UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NICHOLAS GEORGE, Plaintiff, v. WILLIAM REHIEL, *et. al*, Defendants.	No. 2:10-cv-586 (EL) ECF Case

PLAINTIFF'S MEMORANDUM IN OPPOSITION
TO THE UNITED STATES' MOTION TO DISMISS

BEN WIZNER, *pro hac vice*
JONATHAN MANES, *pro hac vice*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500 (phone)
(212) 549-2583 (facsimile)
bwizner@aclu.org
jmanes@aclu.org

MARY CATHERINE ROPER (PA No. 71107)
M. M. TACK-HOOPER (PA No. 307828)
American Civil Liberties Union Foundation of Pennsylvania
P.O. Box 40008
Philadelphia, PA 19106
(212) 592-1513 ext. 116 (phone)
(212) 592-1343 (facsimile)
mroper@aclupa.org
mtack-hooper@aclupa.org

DAVID RUDOVSKY (PA No. 15168)
Kairys, Rudovsky, Messing & Feinberg, LLP
718 Arch Street
Suite 501S
Philadelphia, PA 19106

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

INTRODUCTION

In August 2009, Plaintiff Nicholas George, a 21-year old Philadelphia resident and student at Pomona College, was detained, abusively interrogated, subjected to a humiliating arrest during which he was led through a crowded airport in handcuffs in plain view of the public, and locked in a jail cell for several hours solely because he was carrying a deck of Arabic-English flashcards and a book critical of U.S. foreign policy. He brings this lawsuit to vindicate his Fourth Amendment right to be free from unreasonable seizures and his First Amendment right against retaliation for possessing constitutionally protected educational materials. He also brings claims under the Federal Tort Claims Act ("FTCA") for false imprisonment and arrest, assault and battery, and false light invasion of privacy.

The government has moved to dismiss all claims asserted in the complaint against the United States.[1] The government's overarching argument is that the individual federal defendants played no role in the false imprisonment, assault and battery, and false light committed by the Philadelphia Police Department ("PPD") defendants. In essence, the government argues that the United States is not liable for the Transportation Security Administration ("TSA") agents' decision to summon the PPD and deliver Mr. George into the PPD's hands for arrest and interrogation. Likewise, the government argues that the Joint Terrorism Task Force ("JTTF") agents who interrogated Mr. George and ultimately released him from detention are not responsible for anything that happened outside of the 30 minutes that they spent interrogating him—not even the several hours that the PPD held Mr. George on behalf of the JTTF agents while awaiting their arrival. The government would have the court dismiss the complaint before

[1] The government has also moved to dismiss the constitutional claims asserted against the individual federal defendants. Mem. in Supp. of Individual Fed. Defs.' Mot. To Dismiss (hereinafter "F. Defs.' Br."). We address that motion in a separate brief.

any discovery has taken place on the theory that only the PPD officers who applied the handcuffs and locked the jail cell door violated the law, and that they acted alone.

This position, which treats Mr. George's arrest and detention in the PPD airport holding cell as isolated from any actions taken by the TSA or JTTF defendants, ignores key facts alleged in the complaint and relies on an erroneous understanding of basic tort law principles. The allegations in the complaint are more than sufficient to sustain false imprisonment, assault and battery, and false light claims against the United States based on the federal defendants' central role in bringing about Mr. George's arrest and prolonged detention in the PPD holding cell. Discovery will clarify the precise relationship between the federal and local defendants.

The government also argues that the United States is immune under the FTCA from suits that arise out of any intentional torts committed by TSA agents. But TSA agents, who execute searches and – as in this case – conduct investigatory detentions and direct arrests are liable to the same extent as other law enforcement officers. In any case, the government does not dispute that it may be held liable for the actions of the JTTF defendants; the United States may be held liable for the torts alleged on the basis of their conduct alone.

FACTS

Plaintiff Nicholas George was a 21-year old college student flying to California to resume his studies at Pomona College when he was detained, abusively interrogated, handcuffed, and jailed because he was carrying a deck of Arabic-English flashcards and a book critical of American interventionism abroad. *See* Amended Complaint for Damages ¶ 1 (hereinafter "Am. Compl.").

Mr. George's detention began properly enough: he was detained at the airport checkpoint for no more than 15 minutes while TSA agents (Does 1 and 2) conducted a thorough search of

his carry-on items for weapons and explosives. *Id*. ¶¶ 22-23, 27-28. Does 1 and 2 found no evidence whatsoever that Mr. George posed a threat to airline safety. But instead of allowing him to go on his way, Does 1 and 2 detained Mr. George for an additional 15 to 20 minutes while waiting for a TSA supervisor to arrive. *Id.* ¶¶ 28-33. Mr. George was then abusively interrogated and further detained for 15 minutes by a TSA supervisor (Jane Doe 3). *Id.* ¶¶ 33-41. That interrogation plainly revealed that Mr. George was regarded as "suspicious" because of the Arabic-English flashcards that he had in his possession. *Id*. ¶¶ 37-40 ("You know who did 9/11? . . . Do you know what language he spoke? . . . Do you see why these cards are suspicious?").

Mr. George explained to the TSA defendants that he was using the flashcards (which included, among dozens of words, the Arabic translations of "bomb" and "explosives") in order to learn Arabic vocabulary to pursue his studies at Pomona and so that he could read the Arabic press. *Id.* ¶¶ 26, 40. The thorough search conducted by Does 1 and 2 revealed absolutely no evidence that Mr. George was carrying any weapons or explosives. Mr. George made no threatening statements and said or did nothing else that would lead a reasonable official to regard him as a threat.

