UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DIANNA JOHNSON, *et al*.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 02-2364 (RMC)**
GOVERNMENT OF THE DISTRICT OF COLUMBIA, *et al*.,	)	
Defendants.	)	

FEDERAL DEFENDANTS' MOTION TO DISMISS

Pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, the United States Marshals Service ("USMS") and Todd Dillard, in his individual capacity, respectfully move this Court to dismiss this action as to them. In support of this Motion, the Court is respectfully referred to the accompanying memorandum of points and authorities. A proposed order consistent with this Motion is also attached hereto.

Respectfully submitted,

/s/
KENNETH L. WAINSTEIN, D.C. BAR # 451058
United States Attorney

/s/
RUDOLPH CONTRERAS, D.C. Bar # 434122
Assistant United States Attorney

/s/
OLIVER W. McDANIEL, D.C. Bar #377360
LISA S. GOLDFLUSS, D.C. Bar #417787
Assistant United States Attorneys

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DIANNA JOHNSON, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 02-2364 (RMC)**
	)	
GOVERNMENT OF THE DISTRICT OF COLUMBIA, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS

Defendants Todd Dillard and the United States Marshals Service, through counsel, the United States Attorney for the District of Columbia, respectfully submit this memorandum in support of their motion to dismiss the actions against them. There is no subject matter jurisdiction over the only remaining claim against the United States Marshals Service ("USMS") because Plaintiffs lack standing to advance that claim, and the claim is moot.[1] The claims against Todd Dillard are barred by the doctrine of qualified immunity, and because the action against him fails to state a claim upon which relief can be granted.

[1] Plaintiffs have conceded that they have no colorable damages action against the United States Marshals Service. See Plaintiffs' Notice, filed May 26, 2006 [dkt. no. 60]. Plaintiffs have affirmed their intention, however, to maintain their claim against the USMS for preliminary and permanent injunctive relief. Id.; see also First Amended Complaint at 50.

THE COMPLAINT

By an Amended Complaint ("Am. Compl.") filed on May 1, 2006, Plaintiffs seek to advance class action claims against the government of the District of Columbia and against the USMS, Todd Dillard and unnamed "Doe" Defendants in their individual capacities involving alleged violations of Plaintiffs' fourth amendment right to privacy and their fifth amendment right to equal protection.[2] Am. Compl. at ¶¶ 1-17, 65-69. Plaintiffs also advance a class action claim against both the District of Columbia and the Federal Defendants pursuant to 42 U.S.C. § 1983, on the theory that authority over those detained in the cellblock of the Superior Court of the District of Columbia, during the relevant time period, derived from the District of Columbia Government. Id.

By way of summary, the Amended Complaint seeks to advance a class action under Fed. R. Civ. P. 23(a), 23(b)(2) and 23(b)(3), with two sub-classes – a Fourth Amendment Class (hereinafter "4AC") and a Fifth Amendment Class (hereinafter "5AC"). Am. Compl. at ¶¶ 1-17, 20, 33. The 4AC, as defined, consists of all adult women arrestees who, during the action and in the three-year period preceding it, were held for presentment in the cellblock of the Superior Court of the District of Columbia for an offense defined under a D.C. statute that did not involve drugs or violence and who were subjected to "a blanket strip, visual body cavity search and/or squat search without any individualized finding of reasonable suspicion or probable cause that she was concealing drugs, weapons or other contraband." Id. at ¶ 20. The 5AC, as defined, consists of all adult women arrestees who, during the same time frame as the 4AC, were held for presentment in the cellblock of the Superior Court of the District of Columbia for any offense defined under a D.C. statute, under similar circumstances as men arrestees, and who were subjected to a blanket strip, visual body cavity

[2] The USMS and Mr. Dillard are hereinafter referred to as the "Federal Defendants."

and/or squat search, even if the search was based upon an individualized finding of reasonable suspicion or probable cause that she was concealing drugs, weapons or other contraband. Id. at 33.

Plaintiffs further allege that Defendant USMS is a federal agency, but is **jointly responsible** with Defendant District of Columbia, as an agent thereof, for planning and implementing the "strip, visual body cavity and squat searches" of women arrestees described in the Complaint. Am. Compl. at ¶ 66. Plaintiffs have advanced suit against ten "Doe" Deputy United States Marshals (DUSMs), whom they contend developed and implemented the policy challenged by the 4AC, and against another ten "Doe" DUSMs, whom they further contend developed and implemented the policy complained of by the 5AC. Id. at ¶¶ 68-69.

Plaintiffs specifically allege that "[t]he United States Marshal for the Superior Court, and his deputies, follow a policy and custom of subjecting, upon their admission to the Superior Court Cell Block, all women arrestees to blanket strip, visual body cavity and/or squat searches without a particularized finding of reasonable suspicion that the woman arrestee [sic] is in possession of weapons, drugs or other contraband." Am. Compl. at ¶ 83. Further, according to the Complaint, "[a]gents of the District of Columbia, including the United States Marshal for the Superior Court and his deputies, do not subject men arrestees in the Superior Court Cell Block awaiting presentment to blanket strip, visual body cavity and/or squat searches." Id. at ¶ 85.[3]

After purporting to describe the nature of the search of the women arrestees, Am. Compl. at ¶¶ 86 - 102, Plaintiffs proceed to make a number of non-factual, conclusory statements about the process. Am. Compl. at ¶¶ 103-106. Among the statements made is that "[t]he practice of the

[3] Federal Defendants dispute that there is a disparity in the treatment of men and women arrestees, but for the purposes of this motion, understand that the Court must treat Plaintiffs' allegations as true.

searches is not justified by a legitimate security interest." Id. at ¶ 105.[4] Plaintiffs allege that both District of Columbia and USMS employees participated in making and implementing the described searches and that District of Columbia employees "acquiesce in and facilitate the practice."[5] Id. at 109-110.

Plaintiffs allege that Todd Dillard, as the (former) United States Marshal for the Superior Court of the District of Columbia, derived "his authority over women arrestees in the Superior Court Cell Block pursuant to statutes of the District of Columbia, including D.C. Code §§ 13-302, 16-703, 23-501, 23-561, 23-563 and 23-581 and cooperative agreements entered into between the United States Marshals Service and the government of the District of Columbia pursuant to D.C. Code § 5-133.17, and the authority of the Chief Judge acting in an administrative capacity for the District of Columbia." Am. Compl. at ¶ 132. Further, they assert another legal conclusion that, "Defendant Todd Dillard and Does 1-10 and Does 11-20 were acting under color of District of Columbia law and . . . were acting pursuant to the policy, custom and practice of Defendant District of Columbia. Id. at ¶ 133.

After summarizing allegations concerning the individual circumstances and alleged unlawful treatment of the named Plaintiffs, Am. Compl. at ¶¶ 134-170, Plaintiffs set forth substantive counts as follows. Count I purports to set forth claimed fourth amendment violations against the 4AC under

---

[4] Such a legal conclusion should not be viewed in a light most favorable to the Plaintiff, as other truly factual allegations advanced in the Complaint.

