in 1972 and that significant changes were made in the Act and, in particular, with reference to standing under section 41.

THE question of standing in these matters is fully considered by Professor Alan Manson in his unpublished article Standing in the Public Interest at Coroners' Inquests in Ontario.

WHILE I do not agree with many of his conclusions, he correctly concluded coroners have almost universally denied standing beyond the set of persons who are related to the deceased, or in respect of whom questions of responsibility or culpability may be addressed. Individuals sharing a common interest, or even a group existence with the deceased, and groups which represent those individuals have consistently been denied standing at inquests.

SEE Re Brown, et al. and Patterson (1974), 6 O.R. (2d) 441 (Ont. Div. Ct.), per Henry, J. The matter was remitted to the coroner and, again, came to the Divisional Court (unreported), Wells, C.J.H.C., Zuber and Weatherston, JJ., April 14th, 1975. The Court refused an application for judicial review of the coroner's decision to grant standing. Zuber, J., in the unreported judgment, said:

> We have been referred to the decision of Henry, J. in this Court on the prior occasion. Henry, J. in our view did not purport to lay down an exhaustive code or definition as to what might constitute the qualities attaching to a person with standing. He simply called attention to some issues that might be considered by the Coroner and it would appear that he has considered those issues.
> Accordingly, in our view, this ground of attack on the proceedings fails.

IN Re Inmates' Committee of Millhaven v. Bennett (unreported) (Div. Ct.) Garrett, J., sitting as a single Judge, January 26th, 1978, the Court refused judicial review of a coroner's denial of standing to three prisoners in their personal capacity and representing the Inmates' Committee of Millhaven Penitentiary. That application involved an inquest into the death of a prisoner shot by a guard during an escape attempt. Garrett, J. held that the coroner asked the proper question and there was, therefore, no basis to interfere with his decision that the interest of the applicants, although, perhaps, substantial, was not direct.

IN Re Inmates' Committee of the Prison for Women, et al. and Meyer (1980), 55 C.C.C. (2d) 308, Eberle, J., sitting as a Judge of the Nigh Court on an urgent basis, pursuant to s. 6 of the Judicial Review Procedure Act, refused an application for judicial review of a coroner's refusal to grant standing to individual inmates and the prisoners' committee at the Prison for Women. After noting the test of direct and substantial interest involved a question of mixed fact and law, and some element of discretion, Eberle, J. held the test for review of such a decision was the test of jurisdictional error:

> ... it is apparent that the coroner directed his mind to the issue before him and that no error of jurisdiction arises from any failure to do so. Did he, however, err in his interpretation of the section? Where the test to be applied involves a mixed question of fact and law, and the exercise of discretion, it is not easy to show an error in interpretation, and I can see none. In any event, in order to found successful application for judicial review, the error must be of such a nature or such a magnitude that it results in a loss of jurisdiction. The most that could be suggested in the present case is that the coroner improperly applied the words which constitute the test to the facts before him. I hasten to say that I do not find that he misapplied the words to the facts before him. There is no evidence of that. But if he did so, it would still not amount to a loss of jurisdiction.

THE Applicant's argument that there is residual discretion in a coroner, apart from that contained in s. 41 of the Coroners' Act, is largely based on the decisions in the Trial Division of this Court and in the Court of Appeal in Wolfe v. Robinson. The trial decision, reported, [1961] O.R. 250; the Court of Appeal decision, [1962] O.R. 132. It is to be noted that in the Wolfe decision, both Wells, J. at trial, and the Ontario Court of Appeal, per Schroeder, J.A. upheld the decision of a coroner refusing to permit counsel for parents of a deceased child to take part in the inquest, other than suggesting witnesses who were then called by Crown counsel. Counsel for the parents was denied any opportunity of examining or cross-examining these witnesses.

ON the basis of the present s. 41, it is unlikely that such a situation would occur at a coroner's inquest at this time.

I do not accept the submissions that the decisions in Wolfe support the proposition that there is any inherent discretion in a coroner to grant standing, apart from that contained in s. 41(1) of the Act.

IN my view, when the Legislature revised and amended the procedures to be followed at coroners' inquests, particularly on the question of standing, the intention was to permit standing only in the situations as they are dealt with in s. 41, and as considered by Eberle, J. in Re Inmates' Committee and Meyer, supra. I conclude the coroner properly considered and applied s. 41.

I therefore see no reason to interfere with the decision and I would dismiss this application.

O'BRIEN J.

CAMPBELL J.:--

THE ISSUE.

The issue on this application for judicial review is whether the court should reverse a coroner's decision that the Coroner's Act, R.S.O. 1980, c. 93, gave him no duty and no power, at an inquest into the suicide of a mentally ill prisoner in the super-protective custody unit at Kingston Penitentiary, to grant standing to the applicant who is the officially elected representative of the twenty remaining prisoners confined under identical and unique conditions in the same unit.

THE INQUEST.

The coroner was conducting an inquest into the suicide on February 20th, 1988, of Michael Zubresky, a mentally ill inmate confined in a super-protective custody unit, a prison within a prison inside the walls of Kingston Penitentiary. Super-protective custody is a form of administrative segregation.

Prisoners are put into super-protective custody not because they have broken the prison rules but because they are, by reason of their offences or their perceived status as informers, at great risk of injury and death from inmates in the general penitentiary population.

THE APPLICATION FOR STANDING.

The applicant, Larry Stanford, is the officially elected range representative of the twenty prisoners confined in that unit.

He applied for standing at the inquest on behalf of himself and the other prisoners of that unit on the

basis that the unique conditions in that particularly restricted prison unit, including allegedly inadequate supervision and treatment, may have caused the death of Zubresky and that the remaining prisoners have a direct interest in the jury's recommendations about Zubresky's condition which was uniquely identical to their own.

The unit in which Michael Zubresky died, and in which the applicants live, is said to be a unique facility unlike any other in the Canadian penitentiary system.

The applicant deposes that each prisoner is confined about twenty-three hours a day to a nine foot by five foot cell with no opportunity for employment, treatment, or the usual opportunities for rehabilitation open to ordinary prisoners.

He deposes that inmates with severe psychiatric and psychological problems are regularly kept there for long periods of time together with inmates who are not mentally ill, and that inadequate treatment and supervision leads to constant anxiety and occasional suicide and self mutilation.

Although there is a monthly review under the penitentiary regulations, we are told that prisoners may remain in the unit for years.

The applicant seeks standing on behalf of himself and the other inmates in the unit on the basis that the recommendations that may come out of the inquest into Michael Zubresky's death may have a significant impact on the very select few inmates in this unit which is a unique facility in Ontario and indeed in Canada.

The application for standing was made to the coroner on three grounds:

1. That the applicant and those he represents have a direct and substantial interest within the meaning of s. 41 of the Coroners Act and that the coroner was therefore obliged as a matter of law to grant standing.
2. Alternatively that the Coroner in addition to the express duty in s. 41 had a residual discretionary power to grant standing which power should be exercised in favour of the applicant.
3. That the applicant's right to life, liberty and security of the person under Charter of the Canadian Rights and Freedoms s. 7 conferred a constitutional right to standing.

The coroner's reasons for refusing standing will be addressed below.

Although no order for standing has apparently yet been made on behalf of Mr. Zubresky's family or the penitentiary authorities, the usual course in these matters would seem to be to grant standing to them if requested.

THE GROUNDS OF THIS APPLICATION.

The same arguments made before the coroner are made here with the exception that the Charter is not invoked in this court except to the extent that it might indirectly bolster the first two grounds.

THE STATUTORY PROVISION.

The Coroners Act, provides, in part, as follows:

20. When making a determination whether an inquest is necessary or unnecessary, the coroner shall have regard to whether the holding of an inquest would serve the public interest and, without restricting the generality of the foregoing, shall consider,

(b) the desirability of the public being fully informed of the circumstances of the death through an inquest; and
(c) the likelihood that the jury on an inquest might make useful recommendations directed to the avoidance of death in similar circumstances.

31(1) Where an inquest is held, it shall inquire into the circumstances of the death and determine,

(a) who the deceased was;

(b) how the deceased came to his death;
(c) when the deceased came to his death;
(d) where the deceased came to his death; and
(e) by what means the deceased came to his death.

(2) The jury shall not make any finding of legal responsibility or express any conclusion of law on any matter referred to in subsection (1).

(3) Subject to subsection (2), the jury may make recommendations directed to the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest.

(4) A finding that contravenes subsection (2) is improper and shall not be received.

(5) Where a jury fails to deliver a proper finding it shall be discharged.

32. An inquest shall be open to the public except where the coroner is of the opinion that national security might be endangered or where a person is charged with an indictable offence under the Criminal Code (Canada) in which cases the coroner may hold the hearing concerning any such matters in camera.

41(1) On the application of any person before or durin9 an inquest, the coroner shall designate him as a person with standing at the inquest if he finds that the person is substantially and directly interested in the inquest.

(2) A person designated as a person with standing at an inquest may,

(a) be represented by counsel or an agent;
(b) call and examine witnesses and present his arguments and submissions;
(c) conduct cross-examinations of witnesses at the inquest relevant to the interest of the person with standing and admissible.

50(1) A coroner may make such orders or give such directions at an inquest as he considers proper to prevent abuse of its processes.

(2) A coroner may reasonably limit further cross-examination of a witness where he is satisfied that the cross-examination of the witness has been sufficient to disclose fully and fairly the facts in relation to which he has given evidence.

(3) A coroner may exclude from a hearing anyone, other than a barrister and solicitor qualified to practise in Ontario, appearing as an agent advising a witness if he finds that such person is not competent properly to advise the witness or does not understand and comply at the inquest with the duties and responsibilities of an adviser.

THE CORONER'S DECISION ON DIRECT AND SUBSTANTIAL INTEREST.

The coroner held that he had no residual discretion to grant standing and that his only power was that set out in s. 41 of the Act. The coroner denied standing on the grounds that the applicant and those he represented did not have a substantial and direct interest within the meaning of s. 41:

> Under Section 41 of the Act it is necessary for me to consider two conditions. One is that the person is substantially involved in this inquest and the other is that he is directly interested in the inquest. Now in the Act neither the words "substantially" nor "directly" are defined and we must rely on everyday meanings and we must rely on analogies, you just mentioned the word analogies. Let us take the situation where a small child, let us say falls down a stairwell of an apartment building and is killed. Now obviously the parents of that child have both a substantial and a direct interest in the case. You could argue that the parents of all other children in that apartment building are interested and indeed they would be. But certainly, they are not interested to the extent that the parents would be. Similarly, the driver of a motor vehicle is involved in an accident and his passenger is killed, obviously he has a substantial and a direct interest in any subsequent inquest proceedings. In both cases the deceased person is not, I believe the term is at "arms length" he is immediately adjacent to the person with standing. Now your request involves people who are resident in the same institution and I would say and would argue that they fall into the same category as the parents of children living in an apartment building where another child is killed. They do not fall into the realm of interest that the parents would have. So in considering these two terms, "substantially and directly" unless I grant that your clients may have an interest in these proceedings, I am not satisfied that their interest is "substantial or direct." In that case I have no alternative but to deny standing.

THE CORONER'S DECISION ON RESIDUAL DISCRETION.

After counsel for the applicant suggested that the coroner in addition to his legal duty under s. 41 of the Act has a further common law discretion to grant standing, the coroner said:

> ... you mentioned ... a Coroner having certain discretionary powers - that is certainly not my interpretation of Section 41 of the Act.
>
> My understanding of that Section, and perhaps Mr. McKenna as Counsel to the Coroner will correct me if I am wrong - that section tells me that if the Coroner is satisfied that the person has a direct and substantial interest then the Coroner must grant standing, he does not have a discretionary power. Adversely, if the Coroner finds that he does not have a substantial and direct interest then he is not in position to exercise any discretion because the Act simply states, that he must find this in order to grant standing. So I would question the use of the word "discretionary power of the Coroner

Counsel to the coroner, the Crown Attorney, confirmed the coroner's view that he had no jurisdiction to grant standing unless the applicant had a substantial and direct interest within the meaning of s. 41.

THE USUAL PRACTICE.

The coroner in refusing standing to the applicant was following the usual practice as described by Professor Alan Manson in his unpublished article Standing In the Public Interest at Coroner's Inquests in Ontario at p. 25;

> Before examining the line of cases since 1972 relating to deaths within penal or mental health institutions, it can be said at the outset that coroners have almost universally denied standing beyond the set of persons who are related to the deceased or in respect of whom questions of responsibility or culpability may be addressed. Individuals who share a common interest or even a common existence with the deceased and groups which represent those individuals have consistently been denied standing at inquests.

This statement is borne out by an examination of the cases presented by both counsel.

THE CASES ON STANDING.

In Re Brown et al. and Patterson (1974), 6 O.R. (2d) 441 (Div. Ct.) a coroner conducting an inquest into the apparent suicide of an inmate in segregation at Millhaven Penitentiary refused standing to a number of inmates, some of whom were in the same segregation unit. The Divisional Court quashed the decision and remitted it to the coroner for a fresh determination, holding that the coroner had not initially acted judicially in denying standing in the sense of giving the applicant a full opportunity to be heard. In the course of its judgment the court, through Henry J., made some obiter comments about the test for standing:

> We do not consider it desirable to define extensively what constitutes a substantial and direct interest. This will depend on the facts of each case. We are informed that Edward Nalon died while in segregation and that some of the applicants were also in segregation then and still are. That group share a common experience. It may emerge that that environment was a factor in causing his death. If that should be, we consider that that would be proper justification in law for a finding that those applicants are persons having a substantial and direct interest in the inquest. It is alleged that some of the applicants knew of the incidents leading up to Mr. Nalon's death and his condition just before his death. If it were found that such evidence was pertinent and not otherwise available, such witnesses might well be persons having a substantial and direct interest. On the other hand, we do not view the section as extending to a person by reason only that he was a friend or associate of the deceased, as some of the applicants were. The Coroner must make his findings after proper inquiry, on the facts before him, on proper principles, and not arbitrarily or on the basis of extraneous considerations, or under the misapprehension that he has a discretion.

This court took the view that the Act did not give the coroner a discretion and that standing must be granted if there is a finding that the applicant has a substantial and direct interest in the inquest.

The matter was remitted to the coroner who, after considering the matter, refused standing again. The coroner said (proceedings, December 11, 1974 at p. 30):

> I am quite familiar with possible circumstances where there would be no hesitation in granting an inmate the status of a person with standing, but I disagree with the Court Order that because they share a common environment, a common experience, that they are entitled to the status of a person with standing and therefore may call their own witnesses, cross-examine all witnesses, and I think their interests can be reflected in calling them as witnesses.

In Re Brown and Patterson (No. 2) the applicants again applied to the Divisional Court (unreported decision, Wells, C.J.H.C., Zuber and Weatherston JJ., April 14, 1975) which refused the application for

judicial review of the coroner's decision to grant standing. Zuber J. in an unreported judgment said:

> With that decision we can find no fault. There is no error in principle demonstrated in his coming to that conclusion.
> We have been referred to the decision of Henry J. in this Court on the prior occasion. Henry J. in our view did not purport to lay down an exhaustive code or definition as to what might constitute the qualities attaching to a person with standing. He simply called attention to some issues that might be considered by the Coroner and it would appear that he has considered those issues.
> Accordingly, in our view, this ground of attack on the proceedings fails.

That case is different from this case in two very important ways. The first difference is that there was no apparent suggestion in that case that the coroner has a residual discretion, quite apart from s. 41, to grant standing if he considers it advisable in order to secure the public interest purposes of the inquest. The second difference is that there is no apparent suggestion in that case that the applicants had anything more than knowledge of the accused's condition and a shared common environment (proceedings, supra, Mr. Copeland's submission's at pp. 21-22). There was no suggestion there, as there is here, that the unit is unique in Canada and that the applicants are not only similarly situated but uniquely and identically situated in a unit where they must remain for years on end.

In 1978 in Inmates Committee of Millhaven Institution, Gordon Duck Willam Hulko and John Drummond v. Ross Bennet, (unreported, Ont. H.C., Jan. 26, 1978), Garrett J. sitting as a single judge of the Divisional Court refused judicial review of a coroner's denial of standing to three prisoners in their personal capacity and as representatives of the Inmates Committee of Millhaven Penitentiary at an inquest into the death of a prisoner shot by a guard during an escape attempt. He held that the coroner asked himself the proper question and that there was therefore no basis to interfere with his decision that the interest of the applicants, although it may have been substantial, was not direct.

Again there was in that case no apparent suggestion that the coroner had a residual discretion apart from s. 41 to grant standing in a proper case, or that the interest of the prisoners in that case was as unique and identical with the deceased's as it is in this case.

Eberle J. in Re Inmates Committee of the Prison for Women et al. and Meyer (1980), 55 C.C.C. (2d) 308, sitting as a judge of the High Court on an urgent basis pursuant to s. 6 of the Judicial Review Procedure Act, R.S.O. 1980, c. 224, as amended, refused an application for judicial review of a coroner's refusal to grant standing to individual inmates and a prisoner's committee at the Prison for Women. After remarking that the test of direct and substantial interest involves a question of mixed fact and law and some element of discretion, he held at p. 310 that the test for review of such a decision was the test of jurisdictional error:

> ... it is apparent that the coroner directed his mind to the issue before him and that no error of jurisdiction arises from any failure to do so. Did he, however, err in his interpretation of the section? Where the test to be applied involves a mixed question of fact and law, and the exercise of discretion, it is not easy to show an error in interpretation, and I can see none. In any event, in order to found successful application for judicial review, the error must be of such a nature or such a magnitude that it results in a loss of jurisdiction. The most that could be suggested in the present case is that the coroner improperly applied the words which constitute the test to the facts before him. I hasten to say that I do not find that he misapplied the words to the facts before him. There is no evidence of that. But if he did so, it would still not amount to a loss of jurisdiction.

SCOPE OF JUDICIAL REVIEW.

There is no appeal from the coroner's decision on standing and the first question is what standard of review this court should apply in scrutinizing the decision.

The standard of review obviously does not involve a power in this court to substitute its own view for that of the coroner on the basis only that the court, in the position of the coroner, would have reached a different decision.

The coroner is faced with a very difficult task and must be afforded a sufficient degree of insulation from review. He must have the power to keep the inquest from turning into a circus and the power to prevent every busybody from using the inquest as a platform for their particular views. Applications for judicial review should be discouraged as they detract from the coroner's ability to control the proceedings and they produce delay.

Some cases in this court, such as Re Brown and Patterson No. 2, supra, describe the standard of review as that of error in principle.

Others, such as Re Inmates Committee of Prison for Women and Meyer, supra, were put on the basis of error in jurisdiction.

In Re On Our Own et al. and King, an inquest standing case involving the use of psychotropic drugs by the deceased, Galligan J. in an unreported judgment (Ont. H.C., November 7, 1980), dismissed the application for review on the grounds that he found "no error in principle or in jurisdiction".

The standard of review of coroners' decisions on standing at inquests has thus been stated three ways:

(1) error in principle
(2) jurisdictional error
(3) error in principle or jurisdiction

As a practical matter there may little difference between error in principle and jurisdictional error. A serious error in principle which deprives an applicant of standing would likely result in such unfairness to the affected party's opportunity to participate in the inquest that an unfair inquest would result. It is common ground between counsel that an error in principle that produces an unfair inquest is an error that goes to jurisdiction.

In my view the coroner erred in law in the interpretation of his jurisdiction to grant standing to a degree that resulted in jurisdictional error. The Legislative Assembly has not insulated coroners with a privative clause, as it has labour tribunals.

While the coroner enjoys special expertise in medical matters relating to the cause of death and in the conduct of inquiries into institutional deaths he has no more expertise than this court in relation to the peculiar legal position of inmates of a prison within a prison or in the interpretation of his or her governing statute.

So far as the legal interpretation of the expression "direct and substantial interest" is concerned the coroner is in no better position than the court to determine the intention of the legislature.

The power to review a coroner should, however, be exercised with a real degree of judicial restraint,

just like the review of decisions made by prison authorities and tribunals.

Although s. 41 provides mandatory standing without any discretion once substantial and direct interest is found to exist, the application of the test involves a measure of discretion in each case, as Eberle J. pointed out, supra, because the test is expressed in open-ended language.

For the reasons noted above, coroners must be given considerable leeway if they are to discharge their difficult responsibilities effectively. To avoid mere second-guessing of coroners on questions of standing, it is important that the court's exercise real restraint in reviewing the decisions of coroners on standing.

THE INTERPRETATION OF S. 41.

The coroner's reasons for concluding that the applicant and those he represented did not have a substantial and direct interest in the inquest, although thoughtful and consistent with the prevailing practice, reflect in my respectful opinion these serious errors in principle which require correction.

(1) The test is too narrow a test, based on a private law approach which does not reflect the public interest functions of an inquest.
(2) The test does not recognize the potentially crucial impact of coroners' jury's recommendations or measure the interest of the applicants in such recommendations.
(3) The test does reflect the legally unique position of the applicants whose situation is not merely similar to but actually identical with that of the deceased.

By applying the analogy of the apartment residents and the motorcycle driver the coroner applied the traditional private law approach that restricts standing at inquests to those who have a personal or pecuniary interest in the outcome of the inquest, or those whose conduct might be subject to implicit censure or criticism.

This private law approach fails to give effect to the dominant public interest function of the inquest which involves public scrutiny and recommendations about those conditions which may have caused or contributed to the death of a member of the community. As the Ontario Law Reform Commission said in its Report on the Coroner System in Ontario, 1971 (H. Allan Leal, Chairman) at p. 25:

> The death of a member of society is a public fact, and the circumstances that surround the death, and whether it could have been avoided or prevented through the action of agencies under human control, are matters that are within the legitimate scope of all members of the community. A major role within the framework of institutions that have been created by our society to reflect these facts of human existence is implicit within the office of the coroner ... the role of the office of coroner must keep pace with societal changes, and where necessary, must move away from the confines of doctrines that are inconsistent with community needs and expectations in 20th century Ontario.

In this public interest context the recommendations of the coroner's jury assume a crucial role.

Different applicants will have a different degree of interest in the potential recommendations of a jury. In some cases the interest of an applicant or applicants will be so remote that there is no question of substantial interest. In other cases the interest will be substantial, but not direct. In other cases, and I think this is one of them, the interest of the applicant in the recommendations will be so acute that it will

amount to a substantial and direct interest.

It will be a question of degree in each case and the coroner must have a wide ambit of discretion in the application of the test, in the sense that he is applying a degree of judgment to a question of mixed fact and law that presents no simple mechanical solution.

Mere concern about the issues to be canvassed at the inquest, however deep and genuine, is not enough to constitute direct and substantial interest. Neither is expertise in the subject matter of the inquest or the particular issues of fact that will arise. It is not enough that an individual has a useful perspective that might assist the coroner. The interest of an applicant for standing in the recommendations of the jury must be so acute that the interest may be said to be not only substantial but also direct.

Once the determination is made by the coroner that the interest of an applicant is substantial and direct, discretion vanishes and there is no choice under the statute but to make the order for standing.

In this case the coroner, following the traditional approach, did not analyze the question of standing in terms of the degree to which the applicants had an interest in the recommendations of the jury, and did not analyze the particular nature and degree of their interest in the potential recommendations to see whether or not it was so acute as to amount to a substantial and direct interest.

There is in this case a unique identity of legal interest between the deceased and the applicants who have an extraordinary interest in any recommendations that may be made with respect to the conditions that totally dominate every aspect of their existence.

Unlike the apartment dweller or the vehicle passenger, the applicants are required by law to live under conditions identical to those which it is alleged caused or contributed to the death of the inquest's subject. In that sense the interest of the applicants is not only similar to that of the deceased but identical in a very unique way. To use the words of the coroner's analogy they are, unlike the apartment dwellers, not at arms length from the deceased.

Their interest is thus more than merely similar or parallel or adjacent; their interest is identical and uniquely so having regard to the singularly restrictive nature of the confinement and precise identity of legal interest which may not be shared by anyone else in Canada.

These applicants have an extraordinarily strong interest in any recommendations directed to the avoidance of death in identical circumstances - their own precise circumstances.

In most cases the jury's recommendations reflect upon some aspect of the lives of those who seek standing. In this case any recommendations would affect the applicants most directly and specifically, much more so than recommendations about the death of a prisoner would affect members of the general prison population. It is customary in these cases to grant standing to the penitentiary authorities on the basis that they have a direct and substantial interest in the inquest. Yet the recommendations would affect only one relatively small part of the overall concerns of the penitentiary authorities as opposed to the single and overwhelming concern of the applicants who are required by law to spend twenty-three hours a day in conditions identical to those of the deceased. It would be somewhat ironic to grant standing to the prison authorities and refuse it to those so overwhelmingly affected by potential recommendations.

I do not see how this unique group of prisoners has any less direct and substantial interest under this

statute than did the parents in phase I of the Grange Inquiry, or the Grand Council of Treaty 9 Bands in the Northern Environment Inquiry, or the POWR (Protect Our Water Resources) group in the Waste Management Royal Commission under the Public Inquiries Act, R.S.O. 1980, c. 411. See Parents v. Grange (1984), 8 Admin. L.R. 250 (Div. Ct.); Re Royal Commission on Northern Environment (1983) 33 C.P.C. 82 (Div. Ct.); Re Royal Commission on Waste Management (1977), 17 O.R. (2d) 207 (Div. Ct.).

Inmates in this "particularly restricted form of segregated detention," to borrow a phrase from LeDain J. in Miller and the Queen (1985), 23 C.C.C. (3d) 97 at p. 99, have a singular legal status in our law. This special legal status was recognized in Martineau v. Matsqui Institution Disciplinary Board No. 2) (1979) 50 C.C.C. (2d) 353 (S.C.C.) and in the trilogy of the Supreme Court of Canada case which included Miller v. The Queen, supra, a judgment upholding a decision of our Court of Appeal in which Cory J.A. (70 C.C.C. (2d) 129 at pp. 131-132) referred to the potentially devastating effect of solitary confinement and other particularly restricted forms of segregated detention.

This recent recognition of the unique legal position of prisoners such as the applicants, inmates of a prison within a prison, emphasizes the uniqueness of their situation and the special nature of their interest in any recommendations of the coroner's jury regarding the identical conditions which are said to have caused or contributed to the death of Michael Zubresky.

I note that it was only in comparatively recent years, after many of the decisions of this court on standing, that the special status of inmates of a prison within a prison such as the applicants, has been recognized by our law.

In a sense the Charter adds very little because the courts, long before the Charter, exercised their inherent jurisdiction to scrutinize the conditions and protect the rights of those undergoing extraordinary deprivations of liberty.

To conclude on the issue of direct and substantial interest, the coroner applied to the traditional narrow private interest test which failed to measure the interest of the applicants in the potential recommendations of the jury directed to the avoidance of death in the unique and identical circumstances shared by the deceased and the applicants, a test which failed to recognize that the interest of the applicants in such recommendations was so acute as to be direct and substantial. The decision therefore reflects a jurisdictional error which in my view can only be corrected by setting aside the coroner's order and granting standing to the applicants.

THE QUESTION OF RESIDUAL DISCRETION.

In my respectful view the coroner enjoys a residual discretion to grant standing quite apart from the provisions of s. 41, if he is of the view that it is appropriate to do so in order to achieve the public interest purposes of the inquest.

This argument has been developed at some length by Professor Manson in his article on standing referred to above.

The modern root of judicial authority on the coroner's power to grant standing is Wolfe v. Robinson, [1961] O.R. 250 (H.C.), affirmed [1962] O.R. 132 (C.A.). A coroner refused standing to the parents of a child who died after their refusal on his behalf to consent to a blood transfusion. Wells J. held that the coroner had a discretion to grant standing but that although he might have been more favourably inclined to grant standing had he been sitting as coroner, (p. 262), there was no right to standing:

> ... apart from express statutory authority there is no right in counsel to appear, examine or cross-examine in the Coroner's Court unless the coroner grants such leave. There is undoubtedly a discretion in the coroner to allow such a procedure.

He expressed this conclusion after discussing the statement in 8 Hals. 3rd ed., p. 494 that any person who, in the opinion of the coroner, is a properly interested person may examine witnesses either in person or by counsel or by solicitor. The authority noted for that statement was the Lord Chancellor's Rules of 1953. After some further historical references to the development of the coroners' system in England Wells, J. referred to the Coroners Act, 1887 (Imp.), c. 71:

> The passing of the Coroners Rules and the absence of any other provisions in the Statute of 1887, which was in effect a tidying up of the law relating to coroners, strengthens the view that apart from express statutory authority there is no right in counsel to appear, examine or cross-examine in the Coroners Court unless the coroner grants such leave. There is undoubtedly a discretion in the coroner to allow such a procedure. But that is something he must decide in view of all the facts of the matter before him. Unless that discretion is exercised in such a way that the facts are suppressed deliberately the Court should not deem it necessary to interfere.

It is important to note that his finding of "undoubted discretion" does not rest on the rules under the English statute, but merely "strengthened" his view that the power inhered in the coroner apart from any express statutory authority.

Wells J. at p. 262 hinted that he, in the coroner's position, might have made a different order.

> It may very well be that had I been sitting in the coroner's shoes I might have exercised my discretion differently because here was a matter in which religious belief caused an objection to certain medical practices. It would have seemed to me the part of wisdom to have had as full a hearing as possible. I think in a certain measure the coroner tried to obtain this result by offering as he repeatedly did to call any witnesses the parents of the child desired to have heard by the jury. Subject to what I have said there is no question in my mind that he had a full discretion to reach the decision which he did. Under these circumstances I do not think I would be justified, considering all the facts of this case, in interfering with that discretion.

As noted above his decision was upheld by the Court of Appeal (Roach, Gibson and Schroeder, JJ.A.). Schroeder J.A. at [1962] O.R. p. 143 expressed himself differently on the question of the coroner's residual discretion to grant standing:

> I turn finally to the appellant's contention that as a result of the advice given to him by the Crown Attorney to the effect that under the provisions of the Coroners Act of Ontario counsel was not entitled to participate in the proceedings before him or to cross-examine the witnesses, the coroner had misdirected himself and had wrongly decided that he possessed no legal discretion to permit counsel to do so. There is no rule of law or practice in Canada applicable to coroners' inquisitions having the force of a statutory enactment similar to the Lord Chancellor's Rules of 1953 in England, to which reference has been made. In the absence of any such Rule or enactment, a coroner in this country has no legal discretion, i.e. a discretion governed and controlled by a specific rule or law or practice to grant or withhold that privilege. Appellant's counsel had no right, therefore, to participate in the proceedings or, more particularly, to cross-examine the

> witnesses. The coroner's ruling in this respect was therefore sound in law despite the erroneous ground upon which it was based, and his refusal to grant counsel the privilege which he sought affords the appellant no right of redress. (emphasis added)

To what extent does this passage represent a rejection of the limited residual discretion, identified by Wells J., to grant standing? In my view a rigorous examination suggests that the limited discretion identified by Wells J. survives this passage.

Schroeder J.A. limited his rejection of a discretion to grant standing to the rejection of "a discretion governed and controlled by a specific rule of law or practice to grant or withhold that privilege." The discretion that he expressly rejected would be a much more powerful tool in the hands of an applicant than the discretion contended for here. Although he by no means enthusiastically embraced the idea of discretion to grant standing he did not reject a discretionary power, uncontrolled by any specific rule of law or practice, to grant standing in a case where the coroner thought it would be helpful to achieve the ends of the inquest.

He did not, therefore, reject the discretion identified by Wells J., which is precisely the kind of discretion contended for here.

Wolfe v. Robinson was referred to by McRuer C.J.H.C. in his 1968 Royal Commission Inquiry into Civil Rights, Report Number One, volume 1 at p. 491, as authority for the proposition that:

> There are no rules or regulations that give those affected by the [inquest] proceedings any right to be heard and there is no legal right to be heard.

It is noteworthy that the reference here was restricted to the right to be heard, not the discretion to hear. The commissioner continued:

> This we think is wrong and our view is shared by many coroners ...

After referring (at pp. 491 and 492) to the potentially devastating social and financial effects on an individual of the publicity given to the inquest and the jury's verdict and after referring to the then current English rules, the Commissioner recommended (at p. 492):

> ... that there be a specific statutory right in persons substantially and directly interested in the inquest to appear by counsel, to call witnesses and cross-examine witnesses, but that there should be a discretion in the presiding officer to limit this right where it appears to be exercised vexatiously or beyond what is reasonably necessary in the circumstances. An inquest should be kept within the bounds of its manifest purpose - an inquiry in the public interest. It should not be a process devised as a preliminary round to the determination of civil liability.

and (at p. 497):

> ... that persons who, in the opinion of the presiding officer, are substantially and directly interested, should have full right to appear by counsel and to call, examine and cross-examine witnesses, with discretion in the presiding officer to limit these rights where it appears they are vexatiously exercised or beyond what is reasonably necessary.

The Ontario Law Reform Commission adopted this recommendation in its 1971 Report on the

Coroner System in Ontario at p. 89:

> In England, with respect to the right to examine witnesses at an inquest, standing which is in some respects equivalent to that of a party before a court is conferred upon "any person who in the opinion of the coroner is a properly interested person". The Royal Commission Inquiry Into Civil Rights recommended giving this right, among others, to "persons who, in the opinion of the presiding officer, are substantially and directly interested" in the inquest. The Commission is of the opinion that the formula recommended by this Royal Commission is the appropriate way in which to determine who should have standing at an inquest. The consequences that should follow from such a determination are set out below.

In its analysis of the issue of standing (at pp. 91 to 93) the Commission discussed only the right to have standing, without any reference at all to the right to apply to the coroner to exercise his discretion to grant standing. The focus was entirely on the right to be heard, not the discretion to hear. After quoting from the Court of Appeal judgment in Wolfe v. Robinson a passage emphasizing that an inquest is not an adjudication of rights affecting either person or property and therefore does not attract the maxim audi alterem partem, the Commission said at p. 92:

> None of this is any answer to the question as to whether there should be some right to be heard at a coroners's inquest. Whether a statutory duty to hear the submissions of persons with a substantial and direct interest in an inquest should exist in the new Coroners Act is a different matter from the result decreed by the present state of the law in the absence of such a duty.
> After carefully considering this question, the Commission concludes that it would be desirable to place a statutory duty upon the presiding officer at an inquest to afford the right to be heard to such persons and under such circumstances as are appropriate, considering the nature of the forum and the type of matters that are dealt with at an inquest.

It will be noted that the Commission speaks uniquely in terms of right and duty to grant standing, not in terms of a residual discretionary power to grant standing.

I conclude that Wolfe v. Robinson, while rejecting a discretionary right to be heard in the sense of "a discretion governed and controlled by a specific rule of law or practice," recognized and left open a residual discretion in the coroner to hear. I conclude that neither Commission in seeking to correct the mischief identified in Wolfe v. Robinson recommended the abolition of this zone of residual discretion.

The crucial question is this: did the legislature, in compelling the coroner to give standing as of right to those directly and substantially interested, thereby correcting the problem of Wolfe v. Robinson, intend to wipe out his wide discretionary power to grant standing to those outside the narrow mandatory test whom he considered to be proper parties?

Section 41 does not explicitly take away the discretionary power so clearly recognized in Wolfe v. Robinson. Neither, in my view, does it do so by implication. It would make sense for the Legislature to add, as it did in s. 41, a new mandatory power to grant standing in a case like Wolfe v. Robinson. But I see no evidence in the statute that the grant of the new mandatory power was intended to have any effect on the clearly recognized and well established discretionary power.

It is of course arguable that in specifically granting standing as of right to a limited class the

Legislature by implication rejected any residual discretion to grant standing in other cases; expressio unius exclusio alterius

The first reason I reject this argument is that the old doctrine should not be applied if it will lead to injustice, particularly when dealing with the holder of a public office engaged in duties connected with important public duties. Nicholson v. Haldimand-Norfolk Police Commission, [1979] 1 S.C.R. 311 per Laskin C.J.C. at pp. 321-322.

The second reason I reject this argument is that the maxim does not apply if there is no evidence demonstrated in the statute or its legislative history that the Legislature turned its mind to the impugned power and rejected it. In the absence of such evidence the interpretation should be chosen which most closely accords with the objectives of the statute.

It would take express words to convince me that the Legislature, in a statute designed to advance to the public interest and preventative goals of the inquest, would abolish an established residual power in the coroner to promote those very goals by granting standing in appropriate cases to those whose interest, perspective, or expertise could help the inquest achieve these goals.

While it would certainly be within the power of the Legislative Assembly to give with one hand and take away with the other, it would not be logically consistent for it to do so in the light of the goals it was attempting to achieve. I can see no such logical inconsistency implicit in the statute.

In the absence of express words removing the residual power I am not prepared to infer from the silence of the Legislature an intention to abolish this clearly recognized power which helps secure the legislative goals reflected in the statute as a whole.

There has been some tendency by coroners in recent years to grant standing in cases to applicants whose special knowledge and expertise will assist the coroner in achieving the goals of the inquest, even though they have no direct or substantial interest.

To take one example from Professor Manson's article; Dr. Robert McMillan in a 1983 inquest into the death of Richard Thomas, a mentally retarded man, granted standing to the Ontario and Canadian Associations for the Mentally Retarded. There was a suggestion that the primary parties in the inquest would be mainly concerned to protect their own self interest. The coroner, although stressing that the inquest was not a Royal Commission and would not be permitted to become a public forum for the whole issue of the care of the mentally handicapped, granted standing.

That case may provide an example of the difficulties that arise when the primary parties at an inquest are involved in actual or contemplated litigation. Actual or contemplated litigation might encourage a party to focus on its own litigation interest to the detriment of the public interest. A coroner might well feel that the public interest would best be served by granting standing to a party wnich enjoyed significant expertise coupled with a less biased perspective.

It is true that the Crown Attorney as coroner's counsel will bring to bear his or her traditional expertise as an advocate for the public interest. That perspective, however, relates to the overall public interest as opposed to the interest of a particularly affected group and the Crown Attorney of course lacks the benefit of a confidential relationship with those who seek standing.

The residual power to grant standing is not completely open-ended. It must be exercised judicially in a way that will assist the coroner achieve the goals of the inquest. It is not a power to turn the inquest into

a Royal Commission or, as noted above, to provide a platform for every busybody in search of a platform.