Nevertheless, the TSA agents further escalated Mr. George's already unlawful detention by summoning the local police and directing them to take Mr. George into custody. *Id*. ¶¶ 5-6. Defendant Rehiel, a Philadelphia police officer, handcuffed Mr. George immediately upon arriving at the airport screening area, clearly at the direction of the TSA. *Id.* ¶¶ 42-46. Defendant Rehiel then subjected Mr. George, handcuffed, to a humiliating "perp walk" through the airport in plain view of the traveling public. *Id*. ¶ 45. Defendant Rehiel took Mr. George to the airport jail where he was locked in a cell. *Id.* ¶¶ 50-52. Mr. George was left in the cell for

more than four hours.[2] Mr. George was kept in handcuffs for the first two hours of this incarceration. *Id.* ¶ 53.

It is clear from the complaint that the local police were holding Mr. George on behalf of the federal defendants and that they had detained Mr. George specifically for further questioning by the two JTTF officers named as defendants in this case (John Does 4 and 5).[3] During Mr. George's four-hour imprisonment, the local police asked Mr. George no questions and took no other meaningful steps to investigate whatever unfounded suspicions they may have had. Nor did anyone explain to Mr. George why he was being held. *Id.* ¶¶ 48, 51, 62. When the two JTTF defendants finally arrived after approximately four hours, it was clear that the local police "had been expecting and waiting for [them] to arrive," and had in fact called the JTTF "in order to arrange for Mr. George to be interrogated." *Id.* ¶ 63. Mr. George has therefore clearly alleged

[2] The government erroneously states that Mr. George was incarcerated for only two hours before the JTTF defendants arrived. Mem. in Supp. of U.S.'s Mot. to Dismiss at 3 (hereinafter "U.S. Br."). This is inconsistent with the complaint, which expressly alleges that Mr. George was arrested by the local police at 2:20pm, released nearly five hours later at 7:00pm, and that he spent all of the intervening time locked in the jail cell, except for a short trip to the restroom and the JTTF defendants' 30-minute interrogation. *See* Am. Compl. ¶ 49 (alleging that plaintiff was arrested at approximately 2:20pm); *id.* ¶ 74 (alleging that Mr. George was ultimately released from the airport jail at 7:00pm); *id.* ¶¶ 50-52 (alleging that Mr. George was led directly into the cell upon arrest); *id.* ¶ 67 (alleging that Mr. George's interrogation at the police station lasted 30 minutes).

[3] The complaint describes John Does 4 and 5 as PPD detectives. John Doe 4 was "affiliated with the Philadelphia Police Department's Homeland Security Unit" and John Doe 5 was affiliated with the "FBI's Joint Terrorism Task Force." Am. Compl. ¶¶ 9, 63. The defendants' brief, however, describes *both* Does 4 and 5 as JTTF officers and claims them as agents of the federal government. U.S. Br. 3. While the relationship between the federal government and Does 4 and 5 is unclear, it may well be that both had in fact been deputized by the federal government to work with the FBI at the JTTF. For the sake of clarity, plaintiff follows the government in describing the Does together as the "JTTF Defendants." And for the purposes of this motion, plaintiff agrees that they should be treated as agents of the federal government.

that his detention by the PPD was on behalf of, and at the direction of, the federal defendants, and was in any case prolonged by the JTTF defendants' failure to arrive promptly.

After arriving at the police station, the JTTF defendants proceeded to interrogate Mr. George for 30 minutes, further prolonging his arrest and detention. *Id.* ¶ 67. The interrogation strayed far from any concern about flight safety. *Id.* ¶¶ 68-72 (recounting JTTF defendants' questions on matters including plaintiff's personal and religious beliefs, travel, educational background, associations, and other information). The JTTF defendants' questions make clear that they were investigating suspicions that Mr. George was somehow involved in terrorism or dubious political activities. The questions also reveal that the JTTF defendants did not have probable cause to believe that Mr. George was involved in a crime and that their suspicions were far-fetched and unreasonable. *See, e.g.*, *id.* ¶ 71 (JTTF defendant asking Mr. George whether he was a member of "pro-Islamic" or "communist" groups on campus).

Like the TSA defendants, the JTTF officers were engaged in a fishing expedition prompted by their unreasonable and unwarranted suspicions of Mr. George's Arabic-language flashcards. Mr. George filed this action to seek redress for his five-hour ordeal and to vindicate his rights to be free from false arrest and imprisonment, assault and battery, and false light invasion of privacy.

ARGUMENT

I. THE UNITED STATES IS LIABLE FOR FALSE ARREST AND IMPRISONMENT, ASSAULT AND BATTERY, AND FALSE LIGHT FOR ITS AGENTS' ROLE IN THE UNJUSTIFIED ARREST, HANDCUFFING, AND PROLONGED DETENTION OF MR. GEORGE.

"The extent of the United States' liability under the FTCA is generally determined by reference to state law." *Horne v. United States*, 223 F. App'x 154, 156 (3d Cir. 2007). The

substantive law of the state in which the tortious conduct occurs governs an FTCA claim. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700 (2004) (citing 28 U.S.C. § 1346(b)(1)).

Pennsylvania has adopted the Restatement (Second) of Torts' definition of false imprisonment. *See, e.g.*, *Brownstein v. Gieda*, 649 F. Supp. 2d 368, 376 (M.D. Pa. 2009). False imprisonment has two essential elements: causing the confinement of another person, and the absence of legal justification for the confinement. *See* U.S. Br. 7 (citing *Renk v. City of Pittsburgh*, 641 A.2d 289, 293 (Pa. 1994)). Under the Restatement, a "false arrest" is essentially false imprisonment for the purported purpose of securing the administration of the laws. Restatement (Second) of Torts §§ 112, 118 cmt. b (1965); *Gagliardi v. Lynn*, 285 A.2d 109, 111 n.3 (Pa. 1971). False arrest and false imprisonment are thus intimately related torts. In Pennsylvania, the two are frequently regarded as interchangeable. *See, e.g.*, *Manley v. Fitzgerald*, 997 A.2d 1235, 1237, 1238, 1241 (Pa. Commw. Ct. 2010) (referring to "false arrest/imprisonment"); *accord* U.S. Br. 7 (citations omitted); *Olender v. Twp. of Bensalem*, 32 F. Supp. 2d 775, 791 (E.D. Pa. 1999) (observing that in certain cases "false arrest and false imprisonment are essentially the same claim").