[5] Plaintiffs have alleged that the events to which the First Amended Complaint refers "occurred before the last day of April, 2003," Am. Compl. at ¶ 3, and that in April, 2003, "the Federal Defendants represented [through their United States Justice Department attorneys] to the Plaintiffs and the Court that they stopped the strip search practices described herein." Id. Nonetheless, Plaintiffs have written their Amended Complaint in the present tense. Id.

42 U.S.C. § 1983. Am. Compl. at ¶¶ 171-180. Count II purports to set forth claimed fourth amendment violations against the 4AC by the Federal Defendants. Id. at ¶¶ 181-186. Counts III and IV set forth claims involving the 5AC. Count III purports to set forth claimed fifth amendment violations against the 5AC under 42 U.S.C. § 1983. Id. at ¶¶ 187-199. Finally, Count IV, in like manner, alleges claimed fifth amendment violations against the 5AC by the Federal Defendants. Id. at ¶¶ 200 - 204. Plaintiffs assert a claim for declaratory and injunctive relief, then set forth their prayer for relief. Id. at ¶¶ 205 - 206 & at 49 - 51.

STANDARD OF REVIEW

A. Dismissal for Lack of Subject Matter Jurisdiction (Fed.R.Civ.P. 12(b)(1))

"A motion under 12(b)(1) 'presents a threshold challenge to the court's jurisdiction.'" Gardner v. U.S., No. 96-1467, 1999 WL 164412, Slip op. at *2 (D.D.C. Jan. 29, 1999), quoting Haase v. Sessions, 835 F.2d 902, 906 (D.C. Cir. 1987), aff'd, 213 F.3d 735 (D.C. Cir. 2000), cert. denied, 531 U.S. 1153 (2001); see also 4 Wright & Miller: Federal Prac. & Proc. § 1350 (R12) (2002 Supplement) ("...subject matter jurisdiction deals with the power of the court to hear the plaintiff's claims in the first place, and therefore imposes upon courts an affirmative obligation to ensure that they are acting within the scope of their jurisdictional power.")

A court may resolve a motion to dismiss brought pursuant to Rule 12(b)(1) in two ways. First, the court may determine the motion based solely on the complaint. Herbert v. National Academy of Science, 974 F.2d 192, 197 (D.C. Cir. 1992). Alternatively, to determine the existence of jurisdiction, a court may look beyond the allegations of the complaint, consider affidavits and other extrinsic information, and ultimately weigh the conflicting evidence. See id.; see also Cureton v. United States Marshal Service, 322 F.Supp.2d 23, 26 (D.D.C. 2004).

B. Motion for Failure to State a Claim (Fed.R.Civ.P. 12(b)(6))

In making determinations on a motion to dismiss under Rule 12(b)(6), the Court must view facts alleged in the complaint in the light most favorable to the plaintiff. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Nix v. Hoke, 139 F. Supp. 2d 125 (D.D.C. 2001), citing Weyrich v. The New Republic, Inc., 235 F.3d 617, 623 (D.C. Cir. 2001); see also Slaby v. Fairbridge, 3 F. Supp. 2d 22, 27 (D.D.C. 1998). A complaint should be dismissed if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 46. See also Warren v. District of Columbia, 353 F.3d 36, 37 (D.C. Cir. 2004) (noting that the 12(b)(6) dismissal standard is no different for *pro se* prisoner complaints, despite frequent incantation that courts should apply a "liberal construction" in such cases: "But again this is not unique for prisoner cases. It is the 'accepted rule' in every type of case."). Although the plaintiff is given the benefit of all inferences that reasonably can be derived from the facts alleged in the complaint, the court need not accept inferences that are not supported by such facts, nor must the court accept plaintiff's legal conclusions cast in the form of factual allegations. Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994).

ARGUMENT

I. Federal Defendant Todd Dillard Is Entitled to Qualified Immunity.

Federal Defendant Todd Dillard is entitled to qualified immunity. See Anderson v. Creighton, 483 U.S. 635, 638 (1987); Davis v. Scherer, 468 U.S. 183, 191 (1984), and Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982). Individually-named federal defendants sued for money damages for violations of constitutional rights are immune from suit under the doctrine of qualified immunity if, *inter alia*, the complaint fails to allege facts that give rise to the violation of a clearly-established constitutional

or statutory right of which a reasonable person would have known. Saucier v. Katz, 533 U.S. 194, 196 (2001); Harlow, 457 U.S. at 818 (government officials are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known); Farmer v. Moritsugu, 163 F.3d 610, 613 (D.C. Cir. 1998); see also Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery."); Zweibon v. Mitchell, 720 F.2d 162, 168 (D.C. Cir. 1983), cert. denied, 469 U.S. 880 (1984) ("once the trial judge determines the law was not clearly established at the time the contested conduct occurred, the inquiry ceases.").

Once the individual defendant raises qualified immunity, courts must resolve two issues: (1) whether a constitutional right would have been violated on the facts alleged and, if the violation is established, then (2) whether the right alleged to have been violated was clearly established such that a reasonable person would have known. Saucier, 533 U.S. at 196. For a public official to be liable for damages, that official both must have violated a constitutional right, and that right must have been "clearly established" at the time of the violation – "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. at 640 ("qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law'") (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

The validity of the qualified immunity analysis "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." Anderson, 483 U.S. at 639. At the first stage of the inquiry, "courts must not define the relevant constitutional right in overly general

terms, lest they strip the qualified immunity defense of all meaning." Butera v. District of Columbia, 235 F.3d 637, 646 (D.C. Cir .2001); see International Action Center, 365 F.3d at 25. As the Butera Court explained:

> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of Harlow. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

Id. (citing Anderson, 483 U.S. at 639). Thus, it is not enough for Plaintiffs here to claim that the searches to which they were subject violated their constitutional rights. Rather, the claimed constitutional right "must be identified 'at the appropriate level of specificity' for a court to determine the second prong of the inquiry: whether the right was 'clearly established.'" Wilson v. Layne, 526 U.S. 603, 615 (1999). As the Supreme Court stated in Anderson, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent." 483 U.S. at 640 (citation omitted). Given the state of the law concerning blanket strip searches, and the fact-based analysis associated with existing case authority, the Complaint here does not allege the violation of constitutional or statutory rights that were clearly established under law, or sufficiently clear or apparent at the time of the alleged violation. Defendant Dillard submits that, even assuming the truth of the allegations of the Amended Complaint, "the state of the law [at the relevant time did not give officials] fair warning that their alleged treatment of [the plaintiffs] was unconstitutional." Hope v. Pelzer, 536 U.S. 730, 741 (2002).