There are very few cases on the issue and it must be left initially to the coroners to develop their own practice in accordance with their considerable experience and their understanding of the public interest and preventive goals of the inquest.

The principles in these cases, however, cannot be transplanted unthinkingly to the inquest which is not a trial or a Royal Commission, and must be adapted to its unique goals and needs. So long as the coroner acts judicially and without any serious error in principle in his or her understanding and application of the residual power to grant standing, a court would defer to the coroner's expertise and would not interfere.

It may be that in cases involving prison deaths a coroner might be inclined to exercise the residual discretion in a way to provide some measure of inmate participation, if the coroner was of the view that the applicants and their counsel would be of assistance to the coroner and to the objectives of the inquest.

In cases involving prison death there is in addition to the ordinary considerations another powerful force at work - the inmate code of silence. It is an open and notorious public fact that prisoners are most reluctant to co-operate with investigations conducted by the authorities. While that may be less so in the investigation of a suicide than the investigation of a homicide, it is nonetheless a strong force in the culture of a prison and a significant barrier to the effective investigation of any prison incident.

A coroner might well conclude that inmates who have the benefit of representation, including a confidential relationship with a responsible and experienced counsel, may be able to contribute something to the inquest that would not be available if they did not have the benefit of standing and counsel.

One of the functions of an inquest into a death in a prison or other institution not ordinarily open to public view is to provide the degree of public scrutiny necessary to ensure that it cannot be said, once the inquest is over, that there has been a whitewash or a coverup. There is no better antidote to ill-founded or mischievous allegations and suspicions than full and open scrutiny. The granting of standing to the applicants in this case will provide added reassurance that the inquest has the benefit of all the evidence and perspectives necessary to ensure the fullest scrutiny.

The problem of suspicions and misgivings was addressed in the Report of the Commission of Inguiry Into Certain Disturbances At Kingston Penitentiary During April 1971 by J.W. Swackhamer, Q.C., at p. 62:

> Thirty-eight years ago the Archambault Report commented that under the present system existing in the Canadian penitentiaries, what is going on in the institutions is shrouded with absolute secrecy, giving rise to suspicion and misgivings, which are further enhanced by extravagant and abused tales of ex-prisoners and the imagination of sentimentalists. As a consequence, although for the sake of security no undue information should be given, a practical check of what is going on should be made. The prisoner feels that he has no access to a fair administration of justice and is absolutely removed from the protection of his fellow man. These observations are equally pertinent in 1971.

I would adopt these words and add only that nothing in the record of this case, or the common experience of those engaged in the administration of criminal justice, suggests they are any less true today than they were in 1971 or 1933.

While great benefits may come from granting standing at an inquest to interested groups who may not technically have a direct and substantial interest, there are corresponding dangers if the residual discretion to grant standing is not exercised with some caution.

The danger is not simply that of the busybody or the crank, but also the danger of sincerely motivated groups seeking a public platform for views that are not sufficiently relevant to the subject of the inquest and which will only result in undue delay and inefficiency.

To paraphrase what was said with respect to criminal trials in McCormick's Evidence Handbook (2 ed. 1972) at p. 81; the coroner has the power and the duty to see that the sideshow does not take over the circus. As said with respect to criminal trials. It is for the coroner in each case to balance this danger, and the need to avoid repetition and unduly prolonged procedures, against the degree of knowledge or expertise demonstrated by the applicants for standing and the degree to which they and their counsel can assist by providing a point of view that might not otherwise emerge.

In my view the coroner erred in law in declining jurisdiction to exercise his residual discretion to grant standing on the principles noted above.

CONCLUSION.

In my view the coroner's interpretation and application of s. 41 reflects a jurisdictional error which requires intervention by the court. The only way to give effect to the correct interpretation of s. 41 in this case is to grant standing.

In light of that conclusion it is unnecessary to consider what follows from the coroner's declining of his residual jurisdiction, although I cannot imagine a clearer case for its exercise.

In the result I would allow the application and grant standing to the applicants.

I would make no order for costs.

CAMPBELL J.

* * * * *

Corrigenda
Released: July 25, 1989

Campbell J.'s reasons:

Page 1 - "This issue on this application ..." changed to "The issue on this application ..."

Page 14 - "But if he did so, it would still amount to a loss ..." changed to "But if he did so, it would still not amount to a loss ..."

Page 17 - "... it is important that the court's exercise ..." change to "... it is important that the courts

exercise ..."

Page 18 - "potentially crucial impact of coroners, jury's ..." changed to "potentially crucial impact of coroners' jury's ..."

Page 20 - "The interst of applicant for standing in the ..." changed to "The interest of an applicant for standing in the ..."

O'Brien J.'s reasons:

Page 8 - "But if he did so, it would still amount to a loss ..." changed to "But if he did so, it would still not amount to a loss ..."

TAB C

Indexed as:

# Groenewegen v. Northwest Territories (Legislative Assembly)

IN THE MATTER OF the Legislative Assembly and Executive Council Act, R.S.N.W.T., 1988, c. L-5
AND IN THE MATTER OF a decision of the Conflict of Interest Commissioner dated March 18, 1998 regarding the provision of independent legal counsel for Ms. Jane Groenewegen as it relates to her complaint of February 16, 1998 with respect to alleged contraventions of the Legislative Assembly and Executive Council Act by the Honourable Member for Tu Nedhe, Don Morin
AND IN THE MATTER OF a decision of the Northwest Territories Legislative Assembly Management and Services Board dated July 28, 1998
Between
Jane Groenewegen, applicant, and
Sam Gargan, for and on behalf of the Legislative Assembly of the Northwest Territories as Speaker of the Assembly and as Chair of the Management and Services Board, respondent

[1998] N.W.T.J. No. 129
Docket: CV 07836

**Northwest Territories Supreme Court**
**Yellowknife, Northwest Territories**
**Vertes J.**

Heard: August 26, 1998.
Judgment: filed September 4, 1998.
(21 pp.)

**Statutes, Regulations and Rules Cited:**

Department of Justice Act, R.S.N.W.T. 1988, c. 97, s. 4(b).
Financial Administration Act, R.S.N.W.T. 1988, c. F-4, s. 47(1).
Interpretation Act, R.S.N.W.T. 1988, c. I-8, s. 10.
Legislative Assembly and Executive Council Act, R.S.N.W.T. 1988, c. L-5, ss. 37, 81(2), 82(1), 82(2)(a), 82(2)(b), 82(2)(c), 82(3), 82(4), 83(1)(b), 84(2).
Public Inquiries Act, R.S.N.W.T. 1988, c. P-145, ss. 4(1), 4(2)(a), 4(2)(b), 4(2)(c), 5(a), 5(b), 5(c), 5(d), 7(1), 10(a), 10(b).

Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10.

*Administrative law — Public inquiries — Practice — Funding — Funding of counsel.*

This was an application by Groenewegen for a declaration that the jurisdiction of the Conflict of Interest Commissioner included the power to engage counsel, in addition to Commission Counsel, to represent a party other than the Commissioner. Groenewegen also applied for a declaration that a decision of the Commissioner on March 18, 1998 was intra vires. Groenewegen was an elected member of the legislature of the Northwest Territories. In February 1998, she lodged a complaint alleging conflicts of interest by the Premier of the Northwest Territories. The complaint was forwarded to the Commissioner, who conducted a preliminary review and directed that several specific items be put to public inquiry. The Commissioner gave standing to the Government of the Northwest Territories and Groenewegen. Groenewegen, with the Commissioner's support, sought assistance from the Management and Services Board of the Legislative Assembly to retain legal counsel. The Board rejected this request on the ground that Groenewegen had access to a Law Clerk who could provide her with general legal advice and information, but who could not act as her advocate. The Board approved funding of independent counsel for Morin. Groenewegen asked the Commissioner if she could obtain independent counsel through the Commissioner's office. In a written decision issued on March 18, 1998, the Commissioner concluded that she had statutory authority to appoint counsel for a complainant. Counsel chosen by Groenewegen was retained by the Commissioner. When the lawyer's first account was forwarded to the Board for payment, the Board refused to pay on the basis that the Commissioner did not have the statutory authority to engage publicly funded counsel on behalf of anyone other than herself.

**HELD:** The declarations sought by Groenewegen were refused. As alternative relief, a declaration would issue to the effect that the Commissioner had the authority to recommend that the Board provide funding for legal counsel for designated parties before the inquiry. The Commissioner did not have the statutory power to engage counsel for anybody but herself. The plain interpretation of the words used in section 82(2)(b) of the Legislative Assembly and Executive Council Act or in section 10 of the Public Inquiries Act were that the services of counsel were meant for the Commissioner. However, the Commissioner could request or recommend that publicly funded counsel be made available to specific parties. The Board should give any such request careful consideration and should turn it down only for compelling reasons.

**Counsel:**

Barrie Chivers, for the applicant.
Sheila M. MacPherson, for the respondent.
Elizabeth A. Johnson, for the Conflict of Interest Commissioner.
Earl D. Johnson, Q.C., for the Attorney General of the N.W.T.

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## REASONS FOR JUDGMENT

¶ 1 **VERTES J.**:— The applicant seeks declaratory relief respecting certain aspects of the powers enjoyed by the Conflict of Interest Commissioner appointed by the Legislative Assembly of the Northwest Territories. Specifically, the issue posed is whether the Commissioner can appoint counsel and direct payment of counsel fees for individuals who will be interested participants in an inquiry into alleged conflict of interest of a member of the legislature. The Commissioner and the Management and Services Board of the Legislative Assembly differ as to the statutory power enjoyed by the Commissioner in this respect.

¶ 2 It is necessary to provide an outline of the background to this dispute.

¶ 3 On February 16, 1998, the applicant, Jane Groenewegen, an elected member of the legislature, lodged a complaint with the Clerk of the Legislative Assembly alleging conflicts of interest by another member, Don Morin, who is also the Premier of the Northwest Territories. The Legislative Assembly and Executive Council Act, R.S.N.W.T. 1988, c.L-5 (the "LAECA"), provides that any such complaint shall be forwarded to the Conflict of Interest Commissioner (the "Commissioner") who shall conduct an inquiry into the complaint. The Commissioner may, however, decline to conduct an inquiry if she determines that the complaint is frivolous or vexatious or not made in good faith or there are insufficient grounds to warrant an inquiry: see s.81(2), LAECA. In this case, the Commissioner conducted the preliminary review contemplated by s. 81(2) and filed her report on May 29, 1998. The Commissioner directed that several specific items be put to a public inquiry.

¶ 4 The subject matter of the complaints is not pertinent for this application. Suffice it to say that there are certain allegations made respecting Mr. Morin's dealings with two private individuals, Milan Mrdjenovich and Roland Bailey, and Mr. Morin's role in certain contracts between the Government of the Northwest Territories and these individuals. As a result of these other individuals being named in the terms of reference for the public inquiry, the Commissioner subsequently gave them standing to participate in the hearings, in person or by counsel, including the right to receive disclosure of materials and to examine and cross-examine witnesses. The Government of the Northwest Territories was also given standing since its contracting practices are brought into question. Finally, Ms. Groenewegen, as the complainant in this process, was given standing. The scope of what standing entailed with respect to each interested party was outlined by the Commissioner on August 4, 1998.

¶ 5 Right from the filing of the complaint, the issue of funding for counsel has been a significant one. Ms. Groenewegen expressed her concern to the Commissioner that she has no resources to retain counsel to assist her with the preparation of information requested by the Commissioner. Ms. Groenewegen, as a member, asked the Management and Services Board of the Legislative Assembly (the "Board") for assistance in retaining legal counsel. She had the support of the Commissioner in this request. The Commissioner, on February 24, 1998, wrote to Ms. Groenewegen, with a copy to the

Speaker of the Assembly, the respondent Sam Gargan (who also serves as chair of the Board), as follows:

> In your case the substance of the complaint is far more complicated and involves corporate entities of various kinds and legal transactions and documentation which would be difficult for a Member to properly evaluate without legal advice.
> I would support a request to the Management Services Board for you to obtain Counsel, because at this point it would assist the Commissioner in fairly and promptly determining the scope of the complaint and whether it meets the standard set in 81(2).

The Board rejected the applicant's request. I am not aware of the Board giving any written reasons for the rejection other than to say that Ms. Groenewegen, as a member, has access to the services of the Legislative Assembly Law Clerk who can provide her with general legal advice and information (but not to act as her "advocate").

¶ 6 I was informed that the Board did approve, in response to a request made after the filing of the complaint, funding for independent counsel for Mr. Morin. There are apparently no minutes of Board meetings so I do not know what policy considerations, if any, went into the decision to fund counsel for Mr. Morin but not for Ms. Groenewegen. I was told that the Board acted on the basis of what it did on one previous conflict of interest complaint when it funded outside counsel for the member who was being investigated then. There are apparently no rules of procedure or policy statements in place to guide the Board. It apparently decides to fund legal services for members on a case-by-case basis. In any event, Mr. Morin's counsel is being paid pursuant to a contract between that counsel and the Speaker and I was told that there is no limit on the total amount that may be paid under that contract.

¶ 7 Ms. Groenewegen raised concerns about having to rely on the services of the Law Clerk and asked the Commissioner if she could obtain independent counsel through the office of the Commissioner. The Commissioner sought submissions on this point, including an opinion from Commissioner's counsel, and then issued the ruling that is the catalyst for this application.

¶ 8 In a written decision issued on March 18, 1998, the Commissioner concluded that she has statutory authority to appoint counsel for a complainant (such as Ms. Groenewegen). The applicable test is whether, in the opinion of the Commissioner, the appointment of counsel for the particular complainant would "aid and assist" the Commissioner in the conduct of the inquiry. As part of her decision, the Commissioner wrote about the basis for the exercise of her authority in this regard:

> The authority to appoint must be exercised in a manner consistent with the mandate of the Commissioner. The Assembly looks to maintain the confidence of the public in government and in the affairs of government by creating a complaints process in which individuals (some of whom may be

> Members of the Assembly, but in their individual capacities) can challenge the acts of elected Members. In doing so the Assembly implicitly anticipates that, almost without exception, the complainant will have fewer resources at his or her disposal than will the Member complained against. It also anticipates that the acts complained of may not be immediately open for public scrutiny and may require additional resources to articulate.
> In the context of s. 81(2), it is neither the role of the Commissioner to solicit and enhance a complaint nor to restrict and limit a complaint. It is the role of the Commissioner to make clear to the complainant the threshold requirements for a complaint and the information needed to cross that threshold. The complainant must be given a fair and adequate opportunity to meet those requirements. Failure to do so leads to the implication that process has overwhelmed substance, and that even in a forum designed to promote confidence and fairness in government, only the most sophisticated, legally trained, articulate, and perfectly informed need apply.

The Commissioner then set out a series of factors that are relevant and concluded that Ms. Groenewegen's request for the appointment of publicly funded counsel satisfied those factors. The Commissioner also stressed the benefits to the inquiry process in having a level playing field respecting the resources of the participants:

> In order to maintain balance and fairness in the process in this case, the discretion of the Commissioner should be exercised in favour of authorizing Counsel. To have a balanced process assists the Commissioner in reaching a fair decision on the merits of the matter. A transparent and fair decision is to the benefit of all involved.

¶ 9 All parties recognized that it is not for me to say whether the Commissioner has appropriately assessed the various factors that may be relevant to such an exercise of power. My role is to determine if she has the power. I quote from this decision, however, because an essential part of the applicant's argument is that the Commissioner may appoint counsel for any participant so long as such an appointment is to aid and assist the Commissioner. In these extracts, it is argued, the Commissioner has set out how this appointment will aid and assist the inquiry process.

¶ 10 As a result of this decision counsel (chosen by Ms. Groenewegen) was retained by the Commissioner. When the first bill was forwarded to the Board for payment, the Board refused to pay on the basis that the Commissioner did not have the statutory authority to engage publicly funded counsel on behalf of anyone other than herself. This position had been communicated to the Commissioner shortly after she issued her March ruling. This dispute has been at an impasse ever since.

¶ 11 The Commissioner, in her March decision, only went so far as to order that Ms. Groenewegen is entitled to retain independent counsel at the commission's expense (and hence at the legislature's expense) for the preliminary investigation phase. She ruled that, if the process continues to a public inquiry, then the need for independent counsel will be

reassessed. That reassessment was done at the August 4th meeting when she granted standing to Ms. Groenewegen and to Messrs. Mrdjenovich and Bailey. Clearly the Commissioner intended to authorize that counsel for Ms. Groenewegen continue to be publicly funded. She also gave a clear indication that, once this particular dispute is resolved, and if she does have the authority to do so, she will direct that counsel for Messrs. Mrdjenovich and Bailey also be publicly funded. The Commissioner indicated in August that:

> If and when it [the dispute over counsel funding] is resolved it would be my intention that the parties I have just named would be entitled to counsel funding for the reason that they are bearing the burden of the preparation of the public inquiry. They have no potential for recovery of costs as they would have in a court proceeding and it enhances the process to ensure that there is adequate balance among the main participants.

¶ 12 Resolution of this dispute is obviously critical, in the eyes of many of the participants and in the opinion of the Commissioner, to the integrity of the inquiry proposed to be held into this complaint. As a result the applicant brought this motion seeking the following relief:

1. A declaration that the jurisdiction of the Conflict of Interest Commissioner includes the power to engage counsel, in addition to Commission Counsel, to assist and represent a party other than the Commissioner where the engagement of such counsel will aid and assist the Commissioner in the inquiry.
2. A declaration that the decision of the Conflict of Interest Commissioner dated March 18, 1998 is intra vires the jurisdiction of the Conflict of Interest Commissioner.

¶ 13 Supporting the applicant's position is counsel for the Commissioner. The Commissioner is entitled to appear on the basis that her submissions are directed to the specific issue of her jurisdiction to make the order that she did: see Northwestern Utilities Limited, et al v. City of Edmonton (1978), 7 Alta.L.R.(2d) 370 (S.C.C.), at pages 388-389. No one took issue with this point.

¶ 14 In opposition were counsel for the Speaker of the Assembly (on behalf of the Board) and counsel for the Attorney General of the Northwest Territories. The Attorney General appeared for the purpose of fulfilling its statutory duty to ensure that the administration of public affairs accords with the law: see Department of Justice Act, R.S.N.W.T. 1988, c. 97 (Supp.), s. 4(b).

¶ 15 The other parties who have a stake in the upcoming public inquiry (which has been scheduled to commence on October 13th) were served with notice of these proceedings but did not appear in person or by counsel.

Legislation:

¶ 16 The LAECA creates a regime for the regulation of conflicts of interest for elected members of the legislature. The Act defines what are conflicts for members (whether they be actions of the members or their families) and imposes positive obligations on members to avoid conflicts in the performance of their duties of office and to arrange their private affairs so as to conform to the legislative requirements. The statute imposes disclosure obligations as well as a "cooling of" period for any former member who served as Speaker or a Cabinet minister.

¶ 17 The LAECA also creates the office of Conflict of Interest Commissioner as the central enforcement power for the obligations imposed on members. The Commissioner is appointed by the Commissioner of the Northwest Territories on the recommendation of the Legislative Assembly. The Commissioner is appointed for a four-year term and holds office during good behaviour. The appointment may only be revoked for cause or incapacity. The Commissioner, upon appointment, must take an oath to faithfully and impartially perform her duties.

¶ 18 The Commissioner is clearly an independent public official. She must submit an annual report to the Speaker which in turn must be laid before the Legislative Assembly. She may provide opinions and recommendations to members as to their obligations under the Act. Most significantly, the Commissioner must conduct an inquiry into any complaint of a contravention by a member of the conflict of interest provisions.

¶ 19 After conducting an inquiry, the Commissioner must submit a report to the Speaker who in turn must present it to the legislature. The Commissioner may report that the complaint is dismissed. If so, that is the end of the matter. Or, the Commissioner may report that she has found the member to be guilty of a contravention of the LAECA conflict of interest provisions. In that case she may recommend any one or more of a list of punishments, set forth in s. 83(1)(b) of LAECA, including from the extreme of declaring the member's seat vacant to a fine or a reprimand. She may recommend that compensation or costs be paid by the member. The legislature must consider the report within a fixed time period and it may order the imposition of the punishment recommended or it may reject it (s. 84(2) LAECA). The statute does not provide for any other alternative, such as imposing some other punishment (nor can the legislature not accept the finding of guilt).

¶ 20 It seems obvious that the reservation to itself of the ultimate decision in respect of punishment is an exercise by the legislature of its traditional parliamentary privilege of regulating the conduct of its members. The exercise of a privilege is not subject to review by the courts: see New Brunswick Broadcasting Co. v. Nova Scotia (1993), 100 D.L.R.(4th) 212 (S.C.C.). But that, in my opinion, does not mean that the legislature can act arbitrarily. The statute has encroached on the traditional privilege by enacting the conflict of interest rules and by creating the office of the Commissioner. Hence any decision by the legislature must be a bona fide one made in conformity with the purpose of the legislation and in the public interest.

¶ 21 In carrying out an inquiry the Commissioner acts in a quasi-judicial capacity. This is made clear by s. 82 of LAECA:

82(1) Any hearing in an inquiry shall be conducted in public unless the Conflict of Interest Commissioner considers that it is necessary in the public interest to conduct the hearing ill camera.

(2) In the conduct of an inquiry, the Conflict of Interest Commissioner

(a) may require the Clerk to produce a disclosure statement or a supplemental disclosure statement received by the Clerk under section 77;
(b) has the powers of a Board under the Public Inquiries Act, including the power to engage the services of counsel, experts and other persons referred to in section 10 of that Act; and
(c) is not subject to technical rules of evidence.

(3) The member complained of may not refuse to give evidence at the inquiry.

(4) The Conflict of Interest Commissioner shall conduct an inquiry in accordance with the principles of natural justice.

¶ 22 The reference in s. 82(2)(b) above to the Public Inquiries Act, R.S.N.W.T. 1988, c.P-14 (the "PIA"), is significant. That statute empowers the Commissioner of the Northwest Territories to establish a public inquiry when necessary or m the public interest. The powers of a "Board" under that statute (and applicable to the Commissioner when conducting an inquiry under LAECA) are several:

4(1) Subject to subsection (1) and sections 6 to 9, the conduct of and the procedure to be followed on an inquiry is under the control and direction of the Board.

(2) Every Board may, subject to reasonable notice,

(a) summon any person as a witness;
(b) require any person to give evidence on oath or affirmation; and
(c) require any person to produce the documents and things that the Board considers necessary for a full and proper inquiry.

5. Every Board has the same power as is vested in a court of record in civil cases

(a) to administer oaths and affirmations;
(b) to enforce the attendance of any person as a witness;
(c) to compel any person to give evidence; and
(d) to compel any person to produce any document or thing.

10. The Board, if authorized by the statutory instrument establishing the

Board, may engage

> (a) the services of accountants, engineers, technical advisors or other experts, clerks, reporters and assistants that the Board considers necessary or advisable, and
> (b) the services of counsel,
>
> to aid and assist the Board in the inquiry.

¶ 23 These powers are fairly common in statutes respecting administrative tribunals and boards of inquiry. They extend a wide discretion to the board, or the Commissioner in this instance, to determine how best to proceed with the inquiry. The overriding consideration is that the inquiry be conducted in accordance with the principles of natural justice (as per s.82(4) LAECA).

¶ 24 What these provisions do not include, in the absence of an express reference, is the power to award "costs" as that term is known in ordinary civil litigation. Counsel are in apparent agreement on this point. "Costs" in this sense are an award made at the conclusion of a case whereby the unsuccessful litigant compensates the successful one for part or all of the latter's costs of litigation. The power to award such costs is an inherent one enjoyed by superior courts and one usually contained in court rules of procedure. But with respect to administrative tribunals, such a power must be expressly provided in the tribunal's enabling statute. Even a reference, as in s. 5 of PIA to the powers of a "court of record", does not include the power to award costs: Reference re National Energy Board Act (1986), 29 D.L.R. (4th) 35 (Fed.C.A.), leave to appeal to S.C.C. refused.

¶ 25 Counsel also agree that the ability of the Commissioner to recommend, as a penalty on a guilty finding, that the member pay "costs" is a reference to the member being obligated to pay an amount to offset the costs of the inquiry itself, not the costs incurred by other parties to the inquiry. But, in any event, as the applicant's counsel noted, this case is not about the ability of the Commissioner to order costs; it is about the power of the Commissioner to engage counsel.

¶ 26 The PIA also contains a provision that imposes both an obligation and a power on a "Board" (which also apply to the Commissioner here):

> 7(1) Every Board shall accord to any person who satisfies it that he or she has a substantial and direct interest in the subject matter of an inquiry, an opportunity during the inquiry to give evidence and to call and examine or to cross-examine witnesses personally or by his or her counsel or evidence relevant to his or her interest.

This subsection imposes the obligation on the Commissioner to give any person with a substantial and direct interest the opportunity to participate in person or by counsel at the hearing. It also gives the power to the Commissioner to give standing to any such person

and allow them to appear by counsel. The importance of such a provision was pointed out by Schroeder J.A. in Re Ontario Crime Commission; Ex Parte Feeley (1962), 34 D.L.R.(2d) 451 (Ont.C.A.), at page 475:

> In the present inquiry, allegations of a very grave character have been made against the applicants, imputing to them the commission of very serious crimes. It is true that they are not being tried by the Commissioner, but their alleged misconduct has come under the full glare of publicity, and it is only fair and just that they should be afforded an opportunity to call evidence, to elicit facts by examination and cross-examination of witnesses and thus be enabled to place before the commission of inquiry a complete picture rather than incur the risk of its obtaining only a partial or distorted one. This is a right to which they are, in my view, fairly and reasonably entitled and it should not be denied them. Moreover it is no less important in the public interest that the whole truth rather than half-truths or partial truths should be revealed to the Commissioner.

The Court also pointed out that it was unrealistic to think that the interests of such interested persons could be adequately protected by counsel acting directly for the Commissioner.

¶ 27 As noted before, the issue in this case is the scope of the Commissioner's power to engage counsel. No one disputes that she may appoint counsel or others to advise and assist her in the conduct of the inquiry. The question is whether she may engage counsel to represent parties who are appearing before her at the inquiry. That is a matter of statutory interpretation, not just of the specific provisions but of the purpose of the legislation as a whole so as to place the specific provision within the context of the whole. And, in doing so, I must give the legislation "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": Interpretation Act, R.S.N.W.T. 1988, c. I-8, s. 10.

Discussion:

¶ 28 The Legislative Assembly, by enacting the conflict of interest provisions of IAECA, has given expression to the public's expectation that elected officials will work in the public's interest, not in their own private interest. As the applicant's counsel submitted, the legislation's purpose is the maintenance of public confidence that members of the Assembly are conducting themselves in accordance with their obligations. The enforcement powers of the Commissioner serve the public interest by ensuring that there is an effective and independent process to regulate compliance with those obligations. The public interest aspect of this type of legislation was well expressed by Robins J. in Re Moll and Fisher (1979), 96 D.L.R.(3d) 506 (Ont.Div.Ct.), at page 509:

> This enactment, like all conflict-of-interest rules, is based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well-meaning men and women may be impaired when

their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose. And the Act, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty. The public's confidence in its elected representatives demands no less.

¶ 29 Above I referred to the Commissioner's role in conducting an inquiry as a quasi-judicial one. This is a term that is not used as often as it once was in administrative law but it is apt for this situation. It means that the Commissioner, when conducting an inquiry, is exercising powers which are essentially judicial in nature. She must conduct the inquiry in accordance with the principles of natural justice. Traditionally there are two broad "principles of natural justice". First, an adjudicator must be disinterested and unbiased (nemo judex iri causa sua); second, the parties must be given an opportunity to be heard (audi alteram partem). These broad principles have been delineated further into specific aspects of procedural fairness: the right to notice, to disclosure of all information in the possession of the adjudicator that has a bearing on the decision, to particulars of the allegations, to present evidence, to cross-examine witnesses, to open and public proceedings, to know the reasons for the decision, to have a disinterested and unbiased adjudicator, and the right to be represented by counsel. I do not think anyone can argue that these rights are not contained within the ambit of the "natural justice" obligation imposed on the Commissioner when conducting an inquiry. But how this obligation is carried out is very much part of the discretion enjoyed by the Commissioner.

¶ 30 The "rights" enumerated in the preceding paragraph are clearly applicable to the person who is the subject of the inquiry (in this ease Premier Morin). He is clearly in jeopardy having regard to the range of penalties that may be imposed should there be a finding of guilt. He has every right to be represented by counsel. Whether that counsel should be funded from the public purse, as the Board has already decided, is not for me to say. I think a strong argument can be made in favour of such funding since defending these types of charges can be an extremely costly affair. But, as I said, this is not part of the issue before me. The Board has made its decision.

¶ 31 It also seems to me that the "rights" listed above also apply to those parties who have been implicated in these alleged violations (Messrs. Mrdjenovich and Bailey respectively). The Commissioner has given these individuals standing to participate. She has exercised her authority and the obligation to comply with s. 7(1) of PIA (as quoted above).

¶ 32 The applicant, as the complainant in this proceeding, also comes within the purview of s. 7(1) as a person with a substantial and direct interest in the inquiry. The Commissioner has so held. As noted in Re Public Inquiries Act & Shulman (1967), 63 D.L.R.(2d) 578 (Ont.C.A.), a complainant, especially one who holds public office, is liable to be discredited in the eyes of the public if the allegations of wrongdoing should prove to be unfounded. A complainant is therefore a person affected by the inquiry.

¶ 33 The applicant also had the burden of gathering together documents and other information for the Commissioner. This imposed on the applicant (as it does on Messrs. Mrdjenovich and Bailey) a heavy obligation. It is only reasonable that the applicant would turn to professional legal assistance. But when the applicant, who is also a member of the legislature, turned to the Board for funding for counsel she was refused. The Board did not say why. All it did say was that Ms. Groenewegen could use the services of the Assembly's Law Clerk. This was described, in a letter of March 2nd from the Board's Secretary to the Commissioner, as the same assistance that is offered to any member of the assembly. Evidently that was not meant to include the type of assistance offered to Mr. Morin.

¶ 34 I think the Commissioner, in deciding to engage counsel for the applicant and in flagging her intention to do the same for Messrs. Mrdjenovich and Bailey, was clearly attempting to satisfy the natural justice requirements for the inquiry process. She identified numerous relevant factors that went into consideration.

¶ 35 The position of the applicant, as well as that of the Commissioner, is that s. 82(2)(b) of LAECA and s. 10 of PIA empower her to engage counsel for a party appearing at the inquiry so long as that will aid and assist the Commissioner in the conduct of the inquiry. It is submitted that the power to make such a determination is a necessary incident of her public responsibilities in carrying out the inquiry. It is said that the inability to appoint counsel would fetter the Commissioner's ability to carry out these responsibilities. Counsel argued that such power is expressly conferred by the above-noted sections of LAECA and PIA and, if not, then it exists by necessary implication.

¶ 36 The Board, supported by the Attorney General, takes the position that the only appointment power enjoyed by the Commissioner is to appoint counsel directly for herself and not for others. It is argued that the power to appoint publicly funded counsel for parties must be one expressly conferred by statute.

¶ 37 Before analyzing these respective positions specifically, I want to comment on some general points that arose in the evidence and during the hearing. They are important so as to clarify the issue in dispute.

¶ 38 No one contests the general proposition that having competent legal representation for the parties with standing would be beneficial to the efficient and effective workings of the inquiry. Therefore, in a broad sense, such representation would aid and assist the Commissioner in her work. But this could be said for every proceeding, in court or otherwise, that has an adversarial quality to it (and one should make no mistake -- this is not some information-gathering exercise; this is an inquiry into conduct that allegedly violates the law and could result in severe consequences -- it is very much adversarial).

¶ 39 Similarly, I do not think anyone can contest the fact that the Board could, if it wanted to, fund counsel for the applicant. Indeed it seems to me it could fund counsel for the other parties with standing even though those individuals are not members of the

legislature. I recognize, of course, that since we are discussing the expenditure of public funds, the Board should have good reason to do so (and perhaps that reason can be the same one that impels the Commissioner in this matter). But there is no statutory impediment to the Board doing so. The Speaker is exempt from the contracting provisions of the regulations passed pursuant to the Financial Administration Act, R.S.N.W.T. 1988, c. F-4. By s. 47(1) of LAECA, the Speaker may, with the approval of the Board, enter into any agreement on behalf of the Assembly that the Speaker considers advisable "for the purposes of carrying out the provisions of (the LAECA)". Presumably that includes the provisions dealing with conflict of interest inquiries.

¶ 40 I raise this because one of the concerns expressed by the Board, in response to the Commissioner's ruling of March 18th, was that the decision, since it involves the expenditure of public funds, must be authorized by statute. Fair enough. But, whether the Commissioner has the authority or not, it is clear that the Board has the authority to fund counsel for these parties. This point was conceded by respondent's counsel at the hearing.

¶ 41 Further, even though the LAECA does not mention payment of the Commissioner's costs or the expenses of an inquiry, it clearly contemplates that any such expenses would be paid out of the public purse. The Commissioner is a public officer carrying out statutory duties. Therefore, if the Commissioner does have the power to engage counsel for anyone, then obviously the costs incurred by such engagement would also be paid out of the public purse.

¶ 42 Some of these issues were brought to the forefront by a press release issued by the Board on July 29, 1998. This release contained the following:

> It has always been the view of the Board that the Commissioner has exceeded the scope of the authority given to her by the Legislative Assembly and Executive Council Act in ordering legal counsel to aid and assist Mrs. Groenewegen.
>
> While the Commissioner clearly has legal authority to retain counsel to aid and assist her, the powers granted to her do not extend to giving her the power to order the appointment of legal counsel for a person who files a complaint under the Act.
>
> "The Act is designed to enable anyone to file a complaint without the benefit of or requirement of legal advice or counsel," said the Hon. Sam Gargan, Speaker of the Legislative Assembly and Board Chairman. "In passing this legislation, it was never intended that the Assembly would pay the legal costs of a person launching a complaint against a Member. We support the work of the Commissioner and will do what we can to assist her, however, we can not support her ruling which we feel is outside the scope of her jurisdiction."
>
> Members confirmed that the Legislative Assembly would not cover the legal costs incurred by Mrs. Groenewegen, the complainant in the Conflict of Interest Public Inquiry against Premier Don Morin.
>
> During their meeting earlier this week, Members also decided against covering the legal costs of witnesses who may be called to testify by the

Conflict of Interest Commissioner.

¶ 43 Insofar as the release conveys the Board's opinion that the Commissioner does not have the statutory authority to engage counsel to represent the applicant or others then it is fair comment. But, as noted above, that misses the point. Even if, for sake of argument, the Commissioner does not have this authority, the Board certainly does. The Board's mandate is to provide services to members and generally be the administrative controller for the legislature: see s. 37 LAECA. The Speaker is the chair. The Board is accountable only to the Assembly and essentially the only control the Assembly has is the power to appoint and remove the members of the Board (other than the Speaker).

¶ 44 The press release fails to indicate any appreciation for the specific circumstances that compelled the Commissioner to make the ruling that she did. She carefully explained her reasons. Her ruling does not include the provision of publicly funded counsel for all witnesses. She was very careful to say that her intention to direct publicly funded counsel was for those persons who she said had a substantial and direct interest in the inquiry. The availability of counsel for those persons was held by the Commissioner to be of assistance to the workings of the inquiry process and to her ability to fulfill her responsibilities. I certainly cannot say she was wrong. It seems to me that the Board should at a minimum have considered these factors instead of simply relying on the point that the Commissioner has no authority to do this or the bootstrapping argument that they never intended the legislation to provide for this result. The "natural justice" issues raised by this situation must necessarily be assessed on their merits.

¶ 45 Insofar as the Board acts on behalf of the legislature it enjoys certain parliamentary privileges. Parliamentary privilege has been called the collection of rights and immunities which enable the legislators to do their work. But these rights and immunities are founded upon the basis of necessity. It is those rights that are absolutely necessary for the due execution of the legislature's function that constitute the privilege: see New Brunswick Broadcasting Co. v. Nova Scotia, supra.

¶ 46 The reservation to the legislature of the ultimate decision as to whether or not to accept the Commissioner's recommendation as to punishment can be viewed as an aspect of the privilege enjoyed by the legislature to discipline its members. But, a decision as to whether or not to fund legal counsel for any type of work or for any individual can hardly be said to be the exercise of privilege. It is the exercise of a discretion, one that has to be animated by the purposes of the request and its relationship to the purposes of the Legislative Assembly and Executive Council Act.

¶ 47 I want to be clear that I do not intend to say, and I do not decide, that a decision by the Board to fund counsel is something subject to judicial review. That point is not before me. The New Brunswick Broadcasting case, however, recognized that the courts have the authority to decide what is or is not an aspect of parliamentary privilege. It just seems to me that there is no clearly discernible principle that would elevate the case-by-case decision to fund legal counsel to the lofty level of privilege.

¶ 48 I am reinforced in these opinions by the extent to which the legislature has encroached on its privilege to discipline its members through the powers delegated to the Commissioner and the limitations it imposed on itself. The Commissioner carries out the inquiry. She makes determinations. If she dismisses the complaint then her decision is final. If she finds the member complained of guilty, then that decision is final. The only thing the legislature can do is either accept or reject the Commissioner's suggested punishment. The fact that the legislature has delegated so much discretion and responsibility to the Commissioner suggests to me that it wanted to repose a significant degree of autonomy on the Commissioner. Therefore, I think the public may be quite sceptical as to any perceived attempt to limit or second-guess the Commissioner in the performance of her duties.

¶ 49 I have gone on at length on these points at the risk of obscuring the obvious. In my opinion, the Board is correct on the narrow point put before me. The Commissioner does not have the statutory power to engage publicly funded counsel for anyone but herself. However, as everyone agreed at the hearing, the Commissioner can certainly make a request (or make a recommendation, however one wishes to phrase it) that publicly funded counsel be made available to specific parties. Any such request, coming as it does as part of the conduct by the Commissioner of the statutorily mandated inquiry, should be given careful consideration by the Board on its merits. If such a request was turned down, I think the public would expect that the Board had compelling reasons, reasons that can be publicly defended within the context of the legislature's aims in establishing the conflict of interest regime contained in the legislation. It seems to me that the dignity and integrity of the legislature require no less than good and compelling reasons to refuse a request from the independent officer that the legislature itself appointed to carry out the duties of investigating and adjudicating complaints against its own members. The public perception of the integrity of the legislature would be sorely tested by anything less.