Pennsylvania also looks to the definitions of assault and battery contained in the Restatement (Second) of Torts. Under Pennsylvania law, "[a]n assault occurs when an actor intends to cause an imminent apprehension of a harmful or offensive bodily contact." *Sides v. Cleland*, 648 A.2d 793, 796 (Pa. Super. Ct. 1994) (citing Restatement (Second) of Torts § 21 (1965)), *appeal denied*, 656 A.2d 11 (Pa. 1995); *Grier v. Univ. of Pa. Health Sys.*, No. 07-4224, 2009 WL 1652168, at *5 n.4 (E.D. Pa. June 11, 2009) (citing *Sides*, 648 A.2d at 796); *Regan v. Upper Darby Twp.*, No. 06-1686, 2009 WL 650377, at *16 (E.D. Pa. Mar. 11, 2009) (same). The Restatement specifies that an actor is liable for battery "if (a) he acts intending to cause a

harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) an offensive contact with the person of the other directly or indirectly results." Restatement (Second) of Torts § 18 (1965); *Montgomery v. Bazaz-Sehgal*, 742 A.2d 1125, 1130 (Pa. Super. Ct. 1999).

In the context of an arrest or detention for investigatory purposes, one may not be held liable for the confinement, assault, and battery necessary to effect the arrest where the arrest or detention was legally justified. *See, e.g.*, Restatement (Second) of Torts § 118 cmt. b (1965) ("Where a privilege to arrest exists, it justifies not only the confinement but also any conduct which is reasonably necessary to effect the arrest."); *McGriff v. Vidovich*, 699 A.2d 797, 799 n.3 (Pa. Commw. Ct. 1997) ("A false arrest is defined as 1) an arrest made without probable cause or 2) an arrest made by a person without privilege to do so." (citing Pennsylvania Suggested Standard Civil Jury Instructions § 13.04 (2003); *Renk*, 641 A.2d at 295 n.2 (Montemuro, J., dissenting)).

A. On the facts aleged, defendants did not have probable cause or even reasonable suspicion of criminality, and had no other lawful basis to detain and arrest the plaintiff.

The government argues that the pleadings establish that defendants had cause to detain Mr. George, relying on the conclusory assertion that "the facts known to the officers involved established reasonable suspicion."[4] U.S. Br. 8. Remarkably, nowhere in its memorandum does the United States explain *what* the defendants suspected Mr. George of having done, much less

[4] *See, e.g.*, U.S. Br. 5 ("[T]he 30 minute detention Mr. George attributes to the JTTF defendants was lawful."); *id.* at 6 ("[The JTTF defendants'] investigation was supported by reasonable suspicion."); *id.* at 8 ("Even if the full period of detention is attributed to the JTTF defendants, that detention was lawful. The JTTF defendants were entitled to rely on the determination that an investigation was reasonably required pursuant to the collective knowledge doctrine, and the facts known to the officers involved established reasonable suspicion.").

what facts alleged in the complaint and known by the officers made that suspicion "reasonable." The detention and interrogation of Mr. George were not privileged as a matter of law.

The government also attempts to demonstrate the constitutionality of its seizure of Mr. George in its motion to dismiss plaintiff's *Bivens* claims. To the extent that the government seeks to rely on the arguments in that motion to support its argument that plaintiff's arrest and detention were legally justified and that the United States may not be held liable for false arrest, false imprisonment, assault, or battery arising therefrom, plaintiff incorporates herein the arguments set forth in opposition to the government's motion to dismiss the *Bivens* claims. *See* Pls.' Mem. in Opp. to Individual Fed. Defs.' Mot. to Dismiss (hereinafter "Pls.' *Bivens* Br."). As that brief makes clear, the alleged facts do not give rise either to probable cause to arrest Mr. George or to reasonable suspicion sufficient to support an investigatory detention. Furthermore, the administrative search rationale was exhausted after no more than fifteen minutes, when the TSA screeners completed their search of Mr. George's carry-on items and determined that he was carrying no weapons or explosives. Pls.' *Bivens* Br. sec. II.

B. Under Pennsylvania tort law, the TSA and JTTF Defendants' can be held liable for false arrest and imprisonment, assault, and battery because of their own actions and because they instigated plaintiff's arrest by the PPD and authorized or ratified the PPD's subsequent conduct.

The United States is liable for the entirety of Mr. George's five-hour ordeal. The government attempts to limit its liability by disavowing responsibility for Mr. George's arrest, handcuffing, and detention for four hours in the airport jail at the hands of the Philadelphia Police Department defendants. It then argues that the remaining portions of Mr. George's detention – the 35 minutes during which he was unlawfully confined by the TSA before the local police arrived and the 30 minutes during which the JTTF officers were interrogating Mr. George at the airport jail – were lawful and therefore not actionable. The government's tactic fails.

Under ordinary tort principles, individuals are liable not only for their own conduct, but also for the actions of others that they order, authorize, and ratify. Under this standard, the federal officials are liable not only for their own false imprisonment of the plaintiff at the TSA screening checkpoint and during the JTTF's interrogation, but also for the local police's tortious arrest, imprisonment, battery, and assault. Moreover, even if the United States were not on the hook for the PPD's conduct under tort principles, the FTCA makes the United States directly liable for the PPD's conduct, because at the time of the events in question the local officers were "persons acting on behalf of a federal agency in an official capacity." 28 U.S.C. § 2671.