Any analysis of the constitutionality of prisoner searches necessarily begins with the United States Supreme Court's landmark decision in Bell v. Wolfish, 441 U.S. 520 (1979). In that case, pretrial detainees challenged the constitutionality of numerous conditions of confinement and practices at the New York Metropolitan Correctional Center, a federally-operated, short-term custodial facility in New York City designed primarily to house pretrial detainees. One of the challenged practices the Court addressed was the strip and visual body cavity search conducted on all inmates ***after every contact with an outside visitor***.

In its analysis, the Court strongly emphasized that "maintaining security and preserving internal order and discipline [were] essential goals that may require limitation or retraction of the retained constitutional rights of . . . pretrial detainees." Bell, 441 U.S. at 546. "Central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." Id. at 546-47 (citations omitted). "Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry," and "[t]he Government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees." Id. at 540, 546-47 (citations omitted). "[E]ven when an institutional restriction infringes a specific constitutional guarantee, such as the Fourth Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security." Id. at 547.

This evaluation, however, according to the Bell Court, was an extremely deferential one. The Court stated that "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve the internal order and discipline and to maintain institutional security." Bell, 441 U.S. at 547 (citations

omitted). "'Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.'" Id. at 547-48, *quoting* Pell v. Procunier, 417 U.S. 817, 827 (1974). The Court noted that "judicial deference [was] accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." Bell, 441 U.S. at 548 (citation omitted).

The Court held that such a strip search procedure was not an unreasonable search prohibited by the Fourth Amendment. The Court noted that "[t]he test of reasonableness under the Fourth Amendment [was] not capable of precise definition or mechanical application" and that "each case . . . requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." Bell, 441 U.S. at 549. The factors that must be considered, the Court held, were "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Id. at 559.

The Court of Appeals for the D.C. Circuit has not rendered a decision addressing whether a blanket strip search policy violates the Fourth Amendment. Accordingly, the lead federal court in this Circuit has not ruled on the question. Nonetheless, in the years since Bell, a number of federal courts have ruled that the Fourth Amendment precludes these types of searches on arrestees charged with misdemeanors or other minor offenses brought to the jail after arrest unless officials have

reasonable suspicion that the specific arrestee is concealing weapons, drugs or other contraband.[6] However, other federal courts have considered the practice in various contexts and determined that there were permissible bases for conducting the searches. And, each case is considered on its own facts and circumstances.

This caselaw has developed in the context of allowing blanket prisoner strip search policies, without individualized assessment, in circumstances where individualized assessment is not readily practical and the risks are substantial. Thus, courts in certain circumstances have upheld the constitutionality of strip searches of detainees, even for those who were charged only with misdemeanors, minor offenses, or crimes not involving violence. These courts have focused on the fact that the detainees searched had already been intermingled with all other prisoners; that they had access through attorneys or others to possible contraband; and that the facility had a history of attempts to introduce contraband.

Thus, in Richerson v. Lexington Fayette Urban County Government, 958 F.Supp. 299 (E.D. Ky. 1996), the plaintiff had been arrested for a non-violent traffic offense and taken to the County Detention Center where he was held in the general population as a pretrial detainee. Afterward, Mr.

---

[6] See Wilson v. Jones, 251 F.3d 1340 (11th Cir. 2001); Skurtenis v. Jones, 236 F.2d 678 (11th Cir. 2000); Swain v. Spinney, 117 F.3d 1 (1st Cir. 1997); Wachtler v. County of Herkimer, 35 F.3d 77 (2d Cir. 1994); Chapman v. Nichols, 989 F.2d 393 (10th Cir. 1993); Justice v. City of Peachtree City, 961 F.2d 188 (11th Cir. 1992); Masters v. Crouch, 872 F.2d 1248 (6th Cir.), cert. denied, 493 U.S. 977 (1989); Watt v. City of Richardson Police Department, 849 F.2d 195 (5th Cir. 1988); Walsh v. Franco, 849 F.2d 66 (2d Cir. 1988); Weber v. Dell, 804 F.2d 796 (2d Cir. 1986), cert. denied, 483 U.S. 1020 (1987); Ward v. San Diego County, 791 F.2d 1329 (9th Cir. 1986); Jones v. Edwards, 770 F.2d 739 (8th Cir. 1985); Stewart v. County of Lubbock, 767 F.2d 153 (5th Cir. 1985), cert. denied, 475 U.S. 1066 (1986); Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985); Hill v. Bogans, 735 F.2d 391 (10th Cir. 1984); Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983); Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981), cert. denied, 455 U.S. 942 (1982).

Richerson was taken to the County District Court for arraignment. The arraignment was held in the District Court Building, which was connected to the Detention Center by a pedway. The pedway opened into a holding cell adjacent to the courtroom. Plaintiff, along with other detainees, walked across the pedway and was placed in the holding cell, where he had access to his attorney. He was then arraigned in the courtroom, where members of the general public were present. After his arraignment, plaintiff was placed back into the holding cell until all arraignments were completed.

Following his arraignment, Mr. Richerson was subject to a strip search. This search involved Plaintiff removing his jumpsuit and any other clothing. While naked, he and other detainees were made to lift up their arms, open their mouths, lift their tongues, run their fingers through their hair, turn from side to side, lift their genitals and turn around, bend over and spread their buttocks for inspection, and show the bottoms of their feet. Mr. Richerson was then returned to the Detention Center, where he was placed back in the general population.

The Court noted that the County strip searched prisoners only after they had intermingled with other prisoners and had outside access to attorneys and others. The Court upheld the constitutionality of the blanket strip search policy. The Court held that,

> in circumstances like those presented here, where pretrial detainees, including those charged with minor, nonviolent offenses, ***are kept in a detention center's general population prior to arraignment, and are thereafter put in a position where exposure to the general public presents a very real danger of contraband being passed to a detainee***, a policy of strip searching the detainees upon their return from the courthouse and prior to their being placed back in the general population of the detention center is both justified and reasonable. The Court determined that the detention center's legitimate security interests outweigh[ed] the detainees' privacy interests in such a situation.

Richerson at 307 (emphasis added). See also Dobrowolskyj v. Jefferson County, 823 F.2d 955, 959 (6th Cir. 1987)(upholding constitutionality of strip search of non-serious offenders because County's

policy was "a more narrowly drawn policy of searching only those detainees who were required, by force of circumstance, to be moved into the general jail population. . . . The security interests of the jail in conducting a search at this point were strong. [Plaintiff] was about to come into direct contact with the general jail population, including prisoners who would then be moved into all sections of the jail. The jail had legitimate interests in preventing the flow of contraband into the other sections of the jail."); Simenc v. Sheriff of DuPage County, 1985 WL 4896, slip op. at *3 (N.D. Ill. 1985) ("The policy considerations for conducting strip-searches when detainees have had outside contacts are more compelling than in the case of initial searches of traffic and misdemeanor detainees. When detainees are being transferred from detention facilities to make court appearances there is a legitimate interest in locating contraband that might threaten the safety of transferring police officers or the court." Simenc at *3, citing Dougherty v. Harris, 476 F.2d 292 (10th Cir. 1972), cert. denied, 414 U.S. 872 (1972).