¶ 50 Why do I say that the Commissioner does not have the statutory authority she seeks?

¶ 51 First, as a general proposition, any board or tribunal, including the position of Conflict of Interest Commissioner, being created by statutes, can only exercise the powers conferred upon them by their enabling legislation. The plain interpretation of the words used in s. 82(2)(b) of LAECA ("the power to engage the services of counsel") or s. 10(b) of PIA ("may engage...the services of counsel to aid and assist") is that the "services of counsel" are meant for the Commissioner.

¶ 52 The Commissioner's counsel submitted that the power sought by the Commissioner exists by necessary implication from the wording of the statute, its structure and its purpose. I agree that it is possible to necessarily imply some power to a tribunal: see Bell Canada v. CRTC (1989), 60 D.L.R.(4th) 682 (S.C.C.). Counsel argued that the legislation vests in the Commissioner the discretion to determine whether and to what extent she will engage the services available to her under s. 10 of PIA. The only criterion to be applied is whether any service will "aid and assist" the Commissioner in

the inquiry. Hence, it is argued, whatever will aid and assist the Commissioner must be implicitly included in her power of engagement.

¶ 53 The difficulty I have is that almost anything that would enable the inquiry to function more efficiently and effectively would, by definition, aid and assist the Commissioner. On a narrower point, I think a useful analogy can be drawn, as was done in the submissions on behalf of the Board and the Attorney General, to funding for intervenors before administrative boards and tribunals. It has been held that the power of a statutory tribunal to grant intervenor funding in advance of the hearing must be expressed in clear language in the statute: Re Regional Municipality of Hamilton Wentworth et al (1985), 19 D.L.R.(4th) 356 (Ont.Div.Ct.).

¶ 54 I recognize that the applicant and Messrs. Mrdjenovich and Bailey are not mere "intervenors". They are persons who have already been granted standing because they have a substantial and direct interest in the subject matter of the inquiry. As such they have certain rights. Those rights are ones that would accord with the principles of natural justice. The right to examine and cross-examine witnesses is one. The right to be represented by counsel is another. But, there is nothing in the principles of natural justice that mandate the provision of publicly funded counsel. A common sense of fairness may tell us that if one member of the legislature is provided with funds for his counsel then perhaps another member should be too. But that does not equate to a legal obligation.

¶ 55 The same issue arose before the Federal Court in Jones v. Canada (Royal Canadian Mounted Police Public Complaints Commission), [1998] F.C.J. No. 1051 (T.D.). The issue there was whether the R.C.M.P. Complaints Commission could either direct or recommend that publicly funded counsel be made available for the complainants. There was considerable support for the proposition that, without publicly funded counsel, the complainants would be at a great disadvantage: "there will not be a level playing field" (paragraph 7). The court found no statutory authority, express or implied, to authorize such a step. More significantly for this discussion, the court noted that no convincing argument can be made that there is a constitutional right to publicly funded counsel.

¶ 56 I have examined the relevant portions of the Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10, and they are in sum and substance to the same effect as the relevant portions of LAECA and PIA. In my opinion, the conclusions to be drawn from these statutory provisions are the same.

¶ 57 The court also noted, however, that nothing in the legislation prevented the Complaints Commission from recommending to the government that such funding be provided or precluded the government from providing such funding. As Reed J. wrote (at paragraph 19):

> The Commission has an obligation under subsection 45.45(5) to ensure that "the parties [which includes a complainant] and any other person" are afforded "a full and ample opportunity" to present evidence, to cross-examine witnesses and to make

representations. If the Commission considers that for the purposes of the present inquiry, "a full and ample opportunity" can best be achieved by the complainants having counsel, then it is open to the Commission to recommend that the state fund counsel. If the Commission wishes to do so in a public as opposed to a private manner, that is also within the Commission's discretion.

I think the same points apply equally to the case before me. The lack of an express authority in the statute to recommend such a step is no impediment to doing so if it is in the interests of justice.

¶ 58 The respondent's counsel submitted that the issue of providing public funds for counsel for complainants and witnesses in public inquiries is a significant policy issue. Thus it is one that must be expressly stated. She noted the serious cost implications to such a policy. I agree that there are significant implications. But, with respect to this case, that argument carries much less weight since the Board has already decided to pay Mr. Morin's legal fees and apparently without any limit on the amount.

¶ 59 Counsel were unable to provide me with any judicial authority to support the Commissioner's position. The applicant's counsel referred to the "modem rule" of statutory interpretation: see R. Sullivan, Driedger on the Construction of Statutes (3rd ed.), at page 131. He argued that the authority sought for the Commissioner is supportable having regard to its compliance with the legislative text, its promotion of the legislative purpose, and the reasonableness and justness of the outcome of such an interpretation. The only qualification I would add to this is that the actual words under review must be able to reasonably bear that interpretation. The power sought may promote the legislative objects and result in a more just regime. But, in my opinion, the words of the statute are plain and clear. Whether I think such a power would be a good thing is irrelevant. My function is to interpret the statute. I have concluded, based on all of the submissions, that the Commissioner's power to engage counsel does not extend to the engagement of counsel for parties at public expense.

Conclusions:

¶ 60 The applicant sought declaratory relief. This remedy is used to declare the rights of the parties. It is an unenforceable remedy, unlike judgments in normal litigation. Its power comes from the fact that it is a judicial opinion. Traditionally it is expected that government and other public authorities will respect a declaration by a court: see Jones & de Villars, Principles of Administrative Law (2nd ed.), at page 554.

¶ 61 The declarations sought by the applicant are refused for the reasons given. However, as alternative relief, a declaration will issue to the effect that the Commissioner has the authority to make a recommendation, if she thinks it appropriate to do so, that the Board provide funding for the provision of legal counsel for designated parties before the inquiry. The form and contents of such a recommendation are within the Commissioner's discretion. The decision is then the Board's to make. The public's expectation though is that the Board's decision would be made keeping in mind the objects and purpose of the

legislation, the public interests involved, the demands of justice, the reasons given by the Commissioner for the request, and the responsibilities delegated to the Commissioner by the legislation.

¶ 62 An order in accordance with these reasons will issue. I thank all counsel for their helpful submissions. Costs of these proceedings will be reserved for further argument should it become necessary.

VERTES J.

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**INTERNAL INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO ABDULLAH ALMALKI, AHMAD ABOU EL MAATI AND MUAYYED NUREDDIN ESTABLISHED BY ORDER IN COUNCIL P.C. 2006-1526**

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**AFFIDAVIT OF BENAMAR BENATTA IN SUPPORT OF MOTION FOR STANDING**
**(sworn March 14, 2007)**

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I, **BENAMAR BENATTA**, of 1112 Dufferin Street, in the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am the moving party in this motion and, as such, I have knowledge of the matters to which I hereinafter depose.

**A. The Facts**

2. This affidavit is made in support of a motion for standing to participate or intervene into the Internal Inquiry into the actions of Canadian Officials in relation to Abdullah Almalki, Ahmad Abou El Maati and Muayyed Nureddin (the "Inquiry"). This affidavit is also made in support of a motion for a recommendation of funding to enable me to be represented by counsel if I am granted standing to participate or intervene in the Inquiry.

3. I am an Algerian citizen. I was born in Muaskar City (also known as Mascara) in Algeria on May 16, 1974.

4. I am a Muslim man.

5. I joined the Algerian armed forces in 1992. Following one year of training in the military, I went to the University of Blida near Algiers and trained as an

aeronautical engineer, with an emphasis of avionics (also known as aviation electronics). I graduated university in 1998 and then returned to military service.

6. While part of the Algerian armed forces, I was politically persecuted and also feared for my life. In particular, while engaged in active combat in Algeria in 1999, I witnessed, objected to and was forced to participate in unlawful and unconscionable acts of the Algerian military. For my refusal to participate in those acts, I spent five months in prison for insubordination. I was worried that my conscience would prevent me from continuing to follow such orders and that future punishment for insubordination would have been even more severe.

7. My life was also threatened by the GIA, the armed wing of the Islamic Salvation Front because of my military associations. I was informed that unless I left the military, I would be killed.

8. In December 2000, I travelled to the United States of America with a large group of individuals from the Algerian armed forces to participate in a training program offered by a private aerospace firm, Northrup Grumman. I did not tell my peers or superiors that I intended to desert the Algerian military and seek sanctuary in North America.

9. At the end of the program in April 2001, I deserted the Algerian Armed Forces by not returning to Algeria.

10. I believed that my chances of obtaining asylum would be higher in Canada.

11. On September 5, 2001 I crossed the border at Fort Erie into Canada. I was detained at the Canadian border on the basis that I was carrying a false document. My Algerian passport was in my luggage. As soon as my Algerian passport was discovered, I immediately confirmed my true identity and indicated that I was claiming asylum in Canada.

12. I was told by an immigration official when I was detained and I believed that there was no translator on hand at the time who spoke French.

13. I was held in detention by Canadian authorities at the Niagara Detention Centre from September 5, 2001 to September 12, 2001.

14. On September 12, 2001, I appeared before an Immigration Adjudicator. I did not have access to a lawyer at that proceeding.

15. During the proceeding on September 12, 2001, I had not yet heard about the terrorist attacks in America which took place on September 11, 2001.

16. The proceedings on September 12, 2001 were conducted in English. I did not understand English very well as my first language is French so I asked the Adjudicator to speak more slowly.

17. The Immigration Adjudicator ordered that my detention continue in order to allow the immigration officials to make further inquiries in order to confirm my identity. A further review was to be scheduled within one week. A transcript of this hearing is attached to this my Affidavit as **Exhibit "A"**.

18. A further detention review never took place in Canada.

19. Instead, on September 12, 2001 I was interviewed by two Canadian officials, who I believe to be the same officials who conducted my detention review. They asked me about my experiences in Algeria and about my ability to fly airplanes. They did not ask me any information about my claim for asylum.

20. In or around the evening of September 12, 2001, I was placed in the back of a car. I believed that I was being driven to another detention facility in Canada.

21. Instead, on the evening of September 12, 2001, two officials who I believe to be Canadian officials handed me over to American officials. I was brought to the

Batavia Detention Centre (hereinafter, "BDC") in Buffalo, New York. I was very surprised and confused to learn that I had been sent back to America by Canadian officials.

22. At BDC I was held in isolation without access to anyone including a lawyer and I was repeatedly interrogated about recent terrorist attacks in America. This was the first time that I heard about the terror attacks that took place on September 11, 2001.

23. On September 16, 2001, I was transported to the Metropolitan Detention Centre (hereinafter, "MDC") in Brooklyn, New York. I was assigned "high security status".

24. I was kept in solitary confinement and deprived of sleep. My cell was illuminated 24 hours a day and the prison guards woke me up every half hour of every day by knocking loudly on the door of my cell.

25. I was held incommunicado and was denied access to counsel or any communication with the outside world. I was only taken out of my cell to be interrogated regarding the terrorist attacks of September 11, 2001.

26. I was beaten regularly by MDC prison guards. I repeatedly had my head slammed against the wall and the guards routinely stepped on my leg shackles causing injuries.

27. The acronym WTC (referring to the "World Trade Centre") was written in graffiti outside my prison cell.

28. I went on hunger strike in an attempt to improve my conditions and treatment while being held at MDC.

29. My treatment and the treatment of other people in my situation is documented by the United States government in two reports issued by the Office of the Inspector

General of the US Department of Justice: *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003) and *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Centre in Brooklyn, New York* (December 2003). Excerpts of these reports are attached to this my Affidavit as **Exhibits "B" and "C"**, respectively.

30. The United Nations, Commission on Human Rights, Working Group on Arbitrary Detention (hereinafter "UN Working Group") produced an Opinion dated May 7, 2004 (Opinion No. 18/2004) which found that the conditions that I was held under in America involved "impositions that could be described as torture". The UN Working Group also found that the United States government arbitrarily deprived me of my liberty and acted in contravention of Articles 9 and 14 of the *International Covenant on Civil and Political Rights*, the Universal Declaration of Human Rights and the United Nations Standard Minimum Rules for the Treatment of Prisoners. The UN Working Group Opinion is attached to this my Affidavit as **Exhibit "D"**.

31. On November 15, 2001, the Federal Bureau of Investigation (hereinafter, the "FBI") officially cleared me of any connection to terrorism. However, I was not told that I was cleared. I continued to be held at MDC in solitary confinement and without access to legal counsel.

32. On December 12, 2001, my American asylum claim was rejected. On the same day, December 12, 2001, I was criminally indicted for possession of a false Social Security Card and possession of a false and procured US Alien Registration Receipt Card.

33. These charges were eventually dismissed in or around October 2003 on the recommendation of Magistrate Schroeder on various grounds, including the fact that the delay in prosecution violated my Sixth Amendment right to a speedy trial and the undue and oppressive conditions that I endured in prison compromised my ability to make a proper defence. Magistrate Schroeder found that the charges were a "sham"

and further noted that I was undeniably deprived of 'liberty' and held in custody under harsh conditions which can be said to be oppressive.

34. Magistrate Schroeder also noted that Canadian officials were the ones who identified me as a terror suspect and alerted my presence to the American authorities. Magistrate Schroeder's decision is attached to this my affidavit as **Exhibit "E"**.

35. Even though the charges against me were dismissed, I remained in detention in the United States of America until July 20, 2006.

36. On July 20, 2006, following a period of negotiation between the United States government and the Canadian government involving the Canadian Council for Refugees, I was transferred to Canada in order that I might make an asylum claim.

37. My asylum claim in Canada is currently pending. I still fear for my life and security if I am returned to Algeria.

38. Canadian officials have suggested that I withdrew my claim for asylum prior to being removed to the United States of America on September 12, 2001. I strongly deny this suggestion. I never withdrew my claim for asylum in Canada.

39. To date, Canadian officials have not provided me with a record of any alleged withdrawal. In fact, a Canadian official admitted in a letter that "there is no documentation to support the suggestion that Mr. Benatta withdrew his claim such as a copy of an "Allowed to Leave" form, as would normally be the case". This letter is attached to this my affidavit as **Exhibit "F"**.

40. A Washington Post article describing my ordeal while I was still in prison in the United States is attached to this my affidavit as **Exhibit "G"**.

## B. Request for Standing to Participate or Intervene in the Inquiry

41. I believe that I have a substantial and direct interest in the subject matter of the Inquiry.

42. I further believe that I have a genuine concern about the subject matter of the Inquiry as well as having a particular perspective that will assist the Commissioner in conducting the Inquiry.

43. My experiences are uniquely similar to the experiences of Abdullah Almalki, Ahmad Abou El Maati and Muayyed Nureddin. I believe that Canadian officials were responsible either directly or indirectly for my detention, torture and abuse in the United States of America in part because of information provided to the foreign government (America) by Canadian officials linking me to terrorist activities, in particular, the events of September 11, 2001.

44. In my case, Canadian officials not only provided information to a foreign government but also apparently drove me over the border into the United States of America and handed me over to American officials without a hearing, without access to legal counsel and without access to a translator for my first language (French).

45. Like Messrs. Almalki, El Maati and Nureddin, I was tortured on foreign soil (America) as documented in a UN Working Group Opinion dated May 7, 2004 (Opinion No. 18/2004).

46. Like Messrs. Almalki, El Maati and Nureddin, I believe that I was targeted by Canadian officials because I am a Muslim. In fact, I believe that the only reason that I was identified as a terrorist suspect in the September 11, 2001 attacks by Canadian officials was because I am a Muslim man who knows how to fly planes.

47. Like Messrs. Almalki, El Maati and Nureddin, I am concerned about unchallenged inferences that I am or was connected with terrorist activities. I also do not believe that any allegation against me by Canadian officials involving terrorism

was warranted. I deny that I have or ever had any connection to terrorism and I would like the opportunity to clear my name in Canada.

48. Like Messrs. Almalki, El Maati and Nureddin, I believe that I have a direct interest in seeing that there are appropriate mechanisms in place to ensure that existing laws are enforced and human rights are balanced against national security interests.

49. I have a direct interest in the development of mechanisms that will ensure accountability and monitoring of Canadian security and / or immigration officials in their investigations and to ensure that actions are not undertaken extra-judicially.

50. I have a direct interest in holding Canadian officials to account for acting extra-judicially.

51. I have a direct interest in the elimination of racial profiling and systemic racism as part of the Canadian security intelligence regime.

**C. Request for funding**

52. I cannot afford to retain counsel to assist me and represent me at the Inquiry. Accordingly, I am seeking funding for my counsel to act on my behalf during the Inquiry if I am granted standing or intervenor status.

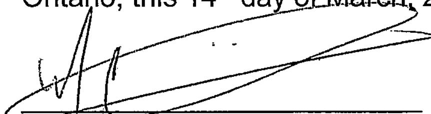
53. Since my return to Canada on July 20, 2006, I have been largely unemployed and I have found it very difficult to secure employment. I spent 5 years of my life in prison and this prison record has made securing future employment difficult.

54. I am also unable to continue to work in my chosen field due to the amount of time and money that it would take for me to re-train to work in aeronautical engineering.

55. I am currently unemployed and receiving a small amount of social assistance on which to live.

56. I make this Affidavit in support of my motion for standing to participate or intervene into the Inquiry and for funding and for no improper purpose.

SWORN BEFORE ME at the City
Of Toronto in the Province of
Ontario, this 14th day of March, 2007.



A COMMISSIONER, ETC.
NICOLE CHROLAVICIUS
LSUC No. 45911G.

BENAMAR BENATTA

4550 Information Act / Document divulgué en vertu de la Loi sur l'accès à l'information



This is Exhibit A referred to in the affidavit of Benamar Benatta sworn before me, this 14th day of March 2007

A COMMISSIONER FOR TAKING AFFIDAVITS
Nicole Chrolavicius
LSUC #45911G

# IMMIGRATION AND REFUGEE BOARD

## -ADJUDICATION DIVISION-

Record of a Detention Review under the

Immigration Act, concerning

**BENAMAR BENATTA**

| | |
|---|---|
| **HELD AT:** | Niagara Regional Detention Centre<br>Niagara Falls, Ontario |
| **DATE:** | September 12, 2001 |
| **BEFORE:** | L. Lasowski - Adjudicator |

**APPEARANCES:**

| | |
|---|---|
| B. Benatta | - Person Concerned |
| B. Reid | - Case Presenting Officer |
| n/a | - Counsel |
| n/a | - Interpreter |

Information Act / Document divulgué en vertu de la Loi sur l'accès à l'information.



5 **ADJUDICATOR:** Good afternoon. This is a 48-hour detention review being held today, the 12th of September 2001 at the Niagara Regional Detention Centre by me, Liz Lasowski, the adjudicator. This is a detention review concerning Benamar Benatta.

10

Is that your true and correct name?

**PERSON CONCERNED:** Yes.

15 **ADJUDICATOR:** I note the presence of Mr. Reid. He is the senior immigration officer here to represent the Minister.

The purpose of this detention review is for me to
20 decide whether you should remain in continued detention or whether you can be released under certain terms and conditions pending the continuation of your immigration matter.

25 Under the *Immigration Act* there are two grounds under which a person can remain in detention. One is if they are likely to pose a danger to the public and the other is if they are unlikely to appear.

30 First I will hear a recommendation from Mr. Reid, the senior immigration officer, and then you have an opportunity to make any statements on your own behalf.

**CASE PRESENTING OFFICER:** Mr. Benatta was seeking ---

35

**PERSON CONCERNED:** By the way, can you speak more slowly because I don't understand English very well.

**ADJUDICATOR:** Did you want an interpreter for your
40 next hearing?

**PERSON CONCERNED:** No, it's okay if you speak more slowly.

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5

**ADJUDICATOR:** Okay.

**CASE PRESENTING OFFICER:** Mr. Benatta was seeking admission to Canada at Fort Erie on the 5th of September. During the examination at the primary line, he was selected for a secondary examination. On the primary line he showed his U.S. resident alien card in the name of Ali Kachir, K-A-C-H-I-R. The date of birth of that person was May 16th, 1974, which is the same date of birth under a passport which was subsequently found in his luggage on a search under the name of Benamar Benatta. He claims that Benamar Benatta is his true name. Under that name, it shows that he was admitted to the United States on the 31st of December 2000 as a visitor until the 30th of June 2001. Apparently he overstayed his visit in the United States and was looking for work there.

He claims to be a lieutenant in the Algerian Air Force and that he is now away from the air force without leave. He indicated that the reason that he used fraudulent identification at the border was that he was afraid he would be detained and that his plan was to go to Toronto and then make a refugee claim once he got into Canada.

He is in possession of a U.S. alien card in another name. He is detained at this time for examination. I suppose one of the things we will want to examine is whether the alien card is a valid card and whether the passport he has is a valid passport in an attempt to determine what his true identity is.

At least until that point, I am seeking his continued detention on the grounds that he is unlikely to appear given the actions that he has taken so far. Those are my submissions.

**ADJUDICATOR:** Are you seeking detention on the issue of determining his identity?

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5

**CASE PRESENTING OFFICER:** Yes.

**ADJUDICATOR:** Mr. Benatta, do you wish to make any statements on your own behalf?

10

**PERSON CONCERNED:** I don't understand what you mean.

**ADJUDICATOR:** Mr. Reid has asked that you remain in continued detention. He has indicated that when you came

15 to Canada you were using a U.S. alien card in another person's name. He stated that Immigration later found a passport in the name of Benamar Benatta and that you claim to be that person.

20 **PERSON CONCERNED:** Yes, it's mine.

**ADJUDICATOR:** So Immigration is going to look into the authenticity of your passport and also into whose green card you were using. They are asking that you remain in

25 detention so they can confirm and be satisfied with your true identity.

**PERSON CONCERNED:** What about the alien card? I know that they can catch me in Niagara Falls.

30

**ADJUDICATOR:** Pardon?

**PERSON CONCERNED:** I know maybe they can catch me here in Niagara Falls with this card. I talked to the

35 Immigration people. I have a friend -- a lot of friends who go to the U.S. with a false passport. They get the paper. I used the same thing. That's why I bring this card with me. I said if I don't go to Toronto, they can catch me here and give me the paper, like the U.S.

40

**ADJUDICATOR:** What is your native language?

**PERSON CONCERNED:** I speak Arabic and French.

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5

**ADJUDICATOR:** And what?

**PERSON CONCERNED:** And French.

10 **ADJUDICATOR:** Do you wish to say anything else?

**PERSON CONCERNED:** I think that's all.

**ADJUDICATOR:** At this time I am making an order for
15 your continued detention.

The issues that have been identified to me by Immigration are that Immigration wants an opportunity to confirm your true identity. It appears that when you came
20 to Canada, you were using the identity of a U.S. alien card holder. Immigration found a passport under the name of Benamar Benatta. In that you had demonstrated that you were willing to use the identity of another person, Immigration wishes to have an opportunity to confirm
25 whether the passport that was found in your possession is an authentic passport. This is a reasonable request for them to do so in that you, as I said, already have indicated a willingness to misrepresent your identity to Immigration officials.

30

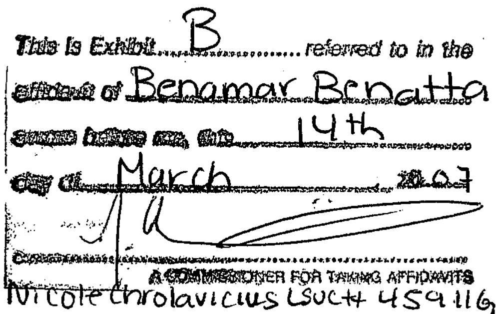
So you will have another detention review in seven days. If the Immigration Department is satisfied with your identity before that time, they may make a determination as to whether or not you should be subject to a report, and
35 you may have to appear for an inquiry. So at this time the detention is for the purposes of having an examination by immigration officials, and if a report is written within a few days, then we would have an inquiry scheduled. If your identity is not yet confirmed within seven days, then you
40 would have another detention review at that time.

**- - - REVIEW CONCLUDED - - -**

U.S. Department of Justice
Office of the Inspector General

# The September 11 Detainees:

## A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks


This is Exhibit B referred to in the affidavit of Benamar Benatta sworn before me, this 14th day of March 2007

A COMMISSIONER FOR TAKING AFFIDAVITS
Nicole Chrolavicius LSUC# 45911G

Office of the Inspector General
April 2003

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In conducting our review, we were mindful of the circumstances confronting the Department and the country as a result of the September 11 attacks, including the massive disruptions they caused. The Department was faced with monumental challenges, and Department employees worked tirelessly and with enormous dedication over an extended period to meet these challenges. It is also important to note that nearly all of the 762 aliens we examined violated immigration laws, either by overstaying their visas, by entering the country illegally, or some other immigration violation.

## II. METHODOLOGY OF THIS REVIEW

The OIG conducted interviews, fieldwork, and analysis for this review from March 2002 until March 2003. As noted above, we focused on two detention facilities, the MDC in Brooklyn, New York, and the Passaic County Jail in Paterson, New Jersey. We chose the MDC because it housed 84 aliens arrested in the aftermath of the September 11 terrorist attacks. In addition, the MDC received widespread media coverage for allegations of abuse against detainees and for the restrictive conditions of confinement it imposed on the detainees. We selected Passaic because it housed 400 aliens arrested in connection with the September 11 terrorism investigation – the most in any single facility – and, like the MDC, was the subject of many media articles regarding the treatment of detainees.

In this review, "September 11 detainees" are defined as aliens held on immigration violations in connection with the investigation of the September 11 attacks. The FBI categorized these aliens as either "of interest," "of high interest," or "of undetermined interest" to its terrorism investigation. The INS treated all three categories as "September 11 detainees," and sometimes referred to them as "special interest" or "of interest" detainees.[10]

As noted above, the Department detained 762 aliens on immigration charges in connection with its terrorism investigation between September 2001 and August 2002. From the total of 475 September 11 detainees held at the MDC and Passaic,[11] we selected a sample of 119 detainees – 53 held at the MDC and 66 confined at Passaic – to examine their detention experiences in detail.

Our MDC sample of 53 detainees was composed of 19 aliens who were being held at the facility during our site visit in May 2002; a random sample of 30 detainees previously held at the MDC but released or transferred prior to

---

[10] In this report we generally refer to all three FBI categories collectively as "of interest," unless otherwise noted.

[11] Nine September 11 detainees were held at both Passaic and the MDC.

people representing 32 federal, state, and local law enforcement agencies were working 24 hours a day at FBI Headquarters. By September 18, 2001, 1 week after the attacks, the FBI had received more than 96,000 tips or potential leads from the public, including more than 54,000 through an Internet site it established for the PENTTBOM case, 33,000 that were forwarded directly to FBI field offices across the country, and another 9,000 tips called into the FBI's toll-free "hotline."

**B. Department of Justice Response**

In response to the September 11 attacks, the Attorney General directed all Department of Justice components to focus their efforts on disrupting any additional terrorist threats. As articulated in a September 17, 2001, memorandum to all United States Attorneys from Attorney General Ashcroft, the Department sought to prevent future terrorism by arresting and detaining violators who "have been identified as persons who participate in, or lend support to, terrorist activities. Federal law enforcement agencies and the United States Attorneys' Offices will use every available law enforcement tool to incapacitate these individuals and their organizations." Given the identities of the September 11 terrorists, the Department recognized from the earliest days that its terrorism investigation had a significant immigration law component.

The Attorney General summarized the Department's new focus in a speech he gave to the U.S. Conference of Mayors on October 25, 2001:

> Forty years ago, another Attorney General was confronted with a different enemy within our borders. Robert F. Kennedy came to the Department of Justice at a time when organized crime was threatening the very foundations of the Republic...
>
> Robert Kennedy's Justice Department, it is said, would arrest mobsters for "spitting on the sidewalk" if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror.
>
> Let the terrorists among us be warned: If you overstay your visa – even by one day – we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.
>
> In the war on terror, this Department of Justice will arrest and detain any suspected terrorist who has violated the law. Our single objective is to prevent terrorist attacks by taking suspected terrorists off the

> street. If suspects are found not to have links to terrorism or not to have violated the law, they are released. But terrorists who are in violation of the law will be convicted, in some cases deported, and in all cases prevented from doing further harm to Americans.

The Attorney General told the OIG that he instructed that if, during the course of the investigation, aliens were encountered who had violated the law, they should be charged with appropriate violations, particularly if the alien had a relationship to the September 11 attacks.

The Deputy Attorney General explained to the OIG that the threat presented by terrorists who carried out the September 11 attacks required a different kind of law enforcement approach. He stated that the Department needed to disrupt such persons from carrying out further attacks by turning its focus to prevention, rather than investigation and prosecution.

Michael Chertoff, the Assistant Attorney General for the Criminal Division, told the OIG that within days of the attacks it became evident that some aliens encountered in connection with the PENTTBOM investigation were "out of status" in violation of the law – a matter that fell within the jurisdiction of the INS. He stated the Department's policy was to "use whatever means legally available" to detain a person linked to the terrorists who might present a threat and to make sure that no one else was killed. In some instances, he noted, that would mean detaining aliens on immigration charges, and in other cases criminal charges. Chertoff said he did not believe that the Department had a blanket policy to go with one or the other, if both were possible. He said he understood the Department would use whichever charge was most "efficacious." He stated that he was involved in meetings with the Attorney General, the Deputy Attorney General, and the FBI Director at which this philosophy was discussed, but he added that, from the beginning, there was an insistence from senior Department officials that things be done legally. Chertoff explained that his deputy, Alice Fisher, was placed in charge of immigration issues for the Criminal Division.

Fisher told the OIG that during the fall of 2001 she spent the "majority" of her time on terrorism issues, some of which involved illegal aliens who presented a potential terrorism threat. She recalled that Chertoff told her "we have to hold these people until we find out what is going on." She said she understood that the Department was detaining aliens on immigration violations that generally had not been enforced in the past.

### C. New York FBI's Response

The FBI Field Office in New York City and its JTTF received thousands of leads from the public related to terrorism in the weeks after September 11. Staff at the New York JTTF command post entered the leads into an FBI

like to learn how to fly an airplane. After the September 11 attacks, the [redacted] called the FBI and recounted his conversation with the [redacted] [redacted] [redacted]. The INS subsequently arrested the alien when it determined he was out of immigration status, and he was considered a September 11 detainee.

- Another alien treated as a September 11 detainee was arrested at his apartment in [redacted] a few days after a caller told the FBI that "two Arabs" rented a truck from his [redacted] [redacted] vehicle rental business on September [redacted] for a one way trip to a [redacted] city, and then returned it [redacted] minutes later having gone only [redacted] miles. They were, according to the caller, "extremely nervous," and did not argue when told they would not be refunded the hundreds of dollars they had paid for the rental.

- Another alien was arrested, detained on immigration charges, and treated as a September 11 detainee because a person called the FBI to report that the [redacted] grocery store in which the alien worked, "is operated by numerous Middle Eastern men, 24 hrs – 7 days a week. Each shift daily has 2 or 3 men. . . . Store was closed day after crash, reopened days and evenings. Then later on opened during midnight hours. Too many people to run a small store."

## III. ASSIGNMENT TO A DETENTION FACILITY

Our review determined that September 11 detainees arrested in New York City generally were confined at the MDC or transported to Passaic and other INS contract facilities in northern New Jersey. The housing determination for a September 11 detainee was the result of a two-step process that began with the FBI's assessment of the detainee's possible links to terrorism. The FBI provided this assessment to the INS, which made the actual housing determination. Witnesses told the OIG that the INS's determination was based almost solely on the FBI's assessment.

Where a September 11 detainee was housed had significant ramifications on the detainee's detention experiences. Detainees housed at the MDC (discussed in Chapter 7) experienced much harsher confinement conditions than those held at Passaic (discussed in Chapter 8). The September 11 detainees held at the MDC were locked down 23 hours a day, were placed in four-man holds during movement, had restricted phone call and visitation privileges, and had less ability to obtain and communicate with legal counsel.

### A. FBI Assessment

The first part of the process to determine where a September 11 detainee would be confined began with the FBI's initial assessment of the detainee's

BOP to limit, as much as possible within their lawful discretion, the detainees' ability to communicate with other inmates and with people outside the MDC.[23]

### D. Department of Justice's Role

Witnesses told us that the Department of Justice had little input into where the detainees were held. For example, Chertoff, the Assistant Attorney General in charge of the Criminal Division, said he did not have any information about where or how the detainees would be held, with the exception of one conversation in which he was told that an alien had claimed he was hurt by a guard. He said that he was later told that the report was inaccurate, and that the alien had not made such an accusation. David Israelite, Deputy Chief of Staff to the Attorney General, said he could not recall any discussions of holding people "incommunicado" or any discussion of where detainees should be held. He also recalled one allegation of mistreatment being called to the attention of the Attorney General, who he said asked staff to look into the incident.

Alice Fisher, the Deputy Assistant Attorney General who was in charge of terrorism issues for the Criminal Division, stated that she had no information about which facility a detainee would go to or the conditions that would be imposed on the detainees. She noted that there was an "effort" to accommodate the needs of the Assistant U.S. Attorneys who were conducting the grand jury investigation into the attacks. David Kelley, the Deputy U.S. Attorney for the SDNY who played an important role in the September 11 investigation, said he had no input into where people would be confined, except that a person might be moved to the New York area if he was needed to testify. An Assistant U.S. Attorney from the SDNY who worked on the terrorism investigation explained that he generally did not have input into where detainees would be held. He recalled being frustrated that the BOP did not distinguish between detainees who, in his view, posed a security risk and those detained aliens who were uninvolved witnesses.

## IV. DEMOGRAPHICS OF SEPTEMBER 11 DETAINEES

The 762 September 11 detainees we reviewed were almost exclusively men, [redacted].

[23] We discuss Hawk Sawyer's conversations with Christopher Wray, Principal Associate Deputy Attorney General, and David Laufman, Chief of Staff to the Deputy Attorney General, in Chapter 7.

The age of the detainees varied, although most, 479 (or 63 percent), were between 26 and 40 years old. However, many of the detainees were much older.

See Figure 1.

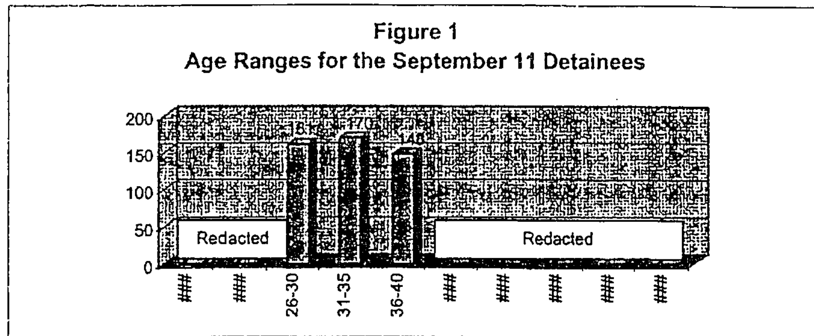


**Figure 1**
**Age Ranges for the September 11 Detainees**

The September 11 detainees were citizens of more than 20 countries. The largest number, 254 or 33 percent, came from Pakistan, more than double the number of any other country. The second largest number (111) came from Egypt. Nine detainees were from Iran and six from Afghanistan. In addition, 29 detainees were citizens of Israel, the United Kingdom, and France. See Figure 2.

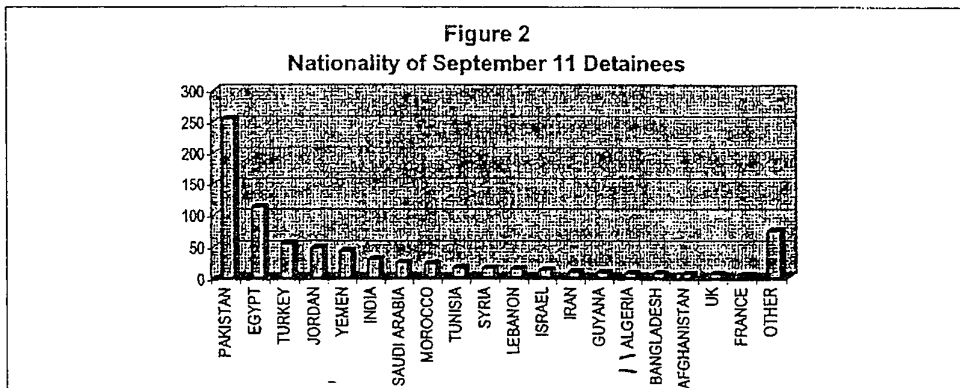


**Figure 2**
**Nationality of September 11 Detainees**

The arrest location of a September 11 detainee proved significant because it determined which FBI field office had responsibility for, among other things, investigating the detainee for any connections to terrorism (the "clearance process" that we examine in detail in Chapter 4). By far the

Pearson, the INS Executive Associate Commissioner for Field Operations, said that Levey called a senior INS official the week after the September 11 attacks and directed that no INS detainees should be released without being cleared by the FBI. Pearson said he also received instructions from INS Commissioner James Ziglar that none of the detainees should be released by the INS until they had been cleared by the FBI of any connections to terrorism. Pearson told the OIG that he passed these instructions along to employees at INS Headquarters's units assigned to handle September 11 detainee cases.

Similarly in the FBI, our interviews and review of documents confirm that FBI officials understood and applied the "hold until cleared" policy. For example, an October 26, 2001, electronic communication (EC) (similar to an e-mail) from an FBI agent in the SIOC to FBI field offices stated that, "Pursuant to a directive from the Department of Justice, the INS will only remove individuals from [the special interest] list after the INS has received a letter from FBIHQ [FBI Headquarters] stating that the FBI has no investigative interest in the detainee."

In addition, an attorney with the FBI's Office of General Counsel who worked on the SIOC Working Group told the OIG that it was understood that the INS was holding September 11 detainees because the Deputy Attorney General's Office and the Criminal Division wanted them held. She said the Deputy Attorney General's Office took a "very aggressive stand" on this matter, and the Department's policy was clear even though it was not written.

Levey told the OIG that the idea of detaining September 11 detainees until cleared by the FBI was "not up for debate." He said he was not sure where the policy originated, but thought the policy came from "at least" the Attorney General.