At the outset, it is important to note that the TSA agents' initial detention and interrogation of Mr. George and the JTTF agents' interrogation at the airport jail in and of themselves provide grounds for holding the United States liable under the FTCA for false imprisonment. As explained in section I.A, *supra*, and in plaintiff's brief in opposition to the individual federal defendants' motion to dismiss, the TSA exhausted the lawful basis for its administrative airport stop after no more than fifteen minutes, when it determined that Mr. George was carrying no weapons or explosives. Because, on the facts alleged, there was no basis for reasonable suspicion or probable cause, the investigatory detention and arrest that followed the initial, lawful search were unconstitutional and unlawful. *See* Pls.' *Bivens* Br. sec. II (explaining the unconstitutionality of the TSA and JTTF officials' conduct in greater detail). As such, the first 35 minutes of Mr. George's detention (at the hands of the TSA) and the last 30 minutes of his detention (during the JTTF interrogation after four hours of arrest and incarceration) were not legally justified and thus constitute false imprisonment.

The government argues that these periods of imprisonment do not constitute false imprisonment. *See, e.g.*, U.S. Br. 8 ("The JTTF defendants questioned Mr. George for *only* 30

minutes regarding his flashcards, foreign travel, and political beliefs.") (emphasis added). To the extent that the government suggests that a 30-minute detention is de minimis as a matter of law and therefore not actionable as false imprisonment, it is incorrect. These portions of Mr. George's detention were not "merely transitory or otherwise harmless." Restatement (Second) of Torts § 35(2) (1965). In any case, involuntary confinement of *any length* is actionable if the defendant "acts intending to confine the other," which was clearly the case here. *Id.* § 35(1)(a), (2) & cmt. h.; *see also* Restatement (First) of Torts § 35(1) (1935) ("An act which, directly or indirectly, is a legal cause of a confinement of another within boundaries fixed by the actor *for any time, no matter how short in duration*" may confer liability for false imprisonment.) (emphasis added). The length of the detention thus goes to damages, not liability.

In any event, the government distorts both law and facts in attempting to characterize the TSA and JTTF interrogations as discrete occurrences whose impact on Mr. George can be evaluated in isolation. Rather, the TSA defendants' initial detention and the JTTF defendants' interrogation were the bookends to an uninterrupted course of unlawful interrogation, harassment, and detention by hostile authorities that lasted "well over five hours." Am. Compl. ¶ 74.

The government, however, insists that no individual federal defendants were responsible for the middle four hours of Mr. George's ordeal, as no federal defendant applied handcuffs or was present in the PPD station while Mr. George was detained there.[5] This argument misapplies Pennsylvania tort law and ignores the relevant allegations in the complaint. The complaint states

[5] *See* U.S. Br. 5 ("the individual federal defendants were not responsible for the 'false arrest' or 'false imprisonment'"); *id.* at 6 ("[T]he JTTF defendants . . . did not participate in Mr. George's 'arrest.'"); *id.* at 7-8 ("The JTTF defendants were not present while the Philadelphia Police defendants handcuffed Mr. George, led him to the airport police station, and put him in a cell. . . . Accordingly . . . the United States cannot be held liable because the federal defendants did not participate in the alleged arrest.").

claims against the TSA and JTTF defendants for false arrest and imprisonment, assault, and battery arising out of Mr. George's arrest—regardless of whether the PPD officers' alleged conduct may *also* be liable for these torts.

1. *Under basic tort law principles, actors who order, authorize, or ratify an unlawful arrest or detention are liable for the false imprisonment and/or assault and battery that result from the unlawful arrest or detention.*

Under the Restatement (Second) of Torts of false imprisonment, adopted by Pennsylvania, it is immaterial whether the tortfeasor was the direct or indirect cause of the confinement. Restatement (Second) of Torts § 37 (1965); *see also Pennoyer v. Marriott Hotel Servs., Inc.*, 324 F. Supp. 2d 614, 619-20 (E.D. Pa. 2004) (citing *Gagliardi*, 285 A.2d at 111 n.2 Restatement (Second) of Torts § 35 (1965). Thus, one may be liable for false imprisonment not only for locking the victim in a holding cell without legal justification, but also for "instigat[ing] an arrest or imprisonment through his influence on a third party." *Clark v. Conahan*, --- F. Supp. 2d. ---, No. 09-2535, 2010 WL 3398888, at *25 (M.D. Pa. Aug. 25, 2010) (quoting *Gilbert v. Feld*, 788 F. Supp. 854, 862 (E.D. Pa. 1992)); *see also* Restatement (Second) of Torts § 45A (1965) ("One who instigates or participates in the unlawful confinement of another is subject to liability to the other for false imprisonment."). Similarly, one who instigates or participates in an unjustified arrest, which routinely involves the application of force and the apprehension of force, is liable for the assault and battery incidental to arrest as if he himself had applied the handcuffs. *See* Restatement (Second) of Torts § 45A, cmt. a (1965) ("The general principle stated in this Section is applicable to all torts. It receives special statement here because of the frequency with which the question has arisen in cases of false arrest."). Thus, an official who, without legal justification, directs a police officer to arrest someone is liable to the arrestee for the resulting false imprisonment, assault, and battery. *See Gagliardi*, 285 A.2d at 110-12 (mayor, who directed police officer to arrest plaintiff but lacked adequate legal grounds to do so,

was liable for false imprisonment, assault, and battery caused by plaintiff's arrest); *Pennoyer*, 324 F. Supp. 2d at 619-21 (Marriott Loss Prevention Officers, who lacked sufficient grounds to believe that plaintiff had committed a crime, were liable to plaintiff for calling police and detaining him while waiting for arrival of police).