In a similar case, Roscom v. City of Chicago, 570 F.Supp. 1259 (N.D. Ill.1983), Ms. Roscom was charged with deceptive practice when she wrote a number of checks that had been dishonored by her bank. She was taken to the City jail but later transferred to the County jail, where she was subjected to a strip search pursuant to the County's policy. The policy allowed such searches either when there was a reasonable suspicion that the inmate might have a weapon or contraband, ***or when inmates were moving into or out of "high risk areas,"*** e.g., from the holding cells to the general jail population. She was taken to a room with other females, all of whom were ordered to line up in single file and take off their clothes. After a frontal visual search by the matron, Ms. Roscom was instructed to turn around, spread her legs and bend over for a visual genital area search. Only women

were in the room when the searches took place, and at no time during the search did anyone touch Ms. Roscom.

The Court applied the Bell balancing test and, noting that the strip search procedure was a legitimate one to insure the security of the County jail, upheld the search. The Court stated that "[i]rrespective of the crimes [with which the detainees were charged], [the] County [jail] may reasonably consider any of them could be carrying weapons or contraband, either brought with the detainee into the County Jail or procured from other persons in the holding cell." Roscom at 1262. The Court also noted that the County had a legitimate interest in the security of its jail, the strip search was carried out by same-sex personnel, and in a separate room. The strip search was, therefore, constitutionally permissible.

In balancing the government's need for a particular search against the invasion of personal rights that the search entails, courts have consistently recognized that the general threats posed in the jail context may outweigh an individual's privacy interests. In other words, these courts have recognized that jail officials are not necessarily required to have a particularized suspicion that a specific arrestee is concealing weapons, drugs, or other contraband before a search will be found reasonable and constitutional.

For example, in Gary v. Sheahan, 1998 WL 547116 (N.D. Ill. 1998), the Court examined the constitutionality of strip searches conducted on female detainees after they had been ordered released from custody by a judge. The Court explained the balancing test as follows:

> [I]f jail security is to justify the search the detainee must present some threat to jail security. The facts in the cases where searches have been upheld suggest some reasonable cause on the part of the authorities to suspect that the detainees might be trying to smuggle weapons or contraband into the jail. . . . A person detained for violent crime may presumptively be suspected of carrying a weapon. However, when

> an arrestee is being detained briefly awaiting the posting of bond on a traffic or misdemeanor offense, generally a strip-search can be made only on reasonable suspicion that the arrestee is carrying or concealing a weapon or contraband ***unless authorities can demonstrate that misdemeanants regularly pose a threat to jail security***.

Gary at 1998 WL 547116, *13, citing Simenc v. Sheriff of DuPage County, 1985 WL 4896, at *3 (emphasis added). See also N.G. v. Connecticut, 382 F.3d 225 (2nd Cir. 2004) (upheld strip search of juveniles upon initial admission to a detention facility); Smith v. Montgomery County, 643 F.Supp. 435, 439(1986) ("This 'blanket risk' approach implicit in the Fourth Amendment balancing test makes particular sense in the jail context because of the magnitude of risks involved."); Giles v. Ackerman, 746 F.2d 614, 617 (9th Cir. 1984) ("the County has not demonstrated that its security interests warrant the serious invasion of privacy inflicted by its policy"– implicitly recognizing class versus individualized suspicion analysis), cert. denied, 471 U.S. 1053 (1985); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1273 (7th Cir. 1983) (same).

The United States District Court for the District of Columbia has upheld the policy requiring a reasonable suspicion to strip search detainees. Citing various authorities, the Court has said " 'strip searches are violative of the Fourth Amendment when applied to *all* arrestees, Stewart v. Lubbock County, Texas, 767 F.2d 152 (5th Cir. 1985), or if only females are subjected to strip search, when similarly situated males are not searched, Mary Beth G. 723 F.2d at 1263, or if all arrestees, even those charged with minor traffic offenses, are routinely searched, Giles v. Ackerman, 746 F.2d 614 (9th Cir.1984), *cert. denied*, 471 U.S. 1053 (1985).'" Doe v. Berberich, 704 F.Supp. 269, 271 (D.D.C. Cir. 1988) (search following arrest for possession of marijuana not violated Fourth Amendment). The Court went on to say that there must be a "reasonable suspicion that the category of offenders subject to strip searches might possess weapons or contraband." Id. In the Doe case,

even though the offense (possession of a controlled substance) was a misdemeanor, there was reasonable cause to believe that the detainees possessed contraband, therefore, a strip search was within the bounds of the Fourth Amendment. Id. at 272. Further, the Court followed Bell v. Wolfish, and said that "even 'visual' body cavity searches of federal pretrial detainees can be conducted on less than probable cause so long as the search is conducted in a reasonable manner." 441 U.S. at 560.

Thus, under applicable case law, although individualized suspicion is required for prisoner strip searches in many circumstances, it is not clear that a blanket strip search policy is unconstitutional where the circumstances indicate a real security risk if all prisoners are not searched. Based on the decisions discussed above, although individualized suspicion is required for prisoner strip searches in many circumstances, a blanket strip search policy is deemed constitutional where the circumstances indicate a real security risk unless all prisoners, or a certain category of prisoners, are searched. Therefore, Defendant Dillard submits that it was not apparent that a blanket strip search policy was unconstitutional.

In light of the case-specific nature of the fourth amendment analyses undertaken in these cases, and the unique circumstances of the D.C. Superior Court cellblock, Federal Defendants respectfully submit that it was not clearly established that the search policy described in the Amended Complaint violated the Fourth Amendment. The foundation for this conclusion is as follows:

Assuming the truth of the allegations of the Amended Complaint, the searches conducted were consistent with the Bell factors of reasonableness in scope, manner, justification and place. Plaintiffs do not allege that the arrestees searched were required to remove all of their clothing, but

instead to lower only that clothing sufficient to determine that she was not secreting weapons or contraband. The searches were conducted is a manner so as not unnecessarily to embarrass or humiliate the arrestee to the extent that only women were in the area, and were as minimally intrusive as possible consistent with jail security. The searches were conducted only by same-sex personnel.

The facts and circumstances surrounding the searches, as alleged in the Amended Complaint, were unique and distinguishable from those cases in which the courts have required individualized reasonable suspicion to believe that an arrestee is carrying weapons, contraband, or other drugs to justify a search. Those cases generally involved "new" arrests in which police took arrestees directly to the jail and subjected them to strip searches. In contrast, here MPD and the D.C. Jail deliver arrestees to the D.C. Superior Court, the arrestees were alleged to have been intermingled; there had been outside access by attorneys and others, and prisoners had had the opportunity to secret contraband in the orifices of their bodies. See e.g., Am. Compl. at ¶¶ 70-72.