A Senior Counsel in the Deputy Attorney General's Office who worked closely with Levey on immigration matters ("Senior Counsel to the DAG") stated in her response to the draft of this report that those involved in the discussion of the process, including attorneys from the INS, OIL, and the Criminal Division (including TVCS), were aware that the strategy had risks, and clearly anticipated the filing of habeas corpus petitions because of the position the Department planned to take that any illegal alien encountered pursuant to a PENTTBOM lead should be detained until cleared by the FBI. She noted that this was "unchartered territory." On September 27, 2001, the Senior Counsel sent an e-mail to David Ayers, Chief of Staff to the Attorney General, on September 27, 2001, that discussed this "hold until cleared" policy. The e-mail described the "strategy for maintaining individuals in custody." The document attached to the e-mail, entitled "Maintaining Custody of Terrorism Suspects," begins with a "Potential AG Explanation" that states:

> The Department of Justice (Department) is utilizing several tools to ensure that we maintain in custody all individuals suspected of being involved in the September 11 attacks without violating the rights of any person. If a person is legally present in this country, the person may be held only if federal or local law enforcement is pursuing criminal charges against him or pursuant to a material witness warrant. Many people believed to be involved in the attacks, however, are not present legally and they may be detained, at least temporarily, on immigration charges. As of September 27, 2001, the Immigration and Naturalization Service (INS) was detaining without bond 125 aliens related to this investigation on immigration charges.

The document then describes plans for handling bond hearings and coordination efforts among the FBI, INS, and Criminal Division to ensure that September 11 detainees would remain in custody. Levey told us this document was drafted to enable the Attorney General to provide an explanation as to how, within the bounds of the law, the Department could hold and not release aliens who were suspected of terrorism.

Other senior Department officials confirmed that the directive to hold the September 11 detainees without bond stemmed from discussions at the highest levels of the Department. Assistant Attorney General Michael Chertoff told the OIG that in the early days after the terrorist attacks the issue was discussed among the Attorney General, Deputy Attorney General, and FBI Director that detention should be sought of a charged person "if there is a link to the hijackers and we are not able to assure that the person is not a threat and there is a legal violation." Alice Fisher, a Deputy Assistant Attorney General in the Criminal Division and a participant in the SIOC Working Group, told the OIG that Chertoff told her that "we have to hold these people until we find out what is going on" and that, in some cases, they could use immigration charges to keep the detainees in custody.

David Laufman, Chief of Staff to the Deputy Attorney General, told the OIG that he recalled a meeting which INS representatives attended soon after the terrorist attacks that included a discussion of whether potential immigration violations could be "leveraged" against September 11 detainees when there was insufficient information for criminal cases. He added that it was recognized that, "if we turn one person loose we shouldn't have, there could be catastrophic consequences." He said he recalls, however, asking Levey to take whatever steps were appropriate to expedite clearance by the FBI and the CIA.

Daniel Levin, Counselor to the Attorney General, told the OIG that he could not say for certain when the clearance policy was developed or at what level. He described a "continuous meeting" for the first few months after the terrorist attacks involving the Attorney General, Deputy Attorney General, FBI

had insufficient evidence for upcoming bond hearings, and that Immigration Judges already had ordered certain September 11 detainees to be removed from the United States. When an INS official complained that the INS could not continue to hold the detainees, Levey responded that the INS needed to be patient. According to the notes, Levey said that he did not expect INS to wait months for the results of the clearance checks, but that the INS could wait four to five days for the CIA checks. The group also discussed resource problems at the FBI and INS, as well as ways to improve the flow of information between the two agencies.

According to the notes of the meeting, FBI Supervisory Special Agent (SSA) Kerr said the time frame for assigning a September 11 detainee case to an FBI agent for a clearance investigation was a few days. He urged Levey to direct that all the detainees on the New York list continue to be held without bond until cleared. Notes taken by a participant at the meeting summarized the conflict: "In NY, all people FBI picks up on pentbom [sic] get held no bond. Everyone else, INS exercises a little discretion, looking for a scintilla of evidence, to justify no bond."

Cerda argued that the New York list should not be added wholesale to the INS's Custody List. He explained that the INS did not want to begin treating all the detainees on the New York list under the more restrictive INS policies applicable to September 11 detainees. He stated that, for the most part, detainees' placement on the list meant they did not get off for a long time. During the meeting, at least one INS official suggested dispensing with CIA checks for detainees who otherwise had been fully cleared by the FBI. Levey told the group that the Criminal Division favored the CIA checks and that he would need to check to see if any detainees could be released without the CIA check.

At the conclusion of the meeting, Levey decided that all the detainees on the New York list would be added to the INS Custody List and held without bond. In explaining his decision later to the OIG, Levey said he wanted to err on the side of caution so that a terrorist would not be released by mistake. He also stated that he had received a commitment from the FBI to "expedite" its investigation of everyone on the list, and a promise that the FBI would "analyze" all the detainees within one or two weeks. The FBI OGC attorney present at the November 2 meeting said she does not recall making, or hearing Kerr make, such a commitment. Kerr told the OIG that, while present at the November 2 meeting, he may well have committed to assigning the case within a short time frame but he does not recall making a commitment to expedite all the cases or analyze all the cases within two weeks. The notes of this meeting provided to the OIG by INS and TVCS officials contain mention of Kerr's commitment to assign the "unassigned" cases to agents within a few days, but make no mention of a commitment to "expedite" the investigations or of any promise to "analyze" the cases within one to two weeks. According to

to establish the alien's dangerousness or risk of flight, the information would be used only as a last resort after high-level review of the case. If the Immigration Judge ordered the alien's release, the INS would "immediately" file a motion to stay that decision and would appeal the decision to the BIA. If the BIA ordered the alien released, the INS would refer the case to the Attorney General. According to the document, the Civil Division was preparing briefs in anticipation of having to oppose petitions that might be filed by aliens seeking release in federal court. The Department planned to argue that any such petitions filed before resolution of the aliens' bond hearings were premature, and it planned to appeal any adverse decision from a federal district court granting release to these aliens. The strategy noted that if any alien "believed to be involved in the September 11 attacks" was ordered released, the Criminal Division might still be able to obtain a material witness warrant.

Implementation of this strategy, as discussed in the following sections of this chapter, determined whether a September 11 detainee would be released on bond pending a hearing on his immigration charges.

## III. INS EFFORTS TO MAINTAIN DETAINEES IN CUSTODY

The INS took a variety of steps to ensure that aliens arrested in connection with the PENTTBOM investigation would not be released until the FBI had determined that they posed no danger to the United States. INS District Directors made an initial custody determination of "no bond" for all September 11 detainees (since granting bond could have resulted in the release of aliens not yet cleared by the FBI). Second, INS Executive Associate Commissioner for Field Operations Michael Pearson issued a directive two days after the terrorist attacks instructing INS field offices that no September 11 detainee could be released without Pearson's written authorization. Third, officials at INS Headquarters created a bond unit to handle the September 11 detainees' cases. Fourth, INS attorneys requested multiple continuances in bond hearings for September 11 detainees in an effort to keep the detainees in custody as long as possible. We describe these actions in turn.

### A. Initial "No Bond" Determination

One of the initial steps taken by the INS to ensure that the September 11 detainees would not be released was the requirement that District Directors across the country who made the initial bond determination for aliens charged under federal immigration law make custody determinations of "no bond" for all September 11 detainees. As explained above, an alien initially denied bond by a District Director has the right to request a bond re-determination hearing before an Immigration Judge. In response to the blanket "no bond" policy, many September 11 detainees requested bond re-determination hearings. Consequently, the INS had to defend the "no bond" determination at hearings

## CHAPTER SEVEN

## CONDITIONS OF CONFINEMENT AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK

### I. INTRODUCTION

Almost 60 percent of the 762 aliens detained in connection with the Government's investigation of the September 11 terrorist attacks were arrested in the New York City area. As discussed previously, the overwhelming majority of these aliens were arrested on immigration charges that, in a time and place other than New York City post-September 11, would have resulted in either no confinement at all or confinement in an INS or INS contract facility pending an immigration hearing. However, fear of additional terrorist attacks in New York City and around the country changed the way aliens detained in connection with the investigation of the September 11 attacks were treated.

Aliens arrested by the INS on immigration charges who were deemed by the FBI to be of "high interest" to its terrorism investigation were held in high-security federal prisons across the country, such as the Federal Bureau of Prisons's (BOP) Metropolitan Detention Center (MDC) in Brooklyn, New York.[88] Overall, the BOP confined 184 September 11 detainees in its facilities nationwide. A total of 84 detainees determined by the FBI to have a possible connection with the PENTTBOM investigation or terrorism in general were housed at the MDC from September 14, 2001, to August 27, 2002.

Generally, aliens deemed by the FBI to be "of interest" or "of undetermined interest" to the Government's terrorism investigation were detained in lower security facilities, such as the Passaic County Jail in Paterson, New Jersey (Passaic). From September 2001 to May 2002, 400 September 11 detainees were confined in Passaic.

This chapter examines the conditions of confinement for September 11 detainees held at the MDC, while the next chapter examines conditions experienced by September 11 detainees at Passaic. As we discuss in these two chapters, the FBI's initial assessment of its level of interest in specific September 11 detainees directly affected the detainees' conditions of confinement within the institution and their access to telephones, legal counsel, and their families.

[88] The MDC is a 9-story BOP facility in Brooklyn that generally houses men and women either convicted of criminal offenses or awaiting trial or sentencing. On December 10, 2002, the MDC housed 2,441 men and 181 women.

However, once the FBI characterized a detainee as "high interest" and the INS transferred the detainee to BOP rather than INS custody, the BOP took responsibility for the detainee's confinement. In the heightened state of alert after the terrorist attacks, the BOP combined a series of existing policies and procedures that applied to inmates in other contexts and applied them to the detainees they received after September 11, such as designating September 11 detainees as WITSEC inmates.

As a threshold matter, we question the criteria (or lack thereof) the FBI used to make its initial designation of the potential danger posed by September 11 detainees. The arresting FBI agent usually made this assessment without any guidance and based on the initial detainee information available at the time of arrest. In addition, there was little consistency or precision to the process that resulted in detainees being labeled "high interest," "of interest," or "of undetermined interest." While many of these decisions needed to be made quickly and were based on less than complete information, we believe the FBI should have exercised more care in the classification process, given the significant ramifications on detainees' freedom of movement and association depending on whether they were confined in a high-security facility such as the MDC or a less restrictive facility such as Passaic (discussed in Chapter 8). More important, as discussed in Chapter 4, the FBI devoted insufficient resources to investigating or clearing most of these detainees, resulting in their prolonged confinement under extremely high security conditions. Even after clearance, the BOP's delay in notifying the MDC lengthened even further these detainees' stay in the ADMAX SHU.

With regard to the conditions of confinement for detainees at the MDC, we appreciate that the influx of high-security detainees stretched MDC resources to their limit, with MDC staff members often working double shifts to monitor the detainees during a highly emotional period of time. We also appreciate the uncertainty surrounding these detainees and the chaotic conditions in the immediate aftermath of the September 11 attacks. However, our review raises serious questions about the treatment of the September 11 detainees housed at the MDC in several regards.

First, BOP officials imposed a "communications blackout" specifically for September 11 detainees within a week of the terrorist attacks. During this blackout period, detainees were not permitted to receive any telephone calls, visitors, or mail, or to place any telephone calls or send mail. While we were unable to determine the exact length of this communications blackout, it appears to have lasted several weeks, after which time the September 11 detainees were permitted limited attorney and social contacts. During this time, attorneys and family members were unable to receive any information about these detainees, including where they were being held. While such a policy was within the BOP's discretion, we question the justification for a total

communications blackout on all these individuals, particularly for the length of time that it was imposed. In addition, the telephone limitations imposed on this group of detainees – one legal telephone call per week and one social call per month – further hindered the detainees' ability to obtain legal assistance, which posed a significant problem since the majority of the detainees entered the MDC without counsel.

Second, as noted above, the BOP initially designated all September 11 detainees as WITSEC inmates. Usually, this designation is applied to individuals who agree to cooperate with law enforcement by providing testimony against criminal suspects. Application of this WITSEC classification to the September 11 detainees, however, resulted in MDC officials continuing to withhold information about the detainees' location, even after the communications blackout was lifted.

This classification frustrated efforts by the detainees' attorneys, family members, and even law enforcement officers to determine where the detainees were being held. Because information on WITSEC inmates is tightly restricted, even MDC staff working at the front desk in the facility's lobby did not have access to information about the September 11 detainees. We found that MDC staff frequently – and mistakenly – told people who inquired about a specific detainee that the detainee was not held at the facility when, in fact, the opposite was true. Instead, the staff referred the caller or visitor to the BOP's Inmate Locator system for information about where an individual detainee was being held. But WITSEC inmates are not listed in this public system because of security reasons, and this prevented attorneys or family members from locating these September 11 detainees. We fault the MDC for not considering in a more timely manner the implications of labeling these September 11 detainees as WITSEC detainees and for not properly communicating to its employees – especially its staff who worked the facility's front desk – about the classification issues affecting September 11 detainees and how to properly address inquiries from the public.

The BOP tried at least twice to address this situation by reclassifying the September 11 detainees, first by renaming them "Group 155" inmates. Even then we found the BOP continued to use "WITSEC" as its primary designation. On October 31, 2001, the BOP reclassified the detainees as "Special SIS Cases." Neither reclassification alleviated the access issues confronted by detainees' attorneys and family members. In fact, we found that as late as March 1, 2002 – more than six months after the first September 11 detainees arrived at the MDC – the BOP's initial decision to classify the detainees as WITSEC inmates continued to cause confusion and resulted in attorneys being told incorrectly that their clients were not being held at the MDC.

We understand the MDC's efforts to follow instructions from BOP Headquarters and confine the September 11 detainees under secure

conditions. That said, the detainees were pretrial inmates, most of whom had not obtained legal representation by the time they were confined at the MDC. Consequently, their designation by BOP officials as WITSEC inmates hindered the detainees' efforts to contact legal counsel and their families. We also believe the BOP should have taken timelier and more effective steps to address the situation after it realized the impact this designation was having on the September 11 detainees and the ability of their attorneys and families to locate them.

Third, with regard to the policies within the MDC for confining the September 11 detainees, MDC officials used existing BOP policies applicable to inmates in disciplinary segregation, and confined the September 11 detainees in the ADMAX SHU. The detainees were placed in restraints whenever they were outside their cells, including handcuffs, leg irons, and heavy chains. Four staff members were required to be present each time a detainee was placed into restraints and escorted from a cell. The detainees also were required to remain in restraints during their non-contact visits with their attorneys or family members.

Because of these restrictive conditions, we believe it was important for the FBI, INS, and BOP to determine, in a reasonable time frame, whether these detainees were connected to terrorism or whether they could be cleared to be moved from the ADMAX SHU to the MDC's much less restrictive general population. Yet, detainees remained in the ADMAX SHU for a long period of time waiting for the FBI's clearance process which, as we described in Chapter 4, was excessively slow. Even when the FBI cleared the detainees, they remained in the ADMAX SHU for days and sometimes weeks longer than necessary due to delays between the time the FBI cleared a detainee of a connection to terrorism and the time the MDC received formal notification of the clearance. In addition, we found that the MDC did not consistently follow its established procedures. Without explanation, it released at least four September 11 detainees from the ADMAX SHU prior to receiving clearance from the FBI that the detainee had no links to terrorism.

Fourth, the restrictive conditions imposed by the MDC prevented the detainees from obtaining counsel in a timely fashion. The BOP has no national policy regulating the number or length of telephone calls that inmates in an ADMAX SHU can make to their attorneys. Consequently, the policy regulating the frequency and duration of legal telephone calls established by the MDC for September 11 detainees – while complying with very broad BOP national standards – severely limited the detainees' ability to obtain and consult with legal counsel.

As mentioned previously, most September 11 detainees did not have legal representation prior to their detention at the MDC (only 2 of the 19 detainees we interviewed had hired legal counsel before they entered the MDC).

The MDC imposed a policy that permitted September 11 detainees housed in the ADMAX SHU only one legal call per week. This type of policy is more appropriate for pre-trial inmates who have obtained counsel prior to their incarceration rather than for inmates like the September 11 detainees who needed to find counsel.

Further complicating the detainees' efforts to obtain counsel, the pro bono attorney lists provided September 11 detainees by the INS through EOIR contained inaccurate and outdated information. As a result, detainees often used their sole legal call during a week to try to contact one of the legal representatives on the pro bono list, only to find that the attorneys either had changed their telephone number or did not handle the particular type of immigration situation faced by the detainees. In addition, detainees complained that legal calls that resulted in a busy signal or calls answered by voicemail counted as their one legal call for that week. When questioned about this, MDC officials gave differing responses about whether or not reaching an answering machine counted as a completed legal call. We believe that counting calls that only reached a voicemail, resulted in a busy signal, or went to the wrong number was unduly restrictive and inappropriate.

In addition, the manner in which the MDC inquired whether the detainees wanted to place a legal call was unclear and inappropriate. In many instances, the unit counselor inquired whether September 11 detainees in the ADMAX SHU wanted their weekly legal call by asking, "are you okay?" For some period, several detainees told the OIG that they did not realize that an affirmative response to this rather casual question meant they opted to forgo their legal call for that week. We believe the BOP should have asked the detainees directly "do you want a legal telephone call this week?" rather than relying on the detainees to decipher that a shorthand statement "are you okay?" meant "do you want to place a legal telephone call?"

Our review determined that the MDC officials recognized their obligation to permit representatives from foreign consulates to visit with detainees and established a clearance procedure to facilitate these visits. However, we found that consular representatives experienced the same difficulties as attorneys in obtaining access to detainees due to the BOP's categorization of the detainees as WITSEC inmates. In addition, the MDC's classification of detainee calls to their consulates as "social calls" severely limited the detainees' ability to contact their consulates in a timely manner, given the MDC's limit of one social call per month for detainees.

Fifth, the restrictive BOP policies and the classification of September 11 detainees also hindered family visits. Although MDC management tried to train reception area staff on proper procedures for granting visitation to detainee family members, problems persisted even many months after September 11.

Sixth, with regard to allegations of physical and verbal abuse, we concluded that the evidence indicates a pattern of abuse by some correctional officers against some September 11 detainees, particularly during the first months after the attacks. Most detainees we interviewed at the MDC alleged that MDC staff physically abused them. Many also told us that that MDC staff verbally abused them with such taunts as "Bin Laden Junior" or with threats such as "you will be here for the next 20-25 years like the Cuban people." Although most correctional officers denied such physical or verbal abuse, the OIG's ongoing investigation of complaints of physical abuse developed significant evidence that it had occurred, particularly during intake and movement of prisoners.[130]

Seventh, MDC staff failed to inform detainees in a timely manner about the process for filing complaints about their treatment. Only 1 of the 19 detainees we interviewed said he received a facility handbook when he arrived that described the formal complaint process. Ten detainees told the OIG they did not learn about the complaint resolution process until they received their facility handbook 4 to 6 months after arriving at the MDC.

The Associate Warden for Programs told the OIG that all September 11 detainees received a facility handbook when they were processed into the MDC. Yet, even if the detainees received handbooks, staff apparently confiscated them as unacceptable items to retain in their ADMAX SHU cells. In addition, we found that a 2-page summary of MDC policies distributed to many of the detainees did not contain information about how to file a formal complaint. The haphazard fashion in which MDC staff handled dissemination of the facility handbook impeded the detainees' ability to seek review for their complaints about conditions of confinement at the MDC. If the detainees were not permitted to keep the facility handbook in their cells for security reasons, the MDC's 2-page summary of facility policies should have included information that described the process for filing a formal complaint.

Eighth, MDC staff appropriately took affirmative steps to prevent potential staff abuse against September 11 detainees – and protect MDC staff from unfounded allegations of abuse – by installing security cameras in each detainee's cell and by requiring staff to videotape all detainee movements outside their ADMAX SHU cells. However, the BOP's decision to permit MDC staff to destroy or reuse these videotapes after 30 days hampered the usefulness of the videotape system to prove or disprove allegations of abuse raised by individual detainees. We understand the difficulty in storing the

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[130] To date, our investigation has not uncovered any evidence that the physical or verbal abuse was engaged in or condoned by anyone other than the correctional officers who committed it. However, our investigation is still ongoing.

hundreds of videotapes the MDC accumulated after several months of taping the detainees. But the decision to recycle or destroy the videotapes created problems regarding allegations of physical abuse at the MDC. Detainees were unable to use videotape evidence to support allegations of abuse filed more than 30 days after an alleged incident. Similarly, MDC staff had more difficulty refuting abuse allegations raised by detainees if the complaint was filed more than 30 days after the incident.

Given the proactive steps taken to prevent or document incidents of physical abuse against September 11 detainees, we believe rescinding the videotape retention policy was unwise. If BOP and MDC management wanted to refute detainee allegations of abuse using videotape evidence, it was shortsighted on their part to assume that all such allegations would be made and resolved within 30 days.

Ninth, we found that recreation offered to the September 11 detainees was limited due to BOP security policies, the limited number of recreation cells within the ADMAX SHU, and lack of proper clothing that led detainees to regularly refuse recreation because it was offered most often in the early morning hours when it was colder in the open-air recreation cells.

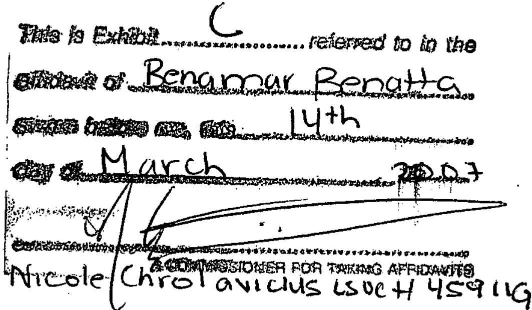
Tenth, MDC staff subjected the September 11 detainees to having both lights illuminated in their cells 24 hours a day for several months longer than necessary, even after electricians rewired the ADMAX SHU range. Our review determined that, despite the initial representations to us by MDC officials, the MDC was able to reduce the amount of light in an individual detainee's cell as early as November 2001, but instead kept both cell lights illuminated until at least mid-March 2002. Eighteen of the 19 detainees we interviewed complained to the OIG about the difficulty of sleeping with both lights illuminated 24 hours a day, citing exhaustion, depression, stress, and sleep deprivation. The MDC had little reason for keeping the lights constantly illuminated for as long as it did.

In sum, we recognize the uncertainties and confusion surrounding the initial policies and treatment relating to these September 11 detainees. Much about these detainees was unknown, and the BOP had to accept the FBI's loosely applied assessment of these detainees as "of interest" to the terrorism investigation. However, while we fault the FBI for the slowness of the clearance process, we believe the blackout and the initial WITSEC designation that the BOP imposed for several weeks was excessive, particularly because many of these detainees had no counsel or any contact with families. We also believe that the BOP instituted excessively restrictive policies on the detainees, particularly regarding telephone privileges. In addition, the BOP did not provide adequate information about the location of the detainees to the detainees' attorneys or their family members. These policies hindered the detainees' ability to obtain and consult with legal counsel and were more

appropriate for detainees who had attorneys prior to arriving at the MDC. We also believe that some of the detainees were subject to physical or verbal abuse. Finally, we believe that some of the conditions of confinement were unnecessarily severe, such as two lights constantly illuminated in the detainees' cells. While the chaotic situation and the uncertainties surrounding the detainees' role in the September 11 attacks and the potential for additional terrorism explain some of these problems, they do not explain or justify all of them. We believe that the Department and the BOP should consider these issues carefully in an effort to avoid similar problems in the future.

U.S. Department of Justice
Office of the Inspector General

# Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York




Office of the Inspector General
December 2003

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## I. INTRODUCTION

This report details the investigation conducted by the Office of the Inspector General (OIG) concerning allegations that staff members of the Federal Bureau of Prisons' (BOP) Metropolitan Detention Center (MDC) in Brooklyn, New York, physically and verbally abused aliens who were detained in connection with the terrorist attacks of September 11, 2001.[1] In June 2003, we issued a broader, 198-page report evaluating the treatment of 762 detainees who were held on immigration charges in connection with the investigation of the September 11 attacks.[2] In that report, we examined how the Department of Justice (Department) handled these detainees, including their processing, their bond decisions, the timing of their removal from the United States or their release from custody, their access to counsel, and their conditions of confinement.

In Chapter 7 of the Detainee Report, we described the treatment of September 11 detainees in the MDC, and we concluded that the conditions were excessively restrictive and unduly harsh. Those conditions included inadequate access to counsel, sporadic and mistaken information to detainees' families and attorneys about where they were being detained, lockdown for at least 23 hours a day, cells remaining illuminated 24 hours a day, detainees placed in heavy restraints whenever they were moved outside their cells, limited access to recreation, and inadequate notice to detainees about the process for filing complaints about their treatment.

We also concluded in the Detainee Report that evidence showed some MDC correctional officers physically and verbally abused some September 11 detainees, particularly during the months immediately following the September 11 attacks. However, we noted in our report that our investigation of physical and verbal abuse was not completed, and we stated that we would provide our findings in a separate report. This report details our findings and conclusions from the investigation.

We have provided the results of our investigation to managers at BOP Headquarters for their review and appropriate disciplinary action. In the report to the BOP, we include an Appendix identifying those staff members who we believe committed misconduct or exercised poor judgment and setting forth the

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[1] In this report, "staff members" refers to MDC employees, including correctional officers, lieutenants, management officials, and other personnel.

[2] See "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" ("Detainee Report"), issued June 2, 2003. The report is located on the OIG's website at http://www.usdoj.gov/oig/special/03-06/index.htm.

specific evidence against them. In the Appendix, we also describe the allegations against specific officers that we did not substantiate.

As discussed in detail below, our investigation developed evidence substantiating allegations that MDC staff members physically and verbally abused September 11 detainees. In the Appendix referenced above, we recommend that the BOP consider taking disciplinary action against ten current BOP employees, counseling two current MDC employees, and informing employers of four former staff members about our findings against them.

## A. Background

### 1. Detainee Arrival and Confinement at the MDC

As discussed in detail in the Detainee Report, the Department used federal immigration laws to detain aliens in the United States who were suspected of having ties to the September 11 attacks or connections to terrorism, or who were encountered during the course of the terrorism investigation conducted by the Federal Bureau of Investigation (FBI). In the first 11 months after the attacks, 762 aliens were detained in connection with the FBI terrorism investigation for various immigration offenses, including overstaying their visas and entering the country illegally.

A total of 84 of these aliens were confined at the MDC on immigration charges in the 11 months after the attacks. The facility at which a September 11 detainee was confined was determined mainly by the FBI's assessment of the detainee's potential links to the September 11 investigation or ties to terrorism. The FBI assessed detainees as "high interest," "of interest," or "undetermined interest."[3] Generally, those labeled of "high interest" were confined at the MDC.

The MDC is a 9-story high-security BOP prison in Brooklyn, New York, that generally houses men and women either convicted of criminal offenses or awaiting trial or sentencing.[4] The majority of the MDC inmates are housed in the facility's General Population Unit. Some inmates are confined in the Special Housing Unit (SHU), which normally holds inmates who are disruptive, pose a security risk, or need protection as witnesses. When MDC officials learned that they would receive aliens deemed potential suspects in the FBI's

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[3] As we described in our Detainee Report, we concluded that the FBI in New York indiscriminately applied these labels to aliens and that the FBI took much longer than Department officials expected to clear these aliens of any connection to terrorism.

[4] During the period reviewed in our Detainee Report, the MDC housed 2,441 men and 181 women.

terrorism investigation, the MDC modified one wing of the SHU to accommodate these "high security" detainees and labeled the modified wing the "administrative maximum" or "ADMAX" SHU. The ADMAX SHU was designed to confine the detainees in the most restrictive and secure conditions permitted by BOP policy.

The detainees began to arrive at the MDC on September 14, 2001. They were transported often in armed convoys and generally by federal agents from the Immigration and Naturalization Service (INS). The transport vehicles holding the detainees entered the MDC through the U.S. Marshal's sally port, which is similar to a large garage and is connected to the Receiving and Discharge (R&D) area of the MDC. Once inside the sally port, the transport vehicle was met by four to seven BOP staff members who removed the detainee from the vehicle. The staff members then put the detainee next to a wall directly adjacent to the transport vehicle and performed a "pat search" during which the detainee was frisked and the restraints in which the detainee arrived were exchanged for BOP restraints. The BOP officers then walked the detainees up a ramp in the sally port through a set of doors leading to a holding cell in R&D.

In R&D, the detainees were taken one at a time from the holding cell to be fingerprinted, photographed, examined, and then strip searched with restraints removed.[5] They received prison clothes, were once again fully restrained in metal handcuffs attached to a waist chain that was connected to ankle cuffs, and were taken up the elevator to the ninth floor of the MDC.

On the ninth floor, the detainees were taken to the ADMAX SHU, where they were strip searched again and locked in their cells alone or with one other detainee. Detainees remained in their cells at least 23 hours a day. Until late February 2002, the cells were constantly illuminated.

The ADMAX SHU range was shaped like a rectangle, with cells down one side of two long corridors. Four recreation cells separated by chain-link walls and with chain-link, open-air ceilings were located in the middle of the rectangular range. MDC staff members used a multipurpose room located at the end of the ADMAX SHU range for medical examinations, strip searches, and meetings. A room adjacent to the multipurpose room was used as a lieutenant's office.

The ADMAX SHU was separated from the regular SHU by an area containing a holding cell, the SHU lieutenant's office, and a visiting area where attorneys and family members met with the September 11 detainees. These

[5] The BOP technically refers to strip searches as "visual searches," but every MDC staff member we interviewed referred to them as "strip searches."

visits occurred in "non-contact" rooms, meaning a clear partition precluded any physical contact between parties.

As described in the Detainee Report, the MDC confined the September 11 detainees under highly restrictive conditions. For example, the MDC instituted a four-man hold restraint policy with respect to moving the detainees. This meant that whenever a detainee was taken from his cell, he was escorted by three officers and a lieutenant at all times. During routine escorts on the ADMAX SHU, the detainees also were handcuffed behind their backs and placed in leg restraints. When they were escorted to visits, interviews, or out of the MDC, the detainees were handcuffed in front, restrained in a waist chain, and placed in leg restraints.

On approximately October 5, 2001, as a result of an incident involving a detainee who alleged that he was injured by MDC staff members, the MDC instituted a policy requiring officers to videotape detainees with handheld video cameras whenever they were outside their assigned cells, including when they first arrived at the MDC.[6] As described below, however, we found that staff members did not always adhere to this policy.

### 2. Atmosphere at the MDC Following September 11

As we discussed in the Detainee Report, we recognize that the impact of the terrorist attacks of September 11, 2001, was particularly pronounced for people living or working in the New York City area. Some of the MDC staff members lost relatives, friends, and colleagues in the attacks. Moreover, the staff was working under difficult conditions on the ADMAX SHU, with many working 12-hour shifts, six or seven days a week, for extended periods of time. In addition, based on the vague label attached to the detainees by the FBI, the MDC staff initially was led to believe that the detainees could be terrorists or that they may have played a role in the September 11 attacks.

Many of the staff members we interviewed described the atmosphere at the MDC immediately after September 11 as emotionally charged. One of the lieutenants currently at the MDC said the staff "had a great deal of anger" after September 11 and that it was a chaotic time at the MDC. Another lieutenant, one of the lieutenants responsible for escorting detainees, stated that upon entering the institution the detainees were handed over to teams of five to seven officers who were "spiked with adrenaline." He said that there were some officers on the escort teams who were "getting ready for battle" and "talking crazy." Another lieutenant responsible for escorting detainees similarly described the officers as "high on adrenaline."

[6] Later in October 2001, the requirement of videotaping all detainee movements became a BOP-wide policy.

Even though the atmosphere was emotionally charged, none of the current or former staff members we interviewed suggested that the terrorist attacks justified engaging in abusive behavior towards the detainees. To the contrary, nearly all of the MDC staff members we interviewed asserted that they and other staff members always behaved professionally with the detainees.

Yet, as we describe below, these staff members' depictions of their actions were undermined substantially by the consistent allegations of the detainees, the statements of several other MDC staff members, the statements of senior BOP officials, and the videotapes we reviewed.

### 3. The OIG Investigation

In mid-October 2001, the BOP's Office of Internal Affairs (OIA) first referred to the OIG several allegations of physical abuse at the MDC. The OIG's New York Field Office (NYFO) initiated a criminal investigation into allegations that several detainees were slammed against walls by MDC staff members when they first arrived at the MDC. The NYFO interviewed the detainees who made allegations, obtained their medical records, and interviewed several MDC staff members. In conducting this investigation, the NYFO consulted with prosecutors from the Department's Civil Rights Division (CRT) and the United States Attorney's Office (USAO) for the Eastern District of New York.

In addition to the allegations investigated by the NYFO, the detainees made other allegations of physical and verbal abuse against MDC staff members. The CRT assigned some of these additional allegations to the FBI for investigation, and the OIG referred several allegations to the BOP OIA for investigation.

On September 25, 2002, the CRT and the USAO declined criminal prosecution of the MDC staff members who were the focus of the NYFO's investigation. However, even if a matter is declined criminally, the OIG can continue that investigation to determine if there was misconduct that should result in disciplinary or other administrative action. The OIG therefore pursued this investigation as an administrative matter after prosecution was declined.

Other allegations of detainee abuse assigned to the FBI and the BOP OIA also were considered and declined for criminal prosecution. In March 2003, the OIG took over all of the cases that had been referred to the FBI and the BOP OIA and consolidated them into a comprehensive administrative investigation into allegations that some MDC staff members physically and verbally abused some September 11 detainees. This administrative investigation was led by two OIG attorneys, one of whom is a former federal

prosecutor in the Public Integrity Section of the Department. This report describes the results of our investigation.

The relevant time period under review was from September 2001 to August 2002, when the detainees were housed in the ADMAX SHU of the MDC. Our review focused solely on complaints at the MDC.

After consolidating approximately 30 detainees' reported allegations against approximately 20 MDC staff members, we sorted the allegations of physical abuse into the following six categories:

1. Slamming detainees against walls;
2. Bending or twisting detainees' arms, hands, wrists, and fingers;
3. Lifting restrained detainees off the ground by their arms, and pulling their arms and handcuffs;
4. Stepping on detainees' leg restraint chains;
5. Using restraints improperly; and
6. Handling detainees in an otherwise rough or inappropriate manner.

The detainees also alleged that MDC staff members verbally abused them by referring to them as "terrorists" and other offensive names; threatened them; cursed at them; and made offensive comments during strip searches.

In the OIG's review of these allegations, we conducted more than 115 interviews of detainees, MDC staff members, and other individuals. The staff members we interviewed primarily were correctional officers and lieutenants who had been assigned to the ADMAX SHU after September 11, 2001, or were involved in escorting the detainees on and off the ADMAX SHU. Almost all of the interviews of the current staff members were administratively compelled, meaning that the employees were required to appear and answer questions.[7] In many cases a union representative, who also was a staff member at the MDC, attended the interview with the employees.

In addition to the correctional officers and lieutenants, we interviewed MDC management officials, internal affairs investigators, and the physician's

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[7] In a compelled interview, Department employees are required to answer questions from the OIG. Compelled interviews normally occur after criminal prosecution of a subject is declined, or if a witness does not voluntarily agree to cooperate. The statements in a compelled interview cannot be used against the person in a criminal proceeding. If an employee refuses to answer the OIG's questions or fails to reply fully and truthfully in an interview, disciplinary action, including dismissal, can be taken against the employee.

assistant who was responsible for the detainees' medical needs and evaluations, including examining injuries and monitoring detainees' health during hunger strikes. We also interviewed a senior BOP official who until this year oversaw correctional operations at the BOP during the relevant period, and a senior BOP official who has been responsible since 2000 for training new BOP officers on restraint and escort techniques.

We also interviewed federal officers, mostly from the former INS, who were involved in transporting the detainees to the MDC. In addition, we interviewed an attorney for one of the detainees who visited his client at the MDC and said that he witnessed abuse.

We reviewed medical records and incident reports for the detainees from the MDC's files. We also reviewed MDC videotapes, including hundreds of tapes showing detainees being moved around the facility, tapes from cameras in the detainees' cells, and several tapes depicting officers using force in specific operations against certain detainees. As will be detailed later in this report, MDC officials repeatedly told the OIG that videotapes of general detainee movements no longer existed. That information was inaccurate. In late August 2003, the OIG discovered more than 300 videotapes at the MDC, primarily spanning the period from early October through November 2001, and we reviewed all of those tapes. While these tapes substantiated many of the detainees' allegations, detainees indicated to us that abuse dropped off precipitously after the video cameras were introduced.

### B. Report Outline

This report is divided into three main sections. First, the report discusses the evidence regarding allegations that the detainees were physically and verbally abused at the MDC. Second, the report describes several issues of concern relating to the systemic treatment of the detainees at the MDC. Finally, the report offers recommendations to address the issues discussed in this report.

In an appendix to this report, we provide to the BOP our findings on specific MDC staff members, current and former, who handled the detainees. That section of the report will not be released publicly because of the privacy interests of those individuals as well as the potential of disciplinary proceedings against them. In the Appendix, we recommend that the BOP consider taking disciplinary action against ten current BOP employees, counseling two current MDC employees, and informing employers of four former staff members about our findings against them. We also recommend that the BOP take appropriate disciplinary action against several unidentified staff members who we observed on videotapes physically abusing detainees or behaving unprofessionally.

## II. PHYSICAL AND VERBAL ABUSE

Our investigation developed evidence that approximately 16 to 20 MDC staff members, a significant number of the officers who had regular contact with the detainees, violated BOP policy by physically or verbally abusing some detainees. For the purposes of this report, we consider "physical abuse" to be the handling of the detainees in ways that physically hurt or injure them without serving any correctional purpose. Under BOP Program Statement (P.S.) 5566.05, improper handling includes instances when staff members use more force than necessary on the detainees or cause the detainees unnecessary physical pain or extreme discomfort. Similarly, we consider "verbal abuse" to be insults, coarse language, and threats to physically harm or inappropriately punish detainees, all of which violate BOP P.S. 3420.09, "Standards of Employee Conduct."