One may also be liable for false imprisonment for ratifying an unlawful confinement carried out by another on his account; under the Restatement, the ratifying actor is liable just as if he had authorized the unlawful confinement in the first place. Restatement (Second) of Torts § 45A cmt. f (1965).

2. *Plaintiff has adequately alleged that his arrest by the PPD officers was carried out on the authority of the TSA defendants and for the purpose of enabling interrogation by the JTTF defendants.*

Reading the complaint in the light most favorable to plaintiff, plaintiff has adequately alleged that the TSA and JTTF defendants committed false arrest and imprisonment, assault, and battery by participating in plaintiff's arrest and confinement by the PPD. The facts alleged in the complaint establish that the PPD officer defendants first came into contact with Mr. George when Officer Rehiel arrived while a TSA Supervisor was interrogating Mr. George. Am. Compl. ¶ 42. As soon as Officer Rehiel walked into the room, he ordered Mr. George to place his hands behind his back and handcuffed him. *Id.* ¶ 43. Defendant Rehiel did not pause to make any independent assessment of the situation or weigh available options once he arrived; he did not even wait for the TSA Supervisor to complete her sentence before handcuffing Mr. George. *Id.* It is reasonable to infer from these allegations that the TSA defendants summoned the PPD officers and requested that they take Mr. George into custody. Indeed, the government contends that the TSA screeners routinely "call law enforcement officers to search, seize, and arrest individuals" because they lack the authority to do this themselves. U.S. Br. 6.

Plaintiff has also adequately alleged that the PPD defendants detained Mr. George for the purpose of allowing the JTTF agents to interrogate him, and that the JTTF defendants may have authorized this detention by phone. Am. Compl. ¶ 8 ("Defendant Richards prolonged Mr. George's detention until John Does 4 and 5 arrived to interrogate him."); *id.* ¶ 63 ("[T]he Philadelphia police officers appeared to treat the detectives with deference and respect. It appeared that the police officers had been expecting and waiting for the [JTTF] detectives to arrive. During Mr. George's incarceration, the Philadelphia police officers had called various federal and state agencies including the JTTF. . . in order to arrange for Mr. George to be interrogated while in custody."); *id.* ¶ 73 (JTTF defendant commented that "[t]he police call us to evaluate whether there is a real threat."). The complaint also alleges that the JTTF agents ratified the detention upon their arrival by proceeding to search Mr. George's belongings and then take him into another room of the station where they interrogated him. Am. Compl. ¶¶ 64-73.

3. *In the alternative, the United States is liable for the tortious conduct of the PPD because under the FTCA the United States is liable for torts committed by officials temporarily acting on behalf of a federal agency.*

The government contends that the United States cannot be held liable for torts committed by PPD officers because the FTCA applies only to acts committed by "officers or employees of any federal agency." U.S. Br. 4 (citing 28 U.S.C. § 2671). To the contrary, the full text of section 2671 makes clear that the Act applies not only to "officers or employees of any federal agency" but also to "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation . . . ." 28 U.S.C. § 2671. The Third Circuit has interpreted this provision to mean that the United States might, in the appropriate circumstances, be held liable under the law enforcement proviso to the FTCA for intentional torts committed by local law enforcement officers acting "on behalf of the federal government." *Couden v. Duffy*, 446 F.3d 483, 499 (3d

Cir. 2006) (declining to find the United States liable because "[n]othing in the record suggest[ed] that the actions of the [local] officers were taken on behalf of the federal government"). As explained above, the PPD officers arrested and detained Mr. George on behalf of the federal government. *See supra* pp. 4-5.[6]

C. The United States is liable under the FTCA for false light invasion of privacy

1. The TSA Agents Who Summoned the PPD to Arrest Mr. George and the PPD Officers Who Arrested Him Are Jointly Responsible for Committing False Light.

The government contends that the complaint does not adequately allege that the TSA agents' and JTTF agents' interrogations of plaintiff took place "before the public." U.S. Br. 11. But as the complaint makes clear, plaintiff's false light claim arises out of his removal from the TSA screening area through the airport to the PPD station, in handcuffs. *See* Am. Compl. ¶ 45 ("The officer took hold of Mr. George's arms and led him, handcuffed and in plain view of other passengers, through the terminal and down a set of stairs to the airport police station."). The government's assumption that plaintiff's false light tort claim against the United States arose out of the interrogation of Mr. George by the TSA or JTTF defendants is unfounded and is divorced from the broad scope of liability under Pennsylvania tort law. The TSA agents were fully aware that calling for plaintiff's arrest by the PPD agents stationed at the airport would involve his being escorted by uniformed law enforcement officials past the traveling public in a manner reserved for criminal suspects.

[6] If the government means to argue that the mere participation of non-federal employees (namely, the PPD officers) in the torts arising out of plaintiff's arrest precludes holding the United States liable for the federal employees' own role in committing this tort, it is plainly wrong. There is no support for the proposition that federal employees can immunize the United States from liability for their tortious conduct by soliciting the participation of non-federal employees.

In Pennsylvania, false light is one of four "invasion of privacy" torts derived from section 652E of the Restatement (Second) of Torts. *See Burger v. Blair Med. Assocs., Inc.*, 964 A.2d 374, 376-77 (Pa. 2009) (citing Restatement (Second) of Torts §§ 625B-E (1965)) (listing elements of false light); *Wecht v. PG Publ. Co.*, 725 A.2d 788 (Pa. Super. Ct. 1999) (stating that Pennsylvania has adopted definition of false light contained in Restatement (Second) of Torts § 625E (1965) (citing *Larsen v. Phila. Newspapers*, 543 A.2d 1181, 1188 (Pa. 1988)). "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." Restatement (Second) of Torts § 625E (1965); *see also Wecht*, 725 A.2d at 790.