To say that "[a] detention facility is a unique place fraught with serious security dangers [and that] [s]muggling of money, drugs, weapons, and other contraband is all too common an occurrence," Bell 441 U.S. at 559, is to understate drastically the conditions at the D.C. Superior Court. The amount and nature of contraband recovered at the USMS cellblock, including from body cavities, is staggering and the danger is real. The prisoners received at the USMS cellblock run the gamut from "protester" to violent sociopath. They invariably have had contact with each other and even the most innocent looking can be preyed upon or be a threat. See e.g., Am. Compl. at ¶¶ 70-72. Likewise, the USMS is informed little about the history or character of each prisoner received. Thus, the only reliable way to assure security in this high-risk environment is to take reasonable steps to

ensure security. On the unique facts presented here, Defendant Dillard believes that the circumstances in the cellblock pose a sufficient danger to justify the blanket squat searches of prisoners utilized at the USMS cellblock of the District of Columbia Superior Court, even absent individual reasonable suspicion that a particular prisoner was secreting weapons, drugs, or other contraband.

The blanket searches conducted, which were less than full strip searches, were reasonable, such that the officials involved could not be found to have been violating a "clearly established federal statutory or constitutional right" of the detainees. The officers were following clearly established USMS procedures.

Plaintiffs appear to recognize that it is not former United States Marshal Dillard who "participated in making and implementing the policy of subjecting women arrestees to [the searches at issue];" rather, it was the "Doe" defendants. See Amended Complaint at ¶¶ 84 ("[a]gents actually physically conduct . . . searches"), 109 (USMS "employees participated in making and implementing the policy"). Indeed, the United States Marshals Service policy on the issue that was formalized in 1999 makes no distinction between how Deputy Marshals are to treat female and male prisoners. See United States Marshals Service Policy Directive 99-25 (July 7, 1999) at 1, § III(B) (attached hereto) ("This directive applies to all searches of persons, including juveniles."). There is a distinction between the searches of men and women under the policy, in that "[a] strip search should always be conducted by a deputy of the same sex, unless the person conducting the search is a physician, physician's assistant or nurse.") Id., at 3, § IV(C)(3). Plaintiffs do not object to the searches because they are conducted by Deputy Marshals of the same gender as the person being searched.

If Plaintiffs' equal protection claim is founded on a perceived disparity in the number of searches made of women versus men, then their concern is with a perceived inconsistency in applying the policy. Marshal Dillard is not alleged to have ever actually searched any of the Plaintiffs; and, indeed, he would not have done so, because the policy calls for only female Deputies (or medical personnel) to conduct searches of the female prisoners. Am. Compl. at ¶¶ 87-90. Similarly, the policy quite logically calls for Deputy Marshals (not the U.S. Marshal) to conduct the searches. See Directive 99-25 at 3. Thus, Plaintiffs' claim against former Marshal Dillard necessarily is that he did not do enough to ensure that the male Deputy Marshals were properly implementing the policy as applied to the men arrestees within the cell block. This amounts to a claim that Mr. Dillard was somehow required personally to oversee the processing of every male through the cell block. Such a standard is not what is required in the prison setting. See Farmer v. Moritsugu, 163 F.3d 610, 613-14 (D.C. Cir. 1998).

In Farmer, the plaintiff argued that the Bureau of Prisons Medical Director was aware of, yet ordered no treatment for, the prisoner's medical condition. The District Court agreed, finding that Moritsugu effectively "sanction[ed]" the withholding of treatment from Farmer. The Court of Appeals, found, however, that Farmer's claims imply an obligation falling well outside the scope of Moritsugu's role as Medical Director, and, moreover, that Moritsugu's response to Farmer's requests comported with constitutional BOP medical policy. Thus, the Court concluded that Moritsugu's conduct met the standard of "objective legal reasonableness" required to support qualified immunity. Id.

Here, the Plaintiffs suggest that Mr. Dillard was not only required to ensure that a lawful policy was adopted, but also that each male prisoner was searched when the policy permitted. This

suggestion was much like that rejected in Farmer. The leader of the agency is simply not required to play a role in each day-to-day decision made by all employees under his or her supervision. Farmer, 163 F.3d at 615 ("the most important point in this case is that Moritsugu is not the person within the BOP who determines whether psychotherapy is required in a given case. As Medical Director, overseeing operations in facilities nationwide from his office in Washington, D.C., Moritsugu does not diagnose individual patients; nor does he prescribe treatments for particular patients, except insofar as he may be called upon to approve the recommendation of a treating physician. ")

To hold otherwise would be to countenance personal liability for the supervisor for the actions of those under his supervision. Such a respondeat superior theory of personal liability has been consistently rejected by the Courts in the context of constitutional tort liability. Monell v. Department of Social Services, 436 U.S. 658 (1978); Cameron v. Thornburgh, 983 F.2d 253, 258 (D.C. Cir. 1993); Meyer v. Reno, 911 F. Supp. 11, 15 (D.D.C. 1996). See also, Simpkins v. District of Columbia Government, 108 F.3d 366, 369 (D.C. Cir. 1997) ("Bivens claims cannot rest merely on respondeat superior . . . The complaint must at least allege that the defendant federal official was personally involved in the illegal conduct."); Boykin v. District of Columbia, 689 F.2d 1092, 1097-99 (D.C. Cir. 1982); Tarpley v. Greene, 684 F.2d 1, 9-11 (D.C. Cir. 1982). In Cameron, the D.C. Circuit dismissed the Attorney General and Director from the suit because the complaint failed to allege their personal involvement and was based solely "on the bare assumption" that policy decisions in the District of Columbia influenced the prisoner's treatment in a federal prison in Indiana. Id. at 258.

In the Meyer case, 911 F. Supp. at 15, this Court discussed *respondeat superior* within the context of federal inmate lawsuits:

> Absent any allegations that defendants Reno and Hawk personally participated in the events which gave rise to the plaintiff's claims, or any corroborative allegations to support the inference that these defendants had notice of or acquiesced in the improper securing of detainers against the plaintiff by their subordinates, dismissal is appropriate. See Haynesworth v. Miller, 820 F.2d 1245, 1259 (D.C. Cir. 1987) (fellow government employees cannot be held liable under the theory of *respondeat superior* for either constitutional or common law torts); Smith-Bey v. District of Columbia, 546 F. Supp. 813, 814 (D.D.C. 1982) (same). *Respondeat superior* has been consistently rejected as a basis for the imposition of § 1983 or Bivens liability. See, e.g., Monell v. Dep't of Social Srvcs., 436 U.S. 658, 691 (1978); Rizzo v. Goode, 423 U.S. 362 (1976); Boykin v. District of Columbia, 689 F.2d 1092, 1097-99 (D.C. Cir. 1982); and Tarpley v. Greene, 684 F.2d 1, 9-11 (D.C. Cir. 1982). Therefore, any potential § 1983 or Bivens claims against these defendants, whose only relationship to the instant litigation is their ultimate supervisory status, must be dismissed.