We discuss in this section the general evidence that staff members physically and verbally abused some detainees.

### A. Physical Abuse

#### 1. Slamming, Bouncing, and Ramming Detainees Against Walls

Most of the detainees who made allegations of abuse specifically alleged that MDC staff members slammed them into walls. Several detainees also alleged staff members slammed them into doors and the sides of the elevator that took them up to the ADMAX SHU. According to approximately ten detainees, staff members slammed them against walls on their first day at the MDC while they were in R&D. Detainees also alleged staff members sometimes slammed them into walls in the ADMAX SHU during escorts to and from attorney visits, doctor visits, or recreation, but not as frequently as in R&D. The detainees alleged that these slamming incidents occurred when they were being fully compliant with the officers and were not resisting.

For example, one detainee told us that immediately after he arrived at the MDC, staff members took him out of the van, "slammed" him against a wall, and warned him that they would break his neck if he moved. Another detainee also stated that officers repeatedly "slammed" him against the wall in R&D on the day he arrived. Another detainee stated that on his first day at the MDC, officers painfully "slammed" him back and forth against walls in the ADMAX SHU all the way to his cell. In addition, another detainee stated that he was "slammed" against the wall in the sally port and that the experience was very painful. In all of these cases, the detainees claimed that they were fully compliant with staff members' instructions.

Detainees said they were slammed into walls much more frequently before the handheld video cameras were introduced in October 2001 than after. One detainee stated staff members told him things like, "If the camera wasn't on I would have bashed your face," and "The camera is your best friend." Detainees also told us that their treatment by the staff at the MDC was worse than their treatment by officers at other institutions. Few made complaints of mistreatment by other officers outside of the MDC.

Our efforts to substantiate or refute allegations that staff members slammed detainees against walls were hindered to some extent because: (1) detainees' escorts were not videotaped until early October 2001, after many of the detainees already had arrived; (2) even after the MDC instituted the policy requiring all detainee escorts be taped, some detainees' escorts were not taped;[8] and (3) a significant number of detainee videotapes were recycled or destroyed, in accordance with a regional policy directive issued in December 2001 that allowed the tapes to be re-used or destroyed after 30 days. These issues are discussed more fully below under section III (F), "Obtaining Videotapes from the MDC."

BOP policy prohibits staff members from using more force than necessary on inmates. BOP P.S. 3420.09, "Standards of Employee Conduct," states, "An employee may not use brutality, physical violence, intimidation toward inmates, or use any force beyond that which is reasonably necessary to subdue an inmate." Similarly, BOP P.S. 5566.05, "Use of Force and Application of Restraints on Inmates," authorizes staff members to use force on inmates only as a last alternative after all other reasonable efforts to resolve a situation have failed. It states that even when force is authorized, staff members must not use more force than necessary on the inmates, or cause them unnecessary physical pain or extreme discomfort.[9]

We spoke with two senior BOP officials concerning slamming or bouncing inmates against the wall. One of the officials, who had oversight responsibilities for correctional operations during the relevant time period, stated that unless an inmate is combative or resisting, slamming the inmate into a wall is improper and violates the BOP's policy on "use of force." The other official, who is responsible for training new BOP officers, confirmed that slamming a compliant inmate against the wall is not an appropriate control or

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[8] An officer confirmed to us that not all escorts were recorded. He stated that some movements were not recorded because the officers were unable to find a camcorder. He said that even though seven camcorders were purchased for the ADMAX SHU, over time the camcorders started to disappear.

[9] BOP P.S. 5566.05 provides: When authorized, staff must use only that amount of force necessary to gain control of the inmate; to protect and ensure the safety of inmates, staff, and others; to prevent serious property damage; and to ensure institution security and good order.

escort technique. Both officials stated that slamming, bouncing, and firmly pressing compliant inmates against the wall violates BOP policy.

A former MDC lieutenant, who was one of the lieutenants in charge of escorting the detainees to and from the ADMAX SHU (hereinafter "Lieutenant 1"), corroborated detainees' allegations of slamming. He stated that before the MDC began videotaping all detainee movements, which was on or about October 5, 2001, almost all of the detainees were slammed against walls, particularly in the sally port. He also stated he witnessed staff members "bounce" detainees against the wall. Lieutenant 1 explained that "slamming" a detainee against the wall was when officers shoved the detainee into the wall and held him there, and "bouncing" a detainee off the wall was when officers shoved the detainee into the wall and then quickly pulled him back. Lieutenant 1 said "pressing" a detainee against the wall was when officers used physical force to keep a detainee's chest against the wall.

Lieutenant 1 said he witnessed officers unnecessarily slam, bounce, and forcefully press detainees against the wall. Lieutenant 1 told us that some officers took detainees off transport vehicles and bounced them against the wall every time they could get away with it. Lieutenant 1 asserted the only time it would have been appropriate for an officer to press, bounce, or slam a detainee against the wall was if the detainee was aggressive, combative, or violent. However, Lieutenant 1 said he never saw a detainee act in these ways.

According to Lieutenant 1, he confronted another lieutenant who was responsible for escorting detainees (hereinafter "Lieutenant 2") after seeing Lieutenant 2 slamming detainees against the wall. Lieutenant 2 also supervised many of the officers who Lieutenant 1 witnessed slam detainees against the wall. Lieutenant 1 stated that Lieutenant 2 told him that slamming detainees against the wall was all part of being in jail and not to worry about it.

When interviewed by the OIG, Lieutenant 2 maintained that his officers did not slam detainees against the wall, but he stated that it was possible an officer could have slipped by mistake and slammed a detainee into the wall. He also stated that if the lieutenant supervising an escort was not paying "very, very close attention" and actively controlling the officers while trying to communicate with the detainee, then "anything could have happened."

Moreover, one current MDC officer implied, although did not state, in an affidavit that some staff members bounced detainees off the wall. He wrote, "There were some lieutenants like [Lieutenant 1] who would [rein] in an officer for bouncing a detainee against the wall, but there were probably other lieutenants who would let more slide."

A federal agent who served on the INS's Special Response Team that transported many detainees to the MDC said he witnessed MDC staff members

briskly walk compliant detainees into walls without slowing them down before impact. During two escorts we viewed on videotape, we observed officers escort detainees down a hall at a brisk pace and ram them into a wall without slowing down before impact, just as the INS agent described.

Further, an attorney for one detainee said he observed MDC staff members slam his client against the wall. The attorney said that after his visit with his client in February 2002, MDC officers escorted his client out of the visiting room and threw him up against the wall face first. The attorney stated that the officers then removed his client's shoes and banged them against the wall right by his face, clearly intending to intimidate him. According to the attorney, this incident was not recorded by a video camera.

In our review of the videotapes, we saw staff members slam one detainee into two walls while he was being escorted from a recreation cell to a segregation cell. In another incident, we saw staff members forcefully ram a second detainee into two walls while he was being escorted from the recreation deck to a segregation cell. On several videotapes leading up to and following these incidents, we did not observe any conduct that would justify staff members using this amount of force on either of these detainees. Instead, the videotapes show that both men were compliant before and during the escorts when staff members slammed and rammed them against walls.[10]

Many of the detainees also alleged that they were slammed against the wall in the sally port at the bottom of a ramp where a t-shirt was taped to the wall.[11] The t-shirt, which is discussed below in greater detail under "T-Shirt with Flag and Slogan," had a picture of the U.S. flag and the phrase "These colors don't run" on it.

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[10] These incidents are discussed below in detail under "Improper Application and Use of Restraints."

[11] Several officers and two INS agents stated that when the detainees were removed from their transport vehicles, they were pat searched against the wall, right where the t-shirt was located. One officer who worked in R&D said that when staff members pat searched detainees, they leaned the detainees into the wall and placed their faces on the t-shirt.

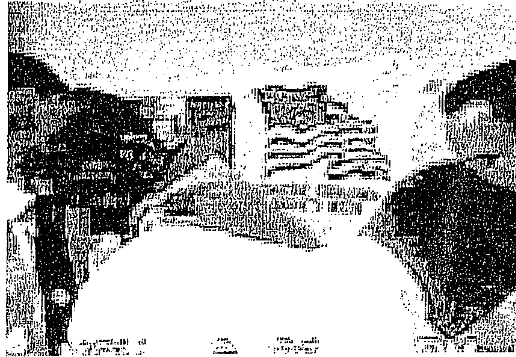

**Image 1: The t-shirt in the sally port.**

Two staff members, Lieutenant 1 and a staff member from R&D, told us they observed blood on the t-shirt. Lieutenant 1 stated some of the bloodstains looked like a couple of bloody noses smudged in a row, and other stains looked like someone with blood in his mouth spit on the t-shirt. None of the current or former staff members we interviewed said they knew how blood got on the t-shirt. Moreover, none of the INS agents who brought the detainees to the MDC recalled any of the detainees being bloody before they arrived at the sally port. While we cannot say definitively whether the blood was from the detainees, the fact that two staff members saw blood on the t-shirt where detainees were "placed" provides some evidence that detainees were slammed into the t-shirt, as many alleged.

In addition, our investigation revealed that at least one detainee likely received a bruise on his arm from being slammed into a wall.[12] In his interview, the detainee said his bruise was caused by officers who repeatedly slammed him against the wall in R&D. According to Lieutenant 2, who examined the detainee when he arrived at the MDC, the detainee did not have any bruises when he entered the MDC during the evening of October 3, 2001. However, when the detainee left for court the following day, he had a large bruise on the side of his right upper arm. A videotape of the detainee's bruise showed that it was very dark, circular, and about the size of a tennis ball. Lieutenant 2 said that when he observed the bruise on the detainee's arm the next day, he concluded that the bruise was caused in the MDC, but he did not know how.

[12] Two other detainees also maintained they developed bruises after being slammed into the walls.

The detainee's bruise was examined by an MDC doctor on October 5, 2001, but the detainee's medical records do not indicate what caused his injury. On a videotape of his medical examination that we reviewed, the detainee told the doctor that his bruise "happened here," but the doctor did not ask how he got the bruise and instead said he only wanted to confirm which bruise he was supposed to examine.

The OIG obtained medical records for seven other detainees who alleged MDC staff members slammed them against walls. These records do not indicate that the detainees were bruised or otherwise injured from being slammed against the wall.[13] It is possible that the detainees were not injured. However, if they were injured, there are several explanations for why their injuries may not have been recorded in the detainees' medical records. First, some detainees did not seek medical treatment for their bruises because they would have been required to request treatment from the same officers who they alleged injured them. Second, detainees generally received their intake medical assessments shortly after they arrived, before bruises would have developed from being slammed against the wall in R&D. Third, MDC staff members who observed the bruises did not always offer detainees the opportunity to visit medical personnel, as one detainee alleged happened when he showed a lieutenant a bruise he obtained following a "use of force" incident on April 2, 2002. Fourth, some MDC medical personnel may have failed to examine detainees' injuries or discern how they were injured, as shown on the videotape of the medical examination of the detainee who had a bruised arm.

In our interviews of MDC staff members, most of them denied detainees <u>ever</u> were slammed or bounced against the wall. A few staff members did state that detainees were slammed against the wall, but only when they were noncompliant.[14] Almost all of the staff members we interviewed described the detainees, with the sole exception of Zacarias Moussaoui, as fully compliant and non-combative.

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[13] One detainee alleged his chin was injured by officers who slammed him into a wall, but we did not find sufficient evidence to substantiate this allegation. The detainee obtained a two millimeter long laceration on his chin the day he arrived at the MDC. He alleged that MDC staff members slammed him into the wall while escorting him into R&D. According to staff members who were involved in the escort or who witnessed the incident, the two staff members escorting the detainee tripped over the feet of another staff member who was holding the door open at the top of the sally port ramp. The detainee's medical records indicate that at the time of the examination, he stated that his injury occurred when he "tripped going up."

[14] One lieutenant stated that he observed several detainees not complying when they resisted getting out of transport vehicles, refused to walk up the sally port ramp, or were unresponsive to staff members' commands, such as to lift their arms up during pat searches. This characterization was contradicted by most other witnesses we interviewed.

But many of the staff members who told us the detainees never were slammed against the wall or who said that the detainees were slammed against the wall only when they were violent, also told us the detainees never were pressed against the wall, the detainees' heads never touched the wall, or there never was a t-shirt with an American flag on it hanging in the sally port. These claims were contradicted by numerous videotapes showing that staff members routinely pressed detainees into walls, regularly instructed detainees to place their heads against walls, and directed the detainees to face the t-shirt prominently displayed for months in the sally port.

**Image 2: Officers face detainee towards t-shirt with flag.**

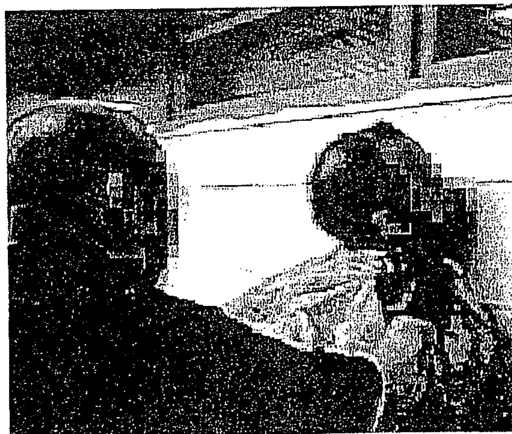

**Image 3: Officers press detainees against walls.**

Furthermore, nearly all of the staff members we interviewed stated that the detainees were compliant, only a few of them were argumentative, and none of them were violent or hostile.[15] For example, a current lieutenant at the MDC said that when the detainees arrived they were scared and visibly afraid. He said it became apparent to him that the detainees were not terrorists.

In addition to alleging that they were slammed against walls, five detainees alleged MDC staff members used force on their heads or necks. For example, one detainee stated that when certain officers pressed him against the wall, they put a lot of pressure on the back of his head and pressed his forehead against the wall. He said whenever he moved his head away from the wall, the officers banged his head on the wall. Similarly, another detainee told us that on the day he arrived at the MDC, one officer grabbed the back of his head in the elevator, pushed his whole face against the elevator wall, and squeezed his head behind his ear as hard as he could. The detainee said, "It was very, very painful."

The two senior BOP officials we interviewed stated that pressing a compliant, non-combative inmate's head or neck against the wall is not an appropriate control technique. The official responsible for training BOP officers said it never was acceptable to touch or use force on an inmate's head or neck unless the inmate was violent and staff members were trying to defend themselves. As noted above, BOP policy prohibits staff members from using more force than necessary to control inmates, or causing them unnecessary physical pain or extreme discomfort. See BOP P.S. 3420.09 and BOP P.S. 5566.05.

Lieutenant 1 identified two officers who regularly pressed detainees' heads against the wall. He said one officer put detainees' faces against the wall and screamed at them, and the other officer frequently put his hand on the back of detainees' necks and put their heads on the wall.

When we interviewed the two officers Lieutenant 1 identified, however, both denied ever pressing detainees' heads into the wall or ever witnessing any officer touch a detainee's head or neck. One of the officers commented to us that, "there could be serious damage" if officers put detainees' heads on the wall.

Similarly, nearly all of the other current and former staff members we interviewed maintained they never saw or heard of staff members touching detainees' necks or heads, or pressing detainees' heads against walls. One

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[15] While the detainees were largely compliant, staff members occasionally had to enter a few detainees' cells and use force to prevent detainees from engaging in conduct that violated ADMAX SHU rules, including peeling paint off the walls, injuring themselves, hiding from cameras, or refusing to come to the cell door to be handcuffed.

former officer stated, "we don't put hands on their heads," and another former officer said officers specifically told the detainees not to place their heads against the walls.

However, several videotapes showed officers pressing detainees heads against the wall. One tape showed an officer controlling a detainee by his head and firmly pressing his head and neck against the wall until a lieutenant, noticing the video camera, slapped the officer's hand away. On another videotape, we saw an officer grab a detainee by his hair and his neck, and firmly press his head against a wall. (Image 4) This particular incident was witnessed by one of the officers who told us that he never saw any staff member touch a detainee's neck or head, or press a detainee's head to the wall.

**Image 4: Officers firmly press detainee's head against the wall.**

In sum, we concluded based on videotape evidence, detainees' statements, and staff members who corroborated allegations of abuse, that several MDC staff members slammed and bounced detainees into the walls when they first arrived at the MDC and sometimes in the ADMAX SHU, without justification and contrary to BOP policy. We also concluded that some staff members, contrary to their denials, inappropriately used force on detainees' necks and heads, and pressed their heads against walls.

### 2. Bending Detainees' Arms, Hands, Wrists, and Fingers

Ten detainees alleged that while their hands were cuffed behind their backs, MDC staff members inappropriately twisted or bent their arms, hands, wrists, or fingers during escorts on the ADMAX SHU or to and from R&D, causing them pain. The detainees said staff members bent their arms up into the middle of their backs, pulled their thumbs back, twisted their fingers and

wrists, and bent their wrists forward towards their arms (referred to by MDC staff members as "goosenecking").

As noted above, BOP policy prohibits staff members from using more force than necessary to control an inmate. Similarly, BOP P.S. 5566.05, "Use of Force and Application of Restraints on Inmates," authorizes staff members to use force on inmates only as a last alternative after all other reasonable efforts to resolve a situation have failed. In our interviews with two senior BOP officials, they indicated that twisting or bending hands, wrists, or fingers of compliant inmates is an inappropriate control technique. The BOP official who is responsible for training new BOP officers on restraint and escort techniques stated that staff members should not use pain compliance techniques, such as bending fingers or twisting wrists, unless the inmate is noncompliant or violent and confrontation avoidance through communication has failed. He stated that using pain compliance methods under any other circumstances would be using more force than necessary on an inmate and thus would violate BOP policy.

Two lieutenants and an officer told us that MDC staff members twisted and bent detainees' hands, wrists, and fingers. Lieutenant 1 stated that one officer always twisted detainees' hands during escorts, even when they were being compliant. He said that he had to correct this officer not to hold detainees' fingers or hands "in a manner which causes unnecessary pain." Lieutenant 2 told us he saw officers unnecessarily gooseneck detainees' wrists and said he had to correct them. In addition, an R&D staff member told us he saw officers control detainees by bending their wrists down in "modified gooseneck holds." He stated that these holds were "modified" because the officers were not bending detainees' wrists in order to hurt them, unlike the gooseneck hold. However, he said that the modified gooseneck holds made the detainees uncomfortable and caused some detainees to complain that they were in pain.

Other current and former MDC staff members we interviewed told us different things with respect to whether they or other officers bent detainees' thumbs and goosenecked their wrists. Some said officers never were supposed to hold or bend detainees' thumbs, and they never saw or heard of staff members bending detainees' thumbs or goosenecking their wrists. Others said it was appropriate to bend detainees' thumbs, gooseneck their wrists, or use pain compliance methods if the detainees were being noncompliant or combative, although many of them said the detainees never were noncompliant or combative. One lieutenant told us that it was possible that officers intentionally twisted the injured hand of one detainee who argued with the officers, "just because it's human nature."

Moreover, contrary to some officers' denials that staff members ever bent detainees' hands, wrists, or fingers, in our review of videotapes we observed

several instances when MDC staff members bent compliant detainees' arms, hands, wrists, and fingers for no apparent reason. For example, we saw a staff member gratuitously gooseneck a detainee's wrist during a routine escort, even though the detainee was fully cooperative and compliant. (Image 5)

**Image 5: Officer uses thumb to gooseneck compliant detainee's wrist.**

Based on the consistency in the detainees' allegations, witnesses' observations, and videotape evidence, we believe some staff members inappropriately twisted and bent detainees' arms, hands, wrists, and fingers, and caused them unnecessary physical pain, in violation of BOP P.S. 5566.06.

### 3. Lifting Detainees, Pulling Arms, and Pulling Handcuffs

Several detainees alleged that MDC staff members carried them, pulled their handcuffs or waist chains, dragged them, or lifted them off the ground by their restraints and arms. Some detainees also alleged staff members pulled their arms up while their hands were cuffed behind their back, which exerted great pressure on their handcuffs and hurt their wrists. Many of these allegations related to the detainees' first day at the MDC.

For example, one detainee stated staff members dragged him along the ground from R&D to his cell on the ADMAX SHU the day he arrived at the MDC. Similarly, a second detainee alleged MDC staff members pulled him by his arms from R&D to the ADMAX SHU. Furthermore, a third detainee told us that staff members linked their arms through his cuffed elbows to lift him off the ground every time they moved him for the first three days he was at the MDC, even though he was compliant. Another detainee said that staff members lifted him off the floor by his chains and ran with him, even though he was fully restrained and compliant.

According to the senior BOP official responsible for training BOP officers on restraint and escort procedures, it is unnecessary and inappropriate for staff members to lift compliant inmates' restrained arms up behind their backs, even to pat search their lower back area. He also stated that it is not appropriate for staff members to lift or carry inmates if they are compliant and willing to walk on their own. He said using these techniques on compliant inmates violates the BOP's policies because it can cause the inmates unnecessary pain. As noted above, BOP policy prohibits staff members from using physical violence, causing inmates unnecessary physical pain or extreme discomfort, or using any force beyond that which is reasonably necessary to subdue an inmate. See BOP P.S. 3420.09 and 5566.05.

Several MDC staff members and a detainee's attorney told us they witnessed staff members carry detainees, lift detainees, pull detainees' restraint chains, or pull detainees' arms. For example, Lieutenant 1 stated he had to correct an officer for making detainees walk on their toes by lifting their arms or restraints in a painful way. Another MDC lieutenant said there were times officers pulled on detainees' handcuffs too much, and he had to slap the officers' hands away. In addition, one detainee's attorney told us that even though his client was in leg restraints, the officers hurried him down the hall so quickly that they nearly were picking him up off the ground when they brought his client to meet with him.

Most current or former MDC staff members we interviewed told us they did not see, hear, or ever recall staff members carrying detainees, lifting detainees, pulling detainees' restraint chains, or pulling detainees' arms to hurt their wrists.

On videotapes of the detainees, however, we observed MDC staff members carry compliant detainees, pull detainees' arms in a way that painfully strained their handcuffed wrists, and forcefully hurry detainees during escorts. For example, we saw staff members in separate incidents quickly move two detainees by carrying them horizontally to the floor, even though there was no indication the detainees refused to walk. We also saw several officers raise compliant detainees' handcuffed arms up behind their backs in a way that bent the detainees' elbows and appeared to hurt the detainees' arms and wrists. (Image 6)

**Image 6: Officers raise compliant detainee's arms up behind his back.**

The senior BOP official responsible for training new officers reviewed some of these instances on the videotapes and stated that the officers' use of these techniques was inappropriate.

We determined from the videotapes and witnesses' statements that some staff members inappropriately carried or lifted detainees, and raised or pulled their arms in painful ways. However, we did not substantiate detainees' allegations that staff members dragged them on the ground, lifted them solely by their chains, or refused to let their feet touch the ground for days.

### 4. Stepping on Detainees' Chains

Several detainees alleged that MDC staff members purposely stepped on their leg restraint chains while they were stationary and also while they were walking, injuring their ankles and causing them to fall. According to one detainee, after staff members stepped on his leg restraint chain and caused him to fall, they dragged him by his handcuffs and clothes, stood him up, stepped on his chain again, and repeated the process.

The senior BOP official who trains new BOP officers stated that staff members are never taught to step on inmates' leg restraint chains, even if the inmate is non-compliant, because there is no correctional purpose served in doing so. In his opinion, the only reason officers would step on an inmate's leg restraint chain would be to inflict pain. Again, BOP policy specifically prohibits staff members from using more force than necessary to control inmates, inflicting unnecessary physical pain on inmates, or causing inmates extreme discomfort.

Lieutenant 2 acknowledged that he observed officers step on detainees' leg restraint chains when they were placed against the wall, although he said he did not like it. He explained that because the detainees' legs were spread apart and the leg restraint chain was taut, the leg restraints could have bruised the detainees' ankles when officers stepped on the chain. Lieutenant 2 said he tried to correct officers when he saw them step on detainees' leg restraint chains.

An R&D staff member also said he saw officers step on detainees' leg restraint chains during pat searches in R&D. According to this staff member, officers stepped on the detainees' leg restraint chains when the detainees first started arriving at the MDC, although they stopped stepping on their leg restraint chains as time passed.

Similarly, an INS agent witnessed MDC staff members step on two detainees' leg restraint chains while firmly holding them against the wall. The agent said the more pressure the officers put on the leg restraint chains, the more the detainees squirmed and complained; and the more the detainees squirmed and complained, the "worse it got" for them.

One MDC correctional officer who assisted with approximately 7 to 10 detainee escorts from R&D to the ADMAX SHU said he observed staff members stepping on detainees' leg restraint chains. The officer incorrectly thought that security procedures required officers to step on detainees' leg restraint chains whenever they were stopped or whenever officers needed to remove their leg restraints. The officer said staff members stepped on detainees' leg restraint chains when they came out of their cells before going to recreation, when officers had to apply or remove leg restraints, or when officers escorting a detainee had to wait for elevators or doors. He stated, however, that he thought the officers only stepped on excess chain that was on the ground and not on chain that was stretched tight between the detainees' legs.

Our investigation found evidence that some detainees had substantial bruises and scabs around their ankles caused by the leg restraints. For example, we reviewed a videotape that showed that by one detainee's second day at the MDC, his ankles were badly bruised.[16]

Similarly, another detainee's attorney said that he observed significant black and blue bruises on his client's ankles and that his client told him they were caused by staff members who stepped on his leg restraint chains. Based

[16] An MDC doctor who examined the detainee suggested in the videotapes that his bruises were caused by irritation from the leg restraints and said that he recommended the detainee wear his leg restraints over his socks to prevent further bruising. However, a videotape of the detainee's medical examination showed the detainee already had been wearing the leg restraints over his socks.

on the statements of MDC staff members, we believe these injuries were the result of staff members stepping on detainees' leg restraint chains, although tight leg restraints that restricted blood flow also may have contributed to bruising around detainees' ankles.[17]

In our interviews, numerous current or former MDC staff members who handled the detainees asserted they never saw or heard of staff members stepping on detainees' leg restraint chains. Several of them, including a senior MDC management official, said it never would be appropriate for staff members to restrain detainees by stepping on their leg restraint chains, unless there was an emergency, because it would have hurt the detainees' legs or caused them to trip.

However, these denials were belied by the statements of other officers, which we described above. Moreover, despite the senior MDC management official's statement that it never was appropriate to step on a detainee's leg restraint chain, we saw a videotape in which he and another staff member appeared to restrain a detainee by stepping on his leg restraint chain during a non-emergency medical examination.[18]

Based on the consistency in the detainees' allegations, eyewitness statements by several staff members, videotape evidence of detainees' ankle injuries, and videotape evidence of the senior MDC management official and another staff member stepping on a detainee's leg restraint chain, we believe some staff members violated BOP policy by stepping on detainees' leg restraint chains. However, the evidence is inconclusive regarding whether MDC staff members stepped on detainees' leg restraint chains while they were walking or repeatedly tripped them and dragged them on the floor, as one detainee alleged.

### 5. Improper Application and Use of Restraints

As described in the June 2003 Detainee Report, the BOP treated all September 11 detainees as "high security" inmates, which meant that they were placed in the ADMAX SHU and subjected to the strictest form of confinement whenever they were taken out of their cells. For example, the

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[17] We discuss this further under "Improper Application and Use of Restraints" in section 5 below.

[18] In this incident, it appeared that stepping on the detainee's leg restraint chain did not pull on the detainee's ankles and may have been intended to ensure that the detainee would not hurt himself or others by bucking his legs. Yet, after reviewing the videotape with us, the senior MDC management official continued to maintain that he did not step on the chain. The other employee on the videotape acknowledged that he believed he and the senior MDC management official stepped on the detainee's leg restraint chain.

detainees were restrained with what the BOP calls "hard restraints:" steel handcuffs, leg restraints, and sometimes waist chains.

Nine detainees alleged that staff members applied handcuffs or leg restraints too tightly, punished the detainees by squeezing their handcuffs tighter, did not loosen restraints after the detainees complained that they were very painful, or left detainees restrained in their cells for long periods of time. For example, one detainee filed a formal complaint against one officer for squeezing his handcuffs tightly during an escort and causing his wrists to bruise. Similarly, another detainee told us that some of the MDC staff members intentionally hurt the detainees by tightening their restraints. This detainee said that if the detainees were "mouthy" or cursed, staff members punished them by applying their restraints tightly. He also said that if a detainee complained that his restraints hurt, the staff members tightened his restraints even more.

While the proper application of restraints may result in some discomfort, the BOP prohibits staff members from using restraints to punish inmates, cause unnecessary physical pain or extreme discomfort with overly tight restraints, or restrict blood circulation in any manner. See BOP P.S. 5566.05 and 3420.09. When staff members apply restraints to inmates in "use of force" incidents, for example, the BOP prohibits staff members from continuing to restrain the inmates after they have gained control of them. See BOP P.S. 5566.05. In addition, the BOP prohibits staff members from applying restraints to an inmate in an administrative detention cell, such as an ADMAX SHU cell, without approval of the Warden or his designee. See BOP P.S. 5566.05.

The senior BOP official who trains new BOP officers stated that all BOP officers are taught how to apply restraints in a way that does not cause pain or restrict blood circulation. However, we observed a few instances on videotapes when medical personnel examining a detainee determined a detainee's restraints were applied too tightly and needed to be loosened. While these videotapes show that staff members applied some detainees' restraints too tightly, we did not substantiate particular detainees' allegations that staff members injured them by tightening their restraints or punished them by applying their restraints too tightly.

However, our investigation developed evidence that staff members punished at least two detainees by leaving them restrained in segregated cells for at least seven hours. According to the senior BOP official responsible for training new officers, inmates can be left in restraints in their cells only so long as they are combative. He stated a lieutenant has to check on the restrained inmates every two hours to determine if they are still physically combative. See BOP P.S. 5566.05. As soon as a lieutenant determines the inmate has regained physical control and is no longer a threat to himself, other inmates, or

property, his restraints must be removed. The official said staff members violate BOP policy if they keep inmates restrained longer than necessary, or if they restrain inmates to punish or discipline them. He further stated that if inmates are being disruptive or noncompliant by yelling, it is entirely ineffective to place them in restraints because handcuffing them will not stop them from yelling. He said the only appropriate action would be to move them to another cell where their yelling cannot be disruptive.

On November 8, 2001, two detainees began yelling in their cells and banging on their cell doors in response to screams from a third detainee who was in the medical room having a blood sample taken.[19] On videotapes, we heard a couple of detainees yelling, "What are you doing to [the third detainee]?" immediately after the third detainee began screaming. We also observed that as soon as these detainees began yelling and banging on their cell doors, a senior MDC management official abruptly turned and walked out of the medical exam room with his deputy following after him. Of the ten staff members in the medical exam room at the time, only the senior MDC management official and his deputy responded immediately to the detainees. Shortly after the senior MDC management official left the medical examination room, we heard a staff member, who sounded like the senior MDC management official, say things to the detainees like, "What do you want?" and "Are you done?"

Subsequently, according to staff members' memoranda and official reports, staff members activated an emergency alarm to request assistance on the ADMAX SHU and performed an "emergency use of force" on the two detainees who had yelled and banged on their cell doors. These memoranda and reports allege that the two detainees were staging a group demonstration and encouraging other detainees to riot and engage in a hunger strike. As part of the "emergency use of force," the two detainees were taken to recreation cells, left there for about half an hour, and then transferred to segregation cells.

In the videotapes of the two detainees initially being escorted from their cells to the recreation deck, we observed that they fully complied with the staff members and that the staff members were not aggressive with them. We saw no "use of force" employed or needed during these escorts from their cells.[20]

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[19] The detainee alleged he was screaming in part because one of the officers had bent his thumb back severely while his blood was being taken. While we could not determine by viewing a videotape of the incident whether this officer had bent the detainee's thumb back, on the videotape it appeared that the officer held the detainee's thumb during part of the medical examination.

[20] According to MDC policy, all "use of force" incidents must be videotaped and the tapes given to the Special Investigative Section (SIS) as evidence to be stored in the SIS evidence safe (continued)

While the two detainees were on the recreation deck, we heard staff members discuss the incident off-camera. The staff members never indicated the two detainees were inciting a riot or staging a group demonstration. Instead, one staff member stated to the others that the ADMAX SHU could not house the detainees adequately because there were too many detainees for the staff to handle. Another staff member responded, "Well, things are quiet now. They are not yelling or nothing." Finally a third staff member, who sounded like the senior MDC management official, replied, "Right. We gotta follow up. We've got to leave them in restraints and make them behave – that this is not appropriate."

Shortly after this discussion, we saw on videotapes staff members escorting the two detainees from the recreation deck to segregation cells. These escorts were much more aggressive than the previous escorts to the recreation deck. We saw the officers rush the detainees down the corridors, slam one detainee into walls, ram the second detainee into walls, and hold both of them by their heads or necks. Two lieutenants present during these escorts submitted memoranda alleging that the two detainees were "placed against the wall" because they were uncooperative or resisting staff members. On videotapes of the escorts, however, the two detainees did not appear to be uncooperative or resisting staff members.

The two detainees were then left in hard restraints for more than seven hours in segregation cells.[21] Although staff members submitted memoranda or reports indicating that the officers had handled the two detainees in accordance with BOP policy, the evidence we reviewed indicates that staff members violated BOP policy by using more force than necessary to gain control of the detainees – who appeared compliant – and by leaving them restrained in their cells for an inappropriately long period of time.

Based on our review of the videotapes that were recorded at different locations on the ADMAX SHU, it did not appear that the two detainees were staging a group demonstration, inciting a riot, or doing anything but yelling and banging on their cell doors in response to the screams of the third detainee who was in the medical exam room. While detainees are not permitted to yell, bang on doors, or curse at staff under ADMAX SHU rules, we do not believe the two detainees' behavior in this instance amounted to inciting a riot or required them to be locked in hard restraints in segregation cells for seven hours. Rather, the evidence suggests that in this incident, staff members used rough treatment and restraints to punish the two detainees, in violation of BOP policy.

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for two-and-a-half years. However, there were no tapes of these detainees for this date in the SIS safe, according to MDC officials.

[21] An official report from the MDC states they were restrained from 2:00 p.m. to 9:10 p.m.

### 6. Rough or Inappropriate Handling of Detainees

Several detainees alleged MDC staff members handled them roughly or inappropriately, asserting that they were punched, kicked, beaten, or otherwise physically abused.

According to the BOP official who trains new BOP officers, officers are not to handle inmates roughly, aggressively, or in any manner that causes them unnecessary pain. He reiterated that using any more force than necessary in handling inmates violates BOP policy.

Several MDC staff members confirmed detainees' allegations that officers used unnecessary force and handled detainees roughly. A current MDC lieutenant who was assigned briefly to the ADMAX SHU stated that a lot of detainees were treated "pretty roughly" when they were brought into the sally port and R&D. Another lieutenant said, "We were not using kid gloves with these guys."

In addition, two former MDC lieutenants and a current lieutenant stated that some officers took their anger and frustration about the September 11 terrorist attacks out on the detainees. They stated they had to tell the officers to "ease up" when handling the detainees, and they had to remove some officers from escort teams because they were too rough with the detainees or were not able to handle them professionally. One of the lieutenants said that some officers "tried to prove that they were men or prove that America was superior" by being unprofessional or overly aggressive with the detainees.

An R&D staff member said he and other R&D staff members had to take officers off escort teams because they were "rambunctious" and "excited." In addition, the R&D staff member told us officers were unnecessarily rough while pat searching the detainees the first few days they arrived. He commented, "You feel bad if you're roughing up someone who is crying." This staff member also stated that he witnessed officers take off detainees' shoes during pat searches in R&D and knock them against the wall right next to the detainees' faces.

Despite these staff members' statements, many other current and former MDC staff members we interviewed claimed that officers never were aggressive with or used unnecessary force on the detainees. Many also denied that detainees were ever pressed or held to the wall. One lieutenant maintained that the detainees were "treated with kid gloves."

On the videotapes, however, we observed that staff members often handled detainees roughly or inappropriately. For example, we observed that staff members regularly pressed and held detainees to the wall. In addition, we saw one officer sharply slap a detainee on the shoulder and grab another

detainee's shoulder and push him. We also saw another officer firmly poke a detainee in the shoulder without any provocation.

One detainee alleged that in late October 2001 staff members punished him twice for talking too much by stripping him, giving him only a sleeveless t-shirt, and locking him in a cell for 24 hours without food or blankets. A second detainee stated he saw officers put the first detainee in cell number 1 with no clothes or blankets, and throw water on the cell floor. The second detainee said that cell number 1 was the punishment cell and the officers kept the first detainee in there all the time. A third detainee also told us that staff members used cell number 1 to punish detainees.

The first detainee identified three staff members who allegedly punished him by locking him in a cell in a sleeveless t-shirt without food or blankets. When interviewed by the OIG, one of the staff members denied generally that any detainees were mistreated. The other two staff members said the detainee never was placed in a cell without food, although he had been placed on suicide watch once or twice and was stripped, given a suicide watch gown, and put in a different cell so he could be monitored.

However, the detainee's medical records do not indicate that he ever was suicidal or needed to be placed on suicide watch. His file also does not contain any suicide risk assessments or suicide watch records. If the detainee was suicidal, his suicide risk assessment or suicide watch should have been documented, as was done for more than ten other detainees.

We did not receive any videotapes that showed the detainee being placed on or monitored during a suicide watch, even though we received videotapes of other detainees who were placed on suicide watch. However, we observed on videotape an incident in which four staff members, including the two who maintained the detainee had been suicidal, cornered the detainee in a recreation cell while a lieutenant threatened him to stop inciting and talking to other detainees. The lieutenant told him that if he did not do what the staff members said, they would send him to a penitentiary where he would have even less privacy and freedom than at the MDC. The lieutenant said, "You think we can't break you? [The penitentiary] will." This incident indicates that staff members were irritated with the detainee and lends credibility to the detainee's allegation that some of the same staff members later punished him by locking him in a segregated cell because he talked too much.

While the evidence is not conclusive, it suggests that the detainee was not suicidal and staff members inappropriately and unnecessarily stripped him down to a sleeveless t-shirt and locked him in a segregation cell for 24 hours as a form of punishment.