According to the definition of false light and the basic agency principles embodied in the Restatement and already discussed at length in this memorandum, the TSA agents' own conduct in summoning the PPD to remove Mr. George caused him to undergo the "perp walk" through the terminal that unreasonably and falsely depicted him as a suspected criminal before the public. The courts have recognized that similar facts state a claim for false light invasion of privacy. *See, e.g.*, *Cummings v. Citizens Bank*, No. 07-1164, 2008 WL 53272 (E.D. Pa. Jan. 3, 2008) (plaintiff stated claim for false light when, during a security alarm at a bank, employee of the bank yelled "Don't let him out!" with respect to the plaintiff, even though the security alarm was triggered by a different customer). The government has not challenged this aspect of plaintiff's case.

2. The FTCA does not exclude the invasion of privacy tort of "false light" from the United States' waiver of sovereign immunity.

The government further asserts that the invasion of privacy tort of false light is "generally" considered to be barred by the intentional tort exception to the FTCA. U.S. Br. 11. Once again, the government is incorrect. The intentional tort exception to the FTCA represents a reservation of sovereign immunity. With the exception of certain intentional torts committed by investigative or law enforcement personnel, the FTCA does not apply to "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). The intentional tort exception does not explicitly bar claims for invasion of privacy in general or false light in particular.

The government seeks to establish that the intentional tort exception bars plaintiff's false light invasion of privacy claim, citing to *Armstrong v. Geithner*, 610 F. Supp. 2d 66 (D.D.C. 2009),[7] and to the three other cases cited therein, none of which addressed Pennsylvania's false light tort. Although the court in each of those cases remarked that the false light invasion of privacy tort at issue "arose out of" slander or libel and was barred by the intentional tort exception to the FTCA, only one of these cases—the Eleventh Circuit's 1986 decision in *Metz v. United States*—contains any reasoning in support of this proposition, and that reasoning was rejected by a majority of justices of the Supreme Court in a subsequent decision.

In *Metz v. United States*, 788 F.2d 1528 (11th Cir. 1986), the Eleventh Circuit opined that the phrase "arising out of" in section 2680(h) should be construed broadly to bar all tort claims arising out of conduct that would also give rise to one of the specifically enumerated intentional

[7] The government incorrectly cites the 2009 decision in *Armstrong v. Geithner*, 610 F. Supp. 2d 66, as a decision of the Court of Appeals for the D.C. Circuit; in fact, it is a decision of District Court for the District of Columbia.

torts. *Id.* at 1533-35. The court then held that on the facts of the case, plaintiff's claims for intentional infliction of emotional distress and various invasion of privacy torts were claims "arising out of" either false arrest or slander within the meaning of section 2680(h). *Id*. at 1535. Subsequently, in *Sheridan v. United States*, a majority of the Court rejected the understanding of section 2680(h) that was endorsed in *Metz*, holding that the "arising out of" language does not bar all tort claims that arise out of facts that might also give rise to an enumerated international tort. 487 U.S. 392, 398-99; *id.* at 406 (Kennedy, J., concurring).

As Justice Kennedy observed in his *Sheridan* concurrence, the same injury can arise from more than one wrongful act, and the language in the FTCA barring claims "arising out of" enumerated intentional torts is not so broad as to bar every tort claim that arises from injuries associated in any way with the enumerated intentional torts. *Id.* at 406 (Kennedy, J., concurring) (citations omitted); *see also Block v. Neal*, 460 U.S. 289, 297-98 (1983) (explaining that the intentional tort exception does not bar other intentional torts merely because they overlap partially with one of the enumerated torts specifically barred); *Quinones v. United States*, 492 F.2d 1269, 1275-76 (3d Cir. 1974) (explaining that injury to reputation may give rise to several torts and that intentional tort exception does not bar all such claims).

In Pennsylvania, as in many states, defamation is a distinct tort from false light invasion of privacy. *See* Restatement (Second) of Torts § 652E cmt. b ("It is not . . . necessary to the action for [false light] invasion of privacy that the plaintiff be defamed. It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position.").[8]

[8] The elements of the two torts are decidedly different. The essential elements of false light are publicity, given to private facts that are not of legitimate concern to the public, which would be highly offensive to a reasonable person. *See, e.g.*, *Rush v. Phila. Newspapers, Inc.*, 732 A.2d

Accordingly, several courts have treated "invasion of privacy" tort claims as cognizable under the FTCA, even though the intentional tort exception bars claims arising out of defamation. *See, e.g.*, *Denson v. United States*, 574 F.3d 1318, 1336-37 (11th Cir. 2009) (United States may be held liable under FTCA for invasion of privacy committed by U.S. Customs Service inspectors during unlawful search of traveler at airport); *Raz v. United States*, 343 F.3d 945, 947-48 (8th Cir. 2003) (holding that invasion of privacy claim is not barred by intentional tort exception (citing *Nurse v. United States*, 226 F.3d 996, 999, 1002 (9th Cir.2000)); *Black v. Sheraton Corp. of America*, 564 F.2d 531, 539-40 (D.C. Cir. 1977); *Birnbaum v. United States*, 588 F.2d 319, 328 (2d Cir.1978). As such, plaintiff's false light invasion of privacy claim is actionable under the FTCA.