"Without a showing of direct responsibility for the improper action, liability will not lie against a supervisory official. A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary." Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). Individual liability for damages for violation of constitutional rights is predicated upon personal responsibility. Schultz v. Baumgart, 738 F.2d 231, 238 (7th Cir. 1984). Hence, the Plaintiffs cannot have Mr. Dillard held individually and personally liable for his actions merely as a supervisor.

II. Plaintiff Failed to State A Claim for Any Civil Rights Violation Under Section 1983

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit

> in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (emphasis added).

Thus, § 1983 does not generally apply to federal officials acting under color of federal law. See Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1987). Rather, by its terms, § 1983 applies only to actions under color of state law and does not ordinarily provide a basis for claims against federal officials. The only possible exception occurs when there is a conspiracy between state and federal officials resulting in an abuse of authority derived from state law. Kletschka v. Driver, 411 F.2d 436, 448 (2d Cir. 1969). The legislative history clearly shows that Congress did not intend for Section 1983 to apply against federal actors. Instead, it was promulgated to provide a measure of federal control over state officials who were either unwilling or unable to protect certain individuals against the deprivation of their constitutional rights. Section 1983 provided a remedy where none existed. It provided a mechanism to protect against a state official's conduct.

Federal Defendant Todd Dillard, who is the former U.S. Marshal for the Superior Court of the District of Columbia, is named as a Section 1983 defendant. In this capacity, however, Mr. Dillard would have acted under color of federal law, specifically under color of 28 U.S.C. §§ 561-569. It is worthy of note that the authority of United States Marshals and Deputy U.S. Marshals extends beyond the District of Columbia (or whatever district in which they primarily work), to any state in which they may execute the laws of the United States. 28 U.S.C. § 564; United States v. Boettcher, 588 F.2d 89 (4th Cir. 1978) (U.S. Marshal may execute arrest warrants at any place within

jurisdiction of the United States); United States v. Hanna, 114 WLR 1153 (Super. Ct. 1986) (noting extraterritorial nature of certain Superior Court warrants).

Congress, in describing a 1979 amendment to Section 1983 "makes clear that Federal courts shall have jurisdiction of section 1983 actions against District of Columbia officials acting under authority of local laws, even if those laws were passed by Congress." H.R. Rep. No. 96-548, at 2 (1979), reprinted in 1979 U.S.C.C.A.N. 2609, 2610.

Thus, the words and history of Section 1983, including the 1979 amendment do not provide for a cause of action under Section 1983 under the circumstances described in Plaintiffs' Amended Complaint. The purpose of Section 1983 was to provide a cause of action where there was none. Indeed, Congress in 1979 did just that when it again provided individuals within the District of Columbia with a remedy for the deprivation of protected rights where there was none before. In the instant case, Plaintiffs' remedy, if one exists, was created by the Supreme Court in Bivens. Under proper circumstances, Plaintiffs may pursue a Fourth Amendment claim under the Bivens doctrine against a federal employee in his or her individual capacity, but not a Section 1983 action. See e.g., Berry v. Funk, 146 F.3d 1003, 1013 (D.C. Cir. 1998) (noting that plaintiffs can bring Bivens actions against federal officials and section 1983 actions against state officials); McCord v. Bailey, 636 F.2d 606, 613 (D.C. Cir. 1980) ("Actions of federal officers are outside of [section 1983's] proscriptions."); Kingsley v. Bureau of Prisons, 937 F.2d 26, 30 n. 4 (2nd Cir. 1991) (an action brought pursuant to Section 1983 "cannot lie against federal officials"); Heck v. Humphrey, 512 U.S. 477 (1994) (stating that section 1983 provides access to a federal forum for claims of unconstitutional treatment at the hands of state officials); Community For Creative Non-Violence v. Unknown Agents of the United States Marshals Service, 791 F. Supp. 1 (D.D.C. 1992) (the United

States Marshals Service for the Superior Court of the District of Columbia was acting under color of federal law when Deputy Marshals executed an arrest warrant issued by the D.C. Superior Court).

The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power "possessed by virtue of state law and made possible only because the alleged wrongdoer is clothed with the authority of state law." Williams v. United States of America, 396 F.3d 412, 414 (D.C. Cir. 2005) (emphasis added) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)); West v. Adkins, 487 U.S. 42, 49 (1988); accord Monroe v. Pape, 365 U.S. 167, 187 (1961) (adopting Classic standard for purposes of § 1983) (overruled in part on other grounds); Monell v. New York City Dept. of Social Services, 436 U.S. 658, 695-701 (1978)); Polk County v. Dodson, 454 U.S. 312, 317-18 (1981).

The Williams court held that a Section 1983 action could not be maintained against a special police officer employed by the U.S. Government Printing Office, who allegedly unlawfully arrested appellant. 396 F.3d at 413. The Government Printing Office is a federal agency which employed the appellee as a special policeman. Id. Federal law authorized these policemen to

> make arrest[s] for violations of laws of the United States, the several States, and the District of Columbia; and enforce the regulations of the Public Printer, including the removal from Government printing office premises of individuals who violate such regulations. The jurisdiction of special policemen in premises occupied by or under the control of the Government Printing Office and adjacent areas shall be concurrent with the jurisdiction of the respective law enforcement agencies where the premises are located.

Id. (citing 44 U.S.C. § 317). Williams was arrested by Officer Hardwick and thereafter alleged the deprivation of his Fourth and Fifth Amendment rights in violation of Section 1983. The Court rejected Williams' contention, holding that Williams could not maintain a cause of action against the officer under Section 1983 and noting that "plaintiffs alleging abuse by federal officials are not

without a remedy. . . as Williams could have brought an action against Hardwick under Bivens. . ." Id., at 416.

To constitute state action, "the deprivation must be caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible," and "the party charged with the deprivation must be a person who may fairly be said to be a state actor." Id. "[S]tate employment is generally sufficient to render the defendant a state actor." Lugar v. Edmondson Oil Co., 457 U.S. 922, 936, n. 18, 937 (1982); see also Williams, supra., at 414-16. Moreover, a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State. See Monroe v. Pape, 365 U.S. at 172. Thus, generally, "a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law. See, e.g., Parratt v. Taylor, 451 U.S. 527, 535-536 (1981); Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970).

The Ninth Circuit in Tongol v. Usery, 601 F.2d 1091 (9th Cir. 1979), discussed the "color of state law" requirement. Tongol involved state officials who sought to recover overpayments of Federal Supplemental Benefits ("FSB") under the Emergency Unemployment Compensation Act of 1974. Id. at 1097. The Court held that the state officials who sought to recover these FSB overpayments were empowered to act only by virtue of their authority under state law. Id. The Court went on to hold that "the 'color of state law' requirement of section 1983 has consistently been treated as the same thing as the 'state action' requirement of the Fourteenth Amendment. [citations omitted]. Id. at 1095. Courts applying the 'color of state law' requirement have indicated that the relevant inquiry focuses not on whose law is being implemented, but rather on whether the authority of the state was exerted in enforcing the law. [citations omitted]." Id. at 1097.