In addition, videotape evidence and witnesses' statements indicate that some staff members often handled detainees roughly or inappropriately. However, we did not find evidence that staff members punched, kicked, or beat detainees, as some detainees alleged.

### 7. Conclusion

In sum, we concluded, based on videotape evidence, detainees' statements, witnesses' observations, and staff members who corroborated some allegations of abuse, that some MDC staff members slammed and bounced detainees into the walls at the MDC and inappropriately pressed detainees' heads against walls. We also found that some officers inappropriately twisted and bent detainees' arms, hands, wrists, and fingers, and caused them unnecessary physical pain; inappropriately carried or lifted detainees; and raised or pulled detainees' arms in painful ways. In addition, we believe some officers improperly used handcuffs, occasionally stepped on compliant detainees' leg restraint chains, and were needlessly forceful and rough with the detainees – all conduct that violates BOP policy. See BOP P.S. 5566.06.

## B. Verbal Abuse

Twenty-two detainees alleged that staff members verbally abused them by calling them names, cursing at them, threatening them, or making vulgar or otherwise inappropriate comments during strip searches. For example, detainees alleged staff members called them names like "terrorists," "mother fuckers," "fucking Muslims," and "bin Laden Junior." They also said staff members threatened them by saying things like:

"Whatever you did at the World Trade Center, we will do to you."

"You're never going to be able to see your family again."

"If you don't obey the rules, I'm going to make your life hell."

"You're never going to leave here."

"You're going to die here just like the people in the World Trade Center died."

Several of the detainees said that when they arrived at the MDC, they were yelled at and told things like:

"Someone thinks you have something to do with the terrorist attacks, so don't expect to be treated well."

"Don't ask any questions, otherwise you will be dead."

"Put your nose against the wall or we will break your neck."

"If you question us, we will break your neck."

"I'm going to break your face if you breathe or move at all."

One detainee stated that when the detainees prayed in the ADMAX SHU, officers said things like, "Shut the fuck up! Don't pray. Fucking Muslim. You're praying bullshit." Another detainee alleged that when the officers were mistreating the detainees, the officers sometimes said, "Welcome to America."

The BOP P.S. 3420.09, "Standards of Employee Conduct," specifically prohibits verbal abuse of inmates, stating, "An employee may not use . . . intimidation toward inmates," and "[a]n employee may not use profane, obscene, or otherwise abusive language when communicating with inmates. [Employees] shall conduct themselves in a manner which will not be demeaning to inmates."

Nearly all of the staff members we interviewed denied ever verbally abusing the detainees or witnessing any other staff member verbally abuse detainees. Several of them denied ever hearing another staff member even utter a curse word around the detainees. One officer told us that all the staff members were "very polite" with the detainees and that they would ask the detainees, "Can you please do this?" and "Can you please do that?" instead of ordering them around.

However, in our interviews with several current and former staff members, we found evidence that corroborated some of the detainees' allegations of verbal abuse and refuted the officers' denials. For example, one current lieutenant told us that when some detainees requested more food, he heard some officers respond, "You're not getting shit because you killed all those people."

Another current lieutenant told us about one officer who referred to the detainees as "fuckers." In addition, a staff member from R&D stated that officers cursed around the detainees, and told each other jokes and made derogatory statements about the detainees during strip searches.[22]

One officer acknowledged to us that officers sometimes let their personal feelings get in the way of their professional responsibilities and said things they should not have said. Moreover, a former officer, who maintained that he and fellow officers never verbally abused the detainees, frequently called the detainees "terrorists," "dirtbags," and "scumbags" during one of our interviews of him.

In addition to these current and former staff members, witnesses from outside the MDC also provided some corroboration for the detainees' allegations of verbal abuse. One detainee's attorney said he heard MDC

[22] Strip searches are discussed further below under section III (C), "Strip Searches of Detainees."

officers constantly refer to the detainee as "the terrorist," "the 9/11 guy," or "the bomber." Similarly, an INS agent told us the detainees were read "the riot act" when they first were brought into the MDC.

We also found evidence on videotapes that suggested officers made inappropriate statements regarding the detainees. For instance, contrary to what many staff members told us, we heard on videotapes staff members curse repeatedly around the detainees. We also saw staff members behave unprofessionally during some strip searches, as the R&D staff member described; on videotapes, staff members laughed, exchanged suggestive looks,. and made funny noises before and during strip searches.

We also observed one officer, who was assisting in a routine escort of a detainee, suddenly shout to another staff member in a threatening way, "This guy over here (gesturing to the detainee) thinks by getting nasty with a female officer and disobeying orders, he's going to get shit (legal calls) from you." At this point, the video camera operator admonished the officer to watch what he said on camera. At the end of the escort, the officer leaned over to the detainee and quietly said something that could not be heard on camera.

Similarly, as discussed above, we observed four staff members corner one detainee in a recreation cell. A lieutenant told him that if he did not do what the staff members said, they would send him to a penitentiary where officers would "break" him. This incident is very similar to threats that another detainee alleged a lieutenant made to him. The other detainee told us that a lieutenant against whom he filed a complaint came to his cell and threatened him by saying, "If you guys make too much noise, you're going to the [penitentiary]. And those guys are killers. You won't survive an hour there."

From the statements of several staff members and witnesses outside the MDC and from the videotapes that we reviewed, we concluded that some staff members violated BOP policy by verbally abusing some detainees.

## III. SYSTEMIC ISSUES RELATING TO THE MDC

### A. Issues Addressed in the Detainee Report

The June 2003 Detainee Report described various issues related to the treatment of detainees at the MDC, including problems with detainees receiving timely access to counsel, detainees being held under extremely harsh conditions of confinement such as cells being lighted 24 hours a day, detainees being held in lockdown for at least 23 hours a day, detainees being placed in full restraints every time they were moved, and detainees not receiving

adequate recreational opportunities.[23] Because those issues were discussed in detail in the Detainee Report, we do not repeat them in this report.

In the course of this investigation, however, we found other systemic problems and further information on several issues previously discussed in the Detainee Report regarding the treatment of MDC inmates, which we describe below. These include staff members using a t-shirt taped to the wall in R&D to send detainees an inappropriate message, audio taping detainees' meetings with their attorneys, unnecessarily and inappropriately strip searching detainees, and banging on detainees' cell doors excessively while they were sleeping. In addition, we describe the difficulties we had in obtaining videotapes from the MDC, despite our repeated requests, and our general assessment of the cooperation and credibility of many officers we interviewed.

### B. Video and Audio Taping Detainees' Meetings with Their Attorneys

We found that MDC staff members not only videotaped the detainees' movements when taken from their cells to visit with their attorneys, they also recorded detainees' visits with their attorneys using video cameras set up on tripods outside the attorney visiting rooms. In total, we found more than 40 examples of staff videotaping detainees' attorney visits.[24] On many videotapes, we were able to hear significant portions of what the detainees were telling their attorneys and sometimes what the attorneys were saying as well.

It appeared that detainees' attorney visits were recorded intentionally. On one occasion, an officer instructed the detainee not to speak in Arabic with his attorney because the meeting was being videotaped. In another videotape, a lieutenant told the detainee and his attorney that he had been instructed that they were required to speak in English during the visit. We also observed on several occasions that officers lingered outside the attorney visiting rooms and appeared to be listening to the conversations.

Audio taping inmates' meetings with attorneys is prohibited by federal regulation. Chapter 28 C.F.R. § 543.13(e) provides that "Staff may not subject visits between an attorney and an inmate to auditory supervision." On

[23] Many detainees said they declined to go to the limited recreation because it often was offered only in the early morning when it was cold, and they had only short-sleeve jumpers and no shoes. Some detainees also complained that they were routinely strip searched after recreation, even though they were frisked before and videotaped during their recreation. In reviewing the videotapes, we found that many times the detainees were in the recreation cells before 7:00 a.m. and they appeared to be uncomfortably cold. We also saw videotapes of detainees being kept in restraints during their recreation period.

[24] Nearly every time we saw a detainee escorted to an attorney visit, his visit was videotaped. While we could hear audio on each of these videotapes, sometimes it was difficult to understand the detainees.

October 31, 2001, the Attorney General signed a directive that permitted monitoring of attorney-inmate meetings only under limited circumstances when the Attorney General approved the monitoring of the conversations and notice was given to the inmate and the inmate's lawyer. 28 C.F.R. § 501.3(d). According to BOP's Office of General Counsel, this authority was not used at the MDC. In a December 18, 2001, memorandum to wardens in the Northeast Region (which includes the MDC), M.E. Ray, the Regional Director, provided specific guidance on videotaping attorney visits for the detainees: "Visits from attorneys may also be visually recorded, but not voice recorded." No BOP or MDC memorandum specifically authorized taping attorney visits for the September 11 detainees or identified reasons to depart from standard BOP policy or the federal regulation.

When interviewed prior to the OIG obtaining all of the videotapes, MDC Warden Michael Zenk told the OIG that, initially, attorney visits were video and audio taped, but in November 2001, after one of the attorneys complained, the video camera was moved far enough away that the audio of the visits was not recorded.[25] However, as late as February 2002, conversations between detainees and their attorneys are still audible on many of the tapes. When confronted with this information, Warden Zenk stated that the visits should not have been audio taped. He also said his staff thought moving the camera away from the attorney visiting rooms ensured that the visits would not be audio taped.

Recording the detainees' attorney visits also was not necessary for the MDC's security purposes. The attorney visits took place in non-contact rooms separated by thick glass, and the MDC required the detainees to be restrained in handcuffs, leg restraints, and waist chains during the visits.[26] The detainees also were pat searched or strip searched after these meetings.

Taping detainees' attorney visits potentially stifled detainees' open and free communications with legal counsel and discouraged them from making allegations against specific staff members. Nevertheless, in some of the taped conversations, we heard the detainees tell their attorneys detailed allegations about the poor and abusive treatment they had received at the MDC. They described being slammed against the wall, physically abused, verbally abused, and intentionally kept awake at night. Their statements were consistent with what the detainees related to the OIG when they were interviewed months later.

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[25] Warden Zenk arrived at the MDC in late April of 2002 and provided this information based upon briefings by his staff members.

[26] See the October 18, 2001, official memorandum from a senior MDC management official to all MDC lieutenants.

In sum, we concluded that audio taping attorney visits violated the law and interfered with the detainees' effective access to legal counsel.

### C. Strip Searches of Detainees

Upon arriving at the MDC, consistent with MDC and BOP policy, detainees were strip searched in R&D and provided prison clothing. Also in accordance with MDC policy, the detainees were strip searched in R&D when they returned from court appearances or anytime they left the MDC. Very few of the detainees complained about the strip searches that occurred in R&D. However, many complained about strip searches that occurred in the ADMAX SHU.

Detainees complained that they were strip searched on the ADMAX SHU for no apparent reason, either minutes after they had been thoroughly searched in R&D and immediately escorted by officers to the ADMAX SHU, or when they had not even left the ADMAX SHU. Several detainees also stated that the staff members performing or observing the strip searches laughed at the detainees during the searches. Detainees complained that the strip searches on the ADMAX SHU often were filmed and that sometimes women were present or in the immediate vicinity during the searches. A few detainees maintained that MDC staff members used strip searches as a form of punishment.

In R&D, the strip searches were conducted in a room that contained detainees' prison clothing. The room had small dividers along the wall that blocked viewing from either side. When regular videotaping of the detainees started in October 2001, the video camera operators turned off the video cameras or filmed detainees only above the waist in R&D.

In contrast, on the ADMAX SHU the strip searches were conducted in either the multipurpose medical examination room, which is completely visible to anyone in the main ADMAX SHU corridor and the recreation cells, or in one of the empty cells on the range. Furthermore, many of the strip searches conducted on the ADMAX SHU were filmed in their entirety and frequently showed the detainees naked. Staff members consistently stated in interviews that filming a strip search in its entirety was against BOP policy.[27] While on some occasions the filming of the strip search was partially blocked by an officer observing the strip search, this did not appear to be an intentional strategy to give detainees more privacy. In a few videotapes, we heard the officers laughing while observing the strip searches.

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[27] BOP officials informed us that there is no national policy specifically prohibiting videotaping inmate strip searches. BOP P.S. 5521.05 provides that the strip search "shall be made in a manner designed to assure as much privacy to the inmate as practicable." However, the very act of filming the entire search seems to run counter to this policy.

It does not appear that the MDC issued written policies regarding when detainees were to be strip searched. According to the detainees and MDC staff, the strip searches on the ADMAX SHU were conducted on the following occasions: (a) always when detainees entered the unit; (b) sometimes when they departed from the unit; (c) often after attorney and social visits on the unit; (d) infrequently after recreation sessions on the unit; and (e) infrequently before medical examinations on the unit.

Staff members informed us that when the detainees arrived on the ADMAX SHU, the detainees had to be strip searched even if they had just been strip searched moments before in R&D.[28] Sometimes the same officers who were present for a detainee's strip search in R&D were present for the detainee's strip search on the ADMAX SHU. Several of the videotapes showed detainees' confusion as they futilely tried to explain that they had just been strip searched in R&D.

On the ADMAX SHU, whenever the detainees were outside their cells, they were handcuffed at all times and almost always were placed in leg restraints. As noted above, attorney and social visits were held in no-contact rooms separated by thick glass, detainees were restrained, and the visits were filmed. Nevertheless, detainees often were strip searched after their attorney and social visits. In interviews with the OIG, several officers stated it was standard MDC policy to strip search detainees following attorney or family visits, but they could not point us to any written policy. Yet, even if such searches were consistent with policy, they were applied inconsistently to the detainees and appeared to be unnecessary. Indeed, some staff members told us that the reason attorney and family visiting rooms were on the same floor as the ADMAX SHU was to avoid having to strip search the detainees.

Several detainees alleged that sometimes women were present during strip searches on the ADMAX SHU, which one detainee told the OIG he viewed as an affront to his religious beliefs.[29] During several of the videotaped strip searches, female voices can be heard in the background. In addition, one videotape shows a female staff member walking in the vicinity of a detainee undergoing a strip search.

Some detainees complained that the strip searches were used by the MDC staff as punishment. For example, in one videotape four officers escorted

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[28] However, we found that detainees who were taken off the ADMAX SHU to other locations in the institution, like the health unit or meeting rooms, were not always strip searched when they returned to the ADMAX SHU.

[29] BOP policy does not address whether staff members of the opposite gender may be present during strip searches, but BOP P.S. 5521.05 requires that staff of the same gender conduct the strip search unless there are exigent circumstances that are documented.

one detainee into a recreation cell and ordered him to strip while they berated him for talking too much with other detainees and for encouraging them to go on a hunger strike. We could see no correctional purpose or justification for strip searching this detainee, who had just been taken from his cell, pat searched, and then escorted into the recreation cell by the four officers.

In sum, we concluded that it was inappropriate for staff members in the ADMAX SHU to routinely film strip searches showing the detainees naked, and that on occasion staff members inappropriately used strip searches to intimidate and punish detainees. We also questioned the need for the number of strip searches, such as after attorney and social visits in non-contact rooms where the detainees were fully restrained and videotaped.

### D. Banging on Cell Doors

Many detainees alleged that officers loudly banged on their cell doors in an attempt to wake them up, interrupt their prayers, or generally harass them.[30] Under MDC and BOP policy, counts were conducted throughout the day and night, including midnight, 3:00 a.m., and 5:00 a.m.[31] During these counts, officers were required to see detainees' "human flesh." See BOP P.S. 5500.09. As a result, officers were permitted to wake detainees up at these times if they could not see their skin.[32] According to the officers, during the counts the detainees usually waved their hands from under their blankets, which generally were pulled over their heads to block out the cell lights that were illuminated at all times until at least February 2002.

While several detainees acknowledged to us they understood that the officers were required to conduct periodic counts, these detainees alleged that several officers went beyond what was required for the count by kicking the door hard with their boots, knocking on the door at night much more frequently than required, and making negative comments when knocking on the door.

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[30] Due to the physical characteristics of the metal cell doors and the acoustics on the range, the sound from a light knock on a cell door would reverberate loudly inside and outside the cell. Officers complained to us and to each other on videotapes regarding the loud sounds that came from the detainees banging on the cell doors.

[31] Counts on the ADMAX SHU were actually double counts. One officer went through the entire range and conducted a count, and then immediately afterwards a second officer conducted an independent second count. At the end, the officers confirmed that they counted the same number of detainees.

[32] BOP P.S. 5500.09 directs staff members to use a flashlight judiciously during nighttime counts, but to use enough light that there is no doubt the staff member is seeing "human flesh." On the ADMAX SHU, however, for months the cells continually were lit by two lights.

For example, one detainee claimed that officers kicked the doors non-stop in order to keep the detainees from sleeping. He stated that for the first two or three weeks he was at the MDC, one of the officers walked by about every 15 minutes throughout the night, kicked the doors to wake up the detainees, and yelled things such as, "Motherfuckers," "Assholes," and "Welcome to America." Similarly, another detainee stated that when officers kicked the doors to wake the detainees up, they said things like, "Motherfuckers sleeping? Get up!" A third detainee also claimed that a few officers made loud noises at night to keep the detainees awake and that these officers appeared to have fun conducting the counts by knocking on the cell doors. Another detainee said that officers would not let the detainees sleep during the day or night from the time he arrived at the MDC in the beginning of October through mid-November 2001.

One detainee's attorney told us that his client stated that every time he fell asleep the officers came and kicked the doors to wake him up. The attorney told us that the detainee said this was not part of the officers' prescribed counts, but that the officers would watch the in-cell cameras and come kick on the doors as soon as they thought the detainee was asleep.

The officers we interviewed denied that they gratuitously or loudly knocked, kicked, or banged on the detainees' doors. One of the officers stated that for the counts, including the ones in the middle of the night, he knocked on the detainees' cell doors and might have used his foot, but he did not kick the doors very hard. This same officer stated that another officer also used his boot to kick cell doors for counts, but he said that neither he nor the other officer ever used expletives with the detainees or said anything inappropriate or unprofessional. Nevertheless, this officer acknowledged that the detainees experienced "sleep deprivation" from a combination of having cell lights illuminated around the clock and the frequent counts. Another officer confirmed that detainees often were awake for the midnight and 3:00 a.m. counts.

Because the detainees were not moved from their cells during the night, staff members were not required to video record nighttime activities. As a result, none of the videotapes we reviewed showed the ADMAX SHU at night or showed the officers conducting counts at night. Due to the lack of videotape evidence and officers' denials, we were unable to substantiate the detainees' allegations that the officers gratuitously banged on the cell doors or woke up detainees unnecessarily. However, the combination of cells being continuously illuminated and the BOP requirement that officers had to see the detainees' skin during each count in the evenings caused detainees to be awakened regularly and suffer from sleep deprivation.

## E. T-Shirt with Flag and Slogan

As discussed above, many detainees alleged that staff members slammed or pushed them into the wall in the sally port where they were pat searched upon first arriving at the MDC. Numerous detainees recalled that a t-shirt was taped to a wall and that their faces were pressed against the t-shirt. For example, a detainee told us that staff members put his face right in the t-shirt, like he had to "kiss it."

In 11 videotapes we reviewed of a detainee entering the MDC, the staff members placed the detainee's face or head against or right next to the t-shirt while performing a pat search and exchanging the detainee's restraints.[33] The tapes show that the t-shirt was taped to the wall at eye-level near the bottom of the ramp in the sally port, across from where vehicles parked to unload detainees. In large, typed print on the t-shirt below the American flag were the words, "These colors don't run." The t-shirt was taped to the right of a large, red plastic sign reminding law enforcement personnel to lock up their firearms before entering the facility. The t-shirt was noticeable, especially because it seemed clearly out of place against a large block wall that was unadorned, except for the professionally designed plastic sign.

Most officers we interviewed who were involved in escorting detainees through R&D either specifically denied seeing the t-shirt or said they did not recall a t-shirt on the wall in the sally port area. A few officers said they remembered a t-shirt or flag on the wall in the sally port. While several claimed that the t-shirt was innocuous and merely a patriotic gesture, three staff members told us they were troubled by how the t-shirt was being used.

One of the three staff members worked in R&D and remembered that the t-shirt was placed on the wall in mid-September 2001, several days after the detainees began arriving at the MDC. He said that when the detainees were pat searched, officers leaned them into the wall and placed their faces against the t-shirt. The R&D staff member believed the purpose of the t-shirt was to send a message to the detainees. He did not know when the t-shirt was taken down, although he remembered seeing it on the floor once before it was placed again on the wall.

The second staff member, a lieutenant, told us that he was disturbed when he observed officers abusing the t-shirt by using it to "acclimate detainees to the MDC" and send a message to them. He said that when the detainees were in front of the t-shirt, the officers roughed them up and

[33] As stated above, even though the MDC instituted a policy beginning in early October 2001 to videotape all movements of detainees, including their escort through R&D, approximately 13 of the more than 300 videotapes that we received showed detainees in R&D.

"manhandled" them more aggressively than necessary. He said he brought his concerns about the t-shirt to the attention of a senior MDC management official, and he thought the t-shirt finally was taken down after he reported it.[34]

The third staff member, also a lieutenant, said he thought the t-shirt was "inappropriate and unprofessional." He claimed that he took the t-shirt down and threw it on the ground on five separate occasions, but staff members kept placing it back up on the wall. The lieutenant said he finally threw it in the trash before mid-November 2001.

We found, however, that in the earliest and latest videotapes that we viewed – in early October 2001 and mid-February 2002 – the t-shirt was displayed in the sally port where the detainees entered the institution. We observed the t-shirt on the wall in every video of the sally port during this time period. These videotapes contradict staff members' denials that the t-shirt existed and the lieutenant's claim that he took the t-shirt down five times and finally threw it away before mid-November 2001.

These videotapes further show that the way staff members used the t-shirt leaves little doubt that its placement was intentional. For example, in one videotape a staff member loudly ordered a detainee to, "Look straight ahead!" while he firmly pressed the detainee's upper torso into the wall and the t-shirt so that the detainee's eyes were directly in front of the phrase, "These colors don't run." Several other videotapes also indicate that the officers intentionally placed the detainees against the wall on or near the t-shirt.

Three videotapes of the lieutenant who claimed that he removed the t-shirt from the wall on five separate occasions showed him leading and pressing detainees against the t-shirt when he was searching them. This lieutenant never appeared uncomfortable with the t-shirt or the way in which it was used, as he maintained in his interview with us. For example, in one videotape he ordered a detainee to lift his head up twice until the detainee was looking directly at the flag and the phrase on the t-shirt.

In our view, the way in which the t-shirt was used by staff members was highly unprofessional. See BOP P.S. 3420.09 ("It is essential to the orderly running of any Bureau facility that employees conduct themselves professionally.") We also did not find credible staff members' claims that they lacked knowledge about the t-shirt, especially when we subsequently viewed videotapes showing several of these same officers in front of the t-shirt frisking detainees.

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[34] The senior MDC management official denied that any lieutenant brought concerns about the t-shirt to his attention until after it was already taken down.

### F. Obtaining Videotapes from the MDC

Shortly after the September 11 attacks, BOP Headquarters sent out a national directive to all regional directors to install video cameras in each September 11 detainee's cell.[35] Some MDC staff members told the OIG that the cameras were installed in the detainees' cells by mid-October 2001, although we learned from other staff members that the cameras were not operating in the cells until February 2002, which is the date on the earliest cell tape the MDC provided us.[36] A senior MDC official confirmed to us that the cell cameras in the ADMAX SHU were not operational until early February 2002.[37] He attributed the delay to logistical and electrical problems.

We determined that the MDC began on October 5, 2001, to videotape the movements of the detainees with handheld camcorders. The impetus for this practice was that a detainee complained to a judge on October 4, 2001, that he had been physically abused by staff members upon entering the MDC the previous day. According to an October 18, 2001, memorandum issued by a senior MDC management official, the purpose of taping detainee movements was to address "serious security concerns." In a memorandum dated October 9, 2001, the BOP Northeast Regional Director instructed all wardens in the region, which included the MDC warden, to videotape any movement of September 11 detainees outside their cells. The memorandum stated that the videotape policy was intended to deter unfounded allegations of abuse by the detainees. The memorandum also directed the wardens to preserve the videotapes indefinitely.

After wardens complained about the difficulties of storing and purchasing vast quantities of videotapes, the policy of preserving the videotapes indefinitely changed when a new regional director, M.E. "Mickey" Ray, issued a memorandum on December 18, 2001, which stated that videotapes had to be retained for only 30 days. After 30 days, videotapes had to be recorded over or incinerated. The only exception was for tapes showing "use of force" incidents and incidents where a detainee alleged abuse; these tapes had to be kept for two years and preserved as evidence in the SIS safe.

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[35] This policy was communicated by BOP Assistant Director Michael Cooksey to all BOP Regional Directors in a series of video conference calls that occurred between September 13 and September 20, 2001.

[36] When we requested the tapes in July 2003, the MDC had cell tapes for February 17, 2002, 3 days in March, 14 days in April, and every day from May through August 2002 when the last September 11 detainee was transferred out of the ADMAX SHU.

[37] Yet, this MDC official, in a memorandum dated October 5, 2001, certified that the in-cell cameras were installed and operating in 31 cells on the South Tier of the SHU where the detainees were held.

During the course of our investigation, we made several requests to MDC officials for videotapes. However, the officials' responses to our requests were inconsistent and inadequate. In response to each of our requests, we obtained additional videotapes that we previously had been told were destroyed or reused.

When the OIG first initiated an investigation of the detainee abuse allegations in October 2001, we requested all tapes for the detainees from the date they first arrived to a date in November 2001. The MDC provided the OIG with 14 tapes and indicated that tapes from other dates had been taped over or destroyed.[38]

In the spring of 2002, the OIG requested from the MDC all videotapes of the detainees from September 2001 to April 2002. Warden Zenk told the OIG that copying such a large number of tapes would be onerous, that the MDC already had given the OIG all the tapes relating to abuse allegations from detainees, and that the MDC received permission in December 2001 to begin recycling or destroying tapes. Warden Zenk and the OIG staff agreed that the MDC would give the OIG nine days of videotapes that related to allegations of abuse raised by detainees interviewed by the OIG. However, the OIG received tapes for only six days, totaling approximately 45 tapes.

In June 2003, the OIG again specifically requested all the videotapes pertaining to all detainees. In response, the MDC provided us with eight tapes from the SIS safe that had not been provided previously.

In early July 2003, we met with an MDC Special Investigative Agent (SIA) and asked for a further explanation of the MDC's procedure for handling and storing videotapes. The SIA mentioned a storage room, only accessible to the SIS staff, in which he thought there still might be videotapes of the detainees from October and November 2001. We requested that he send us those and any other videotapes of the detainees that we did not already have. After about a month, we still had not received the requested tapes, and we contacted Warden Zenk to ask about the tapes. He referred us to a former SIA who previously had been responsible for the videotapes and had since transferred to the BOP regional office. We asked the former SIA for an inventory of the tapes in the storage room.

Despite frequent prompting, we did not receive an inventory from the MDC until August 13, 2003, approximately five weeks from the time we first asked for the videotapes in the storage room. The inventory was largely unhelpful in that it listed over 2,000 tapes, mostly from April 2002 through

[38] Four of the 14 tapes provided by the MDC either were blank or did not have footage of any of the detainees.

August 2002, and it was unclear whether the tapes were from in-cell or handheld cameras. The earliest tapes listed on the inventory were from February 17, 2002.

On August 20, 2003, we visited the MDC to make sense of the inventory and visit the storage room where the tapes were located. The SIA we met with in July escorted us to the storage room that was located in a second building of the MDC. Upon entering the room, we immediately observed a significant number of boxes of videotapes lining much of the wall. The boxes were clearly marked in large handwriting, "Tapes" with dates beginning on October 5, 2001, and continuing to February 2002. These tapes were the only ones omitted from the August 2003 inventory of tapes that had been provided to us by the MDC staff. The SIA said that he did not know why these tapes were not included on the inventory. We took the 308 newly discovered videotapes to review.[39] These 308 tapes provided much of the evidence discussed in this report corroborating many of the detainees' allegations. Many of the tapes contradicted statements of MDC staff members about the treatment of the detainees.

Discovering such a substantial number of videotapes so late in our investigation also caused a significant delay in our ability to complete this report. Moreover, even with these newly discovered tapes, significant gaps existed in the MDC's production of videotapes. For example, we received less than 15 tapes that depicted the detainees being brought into the MDC, either for the first time or when they returned from court appearances or other meetings.[40] In addition, many tapes start or stop in the middle of detainees' escorts. There also are no tapes from some "use of force" incidents, even though these tapes should have been preserved for two years under BOP policy. MDC officials could not explain these omissions.

As discussed previously, we confirmed many of the detainees' allegations by reviewing the tapes, even though the detainees alleged that the abuse dropped off precipitously after video cameras were introduced. Several detainees said that officers referred to the cameras as the detainees' "best friend." Conversely, the videotapes did not refute any of the detainees'

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[39] We also took four tapes from February 17, 2002, that were listed on the MDC's inventory and a tape from April 2, 2002, that was not listed on the inventory. While searching in the room, we noticed that there was no tape from April 2, 2002, the date that a detainee alleged staff members physically abused him during a "use of force" incident. When we asked the SIA where it was, he said that a senior MDC management official had it in his office because he was reviewing it, and the SIA retrieved it from the office for us.

[40] An MDC officer confirmed to us that not all escorts were recorded. He said that some movements were not recorded because officers were unable to find a camcorder. He said that while seven camcorders initially were purchased for the unit, over time the camcorders disappeared.

allegations. It is also apparent from our review of several hundred tapes that the officers were cognizant of the presence of the cameras. In one tape, the camera operator reminded an officer who was berating a detainee that the tape was running, which caused the officer to control himself immediately. On another videotape, when an officer was holding the head of a detainee firmly against the wall, a lieutenant appeared to notice the video camera and quickly swatted away the officer's hand from the detainee's head.

We also heard a lieutenant twice order someone to turn the camera off when he was discussing matters with other officers that he apparently did not want videotaped. A few minutes after giving his instruction to turn off the tape and apparently not knowing that the audio was still running, this lieutenant suggested how the officers could break some detainees' hunger strikes: "We'll cure them . . . I want them to stay on a hunger strike. Don't cure anybody; let 'em stay. Let's get a team. Let's go with a tube. The first guy that gets that tube shoved down his throat, they'll be cured!" He then stated, "We're going hard," to which another officer responded, "Outstanding!" The lieutenant repeated his statement, "We're going hard."

Sometimes staff members' remarks caught on the audio portion of the videotape substantiated certain allegations by detainees about conditions in the MDC. For example, detainees complained continually that they were deprived of adequate opportunities to make legal calls. In an off-camera remark, one of the lieutenants can be heard stating that the MDC official responsible for giving the detainees their legal calls often waited to provide legal calls until just before a detainee was scheduled to go to court. This confirmed that the official was not regularly offering detainees legal phone calls as required.

### G. Some Staff Members Lacked Credibility During OIG Interviews

The videotapes also led us to conclude that several officers lacked credibility in their interviews with the OIG. In our interviews, most staff members, particularly ones still employed by the BOP, denied all detainees' allegations of physical and verbal abuse. In many cases, the staff members were adamant that neither they nor anyone else at the MDC engaged in any of the alleged misconduct.

Because of the delay in the MDC's providing us the videotapes, for almost all interviews of MDC staff members we did not have the benefit of the MDC videotapes. Upon viewing them after the interviews, we saw that some staff members engaged in the very conduct they specifically denied in their interviews. This finding caused us to question the credibility of these staff members and their denials in other areas for which we did not have videotape evidence.

For example, three staff members stated in OIG interviews that they did not press compliant detainees against the wall because that would be inappropriate. In viewing videotapes, however, we saw these same officers pressing compliant detainees into walls. In addition, three other staff members denied that they, or anyone else, had bent or twisted detainees' arms, hands, fingers, or thumbs. Again, we observed on videotapes these same staff members twisting compliant detainees' arms, hands, wrists, or thumbs. Another former officer told us he never saw any officer bend detainees' wrists or pull their thumbs, but in one videotape we saw him bend a compliant detainee's fingers in a way that seemed very painful and did not appear to serve any correctional purpose. Similarly, a lieutenant asserted that he never saw or heard about staff members slamming, pushing, pressing, or firmly placing detainees against the wall, but in a videotape we observed that this lieutenant witnessed staff members forcefully ram a compliant detainee into the wall.[41] In a memorandum he submitted after the incident, the lieutenant described the incident by writing, "The staff placed [the detainee] on the wall until they gained complete control of the inmate and resumed the escort."

Further, another lieutenant claimed to be very disturbed by the t-shirt taped to the wall, but in several videotapes he led detainees right to the t-shirt and exchanged their restraints while officers pressed them against the t-shirt. In another example, an officer adamantly asserted to us that staff members never cursed in front of the detainees. Yet, the videotapes showed several instances when staff cursed in front of this officer and the detainees. In addition, we noted one incident where this officer reminded a colleague that the camera was recording when the colleague cursed about and harassed a detainee.

## IV. OIG RECOMMENDATIONS

We recognize that the MDC faced enormous challenges after the September 11 attacks and that many MDC staff members responded to these challenges by maintaining their professionalism and appropriately performing their duties under difficult and emotional circumstances. However, we believe some staff members acted unprofessionally and abusively. In Appendix A, we describe these specific offenses and the evidence relating to them. We believe that appropriate administrative action should be taken against those employees.

In addition, we believe that the BOP and the MDC should review the evidence from our investigation to better prepare for and respond to future emergencies involving detainees, as well as to improve its routine handling of

[41] This incident is discussed in detail under "Improper Application and Use of Restraints" in section II (A)(5).

inmates. We therefore offer a series of recommendations to address issues of concern relating to the MDC's treatment of the detainees.

1. During our investigation, we encountered a significant variance of opinion among MDC staff members regarding what restraint and escorting techniques were appropriate for compliant and noncompliant inmates. We recommend that the BOP provide clear, specific guidance for BOP staff members on what restraint and escorting techniques are and are not appropriate. This guidance could take the form of written policy and demonstrations or examples given during training. The guidance should address techniques at issue in this investigation, including placing inmates' faces against the wall, stepping on inmates' leg restraint chains, and using pain compliance methods on inmates' hands and arms.

2. We found that the MDC regularly audio taped detainees' meetings with their attorneys, in violation of 28 C.F.R. § 543.13(e) and BOP policy. We recommend that BOP management take immediate steps to educate its staff on the law prohibiting, except in specific limited circumstances, the audio monitoring of communications between inmates and their attorneys.

3. While the staff members denied verbally abusing the detainees, we found evidence of staff members making threats to detainees and engaging in conduct that was demeaning to the detainees. We recommend that the BOP and MDC management counsel MDC staff members concerning language that is abusive and inappropriate and remind them of the BOP policy concerning verbal abuse.

4. Because specific officers were not pre-assigned to escort detainees to and from the ADMAX SHU, the lieutenants in charge of escorts used available staff from throughout the institution for the escort teams. Several lieutenants told us that the lack of designated teams contributed to the potential for abuse on escorts. Likewise, while specific staff members were assigned to the ADMAX SHU, we observed on videotapes that staff members from all over the institution, including staff members who had little or no experience handling inmates, were on the ADMAX SHU and had physical contact with the detainees. We recommend that institutions select and train experienced officers to handle high security and sensitive inmates, enforce the policy that a comprehensive log of duty officers and a log for visitors be maintained on the unit, and restrict access to the unit to the assigned staff members, absent exigent circumstances. MDC staff members advised us that officer logs, visitor logs, and restrictions on access to the unit were in place for the ADMAX SHU, but the videotapes showed that the procedures were not followed.

5. By requiring that all detainees' movements be videotaped and installing cameras in each ADMAX SHU cell, BOP and MDC officials took steps to help deter abuse of September 11 detainees and to refute unfounded allegations of abuse. Once the MDC began videotaping all detainee movements, incidents and allegations of physical and verbal abuse significantly decreased. We therefore recommend that the BOP analyze and consider implementing a policy to videotape movements of sensitive or high-security inmates as soon as they arrive at institutions.

6. We found evidence indicating that many of the strip searches conducted on the ADMAX SHU were filmed in their entirety and frequently showed the detainees naked. The strip searches also did not afford the detainees much privacy, leaving them exposed to female officers who were in the vicinity. In addition, the policy for strip searching detainees on the ADMAX SHU was applied inconsistently, many of the strip searches appeared to be unnecessary, and a few appeared to be intended to punish the detainees. For example, many detainees were strip searched after attorney and social visits, even though these visits were in no-contact rooms separated by thick glass, the detainees were restrained, and the visits were filmed.

   We believe that the BOP should develop a national policy regarding the videotaping of strip searches. We also believe MDC management should provide inmates with some degree of privacy when conducting these strip searches, to the extent that security is not compromised.

   In addition, MDC staff members complained to us and to each other off-camera of inadequate resources on the ADMAX SHU to handle the large number of detainees. Because a strip search involves three or four officers, the BOP should review its policies of requiring strip searches for circumstances where it would be impossible for an inmate to have obtained contraband, such as after no-contact attorney or social visits, unless the specific circumstances warrant suspicion.

7. We found evidence that some MDC medical personnel failed to ask detainees how they were injured or to examine detainees who alleged they were injured. We recommend MDC and BOP management reinforce to health services personnel that they should ask inmates how they were injured, examine inmates' alleged injuries, and record their findings in the medical records.

## V. CONCLUSION

This report details our investigation of allegations of physical and verbal abuse against some detainees at the MDC. It is important to note that these allegations were not against all officers at the MDC, and that most MDC officers performed their duties in a professional manner under difficult circumstances in the aftermath of the September 11 terrorist attacks. After the attacks, the MDC staff worked long hours for extended periods, without detailed information about the detainees' connections to the attacks or to terrorism in general. Moreover, some MDC staff members lost relatives, friends, and colleagues in the attacks. The atmosphere at the MDC was highly charged and emotional, particularly in the initial period after the attacks.

However, these circumstances do not justify any abuse towards any detainee, as the BOP officers we interviewed readily acknowledged. We concluded that some MDC staff members did abuse some of the detainees. We did not find that the detainees were brutally beaten, but we found evidence that some officers slammed detainees against the wall, twisted their arms and hands in painful ways, stepped on their leg restraint chains, and punished them by keeping them restrained for long periods of time. We determined that the way these MDC officers handled some detainees was in many respects unprofessional, inappropriate, and in violation of BOP policy.