II. THE FTCA DOES NOT IMMUNIZE THE UNITED STATES FROM LIABILITY FOR INTENTIONAL TORTS COMMITTED BY TSA AGENTS.

The law enforcement proviso of the intentional tort exception to the FTCA waives the United States' sovereign immunity for "acts or omissions of investigative or law enforcement officers of the United States Government . . . arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. § 2680(h). This provision defines "investigative or law enforcement officer" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* Plaintiff contends that not only the JTTF officers, but also the TSA agents, fall within this exception. The government does not dispute that the JTTF defendants are covered by the exception; it contends, however, that the TSA defendants are

---

648, 654 (Pa. Super. Ct. 1999). In contrast, to prevail on a claim for defamation in Pennsylvania, the plaintiff must establish that the defendants (1) made a defamatory communication, (2) about the plaintiff, (3) that was published to a third party, (4) who understood the defamatory meaning of the communication about the plaintiff, (5) where the plaintiff suffered special harm as a result of the publication of the communication, and (6) that any privilege invoked by the defendant was abused. *See* 42 Pa. Cons. Stat. Ann. § 8343.

immune from liability either because all employees of any "administrative agency" fall outside the intentional tort exception or because TSA agents, in particular, fall outside. U.S. Br. 6. Both arguments fail.

The government cites *Matsko v. United States*, 372 F.3d 556 (3d Cir. 2004) for the sweeping proposition that no employee of any "administrative agency" can ever qualify as a "law enforcement officer" within the meaning of the intentional tort exception to the FTCA, even if the officer performs investigative conduct. U.S. Br. 6. There is no reason to read *Matsko* so broadly, and ample reason not to.

Matsko involved FTCA claims arising out of an assault on the plaintiff by an employee of the Mine Safety and Health Administration during a business meeting. 372 F.3d at 557. The Third Circuit affirmed the dismissal of the assault claim because the MSHA employee was acting outside the scope of his employment, and went on to reject the plaintiff's argument that the MSHA employee who had assaulted plaintiff was a "law enforcement officer" within the meaning of the intentional tort exception. *Id.* at 559-60. The court stated that although the MSHA employee possessed "authority to inspect mines and investigate possible violations," the employee had not been acting "within the bounds of an investigation" when he assaulted the plaintiff and therefore did not fall within the law enforcement exception. *Id*. The court added in dictum that "employees of administrative agencies, no matter what investigative conduct they are involved in, do not come within the § 2680(h) exception." *Id.* at 560 (citing *EEOC v. First Nat'l Bank of Jackson*, 614 F.2d 1004, 1007-08 (5th Cir. 1980)). But the case that the *Matsko* court cited did not establish such a sweeping proposition; rather, the Fifth Circuit simply held that EEOC agents are not law enforcement officers within the meaning of the intentional tort

exception because they do not have statutory authority to execute searches, seize evidence, or make arrests. *First Nat'l Bank of Jackson*, 614 F.2d at 1007-08.

The *Matsko* court's dictum regarding the inapplicability of the law enforcement proviso to "administrative agencies" must be understood within the context of a claim arising out of tortious conduct by an employee of the Mine Safety and Health Administration; there is no reason to believe that the court intended to lay out a broad rule applicable to agencies such as the TSA. The *Matsko* decision offers no means of identifying which government agencies should be considered "administrative" for immunity purposes. Nor does anything in the text of the FTCA support a categorical distinction between "administrative agencies" on the one hand and "law enforcement agencies" on the other; in any event, it is by no means clear that the TSA would fall within the former category rather than the latter. Furthermore, a wide variety of officials from diverse "administrative agencies" have been found by other courts to fall within the ambit of 28 U.S.C. § 2680(h). *See United States v. Rubin*, 573 F. Supp. 2d 1123, 1125 (D. Colo. 1983) (collecting cases that find the United States liable for the actions of "Immigration and Naturalization Service agents, the chief of the United States National Central Bureau, a Department of Treasury agent, a federal warden and a federal prison unit manager."). A broad reading of *Matsko* foreclosing U.S. liability for all torts committed by any employees of "administrative agencies" would be a radical departure; there is no reason to believe the Third Circuit intended so sweeping a result.

In the alternative, the government argues that even if some employees of administrative agencies fall within the intentional tort exception, TSA agents do not. In support, the government cites to a single unpublished decision of the District Court for the District of New Jersey, which reasoned that "airport security screeners do not constitute investigative or law

enforcement officials within the meaning of the FTCA," because they lack the necessary legal authority to execute searches, seize evidence, or make arrests. U.S. Br. 6 (citing *Coulter*, 2008 WL 4416454, at *7).

Coulter is mistaken. It misunderstands the nature of the searches that the TSA performs. Furthermore, *Coulter* is easily distinguished. Here, TSA agents were not simply engaging in routine screening, but instead detained Mr. George on criminal suspicion and turned him over to the police for arrest in anticipation of further investigation by federal officials. Accordingly, this court should hold that the TSA defendants fall within the definition of "law enforcement officers" under the FTCA, rendering the United States liable for their intentional torts.

In *Coulter*, the plaintiff argued that the TSA screener defendants' administration of the routine screening protocols prescribed by 49 U.S.C. §§ 44901(a) and 44935(b) constituted legal authority to "search," rendering those defendants "law enforcement officers" within the meaning of the FTCA. *Coulter*, 2008 WL 4416454, at *8. The plaintiff had alleged that TSA employees stationed at a routine airport security checkpoint committed the torts of sexual assault, assault, battery, intentional infliction of emotional distress, and negligent infliction of emotional distress when they patted her down after she set off the magnetometer. *Id.* at *1-2. The court found this argument unpersuasive because all airline passengers *consent* to the screening measures described in those statutory provisions as a condition of air travel. *Id.* at *8. Accordingly, the *Coulter* court held that the authority to perform consensual routine screening measures conferred by those statutory provisions did not constitute sufficient authority "to execute searches, seize evidence, or make arrests" to qualify the TSA screener defendants as "law enforcement officers" within the meaning of the FTCA. *Id.* at *8.