The Third Circuit has held that "there [i]s no set formula for determining whether the employees of an agency with both state and federal characteristics must be examined to consider whether the acts complained of were sufficiently linked to the state." Johnson v. Orr, 780 F.2d 386, 390 (3rd Cir. 1986). "A crucial inquiry is 'whether day-to-day operations are supervised by the Federal [or state] government.'" United States v. Orleans, 425 U.S. 807, 815 (1976).

In Case v. Milewski, 327 F. 3d 564, 567 (7th Cir. 2003), the court recognized two circumstances in which a party may be found to act under color of state law. The first is when the states have cloaked the defendants in some degree of authority, normally through employment or some other agency relationship. Id. at 567; see Yang v. Hardin, 37 F.3d 282, 284 (7th Cir. 1994) finding that Chicago police officers were acting under color of state law when "[t]hey were on duty, wearing Chicago police uniforms, driving a marked squad car and were investigating a crime."); Pickrel v. City of Springfield, Illinois, 45 F.3d 1115, 1118 (7th Cir. 1995) (finding an off-duty Springfield, Illinois police officer could have been acting under color of state law because he was wearing his police uniform and displaying his badge.)

The second circumstance is when the defendants have conspired or acted in concert with state officials to deprive a person of his civil rights. In order to establish a conspiracy, the party must demonstrate that the state officials and the private party somehow reached an understanding to deny a party of his constitutional rights. Case, 327 F.3d 564, 567 [citations omitted]. The court further acknowledged that "although an action brought pursuant to § 1983 cannot lie against federal officers acting under color of federal law, it is assumed that a § 1983 action can lie against federal employees . . . as it can against private individuals . . . if they conspire or act in concert with state officials to deprive a person of her civil rights under color of state law." (emphasis added).

When distinguishing between federal and state actors, "[a] crucial inquiry is 'whether day-to-day operations are supervised by the Federal [or state] government.'" Johnson v. Orr, 780 F.2d 386, 390 (3rd Cir. 1986). The Deputy Marshals are supervised and controlled by the USMS, not the District of Columbia. Even the D.C. Statute acknowledging that the USMS "serves the courts of the District of Columbia," also confirms that such service is "subject to the supervision of the Attorney General of the United States." D.C. Code § 11-1729.

In deed, Plaintiffs concede that "Defendant United States Marshals Service is an agency of the federal government . . .," Am. Compl. at ¶ 56, and that "Defendant Todd Dillard is the United States Marshal for the District of Columbia," id. at ¶ 57. Moreover, the Court need not accept legal conclusions cast in the form of factual allegations. Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). Where the Court need only take judicial notice of the statutes providing the authority for the U.S. Marshals to act, it is clear that there exists no factual dispute on the issue. Defendant Dillard, as a federal employee, was at all times acting under color of federal law. Importantly, section 1983 does not apply to federal officials because they act purely under color of federal law. See Williams v. United States, 396 F.3d at 414. See also Heck v. Humphrey, 512 U.S. 477, 480 (1994) (stating that section 1983 provides access to a federal forum for claims of unconstitutional treatment at the hands of state officials); Bivens v. Six Unknown Named Agents, 403 U.S. at 398 n.1 ("Petitioner also asserted federal jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), and 28 U.S.C. § 1343(4). Neither will support federal jurisdiction over the claim."). Accordingly, Plaintiffs' Section 1983 claim fails to state a claim against Defendant Dillard, because, at all times, he acted under federal, not state, law.

III. There Is No Article III Jurisdiction over Plaintiffs' Claims for Injunctive Relief Against the Marshal Service

Plaintiffs have conceded that they have no colorable damages action against the USMS under Section 1983. See Plaintiffs' Notice, filed May 26, 2006 [dkt. no. 60]. Plaintiffs have affirmed their intention, however, to maintain their claim against the USMS for preliminary and permanent injunctive relief. Id.; see also Am. Compl. at 50. Plaintiffs have done so notwithstanding their own admission that the events to which the Amended Complaint refers "occurred before the last day of April, 2003," id. ¶ 3, and that in April, 2003, "the Federal Defendants represented [through their United States Justice Department attorneys] to the Plaintiffs and the Court that they stopped the strip search practices described herein," id. As discussed below, Plaintiffs' claim for injunctive relief, in the form of an order "enjoin[ing] defendants from pursuing the course of conduct complained of herein," id. at 50, is subject to dismissal as a matter of law for lack of subject matter jurisdiction because Plaintiffs lack standing to bring such a claim, and because any such claim would be moot.

"The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95 (1998), quoting Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884). A subsidiary threshold question, and a predicate to the determination of justiciability, is whether a plaintiff in federal court has standing to sue, a requirement derived from Article III, § 2's limitations of federal judicial power to cases or controversies. Steel Co., 523 U.S. at 101. The "irreducible constitutional minimum" required to establish Article III standing consists of three components, id. at 102-03, citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992):

-- "First and foremost, there must be alleged . . . an 'injury in fact' -- a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent,' not 'conjectural' or 'hypothetical.'" Steel Co., 523 U.S. at 103, quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990), quoting City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983). The allegation of harm must be "particularized." Lujan v. Defenders of Wildlife, 504 U.S. at 560-61.

-- Second, there must be alleged "a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." Steel Co., 523 U.S. at 103, citing Simon v. Eastern Ky. Welfare Rights Organiz., 426 U.S. 26, 41-42 (1976).

-- Third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. at 560-61.

See also Florida Audubon Soc. v. Bentsen, 94 F.3d 658, 661-62 (D.C. Cir. 1996) (en banc).

The party invoking federal jurisdiction bears the burden of establishing the elements of standing. Steel Co., 523 U.S. at 103-04; Lujan v. Defenders of Wildlife, 504 U.S. at 561. The Court must address standing before the merits. Steel Co., 523 U.S. at 100 n.3, 101. "[A]n inescapable result of any standing doctrine application is that at least some disputes will not receive judicial review." Fla. Audubon Soc., 94 F.3d at 665-66. That the standing analysis "should sometimes dictate this result is not a reason to reject either the result or the analysis." Id.

Related to Article III standing is the doctrine of mootness. The mootness doctrine encompasses circumstances "that destroy the justiciability of a suit previously suitable for determination." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3533 (1984) at 211; Mahoney v. Babbitt, 113 F.3d 219, 220 (D.C. Cir. 1997). The doctrine, also derived from Article III, limits federal courts to deciding actual continuing controversies. Mahoney v.