As described in detail in this report, we based our conclusion on a variety of factors. First, the detainees' allegations were specific and, although not identical, largely consistent. In addition, several detainees appeared credible to us when we interviewed them.

Second, the detainees did not make blanket allegations of mistreatment, but distinguished certain MDC officers as abusive and others as professional. Also, the detainees' allegations about their treatment at the MDC contrasted with their description of their treatment at other detention facilities. Most detainees did not have complaints about their treatment at other institutions or by other officers – their allegations of abuse generally were confined to their treatment at the MDC.

Third, several MDC officers provided first-hand corroboration for allegations of mistreatment, including the identities of the offending officers. These officers also made distinctions among officers and practices, lending credence to their testimony.

Fourth, we found unpersuasive the general and blanket denials of mistreatment by many MDC officers who were the subjects of our review. Some officers denied taking actions that we knew occurred based on videotape evidence and other officers' testimony, and other officers we interviewed described some of their actions in terms that lacked credibility. For example,

some said that detainees never were pressed against the wall or even touched the wall, which we know to be untrue. Others claimed that officers were extraordinarily polite to the detainees, or that they never heard officers curse in the prison, or that they treated the detainees with "kid gloves." We found many officers lacked credibility and candor regarding their descriptions of what occurred in the MDC, which calls into question their categorical denials of any instances of abuse.

Fifth, videotapes of officers' interactions with detainees, which we were ultimately able to obtain from the MDC after much difficulty, provided support for the detainees' allegations and also undercut the statements of various officers. We were told that the abuse of detainees declined when the officers' actions were being videotaped, which one would expect. Nevertheless, the videotapes showed instances of a detainee being slammed against the wall and detainees being pressed by their heads or necks, despite officers' denials that this ever occurred and despite statements by senior BOP officials that such actions were not appropriate. Also, contrary to statements made by several officers in their interviews with the OIG, we heard officers on the videotapes using curses in front of the detainees and making derogatory statements about detainees off-camera. The videotapes also confirm that officers placed detainees against an American flag t-shirt in the sally port, which was taped to the wall in the same place for many months, despite officers' denials of the existence of such a t-shirt or claims that it was removed after a short time.

Moreover, the videotapes showed that some MDC staff members misused strip searches and restraints to punish detainees and that officers improperly and illegally recorded detainees' meetings with their attorneys.

In sum, we believe that the evidence developed in our investigation shows physical and verbal abuse of some detainees by some MDC staff members. We believe that the BOP should take administrative action against those employees who committed these abuses. Further, we believe the BOP should take steps to prevent these types of abuse from occurring in the future, including implementing the recommendations we made in this report. We therefore are providing this report to the BOP for appropriate action.

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COMMISSION ON HUMAN RIGHTS
Sixty-first session
Item 11 (b) of the provisional agenda

## CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF TORTURE AND DETENTION

### Opinions adopted by the Working Group on Arbitrary Detention

The present document contains the opinions adopted by the Working Group on Arbitrary Detention at its thirty-eighth, thirty-ninth and fortieth sessions, held in November/December 2003, May 2004 and September 2004, respectively. A table listing all the opinions adopted by the Working Group and statistical data concerning these opinions are included in the report of the Working Group to the Commission on Human Rights at its sixty-first session (E/CN.4/2005/6).

This is Exhibit D referred to in the affidavit of Benamar Benatta sworn before me, this 14th day of March 2007
A COMMISSIONER FOR TAKING AFFIDAVITS
Nicole Christavicius LSUC# 45911G

GE.04-16570 (E) 190205 260105

**OPINION No. 18/2004 (UNITED STATES OF AMERICA)**

Communication addressed to the Government on 7 May 2004

Concerning: Benamar Benatta

**The State is a party to the International Covenant on Civil and Political Rights**

1. (Same text as paragraph 1 of opinion No. 20/2003.)

2. The Working Group regrets that the Government did not reply within the 90-day deadline.

3. (Same text as paragraph 3 of opinion No. 20/2003.)

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comments thereon.

5. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto, as well as the observations by the source.

6. The source informed the Working Group that:

(a) Mr. Benatta entered the United States on 31 December 2000 on a non-immigrant visitor's visa, authorizing him to remain in the country until 30 June 2001;

(b) Mr. Benatta attempted to enter Canada to request political asylum. He was arrested by Canadian officers and handed over to the United States immigration authorities on 12 September 2001;

(c) Mr. Benatta was charged as a removable alien by the Immigration and Naturalization Service and served with a Notice to Appear at Niagara Falls New York, where he was interviewed by agents of the Federal Bureau of Investigation (FBI). He was requested to appear before an immigration court on 25 September 2001. However, on 16 September he was taken by the United States Marshal Service to the Metropolitan Detention Centre in Brooklyn, New York;

(d) Mr. Benatta was placed in a "special housing unit" and assigned high-security status. He was kept in incommunicado detention, in a cell illuminated for 24 hours a day. He was denied access to legal counsel and was woken up every half hour by the guard knocking on his door;

(e) The FBI officially cleared him of suspected terrorist activity on 15 November 2001. He was never told that he was cleared. On 30 April 2002 he was assigned a lawyer for the first time;

(f) During the months he was detained Mr. Benatta appeared before an immigration judge at the facility, without counsel and without having been provided access to the law library. He was brought to the hearings shackled and handcuffed;

(g) On 12 December 2001 he was criminally indicted for possession of a false social security card and possession of a false and procured United States Alien Registration Receipt Card;

(h) In October 2003 the criminal charges against him were dropped. He remains in immigration detention unable to post a $25,000 bond. Mr. Benatta is pursuing his claims for asylum as well as seeking a reduction of bond.

7. The Government in reply to the source's allegations, states that:

(a) Benamar Benatta entered the United States under a B-1 non-immigrant visa on 31 December 2000 with an authorization to remain in the United States until 30 June 2001;

(b) Mr. Benatta attempted to enter Canada to request political asylum. Canada denied Mr. Benatta's entry and returned him to the United States on 12 September 2001. At the time of this return Mr. Benatta was found to be in possession of a fraudulent resident alien registration number and a fraudulent Social Security card

(c) On 12 September 2001 Mr. Benatta was served a Notice to Appear and a Notice of Custody Determination. Mr. Benatta was charged as a removable alien having remained in the United States longer than authorized. On 13 September 2001 Mr. Benatta was taken into custody;

(d) On 25 September 2001 Mr. Benatta was scheduled for his initial hearing. During the interval the FBI examined potential connections between Mr. Benatta and the 11 September terrorist attacks, but cleared him of any involvement on 15 November 2001;

(e) On 12 December 2001 Mr. Benatta was ordered to be removed to Canada or Algeria. He filed an appeal with the Board of Immigration Appeals, which rejected it on 8 April 2002;

(f) Also on 12 December 2001, the District Court for the Western District of New York issued an indictment charging Mr. Benatta with a violation of 18 USC 1028 (a) (6) (knowingly possessing an identification document procured without legal authority) and 546 (possession of a fraudulent alien registration card);

(g) Pursuant to a warrant for his arrest, Mr. Benatta was transferred to the custody of United States marshals on 25 April 2002, but on 3 October 2003 the criminal charges against him were dismissed. On 6 October 2003 he was returned to the custody of the United States Immigration and Customs Enforcement;

(h) The immigration judge again ordered Mr. Benatta's removal to Algeria, but he filed an appeal on 22 April 2004;

(i) Mr. Benatta failed to pay the $25,000 bond set by Immigration and Customs Enforcement as a condition of his release pending the outcome of his appeal.

8. Mr. Benatta's last appeal was rejected on 3 September 2004 and Immigration and Customs Enforcement is in the process of enforcing his departure from the United States.

9. The Working Group considers that:

(a) The versions of events provided by the source and the Government basically correspond as regards the length and handling of Mr. Benatta's detention. Mr. Benatta has in fact been detained for over three years - from 12 September 2001 to the present - in fact for the mere administrative offence of having stayed in the United States after his visa had expired. On 12 December 2001, the District Court for the Western District of New York issued a warrant for Mr. Benatta's arrest, on the basis of possession of fraudulent documentation. Specific charges for that offence were, however, never brought, nor was Mr. Benatta summoned to appear before the trial judge. The accusation proved to be a mere formality, given that when it was dismissed on 3 October 2003, no legal proceedings of any kind had been undertaken. To keep a person in prison awaiting trial for almost three years without actually taking any procedural action on the offence with which he is accused contravenes article 9 of the International Covenant on Civil and Political Rights;

(b) Although both the source and the Government acknowledge that Mr. Benatta was heard by an immigration judge, there is no record of whether the judge ordered or confirmed the detention, since, as the Government has stated, it was Immigration and Customs Enforcement that took the decision to keep Mr. Benatta detained. This deprivation of liberty (from 12 September to 12 December 2001 and from 30 October 2003 to the present) can in no way be justified by the mere fact that Mr. Benatta has been unable to post the $25,000 bond demanded of him on 22 April 2004. The imprisonment Mr. Benatta has endured, at least for the 14 months from 12 September 2001 to 12 December 2001 and from 30 October 2003 to the present, has been a de facto prison sentence, equivalent to what he might have been given had he committed a crime. In no way can the simple administrative offence of having stayed in the United States after his visa had expired justify such a disproportionate punishment;

(c) Finally, the Government has said nothing about the high-security prison regime (involving impositions that could be described as torture) which, for no reason whatsoever, was imposed on him while he was under investigation by the FBI for a possible link to the 11 September attacks. Neither has the Government explained why Mr. Benatta was not told he was under investigation in that connection, or that he was later cleared of all responsibility for the attacks on the Twin Towers on 11 September 2001. These practices violate article 9 of the International Covenant on Civil and Political Rights and the United Nations Standard Minimum Rules for the Treatment of Prisoners. They undoubtedly weakened Mr. Benatta's ability to understand his position and defend himself. Their seriousness is such that Mr. Benatta's imprisonment constitutes arbitrary detention.

10. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Benamar Benatta is arbitrary, being in contravention of articles 9 and 14 of the International Covenant on Civil and Political Rights, and falls within categories I and III of the categories applicable to the consideration of cases submitted to the Working Group.

11. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 16 September 2004

This is Exhibit ...E........ referred to in the
affidavit of Benamar Benatta
sworn before me, on 19th
day of March 20
Nicole Christanicus LSUC# 45911G
A COMMISSIONER FOR TAKING AFFIDAVITS



Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
W.D. New York.
**UNITED STATES** OF AMERICA, Plaintiff,
v.
Benamar **BENATTA,** Defendant.
**No. 01-CR-247E.**

Sept. 12, 2003.
Joseph B. Mistrett, Esq., Federal Public Defender Office, Buffalo, NY, for defendant.

*REPORT, RECOMMENDATION AND ORDER*

SCHROEDER, Magistrate J.

*1 Pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), all pretrial matters in this case have been referred to the undersigned by the Hon. John T. Elfvin.

*PRELIMINARY STATEMENT*

The defendant is charged in a two-count indictment with having violated 18 U.S.C. § 1028(a)(6), possession of a false United States identification document, to wit, a social security card (Count 1) and 18 U.S.C. § 1546, possession of a forged, counterfeited or falsely made and fraudulently procured U.S. Alien Registration Receipt Card. He has filed an omnibus motion wherein he seeks extensive discovery, suppression of evidence and dismissal of the indictment. The government responded to the motion in a timely fashion and thereafter, the defendant filed supplemental papers in support of his motion. The government filed additional responses to these supplemental filings by the defendant. For reasons that will be explained in the recitation of facts, the Court directed the government to produce and submit certain materials to the Court for an *in camera* inspection. Such an inspection was conducted by the Court on February 12, 2003 and an Order issued on February 13, 2003 wherein and whereby certain of the materials produced by the government were ordered to remain sealed and not produced as discovery materials to the defendant, and the remainder of the materials produced by the government for inspection were ordered to be delivered to the defendant. *See* Docket # 29.

Additional supplemental filings and responses thereto were thereafter filed by counsel for the defendant and the government, and oral argument on all of the issues raised therein was heard by this Court on May 28, 2003 and the matter taken under advisement on that date.

Those matters over which I have dispositive jurisdiction pursuant to 28 U.S.C. § 636(b)(1)(A) will be addressed in a separate Decision and Order, and this Report, Recommendation and Order will address only the issues relating to suppression of evidence and dismissal of the indictment.

*FACTS*

The defendant is a citizen of Algeria who had originally entered the United States "as a nonimmigrant B-1 visitor on December 31, 2000 with an authorization to remain in the United States until June 30, 2001." (*See* Declaration of Michael D. Rozos dated January 16, 2003, Docket # 24). The purpose of his visit was educational. The defendant is an avionics technician, and at the time of his original entry, he was a member of a group of Algerian Air Force personnel who were to receive aviation training at a Northrup/Grumann training facility. The defendant completed this scheduled training program, but remained in the United States allegedly for the purpose of seeking political asylum and obtaining employment in this country. However, because his visa had expired and he had not obtained employment in the United States, the defendant attempted to enter Canada and apply for asylum in that country on or about September 5, 2001. Upon his entry, the defendant was detained by Canadian authorities apparently for investigatory purposes. As a result of the horrific events of September 11, 2001, the Canadian authorities alerted United States authorities of defendant's presence and profile as set forth above and returned him to the United States authorities on September 12, 2001 by transporting him across the Rainbow Bridge in Niagara Falls and turning him over to the custody of United States Immigration Officers pursuant to "The Reciprocal Arrangement Between The United States Immigration And Naturalization Service, Department of Justice And The Canada Employment And Immigration Commission For the Exchange Of

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Deportees Between The United States And Canada" dated July 24, 1987. (*See* Exhibit A attached to the defendant's "Supplemental Affidavit In Support of Motion To Suppress Evidence And To Dismiss Indictment," Docket # 21). The defendant was taken into custody on September 12, 2001 by representatives of the U.S. Immigration and Naturalization Service ("INS") and detained in the INS office at the Rainbow Bridge port of entry located in Niagara Falls, New York in the Western District of New York ("WDNY"). While being detained there, the defendant was interviewed by Special Agent Culligan and Special Agent Paul Bellito of the Federal Bureau of Investigation ("FBI"). As alleged by the government, the defendant was advised of his rights and then interrogated by the FBI agents about the alleged false identification found on him. "The INS charged the defendant as removable as an alien who had remained in the United States longer than authorized and accordingly served a Notice to Appear placing him into immigration proceedings" and "on September 13, 2001, the INS commenced a removal proceeding against defendant in the Batavia Immigration Court at the Batavia Federal Detention Facility (BFDF)" and the "defendant was taken to the BFDF for detention by the INS during his removal proceedings." (Declaration of Michael D. Rozos dated January 16, 2003, ¶ ¶ 7 and 8, Docket # 24). Apparently the INS Notice to Appear served on the defendant required his appearance in the Immigration Court in Batavia, New York at the BFDF on September 25, 2001. (*See* Supplemental Affidavit In Support of Motion sworn to by Joseph B. Mistrett, A.U.S.P.D. on November 19, 2002, ¶ 8(d), Docket # 21). For reasons that were never expressly made known, and before the defendant ever had an opportunity to confer with counsel or to be represented by counsel, he was spirited off to the Metropolitan Detention Center in Brooklyn, New York ("MDC Brooklyn") by the U.S. Marshal Service ("USMS") on September 16, 2001. The MDC Brooklyn is a facility operated under the jurisdiction of the Bureau of Prisons ("BOP"). At the time that this "tranfer" took place, no motion for a change of venue had been filed by the INS nor had any order authorizing a change of venue been issued by an Immigration Judge ("IJ"). Thereafter, well after the fact, the INS filed a motion on September 21, 2001 seeking a change of venue for defendant's removal hearing from the Batavia Immigration Court to the Immigration Court at Varick Street, New York, New York. This notice of motion was allegedly served on the defendant on September 21, 2001 while he was apparently being detained at "MDC, NY". [FN1] (*See* Exhibit A attached to the Declaration of Michael D. Rozos dated January 16, 2003, Docket # 24). At this time, the defendant still had not retained counsel nor did he have access to counsel. Further, as admitted by Michael D. Rozos in his Declaration, there are no documents "discussing the rationale for a change of venue." (*See* Docket # 24, ¶ 13). Notwithstanding this fact, John B. Reid, I.J. ordered a change of venue to "NYD" on October 4, 2001 and curiously states that the defendant's "new address is c/o INS, 201 Varick St., New York, N.Y. 10014" [FN2] when apparently the defendant continued to be detained at MDC Brooklyn. A further discrepancy appears wherein I.J. Reid's October 4, 2001 order states that "The Immigration Court having administrative control over this hearing location is 201 Varick Street, Room 1140, New York, N.Y. 10014," (emphasis added), whereas Michael D. Rozos states in his Declaration dated January 16, 2003 that the "Defendant was thereafter afforded several hearings before an Immigration Judge (IJ) at the MDC Brooklyn Immigration Court." (emphasis added). (*See* Exhibit B attached to the Declaration of Michael D. Rozos and paragraph 14 in said Declaration @--Docket # 24). Exhibit D attached to the Supplemental Affidavit of Joseph B. Mistrett sworn to November 19, 2002 establishes that the defendant "entered special housing" ("SH") on "9-17-01" as a "high security status" in MDC Brooklyn and was kept there until sometime in April 2002. (*See* Docket # 21).

FN1. There appears to be a discrepancy as to where the defendant was being housed after September 13, 2001. As previously stated, Michael D. Rozos, Director, Removals Division of the Immigration and Naturalization, declared that the defendant had been transferred to MDC Brooklyn. The certificate of service attached to the INS change of venue motion states that the defendant was personally served "at MDC, N.Y. on 9/21/01" which is an INS Processing Center located at 201 Varick Street, New York City, New York. The Affidavit of Assistant United States Attorney Marc Gromis sworn to August 28, 2002 states that the defendant "was in INS custody at the MDC Brooklyn". Exhibit C attached to Docket # 21. The government's motion by immigration attorney Mark P. Murphy states in paragraph 3 thereof: "[T]he respondent was transferred from the Buffalo (sic) Federal Detention Facility to the Metropolitan Correctional Facility in New York, New York and is now in the

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jurisdiction of the New York, New York Immigration Court at Varrick Street." (*See* Exhibit A attached to Declaration of Michael D. Rozos which is attached as Exhibit A to the Affirmation of Joseph B. Mistrett dated April 11, 2003, Docket # 34). The transcript of the immigration proceedings conducted on December 12, 2001 establishes that they were held "at the Immigration Court holding hearings at Metropolitan Detention Center in Brooklyn, New York." (*See* Exhibit H attached to the Affirmation of Joseph B. Mistrett dated April 11, 2003, Docket # 34).

FN2. This discrepancy of defendant's location during the time period of September 17, 2001 to April 2002 is further compounded by the statement contained in the Order of the Board of Immigration Appeals ("BIA") dated July 31, 2002 wherein it is stated: "The Board's order was mailed to respondent at his last known address Metropolitan Detention Center, 100 29 th Street, Brooklyn, New York 11232...." *See* Exhibit E attached to Docket # 24--Declaration of Michael D. Rozos dated January 16, 2003.

*2 Once placed in SH, the defendant "was thereafter afforded several hearings before an Immigration Judge (IJ) at the MDC Brooklyn Immigration Court" and "in his removal proceedings, defendant designated Canada as his chosen country of removal." (Declaration of Michael D. Rozos dated January 16, 2003, paragraph 14, Docket # 24). The removal hearing was completed on December 12, 2001 and an order of removal was issued by the IJ directing that the defendant be removed from the United States to Canada, or in the alternative, to Algeria. Defendant's application for asylum was also denied by the IJ in this order of removal. (*See* Exhibit F attached to Docket # 21).

While in custody at the MDC Brooklyn, the defendant was interrogated on a number of occasions by FBI agents assigned to the FBI's Terrorist Task Force in the context of his ethnic and religious background, his citizenship and his Algerian Air Force status and the events of September 11, 2001. FBI 302 reports were prepared reflecting these interrogations. [FN3]

FN3. The defendant moved for production of these 302 reports, and the government objected to such production based on matters of relevancy and security. These reports were reviewed by the Court *in camera* and some were ordered to be produced and the remainder were found not to be relevant to this case and were ordered sealed. *See* Docket # 29.

Investigation of the defendant at this time was apparently being conducted under the auspices of the Terrorist and Violent Crimes Section of the Department of Justice ("TVCS") and as a result, "the U.S. Attorney's Office [W.D.N.Y.] was required to notify TVCS and obtain its authorization before filing charges against [the defendant]." The government asserts that "the U.S. Attorney's Office [W.D.N.Y.] was, by October 29, 2001, prepared to file charges in this case" either "by complaint or indictment" but that "authorization to file charges" had not been "received from TVCS [until] November 16, 2001" and "the U.S. Attorney's Office decided to proceed by indictment." (*See* Government's Reply Statement In Response To Defendant's Affirmation in Support Of Dismissal, Docket # 35, pp. 4, 5).

On December 12, 2001, the indictment in this action was returned by the grand jury sitting in Buffalo, New York. (*See* Docket # 1). This Court accepted the return of the indictment on December 12, 2001 and issued a warrant for the arrest of the defendant on that date at the request of the government. Notwithstanding the return of this indictment and the issuance of the arrest warrant and the fact that the defendant was in the custody of the government, the defendant was kept in the MDC Brooklyn until April 30, 2002 when he was finally transferred from MDC Brooklyn to the BFDF by the USMS and has been detained at the BFDF to date. The defendant was not arraigned on the present indictment until April 30, 2002 when he appeared before this Court for that purpose.

In its attempt to explain and justify why the defendant was not returned to the WDNY for arraignment on the December 12, 2001 indictment until April 30, 2002, the government states by way of the Affidavit of former Assistant United States Attorney Marc Gromis, sworn to August 28, 2002, that he "provided a copy of the [arrest] warrant to the INS case agent in Buffalo, Larry Krug, and asked him to lodge it as a detainer against the defendant, who was in custody at the Metropolitan Detention Center in Brooklyn in the Eastern District of New York." Gromis "did not immediately commence action to bring the defendant to Buffalo" because he

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"had been informed by the INS that the defendant was involved in INS removal proceedings at that time in New York City." (Docket # 13, ¶ ¶ 4 and 5). However, the defendant's removal hearing concluded on December 12, 2001, and the IJ issued an order of removal on that date wherein the defendant was ordered removed "to Canada or, in the alternative, to Algeria." (*See* Docket # 24, ¶ 14 and Exhibit C attached thereto). On January 4, 2002, Gromis "sent an e-mail to Jonathan Sack, the Criminal Chief in the Eastern District of New York ... requesting the assistance of that office to commence proceedings to 'writ' the defendant out of INS custody and bring him in front of a Magistrate Judge there for Rule 40 proceedings." (*See* Docket # 13, ¶ 6). However, the defendant was not "taken without unnecessary delay before the nearest federal magistrate judge" (Rule 40, Federal Rules of Criminal Procedure) ("Fed. R.Crim.P.") as requested by Gromis. Instead, Assistant United States Attorney Sack advised Gromis by e-mail on January 8, 2002 that he had "referred the matter to Andrew Hinton, Chief of Intake" and "indicated that a 'removal complaint' might have to be prepared in that district." [FN4] (*See* Docket # 13, ¶ 7 and attached e-mail printouts to the affidavit of Gromis). For reasons, if any, that have not been adequately explained by the government, no further action was taken in this case until March 8, 2002, two months after the Sack e-mail of January 8, 2002, when Assistant United States Attorney Hinton e-mailed Gromis advising him that he had received the January 8, 2002 e-mail forwarded by Sack regarding a Rule 40 proceeding as to the defendant. He further advised that when he "called [his] Marshal Service to start the process, they (sic) suggested that [Gromis] have [the defendant] writted from MDC directly to WDNY." This position of the USMS is directly contrary to this Court's command as set forth in the Warrant for Arrest issued by this Court on December 12, 2001 (Docket # 40), the receipt of which was acknowledged by the INS on December 12, 2001 wherein "the USM and any Authorized United States Officer" is "COMMANDED to arrest BENAMAR BENATTA and bring him forthwith to the nearest magistrate judge to answer an Indictment...." (*See* Docket # 40) (emphasis added). Hinton concluded this e-mail by asking Gromis what he thought of that suggestion especially since "at the very least, it probably saves [them] an identity hearing." (*See* Docket # 13, ¶ 8 and e-mail printout attached to the Affidavit of Gromis). Assistant United States Attorney Gromis telephonically responded to Hinton's e-mail, the date being unknown, and advised that he "did not believe that the INS would favor such a procedure, and that [he] would prefer it if his [Hinton] office would go forward with a Rule 40 removal." [FN5] (*See* Docket # 13, ¶ 8). Almost one month later, Assistant United States Attorney Gromis sent an e-mail on April 4, 2002 to Hinton inquiring as to how "[they] were doing on the Benatta Rule 40." (*See* Docket # 13, ¶ 9 and e-mail printout attached to the Affidavit of Gromis). Hinton responded to this e-mail on April 8, 2002 by advising that the defendant was "scheduled to be arraigned on a removal complaint [on April 9, 2002]." (*See* Docket # 13, ¶ 9 and e-mail printout attached to the Affidavit of Gromis). The defendant was taken before Magistrate Judge Chrein in the Eastern District of New York ("EDNY") on April 9, 2002 and arraigned on a removal complaint, and after being advised of his rights, the defendant waived an identity hearing and was ordered committed to the WDNY. (*See* Docket # 13 and copy of EDNY docket proceedings attached to the Affidavit of Gromis). It is also pointed out that the "Return" on the aforesaid "Warrant For Arrest" establishes that it was executed on April 9, 2002 by representatives of INS. (*See* Docket # 40). However, for reasons not explained, the defendant was not removed from MDC Brooklyn until April 30, 2002 and transported to the WDNY for arraignment on the indictment notwithstanding that the INS removal proceedings had been completed by reason of the fact that "the BIA [had] dismissed [his] appeal from the IJ removal order" on A@pril 8, 20002 thereby resulting in a "final removal order in defendant's removal proceeding." (*See* Docket # 24, ¶ 15 and Exhibit D attached thereto).

FN4. This statement seems contradictory to the position put forth by the government in response to the defendant's motion, to wit, that since the defendant was in INS custody, he could be removed to any facility chosen by INS which is what was done when the defendant was removed from BFDF to MDC Brooklyn on September 16, 2001 without any court order or "removal complaint." Accepting the government's argument, INS could have easily returned the defendant to the BFDF just as it moved him from that facility to MDC Brooklyn.

FN5. This statement also seems contrary to the procedure actually utilized by INS and the USMS in removing the defendant from the BFDF on September 16, 2001 and transporting him to the MDC Brooklyn and assigning a USMS number to him at that facility without a court order or writ.

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*DISCUSSION AND ANALYSIS*

*3 This case presents a "concatenation of events that borders on the bizarre." United States v. Lai Ming Tanu, 589 F.2d 82, 90 (2d Cir.1978). The facts, as set forth above, require an analysis to be made based on separate and distinct principles of law as contained in the Fifth and Sixth Amendments to the United States Constitution ("Fifth and Sixth Amendments") as well as the statutory provisions set forth in the Speedy Trial Act ("STA"), 18 U.S.C. 3161 *et seq.* and Rule 48(b) of the Fed.R.Crim.P. in order to resolve defendant's motion to dismiss the indictment herein. This analysis shall separately address pre-indictment delay and post-indictment delay in the context of the Fifth and Sixth Amendments and the STA and Rule 48(b) of the Fed.R.Crim.P.

1. Pre-Indictment Delay:

The defendant was initially taken into administrative custody by representatives of the INS on September 12, 2001 and charged "as removable as an alien who had remained in the United States longer than authorized." (Docket # 24, ¶ ¶ 7 and 8). Such action by the INS did not constitute an arrest. Civil deportation charges and deportation proceedings pursuant to 8 U.S.C. § 1252 have been classified as civil rather than criminal proceedings. *United States v. Cepeda-Luna,* 989 F.2d 353 (9th Cir.1993). However, the defendant argues that notwithstanding the fact that he was initially taken into custody by the INS at the port of entry at the Rainbow Bridge in Niagara Falls, New York, he was interrogated by special agents of the FBI at that port, after allegedly having been advised of his rights pursuant to *Miranda* (*Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)), about the alleged false identification documents found on him. This custodial interrogation by the FBI agents demonstrates, it is argued, that the defendant was in reality in the custody of the government and being detained on potential criminal violations and that the alleged INS civil charge and detention were merely a "ruse" so as to enable the FBI to hold and interrogate the defendant without charging him with a criminal offense.

> The fact that criminal authorities may have played some role in [the defendant's] initial detention does not necessarily mandate the application of the Speedy Trial Act to civil detentions.
>
> *Cepeda-Luna,* 989 F.2d at 356.

But if it is determined that there has been collusion between INS officials and criminal authorities and the civil detention of the defendant is merely a ruse to avoid the requirements of the STA, such civil detention triggers the thirty-day clock under the STA. *See* 18 U.S.C. § 3161(b); *Cepeda-Luna,* 989 F.2d at 354.

The bizarre events between September 12, 2001 and December 12, 2001 in this case would seem to supply credence to defendant's claim of "ruse" by the INS in conjunction with the actions of the FBI and the USMS. The defendant was served with an INS Notice to Appear thereby placing him in immigration proceedings on September 13, 2001. The defendant was transported to the BFDF in Batavia, New York, WDNY, an immigration holding center wherein two immigration courts are housed and two immigration judges assigned. Because the defendant was taken into civil custody on the immigration violation at the port of entry in Niagara Falls, New York, the WDNY was a proper venue for conducting the removal proceedings. *See* 8 C.F.R. § 3.14(a); *La Franca v. Immigration and Naturalization Service,* 413 F.2d 686 (2d Cir.1969). In fact, on September 13, 2001, the INS formally commenced a removal proceeding against the defendant at the BFDF Immigration Court, and the Notice to Appear served on him required him to appear in the Batavia Immigration Court on September 25, 2001. At that time, the defendant had not been given the opportunity to confer with counsel nor did he have counsel. The fact that the defendant was initially housed at the BFDF on September 12, 2001 and remained there until September 16, 2001 establishes that there was room available for him at this facility. On September 16, 2001, the defendant was taken into custody by the USMS and spirited off to the MDC Brooklyn. At the time of this "transfer" to the EDNY, no motion had been made or filed by either the INS or the defendant seeking a change of venue; nor any explanation given for this "transfer," nor has any explanation been given as to why the USMS transported the defendant to the MDC Brooklyn since he was an INS detainee. Apparently INS was attempting to justify this relocation by characterizing it as a change of venue for the removal proceeding. However, if that truly were the case, INS violated its own regulations wherein it is expressly provided:

> *4 The Immigration Judge, for good cause, may change venue only upon motion by one of the parties, after the charging document has been filed with the Immigration Court. The Immigration Judge may grant a change of venue only after the other party has been given notice and an opportunity to respond to the motion to change venue.

8 C.F.R. 3.20(b). *See also* 8 U.S.C. § 1229(a)(2)(A)

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(emphasis added).

The motion for change of venue was not filed until September 21, 2001, five days after defendant's "transfer," and there is a question as to whether the defendant actually received this motion. The certificate of service states that the defendant "was personally served at MDC NY" whereas defendant was confined in SH at MDC Brooklyn (emphasis added) (*see* Docket # 24, Exhibit A attached thereto).

The defendant rightly asserts that if he were truly being held in the custody of INS for purposes of proceeding with enforcement of the immigration laws and the holding of a removal hearing, this could easily have been accomplished at the BFDF. By not doing so, and instead, by spiriting him off to the MDC Brooklyn in the EDNY without a court order authorizing such "transfer" or change of venue on September 16, 2001, the defendant concludes that the government obviously had "ulterior motives" especially when it placed him in SH in a BOP facility and classified him as being "high security" and assigning a USMS number to him. The damning evidence to support this claim is found in the admission of Michael D. Rozos, Director, Removals Division of the Immigration and Naturalization Service of the Department of Justice in Washington, D .C. wherein he states:

> In my examination of the documentation available at INS HQ/D & R relating to defendant, I did not come across any documents discussing the rationale for a change of venue. Likewise, Supervisory Deportation Officer James Creahan, Buffalo District offices, advises that in a review of the full administrative file (A-file) he did not locate any documentation that discusses the rationale for a change of venue.

Docket # 24, ¶ 13 (emphasis added).

This absence of documentation before the removal of the defendant to the MDC Brooklyn in the EDNY justifies one in concluding that the government intentionally did not want to leave a "paper trail" regarding its actions and that the claim that defendant was being held for immigration removal proceedings and not for other purposes was a subterfuge. It is pointed out that MDC Brooklyn is a BOP facility and not an INS facility as is BFDF. The attempt by INS to "back fill" and attempt to correct its violation of 8 C.F.R. § 3.20 by filing a motion for a change of venue on September 21, 2001, some five days after the fact, constitutes the height of legal folly. Such action by the INS was a sham. It is also noted that the order of the IJ dated October 4, 2001 did not grant this motion *nunc pro tunc* to the date of September 16, 2001. (*See* Exhibit B attached to Docket # 24). There is also a question of whether the defendant was given an opportunity to respond to the change of venue motion as required by 8 C.F.R. § 3.20.

*5 Nothing has been presented by the government to explain why it was necessary to not only remove the defendant to the MDC Brooklyn, but also why it was necessary to classify him as "high security" and place him in SH in a BOP facility for immigration removal purposes. It is pointed out that INS initially assigned an INS number to the defendant, to wit, A79-071-401. However, for reasons not explained by the government, when the defendant was detained at MDC Brooklyn, his INS number apparently was not utilized, but rather, he appears to have been assigned a USMS identification number, to wit, 51430-054. (See Exhibit C attached to Docket # 34 which is described as "Department of Justice, Federal Bureau of Prisons Special Housing Report"). This number assignment would seem to indicate that the defendant was being held as a "criminal" detainee by the USMS rather than as a civil immigration detainee by the INS. It is also this Court's understanding that the INS does not classify its civil detainees as "high security" as was done in the case of the defendant while he was detained in the MDC Brooklyn. It also appears, based on the lack of the government's response, that the defendant was held "incommunicado" and without counsel after being placed in SH at MDC Brooklyn on September 17, 2001 and continuously detained in SH under extremely harsh conditions [FN6] until April 30, 2002 when he was finally returned to the BFDF. During his period of detention at the MDC Brooklyn, the defendant was interrogated by special agents of the FBI on at least five and perhaps six separate occasions, and as evidenced by the declaration of Special Agent Stephen Jennings, Jr., Acting Section Chief of the Counterterrorism Division's International Terrorism Operations Section ("ITOS") at FBI Headquarters in Washington, D.C. dated December 11, 2001, the defendant was "identified" by the FBI as an individual "whose activities warranted further inquiry." (Exhibit J attached to Docket # 34 at page 2). There is no doubt in this Court's mind that the defendant, because of the fact that he was an Algerian citizen and a member of the Algerian Air Force, was spirited off to the MDC Brooklyn on September 16, 2001 and held in SH as "high security" for purposes of providing an expeditious means of having the defendant interrogated by special agents of the FBI's ITOS as a result of the horrific events of September 11, 2001.

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FN6. The April 2003 report of the Inspector General of the U.S. Department of Justice entitled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" corroborates the allegations of the defendant as to the extremely harsh conditions under which he was held wherein it is stated:

In the aftermath of the September 11 attacks, 184 aliens arrested on immigration charges were confined in high-security federal prisons, as opposed to less restrictive INS detention facilities. Eighty-four of these aliens were held at the MDC in Brooklyn, New York. These MDC detainees were held under "the most restrictive conditions possible," which included "lockdown" for at least 23 hours per day, extremely limited access to telephones, and restrictive escort procedures any time the detainees were moved outside their cells. To this end, the MDC created an ADMA SHU specifically to confine the September 11 detainees.

P. 157; *see also* pages 158, 160, 163, 164, 192, 193, 195 and 197.

Admittedly, the defendant was initially in the lawful civil custody of the INS as a result of his illegal immigrant status in this country at the time, and it is conceded that the INS had the discretion to house the defendant at facilities of its choosing after taking the defendant into such custody and to thereafter process him in accordance with the immigration laws of the United States.

I am also of the opinion that because of the events of September 11, 2001, the FBI would have been derelict in its duty if it did not pursue an investigation of the defendant after the Canadian authorities contacted the U.S. officials on September 12, 2001. However, the events of September 11, 2001, notwithstanding the heinous and despicable nature of those events, do not constitute an acceptable basis for abandoning our Constitutional principles and rule of law by adopting an "end justifies the means" philosophy. It is in this context that the rights of the defendant must be evaluated. The previously-noted report of the Inspector General of the Department of Justice (*see* footnote # 6) is critical of the FBI's method of handing the cases designated "September 11 Detainees," of which the defendant was one, wherein it is stated:

*6 The FBI's New York Field Office took an aggressive stance when it came to deciding whether any aliens arrested on immigration charges were "of interest" to its terrorism investigation. Witnesses both inside and outside the FBI told us that the New York FBI interpreted and applied the term "of interest" to the September 11 investigation quite broadly. Consequently, all aliens in violation of their immigration status that the JTTF encountered in the course of pursuing PENTTBOM leads--whether or not subjects of the leads-- were arrested, classified as September 11 detainees and subjected to the full FBI clearance investigation, regardless of the factual circumstances of the aliens' arrest or the absence of evidence connecting them to the September 11 attacks or terrorism. This contrasted with procedures used elsewhere in the country, where aliens were assessed individually before being considered "of interest" to the terrorism investigation and therefore subject to the full FBI clearance investigations.

Moreover, the FBI's initial "interest" classification had an enormous impact on the detainees because it determined whether they would be housed in a high-security BOP facility like the MDC or in a less restrictive setting like Passaic. In addition, the decision to label an alien a "September 11 detainee" versus a "regular immigration detainee" significantly affected whether bond would be available and the timing of the detainee's removal or release.

Pages 186-187 (emphasis added).