To the extent that *Coulter*'s rationale for finding that TSA screeners do not "execute searches" was that TSA screenings are based on consent, its reasoning is insufficient. It is well established that TSA screeners' legal authority to search passengers is not circumscribed by the scope of consent impliedly given by a passenger who presents himself at a security checkpoint and passes through a magnetometer; TSA screeners have authority to search even absent passenger consent. *United States v. Hartwell*, 436 F.3d 174, 177 (3d Cir. 2006) (holding that search of passenger by TSA screener was justified as a permissible administrative search, regardless of whether or not passenger impliedly consented to the search); *United States v. Aukai*, 497 F.3d 955, 960-61 (9th Cir. 2007) (en banc); F. Defs.' Br. 11 (citing *Hartwell* and *Aukai* for the proposition that an airport screener's power to search does not depend on consent). Certainly, the TSA's actions in this case were not undertaken pursuant to consent.

The *Coulter* decision appears to be predicated on the notion, borrowed from Fourth Amendment law, that when consent is given, no "search" occurs for constitutional purposes and therefore the officer in question does not "execute searches" within the meaning of section 2680(h). This general approach to the intentional tort exception is correct – the Third Circuit has confirmed that section 2680(h) is meant to permit liability for "conduct in the course of a search, a seizure, or an arrest." *Pooler v. United States*, 787 F.2d 868, 872 (3d Cir. 1986). But contrary to *Coulter*, the Third Circuit has confirmed that even routine airport screening is a "search" that is constitutional only if it complies with the Fourth Amendment. *Hartwell*, 436 F.3d at 177. It is thus established law in the Third Circuit that the intentional tort exception is intended to permit liability for conduct during "searches," and it is equally well established that even the TSA's

routine activities constitute "searches." As such, *Coulter* is incorrect; TSA agents clearly "execute searches" and fall within the intentional tort exception on that basis.[9]

In any case, even if routine screening does not bring TSA agents within the intentional tort exception, actions of the type alleged in the complaint certainly do. Plaintiff's claims are based on the actions of the TSA that include investigative detention, interrogation, and arrest. Am. Compl. ¶¶ 23, 27-41. In subjecting Mr. George to an investigatory detention based on supposed criminal suspicion, and subjecting him to interrogation, the TSA's conduct was indistinguishable from that of a police officer conducting an unlawful investigative detention on the street. Furthermore, the TSA in this case did not simply conduct an investigative detention; it called for Mr. George's arrest. That the local police arrested Mr. George *immediately* upon arriving at the scene clearly implies that the arrest was directed by the TSA.

As such, the TSA defendants may be regarded as officials who "execute searches . . . or make arrests." 28 U.S.C. § 2680(h). The United States should be held liable for their conduct. Even if the court rejects this conclusion, however, the United States remains liable for the conduct of the JTTF officials. The United States makes no argument whatsoever that it cannot be held liable for the JTTF officials' torts. Because the JTTF agents are liable for the PPD's actions and also for the false imprisonment of the plaintiff during their own interrogation, the

[9] The TSA engages in a range of other activities that also bring it within the law enforcement exception: The TSA is required to establish a federal law enforcement presence at airports, 49 U.S.C. § 44920, and to deploy armed law enforcement personnel to airports, 49 U.S.C. § 44901(h), in addition to promulgating regulations requiring airport operators to maintain a sufficient overall presence of private, local, state, or federal law enforcement at each airport, 49 U.S.C. §44903(c)(1). The TSA is also tasked with ensuring the effective coordination among the various federal, state, local, and private law enforcement personnel stationed at airports. 49 U.S.C. § 44904(b)(5), (d), (e). Consistent with this responsibility for law enforcement, the TSA may empower transportation security personnel to make arrests. 49 U.S.C. § 44903(d)(1)-(2).

United States cannot be dismissed from the case even if the court cannot impose liability for the TSA's tortious conduct.

CONCLUSION

For the foregoing reasons, the court should deny the United States' motion to dismiss plaintiff's FTCA claims.

Respectfully Submitted,

Ben Wizner, *pro hac vice*
Jonathan Manes, *pro hac vice*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500 (phone)
(212) 549-2583 (facsimile)
bwizner@aclu.org
jmanes@aclu.org

/s/ **Mary Catherine Roper**
Mary Catherine Roper (PA No. 71107)
M. M. Tack-Hooper (PA No. 307828)
American Civil Liberties Union Foundation of Pennsylvania
P.O. Box 40008
Philadelphia, PA 19106
(212) 592-1513 ext. 116 (phone)
(212) 592-1343 (facsimile)
mroper@aclupa.org
mtack-hooper@aclupa.org

David Rudovsky (PA No. 15168)
Kairys, Rudovsky, Messing & Feinberg, LLP
718 Arch Street
Suite 501S
Philadelphia, PA 19106

Counsel for Plaintiff Nicholas George

Dated: November 11, 2010

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NICHOLAS GEORGE, Plaintiff, v. WILLIAM REHIEL, *et. al*, Defendants.	No. 2:10-cv-586 (EL) ECF Case

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a copy of the Plaintiff's Memorandum in Opposition to the United States' Motion to Dismiss to be filed electronically. It is available for viewing and downloading from the ECF System of the U.S. District Court for the Eastern District of Pennsylvania. Counsel for all parties have consented to be served electronically and will be served via the ECF System.

/s/ **Mary Catherine Roper**

Mary Catherine Roper (PA No. 71107)
American Civil Liberties Union Foundation of Pennsylvania
P.O. Box 40008
Philadelphia, PA 19106
(212) 592-1513 ext. 116
mroper@aclupa.org

Counsel for Plaintiff Nicholas George

Dated: November 11, 2010