Babbitt, 113 F.3d at 220-21; Clarke v. United States, 915 F.2d 699, 700-01 (D.C. Cir. 1990) (en banc)("[e]ven where litigation poses a live controversy when filed, the doctrine requires a federal court to refrain from deciding it if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future'"), quoting Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 575 (D.C. Cir. 1990). See also Preiser v. Newkirk, 422 U.S. 395, 401 (1975); Tucker v. Phyfer, 819 F .2d 1030, 1033 (11th Cir. 1987) ("The mootness doctrine requires that the plaintiff's controversy remain live throughout the litigation; once the controversy ceases to exist, the court must dismiss the cause for want of jurisdiction.").

Plaintiffs have not satisfied the requirements for Article III standing with respect to their claim for injunctive relief against the Marshal Service. In accordance with the standard for judicial review of a motion filed under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, the Court must assume as true Plaintiffs' factual allegations that all events to which the First Amended Complaint refers took place more than three years ago. See First Amended Complaint ¶ 3. The Court must also deem as true that defendants represented in April 2003, through Justice Department counsel, that they had terminated the alleged "strip search practices described herein." Id. Having asserted those allegations, Plaintiffs' failure to allege any fact giving rise to an inference that any such practice has continued at any time during the past three years, or that those practices are continuing today, constitutes an omission so conspicuous as to be dispositive of jurisdiction over Plaintiffs' claims for an order seeking that those practices be terminated.

For a claim to satisfy the requirements of standing, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. at 560-61. See also Florida Audubon Soc., 94 F.3d 661-62. Plaintiffs' alleged

injuries would not be redressable by any prospective order of this Court requiring the termination of practices alleged to have been terminated three years ago. No injury alleged in the complaint would be redressed by such an order because all of the named class members were arrested and subjected to the alleged unconstitutional searches years ago, and are no longer being subjected to any such alleged practices.

Moreover, Plaintiffs' claim of entitlement to such an order is moot. See e.g., People for the Ethical Treatment of Animals v. Gittens, 396 F.3d 416, 421 (D.C. Cir. 2005) (appeal from order granting a preliminary injunction becomes moot when, because of the defendant's compliance or some other change in circumstances, nothing remains to be enjoined through a permanent injunction). Moreover, the mootness of Plaintiffs' claim for injunctive relief could not be avoided on any purported ground that the acts alleged as the basis of the named Plaintiffs' injuries were "'capable of repetition yet evading review.'" Gittens, 396 F.3d at 421, quoting S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). "One function of the 'capable of repetition' doctrine is to satisfy the Constitution's requirement, set forth in Article III, that courts resolve only continuing controversies." Gittens, 396 F.3d at 422. "For a controversy or wrong to be 'capable of repetition,' there must be at least 'a reasonable expectation that the same complaining party would be subjected to the same action again.'" Id., citing Weinstein v. Bradford, 423 U.S. 147 (1975). There is no reasonable expectation that the named plaintiffs will be arrested again, much less searched pursuant to an alleged practice the continuation of which is not even alleged in the Amended Complaint. See Am. Compl. at ¶ 3. Indeed, assuming the facts alleged to be true, the Court may reasonably infer, without going beyond the four corners of the Amended Complaint, that any such alleged practice has been terminated, and has been terminated for at least three years. Because this is so, Plaintiffs'

claims against the USMS for injunctive relief are jurisdictionally barred because Plaintiffs lack standing to advance them and because they are moot.

IV. Bivens Claims Are Untimely.

Defendants submit that the one-year statute of limitations governs Plaintiffs' Bivens claims.

> When a federal action contains no statute of limitations, courts will ordinarily look to analogous provisions in state law as a source of a federal limitations period. See, e.g., Burnett v. Grattan, 468 U.S. ----, 104 S.Ct. 2924, 2929, 82 L.Ed.2d 36 (1984); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 464, 95 S.Ct. 1716, 1722, 44 L.Ed.2d 295 (1975); Brown v. United States, 742 F.2d 1498, 1503 (D.C. Cir. 1984) (*en banc*). Concluding that "damage to reputation ... is central to the [plaintiff's] claim," Opinion at 2, the district court applied the District of Columbia's one year statute of limitations governing defamation actions to Doe's Bivens suit. See D.C. Code § 12-301(4). The D.C. statute of limitations reads, in relevant part: Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:. . .(4) for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment -- 1 year; . . .(8) for which a limitation is not otherwise specially prescribed--3 years. D.C. Code § 12-301. We agree with the district court that the one year limitations period should be applied.

Doe v. United States Department of Justice, 753 F.2d 1092, 1114 & n.28 (D.C. Cir. 1985) (footnote inserted into text). Here, the allegedly unlawful action took place as early as 1999, *i.e.*, three years prior to the filing of the Complaint. See Am. Compl. at ¶¶ 3, 20 & 33. The original complaint was not filed until 2002, well beyond the one-year limitations period for many of the claims.

Federal Defendants recognize that the Supreme Court has reached a different conclusion in addressing Section 1983 actions. See Wilson v. Garcia, 471 U.S. 261, 271-72 (1985) (applying statutory construction principles to Section 1983 and concluding that the personal injury limitations period would presumably apply). A Bivens action, however, is not created by statute; and Plaintiffs' claims are most like those described in D.C. Code § 12-301(4). See Banks v. Chesapeake and

Potomac Telephone Co., 802 F.2d 1416, 1429, (D.C. Cir. 1986) (citing McClam, 697 F.2d at 372-74). Courts in other jurisdictions have, in Federal Defendants' view, incorrectly assumed that the statutory analysis applied in Wilson should also be applied in the Bivens context. See e.g., Harris v. United States, 422 F.3d 322, 331 (6th Cir. 2005). To Defendants' knowledge this Circuit has not accepted this invitation to treat Bivens claims as if they were subject to the statutory analysis applied in Wilson. Bivens claims are uniquely creatures of Federal common law, and as such they cannot and should not be treated uniformly, as contemplated in Wilson. Instead, local law has elected to separate common law claims as subject to differing limitations periods, depending on the nature of the claim. This practice should continue to be followed unless and until the District of Columbia adopts a separate limitations period for Bivens claims. See Banks v. Chesapeake and Potomac Telephone Co., 802 F.2d at 1429; McClam v. Barry, 697 F.2d 366, 372-74 (D.C. Cir. 1983) (false arrest claim most closely analogous to a claim under D.C. Code § 12-301(4)). Thus, all Bivens claims that were over one year old when this action was commenced are subject to dismissal as untimely.

CONCLUSION

WHEREFORE, Federal Defendants respectfully submit that this motion to dismiss should be granted.

Respectfully submitted,

/s/
KENNETH L. WAINSTEIN, D.C. Bar # 451058
United States Attorney

/s/
RUDOLPH CONTRERAS, D.C. Bar # 434122
Assistant United States Attorney

/s/
OLIVER W. McDANIEL, D.C. Bar #377360
LISA S. GOLDFLUSS, D.C. Bar #417787
Assistant United States Attorneys
Civil Division
555 4th Street, N.W.
Washington, D.C. 20530
(202) 514-7151
(202) 514-8780 (Facsimile)

May 31, 2006