In concluding his Report, the Inspector General was critical of the Department of Justice's handling of the cases involving the "September 11 Detainees" wherein "the Department of Justice used the federal immigration laws to detain aliens who were suspected of having ties to the attacks or terrorism in general" and found that "the Department instituted a policy that these detainees would be held until cleared by the FBI." Pages 195-196 (emphasis added).

The FBI did not "clear" the defendant until sometime in November 2001 as established in an FBI 302 report dated November 15, 2001 wherein it is stated:

Given the negative searches and after consultation with ASAC Kenneth Maxwell, FBI general counsel Hyon Kim (FBI HQ) and INS prosecuting attorney Ann Gannon the writer requests BENATTA be cleared of his involvement in the captioned investigation.

Exhibit I attached to Docket # 34.

Notwithstanding this aforesaid "clearance," the

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defendant continued to be held in SH as "high security" at the MDC Brooklyn until April 30, 2002 when he was transported by the USMS to the BFDF. (*See* Declaration of Michael Rozos, ¶ 18, Docket # 24).

Based on the particular facts of this case, it is reasonable to conclude that as of September 16, 2001, the defendant was primarily under the control and custody of the FBI when he was spirited off to the MDC Brooklyn and placed in SH as "high security." It is apparent that the transportation from the BFDF to the MDC Brooklyn and the detention of the defendant in SH were in fact orchestrated by the FBI for purposes of investigating whether the defendant was involved in terrorist activity. It is also reasonable to conclude that the defendant remained in such FBI custody at least until November 15, 2001 and more probably until April 2002. To accept and adopt the argument put forth by the government in response to the defendant's motion to dismiss the indictment, that the defendant was being detained by the INS for the purpose of conducting removal proceedings would be to join in the charade that has been perpetrated. The INS had the defendant in custody at the BFDF, an immigration detention facility, and had undertaken removal proceedings against the defendant in the WDNY on September 13, 2001. Immigration Judge Reid, sitting in Batavia, New York, had apparently been assigned this removal proceeding which had been "scheduled for a master calendar hearing on September 25, 2001 at the BFDF." (*See* Exhibit D, ¶ 2 attached to Docket # 34).

*7 It is also reasonable to conclude that since the FBI was now exercising dominion and control over the defendant as of September 16, 2001 and causing him to be held in SH with the designation "high security," it in essence "arrested" the defendant for purposes of conducting a criminal investigation of him. The INS facilitated this custodial detention and investigation. Whether such facilitation constitutes a "ruse," as claimed by the defendant, does not have to be determined at this time for the reasons and recommendations hereinafter made. FN7 However, there is no doubt in this Court's opinion that the facts of this case clearly establish that there was collusion between the INS and the FBI in the treatment of the defendant.

> FN7. Should the District Judge not accept this Court's recommendation to dismiss the indictment herein, it is further recommended that the matter be returned to this Court for purposes of holding a hearing on the issue of whether the lengthy "civil" detention was in fact a ruse by the INS or constituted "bad faith" on the part of the government.

A. The Fifth Amendment Due Process Claim

The Fifth Amendment to the United States Constitution expressly provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, ..., nor be deprived of life, liberty, or property, without due process of law .... (emphasis added).

The government argues that the defendant's motion to dismiss the indictment based on his claim of denial of due process under the Fifth Amendment must be denied because the defendant has failed to establish prejudice which is a prerequisite for such relief as set forth in case law and since the indictment in this case was returned within the allowable statute of limitations period for the charges therein, the defendant has no legal basis to warrant a dismissal of the indictment. It has been held that:

> [O]nly government conduct that "shocks the conscience" can violate due process. *United States v. Chin*, 934 F.2d 393, 398 (2d Cir.1991) (quoting *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952).... The paradigm examples of conscience-shocking conduct are egregious invasion of individual rights.

*United States v. Rahman*, 189 F.3d 88, 131 (2d Cir.1999).

However, the Court of Appeals for the Second Circuit has also held that:

> An indictment brought within the time constraints of the statute may nevertheless violate due process where pre-indictment delay has been shown to cause 'substantial prejudice' to the defendant's ability to present his defense and 'the delay was an intentional device to gain [a] tactical advantage over the accused.' [*United States v. Marion*, 404 U.S. 307, 324, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971) ]. As the Supreme Court further has explained, where delay prejudices the presentation of a defense and is engaged in for an improper purpose it violates the Due Process Clause because such conduct departs from the fundamental notions of 'fair play.' *United States v. Lovasco*, 431 U.S. 783, 795, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). A defendant bears the 'heavy burden' of proving both that he suffered actual prejudice because of the alleged pre-indictment delay *and* that such delay was a course intentionally pursued by the

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government for an improper purpose. *See United States v. Scarpa*, 913 F.2d 993, 1014 (2d Cir.1990); *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir.1987).

*8 Prejudice in this context has meant that sort of deprivation that impairs a defendant's right to a fair trial. *See United States v. Elsbery*, 602 F.2d 1054, 1059 (2d Cir.1979). This kind of prejudice is commonly demonstrated by the loss of documentary evidence or the unavailability of a key witness. *See e.g. Lovasco*, 431 U.S. at 796, 97 S.Ct. 2044, 52 L.Ed.2d 752....

*United States v. Cornielle*, 171 F.3d 748, 752 (2d Cir.1999).

I do not find anything in the present record that would support a finding that the delay in indicting the defendant herein was caused so as to "gain a tactical advantage over the accused" or that such delay has caused the "loss of documentary evidence or the unavailability of a key witness." As a result, it cannot be said that the defendant's rights under the Due Process Clause of the Fifth Amendment have been violated under those circumstances. The difficult question is whether the investigation tactics employed by the FBI with the collusion of INS constitute an "improper purpose" because "such conduct departs from fundamental notions of fair play" and therefore constitutes a violation of Due Process. This Court recognizes that the events of September 11, 2001 necessitated extraordinary action by the government in order to prevent further harm and acts of terrorism and to apprehend all those who had involvement in those despicable acts. Once again, however, under our Constitution, absent due process, the end cannot justify the means no matter how well or good intentioned the parties may be, for as the old adage teaches, "the road to hell is paved with good intentions." Holding the defendant for a reasonable period of time in order to determine if he was involved in terrorism was justified, especially considering the circumstances of September 11, 2001 and the fact that he is an Algerian citizen in the Algerian Air Force and was attempting to leave this country and enter Canada on September 5, 2001. Although this may have smacked of "profiling," common sense dictated that the defendant be investigated in light of the circumstances. What I do find to be most troubling, however, is the prosecution's attempt to put a "spin" on what was done

in this case by asserting that at all times the defendant was in the legal custody of the INS and was being held for the purpose of enforcing the immigration laws of the United States. The facts of this case belie that assertion. Nevertheless, for the reasons hereinafter stated, I find that it is not necessary to answer this perplexing question of whether the actions of the INS and the FBI in their treatment of the defendant were taken for an "improper purpose" so as to cause a finding that the Due Process Clause of the Fifth Amendment was violated. The basic issue herein is better addressed under the principles of the Sixth Amendment and the Speedy Trial Act as well as Rule 48(b) Fed.R.Crim.P.

B. The Sixth Amendment Speedy Trial Claim:

The language of the United States Supreme Court in *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) is most applicable to the factual circumstances in the case at hand and therefore, brevity will be sacrificed intentionally by setting it forth at length:

*9 We have observed in prior cases that unreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including "oppressive pretrial incarceration," "anxiety and concern of the accused," and "the possibility that the [accused's] defense will be impaired" by dimming memories and loss of exculpatory evidence. [*Barker v. Wingo*, 407 U.S. 514, 532, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972) ]; *see also Smith v. Hooey*, 393 U.S. 374, 377-379, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969); *United States v. Ewell*, 383 U.S. 116, 120, 86 S.Ct. 773, 776, 15 L.Ed.2d 627 (1966).

* * *

*Barker* stressed that official bad faith in causing delay will be weighed heavily against the government, 407 U.S. at 531, 92 S.Ct. 2182, 33 L.Ed.2d 101.... Between diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him.... *Barker* made it clear that "different weights [are to be] assigned to different reasons" for delay. *Ibid.* Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence

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compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness, *cf.* Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 101 L.Ed.2d 281 (1988), and its consequent threat to the fairness of the accused's trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority. The government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the government attaches to securing a conviction, the harder it will try to get it. *Id.* at 654, 656-57 (emphasis added).

The view expressed by Justice Thomas in his dissenting opinion in *Doggett,* which was joined in by Chief Justice Rehnquist and Justice Scalia is most applicable to the defendant's case wherein he stated:

> We have long identified the "major evils" against which the Speedy Trial Clause is directed as "undue and oppressive incarceration" and the "anxiety and concern accompanying public accusation." United States v. Marion, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 20 L.Ed.2d 468 (1971) p. 659. "[These] two concerns lie at the heart of the Clause....
>
> * * *
>
> *10 "[T]he Speedy Trial Clause's core concern is impairment of *liberty."* United States v. Loud Hawk, 474 U.S. 302, 312, 106 S.Ct. 648, 654, 88 L.Ed.2d 640 (1986).... The Clause is directed not generally against delay-related prejudice, but against delay-related prejudice to a defendant's liberty. "The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial ...." (emphasis added) (internal citations omitted).
>
> *Id.* at 659-661.

The defendant in this case undeniably was deprived of his "liberty" and held in custody under harsh conditions which can be said to be "oppressive." (*See* Inspector General's Report--"The September 11 Detainees," *supra,* fn. 6; Docket # 34, ¶ 48). This period of harsh detention had been in effect for approximately three months before the present indictment was returned against the defendant on December 12, 2001. Notwithstanding the fact that the defendant was in the government's custody, either by way of the INS, the FBI or the USMS, and a warrant for his arrest had been issued by this Court on December 12, 2001 at the request of the government, and that the defendant had been "cleared" by the FBI of terrorist activity in November 2001, the defendant was not brought before a magistrate judge for arraignment on this indictment until April 30, 2002. More disconcerting is the fact that the defendant was kept at the MDC Brooklyn in SH until April 30, 2002 under the same harsh conditions notwithstanding his "clearance" by the FBI in November 2001.

To accept the government's argument that the defendant has not been "prejudiced" in this case or that the defendant has failed to establish "prejudice" would be to deny reality and the very "core concern" of the Sixth Amendment. To be kept in "lockdown" in SH at the MDC Brooklyn, under the oppressive conditions described in the Inspector General's Report on "The September 11 Detainees" for more than seven months under the factual circumstances of this case, certainly constitutes the "undue and oppressive incarceration" the Sixth Amendment is meant to prevent. [FN8]

> FN8. It is noted that under the Federal Sentencing Guidelines, the defendant's guideline range is zero to six months and therefore, he was and is eligible for probation. As a result, custodial detention in SH at the MDC Brooklyn for the period December 12, 2001 to April 30, 2002 could be said to have unnecessarily deprived him of his liberty.

The explanation for the delay in returning the defendant to the WDNY and not arraigning him on the indictment until April 30, 2002 does not establish a legitimate justification for such delay but rather demonstrates incompetence and negligence on the part of the government's counsel. [FN9] It also contradicts the argument put forth by the government in justifying the removal of the defendant from the BFDF on September 16, 2001 and spiriting him off to the MDC Brooklyn. More specifically, the government argues that since the defendant had been taken into custody by the INS on September 12, 2001 as an illegal alien, it had the right to transport and house him anywhere the INS deemed appropriate and that it was not necessary to have a court order or any other type of judicial authorization for such removal and relocation. If that is the case, why was it necessary for the government to file a "removal complaint" or consider using a "writ" to bring the defendant back to the WDNY and house him in the

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BFDF? Using the authority postulated by the government, the INS did not need any order or judicial authorization in order to relocate or re-transport the defendant to the BFDF. Assistant United States Attorney Gromis merely had to request that such return of the defendant be effectuated since it has been established that Gromis was working with Larry Krug, the INS case agent in Buffalo for this very purpose when he "provided a copy of the [arrest] warrant" to him for the arrest of the defendant on the indictment herein. Upon such return to the WDNY under the custody of INS on the immigration charge, the defendant could have easily been brought before this Court for arraignment on the indictment. In any event, it is emphasized that Rule 40, Fed.R.Crim.P. proceedings are not complex and the mandate of the Rule is quite clear, to wit:

FN9. *See* Docket # 13.

*11 If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person shall be taken without unnecessary delay before the nearest available federal magistrate judge, in accordance with the provisions of Rule 5. (emphasis added). [FN10]

FN10. This was the Rule in effect in December 2001 and January through November 2002.

It is noted that Assistant United States Attorney Gromis, in his Affidavit sworn to August 28, 2002, paragraph 4 (Docket # 13), states that he "provided a copy of the [arrest] warrant to the INS case agent in Buffalo, Larry Krug, and asked him to lodge it as a detainer against the defendant, who was in custody at the Metropolitan Detention Center in Brooklyn in the Eastern District of New York." Since the defendant was already in the custody of the INS, and it now had an arrest warrant for the defendant, I fail to see why that warrant could not have been executed immediately and the defendant brought "forthwith" to the nearest magistrate judge. (*See* Docket # 40). The explanations set forth in the attached e-mail printouts to the Gromis affidavit (Docket # 13) border on ridiculousness. For two supposedly experienced Assistant United States Attorneys to debate on how to return an indicted defendant from the custodial district to the charging district for a period of approximately four months is ludicrous. Furthermore, Gromis's assertion that he "did not immediately commence action to bring the defendant to Buffalo" because he "had been informed by the INS that the defendant was involved in INS removal proceedings at that time in New York City" rings hollow. (Docket # 13, ¶ 5). The INS removal hearing had been completed on December 12, 2001 and an order of removal issued on that date. (*See* Docket # 24, ¶ 14 and Exhibit C attached thereto). Admittedly, the defendant filed an appeal from this order of removal to the Board of Immigration Appeals ("BIA") on January 4, 2002, but there was no legal requirement to hold the defendant at the MDC Brooklyn while this appeal was pending or to keep him at any facility in the New York City area. The INS appeal process could just as easily have been completed while the defendant was detained at the BFDF as so often happens. This BIA appeal was certainly not a legal impediment to the execution of the aforesaid arrest warrant and appearance before a magistrate judge.

Nevertheless, "on April 8, 2002 the BIA dismissed defendant's appeal from the IJ removal order" (*see* Docket # 24, ¶ 15 and Exhibit D attached thereto) and the arrest warrant was executed on April 9, 2002 by representatives of INS and the defendant was "arrested by INS Brooklyn, N.Y." on April 9, 2002. (*See* Docket # 40). I find it curious that INS agents executed the arrest of the defendant on non-INS charges, but nevertheless, such action further buttresses this Court's opinion that the defendant could have easily been returned to the WDNY in December 2001 and certainly no later than January 14, 2002 by the INS.

*12 Because the government contends that the defendant was always in the custody of INS since his "civil arrest" on September 12, 2001, and since INS Agent Krug had been given the arrest warrant for the arrest of the defendant on the indictment on or about December 12, 2001, I consider the defendant to have been constructively arrested on the indictment on or about December 12, 2001 by reason of his confinement at the MDC Brooklyn in SH as "high security" under the alleged custody of the INS. As a result, the defendant should have been "taken without unnecessary delay before the nearest available federal magistrate judge" pursuant to Rule 40 of the Fed.R.Crim.P. By not doing so, and keeping the defendant detained in the MDC Brooklyn, SH without bail or affording him an opportunity to apply for bail, constituted "delay-related prejudice to [his] liberty" which rose to the level of violating his Sixth Amendment right to a speedy trial. This type of government malfeasance or negligence should not be tolerated since it "falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying" the criminal prosecution of the defendant. *Doggett, supra.* As a result, it is

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recommended that defendant's motion to dismiss the indictment be granted on this ground.

C. The Speedy Trial Act Claim:

If the District Judge elects not to accept the recommendation of this Court to dismiss the indictment on Sixth Amendment grounds, it is submitted that the defendant's motion to dismiss should be granted on the basis that the government, under the specific and bizarre facts of this case, failed to comply with the requirements of the Speedy Trial Act ("STA"), 18 U.S.C. § 3161(c)(1).

Title 18 U.S.C. § 3161(c)(1) provides:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. (emphasis added).

The government argues that the STA has not been violated since the defendant did not appear before this Court for arraignment on the indictment until April 30, 2002 at which time he entered a plea of not guilty to the charges and therefore, the "seventy day" period under 18 U.S.C. § 3161(c)(1) did not commence to run until that date. This particular posturing by the government not only attempts to place form over substance, it also constitutes a bootstrapping argument of the most discreditable kind and is nothing more than sophistry. By its very actions in keeping the defendant detained in SH at the MDC Brooklyn from December 12, 2001 until April 30, 2002, the defendant, through no fault of his own, was prevented from appearing sooner before this Court for arraignment on the indictment which was filed and made public on December 12, 2001. The very purpose of the STA would be defeated if the government is allowed to prevent the arraignment of the defendant by holding him in its custody and at the same time claim that the speedy trial clock has not started because the defendant has not been arraigned. The provision set forth in 18 U.S.C. § 3161(c)(1) as to when the seventy day period commences is meant to apply to those circumstances wherein the defendant is not available for arraignment after an indictment has been returned and filed or where the defendant has caused the delay in his arraignment. That is not the case before this Court. Because the defendant was in the control and custody of the government on December 12, 2001 and therefore available for arraignment on the indictment, the government cannot utilize the actual arraignment date to justify its inaction in this case. Such delay has not only caused "prejudice" to the defendant for the reasons set forth above, it has denied him his rights as provided under the STA.

***13** Admittedly, a formal plea of not guilty to the charges in the indictment had not been entered until his arraignment on April 30, 2002. Nevertheless, the defendant is presumed innocent of these charges and such presumption of innocense which existed from December 12, 2001 equates to a plea of not guilty to the charges herein for purposes of this analysis.

> The principle that there is a presumption of innocense in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

*Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895); *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).

This Court finds that the defendant could have easily been returned to the WDNY and arraigned on the present indictment by January 14, 2002 even if it were necessary to have done so pursuant to Rule 40 of the Fed.R.Crim.P. Using this January 14, 2002 date, another 105 days elapsed before the defendant was returned to the WDNY and arraigned on the indictment. As a result, the defendant was subjected to oppressive pretrial incarceration which constitutes prejudice as a result of the government's failure to have him promptly arraigned on the indictment. *Doggett v. United States, supra.* Such delay should not be tolerated and therefore, an appropriate remedy for this violation is dismissal of the indictment. *See* 18 U.S.C. § 3162(a)(2).

> Regardless of the defendant's guilt or innocense, courts are permitted to exercise the power of dismissal against the wishes of the prosecutor when there is a failure to prosecute that is unjustified either because of the literal application of the statute or because of a showing of prejudice to the accused or an intentional delay by the prosecution to effect such prejudice.

*United States v. Lai Ming Tanu*, 589 F.2d 82, 87 (2d Cir.1978).

Notwithstanding the decisions in *United States v. Lai Ming Tanu, supra,* *United States v. Lainez-Leiva*, 129 F.3d 89 (2d Cir.1997) and *United States v. Jones*, 129 F.3d 718 (2d Cir.1997), the unique and bizarre facts of this case cause me to conclude that support

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for this finding is found, by analogy, in the provisions of 18 U.S.C. § 3161(j)(1), (2) and (3). 18 U.S.C. § 3161(j)(1), (2) and (3) provide as follows:

(j)(1) If the attorney for the government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly -

* * *

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

2. If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the government who caused the detainer to be filed.

***14** 3. Upon receipt of such notice, the attorney for the government shall promptly seek to obtain the presence of the prisoner for trial. (emphasis added).

Logic dictates that the defendant, who was held in the custody of the government in a BOP facility in SH for purposes of allegedly being deported pursuant to the immigration laws of the United States, should have been notified that criminal charges had been filed against him and that he had a right to demand a trial on such charges. Assistant United States Attorney Gromis caused a "detainer" to be filed against the defendant by providing the warrant for the arrest of the defendant to INS case agent Larry Krug on December 12, 2001 and asking him "to lodge it as a detainer against the defendant." (Docket # 13, ¶ 4). It appears from a reading of the record and the submissions made in this case, that the defendant had not been advised promptly of the indictment against him and his right to demand a trial. In fact, it appears to this Court that the defendant was never advised of the indictment until his appearance before the magistrate judge in the EDNY on April 9, 2002 when he was ordered returned to the WDNY. Holding the defendant in SH at MDC Brooklyn under harsh and oppressive conditions for a period of approximately 138 days before having him arraigned on the indictment constitutes a violation of the STA and therefore, it is RECOMMENDED that the indictment herein be dismissed pursuant to 18 U.S.C. § 3162(a)(2).

D. Dismissal Pursuant to Rule 48(b) Fed.R.Crim.P.:

Rule 48(b) of the Fed.R.Crim.P. provides as follows:

The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in:

* * *

3. Bringing a defendant to trial (emphasis added).

*See also United States v. Marion,* 404 U.S. 307, 319, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

Arraignment of a defendant on the indictment is the initial step necessary for bringing a defendant to trial when an indictment has been returned by a grand jury. *See* Rule 10, Fed.R.Crim.P. For the reasons previously set forth, the delay in arraigning the defendant on the indictment was absolutely unnecessary. Furthermore, even if it were concluded that such delay did not rise to the level of a violation of the Sixth Amendment right to a speedy trial, or to a violation of the STA, the Court nevertheless has authority under Rule 48(b) Fed.R.Crim.P. to dismiss the indictment herein. As the Court of Appeals for the Fourth Circuit has held:

[Rule 48(b) of the Fed.R.Crim.P.] not only allows a court to dismiss an indictment on constitutional grounds, *see Pollard v. United States,* 352 U.S. 354, 361, n. 7, 77 S.Ct. 481, 1L.Ed.2d 393 (1957) (noting that Rule 48(b) provides for enforcement of the Sixth Amendment's speedy-trial right), but it also restates the court's inherent power to dismiss an indictment for lack of prosecution where the delay is not of a constitutional magnitude, *see* Fed.R.Crim.P. 48(b) advisory committee note (pointing out that the rule restates 'inherent power of the court to dismiss a case for want of prosecution').

***15** *United States v. Goodson,* 204 F.3d 508, 513 (4th Cir.2000).

Therefore, because of the prejudice that the defendant has suffered by reason of his confinement at the MDC Brooklyn, it is RECOMMENDED that the indictment herein be dismissed with prejudice pursuant to Rule 48(b) Fed.R.Crim.P. if it is not dismissed pursuant to the Sixth Amendment or the STA.

E. Defendant's Motion To Suppress Evidence:

The defendant moved to suppress any statements made by him to the various FBI agents who interrogated him during the period of September 12, 2001 through November 2001. The government has represented that it "does not intend to offer any ... statements [of the defendant] at the defendant's trial during its case-in-chief." (*See* Government Response

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to Defendant's Motion, Docket # 12, page 1). As a result of this representation, the defendant's motion to suppress should be denied on the basis that it is moot.

*CONCLUSION*

Based on the foregoing, it is hereby RECOMMENDED that the defendant's motion to dismiss the indictment be GRANTED and that the indictment be dismissed with prejudice and that the defendant's motion to suppress evidence be DENIED on the basis that it is moot.

Therefore, it is hereby ORDERED pursuant to 28 U.S.C. § 636(b)(1) that:

This Report, Recommendation and Order be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report, Recommendation and Order must be filed with the Clerk of this Court within ten (10) days after receipt of a copy of this Report, Recommendation and Order in accordance with the above statute, Fed.R.Civ.P. 72(b) and Local Rule 72.3(a)(3).

The District Judge will ordinarily refuse to consider *de novo,* arguments, case law and/or evidentiary material which could have been, but were not presented to the magistrate judge in the first instance. *See, e.g., Patterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.,* 840 F.2d 985 (1st Cir.1988). *Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Judge's Order. Thomas v. Arn,* 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Wesolek v. Canadair Ltd.,* 838 F.2d 55 (2d Cir.1988).

The parties are reminded that, pursuant to Rule 72.3(a)(3) of the Local Rules for the Western District of New York, "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." *Failure to comply with the provisions of Rule 72.3(a)(3), or with the similar provisions of Rule 72.3(a)(2) (concerning objections to a Magistrate Judge's Decision and Order), may result in the District Judge's refusal to consider the objection .*

The Clerk is directed to send a copy of this Report, Recommendation and Order to the attorneys for the parties.

2003 WL 22202371 (W.D.N.Y.)

**Motions, Pleadings and Filings** (Back to top)

. 1:01CR00247 (Docket) (Dec. 12, 2001)

END OF DOCUMENT

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Government of Canada
Consulate General of Canada

Gouvernement du Canada
Consulat général du Canada

Immigration Regional Program Center
3000 HSBC Center, Buffalo, NY 14203
e-mail: buffalo-im-enquiry@international.gc.ca

July 11, 2006

Mr. James Grable
Chief Counsel
DHS
Buffalo, New York

Dear Mr. Grable,

This letter pertains to Mr. Benamar Benatta and our recent conversations about his possible return to Canada.

As you recall, the circumstances surrounding Mr. Benatta are as follows: Mr. Benatta attempted to enter Canada on September 5, 2001. He was detained between September 5 and 12, 2001, for identity purposes under the *Immigration and Refugee Protection Act (IRPA)* for misrepresentation and for use of fraudulent documentation when he presented himself at the port of entry (POE). Mr. Benatta's file indicates that when he was examined at the POE and during his period of detention, he expressed a desire to seek refugee status in Canada. However, there is no record of a claim.

On September 12, 2001, Mr. Benatta was returned to the United States. Information on the file indicates this was a voluntary withdrawal. However, there is no documentation to support this such as a copy of the 'Allowed to Leave' form, as would normally be the case. Further, there are documents on file indicating that Canada agreed with their U.S. counterparts that Mr. Benatta would be allowed to return to Canada should he wish once the U.S. authorities had finalized processing of his case.

Therefore, this letter will serve as a notification to your office that the Government of Canada in order to meet the above objective will issue a Temporary Resident Permit to Mr. Benatta to allow him entry into Canada.

We would appreciate if you could provide the Government of Canada with an application form from Mr. Benatta for a Temporary Resident Application (TRP) and his original Algerian travel document.

Thank you for all your efforts.

Sincerely,

Randy W. Orr
A/Immigration Program Manager

Cc: Case Management Branch, CIC

This is Exhibit F referred to in the affidavit of Benamar Benatta sworn before me, this 14th day of March 2007

A COMMISSIONER FOR TAKING AFFIDAVITS
Nicole Chrolavicius LSUC#45916

Canada

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November 29, 2003 Saturday
Final Edition

This is Exhibit G referred to in the
affidavit of Benamar Benatta
sworn before me, this 14th
day of March 2007

A COMMISSIONER FOR TAKING AFFIDAVITS
Nicole Chrolavicius LSUC#45911G

**SECTION:** A Section; A01

**LENGTH:** 2339 words

**HEADLINE:** A Prisoner Of Panic After 9/11;
Algerian-Born Detainee Seen as Victim of Excess

**BYLINE:** Michael Powell, Washington Post Staff Writer

**DATELINE:** BATAVIA, N.Y.

**BODY:**

Benamar Benatta sits in a whitewashed cell, lost in a post-Sept. 11 world.

Jailed the night of the attacks on the World Trade Center and Pentagon, the Algerian air force lieutenant with an expired visa has spent the past 26 months in federal prisons, much of that time in solitary confinement — even though the FBI formally concluded in November 2001 that he had no connection to terrorism.

Since the government first took Benatta into custody, the United States has apprehended and released about 760 domestic detainees. More than 80 prisoners have been released from the military jail where alleged al Qaeda and Taliban fighters are held in Guantanamo Bay, Cuba. It appears that no detainee has been locked up as long as Benatta, although it is impossible to know because of secrecy surrounding some material witnesses who may still be in government custody.

He remains behind bars, awaiting a deportation hearing, unable to post a $25,000 bond.

"Two years ago, I had hopes. I was okay," said Benatta, 29, a pale, handsome man who wore loose-fitting orange prison pajamas and spoke slightly French-accented English during a two-hour interview at the Buffalo Federal Detention Facility. "Now I lie in my cell and think: 'What has become of me?' "

Benatta was among the 1,200 or so men detained by U.S. law enforcement agents in the frenzied weeks after the Sept. 11, 2001, terrorist attacks. He had a most unfortunate résumé: An Algerian and a Muslim, he was an avionics technician, and — like most of the others — he lacked proper immigration papers.

The Canadians had held Benatta since he arrived at the Peace Bridge crossing near Buffalo and applied for asylum the previous week. They turned him over to federal agents. A few days later, prosecutors sent him south to New York City, where he was placed in solitary confinement.

It was as though Benatta became invisible. His name never appeared on lists of detainees. His family in Algeria believed he had vanished. No defense attorney knew of his existence until a federal defender in Buffalo was assigned his case in late April 2002.

The federal government has few explanations for what happened. In legal briefs, the U.S. attorney in Buffalo blamed some of the delays on bureaucratic wrangling between prosecutors and the U.S. Marshals Service, and the confusion that followed the terrorist attacks. But in the documents, U.S. Attorney Michael A. Battle of the Western District of New York ultimately acknowledged that such conditions could "not justify violating the defendant's rights."

Two years after the attacks, federal Magistrate Judge H. Kenneth Schroeder Jr. would examine Benatta's case and find a study in governmental excess.

Schroeder issued an unsparing report in September, writing that federal prosecutors and FBI and immigration agents

engaged in a "sham" to make it appear that Benatta was being held for immigration violations. Prosecutors trampled on legal deadlines intended to protect his constitutional rights and later offered explanations for their maneuvers that "bordered on ridiculousness," Schroeder wrote. And he found that the government compounded its mistakes by failing to act once it was clear that Benatta was not an accomplice to terrorists.

"The defendant in this case undeniably was deprived of his liberty," Schroeder wrote, "and held in custody under harsh conditions which can be said to be oppressive." To keep Benatta imprisoned any longer, the magistrate concluded, "would be to join in the charade that has been perpetrated."

Battle filed papers in October objecting to Schroeder's "harsh" criticism of his prosecutors, several of whom were identified by name.

Soon after, however, Battle accepted Schroeder's report and dropped the two criminal charges alleging that Benatta possessed false identification papers.

Battle, through a spokesman, turned down a request for an interview. A former federal prosecutor criticized by Schroeder also declined to comment, as did a Justice Department spokesman in Washington. A spokesman for the Bureau of Immigration and Customs Enforcement, which assumed parts of the former Immigration and Naturalization Service, noted only that Benatta now faces a "removal hearing."

After the terrorist attacks, federal officials defended detentions for immigration violations as central to preserving national security. "Let the terrorists among us be warned: If you overstay your visa — even by one day — we will arrest you," U.S. Attorney General John D. Ashcroft said in October 2001.

Critics have long contended that the government crackdown infringed on the civil rights of some detainees. Earlier this year, the Justice Department's own inspector general examined the government's handling of some detainees and found that many had been held without charge longer than is allowed by statute, and that a number had been denied access to lawyers for long periods. Inspector General Glenn A. Fine also found that the FBI took too long to investigate and clear them of connections to terrorism.

The inspector general's report also said that corrections and court officers in the New York region had subjected detainees to "patterns of verbal and physical abuse."

Benatta said he did not talk with Fine's investigators. But the Algerian was held in the same wing of the same prison they examined — the Metropolitan Detention Center in Brooklyn. His descriptions of being threatened and mocked by corrections officers closely track the report's findings.

"This is one of the worst cases we've seen," said Elisa Massimino, Washington director of the Lawyers Committee for Human Rights, which has sued the government to stop the holding of detainees without recourse to lawyers. "This is a perfect example of how the government has played a shell game with detainees for months and months."

Benatta landed in the United States on Dec. 31, 2000, an Algerian air force lieutenant accompanying 39 men to classified training seminars at Northrop Grumman Corp. in Baltimore. He held a six-month U.S. visa.

But Benatta did not return to Algeria. He would not discuss precise reasons for overstaying his visa but noted that Algeria is plagued by terrible violence and divided between an often-murderous Islamic fundamentalist movement and a military implicated in human rights abuses.

"I had a problem with the terrorists who wanted to kill me and with the military, which was beating and torturing people," he said. "My parents knew I did not intend to come back."

Benatta said he moved to New York City, where he worked as a busboy and lived with an Orthodox Jewish roommate in the Bronx. His visa expired on June 30, 2001. In what he described as a moment of desperation, he took a midnight bus to Buffalo on Sept. 5 and filed for asylum in Canada. Canadian officials detained him in a cell at their offices on the far side of the Peace Bridge, apparently concerned that he was depressed and perhaps suicidal, while they investigated his claim.

On the evening of Sept. 11, Benatta said, officers walked into his cell and asked about his military background and the false identification papers he allegedly carried with him. Within hours, he was on his way to a holding cell in upstate New York, where an FBI agent showed him a photo of the World Trade Center and told him of the attack.

"The agent warned that if I say I have no connection with this terrorism, I will spend the rest of my life in prison," Benatta recalled. "I thought they would offer me to the American people as the one who did this attack. I thought my life was done."

The next days, in his telling, became a blur. Teams of FBI agents repeatedly questioned Benatta. Guards put him in ankle chains and handcuffs, slung a chain around his waist, and loaded him into an airplane to New York City. Dozens of officers with rifles met him at Kennedy International Airport and took him to a federal prison in Brooklyn.

In court papers, the government does not dispute the outlines of Benatta's account. Schroeder discovered numerous violations of the detainee's rights during those first weeks. He noted that INS lawyers did not file legal papers to transfer Benatta until a week after he had arrived in New York, an action the magistrate termed "a sham."

More broadly, Schroeder found "damning evidence" that INS lawyers improperly "colluded" with the FBI and federal prosecutors to use immigration procedures as a "subterfuge" to "spirit" Benatta to New York City. Once there, the government "in essence arrested" Benatta for the purpose of conducting a criminal investigation of him and did not allow him to speak with a lawyer.

These actions, Schroeder wrote, violated Benatta's Sixth Amendment rights to a speedy trial. Federal prosecutors responded that the attorney general has the unilateral power to determine where to hold an immigration detainee, an argument Schroeder rejected.

At the high-security detention center in Brooklyn, Benatta was placed in a solitary cell — known by prisoners as "the box." His cell was illuminated 24 hours a day. The guards wrote "WTC" in chalk on his cell door and, he said, for weeks they would knock loudly on the door every half-hour to wake him up.

He had no access to books, television or a lawyer. For weeks, he could not leave the cell except when FBI agents arrived to interrogate him about his job, ethnicity and religious beliefs.

"In the box, I had no right to shave, to shower, nothing," Benatta said.

"By the end of a month, I had a huge beard, and I couldn't even walk. You feel in there that one day is one month."

He recalled being forced to strip while guards mocked him. He said guards knocked his head against the elevator wall while he was in manacles and one time pulled his waist chain so tight he had trouble breathing.

"For three or four months, you couldn't talk or they would punish you," he said. "Then maybe things started to calm down."

Fine's report stated that "we believe there is evidence supporting the detainees' claims of abuse." The U.S. Attorney's Office for the Eastern District has declined to prosecute any prison guards.

On Nov. 15, 2001, the FBI cleared Benatta of any connection to terrorism. In a document quoted in Schroeder's ruling, the FBI wrote: "Given the negative searches and after consultation . . . with FBI General Counsel Hyon Kim and INS prosecuting attorney Ann Gannon, the writer requests BENATTA be cleared of his involvement in the captioned investigation." Battle agreed last month that "the FBI's 9/11-related interest in Mr. Benatta ended" on Nov. 15, 2001.

But no one told Benatta. He remained locked in solitary confinement for another five months and was never offered a lawyer, according to Schroeder.

Benatta betrays a rare flash of anger at the mention of those lost months. "I am cleared after Nov. 16, and still they kept me in the box. Why do they do that?"

With the terrorism investigation concluded, prosecutors in Buffalo obtained a grand jury indictment against Benatta on Dec. 12, 2001, on charges related to carrying false identification papers. A warrant was issued for his arrest, but federal officials never informed him and never offered him an attorney.

Benatta did not learn of the pending charges until April 2002, just before he was transferred to Buffalo. Prosecutors with the Western District offered him a plea bargain that would have carried a six-month sentence, essentially amounting to time served. But Benatta refused. When he arrived in Buffalo, a judge had assigned him a lawyer for the first time — federal defender Joseph B. Mistrett. He decided to fight the charge that he carried false papers.

"I'm not a criminal. Never," Benatta said. "Now I could choose to go to trial."

Mistrett took a liking to Benatta and began filing motions. "It's so outrageous what happened to this guy," Mistrett said. "I was offended as an American citizen."

But despite his efforts, 17 months passed before Schroeder ruled in favor of Benatta, who lived during that time in a cell in the Batavia detention center, where he read and studied law. Last month, Battle filed papers that all but conceded that an injustice had been committed.

"The government agrees that the events of September 11th do not justify violating the defendant's rights," Battle wrote. "Dismissal may be appropriate."

Benatta's worries are like floodwaters that never recede. He now faces a deportation hearing and does not yet have an immigration lawyer. (Mistrett could contest only the criminal charges.) As a military man gone AWOL, he would face a grim fate should he land back in Algeria. "Look, I am in trouble," he said. "If I am not executed right away, I will spend my life in prison."

Human rights advocates suggest Benatta likely is not exaggerating. More than 7,000 people disappeared last year at the hands of Algerian security forces, more than the number recorded in any country in the past decade, according to Human Rights Watch.

Yet Benatta, whose geography has been circumscribed for the past 26 months by cinder blocks and barbed wire, does not sound particularly bitter. He said he understands how, in the weeks and months after nearly 3,000 people died, panic gripped a nation.

"I don't blame the United States. They've never had to deal with terrorists, and 3,000 people die; that's a lot."

Schroeder addressed the same concern in his decision. The FBI, he wrote, "would have been derelict" if it had not investigated Benatta. But he added a caution: "Under our Constitution, absent due process, the end cannot justify the means."

In October, when Battle announced he was dropping charges, a Buffalo reporter asked whether he planned to apologize to Benatta. "I'm not going to address that," the prosecutor said.

That's okay with Benatta. As his interview ended, he stood in Room V1O7 at the Batavia detention center and waited for a guard to unlock the door. Peering back at a reporter, he said: "I don't need an apology. I just want them to stop accusing me."

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